



# PROJECT RESOLUTION

(incorporating Carlisle and Notice)

## Report to Tram Project Board December 2010

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**1. Executive Summary**

**2. Introduction**

The purpose of this report is to update the reader on the current environment surrounding the Edinburgh Trams Infraco Contract between **tie** Ltd and the Consortium consisting Bilfinger Berger, Siemens and CAF (BSC) and makes recommendations as follows:

- on the future of the relationship between between **tie** and BSC, and
- the future of the Edinburgh Tram project.

The report builds upon the analysis and recommendations of the March 2010 report on Project Pichfork and assumes familiarity with the contents of that report and the basis of the recommendations therein which were approved by the Tram Project Board on 10<sup>th</sup> March 2010.

The body of the report is supplemented by a number of appendices which provide further evidence and analysis to support the conclusions and recommendations reached.

The purpose of this report is to describe the following activities, collectively constituting “Project Resolution”:

- The activities undertaken by **tie** supported by our legal, technical and commercial advisors in the period between March 2010 and December 2010 to achieve satisfactory resolution of the disputes, lack of progress and unsatisfactory deliverables which have plagued the delivery of the project since early 2009.
- Present an appraisal of the options identified to progress the project and achieve cost and remaining certainty from this point in time going forward including termination of the Infraco Contract
- Describe the activities which if approved would be undertaken by **tie** following termination to continue with the delivery of the project.

**Comment [s1]:** Since contract award in May 2008.

The report puts these activities in the context of progress on delivery and the developments in the consortiums behaviours since March 2010.

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### 3. Pitchfork Recommendations – March 2010

Project Pitchfork was the name given to the workstreams which took place from January 2010 until March 2010 which investigated options available to **tie** and CEC in respect of the ongoing Infraco Contract and relationships with the consortium partners who were party to that agreement. The report also served as a compendium of analysis and explanation of the history of the disputes and BSC behaviours and delivery failings since the Infraco contract was awarded in May 2008.

The Pitchfork Report was presented to the Tram Project Board (TPB) on 10<sup>th</sup> March 2010 and the following options outlined:

**Option 1 – Termination of Infraco Contract** – At the time of the pitchfork report this was not an option which was being actively pursued. The evidence of Infraco breaches had not been collated and subjected to a legal and technical examination to determine whether individually and collectively they constituted default. Just as importantly we had not exhausted the contractual mechanisms by which we should notify the Infraco of breaches which constitute a default and give them the opportunity to rectify those breaches. At the time of Pitchfork the option of a termination (with the attendant risks and uncertainties surrounding probable litigation and reprocurement) was assessed as being unattractive relative to finding a way forward with BSC.

**Option 2 – Partial or full exit of Bilfinger** – This option was attractive in that it would remove or limit Bilfinger as the main protagonist in the on going disputes whilst presenting an opportunity to retain the Infraco Contract intact with Siemens continuing for all or part of the route with different civils work partners. **tie** could not enforce this outcome on the consortium – it would need to be effected by negotiation both with **tie** and between the consortium partners themselves.

**Option 3 – Continue “As is”** – This option was to continue application of the contract in its present form with the present players. This options was deemed very unattractive to **tie** and its Stakeholders as it presented no prospect of achieving cost and programme certainty or satisfactory progress on construction and other deliverables from the consortium in the absence of and sign that Bilfinger would change direction and behaviours.

**Option 4 – Enforced adherence** – This entailed assertive application of the Infraco contract in its present form with disputes settled in the the short term and a negotiated new way of working. It was recognised that pursuing the option might well lead indirectly to a way forward under Option 2 or provide the evidence to support pursuit of termination under Option 1.

At the TPB meeting on 10<sup>th</sup> March 2010 the following recommendations were agreed:

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**1. Eliminate Option 3 - continuing "as is".**

A reinforcement of the elimination of this option is provided by the appraisal of delivery progress and behaviours since March (see section 4.1) and the updated option appraisal (see section 6).

**2. Continue to pursue tie's rights under the existing contract with vigour and seek acceptable resolution to the main disputes.**

We continued to pursue our rights initially under the action plan proposed in the Pitchfork report as detailed below, continued application of the DRP mechanism including adjudication where necessary (see section 4.2) and latterly this part of Project Notice (see section 4.4).

**3. Rigorously monitor the opportunity to achieve a partial or full exit of BB from the primary contract role on acceptable cost and risk transfer terms.**

**4. Reach a resolution on these matters with BSC in the form of a revised version of the existing contract which remains compliant with procurement regulation.**

**5. Confirm a new way of working with BSC which mitigates against further dispute risk.**

The primary manifestation of efforts under 3, 4 and 5 was Carlisle (see section 4.3)

**6. Retain the termination option – Option 1, not as an option to be pursued currently but kept under review for serious consideration if evidence emerges which merits this.**

The continued unsatisfactory progress on delivery of the project, the behaviours of BSC and outputs from Carlisle have elevated the termination option into serious consideration. Project Notice (see section 4.4) was in the first instance a means to continue enforcement of the contract but the outputs from Notice including the reaction of the consortium and a legal appraisal of the evidence or case for termination constitutes the evidence to support this option.

**7. Assess affordability and re-phasing options, including operational and financial viability.**

This has been addressed at section 4.5

**8. Report regularly to the TPB formally reassess the revised arrangements as soon as practical.**

Regular reporting and briefing to the TPB and to CEC senior officers, CEC group leaders, Transport Scotland and at Ministerial level have continued on a very

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regular basis since March. This report presents a formal reassessment of options and recommendations.

The Pitchfork report outlined an action plan to target specific critical areas where we would pursue application of the contract terms targeted at achieving a breakthrough:

Action identified	Ref to action in this report
Mobilise action on Clause 80	
Seek conclusion on impact of utility diversion delays and overall EOT claim, with consequent revision to a new agreed programme	
Respond to OSSA and offer the Clause 65 alternative route	
Refine argument over SDS management and deploy as appropriate	
Omnibus approach to resolution of outstanding BDDI – IFC disputes ; Expedite response to INTC's (other matters)	
Quantify and execute amended position on prelims	
Seek to resolve the Airport – Edinburgh Park disputes	
Action plan for implementing more collaborative working style	

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- Reminder of attempt to get contract set aside/hold us to ransom/three wheeled car/PSSA outcomes/etc – stage on which contractual disputes played out?
- Keynotes from Council reports in June and Oct?

#### 4. Workstreams Mar 2010 to Present

##### 4.1. Delivery Progress and Behaviours

###### Actual Progress

To set this into context is important to remember that at Infraco Contract award the Edinburgh Tram was expected to be open for revenue service in July 2011. This was amended by Revision 1 of the programme to September 2011 following contract award to take account of design delays at contract award. The subsequent progress is shown in the table below:

Rev 1 OFRS date	March 2010 Infraco Progress	November 2010 Infraco Progress	Planned progress – Rev 1	Projected OFRS at this rate of progress
Sept 2011 - 0%	15.7%	26.9%	98.2%	November 2014

(Table 2)

At March 2010, 15.7% of the Infraco works had been completed. Each period, progress advanced at a rate of between 1.4 - 2.1% per period, which would mean at this rate the Infraco works would take another 52 periods to complete – 4 years or 2014. Since March, progress can be split into 2 categories – on street and off street.

The core reasons for programme slippage have not changed since the Project Pitchfork report and remain as:

- Slow mobilisation of the Infraco and failure to appoint sub-contractors;
- Failure of the Infraco to submit preparatory paperwork – method statements , work package plans;
- Design slippage;
- Time taken by Infraco to advise of changes and then time taken to supply compliant Estimate, and
- MUDFA – delay to the utility diversion programme.

Since March 2010, it has become evident that design is a key driver to the Infraco delays and in particular 1) the completion of the integrated and assured design, and 2) the completion of an approved and integrated track design.

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The following gives a summary of the key progress issues both on street and off street. The table below shows current progress in each section:

Period 08 2010-11	Period		Delta	Cumulative		Delta	Project
	Plan	Actual		Plan	Actual		Wtg
<b>INFRACO PERIOD 08 PROGRESS (Contract Rev.01 Programme)</b>							
Section 1a Newhaven to Foot of the Walk	1.8%	3.0%	1.1%	95.0%	8.4%	-86.6%	16.2%
Section 1b Foot of the Walk to McDonald Road	0.0%	0.0%	0.0%	100.0%	1.3%	-98.7%	7.4%
Section 1c McDonald Road to Princes Street West	4.2%	0.0%	-4.2%	92.2%	0.0%	-92.2%	10.8%
Section 1d Princes Street West to Haymarket	0.0%	0.0%	0.0%	100.0%	42.1%	-57.9%	7.6%
<b>Combined Sections 1A-1B-1C-1D (On-Street) Newhaven Road to Haymarket</b>	<b>1.8%</b>	<b>1.1%</b>	<b>-0.6%</b>	<b>96.1%</b>	<b>11.1%</b>	<b>-85.0%</b>	<b>42.0%</b>
Section 2 Haymarket to Roseburn Junction	0.0%	0.0%	0.0%	100.0%	35.1%	-64.9%	4.2%
Section 5a Roseburn Junction to Balgreen Road	2.2%	0.1%	-2.1%	99.1%	9.9%	-89.2%	13.9%
Section 5b Balgreen Road to Edinburgh Park Central	0.0%	0.0%	0.0%	100.0%	43.4%	-56.6%	13.2%
Section 5c Edinburgh Park Central to Gogarburn	0.0%	2.1%	2.1%	100.0%	23.9%	-76.1%	7.2%
Section 6 Gogar Depot	0.0%	4.9%	4.9%	100.0%	70.2%	-29.8%	11.9%
Section 7a Gogarburn to Edinburgh Airport	0.0%	0.2%	0.2%	100.0%	47.0%	-53.0%	7.6%
<b>Combined Sections 2A-5A-5B-5C-6A-7A (Off-Street) Haymarket to Edinburgh Airport</b>	<b>0.5%</b>	<b>1.3%</b>	<b>0.8%</b>	<b>99.8%</b>	<b>38.3%</b>	<b>-61.5%</b>	<b>58.0%</b>
<b>FULL ROUTE PHASE 1A NEWHAVEN ROAD TO EDINBURGH AIRPORT</b>	<b>1.1%</b>	<b>1.2%</b>	<b>0.2%</b>	<b>98.2%</b>	<b>26.9%</b>	<b>-71.3%</b>	<b>100.0%</b>

(Table 2)

Off Street

Off street works have seen the most significant progress, work has progressed, most significantly in sections 5B, 6 (Depot) and 7 (Airport – Gogar). It was in the sections 6 & 7 that Siemens proposed a focussed attempt at resolving changes to get works progressing – this was originally known as the Siemens 25 initiative since there were 25 changes in this section. Despite **tie**'s efforts, BSC's attempts to resolve outstanding changes in this area were slow and an agreement on drainage in section 7 drainage was only reached between both parties in xxxx. **At time of writing there are 36 changes in this area and only x have been agreed.**

Works also progressed in Sections 5B most significantly at the 2 major structures in this section – Edinburgh Park viaduct and Carrick Knowe viaduct with both these structures effectively complete.

In sections 2A, 5A and 5C some works have progressed but these have been constantly beset by BSC identifying changes to the base date design(BDDI), failing to provide Estimates timeously and insisting on utilising the Change mechanism even though some of the events were covered under Clause 65 (Compensation Events) which meant BSC should have continued with the works being compensated for costs on a reimbursable basis.

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On Street

As can be seen from Table 2, works have only really progressed in Section 1A (Newhaven – Tower Place) and Princes Street. In reality, since November 2009 the only on street works to progress have been at Tower Place Bridge and at Lindsay Road – both in Section 1A, and these have both progressed slower than the original plan.

Work had been completed in Princes St in November 2009, but by the end of 2009 it was clear that there were a large number of defects which required to be rectified as well as snagging items not completed by the time Princes St re-opened to traffic. BSC were repeatedly asked to provide a plan to show how they were going to carry out these remedial and snagging works. No overall plan was received, a total of xxx partial closures have been allowed to carry out immediate repairs and so this led to **tie** issuing 2 Remediable Termination Notices as per Clause 90 of the Infraco Contract in respect of the works on Princes St.

During April BSC were also pushing to start works on the Haymarket – Lothian Road Junction section of works. **tie** by this time, based on the Princes St experience were insisting that all information to allow works to commence was provided in advance of a Permit to Work being issued to BSC. This included an assured integrated design for all works and in particular for the track. To date an integrated assured design has not been provided and the track design has only recently been submitted to CEC as statutory Roads Authority for approval. **tie** were not able to provide a permit to work to Infraco to commence works until these were provided.

BSC have not requested to commence any other on-street track and road works apart from a very small section between Haymarket viaduct and Haymarket Yards. **Check design????**

Trams

CAF have progressed with the manufacture of the trams very well. At time of writing the first 18 trams are complete and tram 18 is undergoing testing. Tram 1 has been in storage on Princes Street since delivery to Edinburgh in April 2010. The remainder are in storage in Irun, Spain at the manufacturing plant as the depot is not ready to take receipt of the trams for testing yet.

Cessation of Works by BSC

In September 2010 BSC wrote to **tie** advising that they were about to stop works at a number of locations where they advised that they were carrying out works on a

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“goodwill” basis. On 29<sup>th</sup> September 2010 a letter was received, **reference xxxxx**, which listed 99 Infraco Notices of **tie** Changes (INTC’s) where BSC believed changes had not been agreed and therefore they were ceasing works at all those locations. They systematically started to demobilise their own resources and those of a number of their sub-contractors from the end of that week. **tie** believes this to be a response to the RTN’s being issued by **tie** and has written to state we do not agree with this approach and have been systematically responding to each INTC and explaining why BSC are wrong in this approach. This **is described in more detail in section xxx**. **tie** believes that this is yet another breach of BSC’s contractual obligations.

Programme Management and Progress Reporting

MUDFA

We reported on the MUDFA delays in the PF 1 report. Since then, the delays due to utility diversions (MUDFA Rev 8) has been adjudicated on and the adjudicator made the following award:

Sectional Completion A	154 days
Sectional Completion B	0 days
Sectional Completion C	0 days
Sectional Completion D	0 days

The detailed reasoning to this decision can be found in **Appendix X**. However, in summary the adjudicator found that he did not agree with BSC’s interpretation of a Designated Working Area (DWA) and in effect the impact of delays had been over amplified as a result. He also stated that as he did not have substantiation for delays in a number of areas he could make no award – this is similar to what **tie** has experienced throughout the life of the contract. Following this, BSC submitted a revised programme to take account of this decision but **tie** was unable to accept this programme as many of the errors found previously had not been rectified, including compliance with the Employer’s Requirements.

Subsequently BSC has submitted a Change – INTC 536 for the majority of utility delays up until 31<sup>st</sup> July 2010. In the Estimate BSC has taken account of the decision in respect of DWA’s but appears to be making a claim for all the delays again, even though the adjudicator made an award for delays until March 2009. It is likely that this will go to DRP. As part of **tie**’s analysis we are looking at whether the design delays are now dominant and so reducing **tie**’s liability in respect of Extension of Time and Costs.

The underlying issue in all this in respect of programme is that BSC are still failing to provide any substantiation of delays, including those caused by themselves for which the have a responsibility to mitigate at their own cost.

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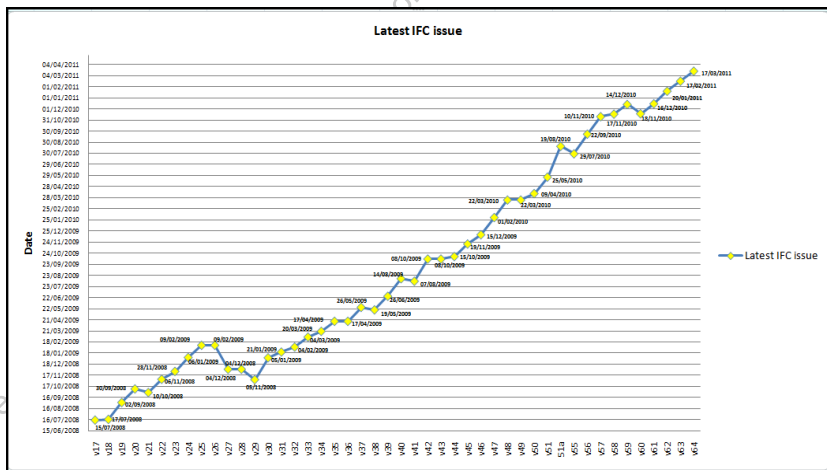
Progress Reporting

**tie** has carried on with routine 4 weekly progress meetings with BSC and weekly “Issues” meetings and these continued to be minuted. However, at a section level, the engagement with BSC was patchy with some **tie** Project Managers getting reasonable engagement from their BSC counterparts but others getting no positive engagement and at the extreme a refusal to provide the information requested. This was particularly prevalent in Sections 2 – 5. Additionally, **tie** found it extremely difficult to obtain information as part of the weekly progress reporting.

In summary, we have not seen any improvement in management of programme and progress reporting apart for a new approach in respect of designated working areas. If anything, in all other respects BSC’s position has hardened. Programme forms the basis of RTN 4 and UWN 2.

Design

In March we reported that design should have been completed across the route 19/08/10. We are currently reporting that design will now not be complete until 17/2/11 BSC consistently to provide any detailed explanation as to the reasons for design slippage. However, it is thought that the integration of the systems design into the overall design has been a key driver o this. The history of design slippage is shown in the graph below:



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Position at Period 13 2009-10 (27-Mar-10)

V55 was submitted to **tie** on 01Mar10 with a progress date of 15Feb. It was noted that there was a significant increase in the number of activities due to the inclusion of Siemens design.

Phase 1a only	Number Required				Number	
	V26	v31	v51A	V55*	Submitted	Granted
Prior Approvals	44	49	58	56	53	52
Technical Approvals	53	71	98	91	87	79
IFC	71	81	235	231		128

Position at Period 8 2010-11 (06-Nov-10)

V63 was submitted to **tie** on 19 October 10. There are 22 IFC's with a slippage of 28 Calendar days or more in the period

phase 1a only	Numbers Required								Number
	V26	V31	V58	V59	V60	V61	V62	V63	Granted
Prior Approvals	44	49	56	56	56	56	60	60	54
Technical Approvals	53	71	92	92	92	92	63	63	55
IFC	71	81	233	230	227	230	230	229*	185

\* reduction in IFC no due to removal of IFC in IFC1 - Application of Generic Void Filling Design to Support Tramway - Leith w/k Cable Tunnel (DCR 0172)

Therefore between the end of Period 13 2009-10 and the end of Period 08 2010-11 Infraco (SDS) achieved the following progress:

- **Prior Approvals** – 54 out of 60 achieved at end of period 8 2010-11 compared to 52 out of 56 at the end of period 13 2009-10
- **Technical Approvals** - 55 out of 63 achieved at end of period 8 2010-11 compared to 79 out of 91 at the end of period 13 2009-10 (the drop in numbers id due to individual approvals for road, drainage, track etc being combined into one approval in line with BSC)
- **IFC Packages** - 185 out of 229 achieved at end of period 8 2010-11 compared to 128 out of 231 at the end of period 13 2009-10.

Note that there are only 112 contractual IFC packages at contract award (v31 of SDS Design programme)

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The production of an assured design – especially by SDS – has consistently fallen behind programmed dates and has not been aligned to the construction programme for the Infraco Works. The main issues have arisen from:

Client biased issues

- approvals
- third party requirements
- CEC/TEL changes and/or conflicting requirements

Infraco/SDS issues

- approvals
- SDS productivity and lack of design co-ordination
- Integration of SDS design with Infraco Proposals (including Infraco detailed design)
- Assurance of integrated design
- Absence of an integrated, prioritised programme for completion of an assured design which supports the construction programme.
- slow resolution of change issues including production of design estimates

During the preferred bidder stage of the contract negotiations for Infraco, BSC assumed that they could start work 20 days after receiving an IFC drawing and this was built into the Infraco programme. Additionally, as part of the novation negotiations, SDS were incentivised to complete these IFC drawings, although it was anticipated that these would be completely assured drawings. At the point of novation SDS had been incentivised for the timely production of IFC packs so that construction could commence in earnest. At that time SDS had adopted an exceptionally hard commercial stance, claiming that the 'change' work being demanded of them was outwith their contract. At contract award the SDS design programme and therefore BSC construction programme contained 112 IFC packages which triggered the ability to commence construction works associated with those packages. The number of IFC's has risen considerably since contract award and now sits at 229.

BSC explain this as:

- 1) IFC's split into smaller packages to allow works to commence
- 2) IFC's increased due to integration of systems design

Additionally, BSC has consistently issued multiple revisions of IFC drawings as the design has progressed. Many of these later revisions form the basis of claimed Compensation Events under Clause 65 of the contract although BSC has consistently failed to provide the substantiation to back these claims up and allow **tie** to make an assessment of any entitlement. Further, whilst the systems design has been progressed and submitted to tie

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for review under Schedule Part 14 of the contract, the civils design has consistently not been submitted in this way. **tie** has written to BSC several times on this subject and to date BSC has not provided a response. This lack of visibility means that **tie** has not had any insight at all into changes being made to the civils design until it is finalised and a change (BDDI – IFC) is submitted to **tie**. An audit undertaken by **tie** into design changes revealed that discussions had been held between BSC and SDS and an agreement entered into in respect of payment to SDS for making design changes. This forms the basis of RTN 5 – SDS Agreement.

However, what BSC has still not provided is a fully assured integrated design. Despite being promised this consistently over the past few months it has consistently been delayed. During senior level meetings held between **tie** and BSC on 16<sup>th</sup> June 2010, BSC advised **tie** that they would present a fully integrated assured design by mid July. The first tranche was eventually delivered to **tie** on 9<sup>th</sup> August – however, this was not complete and not able of acceptance by **tie**. At time of writing this issue is still outstanding.

#### CEC Approval Informatives

One reasons cited by BSC for failing to complete the design or provide an fully assured integrated design, is that CEC fail to approve technical or planning drawings. In fact, CEC has consistently complained about the quality of design being produced by BSC/SDS however, they have adopted a pragmatic approach to approvals which has involved giving approval subject to “informatives” being closed. The informatives are basically comments on a whole range of issues which require to e addressed by BSC. During the summer of 2010 it became apparent to **tie** that BSC did not have a handle of the size of this problem and so **tie**, along with CEC undertook analysis to get an agreed set of informatives and ownership with BSC. At time of writing there are still a large number of informatives outstanding by BSC and the full data relating to this is attached as **Appendix X – Damian to provide**. This appears to have spurred BSc into action and since then a number of workshops have been held in an attempt to close out BSC informatives. If BSC not deliver on this it will demonstrate a change in behaviour but to date this has not happened.

In summary, **tie** has not seen any real improvement in BSC’s management of design, and in particular the integration of the design and provision of an assured design. Design has formed the basis of RTN’s 5 and 6 and UWN 3.

#### Clause 80

The operation of Clause 80 has been one of the main areas of contention between the parties. The key issues have been:

- Value of Estimates
- Time taken to provide estimates
- Clause 80.15/80.13 an 34 instructions – progressing with the works

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For all disputes which have been resolved through the DRP process the value of the change has been reduced from BSC's initial Estimate of £21.9m down to £9.5m – this is a difference of £12.4 m or 57% reduction. Even changes which are resolved without having to resort to the dispute process see a significant reduction in the final value agreed – on average this is xxxx%. The behaviour of submitting high initial Estimates has not stopped.

**tie** has seen no improvement in the behaviour of BSC in respect of the time it takes for them to provide an Estimate following notification of a Notified Departure. In some cases it can take months for BSC to provide an Estimate.

The Estimates provided are rarely complete. In general, impact on programme is never provided and evidence of the change being implemented in the most cost effective manner is not provided.

Since **tie** started to issue RTN's to BSC, **tie** has seen an increase in the level of changes being submitted by BSC. **Do we have a trend graph?**

Many of these items have been the subject of RTN's 8 & 9.

#### Clause 65/22

BSC have consistently attempted to avoid use of Clause 65 – Compensation Events and have instead opted to try and use Clause 80 – **tie** Changes. **tie**'s opinion is that this is because Clause 65 requires BSC to continue working whereas BSC prefer their interpretation of Clause 80 where they argue that the change must be agreed before they can continue or commence work. Clause 22.5 of the Infraco contract requires, under certain circumstances that BSC deal with an event as a compensation event – Clause 65. We have seen a consistent behaviour by BSC in denying **tie** the use of Clause 65 by insisting that events are treated under Clause 80.

#### General Behaviours

The Consortium has not acted as one since day 1 of contract award. They have consistently acted as 3 bodies and this is optimised by the fact that 3 separate invoices are submitted as the Consortium does not have a consorsrtium bank account. Anecdotaly, at a recent adjudication one member of the Consortium stated to **tie** that "I bet you wish you had contracted with a JV." This appears to drive many of the behaviours we observe. We understand that the consorsrtium does not award any sub contract

Behaviours within the consortium appeared to be strained and it was apparent whe. Each party awards their own sub-contracts. We are aware that there are outstanding disputes between sub-contractors and the individual Consorsrtium members. This means that

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withint he Consorsrtium, each member istrying to attach liability to the other parties for issues such as delays. This is particularly true between BB and Siemens.

Stress was also apparent between Siemens and Bilfinger, particularly at the depot, where Siemens were keen to progress with track laying but were consistently being prevented from doing so by BB not handing the site over to them for such activities. Siemens eventually employed a civil contractor to carry out final remedial works on levels to allow track laying to progress. It had been hoped by **tie** that the 1<sup>st</sup> Tram could be transferred to the depot site for storage when it was removed from Princes St for the Christmas festival. However, tie understands that BB were not willing for this to happen, despite Siemens having made moves to have track in place and so this did not happen and the tram is now in storage elsewhere. This is demonstration that whilst there is tension between BB and Siemens they have not broken ranks contractually.

On 24/11/10 BSC wrote to **tie** indicating that they were replacing their Project Director on the project. The Project Commercial Director (who is from Siemens) would be covering the role of Project Director as well.

The move made by BSC in ceasing works at a number of locations resulted in the demobilisation of a number of their sub-contractors along with them making contract and direct staff redundant.

Finally, Siemens have been keen that **tie** pay for materials that they have had delivered to the UK. Currently they have a warehouse at Broxburn which contains materials associated with power and Overhead line equipment. Additionally, over the past few weeks, significant volumes of sleepers and rails have started to be stored across the sites, particularly at the depot.

CAF has worked closely with **tie** throughout the period and even though they are part of the Consortium they have maintained a close relationship with **tie**. CAF delivered the first tram to Princes Street in April 2010 and it was understood that they had done this against the will of the other 2 consortium members.

The summary view is that it appears that BSC are not attempting to minimise their cash flow by stopping works and reducing headcount wherever they can and attempting to get as much materials stored on site that they can with a view to agreeing payment for such materials from **tie**.

#### Senior Level Engagement

**tie** has found it consistently difficult to get engagement from BB and Siemens particularly at a senior level.

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In June 2010 BSC appeared to take a step forward in introducing a negotiator from BB in the shape of Ed Kitzman. I became clear that Ed Kitzman was operating on behalf of BB and not Siemens. Siemens lead, Michael Flynn experienced a bad accident in summer 2010 and his replacement was not visible at all in the process to try and negotiate an alternative Carlisle agreement.

There have been a number of meeting at a senior level with BB and Siemens and details are found in the events log. However, it has never been clear who has the authority to make decisions. There have been meetings with BB involving Kenneth Reid, David Darcy and Dr Keysberg. Most recently Kenneth Reid has left BB, Dr Keysberg has assumed a more senior position and BSC now state that they do not need the services of Ed Kitzman anymore.

PR

BB appointed Donald Anderson, former leader of City of Edinburgh Council to advise on PR issues. We have experienced a high level of briefing to the press which is in breach of the Infraco contract requirements. Most latterly with the retirement of David Mackay from **tie**/TEL we saw BSC attempt to take legal action. This was dropped at the very last minute and a press release issued making statements about the circumstances of the case being made which were completely unfounded.

Positions

On 11/10/10, BB and Siemens met with **tie** to discuss an option for a “mature divorce”. In this both parties outlined that they felt that negotiations were not proceeding and they were willing to discuss with **tie** options to mutually agree a termination of the contract. **tie** left BSC to come back with proposals in this respect. Siemens stated that they would be willing to remain and assist **tie** complete the project but would be unwilling to do so under the Infraco Contract. CAF were unable to attend this meeting.

CAF separately have intimated that they are keen to be re-novated to **tie** to provide the Trams and maintenance for such in the future.

- Good progress with Tram vehicles (on programme). Issue with where to put the trams given Depot not ready. That’s where good news ends.v
- Cessation of work and demobilisation of subbies in Oct (wilful neglect of core contractual responsibilities) was convincing evidence to **tie** mgt that the project will not get finished with BSC under this contract or any other.v

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- Dynamic with Siemens – appear to want to get on with things (at Depot eg) but are prevented from doing so by BB. We are aware Siemens are facing claims from their track work subby BAM. However have not broken ranks with BB contractually. ✓

#### 4.2. DRPs / Adjudications

Following detailed legal analysis and Senior Counsel's opinion, the decision was taken by **tie** in the late summer of 2009 that **tie** would commence dispute resolution proceedings to unlock the contract administration impasse which had developed around three issues:

- the Infraco's position that in any case where it puts forward an Estimate in respect of a **tie** instructed variation to the Infraco Contract, the Infraco has no obligation to carry out the works comprising the variation unless and until **tie** either agrees the Estimate or places it into dispute resolution ;
- the Infraco's position that any amendment to design which altered the so called Base Date Design Information (a limited set of drawings as opposed to the totality of the ETN Scheme) represents an event which entitles the Infraco to automatic additional payment and time relief regardless of the reasons for such alteration; and
- the Infraco disregard of contractual time scales in which it is obliged to produce reasonable Estimates in respect of variations.

A discrete number of disputed matters were initially selected for dispute resolution. This followed concerted efforts to reach compromise through mediation. It should be understood that the DRP was commenced with full recognition that, despite serviceable levels of confidence on outcome, there could be adverse findings. The proposition was that without DRP Infraco would continue with damaging obstinacy and no resolution on either entitlement or value on their claims would be reached without **tie** simply conceding across the board to demonstrably inflated claims. Understood in this context, the use of DRP was the only route open to **tie**, indeed not deploying DRP would have meant ignoring the proper contractual mechanism for resolving difference. Additionally, the DRP contains an internal process to achieve settlement by agreement and **tie** wished to engage this to ensure that all effort had been used to avoid formal proceedings. In numerous instances this has resulted in **tie** driving Infraco to a compromise on the Estimate which would not have been achievable without either the reality or threat of DRP coercing the Infraco to revisit its valuation of the variation in question.

##### 4.2.1 General Overview

To date a total of 22 items have been referred to DRP, 13 by **tie** and 9 by BSC. Where the issue referred has been one of valuation, the reduction in value awarded to BSC has been substantial. This has reduced the claims made by BSC from £21.9m to £9.6m, a reduction

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of 128%. A high level summary of the stage each reached through that process is as follows:

No	Topic	Subject	Stage	Complete
1	Bus lane on Princes Street	Initiate Work	?	✓
2	% uplift in prelims	Costs	Mediation	✓
3	Hilton Car Park	Contract definition	Adjudication	✓
4	EOT1	Costs	Mediation	✓
5	Gogarburn	BDDI – IFC	Adjudication	✓
6	Carrick Knowe Bridge	BDDI – IFC	Adjudication	✓
7	Russell Road Bridge	BDDI – IFC	Adjudication	✓
8	Haymarket	BDDI – IFC/ Costs	Agreement reached without mediation or adjudication	✓
9	Baird Drive	BDDI – IFC	Agreement reached without mediation or adjudication	✓
10	Balgreen Road	BDDI – IFC/costs	Agreement reached without mediation or adjudication	✓
11	Depot Access Bridge	BDDI – IFC/costs	Adjudication	✓
12	MUDFA Rev 8	Time	Adjudication	✓
13	Section 7 track drainage	BDDI – IFC/costs	Adjudication	✓
14	Tower Bridge	BDDI- IFC/costs	Adjudication	✓
15	Murrayfield Underpass	Clause 34.1/80.13 (ability to instruct works before an estimate is agreed).	Adjudication	✓
16	Landfill Tax	Costs	Adjudication	×
17	Sub contractor terms	Principle	Adjudication	×

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18	Preliminaries	Costs / payment	Adjudication	x
19	Section 7 Drainage Valuation of ND 6 & 7	Costs	Referred by BSC. CEO meeting held 13 October 2010. Agreed valuation. Included now in total of DRP on Section 7 above.	x
20	Valuation of PSSA	Costs	Mediation	x
21	Section 5B track drainage	BDDI – IFC/ Costs	Initial stages	x
22	Section 5C track drainage	BDDI – IFC/ Costs	Initial stages	x

#### 4.2.3 Overview of Individual Decisions

The following provides an overview on the main issues which have been referred to the Dispute Resolution Procedure under the Infraco Contract. It is not legal advice on the outcome of the completed adjudications or on the continuing DRP Strategy.

##### Hilton Hotel Car Park

Infraco had refused to accept that it was obliged under the Infraco Contract to proceed with the carrying out and completion of the construction/re-configuration of the car parking spaces at the Hilton Hotel ("**Hilton Hotel Car Park**") unless and until it received an instruction from **tie**. **tie** then referred that matter to the Dispute Resolution Procedure.

Infraco claimed that carrying out the works to the Hilton Hotel Car Park constituted a variation to the Infraco Contract. The amount claimed for this variation was £90,067. The Adjudicator (Mr Robert Howie QC) wholly agreed with **tie's** position, in that Infraco was obliged to carry out and complete the Hilton Hotel Car Park without instruction (or any additional payment) from **tie**.

##### Gogarburn Bridge and Carrick Knowe Bridge

Infraco and **tie** did not agree as to the extent to which the matters depicted on the Issued for Construction Drawings in respect of the structures known as Gogarburn Bridge and Carrick Knowe Bridge constituted a Notified Departure in terms of *Pricing Assumption 3.4.1.1 of Schedule Part 4 (Pricing)* (referred to generally as the "**BDDI to IFC issue**"). **tie** then referred both matters to the Dispute Resolution Procedure.

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On matters of interpretation of *Schedule Part 4 (Pricing)* generally, **tie's** position was that *Schedule Part 4 (Pricing)* says the Infraco's price for the specified works (the "*Construction Works Price*") is a lump sum, fixed and firm price for all elements of work required as specified in the Employer's Requirements and the Infraco Proposals. A Notified Departure occurs if the Base Date Design Information is amended, which gives rise to an examination of the price if that is justified. Infraco's position was that the Construction Works Price is to be based upon the Base Date Design Information only and matters that will become Notified Departures are matters that fall outwith normal design development that could be construed from the information available to Infraco contained within the Base Date Design Information - on Infraco's view *Pricing Assumption 3.4.1.1* applies to all changes except those which could be considered as the "*normal development and completion of design*" from the information available at Base Date Design Information and "*normal development and completion of design*" has to be understood in the particular way provided in the Infraco Contract in that it excludes changes in shape, form or outline specification.

The Adjudicator (Mr Hunter) reasoned (on which point neither party invited him to do so) that the Employer's Requirements have, in terms of the price for works been clarified in *paragraph 3.1 of Schedule Part 4*, and thus limited by the Base Date Design Information and the *Schedule Part 4 (Pricing)* agreement in respect of the agreed fixed price. Adopting that reasoning, the Adjudicator proceeded to find that a number of the matters depicted on the Issued for Construction Drawings in respect of the structures known as Gogarburn Bridge and Carrick Knowe Bridge constituted a Notified Departure in terms of *Pricing Assumption 3.4.1.1*. DLA, McGrigors, Richard Keen QC and Mr Wilson (a subsequent adjudicator) agree with **tie's** position.

Though Mr Hunter was not asked to decide upon matters of valuation, it is the case that **tie** is of the opinion that the Estimates submitted by Infraco in respect of each of the Gogarburn Bridge and Carrick Knowe Bridge structures are grossly overstated - such that (1) Infraco's Estimate in respect of Gogarburn Bridge was in the amount of £313,080.31, whereas **tie's** assessment is in the amount of £72,551.35. This matter was subsequently agreed as £176,195; and (2) Infraco's Estimate in respect of Carrick Knowe Bridge was in the amount of £391,971, whereas **tie's** assessment is in the amount of £99,403.92. This matter was subsequently agreed as £138,265.

#### **Russell Road Retaining Wall 4**

Infraco and **tie** did not agree as to the contents of Infraco's Estimate in respect of the structure known as Russell Road Retaining. Infraco then referred that matter to the Dispute Resolution Procedure. The Estimate was in the amount of £4,597,847.07 and concerned three elements (LOD, Contamination and Foundations)

As part of that dispute, the arguments previously advanced by both Infraco and **tie** in the

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Gogarburn Bridge and Carrick Knowe Bridge disputes were rehearsed before a different adjudicator (both **tie** and Infraco accepting that the decisions of Mr Hunter were not binding on the adjudicator).

On matters of interpretation, the Adjudicator (Mr Wilson) roundly rejected Infraco's position that the Construction Works Price could be construed as being solely for the Works shown on the Base Date Design Information. Similarly, the Adjudicator largely agreed with **tie's** interpretation of *Pricing Assumption 3.4.1.1*, in that "normal" development of design is progression towards the Employer's Requirements as would be expected by an experienced contractor and his designer; and the word "amendment", which qualifies the application of *Pricing Assumption 3.4.1.1*, means that *Pricing Assumption 3.4.1.1* can only apply to something showing on the Base Date Design Information, not an addition to achieve compliance with the Employer's Requirements.

Notwithstanding the issues of principle rehearsed before and examined by the Adjudicator, the substantive dispute concerned the contents of Infraco's Estimate. It was acknowledged that certain of the defences proposed by **tie** to the monetary claims made by Infraco (as set out in the Estimate) might not succeed. Those defences did not, by and large, succeed but it was the case that Infraco's Estimate was initially in the amount of £4,597,847.07, **tie** having assessed an amount of £701,467.95 in respect of Foundations (LOD having been withdrawn by Infraco as part of the dispute resolution process and both Infraco and **tie** agreeing that Contamination was to be dealt with separately) and the Adjudicator decided that the amount of the Foundations to be £1,461,857.21.

#### Section 7A Track Drainage

Infraco and **tie** did not agree as to the contents of Infraco's Estimate in respect of Section 7A Track Drainage. **tie** then referred that matter to the Dispute Resolution Procedure. The Estimate was in the amount of £1,350,000. **tie's** assessment was £24,073.60.

As part of that dispute, the arguments previously advanced by both Infraco and **tie** in the Gogarburn Bridge and Carrick Knowe Bridge disputes were rehearsed before a different adjudicator (both **tie** and Infraco accepting that the decisions of Mr Hunter were not binding on the adjudicator).

During the adjudication process **tie** and Infraco were able to agree the valuation of certain Notified Departures, those amounting to £242,068

**tie** sought a declaration that the matter relied upon by Infraco for the balance of its claim did not constitute a Notified Departure. The Adjudicator (Mr Coutts) came to the view that a Notified Departure had occurred in respect of the remaining Section 7A Track Drainage.

[The matter of valuation of that Notified Departure was not before the Adjudicator. That

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was subsequently settled during the internal DRP stage of a valuation dispute raised by Infraco at £755,000.]

**Tower Place Bridge**

Infraco and **tie** did not agree as to the contents of Infraco's Estimate in respect of the structure known as Tower Place Bridge. **tie** then referred that matter to the Dispute Resolution Procedure. The Estimate was in the amount of £595,358 (and was subsequently reduced to £455,881.56). **tie's** assessment of the admitted Notified Departure was (negative) £305,026.66. The dispute principally concerned matters of valuation. As part of that there was discussion concerning the operation and administration of the electronic data room and the documents stored therein in respect of the Base Date Design Information.

The Adjudicator (Mr Hunter) decided that the value of the admitted Notified Departure was (negative) £260,973.48.

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### Depot Access Bridge

Infraco intimated a Notified Departure in respect of the structure known as Depot Access Bridge (S32). Infraco's Estimate valued the Notified Departure at £2,478,205.05. **tie** challenged the Estimate on the basis that it took no account of the associated walls of the single integrated structure of which **tie** said the Depot Access Bridge formed part. **tie** also contested the Infraco's valuation of elements of the Estimate. **tie** placed a negative value of £4,827,117.21 on the Estimate (in **tie's** view, the associated walls which Infraco took no account of in its Estimate produced a negative value). Agreement could not be reached on the contents of the Estimate and Infraco then referred the matter to the Dispute Resolution Procedure. In its Referral Notice in the adjudication, Infraco reduced the value of its Estimate to £1,819,180.29 (a reduction of £659,024.76).

The Adjudicator (Mr. Porter) decided that the Depot Access Bridge did not form part of a larger single integrated structure affected by the same Notified Departure, and so the associated walls did not require to be valued in the Estimate. Mr. Porter valued the Notified Departure in the sum of £1,230,624.80. (It would be open to **tie** to intimate a separate Notified Departure to Infraco in respect of the associated walls. This has been notified by **tie**).

### MUDFA 8

Infraco intimated a Notified Departure in respect of delays to the MUDFA Works. Infraco's Estimate sought an extension of time in respect of the four Planned Sectional Completion Dates. More particularly, Infraco sought an extension of time for Section A from 1 June 2010 to 13 December 2010; for Section B from 1 July 2010 to 10 January 2011; for Section C from 10 March 2011 to 22 November 2012; and for Section D from 6 September 2011 to 20 May 2012. The Estimate did not deal with costs. **tie** contested the Estimate on the basis that it was not competent because, in broad terms, it did not take account of possible mitigation measures and did not deal with costs. Following a meeting, notwithstanding it undertook to go away and consider proposals put forward by **tie**; Infraco referred the matter to the Dispute Resolution Procedure.

In the adjudication, **tie's** principal position was that the Estimate was incompetent because it did not comply with the requirements of Clauses 80.4 and 80.7 of the Infraco Contract and, in particular, it did not show that the **tie** Change would be dealt with in the most cost effective manner, and did not deal with costs (Infraco argued that there was an agreement to deal with costs once the time element had been agreed - **tie** disputed that such an agreement had been made). **tie's** alternative position was that even if the Estimate was competent, Infraco had failed to prove its entitlement to the extensions of time sought because its delay analysis was flawed. **tie** argued, inter alia, that the delay

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analysis did not consider readily available and cost effective mitigation measures (including accelerative measures) available to it. **tie** also argued that so far as Infraco's calculation of its entitlement to an extension of time was based on its right to exclusive access to Designate Working Areas, which it equated with Intermediate Sections, it was bound to fail.

The adjudicator (Mr. Howie) held a preliminary hearing at which he considered **tie's** principal position (during the hearing Infraco withdrew its argument that there was an agreement between the parties that costs would be dealt with once the time element had been agreed). Mr. Howie decided the Estimate was competent; compliance with each of the requirements of Clause 80.4 and 80.7 was not a condition precedent to the Estimate being considered. In his reasons, Mr. Howie suggested that it would have been open to **tie** to refuse to participate in a clause 80.9 meeting unless Infraco provided a fully completed Estimate.

At a second hearing, Infraco led evidence in support of its claim for an extension of time. Mr. Howie decided that in respect of Section A, Infraco was entitled to an extension to 2 November 2010. In relation to the other sections, Mr. Howie found that Infraco had failed to prove its case. In his Reasons, Mr. Howie held that Infraco had wrongly equated Designated Working Areas with Intermediate Sections. He also held that Infraco were under no obligation to include acceleration measures as part of the Estimate.

### 80.13 Instruction

Infraco referred the issue of their requirement to comply with **tie's** instruction relating to proceeding with Works associated with a Notified Departure. This is a decision on whether clause 80.13 empowers **tie** to instruct/direct Infraco to proceed with the work in the context of a Notified Departure (there being no dispute as to the existence of a Notified Departure). Lord Dervaird decided that **tie** is not empowered by clause 80.13 to instruct/direct as set out above.

Lord Dervaird's decision offers no meaning to the words at the end of clause 80.15 "...unless otherwise directed by **tie**."

Lord Dervaird did not decide whether clause 34.1 empowers **tie** to issue an instruction where the claimed Notified Departure is disputed and in advance of that dispute being determined.

### Future matters

A number of other Estimates submitted by Infraco have been identified as being potential candidates for referral to the Dispute Resolution Procedure, principally on the basis of

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those Estimates being heavily overstated, but also to drive home **tie's** interpretation of the Infraco Contract that the lump sum Construction Works Price is not circumscribed by what is depicted on the Base Date Design Information but rather represents the price for constructing the entire Infraco Works in accordance with the Employer's Requirements.

Under the Infraco Contract, an adjudicator's decision is binding unless overturned by a court judgment and either party is free to take an adjudicator's decision to litigation.

### DRP Outcome

The original strategy of DRP as outlined in the March PF1 report was to:

- test a number of the contractual principles which lay at the heart of the changes;
- drive down the values of the Estimates being submitted by BSC;
- get work started at a number of locations through the application of Clause 80.15 of the Infraco contract, and
- drive change in behaviours by the contractor.

We can say that the strategy has been successful in driving down the values of Estimates and that is evidenced already within the report. It has also resulted in work starting at a number of locations where is was stopped subject the changes being agreed. However, mobilisation of the contractor was slow and inevitably the contractor soon found other "changes" which were subject to the same behaviours.

A number of contractual principle have been tested. However, the results of these adjudication decisions have been mixed and in general the adjudicators have not given clear direction on the operation of the contract or the interpretation they have given is subsequently open to interpretation. This means that it has not provided either party with any basis for certainty.

Behaviours have not improved as a result of opting to put things into DRP. Indeed, we have found that BSC has systematically used the raw DRP decisions as PR opportunities and sought to use this as an opportunity to create widespread media coverage creating tensions across Stakeholder groups.

In summary, DRP is not a basis itself to resolve the differences between the parties and to date has not delivered certainty or acted as a catalyst to progress the works at an acceptable rate. DRP is management resource hungry and an extensive process. This was recognised at the December 2009 TPB and resulted in Project Pitchfork as reported in the PF1 report as a means to find a new way to deliver certainty of cost and programme for the Edinburgh Tram Project.

- Update on DRP table from Pitchfork report – stats on what's been resolved at what value versus what they were claiming –as per Council report/TPB reportsV
- Specific commentary on the following adjudications subsequent to March:
  - MUDFA Rev 8 – their referral. Implication of result of adjudication on our assessed liability for utility diversions delay. Their response – what are they doing now. Has not resulted in an updated mitigated delivery.

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- Depot Access Bridge – adjudicator ducked the full scope.v
- 80.13 Instruction - great significance if principle applied to the rest of the job. BSC hugely encouraged by the result. Current legal view on the basis and scope of Lord Devaird’s decision? Was it complete (cl 80.15/cl34.1)?
- Still progressing specific DRPs – which ones will resolve prior to year end – implications?
- DRPs valuable as a clarification and informing - not delivering either acceptance of principles by either party and therefore any basis for certainty. Reported in March the DRP process was not delaying the programme – no longer the case? Very expensive and management resource hungry. Raw decisions provide fodder for the BB PR machine.
- DRP not a basis of itself to resolve our differences, deliver certainty and progress the works at an acceptable pace. Emphasis moved to a negotiated VfM deal (Carlisle) or establishing BSC default (Notice).

**4.3. Carlisle**

- In [May] tie/BSC entered into discussions on the possibility of a “mature divorce” with the expectation that a series of amendments to the contract could lead to a value for money firm price for off street works plus a section of the on street works (St Andrew Sq was emerging as the likely affordable and viable first phase). This became known as Project Carlisle.
- Describe who approached who and when. Give dates when Carlisle was reported to TPB and CEC. Reference to note of understanding exchanged.
- Concept was that civils works beyond a terminal point would be descoped from the BSC contract whilst tie maintained the aspiration to keep the Infraco contract intact and Siemens involved.
- Our objectives were to pursue the following actions identified in Pitchfork:
  - Monitor opportunity for BB Exit on acceptable cost/risk terms
  - Wrap it into a revised BSC contract compliant with procurement regulation
  - A new way of working with BSC which mitigates against further dispute risk
- Governance and management of the process – separate clean team on each side – composition of our team (TR/GHP/DLA) – their remit and authority – progress reporting back RJ/SB – oversight by tie Commercial team – timescales
- Key deliverables – scope/pricing (GMP)/contractual provisions and risk allocations (Sch Pt4 no more)/assured design/programme
- Key events/meetings and outputs
  - Commentary on their conduct of the negotiation – was their team properly empowered to negotiate – at what point did it appear Kitzman was no longer the man

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- Terminal point they were willing to talk about initially was Wav Br w/ civils descoped beyond Haymarket – left Wav Br to St Andrew Sq as a new reprocurement for civils at least
- Failed to deliver assured design
- Initial offer by them (dates and details)
- Our counter proposal (date)with draft terms and price with range of negotiating outcomes/opportunities identified reported outturn in range of – £538m to £588m for St A Sq by Mid 2012
- Their last offer (date) was £130m over ours – effectively a repricing exercise with little reference to the original contract – insufficient explanation why and risks not taken on (not a GMP)
- Current status – no further engagement since [ ] but neither side has officially declared an irrevocable break down in negotiation.

SC text at 17/9:

#### 4.3.1 Initiation of Carlisle

At a senior level meeting held on 2<sup>nd</sup> March 2010, BSC made a proposal, followed up in writing, for a re-phasing of the project which envisaged completion between Airport and Princes St by April 2012. In [March] tie/BSC entered into discussions on the possibility of a “mature divorce” with the expectation that a series of amendments to the contract could lead to a value for money firm price for off street works plus a section of the on street works (St Andrew Sq was emerging as the likely affordable and viable first phase). This became known as Project Carlisle.

Senior level meetings were held with tie and the Infraco Consortium on 22<sup>nd</sup> March, 25<sup>th</sup> March and 14<sup>th</sup> April 2010. These meetings were led by Siemens who appeared to be trying to find a solution to the ongoing contractual differences, whilst the BB position seemed to be dysfunctional and hardening. On 23<sup>rd</sup> April, Siemens requested a meeting with Tony Rush – tie’s specialist advisor. The purpose of this meeting, which was to discuss an initiative for the Edinburgh Tram Project to :

- re-scope/re-phase the works for the Infraco Contract
- develop revised delivery dates for the re-scope/re-phase the works
- develop a Guaranteed Maximum Price (GMP) for the revised scope and revised delivery dates

Given the difficulties being encountered in discussions with BSC in relation to on-street works, starting works in relation to Clause 80 etc, it was decided that would engage in these discussions( which aligned with one of the key recommendations made at the TPB in March – monitor the opportunity to achieve a partial or full exit of BB)

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to see if a successful outcome could be achieved. The concept of this was that civil engineering work beyond a terminal point would be descoped from the Infraco Contract whilst **tie** maintained the aspiration to keep the Infraco Contract intact and Siemens involved.

Our objectives were to pursue the following actions identified in the Pitchfork Report:

- Monitor opportunity for BB Exit on acceptable cost/risk terms;
- Wrap it into a revised Infraco Contract compliant with procurement regulations, and
- Find a new way of working with BSC which mitigated against further dispute risk.

#### 4.3.2 Carlisle Governance

This process was managed by **tie** using a separate “clean team” using Tony Rush and advisors from GHP associates and DLA. **Remit and authority???**

This resulted in a draft Memorandum of Understanding - MOU(draft 2) being sent to BSC on 4<sup>th</sup> May 2010 and a programme was set out anticipating an agreement being reached by early July 2010.

The key principles of the MOU were that Infraco complete the scope of works as follows:

Included:

- All work from the Terminal Point (to be agreed by expected to be at the East end of Princes Street) to the Airport; Enabling Works on or adjacent to the Forth Port’s Estate;
- Provision of all Trams;
- Testing, Commissioning and Maintenance, and
- Certification leading to full Service Commencement as provided under the Infraco Contract.

Excluded:

- All work from Terminal Point to Newhaven.
- Gogar Interchange.

A guaranteed maximum price (GMP) was to be submitted for the included scope along with a programme with adjusted liquidated and ascertained damages attached to this programme.

Subject to a **tie** Change Order **tie** will have the following options:

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- Purchase unused equipment from Siemens
- Provisional contract with Siemens to provide E&M from Terminal Point to Newhaven.
- Provisional contract with Siemens and CAF to Commission and Maintain from the Terminal Point to Newhaven.

#### Step-in rights for **tie**

Infraco will give **tie** an irrevocable price adjustment to the Contract Price which would be instigated by either **tie** or Infraco exercising step-in-rights [on terms to be agreed] for the following works:

- Civil Engineering Works from Haymarket Viaduct to the Terminal Point
- Remedial Work to Princes Street

Note: Step-in will be subject to an agreed deduction in Contract Price and subject to agreement of a **tie** Completion Date.

Having considered the various options it is clear that there was none which complies with EU Regulation better than varying the Infraco Contract for the remainder of the works to Newhaven. Therefore an essential condition is that the Infraco Contract remains extant with variations which:

- Permit to omit Civil engineering Works from Haymarket to Newhaven
- Permit **tie** to instruct works from the Terminus on a “provisional” basis
- Retains Siemens as the provider of E&M works
- Retains CAF as the Tram Provider
- Retains SDS as the Design Provider
- Satisfies the requirement of the ICP

It was intended that any work omitted from the Infraco Contract would be re-procured by **tie** under EU Regulations.

[Comment needed on procurement law advice]

#### Heads of Terms & Assignment Agreement

**tie** also developed a draft Heads of Terms(HoT's) & Assignment Agreement which was shared with BSC on 9<sup>th</sup> June 2010 to reflect the MOU. The purpose of this document was to start the process of formalising what was outlined in the MOU in anticipation of the legal agreement being reached.

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#### 4.3.3 Carlisle Progress

On the same day as tie sent the HoT's, BSC formally wrote to tie confirming that their desire and commitment to complete the Infraco works under Project Carlisle, but also including a sting in the tail which documented their qualifications for such an agreement. These qualifications related to programme and LAD's, confidentiality agreements and finalisation of scope. This was followed up by a letter dated 11th June 2010 re-iterating that BSC could not meet tie's desired completion dates for the project as set out in the HoT's. At this point, BSC had not engaged with their sub-contractors to start the pricing exercise for the GMP.

By mid-June 2010, the Carlisle negotiations were well underway. Although there were signs of common ground BB did appear to be engaging reluctantly with all the driving being conducted by Siemens. It is fair to say that during the entire process, the negotiating team had consistently felt that BSC (or BB) saw this as an opportunity to re-price the revised scope. There is currently no documentary evidence for this, but this is seen as one of the main areas of risk. Additionally, the programme submitted by BSC in their letter of 9<sup>th</sup> June 2010 identified an OFRS date for Airport – Haymarket as 18<sup>th</sup> November 2012.

However, during June, BB introduced a new face into the equation – Ed Kitzman. By end of June, whilst the negotiation team still felt that BB Germany were in control of the process, they were reporting a very positive approach from Ed Kitzman.

A meeting was held on 16<sup>th</sup> June 2010 involving David Mackay, Richard Jeffrey and Gordon Wakeford and David Darcy. The meeting was direct but cordial and it was apparent that Siemens were in charge. Although the pricing exercise had still not started BSC did state that they were gearing up for it with additional resources being brought in from Asia for this exercise. tie raised concerns about design and BSC confirmed that they would have a fully assured design completed by mid July 2010. At this meeting, BB confirmed their intention to put the Carlisle proposal to a main board meeting on 20<sup>th</sup> July 2010 for a decision.

Tony Rush had discussions with BSC over the weekend of 19/20 June where a revised scope was shared and it appeared that as of 21 June there was a higher level of optimism about a deal being possible than the previous week.

tie responded to the 9<sup>th</sup> June letter and were advised during week of 22 June to expect a response by end June. However, the advice being given by Tony Rush at this point was to remain cautious.

The sequence of events was then as follows:

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- The response which was promised by 22<sup>nd</sup> June was actually received on 29<sup>th</sup> June. This contained an ongoing commitment to work on Carlisle. The letter also contained a number of “clarifications” to the GMP and a programme which only indicated delivery from Airport to Haymarket.
- Whilst work had started on the GMP within **tie** with the creation of templates and sharing of information between the **tie** team and its advisors, as at 20<sup>th</sup> June BSC had still not started this pricing exercise by speaking to sub-contractors. It had been agreed that **tie** would have a seat at the table for the meetings with sub-contractors. Whilst the exercise hadn’t started, BSC had committed additional resources including resource from Asia to assist. By late June/early July this process had started and a GMP was delivered to **tie** on 29/07/10.
- David Mackay and Richard Jeffrey had a telephone conference with David Darcy and Gordon Wakeford on 5<sup>th</sup> July. Again, the tone of the meeting was positive. An integrated assured design was promised by 16<sup>th</sup> July & BB advised that they expected sub-contractor prices by the end of the week. A further meeting was arranged for 26<sup>th</sup> July 2010.
- As of 23<sup>rd</sup> July, **tie** had not seen the design but BSC assured us that it had been delivered to them from SDS. Meeting arranged with **tie** on 26<sup>th</sup> July to review the design. The first tranche of assured design was delivered to tie on 9<sup>th</sup> August - as of 23/08 tie are in the process of reviewing this set of Deliverables.
- **tie** had reviewed the GMP offer and planned to made a counter offer to BSC during week commencing 23/08 with further discussions held with BSC that week. Offer was made on xxx
- During the next 2 weeks further discussions were held with BSC which culminated in a senior level meeting on 13/09/10 (Mackay, Jeffrey, Rush from **tie**, and Wakeford, Enenkel, Walker, Flynn from BSC). Just in advance of this tie received, without warning, a revised offer from BSC. It was clear at this meeting that any Carlisle agreement was still some way off.
- There then followed 2 meetings between Richard Jeffery of **tie** and Richard Walker of BSC to discuss DRP items. At these meetings Richard Walker suggested to **tie** that they would be interested in seeing if there was a way achieving a “mature divorce”. This was followed by a formal meeting on the subject on 11/10/10 with Richard Jeffrey and Susan Clark of **tie** and Richard Walker and Michael Flynn of BSC.
- On 14/10/10 **tie** received a letter from BSC which seemed to indicate that they were withdrawing from discussions on Carlisle. Tie sought clarification from all 3 Infraco parties that they were formally withdrawing from the Carlisle process. No individual responses have been provided but the consorsrtium wrote on 29/10/10 to advise that they no longer felt the need for Ed Kitzman’s involvement, that they were not withdrawing from Carlisle but insisting that it was tie who had to compromise to make Carlisle acceptable. BSC’s final correspondence wa short but outlined their ongoing and combined interest in

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finding a compromise solution with **tie**. Carlisle was not mentioned in this letter and it was sent at a time when discussions had been ongoing about a “mature divorce”.

**4.3.4 Carlisle Deliverables**

There were a range of deliverable expected as part of the Carlisle Project. These were:

- Price Certainty
- Programme certainty
- Agreed scope
- Assured integrated design

The key elements of Carlisle which interact with each other are the GMP, programme, design and risk and these are reported below.

The table below shows the iterative process engaged in by the parties in an attempt to deliver these core objectives.

Offers	Date	GMP	Programme	Scope	Risk	Design
BSC 1 <sup>st</sup> Offer						×
tie counter offer						×
BSC 2 <sup>nd</sup> Offer						×
tie 2 <sup>nd</sup> Counter offer	7/9/10					×
BSC final offer	11/09/10		Dec 2012	Airport - Haymarket		×

The table above clearly demonstrates the gap between both parties at the time of the BSC final offer provided on 11/9/10. The subsequent correspondence on this matter also clearly shows that as far as BSC were concerned they were not willing to compromise on any of the core deliverables and effectively withdrew from the Carlisle process from mid October – this coincided with them promoting discussions on alternative “divorce” options.

**4.4 Notice**

- Pitchfork identified keeping termination under review if evidence emerges which merits this approach. In [June] we embarked on a process of exercising the

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contractual provisions to notify BSC of alleged breaches and underperformance, require that they provide details of how they would make good. The contractual mechanisms to be used were the Remediable Termination Notices (RTNs) and Underperformance Warning Notices (UWN). This became known as Project Notice.

- Dates and details when we reported to TPB and CEC our adoption of this approach
- The strategy behind Project Notice was:
  - Present BSC with a clearer view of our position and the possible consequences of their conduct and delivery deficiencies if improved performance and/or Carlisle did not bear fruit
  - Bring matters to a head – in a way which DRPs of their own were not delivering certainty or resulting in progress on the ground
  - Shift the focus strict from legal interpretation of design development and the change mechanism to wider failures of BSC to perform
  - Provide a clear platform on which to collate evidence of infraco default (including how they respond to RTNs) and get it assessed by legal and QC as a basis for termination if it came to that. Said legal and QC assessment goes at section 7.2 below
- Brief description of how the RTN / UWN mechanisms work
- Explain legal and QC advice to do it in individual RTNs rather than one big one – avoid falling on one poor case or appearing to have acted with termination predetermined
- RTNs issued to date, precise of each, how the underlying defaults undermine the delivery/cost/timescales/quality of the project, primary evidence, their responses if applicable [alternatively most of this could go in the Evidence and Analysis attachment]
  - RTN 1 Princes Street (Defects)
  - RTN 2 Princes Street (Superintendence)
  - RTN 3 Clause 10.4/10.16
  - RTN 4 Clause 60
  - RTN 5 SDS Agreement
  - RTN 6 On-street trackform design
  - RTN 7 Category 4 - Russell Road
  - RTN 8 Clause 80 - tie Change (course of conduct)
  - RTN 9 Course of conduct
  - RTN 10 Design (Gogarburn Retaining Wall)
- UWNs issued to date and how they flow into case for termination [do we need to explain BSC don't recognise the validity of these notices?]
  - UWN 1 Princes Street (Defects)
  - UWN 2 Programme
  - UWN 3 Design (trackform)
  - UWN 4 Non compliance with instructions/misconduct/design integration
- **Important piece** on why, independent of legal case, the RTN/UWNs describe why we do not believe we can complete the project with BSC as currently constituted

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and managed – it not just commercial it's a case of lacking core competences and behaviours

SC text at 17/9:

#### 4.4.1 Notice Preparation

On 10<sup>th</sup> March 2010, the TPB endorsed a recommendation that we retain termination of the Infraco Contract as an option, not to be pursued at that stage but kept under review for serious consideration if evidence emerged which merited action.

In [June] we embarked on a process of exercising the contractual provisions to notify BSC of alleged breaches and underperformance which require that they provide details of how they would make good. The contractual mechanisms to be used were the Remediable Termination Notices (RTNs) and Underperformance Warning Notices (UWN) which were contained within Clauses 90 and 56 of the Infraco Contract . This became known as Project Notice.

There was clear evidence of breach of contract in a number of areas, but since March, the team had been continuing to assemble, structure and refine the detailed evidence for use in any Remedial Termination Notice or Notices. Subsequent audits, the continued commercially assertive strategy and the lack of shift in behaviour, particularly of BB, had all provided additional evidence of breach in a number of areas.

Additionally, the behaviours being demonstrated in respect of the negotiations on Project Carlisle, indicated that Infraco might be seeing this as an opportunity to re-price the project, to complete only the off-street sections and to move risk back to **tie**.

At the meeting on 16<sup>th</sup> June 2010, **tie** advised BSC that the alternative to Carlisle was for **tie** was to initiate Clause 90.1.2 letters of breach in accordance with the Infraco Contract.

In parallel with the Project Carlisle negotiations, **tie** was receiving detailed legal advice on the basis on which the Contract could be terminated in view of BSC's failure to fulfil its obligations. It was necessary to run both the Carlisle and Notice processes simultaneously as a contingency plan in order to avoid a lengthy hiatus should an acceptable result not emerge from the Carlisle negotiations.

In response to these concerns **tie** and its advisors (principally DLA) has been preparing Remediable Termination Notices (RTN) in accordance with Clause 90.1.2 of the Infraco Contract specifying Infraco Defaults (a) and (j). These defaults are:

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- (a) a breach by the Infraco of any of its obligations under this Agreement which materially and adversely affects the carrying out and/or completion of the Infraco Works;
- (j) the Infraco has suspended the progress of the Infraco Works without due cause for 15 Business Days after receiving from **tie**'s Representative a written notice to proceed.

Senior Queens Counsel was instructed on 22 June 2010 and a consultation arranged for 8<sup>th</sup> July to discuss the strength of the case for Termination. This consultation session was useful in that Senior Counsel advised that there were a number of strong areas of evidence which support the issue of a Clause 90.1.2 letter leading to potential Termination if BSC did not remediate the breaches. QC advised that a number of RTN's should be issued rather than one covering a number of breaches and so this advice was taken and a number of RTN's identified and the drafting commenced.

Sitting behind these letters are a number of files of evidence which have been assembled by the team and these continue to be added to as further information becomes available.

#### 4.4.2 Notice Initiation

As part of the Project Carlisle negotiations, the GMP is due to be delivered by Infraco by end July.

The TEL/**tie** Chairman, David Mackay was to meet with senior members of the Infraco on 16<sup>th</sup> June 2010. It was anticipated that any RTN would not be sent to Infraco until at least after this meeting and then based on the attitude being demonstrated by Infraco and the expectation of a successful/or otherwise negotiation on Carlisle. The discussions on Carlisle were continuing positively and the issue of the Clause 90.1.2 letter would be based upon output from the following events and TPB buy-in:

- Advice from Senior counsel in respect of the strength of the termination case;
- Delivery of fully assured integrated design from BSC in mid July, and
- Delivery of the GMP by end July

TPB on 28<sup>th</sup> July endorsed the strategy presented which outlined that a commercial decision needed to be made in respect of the issue of RTN's. On 9<sup>th</sup> August, **tie** issued the first 3 RTN's and the 1<sup>st</sup> UWN. As at 23/08 the programme for these is as follows:

These RTN's have been issued as follows:

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RTNs issued						
	RTN	Date issued	Response due	Plan received	tie response to rectification plan	Approved or rejected
RTN 1	Princes Street (Defects). Relates to the defects which emerged on Princes St following the track and road construction during 2009.	09.08.10	21.09.10	17.09.10	29.09.10	Rejected
RTN 2	Princes Street (Superintendence). Relates to the level of superintendence provided by BSC during the construction works on Princes Street during 2009.	09.08.10	21.09.10	None received	-	-
RTN 3	Clause 10.4/10.16 – relates to BSC's failure to provide access to information and an extranet facility as required under the Infraco Contract.	09.08.10	21.09.10	17.09.10	1.10.10	Rejected
RTN 4	Clause 60 – relates to BSC's failure to progress the works and manage the programme.	16.08.10	28.09.10	24.09.10	7.09.10	Rejected
RTN 5	SDS Agreement – relates to an agreement between BSC and SDS in relation to development of the design and payment thereof.	1.09.10	14.10.10	None received	-	-
RTN 6	On-street trackform design – relates to the management of the design for trackform throughout the route and the lack of an approved integrated trackform design some 30 months after contract award.	8.09.10	26.10.10 *tie agreed 5 BD extension	26.10.10	9.11.10 (due)	Rejected
RTN 7	Category 4 - Russell Road. Relates to the management of demolition works in relation to construction works.	21.09.10	2.11.10	1.11.10		
RTN 8	Clause 80 - tie Change - relates to BSC's management of Clause 80.	30.09.10	11.11.10	10.11.10		

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<b>RTN 9</b>	Course of conduct – relates to some 99 breaches of contract.	30.09.10	11.11.10	10.11.10		
<b>RTN 10</b>	Design (Gogarburn Retaining Wall) – relates to management of the design of the above structure and the failure to get approval of a key stakeholder – BAA.	12.10.10	23.11.10			

RTN 9 is an “all encompassing RTN covering overall conduct and covers 99 breaches of contract including:

- Failure to comply with instructions – Clause 80.13/34;
- Failure to complete an assured and integrated design – Clauses 7.3 10 and 19;
- Failure to procure deliver the SDS services and to manage the SDS provider - Clause 11;
- Breach of obligation to comply with the Change procedure – Clause 80;
- Breach of obligations in respect of Compensation events – Clause 65;
- Breach of general obligations – Clause 6;
- Breach of core obligations – Clause 7;
- Breach of obligations in respect of sub-contractors – Clause 28;
- Breach of best value obligations – Clause 73, and
- Breach of confidentiality – Clauses 7.3.16 & 101.14.

There are many other examples of breach throughout the contract which albeit smaller in materiality all add to the overwhelming view that Infracore have consistently breached the obligations of the Infracore Contract, but the examples above are the areas of breach which are deemed to be most material to **tie**.

QC also recommended that the process of issuing Underperformance Warning Notices (UWN's) as per Clause 56 of the Infracore Contract.

This advice has been acted upon as follows:

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UWN (material breach)					
	Topic	Date of issue	Issued	Response from BSC	tie response
UWN 1	Princes Street (Defects)	09.08.10	✓	Yes – stated that this was a non valid use of UWN	Noted BSC response
UWN 2	Programme	08.09.10	✓	Yes – stated that this was a non valid use of UWN	Noted BSC response
UWN 3	Design (trackform)	12.10.10	✓	Yes – stated that this was a non valid use of UWN	Noted BSC response
UWN 4	Non compliance with instructions/misconduct/design integration	[10.11.10]			

#### 4.4.3 Notice Consequences & Legal Advice

The Infraco Contract stipulates what should happen in the event that **tie** issues a RTN which is as follows:

- 1) Infraco may submit a comprehensive rectification plan setting out how it intends to remedy the Infraco Default. This must be within 30 Business Days of the date of the RTN (or longer if **tie** agrees).
- 2) **tie** has 10 days to consider this plan and determine if it is acceptable or not.
- 3) If **tie** does not accept the rectification plan, or Infraco does not submit a rectification plan, **tie** may after giving 5 Business Days notice in writing to the Infraco terminate the agreement.
- 4) Following termination under the agreement, **tie** may enter upon the Infraco Works and any part of the site and expel Infraco

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- 5) Where **tie** has entered upon the Infraco Works, **tie** may complete or carry out the Infraco Works itself or employ any other contractor to complete the Infraco Works.
- 6) Where **tie** has entered upon the Infraco Works, the Infraco shall, if instructed by **tie**, use reasonable endeavours to assign to **tie** any agreement as soon as practicable which the Infraco may have entered into and which are, in the reasonable opinion of **tie**, material to the completion of the Infraco Works.

Having rejected a number of BSC's rectification plans associated with Remediable Termination Notices, **tie** are now in a position where technically we could issue a Termination Notice. However, BSC have maintained throughout, in each response to a remediable termination notice, that there is no Infraco Default and that **tie** are not therefore able to Terminate the Infraco Contract on the basis of these. In some cases they have not provided any rectification plans and relied on the basis that they believe there is no default.

Senior Counsel opinion has been received on the mechanics of the clauses in the Infraco Contract in respect of Termination of the contract. Whilst BSC may accept Termination of the contract, there is a risk that they may decide to challenge such a Notice. The response to the Remediable Termination Notices indicates that they do not agree with **tie**'s claim of an Infraco default. Such a challenge would proceed by way of adjudication and then litigation. The time involved in such a process would be at least a year and could be a number of years. During the period of such adjudication and litigation **tie** would probably not be able to secure access to carry on the Works. Any attempt by **tie** to enter upon the Works while such a challenge was ongoing would probably be the subject of an application for interdict *ad interim* by Infraco. If Infraco maintained that **tie**'s notice of termination was invalid and that they wished the contract to continue then in it is probable that interim interdict would be pronounced against **tie** from entering up on the works. BSC would be able to seek unlimited damages against **tie** if they were able to prove wrongful repudiation of the contract.

#### 4.4.4 Notice – Mitigation Plan

Given the potential consequences of Termination if BSC opted to challenge and were successful in proving wrongful repudiation, it is recommended that **tie** test this further before issuing proceeding to issue any Termination Notice. This will be done by submitting to DRP one of the RTN's which BSC claim they disagree that there is an Infraco Default. This would progress to adjudication for a decision. Should the adjudicator find in **tie**'s favour then this is evidence which can be used in any future litigation. If the adjudicator disagrees with **tie**, then there are 9 other RTN's to test via this approach.

#### Termination v's Cancellation

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If following issue of Clause 90.1.2 notices, BSC failed to remediate the breaches this would lead to termination of the contract. In such a scenario, there are 3 options available:

- i. Terminate and continue with the project
- ii. Terminate and postpone the project
- iii. Terminate and cancel the project

Each of these options has a range of sub-options and consequences and a separate workstream was set up to review these in order that recommendations could be made and plans put in place in readiness for any potential Termination scenario.

There is a possibility that BSC may opt to take out an interdict against tie preventing termination and preventing any immediate re-procurement however, Senior counsel has advised that given the construction of the Infraco Contract, this risk is very low. They have done this on previous projects including Qatar. tie has lodged caveats at the Court of Session so that it is informed immediately any court action is served.

#### 4.4. Incremental Delivery Strategy / Updated Business Case

Following the Pitchfork report in March tie as prepared an analysis of the options available to deliver the project in an incremental basis to manage affordability and financial risk in light of the impact of the contractual difficulties on the forecast outturn costs for the delivery of Phase 1a in a single phase of construction. A detailed presentation of the findings of the Updated Business Case is not the subject of this report but the principle findings are presented here as they informed both the negotiations under Carlisle and are a key influence on the development of a reprocurement strategy to continue delivery of the project beyond a termination of the infraco contract.

The review of options for incremental delivery addressed the need to manage the project affordability (in the context of the current commercial disputes with BSC) by means of flexible delivery of the on street sections over a longer period of time and in a way which provides the Council greater control over the precise timing of the remaining on-street works.

The approach will ensure the considerable investment already made in the project is realised through the delivery of a viable tram service, integrated with bus services, whilst preserving for delivery the entirety of the scope of Phase 1a, as detailed in the Final Business Case of December 2007.

The scope of the exercise focussed on the following key considerations:

##### Financial and operational viability

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The base revenue and operating costs projections for tram and bus operating as integrated services were reviewed, both for the entirety of Phase 1a and for a number of incremental delivery options, most significantly for a first phase of operating tram from the Airport to Haymarket and from the Airport to St Andrew Square.

The base patronage projections were remodelled by Steer Davies Gleave taking cognisance of an updated view of future economic growth in Edinburgh, a longer profile for the completion of 'committed' developments eg Edinburgh Park in the west and the Forth Ports estate in the north, experienced growth in passenger numbers at Edinburgh Airport and a rebasing against current actual patronage experience of Lothian Buses. For the first time the projections incorporated the positive impact on patronage of the Edinburgh International Gateway interchange between main line trains and trams to delivered by Transport Scotland.

The development of these financial projections was carried out the full oversight of the management of Lothian Buses.

The overall conclusions reached were:

- The financial and operating viability of Airport to Newhaven was reconfirmed
- A tram service from Airport to Haymarket is marginal in terms of operational and financial in the years following commencement of service
- A first phase of tram service from Airport to St Andrew Sq provides the best prospect of being integrated with buses without need for subsidy to the combined operations of tram and bus and the prospect of a positive contribution from trams following patronage build up in the initial years of operation.

Consequently, the negotiations under Carlisle and the initial development of our procurement strategy have focussed on delivering a first phase of tram operations from Airport to St Andrew Square in addition to completing the whole of the route to Newhaven in due course.

### **Economic viability**

The Updated Business Case reconfirmed the Economic Benefits from the introduction of tram as detailed in the Final Business Case of 2007. It also gives additional perspective on the importance of the tram as part of the wider aspirations for transport and economic growth in Edinburgh in the period up to 2030 including the new development envisaged to the west of Edinburgh in the area of the airport which have not been reflected in our patronage projections.

### **Affordability**

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In June 2010 we formally reported to the Council that the full extent of Airport to Newhaven cannot be delivered within the approved funding envelope of £545m (£500m from Central Government and £45m from CEC). In June 2010 CEC officers reported a number of possible additional sources of funding for the project (including Prudential Borrowing) which might be used to provide contingency funding up to a level of £600m, assuming a continued cap on Central Government funding of £500m.

The examination of options to deliver the project on an incremental basis takes cognisance of the funding restriction and is means to manage financial risk by continuing delivery of the project but only committing to the delivery of new infrastructure as and when the funding to do so is identified.

The negotiations under Carlisle and the planning we have undertaken for procurement following a termination have been undertaken with a view to delivering the identified viable first phase of operations from Airport to St Andrew Square within the currently available funding of £545m. However, whilst there remains significant commercial uncertainty with BSC, it is not possible to provide a robust estimate for either the full cost of Phase 1a or for Airport to St Andrew Square.

In all cases the affordability analysis has been prepared on the basis that the terms of the Government grant will be amended such that the entire funding of £500m will remain available for the reduced first phase of delivery to St Andrew Sq. This remains to be formally agreed.

#### **Other key advantages from incremental delivery**

Learning from our experiences from utility diversions and the construction on Princes Street, the other desirable characteristics which can be secured as part of an incremental delivery approach are:

- **Greater control over impact upon the City** – the Council will be in a better position to mitigate the impacts of temporary traffic diversions, avoid the critical embargoed periods, execute the works in a way which responds better to the concerns of stakeholders and provide greater certainty as to start and completion dates.
- **Control over scope change on-street** – building upon the experience on Princes Street, the Council should be in a better position to exercise due diligence on the extent and specification of road and pavement reconstruction and respond to obstructions and unforeseen utilities with fewer concurrent work areas to manage.

#### **5. Process & Governance - Mar 2010 to Present**

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FOISA exempt



- Description of processes by which stakeholders have been kept informed since March with reference to TPB, CEC Officers briefings, CEC group leaders briefings, TS briefings, Ministerial briefings
- Letter from TEL to CEC re likelihood of exceeding £545m – also in CEC report

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## 6. Appraisal of Options available now

### 6.1. Continuing as is

Also called the grinding on option. The “as is” option ie continued application of the Infraco Contract in its present form with present players was effectively eliminated in March 2010 whilst retaining an approach of “enforced adherence” of the existing contract with a view to settling disputes in the short term and negotiating a new way of working. The enforced adherence approach in itself was itself seen as running in parallel with an exploration of the possibilities of achieving a partial or whole exit of BB from the consortium.

The behaviours and actions of the consortium since March, as evidenced by the matters which have been the subject of RTNs and UWNs, lead us to the conclusion that we have no resolved our principal commercial differences to any material extent:

- The issue regarding design change (BDDI-IFC) remains
- Programme dispute and cost of time – despite the MUDFA rev 8 DRP the issue of delay due to utilities remains unresolved and we have no meaningful or compliant programme for the completion of either the off-street or on-street works
- Clause 80 – failure to commence the works until estimate agreed continues
- Failure to deliver best value
- Notified departures continue
- Continued failure to mitigate delays
- Continued failure to manage design including non delivery of an integrated design for on-street works or value engineering opportunities
- Supply-chain mismanagement including failure to deliver Collateral Warranties
- Failure to integrate design leading to rework and delays
- Lack of control over sequencing on-street works
- Issues with defective works on Princes St

What Project Notice has demonstrated more conclusively than ever is that we are not simply grappling with a series of disputes over the legal interpretation of individual contract terms. The consortium (with the notable exception of CAF) is failing to deliver across the most basic of responsibilities we would reasonably expect from a competent contractor.

In addition, the engagement with the consortium continues to be characterised by a lack of trust and respect. Our concern that the frustration of the employees leads to exodus of project management resources remains. Our legal and commercial costs associated with attempts to resolve the disputes now run to several million pounds.

There is no evidence that Siemens are willing take a more active role in resolving matters with their joint and several liability for performance under the contract. They did not work with

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Bilfinger to find a way forward with the “Siemens 25” to enable work to progress from the depot to the airport and the failures to manage and deliver on design are as much their responsibility as Bilfinger. It’s also true that Siemens approach to pricing their element of the BSC Carlisle proposal reflects no more respect for the original contract price than Bilfinger.

There is no evidence that the consortium would be willing to undertake any of the remaining on street works in an expedient manner other than on a basis similar to the Princes Street Supplementary Agreement, the outcome of which has proven to be unacceptable to tie in terms of either cost or quality of the work done.

There is no evidence that there would be any change in the behaviours of the consortium even if an acceptable commercial resolution could be delivered. We have now been striving for a way forward with the consortium since March 2009 and have exhausted all the courses of action open to us to make progress.

Most recently the demobilisation of contactors on site in October 2010 is a cause of significant and irrecoverable delay to the delivery of the Infraco Works.

The totality of the above matters lead us to conclude that it is simply not possible to provide a reliable estimate of outturn costs and completion time for any element of the project under the grinding on option. In this respect it fails completely to deliver on the requirement to deliver cost and programme certainty.

## 6.2. Carlisle

As more fully described at section 4.3 above, the Carlisle negotiations have not yet delivered a complete deal which is capable of being negotiated to a conclusion in the absence of a significant movement in position by the consortium both on price and on commercial terms. As such this section serves to describe and compare the respective position of the parties at the latest point of the negotiations.

From the outset our objectives in entering the Carlisle negotiations were to deliver a deal which:

- Delivered a high level of cost and programme certainty in respect of all of the Infraco Works from the Airport to St Andrew Sq - being the extent of tram infrastructure which would be viable as a first phase of operation
- Was at an affordable price which could be demonstrated as being value for money
- Substantially eliminated the commercial uncertainties and disagreements which have plagued the project – essentially a GMP
- Provided us with an assured integrated design for both the off street and on street works

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A comparison of the respective position of the parties at the point at which negotiations were paused is as follows:

	<b>tie offer of 7<sup>th</sup> Sept</b>	<b>BSC offer of 11<sup>th</sup> Sept</b>
Extent of infrastructure included	Airport to a terminal point at Waverley Bridge – but assumed all new civils work from Haymarket to St Andrew Sq reprocured. Necessitating reprocurement outside BSC contract of all works from Waverley Bridge to St Andrew square.	Airport to Haymarket only – necessitating reprocurement of all works Haymarket to St Andrew Sq. Crucially, work already done at Princes St no wrapped in the deal other than payment of amounts claimed under PSSA
Existing Princes St works	Excluded as BSC not willing to discuss as part of negotiated GMP.	Included in price at cost claimed by BSC
Post contract design costs under SDS	Excluded as BSC not willing to discuss as part of negotiated GMP.	Included in price at cost claimed by BSC
Programme to complete	June 2012	Dec 2012 – but Airport to
Integrated assured design?	[ ]	[ ]
Commercial uncertainties including design development, change mechanism and on-street working	Yes	[ ]
Maintenance responsibilities for Infrastructure	[ ]	[ ]

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In terms of a financial comparison of the offers:

The **tie** offer of 7<sup>th</sup> September was **£216.3m** for 'Part A' meaning from Airport to Waverley bridge excluding new civils works beyond Haymarket, excluding settlement of PSSA or SDS costs but including completion of enabling works underway in Leith. The **tie** offer allocated the tram supply price between Part A and the remainder of the works.

The BSC offer of 11<sup>th</sup> September was £405.3m plus Euro £5.8m = **£410.6m** for Airport to Haymarket including all amounts claimed for PSSA and SDS as well as the works under way in Leith and including 100% of vehicles.

A side by side comparison of the two offers is therefore as follows:

£m	tie Offer	BSC Offer
Civils and Systems by BB and S)		
- Airport to Haymarket	199.0	312.8
- Haymarket to Waverley Bridge (systems only)	9.1	-
- Enabling works in Leith	8.2	8.2
Total excluding PSSA	<b>216.3</b>	321.0
PSSA	9.0	12.9
Civils & Systems (excluding new civils past Haymarket)	225.3	333.9
Post novation design (SDS)	14.0	15.9
Vehicles (CAF)	58.5	60.8
Totals before Risk Allowances	297.8	<b>410.6</b>
Allowance for risk	16.5	40.0
Estimated outturn for BSC work	314.3	450.6

[Insert explanation of the principal reasons we are so far apart on price?]

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On the basis of the **tie** offer above we have estimated the total base outturn cost for completion of the whole of Airport to Newhaven at £662.6m or £[xxx.x]m to St Andrew Square only. In August we reported this as a range of between £614m and £693m for Airport to Newhaven or £539m to £588m to St Andrew square only. The level of outturn within these ranges would be dependent upon the outcome of the final negotiations and risk allocation if the deal were taken to a conclusion.

Prima facie the BSC offer would add £112.8m before allowance for risk and £136.3m after allowance for risk. At this level the costs of completion to St Andrew square would be in excess of £700m. A side by side comparison of the two offers in terms of total outturn costs is therefore as follows:

£m	tie Offer	BSC Offer
<u>Airport to Newhaven</u>		
Net outturn Costs (Base)	662.6	817.9
High Estimate		
Low Estimate		
<u>Airport to St Andrew Sq only</u>		
Net outturn Costs (Base)		
High Estimate		
Low Estimate		

### 6.3. Terminate & Reprocure

As more fully described under section 4.4 above, since [Date] and in parallel with the Project Carlisle negotiations we have been pursuing under Project Notice the notification and remediation of Infraco breaches under the contract, individually and collectively amounting to default which by definition materially and adversely affect the carrying on and completion of the Infraco Works.

In the absence of any of: 1. An ‘as is’ option which represents a practicable way forward; 2. A Carlisle deal on acceptable terms; or 3. An acceptable rectification plan for all of the matters which are the subject of RTNs and UWNs, termination of the Infraco contract is the remaining option available to begin creating some certainty around the delivery of the project.

The determination of the timing of any contract termination is in large part a function of the assessment of legal risks and legal opinion on the grounds we have for termination

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(including evidence to support an Infraco default) as further discussed at section 7 below. In our analysis of the termination option we have assumed a termination of the Infraco Contract in December 2010.

In addition to the legal risks associated with a termination of the infraco contract (and a presumption that the delivery of the remaining infrastructure will be reprocured) there are a number of other benefits as well as risks and uncertainties arising, the principal ones being:

Termination Benefits

- Ends the two year long attrition which shows no sign of delivering an acceptable way forward
- Opportunity to reduce and/or refocus our own spend away from futile disputes with BSC - and our exposure to the consortium's recurring costs
- We get control over procurement method, timing and sequencing of further on street construction in particular – project can be delivered to minimise impact on the city and traffic and over a timescale which is responsive to the availability of funding
- We buy the time necessary to deliver clarity around the costs and programme to deliver the project from Airport to St Andrew Square including resolution of all outstanding design, consents, approvals and governance issues.
- Value is secured from the investment in the project so far
- The first phase of the project interchanges with the Governments new railway station at Edinburgh Gateway

Termination - Disbenefits/risks and uncertainties

- Absent a justifiable out of court settlement we will be entering into litigation which would take 2 years at least – the impact of the litigation outcome on outturn costs would not be known until then.
- Possible further loss of political and public support for the project
- Uncertainty re whether the Government Grant of £500m will be available for a first phase to St Andrew Square.
- In the short term the affordability of the first phase from Airport to St Andrew Sq is still an issue.
- Reprocurement strategy to be clarified developed which will deal with:
  - Interface risks between civils and systems works
  - Compatibility of newly procured systems with Siemens work already installed and the CAF vehicles
  - Maintenance solution over all infrastructure delivered by both BSC and newly procured contractor

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- Liability for work completed to date including design
- Assuming we novate the TSA / TMA back to tie we will have too many vehicles for the initial service to St Andrew Sq unless and until we secure a lease or sale of the surplus vehicles.

Reprocurement

In parallel with the Carlisle negotiations we have been assessing the possible outcomes from a termination of the current Infraco contract and delivering the project on a phased basis beyond procurement. The workstreams we would undertake beyond termination to undertake such a reprocurement exercise are described at section 8 below. The core assumptions made in the Terminate and Reprocure scenario are:

- The infraco contract is terminated in December 2010 and the Infraco's entitlement to payment in accordance with the contract is established at that date
- We call 100% of the Infraco performance and retention bonds (in aggregate £25m)
- The vehicle supply (TSA) and maintenance (TMA) are novated back to tie
- [SDS???
- We enter into litigation which lasts for 2 years
- Certain Interim Works are continued off street (eg completion of the depot and certain structures where construction is in progress) on the presumption
  - The existing sub-contractors are willing to do so on terms acceptable to us
  - Arrangements are compliant under procurement legislation
  - The works concerned are approved by CEC as being required for health and safety reason, to avoid conflict with third party agreements or because they make sound commercial sense
- tie engages in a 9 month exercise to develop and refine a reprocurement strategy which would not in any case involve any further on street works until Jan 2013 – the attendant costs including redesign where necessary are acceptable to CEC
- At the end of the 9 month period a project review will be undertaken to determine validity of reprocurement strategy and costs thereof alongside then extant funding and affordability constraints
- The base programme assumptions are:
  - Airport to Haymarket physically complete by Dec 2012
  - Airport to St Andrew sq complete and open for revenue service by Dec 2013 (respecting the principle that we will not work on Haymarket to Lothian road and Waverley Bridget to St Andrew Sq concurrently)
  - Remainder of project to Newhaven procured and constructed progressively from 2013 to 2017 contingent upon availability of funding and successful delivery and operation of Airport to St Andrew Square

The above assumptions were used to develop three scenarios:

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1. We are successful in litigation and recover a substantial proportion of our marginal costs from BSC at the conclusion of litigation
2. We are unsuccessful in litigation, do not recover any of our own costs and indeed are required to pay BSC costs and loss of profits
3. We settle out of court to avoid uncertainties associated with litigation

The assessed financial outcome of each of the three scenarios is summarised in the following table:

£m	Win Litigation	Lose Litigation	Settle
BB and S entitlement at termination date	86.5	86.6	86.5
Cumulative payment in advance at termination	31.9	31.9	31.9
<b>BB and S projected certification at termination</b>	<b>118.4</b>	<b>118.4</b>	<b>118.4</b>
Bond call	(25.0)	(25.0)	(25.0)
Settlement Premium	-	-	35.0
<b>Net cash to BB and S prior to Litigation</b>	<b>93.4</b>	<b>93.4</b>	<b>128.4</b>
Vehicles (CAF)	58.5	58.5	58.5
Design (SDS)	5.0	5.0	5.0
Interim works and reinstatement	23.0	23.0	23.0
New procurem't incl design and allowance for risk	284.5	284.5	284.5
tie's termination costs (incl litigation)	42.0	42.0	12.0
BSC's litigation costs and loss of profits	-	65.0	-
Other costs	251.9	251.9	251.9
Recovery from BSC after litigation	(88.8)	-	-
<b>Net outturn costs</b>	<b>669.5</b>	<b>823.3</b>	<b>763.3</b>

The estimated recovery from BSC following litigation is calculated at 75% of the difference between:

- a) The gross outturn costs of completing the project following termination (including all amounts paid to BSC); and
- b) The estimated outturn costs for the project in the event BSC adhered to the contract in its present form with disputes settled in the short term and a negotiated new way of working. For the purposes of this analysis that is taken as the base estimate of **£639.9m** for Option 4 presented as part of the Pitchfork work in March which in turn assumed fair and reasonable settlement of all historical liabilities for change (including BDDI to IFC) and liability for delays then extant.

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[Piece of work required here to legally validate the basis of the recovery assessment and how we would recover in respect of work not yet procured and complete at the conclusion of litigation – emerging legal analysis does not sound encouraging]

The settlement premium above does not reflect a current offer from BSC in any way to settle without litigation in the event of a termination and is included for illustrative purposes only. It is unlikely that an out of court settlement with BSC could be demonstrated as being value for money and will only be attractive if the case for proving Infraco default is assessed as poor (in which case the premium is likely to be high) or where litigation is an unacceptable course of action for our stakeholders.

The relative outturns of each of the three scenarios has been subject to a sensitivity analysis to develop a range of outcomes and also to assess the likely outturn costs of delivering from the airport to St Andrew square only as per the following table.

£m	Win Litigation	Lose Litigation	Settle
<u>Airport to Newhaven</u> Net outturn Costs (Base) High Estimate Low Estimate	669.5	823.3	763.3
<u>Airport to St Andrew Sq only</u> Net outturn Costs (Base) High Estimate Low Estimate			

[Need to have reprourement costs validated and segmented to fill in the above table. Also need a commentary on what will influence where we fall within the range of outturn costs - in a nutshell what the completed (re)design looks like, what tie's resource profile looks like going forward, reprourement strategy – how much risk we retain and how we manage it]

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Tram Vehicles / CAF

In the event of any outcome where the delivery of the project is to continue, we have determined that best value is secured by novation of the tram supply and maintenance contracts back to tie. The basis of this recommendation is as follows:

- To date we have spent £[46]m under the CAF supply contract out of a total contract sum of £[58]m. We have taken delivery of one tram vehicle and have the right to take title to the [ ] vehicles which are complete and being stored in Spain.
- If on termination we do not take title to the completed trams and novate the TSA and TMA back to tie:
  - We will have spend £[46]m and have very little to show for it other than the one tram delivered to Edinburgh.
  - On the assumption we could make a competent call on the CAF performance bond (which seems unlikely as CAFs performance under the TSA has been very good) we would realise a maximum of £2.8m (5% of the contract sum). [The performance bond expires at the end of February 2011 – need reminding what milestone this date was aligned with originally]
  - We would have the prospect of seeking to recover the lions share of what we have paid to CAF under the TSA through litigation with the BSC consortium and undertaking an uncertain reprocurement of tram vehicles for the Edinburgh Tram Project.
- Our assessment of the current market for tram vehicles is very strong and that in general the cost of new vehicles may be as much as 50% higher than the price which we secured through the CAF procurement [I hear that statement but I don't have any empirical evidence to back it up]
- To operate a tram service from Airport to St Andrew Sq we have determined that we would need 17 out of the 27 tram vehicles – the best outcome in the circumstances would be one where the 10 tram vehicles not requires to run the Airport to St Andrew Sq can be leased to another operator until such time as they are required to operate a service to Newhaven.
- We have encouraging discussions with TfL regarding the possibility of leasing the surplus trams for use on Croydon Tramlink. In terms of capex the entire 27 trams would still be counted as sunk expenditure even if we have a cash income over the period of any lease as a return for that investment.
- A complete disposal of the 10 trams which are intially surplus to requirements would also be an attractive option from a risk management perspective.
- [The timing of engagement and negotiation with CAF on the terms of the novation back and discussions with both CAF and TfL on the terms of a leasing deal (we'd want CAF to maintain the 4 vehicles during the term of the lease eg) will be important.]

For the purposes of modelling the financial outcomes of termination and reprocurement we have assumed that we acquire all 27 vehicles but that 10 of the vehicles are then

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leased for 7 years at an annual yield of 7.5% to another party until they are required to operate the service to Newhaven at the end of 2017.

#### 6.4. Terminate & Postpone or Cancel

In addition to the terminate and repro cure option we have assessed the [Reprocure after winning litigation - in a nutshell adds 2 years to the programme]

[Cancel after losing litigation – assumed no decision would be taken to cancel the project until the outcome of litigation is known – if we lost the outturn costs of cancellation might be in excess of £500m with no operating tram service to show for it. Political/reputational fall out huge].

[Option of cancelling the project right here and now not formally evaluated – downsides of canx include:

- No immediate prospect of securing value (the benefits detailed in section 3 below) for the investment made to date.
- An extended period of continued uncertainty and costs in pursuing commercial settlement with the existing infrastructure consortium.
- The costs associated with any reinstatement or safeguarding of incomplete works.
- Additional costs of repro curement and mobilisation of a new infrastructure provider if and when the project is restarted.
- Uncertainty about market appetite and required risk premia included in the pricing of a repro curement.
- Damage to the reputation of Edinburgh and Scotland as a place to do business with local and national Government.]

#### 6.5. Summary evaluation of Options

- Summary tables
- Status of estimates
- Costs to date and what we got for the money
  - A large infrastructure project such as the tram project requires a substantial amount of work to be undertaken in advance of construction works.
  - The budget for tram infrastructure represented 46% of the overall project budget with the most significant construction elements within this expenditure to date related to Gogar Depot, the structures along the off-street section and tram works along Princes Street.
  - Significant progress has been made on the construction of the 27 tram vehicles. This part of the project represents 11% of the original project budget.

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- The diversion of utilities has resulted in a significant enhancement of the utility assets in the City including faster broadband services and cleaner water supplies.
- The primary reason for undertaking these diversions is to ensure that tram and other traffic are not disrupted as a result of utility companies servicing assets or reacting to emergencies in the future.
- Costs related to completed design and land account for 12% of the project budget expenditure to date.
- Bond calls – process and timing
- Conclusion – in absence of a viable alternative termination is the only way forward.

## 7. Termination of Infraco Contract

### 7.1. Legal risks & Consequences

### 7.2. Legal opinion on grounds for termination

## 8. Resolution – Delivery of the project beyond Termination

### 8.1. Workstreams – to Sep 2011

Immediately following termination of the BSC contract, and on the assumption that the delivery of the project is to continue and that it will be under the management of tie, a number of interrelated workstreams will be initiated with clear timetables, deliverables, decision making criteria delegated authority / governance arrangements. These workstreams are outlined below under the following headings:

- Ongoing works
- BSC Engagement
- Reprocurement
- Operational readiness planning
- Communications and stakeholder engagement

It is envisaged that these workstreams will require [significant] amendments to the way that tie is resourced and advisors engaged as well as clarification of the ways in which we will engage with CEC officers. In many cases these workstreams have already commenced and the joint deliberations of tie and CEC are being considered through a series of working papers presented to CECs IPG group [for endorsement / approval?]

The totality of these workstreams is envisaged as being completed by September 2011 at which time the strategy for completion of the project would be presented for approval. In

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In addition to the regular reporting to the Tram Project Board it is envisaged that a regime of milestones or stagegates will be defined appropriate to each activity.

These workstreams will require the commitment of additional funding for the project in advance of clarity and certainty with regard to outturn costs, phasing and funding and in advance of determination of either out of court settlement with BSC or litigation.

It is not envisaged that there will be any new commencement of on-street works (east of Haymarket) until Jan 2012 [at the earliest] following the appraisal of the outputs from these workstreams.

**Ongoing works**

**Secure sites and assets** – BSC have completed or partially completed works at a number of worksites along the route. For the most part these are off street but there is also incomplete works on the Forth Ports estate in Leith. It is important that we secure these sites immediately following termination to ensure the safety of the public, fulfilment of our obligations to third parties (such as Network Rail, BAA and Forth Ports) and preservation of the value and integrity of the work which has been done.

**Measurement of work done by BSC** – An important ingredient of any future determination of our contract with BSC will be an accurate measurement of the value of the work completed [and on/off site materials] in accordance with the provisions of the existing Infraco contract.

**Completion of utilities** – In any event it will be necessary to complete all existing utility works underway including the recovery of betterment due from SUCs and satisfactory agreement of final accounts with contractors (the final account with Carillion having already been settled). [Brief description of utility works ongoing? – SGN, Sth Gyle Sewer, BT cables?] No new commitments will be made to utility works in the on street sections, most significantly additional diversion identified as being necessary at Baltic Street.

**Interim Works** – In consultation with CEC officers a series of works which it would be necessary or desirable to continue with as soon as practicable after termination have been identified. The criteria for assessment of these works have been

- Public safety (eg Tower Pl bridge where there is a highway interface)
- They are close to completion (eg Edinburgh Park & Carrick Knowe Bridges)
- Depot Completion including trackwork and systems (sufficient to store and test tram vehicles)
- Commercially sensible (eg Lindsay Rd works and Gogarburn surcharge)

The criteria above are not necessarily discreet – for instance the completion of works because its commercially sensible to do so is closely related to the assessment of how close they are to completion. The test of commercial sensibility will in turn be dependent

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upon the wiliness of existing sub-contractors (and perhaps Siemens) to engage in completion of the works concerned on acceptable terms (compared on a value for money and time basis to the reprocurement of the works concerned) and our compliance with procurement law – see below.

**Reinstatement and remedial works** – In the event of termination there are reinstatement works which CEC would require to be carried out in the on-street sections in particular in recognition that it is not intended to commence new on-street works till early 2012. It is also considered necessary to carry out the necessary remedial works on Princes St to mitigate against any further deterioration of the work completed and on safety grounds [Needs more here – haven't seen the details yet]

**BSC Engagement**

Here the workstreams are predicated on settlement of all outstanding matters under the Infraco contract in the most satisfactory manner with due regard to the relative time and cost consequences of each course of action and the imperative to remove continuing uncertainty regarding the existing contract as consideration with progressing the completion of the project post termination. from with respect . The value for money and risk consideration and the imperative to remove

**Determination of exit premium option** – Immediately post termination we will engage with the consortium on whether they are willing to consider settlement of all outstanding liabilities without recourse to the costs and uncertainties associated with litigation, and at what additional cost to us (if any). Each party will be heavily influenced in this regard by their respective legal advice on the strength of their case – ours is considered in detail at section 7 above. In extremis there might be a justification for payment from the consortium back to tie but it is unlikely that will be an attractive option to them.

Our experience, most recently with Carlisle, indicates that a successful outcome to this course of action would require a clear view of the person(s) representing the consortium (rather than the individual partners) and their level of authority to conclude matters as a prerequisite. Any additional payment to the consortium is unlikely to be demonstrable value for money for what has been delivered under the contract so far – rather the relative attractiveness of such an action will be in comparison the prospect of uncertain and costly termination.

**Siemens** – It has always been a strand of our efforts to resolve matters with the consortium to have continuing arrangement with Siemens for the delivery of the systems element of the project. Much of the proposed Siemens installation and associated design is proprietary in nature and constitutes the more complex engineering elements of the project and the critical interface with the tram vehicles. Siemens responsibility for ensuring their installation is ready to operate, is reliable and then maintain it in the initial

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years of operation will be the most difficult element of the BSC contract to replace in a reprourement – see below.

Siemens behaviour has not been exemplary throughout the disputes – as Bilfinger’s joint and several partner in the consortium they have failed to take a leading role in finding an acceptable way forward. They must bear a significant part of the responsibility for the consortium’s failures including design production, management and integration. Their proposed increase in price as part of Carlisle (relative to the original contract pricing) has little justification. However we must be open to whatever might be possible on terms acceptable to us and which passes the procurement law tests.

**CAF** – This paper is prepared on the presumption that the tram supply and maintenance contracts will be novated back to tie in the event of termination. The immediate engagement with CAF would focus on:

- Resolution of outstanding commercial impact of project delay on their contract(s) [in fact would we not seek a way to do that before novation back to us – to mitigate any attempt by them to lean on us commercially?]
- Arrangements for storage and safekeeping of the tram vehicles
- Reassessment of the programme for completion of the depot and related track work and systems initially. This in turn will be highly dependent upon the extent to which completion of the depot and related track work and systems is part of Interim Works by existing subcontractors (and perhaps Siemens) or in the event needs to be reprocured.
- Structure of any arrangement to lease or dispose of tram vehicles (with or without related maintenance obligations) which are surplus to the number required to operate a service from Airport to St Andrew Sq – the assumed first phase of operations.

**Litigation** – [Need someone else to write this bit who knows what post termination steps towards litigation would be. Important elements would be legal support (McGrigors?), technical/commercial expertise (Rush/GHP?) and how they interface with CEC and their advisors].

**Reprocurement**

**Existing subcontractor arrangements** – BSC have employed a number of sub-contractors although it would appear most of these arrangements are on the basis of letters of intent or limited orders to proceed and consequently without collateral warranties to tie.

Following termination we will review all existing sub-contractor arrangement to assess our ability to step-in to those arrangements. This exercise will inform the extent to which existing contractors may be used to complete Interim Works and/or form part of the overall reprourement strategy if

- It is compliant with procurement law to do so
- The subcontractors are willing to do so at a price and terms acceptable to tie

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**Complete Design or Redesign** – we have already engaged Scott Wilson in an exercise to audit the status of the design completed by SDS. Following termination we would immediately embark on an exercise to procure the completion of an integrated and assured design prior to the reprourement of any new works (other than the Interim Works)

[How do we reprocare design? How do we envisage any new design services provider engaging with SDS?]

An essential element of completing design will be to ensure all practicable value engineering opportunities are secured to mitigate against the increase in costs as a result of design change and failures under the stewardship of BSC. The desirable outcome would be a significant reduction in anticipated cost before retendering the works. Our initial assessment is that this exercise has different characteristics and challenges as between the on and off street sections:

- Off-street – where substantial work has completed or is in progress and where the timescales and uncertainties associated with redesign and consent/approval thereof is likely to be unattractive in terms of impact on outturn cost. Nevertheless opportunities exist eg with respect to the requirement for retaining walls not yet started, drainage specification and trackform through Edinburgh Park.
- On-street – where an assured trackform design has not been delivered by BSC and where the nature and extent of road construction will have a significant impact on outturn costs and programme.

**Development of Reprourement Strategy and Phasing** – Initial workshops have taken place on the development of a reprourement strategy. Following terminations we would embark on full development of a starategy with the assistance of external commercial and legal resources. The essential characteristics we envisage the reprourement strategy having and the principal challenges to be overcome are as follows:

Essential characteristics

- Packages
- Controlled phasing
- First operational system to St Andrew Sq
- Sensible risk allocation

Challenges to overcome

Procurement law with subbies / Siemens

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Design integration risk – civils v systems  
Systems using Siemens kit  
Maintenance and overall liability for making it work  
Secure outstanding consents and approvals

Operational readiness planning

Communications and stakeholder engagement

**8.2. Management arrangements**

**8.3. Process & Governance**

**8.4. Timescales, Costs and Funding**

**9. Conclusions & Recommendations**

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