

Statement of Bob Dawson**INTRODUCTION****1. Prior to joining TIE, and by way of overview:****(1) What were your main qualifications and vocational experience?**

I am a Fellow of the Royal Institution of Chartered Surveyors with 30+ years of experience in construction and infrastructure projects in the UK, working as a consultant for various clients. Please see my CV supplied.

(2) What was your experience in major infrastructure projects, including tram and light rail systems? To what extent do you consider that experience in heavy rail was relevant to a tram, or light rail, scheme?

As my CV shows, I have worked across various sectors, due to having a consultancy background. This did not include tram systems but has included heavy civil engineering and Network Rail. Ironically, for procurement, my most relevant experience was probably the work that I had previously undertaken with the Home Office. These projects were let on a Design, Build and Operate [DBO] basis and thus the structure of the contract was not dissimilar to the Infraco contract. I sat on the Home Office's Project Board and was overall responsible for all procurement and financial matters from inception until final account. It was a £220million programme that was delivered within 0.25% of the original contract sums.

(3) What was your experience in utilities diversions, design and procurement matters?

This question is not particularly relevant as I was not involved in MUDFA. However, I had previously been the Employer's Agent for a design and build project that required the re-alignment of the A4020 Uxbridge Road in West London that was completed to programme and budget.

2. In respect of your employment with TIE:**(1) Between what dates did you work for TIE?**

August 2006 (initially part time) to end of March 2008 (plus two extra days in April 2008) i.e. this was 9 to 10 years ago.

What was your job title?

Procurement Manager.

What were your main duties and responsibilities?

Management of the procurement process for Infraco and Tramco. However, it did not include the Infraco price evaluation, nor did it involve MUDFA or SDS.

Did your duties and responsibilities change at any time (e.g. after the Infraco contract had been procured)?

My duties did not change, although my responsibility on some aspects lessened as my leaving date approached and others came on board. As noted previously, my final duties before I left were debriefing of the unsuccessful bidders, which was several months before the Infraco contract was finally awarded.

(2) To whom did you report and who reported to you?

I reported to Geoff Gilbert, who joined at the same time and like me, was seconded from Dearle & Henderson initially. Valerie Clementson was the Procurement Assistant that worked largely with me. She was appointed directly around the same time. Campbell Skinner, also from Dearle & Henderson joined sometime after and reported to me on Tramco.

THE TRAM PROJECT – OVERVIEW

Procurement

3. In relation to the procurement strategy for the tram project:

(1) What was your understanding of the main elements and objectives of the procurement strategy for the tram project?

- i. Infraco – awarded on a design and build basis.
- ii. System Design Services [SDS] provider – novated to Infraco
- iii. Multiple Utilities Diversion Framework Agreement [MUDFA] - to carry out utilities diversions as an 'enabling works' rather than include within Infraco with the objective of reducing the risk of the inevitable problems delaying the main works.
- iv. Tram rolling stock supply and maintenance contracts [Tramco] – to be let separately but with a contract aligned to Infraco.
- v. Operator – Transdev
- vi. There was also a number of other enabling works contracts including the site clearance and excavation at Gogar Tram Depot.

(2) How important was it to obtain a fixed price for the Infraco contract?

The intention of TIE was to be strongly risk adverse generally and

price certainty was a requirement, I thought stemming from CEC and Transport Scotland.

(3) Did the procurement strategy or objectives change in any way (and, if so, when and why)?

I do not recall any fundamental change while I was there, indeed DLA Piper were keen to ensure that there was no departure from the basis of the Official Journal of the European Union [OJEU] advertisements. There would have been subtle changes of approach at the margins.

(4) In the event, do you consider that the aims of the procurement strategy were met (and, if not, why not)?

I left before the procurement was finally concluded but given the scale of the problems that occurred on the project, the answer has to be that the aims were not met. Although some of the problems may be entirely post contract, it seems that the intended robustness, particularly in relation to design, had become unravelled. The idea of having the design completed as the client wants and then giving it to the contractor on a design and build basis sounds like a 'belt and braces' approach but does have merit in terms of continuity and avoidance of interface issues. However, it does require design issues to be resolved and the SDS Contract to have the appropriate obligations.

Design

As I have stated previously, I was not involved with the SDS Contract and thus not able to answer Question 4 below.

4. We understand that TIE entered into a Systems Design Services (SDS) contract with Parsons Brinckerhoff in September 2005 and that there were three main stages of design, namely, the Requirements Definition phase (provided by December 2005), Preliminary Design (provided by June 2006) and Detailed Design.

We also understand that there were difficulties and delays in progressing and completing the design for the tram project. By way of overview:

- (1) What was your understanding of the main difficulties in carrying out the design work and the main reasons for these difficulties?
- (2) What steps were taken to address these difficulties?
- (3) Were these steps successful (and, if not, why not)?
- (4) In producing the design, the wishes and requirements of a number of different stakeholders required to be addressed (e.g. TIE, CEC, the statutory utility companies (SUCs), Network Rail, Forth Ports and BAA etc). Which body or organisation do you consider was primarily responsible for managing and obtaining the views and agreement of the different stakeholders?

Utilities

As I have stated previously, I was not involved with MUDFA and thus have not able to answer Question 5 below.

5. TIE entered into the MUDFA contract in October 2006. Utilities diversion works commenced in July 2007 and were due to be completed by the end of 2008, prior to the commencement of the main infrastructure works. There were difficulties and delays in progressing and completing the utilities diversion works. By way of overview:

- (1) What was your understanding of the main difficulties in carrying out the utilities works and the main reasons for these difficulties?
- (2) What steps were taken to address these difficulties?
- (3) Were these steps successful (and, if not, why not)?

EVENTS IN 2006

6. We understand that you joined TIE in early 2006.

NO, I was first involved in August 2006 (initially part-time).

- (1) What were your initial impressions of TIE and the tram project?

I do not recall too many specifics. There were some good team members, some lacked a bit of either confidence, experience or focus. The structure was developing but had gaps. I thought the project was ambitious and perhaps Phase 1b (to Granton) could form a later section or option. Most team members were immediately welcoming, a few were less cooperative initially.

- (2) Did you receive a briefing when you joined TIE (and, if so, from whom and what was discussed)?

I received briefings from various people, including Andie Harper, David Powell, Sharon Fitzgerald, John Lyall and others. I do not recall the detail.

7. A record of a meeting on 7 June 2006 between TIE and BSC (**CEC01800968**) noted that TIE's intention was to issue the tender documents in late August/early September, with tender return by the end of December 2006, with a view to contract award by July 2007 and operational trams by the end of 2010.

- (1) What were your views at that time in relation to whether that timetable was realistic and was likely to be achieved?

I had not started in June 2006 and do not recall ever seeing these minutes. However, language such as "intention" could be construed as less than definite. It would have required additional resources that were not engaged at that time.

8. A Monthly Progress Report dated 5 September 2006 from Andie Harper, Tram Project Director, TIE (**CEC01791023**) noted (para 3. Key Issues and Concerns) delays in completing design, which impacted upon the procurement programme. A paper dated 6 September 2006, Outline of the Procurement Strategy, (**CEC01791018**), noted certain problems with the procurement strategy and proposed certain mitigation measures.

- (1) What was your understanding of, and views on, these matters?

That was only just after I started and I do not recall seeing that report.

9. By letter dated 3 October 2006 (**CEC01794929**) Andie Harper issued the Invitation to Negotiate (ITN) for the procurement of the Infracore contract. The date for submission of tenders was 9 January 2007.

(1) Again, what were your views at that time in relation to whether that timetable was realistic and was likely to be achieved?

I do not recall but I expect I thought it ambitious. I do not recall if this was Mr Harper's own view or driven by others. It is not uncommon for overly optimistic views on timescales to be issued. I do not recall if or to who I may have commented at the time. However, I or others, may have thought that the bidders would request longer to tender.

10. By letter dated 13 October 2006 (**CEC01795260**) Richard Walker, BSC, advised TIE that BSC had a number of significant issues with the ITN (as listed in his subsequent letter dated 16 October, **CEC01795314**) which would preclude BSC from submitting a compliant tender and requested a three month extension to the period for submitting a tender return.

(1) What were your initial impressions of the ITN documentation?

If this question relates to the design and specification information, others were responsible for this and they had been there longer. BBS's letter dated 16 October 2006 did not mention design as an issue.

(2) What were your views on the suitability of the proposed form of contract?

As I mentioned in the introduction, I had successfully undertaken projects for the Home Office using a contract with a similar structure (but without designer novation). There was no opportunity to change and I was not unduly concerned with the structure, although there were some clauses that needed to be amended. It is easy to question this now, with the benefit of hindsight but at that stage there was no expectation that the design to be novated would not be in the position to enable the successful bidder to be able to take the design risk. Also, from the questions asked now, I do now have concerns that some of the clauses in the final contract were not sufficiently robust.

(3) Why did BSC seek an extension of the period for submitting tender returns?

I do not recall all the specific detail or if they had disclosed it as bidders often only tell part of the story. Bidders frequently request extensions, sometimes because they have other bids in progress. I recall that BBS were very hesitant about bidding, fearing that it could be abortive if the project was cancelled. I do not recall if TRAMLINES requested an extension.

11. By e-mail dated 22 October 2006 (**CEC01759177**) Jim Harries, Transdev, commented on the Employer's Requirements and observed, "If these really are the

documents that have been sent out to Infraco, they are a very poor reflection on us all!" (Mr Harries' detailed comments on the ERs are shown in **CEC01759178**).

In an e-mail dated 21 November 2006 (**CEC01759176**) Mr Harries noted "Overall, Transdev is disappointed that the ITN second release has so many errors. We consider that it was released with insufficient validation by tie, and has almost certainly resulted in increased project cost and risk".

(1) What was your understanding of, and views on, Mr Harries' concerns?

I do not recall, I do not think Mr Harries's e-mails dated 22 October 2006 and 21 November 2006 were copied to me. The Employer's Requirements [ERs] were not my document and although I would have issued them, I was not responsible for or able to check them. Given that the ERs would include the functional requirements, it would have been more helpful if Mr Harries had commented in advance rather than criticise after the event.

12. By e-mail dated 23 October 2006 (**CEC01795714**) Richard Halliday, Chief Estimator, Bilfinger, set out 14 point relating to the incomplete nature of the design, the lack of prior approvals and consents, the potential for design to change and "*whether the design, reflected in the drawings supplied thus far, is sufficiently advanced to enable a robust and credible price to be prepared*".

By e-mail dated 25 October 2006 (**CEC01795913**) BSC returned a mark-up of the Infraco Contract and Schedules and a document (**CEC01795948**) highlighting the key issues for BSC arising from the ITN documents.

(1) What was your understanding of, and views on, these matters?

I was only forwarded the e-mail dated 23 October 2006, so not leading. Others were responsible for the design and specification information, who had been there longer. I think I would have sought to get better clarity but I do not recall the detail. With regard to BBS's mark-up, the concerns expressed by BBS are fairly typical responses. I do not recall specifically but TRAMLINES also provided a heavy mark up.

(2) What was your view at that time as to whether the design at that stage was sufficiently far advanced to enable a robust and credible price to be prepared?

As last, others were responsible, I could not look at the detail and had to assume and hope that they would resolve.

13. An e-mail dated 25 October 2006 from Scott McFadzen, BSC (**CEC01823109**), noted inconsistencies with the tender documents.

(1) Were there problems in that regard? What was the cause of any such problems? Were these problems ever resolved (and, if so, when and how)?

There were problems in relation to design and specification information but I do not recall the detail.

14. By e-mail dated 30 October 2006 (**CEC01796601**), in relation to rationalising the procurement exercise, Geoff Gilbert noted that "*The contracts are all bespoke based on the OGC PFI template terms. The contracts seem to have grown organically without any clear strategy and do not relate one to the other neatly. They also seem*

to me to be overly complex. There has been little or no procurement guidance with most of the work/decisions being undertaken by lawyers”.

(1) What was your understanding of, and views on, these matters?

I was not copied in to this e-mail and did not work with Mr Trebes who was referred to therein. I do understand Mr Gilbert's comments in relation to the contract. As I mentioned in the introduction, I had been involved in Home Office contracts with a similar structure, both would have had their 'roots' in templates of the former Office of Government [OGC].

(2) Did these matters cause any difficulties?

As noted above, I was not copied in to that e-mail. However there were several clauses that lacked practical knowledge of construction. The drafting for Building Fixings (for the overhead line) and Unexploded Ordnance were two that I recall but there were others. These were able to be solved but took time. Also the contracts for the different elements did not necessarily align with each other.

15. In an e-mail dated 12 November 2006 (CEC01797138) (final paragraph) you shared Ailsa McGregor's concern that TIE may receive low and heavily qualified bids and noted that *“We need to manage the process to ensure that the difficult elements that they can't/won't price firm are identified”*.

(1) What were the risks arising from receiving a low and heavily qualified bid? –

A frequent ploy by tenderers is to price low to make their price appear attractive whilst qualifying areas that will potentially change, so that they can increase prices post contract.

(2) In the event, do you consider that TIE did receive low and heavily qualified bids for the Infraco contract?

As stated previously, I was not involved with the Infraco price evaluation. I did not get that impression at the time.

(3) How did you consider that the process would be managed to ensure that the elements that were not “priced firm” were identified and that firm prices for these elements were received?

I do not recall. When I said “we” I was meaning “TIE” as it was not my responsibility to manage the design. Similarly, I was not involved with the Infraco price evaluation. My e-mail dated 12 November 2006 did raise a number of concerns that I had forgotten about.

16. An e-mail dated 21 November 2006 from Geoff Gilbert (DLA00002083) sought advice from DLA on termination of the SDS contract.

Another e-mail dated 21 November 2006 from Geoff Gilbert (CEC01797672) attached a draft paper “Infraco and Tramco Revised Process to Award” (CEC01797673) which noted that, *“From the discussions to date with the bidders it is clear that there is insufficient clarity in the design information issued with the Infraco*

bid to obtain a de-risked price by 9th January as envisaged by the Procurement Strategy, particularly in respect of key structures ... the design information necessary to minimise the pricing risks within the Infraco tender will not be available to meet the deadline for closing the Infraco deal in July 2007”.

An attached diagram of the Tender Evaluation and Negotiation Process showed the intention to provide design information to Infraco bidders throughout the Infraco evaluation and negotiation process.

The Quarterly Review Report for Transport Scotland dated 26 November 2006 (CEC01691907) noted that AMIS had indicated that the quality of design was far below what would have been expected at that stage and that that may have an impact on their ability to deliver their first programme. SDS performance remained a key concern (para 3).

(1) What was your understanding of, and views on, these matters?

I was only copied in to the e-mail dated 21 November 2006 regarding termination of SDS. I was not copied in to all the other documents, nor noted as consulted.

(2) Why did TIE seek legal advice on terminating the SDS contract?

I do not recall being involved in detail, I assume because of the delays.

(3) Why did TIE decide not to terminate the SDS contract?

I do not recall being involved in discussions but I would expect:

- i. The termination costs could have been high, with a likely counter claim.
- ii. Design responsibility could be split and uncertain.
- iii. It could lead to further delay.
- iv. Any follow-on design contract would have had high costs.

Generally, my comments above are pretty generic reasons why termination is considered a ‘nuclear option’ and not undertaken lightly.

(4) How did you envisage that Infraco bidders would be able to produce a fixed price bid (and how did you envisage that TIE would be able to select a preferred bidder) while elements of detailed design remained outstanding?

I do not recall, I might have assumed that it would be delayed further.

17. By e-mail dated 11 December 2006 (CEC01787192), Geoff Gilbert sent Andrew Holmes, CEC, a short summary of the risks retained by the public sector (CEC01787193).

The risks included: *“Changes to the scope of the work to deliver the Edinburgh Tram Network specified by TIE (effectively CEC)”, “Delays to commencement of Infraco works due to delay in completing utility diversions”, “Delays to commencement of Infraco works due to TROs not being in place”, “Delays to commencement of works due to Prior Approvals not being in place” and “Cost increases due to changes to the scope and design required by TIE (effectively CEC)”.*

(1) What was your understanding, at that time, of the steps that would be taken (and by whom) to prevent or reduce these risks?

I was not copied in to this e-mail but Mr Gilbert's points are valid. The addition of "(effectively CEC)" appears to be putting the onus for these particular points on CEC rather than TIE.

18. By e-mail dated 7 December 2006 (**CEC01761816**) you advised Jim Harries that the TQ process *"hasn't worked out as I would have liked either"* and that one of the three Infraco bidders had dropped out.

(1) What did you mean by the comment noted above?

I do not recall specifically what I meant by the comment but that is the sort of thing I would say if I was frustrated but did not wish to state why. It could have been individuals and / or situations. It is over ten years ago, the chronology of events is difficult to place.

(2) Why had one of the Infraco bidders dropped out?

I do not recall if any reason was given.

What problems resulted from only having two bidders?

Loss of competition principally but also at that stage Bilfinger Berger were not certain about tendering. If it had dropped to one bidder, it would have been very difficult to justify what would then be a 'single source' tender.

19. In an e-mail dated 20 December 2006 (**CEC01788103**) Ailsa McGregor noted that *"SDS have developed their design based on the original ER's, which the client team of tie/TSS has amended without discussion with SDS and issued to Infraco without agreement from SDS"*.

(1) What was your understanding of, and views on, that matter?

I do not recall but it looks as though others (not me) made amendments.

(2) Was the misalignment between the SDS design, the ER's and, in due course, the Infraco Proposals, ever resolved (and, if so, when and how)?

I do not recall.

20. A report to Council on 21 December 2006 (**CEC02083466**) recommended approval of the Draft Final Business Case (**CEC01821403**).

The report explained that the estimated capital cost of phase 1a was £500 million (and the estimated cost of phase 1b was £92 million).

The draft FBC noted that the procurement strategy was intended to *"Transfer design, construction and maintenance performance risks to the private sector ..."* (p16), that *"Following novation of SDS, the design risks pass to Infraco"* (p86), that *"Full design risk passed to Infraco post contract award"* (p95) and that *"The creation of the Infraco contract as a lump sum contract transfers the pricing risk to the private sector"* (p97).

It was noted that *"It is expected that the overall design work to Detailed Design will be 100% complete when the Infraco contract is signed"* (p84) and that risks associated with novation would be mitigated by *"Detailed design being largely completed prior to award of the Infraco contract"* (p86).

It was noted that a rigorous Quantitative Risk Allowance had been applied and there was considered to be a 90% chance that costs would come in below the risk-adjusted level and that *"The level of risk allowance so calculated and included in the updated estimate represents 12% of the underlying base cost estimates. This is considered to be a prudent allowance to allow for cost uncertainty at this stage of the project and reflects the evolution of design and the increasing level of certainty and confidence in the costs of Phase 1 as procurement has progressed through 2006"* (paragraph 9.11).

It was further noted that *"TIE has continued to comply with the HM Treasury recommendations for the estimation of potential Optimism Bias and has determined, in consultation with Transport Scotland, that no allowances for Optimism Bias are required in addition to the 12% risk allowance"* (paragraph 9.12); and that *"Optimism Bias has been shown in Mott MacDonald's Review of Large Public Procurement in the UK, to be eradicated by the current stage of FBC production, in view of greater scheme certainty and mitigation of contributing procurement, project specific, client specific, environmental and external influence areas"* (paragraph 10.44).

(1) Did you have any input into the report to Council or the Draft FBC?

NO

(2) What was your understanding at that time as to the steps that would be taken to achieve the procurement objectives in the draft FBC noted above?

I would not have been copied into these documents and do not recall what my understanding was at that time.

(3) What was your understanding of the extent to which detailed design would be complete (i) when bids were received for the Infraco contract and (ii) when the Infraco contract was signed?

Whether or not it was at this time or another I do not recall but I did understand that not all detailed design would not be available for the initial bids but that this was 'intended' to be addressed by the time of signature.

(4) Who in TIE determined, in consultation with Transport Scotland, that no allowance for optimism bias was required in addition to the 12% risk allowance?

I do not know and do not recall being aware of the 12% risk allowance. I do not know who in TIE would have determined omitting optimism bias, it may have been a collective decision but I would not have been party to it.

Why was that decision taken?

I am unable to comment as I was not involved.

What were your views on whether that was appropriate given the slippage in the procurement programme and the delays and difficulties with design?

I am unable to comment as I was not involved. As an observation now, 12% risk does seem to be rather light given design delays and difficulties, plus at that stage the tenders had not been received and we were down to two bidders. However, that needs to be considered against other provisions and as noted, I was not involved in those aspects.

EVENTS IN 2007

21. We understand that Proposals were submitted by BSC on 12 January 2007 (CEC01533655) and that in January 2007 TIE issued a Supplemental Instructions to Tenderers document (CEC01824070).

The intention was that after bids had been received on 12 January 2007 further dialogue and negotiation would take place with a view to the submission of final Consolidated Proposals on 16 April 2007.

During the period between 12 January and 16 April 2007 it was intended that Tenderers would be provided with further information including updated Employer's Requirements, significant development to the Preliminary Design (including surveys) carrying price or risk implications, updated traffic modelling, current programme for the MUDFA works and detailed design for key structures (with a view to Tenderers incorporating their responses to the further information provided in their Consolidated Proposals).

After submission of the Consolidated Proposals it was proposed that a number of activities would take place, including the selection of a Preferred Bidder, the release of detailed design from SDS (after nomination of the Preferred Bidder), due diligence by the proposed Preferred Bidder on price and risk critical items in the SDS design and final negotiations to settle the agreed Infraco Contract package, including firm price and scope for Phase 1a.

It was anticipated that Infraco contract award would take place in October 2007.

(1) Were tenderers provided, in the period between 12 January and 16 April 2007, with the further information noted above? If not, when was that information provided?

I do not recall the detail but the records should show.

(2) What was your understanding of the phrase "firm price and scope"? Why there was a need for these matters to be "firm"?

A "firm" (or fixed) price 'should' provide better certainty. However, if the scope is not fixed then bidders are unable to provide a fixed price unless they include additional risk monies, which then causes affordability issues.

What required to be done to enable a firm price and scope to be agreed?

I do not recall the detail or if I was even involved but the records should show.

(3) What was your understanding of the reason(s) why the anticipated date for

Infraco contract award was now October 2007?

Aside from any project issues, there was a also delay due to the Scottish Elections in May 2007. Initially from the 'purdah' pre-election period but also following the result. The SNP victory was certainly not anticipated within TIE and there was considerable uncertainty. The project was threatened with cancellation and the Edinburgh Airport Rail Link [EARL] project was cancelled. This created disruption within TIE and there were redundancies. I remember I was intending to take a week off during September 2007 but it was not convenient for whatever reason, so I rescheduled for the second week of October 2007.

(4) What were your views in January 2007 as to whether the proposed procurement programme was realistic and achievable?

I do not recall.

22. A document dated 8 February 2007 from TIE to Transport Scotland (**ADS00017**) noted that both Infraco bidders "*are protecting their risk position pending receipt of more detailed design information and completion of due diligence*", that "*There is a nervousness on the part of both bidders in respect of the nature of the output, depth and delivery of buildable designs to programme by SDS*" and that "*To achieve this, SDS's performance and their performance in the perception of the bidders needs to improve and bidders need to undertake due diligence on the designs before award, or for the critical risk and price elements before coming to a final deal on the Infraco contract*".

(1) What was your understanding of, and views on, these matters?

This was not my document. I was aware of some of the issues but not all. As I noted previously, I was not involved with the SDS Contract or Infraco price evaluation, so I was not party to the detail. However, referring to my comment under item 21 (2) above, the scope (including design) needs to be clear so that bidders can price accurately, without including substantial risk provisions. Also, the bidders need to be confident that the detailed design will be available to meet their proposed programme.

23. An e-mail dated 8 February 2007 from Gary Easton, Technical Support Services (TSS) (**CEC01790405**) attached a schedule (**CEC01790406**) setting out information required by bidders to confirm their price for 16 April and proposals on what designs SDS and Infraco develop.

(1) It would be helpful if you could explain the purpose of that schedule?

It was not my schedule but Mr Easton prepared it to help manage the design.

(2) Did SDS produce designs in time to enable the Infraco bidders to confirm their price by 16 April?

I do not recall to what extent they failed.

(3) What was your understanding of Mr Easton's comment that *"my concern for some time is that SDS are not geared up to confirm design data for pricing"*?

This sounds like a lack of resources or planning, I do not recall. It was not my comment and thus Mr Easton should explain.

24. By e-mail 6 March 2007 (**CEC01794453**) Martin Donohoe, TSS, sent a draft paper to Geoff Gilbert and Mathew Crosse on Procurement: Value Engineering (**CEC01794454**) which noted (p2, 2nd para) that *"Competition is a powerful driver and while technical and approval issues can still be resolved before financial close ..., our bargaining position is weak(er) at that point. The timing of the procurement process would suggest that for maximum benefit we should resolve significant engineering, approval and cost issues before consolidated offer (CO) or at latest by BAFO"*.

(1) What were your views on these matters?

I was not copied into that e-mail but I do understand the comments. It is preferable to resolve earlier and obtain bidders' pricing for such issues while there is the competitive tension of two bidders. If left to the preferred bidder stage with only one pricing they may have less incentive to price keenly and more likely to seek premium prices.

(2) In the event, were significant engineering, approval and cost issues resolved before consolidated offer or BAFO (and, if not, what consequences did that have)?

I was not involved in the Infracore price evaluation but there were still significant issues a year later. Ultimately the consequences were the need for Schedule 4.

25. By e-mail dated 3 April 2007 (**TRS00004144**) Bill Reeve, Transport Scotland (TS), provided TS's comments on the Draft Final Business Case (**TRS00004145**), including comments in respect of the approach taken to calculating Risk (pp7-8) (including that *"on a 'rule of thumb basis' a risk allowance equating to approx 12% for a rail-related project just entering detailed design may be viewed as being a little optimistic but this has to be qualified to the extent that it is possible there may be separate allowances for risk type items in the base costs"*) and whether the various assumptions in relation to Programme were realistic (the programme, for example, being stated to be based on the assumption of *"right first time and on-time delivery"*) (pp9-10).

On 13 April 2007 Rebecca Andrew, CEC, sent an e-mail to Andrew Holmes (**CEC01559060**) attaching a spread sheet (**CEC01559061**) containing TS's and CEC's comments on the draft Final Business Case. The spread sheet noted:

- Governance: *"CEC have some concerns over how project is being managed. Need to build in independent 'Project Assurance' reporting to TPB, to give comfort on TIE-produced reports"*.
- Risk: *"TS perceive 12% risk allowance to be optimistic, although concede [sic] that some of this may be included in the base costs. further detail of cost assumptions need to be provided to make this clearer" and "Details of where will the residual Optimism Bias cost uplift will be allocated should be provided"*.
- Programme: *"(TS) There is general concern that the programme is tight, with little float and that the programme only considers a best case scenario" and "This*

concern is shared by CEC. We are also concerned by the drive to achieve milestones prior to completion of critical activities. For example, failure to complete detailed design before commencing MUDFA is likely to cause contract variations and substantial additional costs. This will be compounded if Infraco is also let before design is complete. There is also a risk that Infraco could be delayed by MUDFA delays due to incomplete designs. All delays and changes increase cost and threaten quality. It is also worth noting that the procurement strategy required advanced design and diversions to 'de-risk' the project – commencing MUDFA and potentially Infraco prior to design completion is potentially building that risk back into the project. TIE should consider whether it is necessary to review the programme, build in more slack and if necessary delay project completion”.

By e-mail dated 18 April 2007 (TRS00004225) Rebecca Andrew sent Transport Scotland CEC's response (TRS00004226) to TS's comments on the draft FBC. CEC's response noted:

- Risk, “Further analysis of costing assumptions is required to give confidence on 12% risk assumption” (para 10).
- Programme, “TS concerns are shared by CEC. We will require TIE to revisit the programme and justify its assumptions, particularly in view of the SDS and Mudfa timetables slipping. We will also require the potential costs associated with delay to be balanced against the cost/quality impact of meeting an overly ambitious programme” (para 11).

(1) What were your views on these matters?

I was not copied in to those e-mails and documents.

(2) What was done to address these matters?

I was not involved.

(3) What were your views on the concerns noted above under Programme? Did CEC require TIE to revisit the programme and justify its assumptions, in particular, in view of the slippages in the design and MUDFA programmes?

I do not recall what views I may have had and I was not party to those e-mails and documents.

26. By e-mail dated 25 April 2007 (CEC01625611) Jim Harries, Transdev, set out a number of concerns in relation to the Infraco evaluation process, including a lack of clarity about who was leading the negotiations, it being noted that Toby Kliskey, Director, Turner and Townsend, thought it was you but you were unable to confirm.

(1) What were your views on Mr Harries' concerns?

Mr Harries' ^Se-mail was sent to Mr Gilbert. I do not recall specifically but it is very possible that Mr Gilbert's response of “I understand that this did not go well” may have been as a result of comments that I and/or possibly Mr Kliskey may have made to him.

RSD
09/04/17

Who was leading the Infraco negotiations?

I do not recall. If I said I was unable to confirm then it was probably unclear. That was an uncertain time around the Scottish elections. I

do not know why Mr Kliskey said he thought it was me as that was never likely.

Were there difficulties with the Infracore tendering and evaluation process?

Yes, although to a degree that is inevitable for a complex project. Were any difficulties in that regard ever resolved (see, for example, (i) further concerns expressed by Mr Harries and Roger Jones of Transdev in e-mails dated July 2007, (CEC01627545) and (ii) concerns expressed by Andy Steel, TSS, in an e-mail dated 16 August 2007, (CEC01649266)?

I do not recall if any difficulties were ever resolved but clearly a substantial number were not and my e-mail response to Mr Steel (also dated 16 August 2007) indicated my concern.

27. In an e-mail dated 4 May 2007 (PBH00010817) Steve Reynolds, Parsons Brinckerhoff, noted a key concern in relation to *"the lack of serious involvement with ... CEC to this point in the reprioritisation of the Master Programme"*, and further noted that he appreciated that that was for a very good reason.

(1) What was your understanding of that matter?

I was not copied in to that e-mail.

(2) Were CEC involved in the reprioritisation of the Master Programme (and, if not, why not)?

I do not know.

28. We understand that on 8 May 2007 BSC submitted Consolidated Proposals (CEC01656123).

(1) What were the main qualifications, in particular, in relation to design and utilities?

That reference relates to the covering letter only. I do not recall the specific comments or even if I saw them. However as a generality, contractors do qualify things that they are not in control of or do not wish to be responsible for.

29. Slides for a meeting of the Design, Procurement and Delivery Sub-committee on 10 May 2007 (TIE00059606) re-affirmed the objectives of the procurement strategy, including *"Transfer of construction risks to the private sector"* (p3) and that it was *"Essentially 'de-risking' Strategy"* (p5).

The slides noted (p7) a number of Risks to the procurement strategy and mitigation measures in relation to each of these risks

(1) What were your views at that time on the main risks to the procurement strategy and whether the proposed mitigation measures were likely to be effective?

Despite my title being Procurement Manager, I was not involved in this Sub-committee. I did not receive this presentation, although slide 9 looks familiar. I never attended any "Blue Skies Challenge Day" and surprised to see that I am noted as the Lead for commercial negotiations on slide 10.

(2) In the event, were the mitigation measures effective (and, if not, why not)?

I do not recall seeing slide 7 at the time. I think the tram element worked reasonably well but the design mitigation measures were not effective. I do not know why as I was not dealing with SDS.

30. By e-mail dated 24 May 2007 (**CEC01657696**) you sent Scott McFadzen an updated design information schedule (**CEC01657697**).

By e-mail dated 28 May 2007 (**CEC01629788**) Mr McFadzen attached a spread sheet with queries on TIE's Procurement and Design Programme. In his e-mail Mr McFadzen stated, "*the Design for the structures, including the 12 Critical structures, should be developed only to the stage where we can quantify and price cost and risk accurately (D&C Tender Stage Design). We believe that we will be able to re-engineer some of these structures to save cost and possibly risk and that it would be a waste of design resources to continue or to complete detailed design, beyond D&C Tender Stage Design standard, at this stage, for these structures*".

(1) What was the purpose of your e-mail and schedule?

To be clear, it was not my schedule, I was merely issuing it and I do not recall who did prepare it. Similarly, the reference in my e-mail to conversations in relation to design would not have involved me. The purpose was to re-prioritize SDS's design programme.

(2) Did TIE accept Mr McFadzen's suggestion that detailed design for structures should not be completed at that stage? If so, did that cause any problems at a later stage (e.g. when BSC came to fix a price for these structures, or in relation to the construction programme)?

I do not recall, I think the structures were still a problem in early 2008 when I left as four Quantity Surveyors were brought in through TSS to measure them.

31. By e-mail dated 31 May 2007 (**CEC01605162**) David Crawley, Engineering Director, TIE, circulated a draft paper (**CEC01605163**) setting out problems with the Employer's Requirements and proposals for addressing these problems.

(1) What was your understanding at that stage of the main problems with the ERs (and the consequences of these problems)?

I do not recall, I was copied in for information, I was not involved in preparing the ERs.

(2) Were these matters ever satisfactorily resolved (and, if not, (i) why not and (ii) what were the consequences)?

It would be better to ask someone directly involved.

32. Notes of meetings on 4 and 6 June 2007 between Steven Bell, Geoff Gilbert, Jim McEwan and Stewart McGarrity (**CEC01629344**) noted slippage in the procurement programme.

In respect of 1. Procurement Programme, it was noted (page 1) that "*the plan as it stands shows that the due diligence process will kick in on receipt of the complete plan. The rationale of de-risking the procurement through ensuring that the design is*

completed upfront is laudable however the sequential nature of the process carried a cost, and the procurement team were asked to consider a different approach viz:- Take 2 months out of the programme through starting due diligence of the critical design items earlier, accepting that in doing this the design process will continue and specifications will therefore be subject to change”.

In respect of 2. Value Engineering (VE), it was noted (pages 2-3) that there were VE opportunities of £72 million (categorised into easy, medium or difficult) and that the target for VE was £14 million.

In respect of 4. Risks, it was recorded (page 5), that the Risk Management process and associated plan had formerly been managed by SDS but that *“the execution by SDS had been unsatisfactory and there was concern on the poacher/gamekeeper status of that arrangement, it had been decided therefore to bring the process under the control of the Tram project team”*. The meeting went through a “pareto” version of the risk register, which resulted in an adjustment of the risk sum to circa £69 million (from £72 million) versus a Draft FBC position of £60 million. It was noted that *“The process, risk plan and toolset are felt to be sound, it was noted that adherence was in a patchy state with roughly 50% of project and functional managers complying”*. One of the agreed actions was *“5. Target moving the aggregate risk position back to the DFBC number”*.

(1) What were your views on these matters?

I was not at any of the meetings in the document, nor was I copied in and no actions are noted as mine.

(2) In relation to the procurement programme, did it cause you any concern that due diligence would be carried out on the critical design items rather than complete designs? What was your understanding of what were the “critical designs”?

I do not recall the detail but I expect that my understanding of “critical designs” was that these would be the most significant ones in terms of cost risk to be prioritized given that “complete designs” were not going to be available. This was obviously a compromise.

(3) In relation to Value Engineering, why did you understand there to be a need to find £14 million of VE savings?

I was not at the VE meeting.

What were your views around that time in relation to whether these VE savings were likely to be achieved?

I do not recall, I expect I was sceptical as achieving savings when the design is incomplete is particularly difficult.

Did there come a time when your views in that regard changed (and, if so, when and why)?

I do not recall any specific event but as a generality, the longer the design goes unresolved then generally the more difficult VE savings become, unless unpalatable decisions are taken.

- (4) In relation to Risk, are you aware why the Risk Management process and associated plan had formerly been managed by SDS rather than by TIE? Did you have any concerns around that time in relation to the risk management process? Why was there a target of moving the aggregate risk position back to the DFBC number?

I am not aware why SDS had formerly managed risk rather than TIE. It could have been resource related as Mr Hamill joined TIE after me, although someone from TSS had an involvement before him.

33. By letter dated 19 July 2007 (**CEC01627004**) Geoff Gilbert set out the Activities to Deliver Contract Award Recommendation. It was noted:

- The strategy for the delivery of the tram project included *"The de-risking of the price for the works by getting sufficient design done in advance of Infracore recommendation so that risk pricing by bidders for scope and performance is minimised"* (para 2.1).
- The programme had been delayed by *"Delays to the design programme resulting in the outputs required for pricing due to their difficulty in obtaining decisions from Project stakeholders. TIE have intervened now to bring about clear decision making"* (para 2.3).
- TIE intended to conclude tender evaluation and negotiations by 28 August 2007, to enable TIE to make a conditional contract award recommendation to its board by 25 September (with proposed contract award in October), which recommendation would be conditional on negotiations and design due diligence (para 2.4).
- To enable that timescale to be met, TIE required bids that met certain requirements, including that bids *"Don't contain significant pricing uncertainty and risk allowances"* and *"Have a clear and agreed basis for adjustments in respect of: significant areas of design uncertainty e.g. roads, pavings and drainage; and significant quantity changes arising from completion of detailed design"* (para 3.1).
- Bidders were required to update their bids for *"The further design information to be provided as the attached schedule"* (para 3.2, 3rd bullet point).
- TIE required *"Details of the items bidders believe are required to enable them to deliver design due diligence for the price and performance risk critical issues"* (para 3.3).

- (1) What was your understanding of, and views on, these matters?

I do not recall. As an observation, the schedule is pretty comprehensive and very detailed. However the activities that Mr Gilbert noted were reliant on others.

34. BSC made a further submission on 7 August 2007 with a Schedule of Clarifications (**CEC01604676** and **CEC01491869**).

- (1) It would be helpful if you could explain BSC's price, the main qualifications (in particular, re design, approvals and consents, the utility diversion works and the programme) and what, if anything, was said about which sums were firm and which were provisional?

Although BBS's submission was sent to me, others were looking at the issues. Similarly, where BBS say "as discussed with you" they mean TIE as for example I never suggested an 80% or indeed any

advance payment!

35. In an e-mail dated 16 August 2007 (**CEC01649280**) you noted *"I have a concern that although we may have firm rates for many items, the extent of unresolved design or specification issues, together with the timescale for execution, does mean that the variable element of bids may be greater than we would like and also any 'clear water' between the Infraco Bidders, making selection of Preferred Bidder difficult"*.

By e-mail of the same date (in the same chain) Andy Steel, TSS, replied *"I think there ... will always be a large price variable until both tie and CEC provide them information to allow the bidders to be precis [sic]. It is not a technical issue per-se"*.

(1) What were your concerns?

With unresolved design or specification issues, bidders are unable to provide a firm (or fixed) price. If there are large elements that are provisional, then it is unclear which Bidder really has the lower price to factor into other aspects of the overall tender evaluation.

(2) What was your understanding of, and views on, Mr Steel's response?

I do not recall but he appears to be implying that delays in technical matters are due to client direction. It may have been a mixture, so I suggest Mr Steel is asked.

(3) Were these matters resolved prior to selection of BSC as Preferred Bidder?

Clearly everything was not properly resolved but I do not recall the detail or if I knew the extent at the time.

(4) Were these matters ever resolved (and, if so, when and how)?

I do not know as I left in March 2008.

36. Scott McFadzen wrote a letter to Geoff Gilbert on 24 August 2007 (**TIE00087652**), following a meeting that day, in which he confirmed BSC's revised price of £217.2m for phase 1a, £45.9m for phase 1b (and £263.1m for phases 1a and 1b).

The Schedule of Clarifications enclosed with BSC's submission dated 7 August 2007 remained effective unless specifically amended.

(1) What was the purpose of that letter?

I do not think I saw it.

(2) What were BSC's main qualifications? What were your views on whether these qualifications were reasonable?

I was not involved.

37. A report dated 4 October 2007 on Infraco Final Evaluation (**CEC01604515**) noted that either bidder could be accepted.

(1) In the event, why were BSC (Rowley) favoured over Scoop (Tramlines)? What were your views?

I was not party to the overall evaluation and I was away on holiday week commencing Monday 8 October 2007 when an internal meeting was held which discussed this and I do not recall being copied in to any minutes.

38. On 22 October 2007 TIE and BSC entered into an agreement relating to the Selection for Appointment as Preferred Bidder (CEC01497399).

(1) By way of overview, what was the purpose of the preferred bidder agreement? What were the main terms of the agreement?

I was not involved.

(2) What was your understanding of the relevance of the sum of £218.5m for the estimated cost of the infrastructure works noted in clause 4.3.1?

I was not involved.

(3) What was the purpose of clause 7, Due Diligence?

I was not involved but as an observation it outlines a process whereby the Preferred Bidder accepts the issues noted before formal award of contract.

(4) What was your understanding of the main "Finalisation Issues" that required to be resolved before the Infraco contract could be entered into (see e.g. clause 3.1 and appendix 1)?

As I stated previously, I was not involved with this but I was aware generally of SDS issues and VE, in addition the Tram novation. Appendix 1 is not there but I doubt I saw it at the time.

(5) What were your views on whether the preferred bidder finalisation programme set out in appendix 2 was realistic and achievable (including, for example, the time allowed for Bidder Due Diligence of design)?

I do not recall. I expect I was sceptical.

39. On 25 October 2007 the Council's approval was sought for the Final Business Case, version 1, in respect of phase 1a (Airport to Leith Waterfront). A joint report was provided by Andrew Holmes and Donald McGougan (CEC02083538).

The report to Council noted that:

- The SDS had prepared preliminary designs and were currently finalising the detailed designs. (para 3.22)
- *"It is anticipated that the SDS and Tramco contracts will be novated to the provider of the infrastructure works. This means that significant elements of the responsibility for the design and vehicle provision and the risks associated are transferred to the private sector"* (para 3.27);
- The estimated capital cost of phase 1a was £498m; *"There is detailed information behind [the] estimates, which take due allowance for risk contingency and further scope for savings, but a fuller breakdown cannot be provided at this stage for reasons of commercial confidentiality"* (para 4.2).
- *"The infrastructure costs are also based on the fixed prices and rates received*

from the recommended infrastructure bidder. However, there is scope for this cost to move slightly, prior to contract close as further design work is required to define more fully the scope of the works to allow a firm price to be negotiated. There is a risk allowance to take account of these variations. The price also assumes that savings can be made on the proposals through certain Value Engineering innovations proposed by ... TIE and the infrastructure bidder" (para 4.3).

- The estimates included a risk allowance of £49m, which had been calculated based on the perceived cost and likelihood of over 400 risks in the project risk register. A statistical analysis known as Quantified Risk Assessment was carried out at a 90% probability level and had concluded that there was a 90% chance that final costs would be within that risk allowance, which "demonstrates a higher than normal confidence factor for a project of this scale and complexity" (para 4.10).
- It was noted that "The risk contingency is designed to cover additional unforeseen costs, but it is recognised that there is an element of residual risk of costs exceeding current estimates. It should also be notified that the risk contingency does not cover major changes to scope. The scope of such changes will be reviewed after completion of the Tram works and commencement of Tram operations" (para 4.32).
- "Fixed price" and contract details would be reported to the Council in December 2007 before contract close in January 2008. (para 5.3).

The Final Business Case, version 1 (CEC01649235) noted:

- "The level of risk allowance so calculated and included in the updated estimate represents 12% of the underlying base cost estimates. This was considered to be a prudent allowance to allow for cost uncertainty at that stage of the project. It reflected the evolution of design and the increasing level of certainty and confidence in the costs of Phase 1 as procurement had progressed through 2006. TIE continued to comply with the HM Treasury recommendations for the estimation of potential OB and had determined, in consultation with TS, that no allowances for OB were required in addition to the 12% risk allowance above" (paragraphs 10.13 and 10.14) (these provisions were essentially the same as the provisions on risk and optimism bias included in the draft FBC dated November 2006, CEC01821403, paras 9.11 and 9.12).
- "By the time of the DFBC, OB was effectively eradicated, as per the findings explained in the Mott MacDonald Review of Large Public Procurement in the UK. This was in view of greater scheme certainty and the mitigation of factors built into the procurement process, as well as project specific risks and environmental and external risks. Instead of using OB, TS and CEC adopted a very high confidence figure of 90% (P90) in the estimate of risk allowances to cover for specified risk, unspecified risk and OB" (para 11.43).

(1) Did you have any input into drafting the report to Council or the FBC?

NO, I was not involved in drafting. I could have provided some information but none of the above looks like my wording.

(2) Do you consider that the report to Council fully and accurately reported on the delays in relation to design, approvals and consents and utility works and the risks arising from these delays?

I was not involved in the drafting, so unable to comment.

(3) What was your understanding of how the Infraco contractor could provide a fixed price, and how design risk could be transferred to the private sector, given the delay in design, approvals and consents (and given the design and TRO milestones noted at page 191 of the FBC whereby, for example, detailed design for phase 1a was not expected to be completed until September 2008)?

I do not recall knowing that date at the time. However, it would not have been practical for the price to be entirely fixed without resolution of design. It seems that there would have been three principal options in this scenario:

- i. Ask the bidder to take the risk but that impacts on affordability, even if they are prepared to do so.
- ii. Defer the award until design is complete.
- iii. Create a basis for the pricing that the design could be considered against, when prepared i.e. the Schedule 4 approach.

(4) What were your views on the paragraphs of the FBC noted above? Did you agree that from late 2006 onwards optimism bias had been effectively eradicated and that it was appropriate to make no further allowance for optimism bias in addition to the risk allowance?

I do not recall being consulted about optimism bias but it could not have been "eradicated" as there was no absolute certainty on cost or programme, so an element of optimism could exist. That could have been allowed in risk register but I do not recall.

40. In response to an e-mail dated 25 October 2007 by Jim McEwan circulating a proposed presentation to the Tram Project Board on Value Engineering, Willie Gallagher stated "*Let no one be [in] any doubt, we will be going back with a number of £498m for Phase 1(a). Get cracking on whatever needs to be done*" (CEC01453723).

(1) What was your understanding of what Mr Gallagher meant by his statement noted above?

I was not party to this e-mail chain or related discussions.

(2) To what extent, if at all, did that statement influence or reflect the approach taken by TIE to the negotiation, agreement and/or reporting of the Infraco price?

See above answer.

41. We understand that further discussions took place after BSC had been appointed Preferred Bidder.

(1) It would be helpful if, by way of overview, you could explain the main discussions that took place between BSC being appointed Preferred Bidder up until the middle of December 2007 (including who were the main individuals from both BSC and TIE involved in these discussions and what discussion took place in relation to design, approvals and consents, the utility diversion works, the programme, pricing and the allocation of risk)?

I was not involved in the main discussions. TIE attendees would

have included Steven Bell, Jim McEwan, Geoff Gilbert, Dennis Murray and possibly Eric Smith and others. Matthew Crosse (Interim Project Director) was involved in some but not as many as might have been expected.

42. By e-mail dated 1 November 2007 (**CEC01549151**) Philip Hecht, DLA, advised of some "fairly major issues" that had arisen in a meeting with BSC the previous day including: *"BBS require to be able to price for risk on any tie Change. The current mechanism allows for payment to be made based on the valuation of the change (reference to BoQs, fair rates and prices, etc), however on top of this, they also require to be able to take account for any risk that is inherent from implementing the change. This could potentially have a significant cost implication for tie and therefore we resisted. This is currently not agreed"*; and

"Mechanism required where Consents are unobtainable. It was our understanding of the agreed position that the Infraco carries Consents responsibility and as such, if it cannot obtain any Consents, it will need to follow the Infraco Change procedure to adequately deal with this failure. BBS now require tie Change. Obviously this has a cost implication for tie however it also acts as a disincentive for the Infraco to use its best endeavours to obtain a Consent when it knows it can request a tie Change. Again, we resisted this and it is currently not agreed".

(1) What was your understanding of, and views on, these matters?

I do not recall specifically. BBS and their solicitors were difficult to deal with. However, it is inevitable that they would seek to maximize their position while TIE was unable to conclude matters.

(2) How were these matters resolved?

I do not recall what was resolved and was not resolved but it still could have been unravelled after I left.

43. The minutes of a TIE/BSC meeting on 13 November 2007 (**CEC01477879**) noted that TIE were to look at fast tracking the technical approvals process, that BSC remained concerned about gaining access to current information via the data room, the GI (Ground Investigations) interpretative report offered by SDS was inadequate, version 3 of the Employer's Requirements was available and was being examined for areas of misalignment, the first Temporary Traffic Regulation Orders (TTROs) were shown in mid 2008 but were required sooner to meet the overall programme and that some SDS designs were also shown to be after construction start, that BSC intended to work from west to east, rather than east to west, in order to make the programme work and that TIE expressed concerns that in some areas where VE had been explored, costs were liable to increase as more information became available to BSC.

(1) What were your views on these matters?

I was not involved in that meeting.

44. An e-mail dated 21 November 2007 from Carla Jones, Planning Manager, PB (**PBH00014489**) attached a weekly deliverables tracker (**PBH00014490**) and noted that of the 344 deliverables on the tracker, only 227 out of 283 planned for delivery had been delivered (i.e. 52 deliverables were late).

(1) Why were these deliverables late?

I do not recall the detail but looking at the e-mail PB accept that 20 were their responsibility and 32 down to TIE / others. Whether that was an accurate allocation or not I do not know but it does indicate a split of responsibility.

(2) Did that cause you any concern?

I do not recall specifically but I expect it did although on the other hand 80% were claimed as having been achieved. As previous, others were dealing with this.

45. The minutes of a TIE/BSC meeting on 22 November 2007 (**CEC01502105**) noted problems with BSC accessing the information in the design database and that a CD was to be provided *“that would enable BBS to produce a firm price”*.

We understand that on or about 25 November 2007 BSC were provided with five CDs containing the design as at that time.

See also Scott McFadzen’s statement dated 19 April 2010 (produced in relation to the Tower Bridge adjudication) (**CEC00351749**) in relation to the problems experienced in accessing and using the Sharepoint drawings database.

(1) It would be helpful if you explain the means by which BSC were provided with the detailed design at that time and any problems in that regard?

I was not at that meeting and not dealing with SDS.

(2) Were any problems resolved (and, if so how and when)?

I do not know.

46. The minutes of a TIE/BSC meeting on 27 November 2007 (**CEC01328042**) noted a number of ongoing outstanding issues. Willie Gallagher expressed concern that insufficient was being achieved to give him confidence that the report to Council would be completed by the due date of 12 December. Critical comments from BSC were noted, including that the programme was unlikely to be concluded until October 2011. Views on ways to improve included: re-prioritise SDS design and parallel MUDFA works.

In relation to Pricing Priorities there was noted to be a need to *“firm up prices to take confidence level to the high ninety %”* and that *“BBS were uncertain if the information was sufficiently complete enough to achieve firm prices”*. BSC considered that Phase 1B was the most complete, followed by the Airport to Haymarket section for 1A. BSC were *“still doubtful over the street section of 1A”*.

Under Programme Issues, it was agreed to *“carve out’ difficult or currently programmed to be late sections e.g. Balgreen Road/Baird Drive/Forth Ports section/Picardy Place”* and that *“The integration with MUDFA is critical to all programme pressures”*.

(1) What were your views on these matters?

I was not at that meeting or copied in to the minutes.

(2) Given the concerns about the street section, why did BSC plan to start construction works on the on-street section (i.e. from east to west) rather than on the off-street section (i.e. from west to east)?

I was not involved in these discussions.

47. An e-mail dated 11 December 2007 from Steve Sharp, Construction Programming Solutions Ltd (**CEC01494306**) advised that certain materials for bridge structures (e.g. steel and concrete beams etc) generally required up to six months between placing an order and delivery of materials on site and that a number of structures for the tram project could be affected depending upon their final construction details.

(1) What discussion was there within TIE in relation to how BSC could provide a fixed price and agree a construction programme while the construction details of the structures (or some of them) remained outstanding? What were your views?

I do not recall.

48. By e-mail dated 17 December 2007 (**TIE00898202**) you attached a copy of a paper Geoff Gilbert had recently produced to inform DLA's re-drafting of Clause 80 (Change Procedure) (**TIE00898203**) and a draft flow chart (**TIE00898204**) you had previously prepared which contained a mechanism whereby if parties could not agree, TIE could instruct work at their Estimate (Price, Programme etc) and Infraco either accepted or went to DRP. You noted, "*This is to prevent the Infraco frustrating agreement and causing delay*".

(1) It would be helpful if you could explain why you considered it necessary to include a mechanism to prevent the Infraco frustrating agreement and causing delay?

It was to guard against the position that it appears subsequently happened. It stems from my involvement in various governments contracts and the principle that I think had its roots in the Ministry of Works (later GC Works) contracts from World War Two when works obviously needed to be progressed. The standard NEC3 contract allows dispute resolution to run in parallel.

(2) In the event, did the final version of clause 80 (**CEC00036952**, pp182-189) contain such a mechanism?

Presumably not as the question has been asked. I do not know why. I recall drafting a few flow charts (three I think) for various mechanisms which Andrew Fitchie commented were very helpful and I thought he or Philip Hecht did include in Clause 80. I am unable to comment further and suggest the audit trail of contract updates is reviewed to see what happened.

49. We understand that around the middle of December 2007 discussions took place at Wiesbaden, Germany, between representatives of BSC and TIE in relation to the pricing provisions of the Infraco contract. There were a number of e-mails around that time including, for example:

- In an e-mail dated 19 December 2007 (8.37 am) (**CEC00547732**) Richard Walker noted that "*our firm price including the additional £8m to fix the 'variable' sums noted in our tender is based on all the additional information which we received from SDS via the 4 No. CDs. The last of which was delivered to us on 25th November 2007. We therefore insist that our contract be related to this*".

- In the same e-mail chain Geoff Gilbert replied that he didn't understand the point Mr Walker was making and would call to discuss.
- In an e-mail dated 19 December 2007 (1.44 pm) (**CEC00547735**) Mr Walker advised Mr Gilbert that *"I have concerns that this amount was the amount envisaged when we thought SDS design would be complete at novation. Obviously this is not now the case and I believe the £"m will need to be increased in the Infraco contract. I presume you have the budget for this elsewhere and that this will be made available"*.
- By e-mail dated 19 December 2007 (1.29 pm) (**CEC00547756**) Mr Gilbert sent a copy of the draft agreement (**CEC00547757**) as further revised to take account of a discussion with Mr Walker.
- In an e-mail dated 19 December 2007 (7.42 pm) (**CEC00547738**) Mr Gilbert stated, *"We went through this [i.e. the proposed agreement] at the Board today and generally everyone was ok with it. However, to get CEC's buy we need to make a few changes ... I don't think there is anything controversial in this but call me if you wish to discuss"* (the revised agreement appears to be dated 19 December, **CEC00547739**).
- In an e-mail dated 20 December 2007 (6.07 am) (**CEC00547740**) Mr Walker advised Mr Gilbert that *"We still have issues with accepting design risk. We have not priced this contract on a design and build basis always believing until very recently that design would be complete upon novation. With the exception of the items marked provisional which we have now fixed by way of the 8 million we cannot accept more drain development other than minor tweaking around detail. Your current wording is too onerous. Trust we can find a solution"*.

On 20 December 2007, an agreement, or heads of terms, were reached (the Wiesbaden Agreement) (**CEC02085660**).

(1) What was your understanding of the purpose of the Wiesbaden discussions and agreement?

I was not involved in the these discussions and had forgotten that there was an agreement made.

(2) What was your understanding of the main matters agreed?

I was not involved.

(3) What was your understanding in relation to any agreement reached as to which party would bear the risks arising from any development of, or changes to, the design in existence at that time?

I was not involved.

50. On 20 December a report was provided to Council (**CEC02083448**) along with version 2 of the Final Business Case (**CEC01395434**).

The report to Council noted:

- *"The cost estimates for the project reflect provision for evolution as the detailed design will be completed in the coming months. The design is completed under the Infraco contract from the point of award of that contract through novation of the System Design Services contract with Parsons Brinkerhoff to Infraco"* (para 3.2).
- *"... Some cost allowance has been made for the risk associated with the detailed design work not being completed, at the time of financial close ..."* (para 8.1).

- The estimate of £498m for phase 1a inclusive of a risk allowance as reported in October 2007 remained valid. The current price estimate was based on a compressed construction programme (para 8.2).
- *“The fundamental approach to the Tram contracts has been to transfer risk to the private sector. This has largely been achieved”* (para 8.10).
- *“Risks retained by the public sector and which therefore bear upon the Council are explained in the Final Business Case section 11. These risks include:*
 - *Agreements with third parties including delays to utility diversions.*
 - *Finalisation of technical and prior approvals.*
 - *The market cannot provide Professional Indemnity Insurance to TIE vis-à-vis a claim by the Council against TIE, because TIE is wholly owned by the Council”* (para 8.13).
- *“There are additional risks such as third party agreements and consents where discussions and negotiations are continuing to reach an acceptable position in respect of allocation of risks”* (para 8.15).
- *“The risk contingency does not cover major changes to scope. It should be noted that the current construction programme is compressed to reduce the length of disruption and provide best value. Changes to the programme could involve significant costs, not currently allowed for in the risk contingency”* (para 8.16).
- It was anticipated that the Notification of Infraco award would be issued on 11 January 2008, the Tramco and Infraco contracts would be awarded on 28 January 2008 and that construction on phase 1a would commence in February 2008 (para 8.19).
- The Conclusions included that, *“The preferred bidder negotiations, in terms of price, scope, design and risk apportionment, give further reassurance that Phase 1a can be completed within the available funding and are consistent with the Final Business Case”* (para 9.2) and that *“The total forecast project cost is consistent with the final business case. TIE is confident that risk contingencies and the final approved design can be accommodated within the funding available”* (para 9.3).
- Authority was sought from members for the award of the Tramco and Infraco contracts by TIE subject to price and terms being consistent with the FBC and subject to the Chief Executive being satisfied that all remaining due diligence was resolved to his satisfaction (paras 1.2 and 10.2).

(1) Did you have any input into drafting the report to Council or the FBC?

NO, I was not involved in drafting. I may have provided some information but none of the above looks like my wording.

(2) What was your understanding of, and views on, the provisions of the report to Council noted above?

I do not believe I was involved and if I was consulted I do not recall.

(3) What was your understanding at that time of the extent to which the Infraco contract was for a fixed price (and the extent to which, and in what circumstances, the price was liable to change)?

I was not involved in the core of Infraco pricing negotiations and only consulted on occasions but became more aware when I prepared the early draft of Schedule 4 (please see Question 51 below).

- (4) It was noted that the risk contingency did not cover "major changes to scope". What was your understanding of "major changes to scope"? Can you give examples?

I do not think I was involved but I would comment that risk is for uncertainties that may occur. It is not for client changes that should be conscious decisions and be subject to a proper change control process.

- (5) Do you consider that the report to Council on 20 December 2007 adequately set out the delays in relation to design, approvals and consents and utility works?

As I stated previously, I was not involved in MUDFA.

- (6) Do you consider that the report adequately set out the risks arising from these delays, including the risks arising from these works overlapping with the infrastructure works?

As I stated previously, I was not involved in MUDFA.

• **EVENTS IN 2008 (January to May)**

As I stated previously, I left in March 2008.

51. By e-mail dated 13 January 2008 (CEC01447445) you sent an early draft of Schedule 4 (Pricing Provisions) (CEC01447446) of the Infraco contract.

- (1) Did you draft the initial version of Schedule 4?

Yes, although I had forgotten until I saw it but the initial template of how it might be structured was mine. As stated previously I had not been involved in the Infraco price evaluation and was not involved in the core of price negotiations as by that time Dennis Murray and Eric Smith had come on board and I was due to be leaving. It looks as though I prepared this at short notice over a weekend as 13 January 2008 was a Sunday. Geoff Gilbert may have asked me to do it in preference to one of them or possibly I was there later on the Friday, I do not recall.

If so, what information was provided to you, and by whom, to enable you to do that (see e.g. in that regard, your e-mail dated 16 January 2008 to Mark Hamill, CEC01513883)?

My e-mail dated 16 January 2008 does note that I received information on the Wiesbaden Deal from Geoff Gilbert on the previous Wednesday and also that I was not aware of the background of various other matters. I do not recall if I even knew what other matters were being discussed.

- (2) What was your understanding at that time of the purpose of Schedule 4 and what it would contain?

My understanding was that Schedule 4 was to represent the basis of

the pricing and qualifications of BBS's (not BSC at that stage) proposals and a 'line in the sand' against which actuals would be adjusted (up and down). I was aware that this was linked to the due diligence on the SDS design. However, I did not know all of what it would contain, although I recall structures were one element.

- (3) By way of overview, who were the main individuals from TIE and BSC involved in the negotiation and agreement of Schedule 4? What was your role and involvement?

My role was limited and as I was leaving, it was led by others, I thought it was to be Dennis Murray, with assistance from Eric Smith as they would be dealing with the commercial aspects once the contract was awarded and thus had a vested interest in getting it right. However, the records should show who was actually involved.

To what extent were parties' respective solicitors involved in these discussions?

I did not recall but documents show that solicitors were involved as Pincet Masons (for BBS) heavily amended, weakening TIE's position from what I initially drafted.

Approximately how many meetings between TIE and BSC took place to discuss and agree Schedule 4?

I do not know. When I left, there was still a lot to be done.

What were the main areas of dispute and how (and approximately when) were they resolved?

I do not know.

52. The minutes of a TIE/BSC meeting on 15 January 2008 (**CEC01529968**) noted, in item 1, certain concerns in relation to the SDS Programme. Under item 2 it was noted "[Geoff Gilbert] explained that details of what the contract price represents will be defined in Schedule 4. Any changes from this will be a tie change".

The minutes of another meeting that day (**CEC01432589**) noted that "The outstanding design approvals is a big cause for concern with both SDS and BBS" (item 2, Novation) and, under Critical Blockers (item 5), "The novation is proving to be a difficult hurdle to get over between BBS and SDS. BBS expressed that this could potentially mean a price change. TIE noted that the price is not variable except for certain stated items (e.g. Forth Ports changes, Picardy place roads and pavings) as agreed in the Wiesbaden agreement)."

- (1) What was your understanding of these matters?

I was not present at either of these meetings.

53. By e-mail dated 1 February 2008 (**CEC01489538**) Richard Walker advised Geoff Gilbert that:

"Bilfinger Berger's business model does not permit the liability for risks that do not belong in our Industry or risks which are unable to be assessed and quantified. The pricing assumptions have been based on the information given that tie would deliver

the Design in accordance with their Procurement Strategy i.e. Complete at Novation. (See Willie Gallagher presentation to Senior BB&S Executives on 15th. November 2007 – ie. Post Preferred Bidder [see slides TIE00087334].) Tie have not delivered the Issued for Construction Detailed Design in accordance with the Procurement Strategy and therefore the Risk Profile has changed for BSC, Tramco and SDS. It is this which is giving rise to the current difficulties and apparent shifting of position”.

(1) What was your understanding of these matters?

I was not copied in to that e-mail or ever saw Mr Gallagher's presentation.

54. By e-mail dated 4 February 2008 Scott McFadzen sent TIE a version of Schedule 4 which contained various Pricing Assumptions (CEC02084854).

By e-mail dated 5 February 2008 (CEC01448266) you circulated a draft of Schedule 4 that contained comments by yourself and Tom Hickman, Programme Manager, TIE (CEC01448267).

(1) What was your understanding of the intended purpose and effect of the Pricing Assumptions in Schedule 4?

I was not leading on Schedule 4 but my understanding was that in the absence of completed design information, the basis of the pricing assumptions was 'qualified' so that it would be adjusted if the design was different. This should have been intended to work both ways.

(2) It would be helpful if you could explain your main comments as noted in CEC01448267 (including your comment in relation to Notified Departures, clause 1.1, p.8, that “can't just be any departure or all risk will come back to tie”)?

The intention of the Infraco Contract, as a design and build contract, was that a design change by Infraco would be at its cost. I was concerned that BBS were trying to unravel that principle by making the slightest change a Notified Departure, hence I suggested adding “materially” so that it only captured a significant change, rather than simple design development. I would like to point out that I was not involved in negotiation of this issue and I do not remember if I was asked to look at or just saw the wording and thought it required further clarification.

55. By e-mail dated 6 February 2008 (CEC01546351) you forwarded Andrew Fitchie a summary of the Wiesbaden deal (CEC01546352).

(1) What was your understanding of the extent to which, if at all, the Wiesbaden deal (as shown in that summary) included an allowance for Changes due to Notified Departures after contract close?

As stated previously, I was not involved in the Wiesbaden deal.

(2) What was your understanding of the extent to which, if at all, TIE's risk allowance included an allowance for Changes due to Notified Departures after contract close?

I do not recall if I ever knew.

56. Parties entered into the Rutland Square Agreement on 7 February 2008 (CEC01284179).

The agreement noted a construction price of £222,062,426, subject to certain exclusions, provisional sums, assumptions and conditions.

(1) What was your understanding of the need for and purpose of that agreement?

I was not involved in any Rutland Square agreement and not copied in to the e-mails therein and thus unable to answer any points under this Question 56.

(2) What was your understanding of the extent to which the price in the agreement of £222,062,426 was fixed and firm (and the extent to which that price was subject to exclusions, provisional sums, assumptions and conditions)?

(3) What was your understanding of clause 2 of that agreement (including clauses 2.1 and 2.2)?

(4) What was your understanding of the need for and purpose of the Schedule to this agreement (including, in particular, paragraph 2.5 of the Schedule)?

(5) Did the e-mails etc attached to the document form part of the agreement?

(6) In relation to the document attached to the agreement (at p26) "SDS Novation – RODs", what was your understanding of (i) the purpose of that agreement and (ii) the words that "*Design Growth: The design information which provided the basis for BSC's price will be a pricing assumption under Schedule 4. The risk of design 'creep' accordingly lies with tie*"?

57. By e-mail dated 11 February 2008 (CEC01508965) Geoff Gilbert attached a copy of a potential SDS incentivisation agreement (CEC01508966 and CEC01508967).

(1) What was your understanding of the need for, and purpose of, such an incentivisation agreement?

I was not copied in to this e-mail and have no recollection of an SDS incentivisation agreement.

(2) What were BSC's views on such an agreement?

(3) In the event, and by way of overview, what was agreed in that regard?

58. An e-mail dated 11 February 2008 from Stewart McGarrity (CEC01423172) circulated a spread sheet (CEC01423173) giving a breakdown of the latest budget at financial close, and included a risk allowance of just over £30 million (compared to a risk allowance of almost £49 million in the Final Business Case).

By e-mail of the same date (CEC01489953) Mark Hamill, TIE's Risk Manager, noted that the spread sheet contained information relating to the risk allowance that he was not aware of and attached a spread sheet containing a number of queries regarding potential new risks (CEC01489954).

He further noted, "*my main concerns here are that (a) we are reducing the risk allowance while the risk has not actually been transferred or closed and (b) the new risk allowance is not sufficient for the risks which tie will retain. I cannot overstate how anxious I am to ensure that the final QRA truly reflects the actual risk profile at financial close*".

(1) What were your views on these matters?

I was not copied in to these e-mail as I was not involved. However, I did sit close to Mr Hamill and recall that he was very anxious.

(2) Who was responsible within TIE at that time for deciding whether the risk

allowance was adequate?

I do not know categorically. Geoff Gilbert and Dennis Murray may have made recommendations but I suspect any decision could have been taken above them.

(3) What were your thoughts on Mr Hamill's comments and queries in the spread sheet attached to his e-mail?

I do not recall seeing, although note my name is in there several times, some against issues that I was not dealing with.

59. On 18 February 2008 BSC produced a Design Due Diligence Summary Report, based on design information received by BSC by 14 December 2007 (CEC01449100). That document raised various concerns about design, including that "*more than 40% of the detailed design information*" had not been issued to BBS.

(1) Were you aware of that report at the time?

I do not think I ever saw that report and do not recall being aware of any 40%+ uncertainty on design, although it would not necessarily follow that the price uncertainty was at a similar level.

(2) What were your views on the matters in the Executive Summary of the report? Did it cause you any concerns?

Part of the reason I do not think I ever saw that report is that I would have been extremely concerned about the potential for a procurement challenge from the unsuccessful bidder (TRAMLINES) if there was a significant variable. Their de-briefing was one of my final activities and I do not believe they raised concerns in this respect.

(3) What discussion was there with within TIE, and with BSC, in relation to which party would bear the risks arising from any development of, or changes to, the design in existence at that time?

I was not involved in these discussions.

(4) Were CEC sent a copy of the report?

I do not know, I was not involved.

(5) What discussion was there with CEC of how the risks arising from incomplete design would be dealt with in the Infracore price and in the risk allowance?

I do not know, I was not involved.

60. By e-mail dated 22 February 2008 (CEC01449876) Ian Laing, Pinsent Masons, circulated a revised draft of Schedule 4 (CEC01449877).

(1) What were your views on that draft? What was your understanding of the risks the draft created for TIE? Did that cause you any concern?

I was only copied in to the e-mail, with a number of others, I was not

leading on Schedule 4 as I was due to be leaving. I did have an on-going concern but do not recall specifically what I may have flagged up to others.

61. By e-mail dated 28 February 2008 (CEC01546728) Graeme Bissett noted, in relation to budget, that *“overall we believe that the existing £498m budget remains within reach if it is accepted that the balance between calculated cost and risk contingency will change and that some areas will be controlled post-Close rather than negotiated into the ground now”*.

(1) What did you understand Mr Bissett to mean by that statement? What areas would require to be controlled post-Close and how would that be done? Did you understand that to carry any cost implications?

I was not copied in to this e-mail.

62. In an e-mail dated 10 March 2008 (CEC01450544) you noted the wording that had been agreed in relation to any change from the Base Case Assumptions being a Notified Departure which would be deemed to be a Mandatory Tie Change.

(1) Who within TIE agreed to that wording?

My e-mail notes Geoff (Gilbert) and Dennis (Murray) and my earlier e-mail dated 6 March 2008 referred to their meeting with BBS.

(2) What was your understanding of the purpose and effect of that wording?

If the design was different, when finalized, from that at the Base Case Assumptions then it would lead to a Tie Change.

(3) Did that wording cause you any concern?

I had previously raised a concern when I suggested adding “materially” as in Question 54. I do not recall why that was not added. It would also depend on the definition of Notified Departure. However, aside from the wording, the situation would have caused me concern as it could result in Tie Changes if the design was changed, incomplete or late.

63. By e-mail dated 10 March 2008 Steven Bell, TIE, noted that an agreement had been reached on 7 March (between Richard Walker, Michael Flynn, Mr Bell and Jim McEwan) that the contract price would be increased by £8.6 million to cover certain matters (CEC01463888).

I was not copied into that e-mail or involved in any way.

(1) Why had a price increase been sought?

(2) Why did TIE agree to a price increase?

(3) What matters did the price increase cover?

64. By e-mail dated 11 March 2007 (CEC01544518) Duncan Fraser, CEC, advised TIE that CEC required a statement confirming the elements of the SDS designs that are being re-designed by BBS, if any, the working assumption to date having been that all of the SDS designs were to be adopted by BBS.

In a reply, Graeme Bissett stated *“the information you want is embedded in the*

Infraco proposal ... As I think we discussed today, the liability would sit with BBS/SDS in relation to any redesign”.

(1) What was your understanding of that matter?

I was not involved with that.

65. A progress report for a proposed meeting of the Tram Project Board on 12 March 2008 (**CEC01246825**) noted: “*SDS submissions to CEC for their approvals are now timed such that, in some cases, construction is programmed to commence before approval has been completed*” (p12) and “*Design. The delivery of design to meet the construction schedules for various structures is causing concern and detailed reviews and discussions are underway with SDS, CEC and BBS to provide solutions*” (p19).

(1) What was your awareness of, and views on, these matters? Did they cause you any concerns? How were any such concerns addressed?

I was not copied in to that e-mail and was not involved.

66. By letter dated 18 March 2008 (**CEC01314423**) Willie Gallagher informed BSC of TIE's intention to conclude the process for the award of the Infraco contract to BBS “*following successful close out of financial, commercial, legal and technical discussions, novation commitments and facilitated negotiations*”.

By e-mail dated 19 March 2008 (**CEC01464731**) Mr Gallagher advised that TIE had issued the PIN the previous day advising that BSC had been selected to build the Edinburgh Tram System and that a contract required to be concluded by 28 March to facilitate the drawdown of funding from Transport Scotland before 31 March.

(1) Did you consider that, by 18 March 2008, there had been “*close out*” of “*financial, commercial, legal and technical discussions, novation commitments and facilitated negotiations*”?

I was not copied in to Mr Gallagher's letter or e-mail. Certainly “close out” had not been achieved at that stage. However, Mr Gallagher's wording could be interpreted as award after “close out” but 28 March 2008 would have been unlikely too.

(2) In the event, why was the contract not concluded by 28 March (and why was it not concluded until 14/15 May 2008)?

I was not involved at that stage and I left at the end of March 2008.

67. By e-mail dated 19 March 2008 (**CEC01451012**) Ian Laing, Pinsent Masons, circulated a revised draft of Schedule 4 (**CEC01451013**).

(1) What were your views on that draft, including the risks it sought to impose on TIE? Did it cause you any concern?

I do not recall, specifically and it must be remembered that I was not leading on this matter. I would have had an ongoing concern as my e-mail dated 12 March 2018 to which Mr Laing was responding had flagged areas where they had inserted unrealistic dates.

68. An internal TIE e-mail dated 26 March 2008 from Stewart McGarrity (**CEC01422917**) attached tables giving a breakdown of the Infraco contract price

(CEC01422918 and CEC01422919).

(1) Do you have any views on the analysis of the contract price as shown in these tables (including, in particular, the extent to which, if at all, allowance had been made for the risk of changes post financial close as a result of Notified Departures)?

This was my final week at TIE and I was not leading on these matters and I had not prepared the tables, although I did add a cross check. I think any allowance for risk would have been outside the Infraco contract price.

69. On 26 March 2008, Ian Laing, Pinsent Masons, sent an e-mail to Steven Bell and Jim McEwan (copied to others) (CEC01465908) in which he stated:

“As we discussed earlier today, the Design Delivery Programme that will be v28. The Pricing Assumption in Schedule 4 of the Infraco Contract assumes that the Design Delivery Programme will not change from v26. It follows that there is the possibility that there will be an immediate Notified Departure on contract execution. Given the unusual position that we are in, please can you confirm that this is understood and agreed by tie”.

In an e-mail dated 31 March 2008 in the same chain (which you do not appear to have been sent), Andrew Fitchie stated that the only approach open to TIE was *“to capture as many identified key changes that tie knows will be required and to attempt to fix them and agree their likely programme and/or cost impact with BBS prior to contract ward, or at least identify the reasonable range of programme and cost impacts”.*

In a response to Mr Bell in the same chain (which, again, you do not appear to have been sent), Mr McEwan stated, *“My view is that if we pursue Andrew’s steer on this we will open up the whole can of worms on the Infraco contract cost overall, and that we have to take on the chin that the programme version is not consistent, get the deal signed and then fight the notified departure tooth and nail. I understand Andrew’s point but if we are at all hopeful of getting this done by the 15th April (this year) we cannot take his suggested approach”.*

(1) What were your views on the matters noted above?

I was not involved.

(2) What do you understand Mr McEwan to mean by his reference to *“the whole can of worms on the Infraco contract cost overall”*?

I was not involved. It implies that he is aware of a potential flaw in the basis of the agreement. However, Mr McEwan or others involved should comment.

(3) What did you understand Mr McEwan to mean by stating *“we have to take on the chin that the programme version is not consistent, get the deal signed and then fight the notified departure tooth and nail”*?

I was not involved. Again it implies that he is aware of a potential flaw in the basis of the agreement. However, Mr McEwan or others involved should comment.

(4) To what extent, if at all, were the above matters discussed with CEC?

I was not involved.

70. By e-mail dated 31 March 2008 (**CEC01546703**) Stewart McGarrity noted that a meeting had been arranged the next day to discuss Schedule 4 and attached a spread sheet (**CEC01546704**) showing how the BSC price had increased since the award of preferred bidder.

My last day was Friday 28 March 2008 (the end of Period 13), although at TIE's request I did return for two days on Thursday 3 and Friday 4 April 2008 to brief unsuccessful bidders.

(1) Do you have any comments on that spread sheet, including why the BSC price had increased?

As noted previously, my last day was Friday 28th March 2008, other than the two extra days.

(2) Do you have any recollection whether a meeting took place on 1 April to discuss Schedule 4 and, if so, what was discussed?

As noted previously, my last day was Friday 28 March 2008, other than the two extra days.

71. By e-mail dated 31 March 2008 (**CEC01493317**), David Leslie, Development Management Manager, Planning, CEC, sent a letter to Willie Gallagher (**CEC01493318**) expressing certain concerns in relation to prior approvals.

On 3 April 2008 Duncan Fraser sent a letter to Willie Gallagher setting out similar concerns by CEC's Transport Department relating to Technical Approvals and Quality Control Issues [**CEC01493639**].

(1) Were you aware of these letters and/or the concerns expressed in these letters?

As noted previously, my last day was Friday 28 March 2008, other than the two extra days.

(2) What discussion of these letters was there (i) within TIE and (ii) with CEC?

I was not involved and had left by then.

(3) What, if anything, was done in response to these concerns?

I was not involved and had left by then.

72. An e-mail dated 2 April 2008 from Ian Laing (**CEC01451381**) attached the latest draft of schedule 4 for "*discussion (and hopefully final resolution) tomorrow*" (**CEC01451382**).

That draft of schedule 4 noted, in paragraph 3.2, that:

"The parties acknowledge that certain of these Pricing Assumptions may result in the notification of a Notified Departure immediately following execution of this Agreement. This arises as a consequence of the need to fix the Contract Price against a developing factual background. In order to fix the Contract Price at the date of this Agreement certain Pricing Assumptions represent factual statements that the parties acknowledge to represent facts and circumstances that are not consistent

with the actual facts and circumstances that apply. For the avoidance of doubt, the commercial intention of the Parties is that in such circumstances the Notified Departure mechanism will apply”.

(1) What was your understanding of the need for, purpose and effect of the wording noted above?

I was not involved and had left by then.

(2) To what extent was that wording discussed (i) within TIE and (ii) with CEC?

I was not involved and had left by then.

(3) What Pricing Assumptions did you (and TIE) consider represented factual statements that were not consistent with the actual facts and circumstances that applied?

I was not involved and had left by then.

73. A Joint Meeting of the TPB and TEL Board took place on 9 April 2008 (CEC00079902).

The minutes noted (page 5, para 3.1) that Steven Bell presented the agreed plan and phasing for the next stages of the MUDFA works and confirmed that *“despite an anticipated slippage of approximately five weeks, the alignment with the Infracore programme was maintained”*. Reasons for the delays in certain areas were: greater congested services than anticipated, SUC’s issue of locating own assets; and AMIS resource level below the Rev 06 programme (para 3.2). Currently 30% of expected works were completed.

The Boards received updates on the progress in relation to the Infracore and Tramco negotiations on pricing, programme, scope and risk profile etc.

Under SDS Novation, it was noted (page 6, para 4.7), that *“some details were outstanding and were being negotiated robustly”*.

In relation to Design Management after Close (page 7, para 10.2) it was noted that *“from novation onwards, the contractual relationship with SDS moves to BBS. However, tie and CEC would continue to support and manage BBS in this regard”*.

(1) What was your understanding of, and views on, these matters?

I was not involved and had left by then.

74. In an e-mail dated 16 April 2008 (TIE00017426), in response to a query from Andy Conway, Steven Bell stated that the logic behind the November 2007 design freeze was that it *“allows for all normal design development at no extra cost”*.

(1) What was your understanding of that matter?

I was not involved and had left by then.

75. In an internal Weekly Report dated 18 April 2008 (PBH00018333 at para 1.3), Steve Reynolds, Parsons Brinckerhoff, noted:

“Richard Walker indicated to me on Friday that he has concerns over the presentation of the Infracore Contract deal to Council. Some weeks ago I had expressed my concerns that the price on the table from BSC did not align with the programme contained in the offer. For example, the price assumes that value engineering savings will be made whereas the programme has no allowance for the design and approvals time which would be required. I had suggested that tie would

have to be careful in the form of presentation so as not to mislead CEC. Richard is now expressing (to me) similar concerns and has suggested that he will take this up with tie separately. To a large extent the current position is one of BSC's making where the offer is dependent upon a set of pricing assumptions which can be interpreted by the informed reader as a basis for price increase and programme prolongation. It may be that Richard is belatedly expressing worries which have more to do with his concern over working with tie as a client or may even be due to friction between Bilfinger Berger and Siemens. Whatever the reason I detect an air of uncertainty and last minute concern over whether BSC should be taking the job".

(1) What were your views on these matters?

I was not involved in this and had left by then.

(2) Did anyone from BSC raise with you (or anyone else at TIE) any concerns in relation to TIE's reporting of the Infraco contract or price to CEC?

I was not involved in this and had left by then.

(3) Did you, at any time, have any concerns in relation to TIE's reporting of the Infraco contract and price to CEC?

I was not involved with the price, nor reporting to CEC.

76. By e-mail dated 28 April 2008 (**CEC01312358**) Graeme Bissett circulated to CEC an updated draft of the Close Report (**CEC01312359**) and other documents.

The updated draft Close Report noted that there had been an increase in the base cost of Infraco of £17.8m compared to the Final Business Case, which increase was as a result of "*substantially achieving the level of risk transfer to the private sector anticipated by the procurement strategy*" and that the increase of £17.8m approximated closely to "*the allowance which was made in the FBC for procurement stage risks i.e. the increase in Base Costs which might have been expected to achieve the level of price certainty and risk transfer which has been achieved*" (p4).

(1) What was your understanding of, and views on, these matters?

I was not involved in this and had left by then.

77. Mr Bissett's e-mail of 28 April 2008 also attached a letter dated 28 April 2008 from DLA to CEC and TIE (**CEC01312368**), a DLA/TIE Risk Matrix as at 22 April 2008 (**CEC01312367**) and a Report on Infraco Contract Suite (**CEC01312363**).

The Report on Infraco Contract Suite noted, in relation to Price, that "*A number of core pricing and programming assumptions have been agreed as the basis for the Contract Price. If these do not hold, Infraco is entitled to a price and programme variation known as "Notified Departure"* (p4) and, in relation to Programme, that "*Following contract signature, it is expected that BBS will seek a Notified Departure on Programme due to SDS delay in design production*" (p4).

(1) What was your understanding of, and views on, these matters?

I was not involved in this and had left by then.

(2) What was your understanding around that time of the likely number and value of Notified Departures after Financial Close?

I was not involved in this and had left by then.

(3) To what extent were these matters discussed with CEC?

I was not involved in this and had left by then.

78. By e-mail dated 30 April 2008 (**CEC01274958**) Willie Gallagher noted that Richard Walker had advised that Bilfinger required an additional £12 million to conclude the deal, despite a deal having been negotiated and agreed by all parties on 14 April.

A meeting of Council on 1 May 2008 was provided with a report dated 23 April 2008 by CEC's Chief Executive (**CEC00906940**) which noted that: the cost of the project was now £508m (comprising a base cost of £476m and a revised QRA of £32m), which increase was largely due to the firming up of provisional prices to fixed sums, currency fluctuations and the crystallisation of the risk transfer to the private sector as described in the Final Business Case; 95% of the combined Tramco and Infracore costs were fixed with the remainder being provisional sums which Tie had confirmed as adequate; and that *"As a result of the overlapping period of design and construction a new risk area has emerged which has been the subject of extensive and difficult negotiation. TIE Ltd advise that the outcome is the best deal that is currently available to themselves and the Council. Both TIE Ltd and the Council have worked and will continue to work diligently to examine and reduce this risk in practical terms"* (para 3.10).

(1) What was your understanding of why BSC sought a further £12 million to conclude the deal?

I was not involved in this and had left by then.

(2) What problems did that cause?

I was not involved in this and had left by then.

(3) What was your involvement in resolving that matter? Did TIE agree to pay the further sum sought and, if so, why?

I was not involved in this and had left by then.

(4) What were your views on the matters in the report to Council noted above?

I was not involved in this and had left by then.

79. In his internal Weekly Report dated 2 May 2008 (**PBH00018873**) Steve Reynolds noted:

"Two observations are that:-

- *tie has sponsored a paper which was materially incorrect at the time when it was presented to CEC.*
- *The price increase proposed by BSC would result in an overall price of £520m in comparison with the overall funding limit of £545m. This is without any allowance for costs to cover changes to scope and programme necessary to bring about alignment of the BSC Offer and the SDS Design".*

(1) What are your views on these matters?

I was not involved in this and had left by then. **Plus**, as I noted previously, I was not involved in the SDS Contract with Parsons Brinckerhoff.

- (2) Had the misalignment between the SDS design, the ERs and the Infracore proposals noted above been resolved by this stage (and, if not, what problems did that cause)?

I was not involved in this and had left by then. **Plus**, as I noted previously, I was not involved in the SDS Contract with Parsons Brinckerhoff.

80. We understand that Mr Gallagher met with Mr Enenkel, BSC, on 5 May 2008. By e-mail dated 5 May 2008 Mr Enenkel proposed that in the event that Phase 1b did not proceed TIE would pay BSC £3.3 million under the contract for Phase 1a (**CEC01337607**) (Mr Enenkel sent a clarification e-mail on 6 May 2008, **CEC01274976**).

Mr Gallagher wrote to Mr Enenkel on 6 May, listing a number of conditions on which BSC would retain its position as preferred bidder (**CEC01284033**).

- (1) What was your awareness of, and views on, these discussions?

None, I had left by then.

- (2) In his e-mail dated 7 May 2008 (**CEC01275063**) Mr Gallagher stated, *"We cannot be seen to have signed contracts and then be doing nothing for a few months. There is nothing new here. Richard, Scott and the team put together the BB Construction Programme which is an integral part of the contract. If we ask you to move away from that unreasonably, then it is a tie notified departure from your pricing assumptions"*. What did you understand Mr Gallagher to mean by that?

As previous, I had left by then.

- (3) What agreement was eventually reached in respect of the price increase?

As previous, I had left by then.

81. On 12 May 2008 (at 18.49 hours) Graeme Bissett circulated an e-mail to CEC (**CEC01338846**) attaching a final set of TIE's internal approval documents.

The Financial Close Process and Record of Recent Events dated 12 May 2008 (clean copy, CEC01338847; tracked changes, CEC01338848) noted that a response was received from BBS on 7 May 2008 which proposed a payment of £9m to BBS and *"Further examination of the contract terms surrounding the design management process, which although unclear pointed to an extended design and consent programme with potentially material adverse consequences for the construction programme"* (p4).

- (1) What was your understanding of that matter?

As previous, I had left by then.

82. On 13 May 2008 parties signed the Kingdom agreement (**WED00000023**).

- (1) It would be helpful if you could explain your understanding of the need for, purpose and effect of that agreement?

As previous, I had left by then.

83. On 13 May 2008 the Council's Policy and Strategy Committee considered a report by the Council's Chief Executive (CEC01246115).

The report advised that the estimated capital cost for phase 1a was now £512.2 million. The report stated that *"Offsetting the increase in cost is a range of negotiated improvements in favour of TIE and the Council in order to reduce the risk of programme delays and minimise exposure to additional cost pressures, as well as better contractual positions"*.

(1) What are your views on the statement noted above?

As previous, I had left by then.

(2) Do you agree with it? If so, what do you consider were the "improvements" and "better contractual positions" that reduced the risk of programme delays and minimised exposure to additional costs?

As previous, I had left by then.

84. Infraco contract close took place on 14 and 15 May 2008, as part of which a number of contracts were signed, including the Infraco contract (CEC00036952) and novation of the SDS contract to BSC.

By way of overview, what was your understanding of the following matters at contract close:

(1) The extent to which detailed design was complete (and all necessary statutory approvals and consents had been obtained), the extent to which these matters were outstanding and when the detailed design was likely to be completed (and all approvals and consents obtained)?

As previous, I had left by then and not involved in design or Schedule 4 beyond early draft.

(2) The extent to which utilities diversions were complete, the extent to which these works were outstanding and when these works were likely to be completed?

As previous, I had left by then and was not involved in MUDFA but I had understood (at the time) that it was 'approaching completion' when I left.

(3) The likely effect on the Infraco works and contract (and the cost of the tram project) if the outstanding design (and approvals and consents) and outstanding utilities diversion works were not completed within the anticipated timescale?

As previous, I had left by then and not involved in these aspects.

(4) The provision made in the risk allowance for the above matters?

As previous, I had left by then.

(5) To what extent did TIE discuss the above matters with CEC? –

As previous, I had left by then and was not involved in the CEC

meetings.

85. The pricing provisions of the Infraco contract were set out in Schedule 4 (USB00000032).

(1) What was your understanding of the extent to which the Construction Works Price of £238,607,664 was a fixed price?

As previous, I was not involved in the Infraco price and I had left by then.

(2) What did you understand to be the main exclusions, provisional sums, assumptions and conditions?

As previous, I was not involved in the Infraco price and I had left by then.

(3) In what circumstances did you consider that the price was likely to change?

As previous, I was not involved in the Infraco price and I had left by then.

86. In relation to the Value Engineering deductions shown in Appendix A of Schedule 4 of the Infraco contract (USB00000032):

(1) What was your understanding of what would happen if the VE savings were not achieved?

As previous, I was not involved in the Infraco price and I had left by then. However, I would comment that VE savings are effectively provisional sums in reverse. If they are not achieved the cost goes up.

(2) What were your views as to whether the VE savings were likely to be achieved?

I was not involved.

(3) In the event, were these Value Engineering savings achieved (and, if not, why not)?

I was not involved and had left by then.

87. Schedule 4 of the Infraco contract (USB00000032) contained a number of Pricing Assumptions.

At the time of Infraco contract close:

I left a while before the Infraco contract close and Schedule 4 would have changed in that time.

What did you consider were the main Pricing Assumptions that were likely to change and result in Notified Departures and why?

(1) Approximately how many Notified Departures did you consider were likely to arise?

(2) What did you consider to be the likely total value of the Notified Departures?

(3) To what extent were the above matters discussed with CEC?

88. Pricing Assumption 3.4 of Schedule 4 (USB00000032) dealt with design development.

(1) What was your understanding of the meaning of that Pricing Assumption, including which party bore the risk that development, or change, of design from the base date of 25 November 2007 would result in a Notified Departure?

I had left by the time Schedule 4 was finalized and this clause has changed. Pricing Assumption 3.4.1 put the risk of change on TIE. This would be expected if instigated by TIE (or not instigated by Infraco). It also excluded development of designs but that could still be fertile ground for argument. Pricing Assumption 3.4.2 to 4 put the risk of late design on TIE. This would be expected in the circumstances and may go towards explaining the reason for the SDS incentivisation agreement.

89. Schedule 4 defined the "Base Date Design Information" as "*the design information drawings issued to Infraco up to and including 25th November 2007 listed in Appendix H to this Schedule Part 4*".

Appendix H of Schedule 4, however, did not list any drawings and, instead, simply stated that the BDDI was "*All of the Drawings available to Infraco up to and including 25th November 2007*".

(1) Are you aware why Appendix H of Schedule 4 did not list the drawings comprising the BDDI?

As previous, I was not involved in the Infraco price and I had left by then.

(2) Did that cause any problems at a later stage (and, if so, what problems arose and how were they resolved)?

As previous, I was not involved in the Infraco price and I had left by then.

90. At Infraco contract close the SDS contract was novated from TIE to BSC.

As previous, I had left by then and had not been involved with the SDS contract.

(1) What was your understanding in relation to who would be responsible for managing the design process after novation and for ensuring that all outstanding design (and all outstanding statutory approvals and consents) was completed/obtained on time?

(2) What responsibility and powers, if any, did TIE retain after novation in relation to managing the design process and ensuring that all outstanding design (and all outstanding statutory approvals and consents) was completed/obtained on time?

(3) Do you consider that any problems arose from the fact that (i) changes to, and completion of, design was primarily under the control of BSC (as a result of novation of the SDS contract to BSC) but (ii) changes to design, or delay in completing design, could give rise to a departure from one of the Pricing Assumptions in Schedule 4 of the Infraco contract and, therefore, give rise to a Notified Departure (leading to an increase in the cost of the project)? Was any

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|--|
| <p>consideration given by TIE to that potential difficulty prior to SDS Novation?</p> <p>91. We understand that a mobilisation payment of £45.2 million was made by TIE to BSC.</p> <p>(1) It would be helpful if you could explain when the payment was made and the purpose of the payment?</p> <p style="text-align: center;">As previous, I had left by then and had not been party to any discussions in respect of such a payment when I was there either.</p> <p>(2) What were your views on the payment?</p> <p style="text-align: center;">As previous, I had left by then.</p> |
| <p>92. In early June 2008, as part of a “lessons learned” exercise, various individuals in TIE set out certain things that had not been done well (see e.g. Jim McEwan, CEC01280055; Susan Clark, CEC01350044; Steven Bell, CEC01280044; Neil Renilson, CEC01280066; Willie Gallagher, CEC01304460; Stewart McGarrity, CEC01353902; Andrew Fitchie, CEC01280047; and Dennis Murray, CEC01288688).</p> <p>(3) (1) What were your views?</p> <p style="text-align: center;">As previous, I had left by then and some of their comments related to the period after I left or before my involvement. In my experience “Lessons Learned” take the form of a workshop with a facilitator. These individuals’ comments included some scathing criticism of others that were not party to the “Lessons Learned” exercise. Thus, the exercise did not fully satisfy the usual requirement for objectivity to develop a detailed output that might have been of benefit for the future.</p> |
| <p>2008 (June to December)</p> <p style="text-align: center;">As previous, I had left by then and thus not able to answer Questions 93 to 106 below.</p> |
| <p>93. Following the completion of the procurement of the Infraco contract:</p> <p>(1) Did your job title and role change in any way?</p> <p style="text-align: center;">Not applicable.</p> |
| <p>94. Following contract close, a major dispute arose between TIE and BSC in relation to the interpretation and application of the Infraco contract and Schedule 4. By way of overview:</p> <p>(1) What was your understanding of the main matters in dispute and the main reasons for the dispute?</p> <p style="text-align: center;">I had left by then.</p> |
| <p>95. In total, approximately 738 INTCs were notified by BSC between Infraco contract close and Mar Hall in March 2011. By way of overview:</p> <p>(1) Were you surprised by the number of INTCs?</p> <p style="text-align: center;">I am unable comment as I was not involved at that stage, nor</p> |

involved in the design earlier on.

(2) What do you consider were the main INTCs in terms of value and importance?

I am unable comment as I was not involved at that stage, nor involved in the price earlier on.

96. The Tram Project Board met on 4 June 2008 (**USB00000005** at page 5). The minutes noted (page 7) that the Board were appraised of current MUDFA progress *“including the close out programmes, the current two week impact on the Infraco critical path and Revision 7 of the programme”* (slides presented to the meeting, **CEC01312258** at page 6, noted that Revision 7 of the Programme was being finalised to enable any impact to be mitigated).

David Mackay raised a concern over the *“ongoing issue of Carillion resource and supervision”*. Willie Gallagher explained that *“both tie and Carillion had underestimated the complexity of managing so many worksites”* and that areas that affect the Infraco critical path were being prioritised (page 7).

(1) What was your understanding of these matters?

I had left by then.

(2) What problems had been experienced in managing and undertaking the MUDFA works?

I was never involved with MUDFA.

(3) What was your expectation at that time in relation to whether the utilities diversion works would be completed before the Infraco works?

I had left by then.

97. The Tram Project Board met on 2 July 2008.

The minutes (**CEC01237111**) noted *“MUDFA progress is improving, but is still not as good as the project team would like. Critical areas include the Foot of the Walk, Haymarket and St Andrews Square”* (para 2.5).

In relation to Programme, it was noted that a number of significant project milestones were behind programme *“but were either not critical to the end date of the project or critical elements are being prioritised and non-critical elements delayed”* (para 2.10).

It was also noted that *“The close out plan for aligning Infraco Proposals with the SDS design (particularly roads and OLE) is being finalised and SB will report to the next TPB on the associated programme and costs”* (page 7, para 2.14).

It was noted, *“SB summarised that the primary risk register is currently light on Infraco specific risks and that a thorough review is already underway dealing with specific risks, especially mitigation plans”* (page 8, para 6.1).

(1) What was your understanding of, and views on, the matters noted above?

I had left by then.

(2) What was your understanding of the “Infraco specific risks” the risk register was light on and why? Are you aware what was done to remedy that?

I had left by then.

98. In July 2008 a Peer Review (led by Malcolm Hutchison) was carried out (CEC01327777).

The report noted, under MUDFA Lessons Learned, that *"The fact that the completion date remains uncertain (works 60% complete) will have an increasing impact on the Infraco works"*.

The report noted, under Contract Issues, *"It is unclear to the review team where risk lies for design development. BBS and tie in interview considered risk lay with the other party"*.

(1) What were your views on these matters?

I had left by then.

(2) When (and how) did you first become aware that there was a dispute between TIE and BSC in relation to where the risk lay for design development?

I had left by then.

99. By e-mail dated 17 September 2008 (CEC01130811) Colin Brady, BSC, sent a proposal for amending the Infraco contract to facilitate urgent changes, where time was critical, to prevent delay to construction operations in progress (CEC01130812) (revised versions were discussed see e.g. DLA00001329 and CEC01125115). Further correspondence took place. Matters had not been resolved by January 2009 (see e.g. Michael Flynn, Siemens, e-mail dated 16 January 2009, CEC01119821).

(1) What was the need for and purpose of that proposal?

I had left by then.

(2) Was an amendment to the change mechanism in the contract and/or a protocol agreed (and, if not, why not)? What difficulties did that cause?

I had left by then.

100. The Tram Project Board met on 24 September 2008.

The minutes (CEC01210242 at page 5) noted that there were issues around management direction and control from Carillion but significant improvement following an internal audit. Slippage on the MUDFA programme from Rev 06 to Rev 07 was currently 4 months (page 6).

Slides for the meeting (CEC01155850) noted, under MUDFA, that *"Overall, programme is now predicting an end date of March 2009 with potential impacts on INFRACO particularly if BT overlaps are difficult to address"* (page 4).

Problems were noted with Design and Consents (page 8).

Factors contributing to programme slippage included Design Change V26-V31, Mobilisation and Delivery Infraco, Design/Progress/Change V31-35 and MUDFA potential overlaps/conflicts (page 10).

(1) What was your understanding of, and views on, these matters?

I had left by then.

101. We understand that in late September 2008 BSC submitted an application for payment in relation to various claims for Notified Departures.

(1) What did these claims relate to?

16 January
should be
26 January

I had left by then.

(2) What discussion was there within TIE (and between whom) of these applications for payment? What were your views?

I had left by then.

(3) What was TIE's response?

I had left by then.

102. We understand that BSC submitted a further (or repeated?) application for payment in October 2008.

We understand that Richard Walker made a presentation to Mr Gallagher around this time with photographs and drawings showing the problems encountered by BSC with the utility works and access to the site (**WED00000025**).

(1) Do you remember what that application related to, what discussion took place within TIE (and between whom) and what was TIE's response?

I had left by then.

(2) Were you present at Mr Walker's presentation and, if so, do you remember the purpose and content of the presentation and TIE's response?

I had left by then.

103. By letter dated 13 October 2008 (**DLA00001671**) Mr Walker suggested a structured approach to progressing matters.

Mr Gallagher replied by letter dated 14 October (**DLA00001672**). In his letter Mr Gallagher stated, "*We ... feel it will be important to recognise that normal design development from the base date design was provided for in the price agreed at contract close*".

There appears to have been a conference call on 14 October 2008 (see the reference to such a call in **DLA00002766** and **DLA00002768**)

(1) What was your involvement, if any, in these matters? What were your views?

I had left by then.

104. In an e-mail dated 18 November 2008, Damian Sharp, TIE, noted that "*the lack of an agreed commercial position with BSC has been holding up completion of various alterations to the designs submitted for Prior Approval*" (**CEC01125370**).

(1) Why was the dispute between TIE and BSC holding up the completion of design by SDS and the obtaining of outstanding approvals and consents?

I had left by then.

105. A letter dated 1 March 2010 from Martin Foerder, BSC, to TIE (**CEC00578330** at para 3) noted that prior to contract award the parties had agreed that Infracore would incorporate the SDS Design Delivery Programme v31 into the Schedule Part 15 – Programme and the result would be the first TIE change. It was further noted that the proposed revised Programme was submitted to TIE on 2 June 2008 but remained without agreement until 17 December 2008.

(1) What was your involvement in that matter?

I had left by then.

(2) What agreement was reached (and between whom) in relation to the revised programme on or around 17 December 2008?

I had left by then.

106. The Tram Project Board met on 17 December 2008.

The minutes (**CEC00988028**), under MUDFA, again noted that "*Carillion performance was slower than anticipated*" (para 2.11).

In relation to Infraco, it was noted that there were ongoing discussions with BSC, collectively there had been insufficient progress but a proposal had been agreed to give BSC comfort in areas where they perceived they were exposed. There were noted to be "*access issues*" at Haymarket and Leith but there were no impediments to work at the depot and airport (para 2.15).

(1) What was your understanding of, and views on, these matters?

I had left by then.

(2) What were the "access issues" at Haymarket and Leith?

I had left by then.

EVENTS IN 2009

As previous, I had left by then and thus not able to answer Questions 107 to 112 below.

107. By letter dated 23 January 2009 (**CEC01182823**), BSC intimated a Compensation Event to TIE on the basis of the failure of SDS to achieve the release of Issued for Construction Drawings (IFC) by the dates identified in the programme in relation to section 1A, Lindsay Road Retaining Wall.

BSC intimated a number of other Compensation Events to TIE in respect of other alleged failures to achieve the release of IFCs by the dates identified in the programme.

What was your understanding of the following matters:

(1) Why were SDS unable to achieve the release of these IFC Drawings by the dates identified in the programme?

(2) Why did BSC consider that that gave rise to a Compensation Event? What were your views?

(3) Given the SDS novation to BSC, (i) why were BSC not able to take steps to ensure that SDS released these drawings on time and (ii) why was that failure not at BSC's cost (rather than at TIE's cost)?

108. We understand that a meeting took place between BSC and TIE on 9/10 February 2009 to discuss the dispute.

Stewart McGarrity produced a note of the meeting (**TIE00089656**).

(see also, for example, (i) TIE's slides provided in advance of the meeting, **DLA00003129**, (ii) TIE's note on BDDI, **TIE00665341** and BSC's response, **CEC01119885**, (iii) TIE's note on BSC Claim for Change from BDDI to IFC, **TIE00665342**, and BSC's response, **CEC01119886**).

- (1) Were you present at the meeting and, if so, what is your recollection of the meeting, including who was present, what was discussed and what was the outcome?
- (2) Mr McGarrity's notes of the meeting, (TIE00089656) record that BSC had estimated their projected outturn costs on the project as between £50m and £80m (comprising broadly £20m of direct costs due to Notified Departures/TIE changes, £20m due to extension of programme and £10m due to delay and disruption). What was your understanding of what these different heads represented?
- (3) Mr McGarrity's notes (paragraph 4) record Richard Walker as having said that there was general acceptance by TIE pre-contract that the project would cost £50m-£100m more than was in the contract at 15 May 2008. What are your views on that suggestion? What discussion was there within TIE prior to Infraco contract close of the likely cost of Notified Departures?

109. A dispute arose in relation to the Princes Street works due to start in February 2009.

After discussions and correspondence over a number of weeks, an internal TIE e-mail dated 20 March 2009 noted that David Mackay and Dr Keysberg had that morning agreed the principles of an agreed amendment to the measurement and payment regime for Princes Street (CEC01009977) .

The dispute was resolved by parties entering into the Princes Street Agreement (CEC00302099) (we understand that an initial draft of the agreement was agreed on 20 March 2009, to allow work to commence on 23 March, and that the final version of the agreement was signed on 30 May 2009).

- (1) When (and how) were you first aware that there was a dispute in relation to the works at Princes Street?
- (2) What was your understanding of the basis, and underlying cause(s), of the Princes Street dispute?
- (3) What was your understanding of why BSC refused to start work on Princes Street?
- (4) How, and when, was the dispute resolved? What was your involvement in resolving the Princes Street dispute?
- (5) Why was it agreed that BSC would carry out the Princes Works at demonstrable cost (plus overhead and profit percentages etc)?
- (6) Did you consider that that was likely to result in the cost of the Princes Street works being greater than the sum allowed for these works in the Infraco price?

110. By letter dated 30 April 2009 (CEC00322635) Steven Bell sent BSC revision 8 of the MUDFA Programme.

That resulted in an INTC from BSC, who asserted that *"tie's failure to procure the completion of the Utility Works in accordance with the Infraco programme, as evidenced by the MUDFA Programme Revision 8, constituted a Notified Departure. This Notified Departure, based on, inter alia, the current facts and circumstances differing from Pricing Assumptions 24, is a deemed Mandatory tie Change"* (per BSC's letter dated 4 September 2009, DLA00001723).

- (1) Do you have any comments on that? Do you agree, for example, that, in principle, a revision to the MUDFA programme resulted in a Notified Departure and a Mandatory TIE Change?
- (2) Similarly, did, in principle, any change to the design programme result in a Notified Departure and a Mandatory TIE Change?

111. An informal mediation took place between TIE and BSC between 29 June 2009 and 3 July 2009.

- (1) Were you present at the mediation? If so, it would be helpful if you could explain

who was present at the mediation, the matters discussed and the outcome?

112. An adjudication decision was issued on 13 October 2009 by Robert Howie QC in relation to the Hilton Hotel car park works (**WED00000026**, page 10)

Adjudication decisions were issued on 16 November 2009 by Mr Hunter in respect of the Gogarburn Bridge (**CEC00479432**) and Carrick Knowe Bridge (**CEC00479431**).

On 4 January 2010 Mr Wilson issued his adjudication decision in relation to the Russell Road Retaining Wall Two (**CEC00034842**).

- (1) To what extent, if at all, were these adjudications intended to establish principles of wider application, or provide guidance, in relation to the other matters in dispute?
- (2) What were your views on these adjudication decisions, including the extent to which they favoured TIE or BSC (both in relation to whether a change had occurred and in relation to the value of that change)?
- (3) Did these decisions give you any pause for thought as to whether TIE's strategy, including its understanding of the contract, was correct?

EVENTS IN 2010

As previous, I had left by then and thus not able to answer Question 113 below.

113. By way of overview:

- (1) What was your role at TIE in 2010?
- (2) What was the main matters you were involved in?
- (3) When did you leave and why?

I had left at the end of March 2008 after selection of preferred bidders. Dennis Murray and Eric Smith had been appointed and there was a reasonable period of over-lap, so my departure was not leaving anyone in the lurch and had been mutually agreed.

PROJECT MANAGEMENT, GOVERNANCE AND CONTRACTORS

114. In relation to project management:

- (1) Which body or organisation do you consider was ultimately responsible for ensuring that the contracts and works were properly managed, including managing the interface between the different contracts and works (both before and after Infracore contract close in May 2008)?

TIE was responsible but they were an 'arm's length' company of CEC and could have been caught up in requirements from CEC or other stakeholders.

- (2) Did you have any concerns at any stage in relation to TIE's management of the tram project or the performance of any of TIE's senior personnel or Board members?

I was largely unsighted on aspects of the project I was not dealing with. I do recall a couple of exasperating discussions trying to get a straight answer from SDS. Some senior TIE personnel were fairly aloof, so it was difficult for me to gauge their performance.

- (3) Did you have any concerns at any stage in relation to TIE's reporting to CEC (or

others)?

I was not party to this reporting or meetings with CEC.

115. In relation to CEC:

(1) How were important matters relating to the tram project reported by TIE to CEC (including by whom and to whom)?

There were meetings, that I was not involved with and I was not party to any reporting. Various senior managers were involved. Andrew Fitchie had a direct reporting role to CEC.

(2) How were the views and requirements of CEC fed back to TIE?

There were meetings but I was not involved in them.

(3) Did you have any concerns at any stage in relation to the performance of senior CEC officials or councillors?

I was not involved with them.

116. In relation to the Tram Project Board (TPB):

I was not involved in these meetings.

(1) How were important matters relating to the tram project reported by TIE to the TPB (including by whom and to whom)?

(2) How were the views and requirements of the TPB fed back to TIE?

(3) Did you have any concerns at any stage in relation to the performance of the TPB or any members of the TPB?

117. In relation to TEL:

(1) How were important matters relating to the tram project reported by TIE to TEL (including by whom and to whom)?

(2) How were the views and requirements of TEL fed back to TIE?

(3) Did you have any concerns at any stage in relation to the performance of TEL or any members of TEL?

I only dealt with Alistair Richards ^{and} had no concerns.

RSD
09/04/17

118. In relation to the Scottish Government (SG) and Transport Scotland (TS):

(1) How were important matters relating to the tram project reported by TIE to SG/TS (including by whom and to whom)?

I do not now know, although I did meet John Ramsay of TS a few times with Susan Clark in the early stages.

(2) How were the views and requirements of SG/TS fed back to TIE?

I do not recall any formal process or one individual.

(3) Did you have any concerns at any stage in relation to the performance of SG/TS or any ministers or senior officials?

I did not have visibility.

- (4) What are your views on the decision taken around July 2007 that TS should play a lesser role in the governance of the project?

I do not recall.

119. In relation to the inter-action between the different bodies and organisations involved in the management and governance of the tram project:

Who? / not involved.

- (1) How were important matters relating to the tram project reported between these different bodies and how, and by whom, were decisions taken in relation to these matters?

Do not recall.

- (2) What were your views in relation to the governance arrangements for the tram project including, in particular, the effectiveness of the governance arrangements?

I do not recall.

- (3) Did you have any concerns at any stage in relation to the governance arrangements?

I had 'instinctive' concerns that things might not be as they should be but I do not recall any hard evidence.

- (4) Which body or organisation do you consider was ultimately responsible for ensuring that the tram project was delivered on time and within budget?

In theory TIE but it was working on behalf of CEC. I expect both might blame each other.

120. In relation to the main contractors involved in the tram project:

As previous, I had left by then.

- (1) What were your views on the performance of each of the main contractors?
(2) To the extent you had concerns in relation to any of the main contractors, what did TIE do to try and address these concerns? Were these steps successful (and, if not, why not)?

Final Thoughts

121. By way of final thoughts:

- (1) How did your experience of the Edinburgh Trams Project compare with other projects you have worked on (both previously and subsequently)?

Some aspects are not dissimilar to other projects but the biggest difference is that TIE was a relatively new and largely a one project body.

- (2) Do you have any views on what were the main reasons for the failure to deliver the project in the time, within the budget and to the extent projected?

The problems generally manifested themselves after I left and / or stemmed from areas that I was not involved with, so I would have no evidence for any views.

- (3) Do you have any comments, with the benefit of hindsight, on how these failures might have been avoided?

Items 48 and 54 above are examples of my concerns either not being heeded or perhaps over-ridden by others. Also, there are numerous instances where I was not involved, or excluded, so it is difficult for me to comment.

If I had been involved in the project from the very start, there are things that perhaps I would have wanted to do differently in terms of procurement and contract strategy. However, this was not the case as I was not involved until August 2006.

It would be easy to be critical of the concept of Novation of Designers that was decided before I arrived and clearly did not work in this case. However, novation can have advantages in terms of continuity of design, particularly in respect of complex interface and stakeholder issues. So perhaps the issue is less about the concept of novation and more about ensuring the design is properly addressed in a timely fashion and contractually enforceable, whatever route adopted.

of
RSD
09/04/17

Scope of project – rather than the whole network approach of the line from Edinburgh Airport to Ocean Terminal / Newhaven and another from Roseburn to Granton, it might have been better to start more cautiously. The section of the network from Edinburgh Airport to the York Place that was actually built could have been awarded on that basis from the start as a Phase 1 Contract. Lessons could then have been learned from this first contract, so that subsequent contracts could have been awarded for remaining works. This would have required the first contract to have sufficient ‘scalability’ for the future in terms of systems. A different approach would then have been needed to order fewer trams initially. However, the ability to order more as ‘Fixed Price Options’ could have been incorporated, subject to fluctuations in the future. This would have resulted in a higher cost per tram but avoided purchasing ones that ultimately have been surplus to requirements and will have depreciated or even perhaps become partially obsolete by such time they are fully required.

I have a slight reluctance to provide further suggestions on more detailed aspects of the procurement and contract strategy that could have been considered as any different approaches might then be considered for a possible future tram extension in due course and risk being taken out of context and construed as professional advice. Subsequently introduced regulations such as the Public Contracts Regulations 2015, Utility Contracts Regulations 2016 and Concessions Contracts Regulations 2016 will lead to changes

around contract modifications in particular and will require a different approach in future.

(4) Are there any final comments you would like to make that fall within the Inquiry's Terms of Reference and which have not already been covered in your answers to the above questions?

I was only involved for a period of 20 months. That did not include the initial formulation of strategy nor the post contract implementation stage where the cost and programme over-runs manifested themselves. Additionally, it is now over ten years ago, so I do not think I can add anything particularly meaningful.

I confirm that the facts to which I attest in the answers contained within this document, consisting of this and the preceding 53 pages are within my direct knowledge and are true. Where they are based on information provided to me by others, I confirm that they are true to the best of my knowledge, information and belief.

WITNESS 

DATE 9th APRIL 2017

Bob Dawson – Supplementary Note of Questions

Responses in blue

- In an email of 17 December 2007 to Trudi Craggs (TIE00898202), you noted that you had checked the latest draft of Clause 80 (TIE Changes) and it was blank. Why had it become necessary to check it at this point? I don't recall, from my e-mail it appears it was discussed at a meeting. Can you explain the contents of the paper from Geoff Gilbert which was attached to your email (TIE00898203)? Again, I don't recall but from my e-mail it appears that Geoff Gilbert had prepared the paper to enable DLA Piper to revise the draft. Beyond that, Geoff Gilbert would need to advise as it was his paper. As noted in my covering e-mail dated 7th January 2018, this was before the introduction of procurement portals and at that stage my e-mail address was the principal point of contact with the preferred bidder BBS. Thus, I only forwarded the paper. Had there been discussions with TIE as to the objectives that Clause 80 should achieve or concerns that arose in relation to it? There had been discussions originally as to the objectives of Clause 80. However, this relied on the design being prepared by Parsons Brinckerhoff / SDS being sufficiently advanced for the novation to be readily accepted. Concerns arose when the design was found to be insufficiently advanced and changes to Clause 80 were sought by BBS. As I have previously stated, I was **not** involved with the SDS Contract and the decision to Novate the Designer was established before I arrived. If so, who was involved in those discussions? It would have been TIE senior managers. Did Andrew Fitchie have a role? I was not involved in detail, so I can't be definite, but I would have expected him to have seen all contract amendments.
- It is apparent from the emails referred to below (which are a selection of the ones involving you at the relevant time) that you played a significant role in drafting Part 4 of the Schedule to the Infraco Contract ("SP4"). It may seem that way but that is not the case. I did prepare the template noted in Q5 below, but changes thereafter were largely by others and/or after I had left. I haven't done a detailed comparison, but the final version differs from that which I drafted. It appears that until your departure from TIE, you were a recipient of emails from BBS and their solicitors with revised drafts (e.g. CEC00592614) and were involved email discussions within the TIE side. As I noted in Q1 above, I was still used as a point of contact, although by that stage not exclusively, as I was due to be leaving. I may have been involved in some discussions within TIE but not all and I was certainly not responsible for Schedule 4. We understand that you left TIE at the end of March or early April 2008. Did you continue to work on SP4 until you left? I may have helped with some aspects of Schedule 4, but I don't recall. However, I did attend a 'close out' meeting in late February 2008 that was attended by most of the TIE Directors and at that stage the substantive element was still outstanding, so I could not have done much. Who else was involved in drafting SP4? As I recall, it was to be led by Dennis Murray as the Commercial Director with support from Eric Smith as they would need to fully understand and agree with the basis as they would be managing the contract post contract. Geoff Gilbert was very keen that they undertook this role as he did not want a 'not invented here' syndrome. There were four

Quantity Surveyors seconded in from TTS / Turner & Townsend to measure structures. What role was played by each person? I don't recall their names, let alone their roles and a lot would be after I left (see also Q8 below). Was there one person with overall responsibility of the Schedule and if so, who was it? As noted above, at the time I was there it was intended to be Dennis Murray. I can't comment as to whether that changed after I left.

3. You have previously said that you were not involved in discussions within TIE or with BSC as to which party would bear the risks arising from any development of, or changes to, the design in existence at that time (see answer to question 59(3)). The Wiesbaden Agreement had addressed that issue and the Inquiry has heard evidence that this was something to be addressed in SP4. Did you know of the intention/desire to transfer this risk when drafting SP4? I don't recall seeing the Wiesbaden Agreement at the time but question 59(3) of my previous statement was related to BBS's due diligence report, which was later. This would tend to suggest that the completeness of the design that was assumed by those responsible for design within TIE was behind what had been included at the time of the Wiesbaden Agreement. However, I wasn't involved in the design or the Wiesbaden Agreement.
4. What role was it intended that solicitors for each of the parties should play in drafting SP4? The solicitors' role was intended to be 'contractualizing' the language. DLA Piper seeking to protect TIE's position. Pinsent Masons seeking to protect BBS's position and perhaps maximize it!
5. **CEC01495585**, **CEC01447445** and **CEC01447446** are two emails and an attachment that is a draft of SP4. Was this the first draft? Who asked you to prepare it? Geoff Gilbert as noted in my e-mail. What were you told as to what it should contain/seek to do and what instructions were you given? As I recall, it was late on the Friday, so I had brief instructions to develop a template over the weekend. It should have been for others to do as I was not leading on Schedule 4, but I think I was around later than them and it was needed a short notice. It is apparent from the emails that you had seen the Wiesbaden Agreement (**CEC02085660**). I disagree, my e-mail dated Sunday 13th January 2008 states "I have incorporated the figures from the e-mail titled "Wiesbaden Deal" that you sent me..." I don't think I saw the whole agreement at that time. Additionally, I noted in that email, that I would need Geoff Gilbert's "input on a few things as I don't not know the background to and have made a few comments in red." This actually reinforces that I was not familiar with the Wiesbaden Agreement. Thus, my initial draft Schedule 4 is only a template, but I feel I flagged a number of uncertainties for resolution.

As an aside, **CEC01447445** is an e-mail from my personal e-mail that I sent due to a technical difficulty when working remotely. My e-mail address has not been fully redacted, please can this be corrected?

What relationship was there between it and SP4? As above, I don't recall seeing it but as noted in Q3 above, things seemed to unravel in respect of design following BBS's due diligence report, so that could explain any difference. Did you discuss the

Wiesbaden agreement with either Willie Gallagher or Matthew Crosse given that they had been present at the meeting in Wiesbaden? No, Willie Gallagher would not have discussed this with me. I don't recall discussing with Matthew Crosse as it is my recollection that he was less involved at that stage. If I did have any discussions it would only have been with Geoff Gilbert and / or Dennis Murray. Were there any pre-conditions or 'red lines' as to areas of the Wiesbaden Agreement that should be reproduced in SP4 and which could not be changed. I don't recall being involved in any such discussions.

6. Your email of 6 February 2008 to Andrew Fitchie (CEC00592614) indicates that there was to be a meeting with DLA to discuss the issue of pricing assumptions. What were you seeking to discuss in relation to them? It was not my meeting. Geoff Gilbert did mention TIE's frustration at lack of progress. Did you seek advice and, if so, what was it? I don't recall anything changing in the meeting that was held subsequently. This email attaches a draft of SP4 with Pricing Assumptions on which you have marked comments (CEC00592615). The draft containing the assumptions has been sent to you by Scott MacFadzen on 4 February (see the same email chain). This draft was the first inclusion of pricing assumptions. Had this been discussed with you in advance. I don't think so but can't be sure, more likely with others if it had been discussed. What purpose were the assumptions intended to have? It was my understanding that the pricing assumptions were to clarify the basis of BBS's pricing of certain items where the design was not sufficiently complete for BBS to price as fixed. Both my comments in blue and Tom Hickman's in pink highlighted significant concerns. All such uncertainties should have been considered carefully by those responsible to ensure the basis was realistic. For completeness, later that day you forwarded another draft with comments from Andy Steele (CEC01448355 and CEC01448356).
7. In relation to the draft with your annotations (CEC00592615), could you explain your concerns relating to the assumptions about design delivery programme (page 2 para (a)(i)), I don't recall specifically but 'negative float' means that the programme doesn't work! the inclusion of the word "materially" on page 2 I recall raising this as an issue due to the status of the design as it was inevitable that there would be changes. However small ones would not have the same impact as a material or fundamental change of scope and I was keen that BBS did not use this to 'talk up' the out-turn cost of the project and your amendment to Clause 1.1 on page 8? the wording stated "differ in any way" and thus not materially, hence my concern. What response did you receive to your comment on page 8 that all risk would come back to TIE? I don't recall, presumably the inquiry has checked my inbox?
8. The email that you sent to Richard Walker on 11 February 2008 to set up a meeting about SP4 (CEC01448511) indicates some of the TIE personnel involved in drafting SP4. What was the role of each? As noted in Q2 above, I had understood that Dennis Murray was leading as he had been appointed as the Commercial Director of TIE to take over from Geoff Gilbert whose contract was due to expire. Others were supporting Dennis, including Eric Smith and the four Quantity Surveyors seconded in from TSS / Turner & Townsend. I don't recall the precise detail of who was doing what. There were issues with structures, ground conditions, track, utilities and the Gogar Depot; i.e.

several areas, hence the secondment of additional Quantity Surveyors. Valerie Clementson was the Procurement Assistant that would have arranged rooms or dealt with administrative issues only. I don't think I attended a meeting the following day.

9. How was the TIE position in relation to the terms of SP4 determined? I suspect it would largely have been discussed at meetings between senior management. Did one person take the lead and, if so, who? As noted in Q2 above, at the time I was there it was intended to be Dennis Murray, but this may have changed. Were there internal meetings to review the various drafts? There was but I would only have attended some as my role was reduced in anticipation of my departure. The email from you to Dennis Murray of 3 March 2008 (CEC01450160) suggests that there was. If so, who attended and what matters were discussed? Attendees would have included Dennis Murray, Eric Smith, Geoff Gilbert, Jim McEwan, Steven Bell, Susan Clark, Alastair Richards, Andy Steel and others for TIE, plus Andrew Fitchie and / or Philip Hecht of DLA Piper. As noted in Q8 above, there were issues with structures, ground conditions, track, utilities and the Gogar Depot. There may have been other problem areas that I was not aware of at the time or arose subsequently. CEC01448861 is an email from you to Dennis Murray dated 14 February 2008 with notes that Geoff Gilbert made on a draft of Schedule 4. You indicate that you are incorporating his comments into a new draft. The draft with GG's notes marked on it is CEC01448862. In carrying out your task of incorporating his comments into a new draft, what did you understand by what he meant in relation to:

- The definition of Base Date Design Information (page 1)
- Paragraph (a) of the definition of Base Case Assumptions (page 2). In particular, what did you understand of the reference to design development. There was no general statement that the price included Normal Design Development despite the inclusion of this in the Wiesbaden Agreement (CEC02085660, clause 3.3, page 5).
- Paragraph (d) of the definition of Base Case Assumptions (page 3).
- Clause 1.1 (page 8)
- Clause 1.3 (page 9)

I don't recall what I understood at the time, it was 10 years ago. As noted in Q3 above I don't recall seeing the Wiesbaden Agreement at the time but question 59(3) of my previous statement was related to BBS's due diligence report, which was later. This would tend to suggest that the completeness of the design that was assumed by those responsible for design within TIE was behind what had been included at the time of the Wiesbaden Agreement. However, I wasn't involved in the design or the Wiesbaden Agreement.

10. By email dated 19 February 2008 (CEC00592621) you sent an email to Scott McFadzen and Michael Flynn with a new draft of SP4 (CEC00592622). Was this draft intended to reflect Geoff Gilbert's comments? The draft departs to a large extent from the BBS draft and returns to the form of the initial TIE draft. Why was this? BBS were seeking to soften things from the initial TIE draft and thus TIE sought to reinstate. I was not party to all discussion on the either within TIE or with BBS and / or Pinsent Masons. At page 5 the draft includes for the first time the wording that normal

development and completion of designs excludes changes of design principle. Why did you include this? I don't recall specifically but suggest it would have been included to clarify that a change to the design principle could be beyond normal development and completion of designs. I don't recall a contemporaneous example but would now suggest that if the design of a simple bridge needed slight amendment it would be design development but if the design didn't work and it needed to be a suspension bridge then that might be a change to design principle. Had you discussed it with anyone within TIE? I don't think this was my wording and would probably have been relayed to me by someone else. If so who? I don't recall who.

11. On 22 February 2008, Ian Laing of Pinsent Masons sent an email to you, Andrew Fitchie and Geoff Gilbert (CEC01449876) Noted but the e-mail was really to others and me for continuity as I was due to be leaving the following month with a further version of SP4 (CEC01449877). This deleted the insertions made by you of the word "materially" (page 6). What was your response to this? As noted in Q7, I recall raising this as an issue due to the status of the design as it was inevitable that there would be changes. However small ones would not have the same impact as a material or fundamental change of scope and I was keen that BBS did not use this to 'talk up' the out-turn cost of the project. By way of comment to Clause 2.4 (page 5), IL suggests a different approach to the pricing assumptions and, later, that approach was adopted. Did you discuss this approach within TIE? I don't think so but at that stage I was less involved than others. If so with who? I don't know, and I don't know how much later was this adopted.
12. CEC01450182 is an email dated 3 March 2008 from you to Geoff Gilbert and Ian Laing of Pinsent Masons with a new draft of SP4 (CEC01450183).
13. CEC01450544 is an email from you to Ian Laing and others dated 10 March 2008. In it, you set out wording you had "agreed". No, please re-read my wording, which was "I note below the wording agreed in the telephone conference with Geoff Gilbert and Dennis Murray." I did not agree the wording personally as I was not involved in the detail, particularly at that stage as I was due to be leaving. It appears that you had been reaching agreement with others within TIE. No, I was merely relaying that the wording had been agreed by others within TIE. I had previously flagged my concern in relation to the wording and copied the e-mail to Geoff Gilbert and Dennis Murray as they either made or were present at the agreement. Can you explain this email and the purpose of the amendments proposed to Clause 3? I don't know what circumstances had come to light that led to this amendment being accepted. Were you seeking the agreement of the consortium? I'm not sure now, it could be construed that I was seeking the agreement of the consortium or, looking at my earlier e-mail dated 6th March 2008 I may have been confirming their agreement if they had been party to the conference call. Unfortunately, it was nearly 10 years ago, and I don't recall which.
14. CEC01545414 is an email of 13 March from Suzanne Moir of Pinsent Masons with a further draft of SP4 (CEC01545415) said to reflect discussions the previous day. Her e-mail does not say who it was discussed with and I don't think I was involved in any

meeting on 12th March 2008. There are no changes to the pricing assumptions relating to design. Had there been discussion about these? Was the position agreed at this point?

15. **CEC01451012** is an email to you from Ian Laing dated 19 March 2008 attaching a new draft of SP4 (**CEC01451013**) said to reflect recent discussions. In the first pricing assumption, the statement that the price includes for any impact of normal design development is deleted. This inclusion had reflected the Wiesbaden agreement. Why was it removed? The e-mail may have been sent to me, but I was not part of the core TIE team involved at the time as I was due to be leaving at the end of the month and I did not attend the meeting. Did it reflect the discussions that had taken place? I can't comment as I wasn't involved in those discussions. All I can suggest is the difference in time between the Wiesbaden Agreement and BBS's due diligence report noted in Q3 above. There is then addition of wording as to the meaning of normal design development and what is included in the proviso after sub-clause 1.3 (page 7). What was the purpose of this. This amended drafting appears to create a circularity; (i) it is said that there shall be no change of design principle etc, (ii) it makes an exception for this for amendments arising from the normal development and completion of designs, *but* (iii) says that normal development and completion of designs excludes changes of design principle etc. This appears to have the effect that the exception as to normal development and completion of designs is irrelevant. Do you agree? Was this discussed? Why was it done?
16. It is clear from an email from Philip Hecht of DLA to you and others (**CEC01451053**) that the Pinsent Masons draft was discussed at a meeting the following day. I don't read it that way, the e-mail dated 20th March 2008 refers to a meeting that day. Also, the e-mail was really to others and me although I was due to be leaving the following week. This email includes a marked-up version showing what was agreed (**CEC01451054**). None of the matters discussed above are the subject of revisions. Were the proposed Pinsent Masons changes agreed at the meeting? I don't know, this was only a week before I was due to leave, so I was not deeply involved. What discussion had there been about them within TIE prior to the meeting. I would have expected so, but I don't recall being involved in any discussions. Philip Hecht's email was copied to Andrew Fitchie. What role was played by Andrew Fitchie and Philip Hecht, his assistant in relation to SP4? I don't know the detail of the roles that each played but their involvement was much greater than mine, even while I was still there. DLA Piper's appointment was on a timecharge basis, so their timesheets and fee accounts may shed so light on the extent of time and activities. I had been responsible for passing DLA Piper's fees previously, but this was transferred to someone else in anticipation of me leaving and I can't recall who.
17. On 26 March 2008, Ian Laing emailed you and others (**CEC01451185**) pointing out that the design delivery programme in the assumption was v26 but that the one that would be used in practice was v28. He notes that there is a possibility that there would be an immediate Notified Departure on execution of the contract and asks that you confirm that this is agreed and understood by TIE. What did you do in response to this? That was the Wednesday before I was due to leave on the Friday. I only received the e-mail as I had been acting as the point of contact for continuity, so I would have passed

on to others and I don't recall who, but I assume the Inquiry can check. With whom did you discuss it? I don't recall specifically, probably Geoff Gilbert but possibly others too. What likelihood did you consider that there was of a Notified Departure? As I have mentioned previously, I was not involved in the core TIE team at that stage as I was due to be leaving. I had sensed that things were not going well but I did not have the detailed knowledge to comment. However, given Ian Laing's e-mail, then a likelihood could not be ignored. What was the likely or possible financial exposure arising from this and how did you come to your view. I had not been involved in the financial evaluation of the Infracore tenders, nor involved in any subsequent pricing, so I did not have a view of the financial exposure. Nevertheless, I did query this as I had a concern that a significant cost increase could impact on the procurement process and warrant going back to the unsuccessful bidder. However, the amounts mentioned at the time were within a relatively small percentage margin of the tender and nowhere near the scale of the cost over-run that ultimately occurred. Were there other Pricing Assumptions in relation to which it was likely or possible that there would be a Notified Departure? Clearly every item that BBS requested to be a Pricing Assumption had the potential to constitute a Notified Departure and should have been something for TIE to have focused their efforts on ensuring those assumptions were realistic and promptly settled post contract. Had any work been carried out to price the effect of these assumptions? I don't recall but that would have been part of the reasoning behind appointing the Quantity Surveyors from TSS / Turner & Townsend. If so, by whom had it been carried out? I don't recall but I expect this was largely after I had left.

18. Jim McEwan was one of the recipients of Ian Laing's email and sent it on to Andrew Fitchie for advice. The email forwarding it and AF's response are found in **CEC01465933**. Did Jim McEwan discuss with you the need for advice? No, by Monday 31st March 2008 I had officially left (although I did end up going back for two days later in the week). As you will see, these later e-mails were not copied to me. In any event, Jim McEwan would not have discussed the matter with me. What was AF's role in providing advice generally about SP4? I wasn't closely involved with him at that stage, but he was heavily attending meetings with TIE senior management and BBS. What was the reaction in TIE to Andrew Fitchie's advice? I don't know, I was not party to that.