

## THE EDINBURGH TRAM INQUIRY

### Witness Statement of Dr Sharon Fitzgerald, DLA Piper Scotland LLP

17 February 2017

My full name is Sharon Fitzgerald. My date of birth is [REDACTED] My contact details are known to the Inquiry.

*Statement:*

#### Duties and Responsibilities

1. It would be helpful for the Inquiry if the following background information could be provided with regards to duties and responsibilities:

a) What were your duties and responsibilities as an Associate and then Partner in DLA?

**Response from SF:**

I refer to my CV which can be found at (CVS00000007). I joined DLA Piper (DLA) in 2003 and I was promoted to Associate in October 2004. I became a Partner of DLA in January 2007. As an Associate and a Partner, I worked and still work, in the Finance and Projects Team in our Edinburgh Office as a Projects lawyer. In terms of my role, I draft and negotiate contracts in respect of a range of different types of project. I work for both public sector and private sector clients. I work generally in infrastructure projects and very often in respect of transport projects (including rail projects).

b) What were your duties and responsibilities as an Associate and then Partner in DLA, in respect of the tram project?

**Response from SF:**

My duties and responsibilities as an Associate and then Partner in DLA in respect of the tram project can be summarised as the following. For elements of the tram project, I was involved in drafting tender and contractual

documentation, I was involved in negotiations and I was involved in giving public procurement advice.

- c) With which aspects of the contract suite were you predominantly involved (Procurement, Design, Utilities, Infrastructure etc.)?

**Response from SF:**

I was involved in the procurement of the contract with Transdev (that was the Development Partnering and Operating Franchise **Agreement** (DPOFA) and this included a variation thereof) (2003-2004, then 2006-2007), the procurement of the design contract with Parsons Brinkerhoff (PB) / SDS (Halcrow were PB's sub-consultant) (2005), the procurement of the technical support contract with Scott Wilson (Turner and Townsend were Scott Wilson's sub-consultant) (2005), the procurement of the joint revenue committee contract with Steer Davies Gleave (2005), the procurement of the MUDFA contract with Alfred McAlpine (AMIS – who became Carillion) (2005-2009), the procurement of the INFRACO contract (I was heavily involved in the earlier stages of the Infraco procurement including negotiation when there were still two bidders in the competition but was only involved in discrete elements at financial close) (2006-2008) and I was also involved in the procurement of the Owner Controlled Insurance Programme (OCIP) procurement (2007-2008). For all of those contracts, I was involved, to a greater or lesser extent, in terms of drafting the tender / contractual documents and the negotiations.

- d) Over what period did you report to Andrew Fitchie as line manager?

**Response from SF:**

I reported to Andrew Fitchie throughout my involvement in the project. When I was an Assistant Solicitor and an Associate, Andrew was the responsible Partner for the Edinburgh tram project. He was the client partner for TIE. When I was promoted to Partner, Andrew still remained the client Partner for TIE. He also remained the location head for our Finance and Projects Team in Edinburgh. My involvement with the Edinburgh tram project was roughly between 2003 and 2009. Andrew Fitchie was my line manager throughout this period including during the period when he was seconded to TIE.

- e) Did you have line management responsibilities over others working on the tram

project?

**Response from SF:**

I had responsibility for a number of solicitors at DLA who worked on the project. There were quite a number of people. I haven't listed those people but I can provide a list of those names should it be required. As well as there being a core team in Edinburgh, there was a team in our Leeds Office. They worked on the Tramco procurement. There was also a team of DLA lawyers who were involved in the disputes after the INFRACO was signed.

- f) What was your understanding of why Dundas and Wilson (who were appointed to work on the private legislation, then on land acquisition for the tram line, putting together parcels of land for the tram route) were not appointed to deal with the contract package? Was any protocol put in place to govern the relationship between DLA and D&W and tie/CEC drawn up [CEC01641232]?

**Response from SF:**

Why Dundas and Wilson (D&W) were not appointed to deal with the contract package would be a question for TIE. TIE ran the procurement competition for legal advisors. I would suggest that the people at TIE who would be appropriate to speak to on this would be Michael Howell and Alex Macaulay. TIE had already completed the procurement competition for legal advisors before I joined DLA. I understood from Andrew Fitchie that this procurement competition was to appoint legal advisors to cover all aspects of the tram project. DLA won that competition. However, it was subsequently decided by TIE to split up the legal advice into three sections. DLA was appointed in respect of the procurement of the contracts; Bircham Dyson and Bell was appointed to draft the tram legislation; D&W was appointed to advise on land and planning.

You will need to ask TIE the reasons for appointing DLA. As a firm, DLA had experience of working on light rail projects in the UK. This type of project had not been done in Scotland before. That may have been one of the reasons why we were appointed. It would just be speculation on my part to comment on why other law firms were appointed by TIE for the other aspects of the project.

In terms of the relationship between DLA and D&W, I wasn't aware of there being any formal written protocol. At one point Ian Kendall (Project Director at TIE) asked D&W to provide a legal interface role. I think that was round about 2006.



At that time a lawyer called Edwin Godfrey from D&W was appointed. For a time we had regular meetings with Edwin and Ian but, from memory, this was fairly short-lived. It was up to TIE to manage the three different legal advisors. DLA would flag potential legal interface issues as they arose. For example, when we were working on the early drafting of the INFRACO contract, we flagged land issues and third party agreements, as being something that we needed to discuss with the D&W team. I remember email exchanges with Trudi Craggs (D&W) in terms of requesting input on that drafting. Andrew mainly dealt with Bircham Dyson and Bell.

There were also land meetings. These were especially in connection with Edinburgh Airport. These were chaired by Alastair Sim (TIE). The meetings were attended by D&W. It was Mike Fitzgerald and Raymond McMaster from D&W who attended those meetings. In summary, there wasn't a formal protocol put in place and TIE guided us on how the relationships grew between the different advisors.

- g) What was your previous experience of working or advising on major public infrastructure projects? How did your experience on the tram project compare with that?

**Response from SF:**

The Inquiry will appreciate that, from a client confidentiality perspective I can't go into the detail of identifying particular clients and projects. When I joined DLA I was about four years qualified. I had at that point worked with a range of public and private sector clients. In Scotland, I had worked on various projects which were being procured by public sector clients. Those included infrastructure projects such as roads projects. I was also involved in other contracts e.g. PFI/PPP contracts. I had extensive experience of construction and standard forms of contracts across a range of sectors. I had experience of providing public procurement advice. I had gained this experience when working in Brussels for Masons and through my time at Shepherd and Wedderburn.

My only involvement in rail or light rail before I joined DLA was in terms of having worked on an English light rail PFI project during my time at Masons. I worked in Masons' London office. During that time I was very much a junior lawyer "mucking in" with the close of a very big project. I can't say that I was leading on

the negotiation of key contracts on that project.

It is difficult to make a general comparison between the tram project and prior infrastructure projects I had been involved with. An observation I would make is that, with some of the projects that I worked on, there was more of a day to day involvement of the external legal team with the procuring authority's in-house legal team. However, I would then contrast that with other projects where legal services were entirely outsourced and there was very little interaction between the internal and external legal team. The difference, in respect of the tram project was that there was no senior in-house legal team at TIE and the interaction with CEC's legal team was, in my experience, fairly limited. TIE did try to establish an in-house legal team and this was reflected by DLA largely being stood down on the project by TIE for a period of time in 2007. In my opinion, it would have helped the project if there had been an in-house legal team who understood the contract suite and were responsible for the internal legal management of the project including, for example, the management of the internal governance process.

In terms of a comparison with other projects, there did seem to be an issue associated with the continuity of personnel throughout the tram project. In other projects I have worked on, I have seen the personnel who have worked on a project from the outset continuing to work on that project throughout procurement, dialogue/negotiation, award and then contract administration. That didn't happen on the tram project to a large extent.

### **The Nature of the Appointment of DLA**

2. By letter addressed to Alex MacCaulay dated 23 June 2005 [CEC01660254] DLA confirmed that while they owed the same contractual duty of care to the Council as they owed to TIE, they were authorised to receive and seek all instructions solely from TIE as Project manager and agent for CEC. They were not under obligation to advise CEC staff or members directly and were able to rely upon tie's instructions as CEC's instructions.

By letter of the same date [CEC01660255] DLA also noted that "we are happy to extend to CEC the same duty of care we owe to tie. Since we have contracted on the basis of tie Limited as client and the party who instructs us, we believe it



would not be reasonable to place us in a position where we have to make assumptions about CEC's interests or instructions.”

- a) What protection and comfort did DLA take from agreeing that instructions from tie were tantamount to instructions from CEC?

**Response from SF:**

There was a legal services agreement between TIE and DLA. Prior to that there had been a public procurement process to appoint us. I think it is very important to consider the relationship between TIE and CEC and how we became comfortable in terms of accepting instructions from TIE.

TIE was a subsidiary company set up specifically by the CEC to deliver the tram project. TIE was wholly owned, controlled and funded by CEC. If TIE had not been wholly owned, funded and controlled by CEC there would have been a procurement issue in terms of CEC using TIE as an agent. There is a procurement case called '*Teckal SRL v Comune de Viano*' which is to do with procuring authorities using the services of entities which that procuring authority wholly owns and controls.

TIE was staffed by a number of ex-CEC employees e.g. Alex Macaulay. There were other CEC personnel who were involved at various stages in the project, including Barry Cross, Lindsay Murphy, David Burns and Ken Macleod, and then latterly the likes of Keith Rimmer (who had responsibility initially as CEC's Director for Transport). I think Keith Rimmer ultimately became a TIE employee. Other Council staff, e.g. Duncan Fraser, were seconded into TIE.

CEC had the legislative powers for the project. CEC was using TIE to assist it in the delivery of those legislative powers.

The funding from the Scottish Government came through CEC. CEC was using its specially created entity (TIE) to deliver the project.

For both myself and DLA, what we saw was that TIE and CEC effectively had aligned interests in terms of the delivery of the project. TIE was instructing us but in turn TIE was being controlled by CEC. That is how we became comfortable with that relationship.

In terms of how, for example, our legal bills were paid, TIE didn't have a separate

source of income. The funding was drawn down through money which was being provided by CEC. We were dealing with a transport team who were being funded and controlled by the parent. The parent had staff from the parent entity actually embedded within that team.

There was also a practicality associated with us taking instructions from just TIE. If we had been receiving two different sets of instructions then it would have been very difficult to deliver our legal services.

- b) Were there ever occasions where DLA thought it appropriate to raise matters with CEC directly, or ensure that matters were brought to their attention?

**Response from SF:**

There weren't ever any occasions where I thought it was appropriate to raise matters with CEC directly or ensure that matters were brought to their attention. This was because I acted in accordance with the contract with TIE and our duty of care letter. It wouldn't have been appropriate for me to be acting in any way other than in accordance with the protocol that had been agreed with TIE.

- c) Did you consider that you were primarily instructed by TIE or CEC?

**Response from SF:**

It would be TIE who primarily instructed us. TIE, in turn, were acting on behalf of CEC.

There was a legal services contract between TIE and DLA.

When I look back at this duty of care letter, it is addressed to TIE, but it was intended that the CEC would be able to rely on that letter. There wasn't a direct appointment or a contract between DLA and CEC other than the obligations which were constituted in terms of this duty of care letter.

- d) Was the effect of the second letter above that you proceeded on the assumption that the interests of CEC were the same as those of TIE at all times? Did you, at any time, have any concerns that the interests of tie and CEC may not be the same?

**Response from SF:**

Yes, it had always been our assumption that the interests of CEC were the same as those of TIE at all times. It had always been our assumption that we were acting on this basis. That was for all of the reasons which I have given earlier in terms of the relationship between TIE and CEC i.e. parent and subsidiary. TIE were delivering the project on behalf of CEC. CEC had the funding and the legislative powers which its delivery company was assisting with.

I did not, at any time, have any concerns that the interests of TIE and CEC may not be the same. As far as I was concerned the relationship between TIE and CEC, as I understood it, was governed by the operating agreement that they had between them and the governance arrangements of the TIE and TEL Boards. I understood that there were CEC officers who sat on those Boards. As far as I was concerned, there was a governance structure in place which included CEC in it, and that was the means by which CEC ensured that its interests and TIE's interests were the same.

- e) Did you, at any time, consider that there were issues in respect of which it may be prudent for CEC to have obtained obtain independent legal advice?

**Response from SF:**

I cannot comment on this as it was for CEC to satisfy themselves on whether it was prudent for them to have obtained independent legal advice.

In the work I carried out, I didn't ever see there was a potential conflict of interest. My role was to assist with the procurement and drafting of contracts. If there had been a conflict of interests, then it would have been my professional responsibility to flag that up.

- f) Did you, at any time, discuss these matters with Mr Fitchie, TIE or CEC?

**Response from SF:**

No. See previous answer.

3. At a later date (10 August 2007) the Council sought legal acceptance from DLA that the Council was a joint client with TIE [CEC00013273].

- a) Are you aware why CEC sought that confirmation and why CEC considered that the duty of care towards CEC acknowledged by DLA in their letter dated 23 June 2005 was insufficient to protect CEC's interests?



What additional protection or comfort did joint client/ ultimate client status give CEC?

**Response from SF:**

I note that this is internal CEC correspondence. I was not aware of why CEC sought confirmation. I don't know the internal background reasons for CEC seeking that legal acceptance from us. I would just observe, from having read the letter, that in my view, it does represent a misunderstanding of CEC's responsibilities in respect of the procurement of the tram project. CEC did have funding responsibilities. There were governance arrangements in place.

Interestingly, when I look at the later duty of care letter from a contractual perspective, I am not actually sure that it changes the position from the original duty of care letter. Certainly, from my perspective, we were exercising the same duty of care throughout the project. This was, from my perspective, because TIE and CEC were, in essence, the same entity.

There is a reference in the correspondence about letting "TIE off the hook" by giving joint client status. I really don't understand what is meant by that comment. The email came from Colin Mackenzie (CEC). I would suggest it is really for Colin to explain the correspondence and the comment on the additional protection. My view is that the additional duty of care letter was largely redundant because it is in the terms of the original duty of care letter. The way I had always acted was on the basis of the interests of both parties being aligned. As far as I was concerned, an instruction from TIE was equivalent to an instruction from CEC.

4. On 16 August 2007 [CEC01711054] DLA sent the Council a draft letter [CEC01711055] accepting, as requested, that the Council and TIE were "joint clients", but this acceptance was given on the understanding that instructions from TIE were "identical to CEC's instructions as if emanating from CEC itself and as taking into account CEC's requirements, objectives and best interests".
- a) Why did DLA seek to reinforce that while tie and CEC had joint client status, instructions from tie were relied upon as tantamount to instructions from CEC?

**Response from SF:**

Instructions needed to come from a single source. I saw that as being consistent with our earlier duty of care and the way in which I had already been advising in

respect of the project. By that time, in 2007, we had already been working on the project for about four years. We were just seeking to ensure consistency in terms of that. What we were signing up to reflected how we had been working on the project.

- b) In your view had there in fact been a "historic commonality of interests between TIE and the Council"?

**Response from SF:**

Yes. As far as I was concerned there had been a historic commonality of interests between TIE and CEC in terms of the overall objectives of the project. However, I was aware of frustration, probably on the part of both sides, in terms of a perceived lack of engagement on certain issues. What I would say from my general experience is that this is not uncommon where you have a multi-stakeholder project that is procured over a long number of years involving a large project team.

- c) There appears to have been hesitance on the part of at least some Council officers to agree that there had been "historic commonality of interests between TIE and the Council" [CEC01567615] and that instructions from TIE were identical to instructions from CEC itself. It was suggested that DLA would be asked to provide CEC with an updated letter of comfort with no caveats [CEC01400601]. Are you aware whether such a letter was ever requested?

**Response from SF:**

I am not aware whether a letter was requested. I would suggest that this would need to be checked with Andrew Fitchie. In terms of the actual historic commonality of interests and CEC's view that there hadn't been that interest, that was something that I wasn't aware of. This is a comment made in an internal email which I didn't see at the time.

- d) Did you agree with the Principal solicitor of the Council that the contractual framework was quite unusual and had potential risks for the Council [CEC01400601]? What did you consider these risks to be?

**Response from SF:**

Generally, what I would say is, when comparing the tram project with other major infrastructure projects and reviewing the elements of the structure which related to parent and subsidiary entities, and the fact that there was grant funding, the actual required structure was not unusual. Often on a major infrastructure



project, if there is a subsidiary entering into the contract, the counter party to that major contract is looking to the ultimate parent to give comfort that the parent is standing behind the obligations of the subsidiary. As far as looking at this from a private sector perspective, the tram project / TIE were signing up to substantial obligations in the INFRACO contract which related to payment of large sums of money. From a private sector perspective there needed to be comfort that the funding, which was coming from the Scottish Government to CEC, and the funding from CEC, would flow to TIE in order for TIE to make those payments. In that sense, the structure wasn't unusual.

I would have expected that when CEC was setting up TIE as its subsidiary and the entity which was going to enter into the contracts for the project, that these sorts of issues would have been considered. It is not that the subsidiary just "sits there" as an independent entity that can be "cut off" if things don't work. The parent and subsidiary are intertwined in terms of their obligations.

For any kind of infrastructure project there are risks for procuring authorities. It wasn't just that these risks were present in the tram project, they would also be present in the roads projects that I had worked on previously. In fact, they would be present in any of the other projects I had worked on. Indeed, there are always going to be potential public sector risks with everything any public sector body, including CEC, does.

In terms of an analysis of that risk, the structure and funding issues had been the subject of business cases, Board approvals and Gateway reviews. I suppose that is why I'm surprised to see an email from 2007 which is referring to this as an unusual structure. There were risks for CEC. There should have been a discussion four years before that on the structure and risks. These discussions would have preceded my own involvement in the project. It may have been that the Principal Solicitor hadn't been involved in those early discussions and was commenting on the basis of his own knowledge rather than the knowledge of CEC. That, however, would be speculation on my part. Just to be clear, the first time I saw this email was when the Inquiry provided it to me.

5. By e-mail dated 18 January 2008, Colin Mackenzie sought confirmation of the nature of the appointment of DLA, namely whether there was either a Duty of Care or full agency in place?



- a) Were you aware that there remained uncertainty on the part of at least some Council officers as to the nature of the appointment of DLA (i.e. as to whether there was either a Duty of Care or full agency in place [CEC01400601]), notwithstanding DLA's letter sent on 16 August 2007?

**Response from SF:**

On the basis of the internal correspondence I have been shown by the Inquiry, I was certainly not aware of any continuing uncertainty. In terms of Colin's reference to duty of care or full agency, I am actually not sure what he means by that because clearly DLA weren't acting as agents for the Council in the delivery of the project. We were appointed to deliver legal services under our contract. I am not clear what the particular issue was and I wasn't aware of it at the time.

## The Procurement Strategy

6. In general, what was your involvement in advising TIE on the procurement strategy for the tram project? What was the role of others in DLA in providing advice on that matter? How was advice provided by you, or others in DLA, in relation to the procurement strategy?

**Response from SF:**

My involvement in advising TIE on the procurement strategy for the tram project was that I worked with Andrew Fitchie, TIE, Partnerships UK (PUK), technical advisors (that would be Faber Maunsell and Mott Macdonald) and the financial advisers (Grant Thornton) during the discussions of 2003/04. Initially it was Alex Macaulay from TIE who was involved with developing the procurement strategy. Latterly it was Ian Kendall (TIE). In terms of the strategy itself, I was involved in meetings and commenting on papers. There were Gateway reviews as the project went on. I was asked to participate in the Gateway reviews. I would be interviewed as a legal advisor for the project. There were other presentations, business cases and ad hoc reviews. I would say that the procurement strategy for the tram project was very much a strategy which was formed out of the experiences of a group of people. It wasn't one individual who came up with the strategy. It was something which the group developed. The strategy was tested

within that group as well as by independent reviewers.

In terms of the individuals who were involved, the main people were Alex Macaulay (TIE), Andrew Fitchie (DLA), Martin Buck/James Papps (PUK), Doug Blenkey (Faber Maunsell), David Hand (Mott MacDonald), myself (DLA), Ian Kendall (TIE) and Iain Bowler (DLA) (in respect of tram procurement).

There were so many TIE project directors on the project alongside new advisors coming on at different stages. This meant that the procurement strategy was interrogated by quite a wide group of people. The same was true when the Price Waterhouse Cooper (PWC) team was appointed.

There were a number of people, over a long period of time, looking into the strategy and asking the question *"does this continue to be what is the right thing for this project?"*

7. Did DLA representatives regularly attend or sit in on meetings of the TIE Procurement Working [CEC01761677] and/or the "Design, Procurement and Delivery sub-committee [CEC01710438]?"

**Response from SF:**

I have checked back in terms of the correspondence which was made available to me by the Inquiry and the email reference. The email from Andrew highlights that DLA was not involved in 2007. There were meetings of the Procurement Working Group during the DPOFA procurement. Those were the meetings that were looking forward to the procurement of the other contracts.

The Design Procurement Delivery Subcommittee, from the minute that has been produced, looks like it was an internal committee. Andrew flags in his email correspondence that we are not involved in Design, Procurement and Deliver sub-committee. I don't know if we were subsequently involved after the date of Andrew's email. You would need to check with Andrew. It may be that the functions of that sub-committee were carried out by another named group. I don't think I was involved in anything relating to that sub-committee. I can say that we did have team meetings where the status of the procurement and outstanding issues were discussed.

8. It was initially proposed that the procurement strategy for the tram project follow



a variation of a conventional design and build contract (i.e. whereby risks arising from design and construction are transferred to the successful bidder, albeit at a price premium) (see e.g. (a) September 2002 Turner and Townsend Report [CEC01868789], (b) September 2002 TIE report [CEC01623145] and (c) a July 2003 paper by Grant Thornton, Infrastructure Procurement and Funding Options Evaluation [CEC01868299]).

In 2004/05 a procurement strategy was developed whereby (i) there would be separate contracts entered into for each of the works, (ii) the design and utility works would be carried out in advance of the infrastructure works and (iii) the design contract would be novated (i.e. transferred) to the infrastructure contractor when the infrastructure contract was entered into.

The chosen procurement strategy is set out in the following documents, namely:

(a) the September 2004 Updated Preliminary Financial Case for line 1 [CEC01868590];

(b) the May 2005 Draft Interim Outline Business Case [CEC01875336];

(c) the Progress Report produced by TIE in September 2005 for the Scottish Parliament [TRS00000209];

(d) the 2006 Draft Final Business Case [CEC01821403]; and

(e) the 2007 Final Business Case [CEC01821403].

The purpose of the procurement strategy was variously described as follows:

- The updated Preliminary Financial Case for line 1 [CEC01868590] produced in September 2004 by TIE for the Scottish Parliament noted that the procurement of the infrastructure contract would be structured to provide a “firm fixed price bid” (p10), that it was anticipated that “the final procurement model will result in substantially all construction risk being transferred to the private sector” (p10) and that “the emerging procurement strategy would effectively de-risk the main infrastructure contract” (p43).
- The May 2005 Draft Interim Outline Business Case [CEC01875336] noted that the advance design and utility work meant that TIE taking greater control over the process during the early development phase would be able to offer the private sector a better defined basis on which to base the INFRACO bids, with a less onerous risk allocation, “such that they will be able to price their bids with a greater degree of accuracy and certainty than has been achieved on earlier deals” and that “In this way, TIE will significantly reduce the risks in, and cost of, the overall project” (p39-40) and that “The novation of the SDS Contract to the INFRACO will mean that responsibility for the design and all risks arising are transferred to the private sector system integrator without the normal disadvantage of an increased risk premium which bidders would apply due to uncertainty if they had to carry out the design work post signature” (p56)
- The September 2005 Progress Report produced by TIE for the Scottish Parliament [CEC00380894] noted that in advance of the award of the main contracts TIE would concentrate on “de-risking” activities, namely, “system design, utility diversions and the related progression of planning and other

CEC01821403  
should be  
CEC00643516



*approvals along the higher risk sections of Lines 1 and 2 which will be difficult to construct” (para 1.4) and that it was intended to let the contracts for the infrastructure works and the tram vehicles on a “fixed price” basis (para 7.1.2).*

- The draft Final Business Case presented to the Council in December 2006 [CEC01821403] 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).
- a) What involvement, if any, did you, or others in DLA, have in producing these documents?

**Response from SF:**

I can't speak to anything that predates me being in DLA (see question 1(a)). I don't believe that I saw the Turner and Townsend report and the TIE report. I did see the Grant Thornton paper and the later iterations of that paper. I would have sat in on meetings where that paper was discussed. As previously described, DLA worked with TIE and a team of advisors. That team of advisors included Partnerships UK (PUK). They were a body which had experience of procuring light rail projects as well as general infrastructure projects. I don't know who had brought PUK into the project. Certainly PUK came with valuable insights in terms of their experience on other schemes.

During my early days on the project, I sat within a wider team that included the PUK team (Martin Buck and James Papps).

In terms of the documents which are referenced by the Inquiry, I did not draft those documents. I may have commented on some of them. In terms of the quotes from those documents, those quotes reflected my understanding of TIE's procurement strategy at the time.

- b) What were your views on the relative advantages and disadvantages of a conventional design and build contract and the procurement strategy chosen for the tram project?

**Response from SF:**

The Turner and Townsend Report (CEC01868789) predates my involvement in the project. Therefore, I am not clear on the context in which the report was prepared and I cannot comment on whether there can be a "like for like"

comparison with the strategy which was selected. For example, if conventional design and build was used for infrastructure works, it would have meant that TIE would have been managing the interface of separate contracts including the Tramco Contract, and a separate contract would have been required for infrastructure maintenance.

- c) What was your understanding of the purpose and aim of the procurement strategy chosen for the tram project?

**Response from SF:**

The procurement strategy was primarily about de-risking the INFRACO contract. You will see that phrase used in quite a lot of the documents. The procurement strategy was also about learning the lessons from other tram schemes in the UK. For example, TIE appointed the operator early on in the process (DPOFA). The idea behind this was that the ultimate operator of the tram system became involved upfront in the project to help TIE determine what TIE wanted from their tram project i.e. what they wanted the project to deliver in terms of services for passengers including the position of tram stops, the size of trams, how the depot should be specified etc. DPOFA was about using all of Transdev's practical experience in terms of *"this is how the system needs to operate in practice"* and considering those operational issues upfront in the procurement of the other contracts.

Another feature of the procurement strategy was early design. The strategy was about trying to deal with the issues on other schemes where design hadn't been carried out early and had led to issues on the consents process during the construction phase.

The strategy for the MUDFA contract related to ensuring that INFRACO was not having to think about and price the risk of unknown utilities when it came to constructing the tram scheme. The MUDFA contract was supposed to remove that particular risk from being an INFRACO risk, and make sure that this risk was dealt with in advance by another contractor.

In summary, the objective of the procurement strategy was to make the INFRACO contract a simpler contract which dealt with some of the issues which had been problems on other tram schemes. The strategy was to make sure that



these issues were dealt with in advance.

- d) What was your understanding of the importance to TIE and CEC of achieving (i) a “fixed” price for the infrastructure contract (and what did you understand that term to mean) and (ii) a transfer of design risks to the private sector?

**Response from SF:**

In terms of fixed price, in my view, TIE and CEC weren't unlike any other public authority procuring a major infrastructure project i.e. they wanted to know that the project was affordable and represented value for money to the public purse. There needed to be transparency of cost, that's what a fixed price should deliver. However, fixed price can mean a number of different things. One needs to interpret it in terms of what the contract says. A normal understanding of fixed price would be where the contract is a lump sum contract. Although the price could still change if the client instructs variations or if there are compensation events under the contract where the contractor was entitled to costs.

I understood that fixed price was important to TIE and CEC because the project needed to be affordable. It needed to represent value for money.

I also understood that achieving a transfer of design risk to the private sector was important. I had been involved, together with Andrew, in looking at the whole concept of the appointment of SDS and TSS. The whole ethos of SDS was to facilitate early design and to then novate that design (and the SDS provider) and design risk to the INFRACO contractor. As far as utilities were concerned, that design risk sat with SDS and was not transferred to the INFRACO contractor as the MUDFA contractor was carrying out the utilities diversions. In respect of other design risks under the INFRACO contract, those sat with INFRACO contractor. This was TIE's desired strategy from the outset i.e. wanting early design but not wanting to have the liability associated with carrying out that design early.

- e) Are you aware of the extent to which the proposed procurement strategy was discussed with, and approved by, CEC and the Scottish Executive?

**Response from SF:**

TIE should be able to confirm the extent to which the proposed procurement



strategy was discussed with, and approved by, CEC and the Scottish Executive. I would say Graeme Bisset would be a good person to speak to about the direct liaison between CEC and Scottish Executive on this. I do know that the strategy was discussed at Gateway Reviews. I am not sure who initiated the Gateway Review process. It could have been a Scottish Government requirement or it could have come from CEC. Indeed it could have come from both organisations.

There were also reviews from CEC itself. For example, I presented to Keith Rimmer on the MUDFA contract and the procurement strategy for separate utilities works. There was representation by CEC at the TIE and TEL Boards.

Transport Scotland (TS) appointed KPMG to look at the procurement strategy, and we discussed the strategy with KPMG.

In summary, I would say that there were a large number of instances where the procurement strategy should have been discussed with CEC and the Scottish Executive.

10. The following documents contain passages relating to how much of the design work it was anticipated would be completed (and statutory permissions and consents would be obtained), before the infrastructure contract was entered into, namely:

- The May 2005 Draft Interim Outline Final Business Case [CEC01875336] noted that *"It is expected that the design work will be around 60-70% complete when the INFRACO Contract is signed"* (p54) and that *"The proposed programme anticipates that planning permissions for the core elements of the scheme (namely, the Haymarket-St Andrews Square link) will have been achieved by the time of signing the INFRACO contract"* (p56).
- A Progress Report produced by TIE in September 2005 for the Scottish Parliament [CEC00380894] noted that *"In advance of the main contracts, TIE will concentrate on other activities which are focussed on de-risking the project and thereby achieving the best prices possible for the tram infrastructure and vehicles. These de-risking activities are principally system design, utility diversions and the related progression of planning and other approvals along the higher risk sections of Lines 1 and 2 which will be difficult to construct"* (para 1.4).
- The draft Outline Business Case prepared in March 2006 [CEC00380898] noted that *"It is expected that the overall design work will be around 60-70% complete when the INFRACO contract is signed. However by identifying key risk areas and prioritising SDS activities, TIE is looking to have completed the design of these areas prior to INFRACO award"* and that *"By the time of contract award*

*(scheduled for July 2007) it is expected that detailed design will be significantly advanced, inclusive of a majority of consents. Outstanding design work at this stage may include non-critical areas, any amendments required by consenting authorities (but not completed) and any remaining value engineering required by the INFRACOs" (para 6.7.1.1); "TIE's intention is to have critical approvals completed by the time that the INFRACO Contract is signed" (para 6.7.3)*

- The draft Final Business Case presented to Council in December 2006 [CEC01821403] 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)
- a) What was your understanding, in late 2006, of the extent to which detailed design would be completed, and statutory consents and approvals obtained, at the time the infrastructure contract was entered into?

**Response from SF:**

I can't comment on what had been agreed between SDS and TIE at that time on the extent of design and consents that would be completed by the time the contract was entered into. I wasn't aware of there being an expression of a percentage of completion of design. I wasn't involved in the discussions between SDS and TIE. I did know that the design was delayed and that TIE was trying to manage that issue. There were programmes in place looking at how time was going to be made up and how additional resources were going to be brought in to deal with the slippages. I can't comment on the detail of that.

I have looked into whether I saw the draft Final Business Case. I couldn't find anything where I have commented on it. I note Andrew has commented on a very early iteration of the business case in November 2006. Andrew was on secondment during this time. There is correspondence between Andrew's secretary and Graeme Bissett in December 2006 which attaches Andrew's comments from November. I don't know if anyone from DLA actually saw the Final Business Case.

All I was aware of at the time was that there were delays in the design. In terms of the drafting of the business case, I would suggest that Graeme Bissett and Stewart McGarrity of TIE would be the people to talk to on the topic of why the final business case changed from the interim business case.

I was not involved in the interface between SDS, the INFRACO contract and the level of design during the negotiations at the end. I was more involved at the



front end of the procurement i.e. setting up SDS and doing some of the early drafting and negotiation of the INFRACO contract. I ceased to have day to day involvement in the project when there were still two bidders involved in the competition. I can't really comment on what subsequently happened. I was aware of there being a delay in the design and the impact that was having in terms of the progress of the MUDFA works being delayed. Andrew Fitchie would be the person to speak to at DLA about the later Infraco negotiations.

Generally speaking, DLA was reliant on the expertise of the technical advisors / TIE. DLA needed them to guide us in terms of the status of the technical inputs that were required for the procurements. In terms of the SDS/TIE interface, I understand that there may have been some involvement from the likes of Gary Easton and Toby Kliskey (Turner & Townsend). They were part of the TSS team. I am not sure of the extent to which they were involved but they would be able to confirm that. In terms of the TIE team, Trudi Craggs from D&W was seconded into the TIE team. I think Trudi may have been looking at the production of design from the perspective of the planning and consents process. I also understand that Damian Sharp (formerly of Scottish Executive who worked on the Edinburgh Airport Rail Line (EARL) project) was involved and had started working at TIE. Another person I remember was Ailsa McGregor. Ailsa was a consultant who was brought in by the TIE team to look at the whole area of design production and the associated delays with design. There were a number of people who were trying to make the delivery of the design happen.

- b) Are you aware of when and why the strategy appears to have changed from it being expected that detailed design would be 60-70% complete when the INFRACO contract was signed to it being expected that detailed design would be 100% complete when the INFRACO contract was signed?

**Response from SF:**

I would speak to those persons I mention above in relation to when and why the strategy appears to have changed from it being expected that detailed design would be 60-70% complete when the INFRACO contract was signed to it being expected that the detailed design would be 100% complete when the INFRACO contract was signed.

11. The following documents contain passages relating to how much of the utility diversion works it was anticipated would be completed before the infrastructure



works commenced, namely:

- The May 2005 Draft Interim Outline Final Business Case [CEC01875336] stated, *“The majority of Utilities work is scheduled for early 2006. This will result in significant Utilities diversion works being completed prior to commencement of tram infrastructure works so potential conflicts between the Utilities and infrastructure works will be minimised”* (p60).
  - The draft Outline Business Case prepared in March 2006 [CEC00380898] noted that, *“The majority of Utilities work is scheduled to commence in early 2007 and end in summer 2008”* (para 6.8.1); *“The award of the MUDFA is scheduled for early June 2006 ... The contract is structured such that the physical utility diversions will not commence until instructed by TIE and this is currently anticipated to be January 2007”* (para 6.8.3); *“Should MUDFA fail to complete on time to allow INFRACO on to the site, then the public sector will be responsible for delay to INFRACO works ...Utilities diversions works ... are anticipated to be significantly advanced, by the time that the INFRACO contract is signed”* (para 8.5.1).
  - The draft Final Business Case presented to Council in December 2006 [CEC01821403] noted that, *“The majority of Utilities works is scheduled to commence in 2007 and end in summer 2008. This will result in significant Utilities diversion works being completed prior to commencement of ‘on street’ works by INFRACO so potential conflicts between the Utilities and infrastructure works will be minimised”* (p89).
- a) What was your understanding, in late 2006, of the extent to which utility diversion works would be completed (i) when the infrastructure contract was entered into, and (ii) when the infrastructure works commenced?

**Response from SF:**

My understanding in late 2006 of the extent to which utility diversion works would be completed is as follows.

There had been various discussions with TIE on how much "float" there was in the programme between MUDFA finishing and INFRACO starting. I remember discussions which expressed the float as being "generous" - so much so, that IN discussion with Ian Kendall (TIE) and others within the TIE team, we were instructed that additional liquidated damages for delay did not need to be included in the MUDFA Contract.

The complexity we were dealing with was the fact that TIE had two contracts which had been executed (SDS and MUDFA), and TIE was in the process of procuring INFRACO. The principal idea was that TIE didn't want to have INFRACO starting on an area where the MUDFA contractor hadn't done what they needed to do in terms of diverting utilities. TIE wanted to make sure that

INFRACO was starting on areas where the MUDFA Contractor had carried out its works.

The delays in the MUDFA Works compressed that float.

I can't give a percentage of the state of the design and MUDFA works in late 2006. I would suggest speaking with Susan Clark (TIE), Gary Easton (Turner & Townsend) and Alan Hill (Scott Wilson) for more detailed comment on this area. The Inquiry would need to get a technical person to interpret what is actually meant in the draft Final Business Case by "*significant*".

- b) Was the strategy in late 2006 of scheduling the majority of Utilities works to commence in 2007, and to end in summer 2008, realistic given the state of Utilities design in late 2006, the extent to which agreement had been reached with the utility companies and the risk of discovering unexpected and additional Utilities when Utilities diversion works commenced?

**Response from SF:**

Susan Clark (TIE), Gary Easton (Turner & Townsend) and Alan Hill (Scott Wilson) would be able to comment on the strategy in late 2006 of scheduling the majority of utilities works to commence in 2007 and whether ending in summer 2008 was realistic. Further people who may be able to provide comment are Graeme Barclay (TIE), John Casserly (TIE) and Martin Hutchinson (TIE). This is a technical question and not part of DLA's mandate.

12. On 10 September 2003 Andrew Fitchie sent an email, to which you were cc'd, stating that "CEC must let go and give TIE the freedom to manage the procurement. Looking over TIE's shoulder and intervening whenever it suits will seriously damage TIE credibility as the DPOF procurement manager and contract partner [CEC01873322]."

- a) What were your views on these matters? In your view, was CEC involvement hindering progress as this email suggests?

**Response from SF:**

The context in which the email was sent was that we had been told at the time by TIE and PUK that CEC had signed off on revenue risk at a previous board meeting (DLA wasn't in attendance at this meeting). That meeting was prior to the commencement of the DPOF procurement. This particular email, and the issue associated with the email, arose post-evaluation of PQQ submissions. TIE

had published its Contract Notice and the PQQ, and these documents had expressed the position on revenue risk. The issue which was being raised by CEC was so fundamental that, in our view, a change in the position on revenue would have meant that TIE shouldn't have published the Contract Notice and PQQ documentation if it was now intended that revenue risk wasn't being dealt with in the way it had been expressed to the market in the Contract Notice and PQQ.

This was concerning because it was such a fundamental issue. As far as we were aware from discussions with TIE and CEC, revenue risk transfer had been discussed and agreed. However, CEC seemed to later be having a problem with that particular risk transfer but it hadn't been raised prior to the Contract Notice being published. The email is sent against that backdrop.

b) Did CEC ultimately take a step back and let TIE manage the procurement?

**Response from SF:**

From my perspective the issue wasn't about CEC stepping back. It was appropriate that CEC was involved in the project. The issue was more that CEC needed to be engaged through the governance process. They should have been inspecting the key decisions at appropriate stages. I don't know why this particular episode happened in the way that it happened.

13. By email dated 28 July 2006 you commented on the procurement strategy [CEC01856445], [CEC01856446], [CEC01779961]. What were your main concerns?

**Response from SF:**

What I have noted is that one of the main issues is the timing of when the maintenance obligations would be transferred. This paper shouldn't be considered in isolation. There were many meetings on the strategy. There were a number of discussions, meetings, concerns over a long period of time which were discussed with TIE.

14. How when and by whom was the decision taken as to which forms of contract to use? In particular, why was the decision taken not to use any of the standard forms? Did you or anyone at DLA have experience of using the contract form



that was adopted?

**Response from SF:**

The ultimate decision on the forms of contract was taken by TIE. They were advised by DLA and TSS (other than in respect of the TSS/SDS contracts). The Inquiry will have seen in the documentation provided to the Inquiry that we would often prepare a Heads of Terms which reflected a detailed discussion with TIE on what the contract/Heads of Terms needed to contain in terms of the contract clauses.

An example of such a discussion was when we met with Ian Kendall in our offices during the development of the MUDFA contract. We sat with Ian and went through line by line what was needed in the contract. Prior to the MUDFA contract being issued with the Invitation to Negotiate (ITN), Ian reviewed the contract and ITN, and 'page turned' it. Generally that was the process which we followed.

In terms of the actual form of contracts, there wasn't a standard form contract that would have covered what the INFRACO contractor was doing. There weren't standard form tram vehicle contracts or early operator involvement contracts. What we did was we based these contracts on precedents which had been used on other light rail projects. We tailored those contracts to reflect the particular requirements of the Edinburgh tram project.

The MUDFA contract was based on an Institute of Civil Engineering (ICE) standard form contract. A lot of what we discussed during the meetings on the MUDFA Heads of Terms was *"does the standard ICE provision work for what is being done here?"*.

There are standard forms of contracts for designers which are prepared by professional bodies (e.g. architect or engineering bodies) which are often, to some extent, "private sector friendly". What is more usually done is that we agree bespoke consultant appointment documentation based on standard form precedents which are created by DLA.

For SDS and MUDFA there were particular nuances associated with the tram project that needed to be reflected. Tram legislation is an example of a

particular nuance. Also, the fact that there were novations happening and a bespoke consents process meant that there had to be some customisation for the project.

In terms of familiarity with the forms of contracts, I would say that Andrew and our Leeds Team had familiarity with the INFRACO, Tramco and DPOF contract terms on other projects. I had familiarity with the construction aspect of INFRACO contract terms on other projects. Andrew and I were familiar with the MUDFA and SDS forms of contract. We had procured contracts on other projects using, not the same, but similar types of terms.

15. On 5 May 2005 Julian Ware at KPMG [CEC01882679] sought a meeting to obtain more information for the Scottish Executive in relation to the procurement strategy. It would be helpful to receive your views on the issues raised;

a) Did you attend the meeting referred to in this minute?

**Response from SF:**

I did attend the meeting referred to in this minute. I can't remember in detail what was discussed. However, I have found in our file an email which Andrew Fitchie and I sent to the TIE team in advance of the meeting. That email goes through each of Julian's questions and gives our view on each of his points.

b) How was it envisaged that effective cost control could be kept over the design [CEC01858852] ?

**Response from SF:**

This is a question for TIE. In the DLA comments on Julian's paper, we commented:

*"Gerry H will be able to give a detailed account of cost control. Basically, the SDS Bidders have been asked to complete very detailed pricing schedules and to give milestone sums for certain aspects of the Services in respect of sectors/sub-sectors of the proposed tram lines. Also, bidders have been asked to give lump sums in respect of management costs, insurance costs etc across all the whole project. Cost control is to be transparent and the SDS Provider will be required to submit resource/cost programmes on P3e to tie in order to back up any applications for payment."*

c) How was it envisaged competition pressure could be maintained?

**Response from SF:**

By maintaining two bidders in the procurement competition, and having extensive negotiations with both bidders.

d) What incentive did SDS have to agree to be novated to the winning infrastructure bidder [CEC01787274]?

**Response from SF:**

In the DLA comments on Julian's paper, we commented:

*"Payments will be made on the basis of monthly application against milestones and fixed lump sums. There will be limits on the amount of payment against milestones until such time as milestone completion certificates have been issued. The incentive to novate is the 3% "novation retention" which is being levied on each monthly payment until such time as the novation agreement is signed. A further incentive is the lost income from the design services which the SDS Provider is likely to be required to provide post novation."*

e) What consideration was given to what would happen if the INFRACO contractor refused to accept novation of the SDS contract?

**Response from SF:**

This was a risk which was to be managed by TIE by affording the INFRACO bidders opportunity for due diligence on the design during the bid period. Novation was included in the contract as a contractual requirement on the Infraco.

f) Was consideration given to how parties could be incentivised to do the minimum essential utility works? [CEC01884238], [CEC01868098], [CEC01868099], [DLA00006411], [CEC01884239], [CEC01884240]. Was incentivisation introduced at an early enough juncture?

**Response from SF:**

In the DLA comments on Julian's paper, we commented:

*"The SDS Provider has been charged with the responsibility of agreeing the need for and extent of any diversions, and with carrying out design to minimise*



*diversion requirements and out-turn costs."*

There was a value engineering incentive in the MUDFA contract and it was the responsibility of TIE and TSS to manage the SDS and MUDFA contracts to ensure that the design and works were carried out efficiently. Suggest that this is discussed with TIE as this was a commercial issue for them.

- g) Did close working between the design team and CEC planners lead to gold plating?

**Response from SF:**

This is a question for TIE, CEC and SDS.. In the DLA comments on Julian's paper, we commented:

*"The TSS Provider will be required to monitor cost control and is responsible for ensuring that "gold plating" does not occur."*

16. On 9 May 2005 [CEC01868356], you queried whether TIE had carried out an analysis of lessons learned from procurement of the Holyrood project [CEC01705043] and [TRS00000053]. TIE's response included an appendix setting out lessons from the management of the Holyrood building project. The lessons included: "Ensure that detailed design is initiated at the earliest opportunity to avoid variations"; "Select a procurement strategy that allows the ability to transfer 'design risk' and 'construction risk' to INFRACO"; "Develop a realistic design and construction programme"; "Ensure that care is taken in the choice of form of contract to be employed with a sound understanding of the risks and benefits of each option"; and "Ensure that decision to award contracts is taken following clear understanding of elements remaining to be clarified and clear obligations".

- a) To what extent, if at all, did the lessons learned from the Holyrood project inform the procurement strategy chosen for the tram project? What features of the tram project procurement were intended to address the issues that arise in Holyrood?

**Response from SF:**

I was familiar with the Holyrood project and the findings of that Inquiry. I was familiar with the best practice suggested in that report. How I approached the Edinburgh tram project wasn't just through specifically applying the lessons learned from Holyrood. The more pertinent report which we were looking at as a project team with TIE was the National Audit Office report on light rail schemes which was published in 2004. Whilst Holyrood dealt with, shall we say, best practice in procurement issues, this particular National Audit Office

report dealt with the procurement of tram schemes.

A number of elements of the procurement strategy for the tram project were developed on the basis of what was said in that NAO report. This was where the PUK team was effective. They brought forward their experience of what was regarded as UK best practice. Also, Andrew, at that time, had been involved in another tram scheme in the UK. We further had the experience of our Leeds team. We were building in lessons from other tram schemes. The lessons we built in were, in essence, different to Holyrood because they were all about the execution of tram schemes and the construction of a transport projects with interfaces between vehicles and rail. Holyrood was different in that it was an accommodation project.

- b) In your view, were any of the same problems repeated in delivering the tram project, and if so why do you think this was?

**Response from SF:**

The Holyrood report contains good practice observations. What I would say in terms of the examples quoted above, all those particular issues were dealt with in the procurement strategy. I don't want to speculate whether in practice, subsequent to the procurement process, these matters were followed through in respect of TIE's implementation of the project.

17. By email dated 3 March 2006 [CEC01857440] Ian Bowler, DLA, noted the need for DLA to have an understanding internally as to how DLA interfaced with the TIE team, in order that they can put concerns with the procurement "on the table" for general consideration. Fundamentally, he noted these concerns were likely to impact on the procurement timetable and could not simply be ignored or dismissed. He further noted that there was a lack of joined up thinking within the different elements of the TIE team on the project timeline.

- a) What were your views on whether there was a lack of joined up thinking within the different elements of the TIE team?

**Response from SF:**

It would be fair to say that at times we (DLA) did experience a lack of joined up thinking on TIE's part. I would say elements of the project were being carried out in silos.

From the legal team's perspective, it was important that we had dialogue internally. Ian's email refers to various matters that I had highlighted to him and a member of his team. It was important for DLA to be aligned in terms of what we were doing legally. This meant that we could be circling back with TIE effectively and say *"I (Sharon) have been speaking to Iain. Iain said that 'x' is happening on the Tramco procurement and that this has an impact on what we are doing on the Infraco procurement. We need to discuss 'x'"*. The project was so complex it meant there were many different work streams that were on-going at the same time. On top of that there was a whole SDS work stream that was being managed by a team in TIE. What there needed to be was an inter-relationship between the different work streams. From our experience there were instances where communication between the different workstreams wasn't happening. As far as it was within our control, we were asking the questions which tried to get those different work streams to be talking to one another.

b) What impact did this have on the project?

**Response from SF:**

I would say at times this meant that the work was delayed or was inconsistent with other elements of the project. For example, I would review something that SDS was writing on a functional specification for INFRACO about utilities diversion. It would become clear to me that the author of that report was not appreciating what was being done on the MUDFA work stream even though SDS was working on the MUDFA workstream (i.e. there had been no internal communication within SDS - PB and Halcrow). Clearly, there was a need for there to be consistency. Where we could, we looked to assist through pointing out areas of inconsistency.

Iain, in particular, was highlighting that we needed input from SDS in terms of drafting the specifications for the Tramco vehicles. He was pointing out that there was a review planned and, without that technical input, we couldn't finish off drafting our contracts. He was essentially saying that we needed that input now.

c) What action, if any, was taken to address Ian Bowler's concerns?

**Response from SF:**



We were meeting with the TIE team very regularly. During this particular period of the contract, Ian Kendall was the Project Director. Our relationship with Ian Kendall was very open. There were regular discussions with Ian Kendall in terms of the state of the deliverables and the need for the team to actually work together. Ian Kendall was conscious of this. There were team bonding events which happened where Ian Kendall tried to bring everyone together to work as one team.

DLA tried to assist Ian Kendall by saying at the team meetings *"have you spoken to so and so?"* However, we weren't the project managers. We were only able to point areas where there should be interaction with others as had arisen out of our role of working on the procurement documents for the contracts. However, we did flag our concerns and tried, to the extent we were able, to make the project team work together as a more cohesive unit.

I have had experience before of communication not happening within the client's team. This issue was magnified in the Edinburgh tram project because there wasn't consistency of senior management within TIE. This issue didn't help with coordinating the input of the different work streams. In my experience, clients who have procured contracts very well have had a consistent team of senior managers who took responsibility for ensuring all of the component parts of the project were working together. As legal advisor, I might pick up on particular issues but it is really up to the client / the client's management team to manage the different advisors and work streams. We would contribute where we saw anything inconsistent or there was a delay in the production of documents. It was really for TIE to manage the project.

- d) Was his concern that the time frame may not allow the interface between TRAMCO and INFRACO to be fully worked through, addressed?

**Response from SF:**

In my view, this issue was eventually addressed. Input on this particular issue (provision of the Tramco functional specifications) was ultimately received from the SDS provider.

18. A report on the findings of the OGC Readiness Review team was issued to the Chief Executive of TIE on 25 May 2006 [CEC01793454] and noted the procurement strategy was originally to build high levels of flexibility into the procurement documentation. The report further noted that this strategy was now under review on the basis that such flexibility could only be achieved at the expense of simplicity and compromised the desired level of cost certainty. In addition to that, the report noted that the approach whereby contracts were novated was not perhaps appealing to bidders and that the ITN (Invitation to Negotiate) should not commit to novation.

- a) What were your views on the advantages and disadvantages of building in high levels of flexibility into the procurement documentation? Why this was this thought to be necessary?

**Response from SF:**

We participated in the readiness review. Both myself and Andrew were interviewed by the readiness review team. I don't think we ever saw a final copy of the report. I think TIE sent us extracts of the findings. I don't know what was in the mind of the OGC reviewers. Flexibility, of course, needs to be balanced against an authority's obligations with regard to the procurement rules.

- b) Was the cost certainty compromised as a result ?

**Response from SF:**

I suggest that the Inquiry discuss this issue with TIE.

- c) Did the ITN ultimately commit to novation?

**Response from SF:**

The ITN stated that it was proposed that novation would happen.

19. By e-mail dated 19 May 2006 [CEC01818076] Price Waterhouse Coopers sent a "Draft report by PwC on the payment mechanism and reflection of principles in the Contracts" [CEC01818078].

By email dated 4 July 2006 you issued comments on the PWC report to David Powell at TIE [CEC01778189], [CEC01778190]. You noted that "*reliance on the principles papers could be confusing and potentially dangerous for the contract management team and DLA Piper would caution against such an approach. The contract management team need to be familiar with the actual detail of the contracts, rather than principles set out in papers which have had no input from the successful bidder and which may reflect out of date positions adopted during the negotiation process*".

- a) What was your understanding of the main recommendations in the report and



whether, and if so, how, the main recommendations were implemented?

**Response from SF:**

Colleagues from DLA's Leeds office and I were involved in providing comments in respect of the report. The report had been prepared by Ian Brookes of PWC. The Inquiry can see that we marked up the report with a number of detailed comments. I am sure there was at least one meeting with Ian Brookes prior to us issuing our comments. If we didn't agree with a recommendation we marked it up in the actual document itself.

We were pleased that TIE had involved PWC in the project. We had been expressing concern for quite some time that there wasn't specialist financial input in respect of the payment mechanism and performance regimes in the INFRACO and Tramco contracts. When TIE had been procuring DPOFA, TIE had been advised by Grant Thornton. It wasn't consistent to not have a financial advisor involved in the other contracts.

b) What were your views on the main recommendations in the report?

**Response from SF:**

We agreed with a number of the recommendations in the PWC report and where our team didn't agree or clarification was required, we marked up the view of our team. The Inquiry will note that our commentary to TIE is very detailed. There were a number of recommendations in the PWC report that we disagreed with. The one I particularly disagreed with was the comment made by PWC about the contracts not being sufficiently tailored and that being a potential risk. My response was made against a backdrop of having sat with Ian Brookes/PWC and explained that the payment mechanism and performance regime schedules hadn't been touched yet as we were waiting for specialist financial input from PWC (financial advisers and not legal advisers would normally draft these schedules) and that we had included precedent documentation that hadn't been customised for the Edinburgh tram project. It was therefore a bit perplexing to then see a report coming back saying "*this isn't customised*". We were saying in our response "*yes, we know, we told you that and that is why you are here*". I think Ian made a comment along the lines of "*when the documents are finalised PWC will look at that*". You will note my comment where I say "*that*



*is not right because the PWC team should actually be in and about these schedules and be developing them because there isn't the specialism within TIE to be looking at these schedules. Specialist input is required". I think from reading the report coming in cold the Inquiry might presume that there had been no discussion or comment of the contract terms. In fact, we had spent a number of years before working through with TIE doing precisely that in respect of the suite of contracts for the project. These schedules hadn't been fully drafted because PWC needed to advise TIE on that.*

- c) In your view, were members of the TIE contracts team sufficiently "familiar with the actual detail of the contracts"? Was there a tendency to rely on the general principles laid out in the accompanying documents rather than familiarise themselves with the contracts themselves?

**Response from SF:**

In terms of the members of the TIE team being sufficiently familiar with the actual detail of the contracts, I can't speak to everyone at TIE but I can speak to the key people who were instructing me. I would say that those persons were very familiar with the contract terms. I have already described Ian Kendall reading through and page turning the contract. Similarly Alastair Richards, David Powell, John Casserly and Geoff Gilbert were all very familiar with the terms of the contracts as they were being administered/negotiated.

I would not say that there was a tendency to rely on the general principles laid out in the accompanying documents rather than individuals familiarising themselves with the contracts - this was the approach suggested by PWC which I disagreed with. I can't speak to what everyone at TIE did in terms of administering all of the contracts. The PWC approach was certainly not how the contracts were negotiated. They were negotiated by reference to the actual contracts rather than any summary.

20. By email dated 5 June 2006 to AF [CEC01859218], you provided comments on the Procurement Option Paper expressing concerns about the paper as drafted. You note *"There seems to be no awareness of all IOBC/OBC work. Existing sign off from stakeholders. NAO Report etc. a proper review of the current strategy has not been carried out. Can we refer to original review of options - this may have been appendix to one of the pwc reports. Original work with puk et al needs to be shared.*

*Changes will cost huge amounts of money, will need new procurement and*

*potentially scare off any bidders. The mandatory variant route is the only way to go.*

*Also, the MUDFA evaluation approval is troubling.”*

(a) Could you explain your concerns?

**Response from SF:**

This paper was being drafted by Alastair Richards (TIE) and Keith McMillan (Scott Wilson) after Ian Kendall had left the project. From my perspective, the concern here was that TIE was in danger of "reinventing the wheel" as far as the procurement strategy was concerned. I was keen for anyone looking at the procurement strategy to have cognisance of the analysis and decisions that had previously been taken. What I wasn't saying was that if things changed it wouldn't be appropriate for the procurement strategy to change. TIE had already determined the particular procurement route at the point that this procurement paper was written. For example, at this point the SDS contract had been entered into, the MUDFA contract was in procurement and the contract notice for INFRACO may have also been issued.

The concern really was that if someone was coming to write a paper they needed to be familiar with what had gone before. This was because, at this point, any changes would entail a number of the previous procurements needing to be terminated with associated costs.

(b) Were you satisfied that TIE took sufficient action to address your concerns?

**Response from SF:**

I can't remember precisely all of the discussions that happened. But I recall discussions around that time which resulted in it being agreed that option 1 (the original procurement strategy) would be progressed.

In my view, the concerns were addressed because TIE ultimately went ahead with the procurement strategy already in place. The strategy was not DLA's decision to make. It was the decision of TIE. It was no bad thing that people were coming in new to the project as that presented an opportunity to review the strategy. There were also Gateway reviews and revaluations of the decisions that had been taken.



21. The full version of the Final Business Case, dated 7 December 2007 [CEC00643516] noted that the procurement strategy had led to a "series of contracts which, managed as a group, will transfer risk effectively to the private sector, advance the scheme as quickly as possible and provide strong value for money". The business case continues that the key benefits of the INFRACO procurement strategy were primarily through the award of "a single turnkey fixed price contract and the novation of the SDS and TRAMCO contracts and the transfer of risks to the INFRACO" and that "Full design risk [was] passed to INFRACO post contract award".

- a) Do you consider that the objectives of the procurement strategy were met, including, in particular, obtaining a fixed price INFRACO contract and transferring design risk to the private sector?

**Response from SF:**

I was not involved in the final negotiation of the INFRACO contract. However, I understand from speaking with Andrew Fitchie at the time that, the objective of obtaining a fixed price INFRACO contract which transferred design risk to the private sector was not fully realised. I don't want to stray into realms of speculation and comment too much on why that objective was not met. I was aware of delays in the preparation of the design by SDS and the delays in the MUDFA works. There was a commercial deal which was struck by TIE management in Wiesbaden. I found out about that because Andrew Fitchie reported it to me after the event. Andrew also reported that CEC required a number of changes to the original scope immediately after execution of the INFRACO contract.

Ideally, if you are structuring a procurement competition, what you want to be doing, while you still have competitive tension in your procurement and two bidders involved, is to express what the totality of your scope is so that you get the best price for doing everything. The idea of there being immediate changes coming through is not conducive to maintaining a fixed price. Best practice would be, if you do know that the change is going to happen, to introduce that change first and then have the procurement competition on the full scope of what you want. I make these comments by way of commenting generally and not specifically on the Edinburgh tram project. As I said, I was not involved in the final negotiation of the INFRACO contract.

- b) If the objectives were not met, what are your views as to why they were not met?



**Response from SF:**

I cannot comment on this for the reasons given at a) above and which follow. On TIE's instruction there was a 'down tools' period on the part of DLA in respect of the INFRACO contract. I had a day to day involvement with INFRACO until May 2007. We were later re-engaged around about September 2007. During the period after September 2007, Andrew was on secondment. I didn't have the day to day role that I had had previously. Many of functions previously carried out by me were carried out by TIE (e.g. the management of issues lists). From September 2007 to close in May 2008, my involvement was more on a discrete ad hoc basis. I was still working on MUDFA, to a certain extent, but on the INFRACO contract I was only involved in the drafting of a schedule to deal with works at Edinburgh Airport, looking at the dispute resolution procedure in terms of comments that had been received and some of the contractualisation of the Employer's Requirements. Andrew Fitchie was specifically involved in INFRACO throughout that period. From September onwards, Andrew was the lead on the drafting and negotiation of the INFRACO contract.

## Design

22. To what extent were you, or others in DLA, involved in the procurement of the Systems Design Services Provider, Parsons Brinckerhoff Ltd (PB) ?

**Response from SF:**

In terms of the procurement of the SDS contract, I was involved together with Andrew Fitchie and others in the DLA team in respect of drafting the tender and contractual documentation. The area of the SDS contract that I wasn't involved in was the detailed administration and novation of the SDS contract. I can only speak to the original procurement and development of the SDS contract.

The TIE people involved when we started working on the SDS documents were Ian Kendall, Gerry Henderson and Dave Ramsay. There was also a consultant who Ian Kendall had worked with previously called Paul Dawkins (CDL). Paul was involved in drafting some of the initial documentation for the procurement.

23. A document in relation to the OJEU notice [CEC01861755] proposed for December 2004 provided that - the level of detail to which the detailed design is to have been developed by the Integrated Tram Systems Design Services provider (ITSDSP) at the point of novation, is likely to be such that the functionality, layout, appearance and technical specification of the system and its components and specification is unambiguous in the context of configuration, spatial layout, design and appearance and specification. It further noted that consideration was being given to the level of completeness of the design at the point of novation. It was stated that the Instructions to Tenderers for the ITSDS (ITT) will identify those aspects of the design that require to be fixed pre novation, and those which will be passed on as an INFRACO responsibility. It was TIE's intention that any residual design risk to be passed onto INFRACO, was only that which could be managed effectively by INFRACO on TIE's behalf.

a) To what extent were you, or others in DLA, involved in the drafting of the Instructions to Tenderers for the (ITSDSP)?

**Response from SF:**

DLA were involved together with TIE in drafting of the Instructions to Tenderers for the SDS.

b) Did the instructions to tenderers/Invitations to Negotiate identify the extent to which design required to be completed at the point of novation and which aspects of the design would be completed by or on behalf of the INFRACO

contractor post novation?

**Response from SF:**

The Memorandum of Information (MOI) and the Pre Qualification Questionnaire (PQQ) together with the ITN, need to be read together to provide some background as to what the SDS provider was to provide. There is an extract in the MOI / PQQ which talks about the level of detail which the detailed design was to be developed to by the SDS provider prior to novation. It sets out that design would be to a level that is likely to be such that the functionality, layout, appearance and technical specification of the system and its components, is well developed and, in critical areas, unambiguous in the context of the following characteristics. That is where the language in the OJEU comes from, it is in the MOI and the PQQ. It goes on to say *“the detailed design work, preparation of associated technical specs in respect of critical areas of the Edinburgh tram network will be identified and notified to SDS provider by TIE in terms of the contract to be entered into”*. There are various general comments in terms of the level of detail that was required prior to novation.

What isn't expressed is a percentage of how much design should be complete. The quantity of design is more expressed as the output of what the design will need to do e.g. enable an efficient and unambiguous procurement by TIE of the INFRACO and the tram vehicle supplier, demonstrate the detailed design as being properly considered and adopted, provide input to the financial model, enable determination of utility diversions and enable negotiation of contracts with Network Rail. In terms of the ITT itself, there was a document called the 'Programme Phasing Structure' which was set out in Appendix 2 of the ITT. That document sets out the programme phasing structure and breaks down the elements of design. This document provides some indicative dates in terms of preparation of design by a particular date for preliminary design and detailed design.

I suggest that the Inquiry discusses this question with TIE.

- c) What was your understanding of the passage noted above that it was TIE's intention that the only residual design risk that would be passed onto INFRACO was that which could be managed effectively by INFRACO on TIE's behalf?



**Response from SF:**

The document provided to me by the Inquiry is a draft of a document issued by Paul Dawkins (CDL consultant). The particular wording quoted by the Inquiry is wording which Paul used. This wording doesn't appear in the final version of the contract notice, the MOI, the PQQ or the ITT. I don't know whether it was myself or others who corrected the wording from Paul's original draft. Paul had just joined the project and these words were his understanding at the particular point in time when he drafted his comments.

The important thing is what actually ultimately appeared in the final documents. The Inquiry should have copies of these documents.

24. By email dated 25 February 2005 [CEC01875678] you noted, "*As discussed previously, the SDS Contract is pivotal to the other contracts and we need to ensure that we have covered off all issues before we go out with the tender documents.*"

a) Why did you consider that the SDS contract was "pivotal" to the other contracts?

**Response from SF:**

There were four main reasons why I considered that the SDS contract was pivotal to the other contracts. Firstly, the SDS design was needed for the utilities diversions; it allowed those works to be carried out by the MUDFA contractor. Secondly, the SDS designer was drafting functional specifications for the INFRACO and Tramco contracts, those specifications were needed to populate the schedules in those contracts. Thirdly, the SDS designer was carrying out early design which was needed for the consents process. Fourthly, SDS was carrying out design so that INFRACO could price the INFRACO contract. I think, at the time, the SDS Contract was described as creating a platform for pricing certainty in terms of INFRACO being able to do due diligence in the design and knowing what was needed from that design in terms of the project itself.

25. By email to Gerry Henderson, Ian Kendall and Mark Bourke dated 8 March 2005[CEC01858273], you noted that it would be very useful to test how particular items from the scope would be priced. You further noted that there were a number of items which required to be done by the SDS Provider but which could not be priced or would be very difficult to price. The scope was still to be reviewed.

a) What items were very difficult to price and why?

**Response from SF:**

It is difficult to remember what my precise concern was at the time with regard to the items which were very difficult to price. My email refers to the third party agreements, accommodation works and surveys.

The pricing schedule had been set up by TIE so that a fixed price was to be given by the designer. The schedule showed a detailed breakdown of the various elements of the price. The bidders would then be asked to give a price which accounted for everything else that they needed to do to fulfil every obligation under the SDS contract. I think it was Gerry Henderson from TIE who worked on this. He would be the person that the Inquiry should speak to on the development of that pricing schedule. Other than that, this email is just my observation. Gerry was a quantity surveyor and the view really needed on the pricing schedule was verification that what Gerry had drafted could be priced. I was just stress testing what the other members of the team were doing.

b) Was this a common feature of infrastructure projects or was this unique to this project?

**Response from SF:**

There will often be aspects of projects which cannot be fully priced. It is then down to the experience of the client's commercial and technical team to figure out the pricing requirements, the strategy and how the returns received from bidders would be evaluated. It is not uncommon to find items that are difficult to price. It is up to the client's commercial team to come up with the strategy to deal with that.

26. By email dated 14 March 2005 you noted that SDS Bidders were about to be issued with the ITT and contract documents and were concerned that it may not be feasible for the ITT to include the information on transport modelling in time [CEC01857682]?

a) In your view, had sufficient time had been built in by TIE?

**Response from SF:**

I checked our emails in and around this date. Later that day the required information came through from Geoff Knight and Alex Macaulay. I think Geoff was out of the country and he had asked Alex Macaulay to provide the information, and there had been a delay in that happening. My original email was probably just indicative of me feeling concerned in terms of there being potential gaps in the ITT. David Burns (TIE), who was involved in the transport modelling work, provided some further comment on the drafting before the ITT went out.

Therefore, this particular issue was dealt with prior to the ITT being issued.

27. By email dated 18 March 2005 [CEC01860346] you noted with Ian Kendall that protections for TIE were included in the SDS contract.

a) What was your understanding of what those protections were?

**Response from SF:**

There were quite a range of different protections in the SDS Contract.

What I am discussing in this email is the ability of TIE to terminate the SDS contract on a no fault basis if there was an issue with funding. In other words, if the funding of the project was withdrawn, then the SDS contract could be terminated with payment of demobilisation costs only / no compensation. There was a retention if the SDS provider didn't novate, and PB gave a retention bond for £500k.

There had been concerns from Ian Kendall at the time in terms of payment to SDS and how that sat with some of the funding drawdowns from the Executive funding and how that funding was transferred from the Executive to CEC to TIE. We put some particular drafting in on that point.



Based on the spreadsheet which we were just talking about a moment ago, there was a very detailed set of milestones and lump sum payments which were to be included in the tender submission. The SDS contract had a more detailed price control mechanism than you might expect to see on a normal design consultancy appointment. We introduced in the tender documents some pricing options on different combinations of lines. This was another thing which Ian had asked for. We also included open book and audit provisions.

TIE had control of "gateways" between phases and options to re-order the sequence of work. There was some flexibility in terms of when the design was done. There was reference to the areas of the network being designed in order of criticality. Again, this was trying to dovetail what MUDFA was doing, with what INFRACO was doing. There was no residual design liability on TIE arising out of early design being carried out by SDS on the project. There was a collateral warranty on novation with step in rights.

The cap on liability ultimately ended up being, following negotiation, £10m. That was for each and every claim except for contamination.

There were very wide indemnities associated with causing a delay in the procurement i.e. costs arising out of breach of contract.

28. The clarification document dated April 2005 [CEC01872939] noted that the SDS Provider would be required to make the Deliverables available to the bidders for the INFRACO and Tram Supply contracts.

a) Were there any difficulties in design being available to the INFRACO bidders when their tenders were submitted?

**Response from SF:**

I wasn't involved in the project at the time when the INFRACO bidders were submitting their final tenders. I would suggest that this would be something that would be better answered by Geoff Gilbert and Bob Dawson (TIE) together with the managers of the SDS design at that particular time.

29. By letter dated 8 June 2005 [CEC01621644] Parsons Brinkerhoff wrote to TIE seeking to have their risks and responsibilities restricted to design issues only *and not construction related issues*.

a) What was your understanding of PB's concern?

**Response from SF:**

I cannot add any more to what PB have stated in their letter.

b) Was the draft SDS contract amended accordingly and if so, who bore the risk for construction related issues pre/post novation?

**Response from SF:**

I have looked at the original SDS contract and compared it to the contract that was executed with PB. If you look at the terms associated with ground condition risk, the original drafting said that the designer was "to assume the risks to the extent appropriate in their services". That was changed in the contract which was executed. It was changed to "particular risks would be taken account of in the performance of their services". I think that this was an appropriate adjustment to make to the contract. The original intent of the drafting had not been to pass ground condition risk to the designer. The intent was for the designer to be undertaking / procuring the surveys then taking into account that information as part of their design.

I note that there was an absolute "shall obligation" in Clause 3.5 which was amended to reflect "best endeavours". I think on that clause we had put in some drafting along the lines of "you the designer shall ensure that there is minimum disruption to Edinburgh". There was an acknowledgement in the discussions with PB that that shouldn't be an absolute obligation for the designer to take on this risk (on the basis that PB didn't have full control over this risk), rather, it was more something that they would use best endeavours to carry out.

c) Did this have any negative implications for the Council/tie?

**Response from SF:**

It is difficult for me to say whether this had any negative implications for CEC / TIE because I wasn't involved in the later stages of the project. But based on my experience, I would say that it is unlikely that these particular changes had any negative implications. The drafting was adjusted to something that would be appropriate for any designer to accept in respect of any major infrastructure

project.

30. By email to Willie Fraser of TIE dated 23 June 2005 [CEC01857978] you advised that when SDS was novated to INFRACO any duty of care owed to the Council would be time limited. You further advised that tie needed to be careful that this duty of care did not alter the duty of care which SDS owed to the INFRACO from the outset. SDS would rather be doing the work for an authority rather than to the requirements of an INFRACO [CEC01711236]

a) Pre- novation, did SDS owe a duty of care to the Council?

**Response from SF:**

No - the duty of care was owed to TIE.

b) Can you explain why you were concerned that the duty of care SDS owed to the Council could potentially alter the duty of care which SDS owed to the INFRACO, post-novation?

**Response from SF:**

The duty of care is different between that which is owed to the ultimate public sector client and an Infraco private sector contractor. There was case law (Blyth & Blyth) which related to the question of novation and so I was aware that we did not want to set up a situation where SDS could argue that their duty of care was to CEC and not Infraco - and that they had discharged their obligations according to that duty of care to CEC.

c) What were PB's views on the question of novation during the SDS contract negotiations?

**Response from SF:**

From memory, PB accepted the requirement to novate and I don't remember any difficulty with them accepting this concept.

d) What design risks were intended to pass from Council to INFRACO on novation and did this happen?

**Response from SF:**

All design risks other than the risks associated with utility design were intended to pass from TIE to the Infraco. I cannot comment on what actually happened as I was not involved in the actual novation.



31. By email dated 24 June 2005 [DLA00002137] Andrew Fitchie noted that an SDS duty of care to CEC might be a 'belt and braces' too far.

- a) What were your views on that matter? In hindsight might it have assisted the Council if SDS had retained a duty of care to CEC?

**Response from SF:**

See response to question 30. The SDS contract and the collateral warranty could be assigned to CEC without PB's consent.

32. By e-mail dated 17 August 2006 [CEC01862428] you sent Ian Kendall and others an updated copy of the heads of terms of MUDFA. The critical path items for the issue of the MUDFA contract included, *“Development of the design by the SDS Provider – how much design needs to be done before issue of the ITT?”*.

You also noted that *“Moving forward, I think that the most difficult issue to sort out will be the management and logistics of the interface between the SDS/MUDFA/Utilities with regard to design issues, construction works and completion/commissioning. What is your plan with regard to this issue? How is this to be expressed contractually?”*

- a) Why did you raise these queries?

**Response from SF:**

I raised these queries as I recognised the importance of the delivery of the design.

- b) Do you recall whether you received a reply to these queries?

**Response from SF:**

Based on documents which I have available to me, I have checked and I do not appear to have received a specific reply. However, this email was near the beginning of the MUDFA procurement and there were many meetings, email exchanges etc in respect of the issues which I raised. However, this remained a key area for TIE and TSS to manage.

- c) What was your understanding, between 2005 and 2007, of how, and by whom, the interface and logistics between the different contracts would be managed?

**Response from SF:**

TIE supported by TSS.

33. We understand that PB submitted a tender for the SDS contract in May 2005 with an assumed start date of 1 July 2005 but that the SDS Contract was not entered into until September 2005.

a) Are you aware of the apparent delay in entering into the SDS contract?

**Response from SF:**

All SDS bidders were invited to submit revised proposals. This caused delay. PB were successful but there was a protracted period where PCG/bond issues and IPR issues in respect of a trackform design were being negotiated between PB and TIE.

b) What was your involvement in the drafting of this contract?

**Response from SF:**

I was involved in the drafting of this contract together with Andrew and other colleagues within DLA.

34. The SDS contract was entered into in September 2005 [[CEC00839054]]. If you were involved in the negotiation of the contract it would be helpful if you could explain the following provisions of the SDS contract:

Services

a) What design services were to be provided by SDS (perhaps with reference to Schedule 1, "Scope of Services" of the SDS contract, at p77, and the phased Design Approach i.e. Requirements Definition Phase, Preliminary Design Phase and Detailed Design Phase)?

**Response from SF:**

I suggest that the Inquiry discusses this with TIE as the scope of services to be provided by SDS requires technical interpretation.

b) What services in relation to Utilities were to be provided by PB in terms of paragraph 3.2 of Schedule 1 of the SDS contract (p87)? That paragraph (third bullet point) refers to the SDS provider "*undertaking critical design and developing a strategy for all Utilities diversions to minimise diversion requirements and out-turn costs*". What "*critical design*" in relation to Utilities was to be undertaken by PB? Who was to undertake the other Utilities design?

**Response from SF:**

SDS was to carry out a defined list of Services (the scope described in Schedule

1). These Services included the Design and Technical Services described in paragraph 2 - this is a very wide description which refers to Deliverables for the Preliminary and Detailed Design Phases, which includes a number of deliverables - e.g. drawings. Also, detailed pricing was given by the SDS in respect of the total work scope for utilities.

I suggest that the Inquiry checks with TIE in terms of reference to "critical". My view is that the reference to "critical" was not meant to mean that there was "non-critical" design being carried out by others. Indeed, no one else was due to carry out any utilities design (e.g. the MUDFA Contractor was carrying out his works in accordance with the design provided by SDS). This drafting is in section 3 "general technical support" - so doesn't contain all of the design services being provided by SDS. So, schedule 1 needs to be reviewed in totality.

- c) What management services were to be provided by PB (with reference to paragraph 4 of Schedule 1 (p91)?

**Response from SF:**

I suggest that the Inquiry discusses this with TIE as the scope of services to be provided by SDS requires technical interpretation.

Programme

- d) What was the agreed programme, when the SDS contract was entered into, for carrying out the SDS services (perhaps with reference to (i) clause 7 (p26-28), of the SDS contract, (ii) Schedule 1, Appendix 2, "Programme Phasing Structure" (p100-101) and (iii) Schedule 4, "Programme" (p238))?

**Response from SF:**

I suggest that the Inquiry discusses this with TIE as the content of the programme requires technical input.

- e) What was the "Master Project Programme" referred to in clause 7.1.1 (p26)? Are you aware whether such a Master Project Programme was agreed and in place when the SDS contract was entered into? Are you aware whether such a programme was maintained, and updated, by TIE as the tram project progressed (together with who, within TIE, was responsible for that)?

**Response from SF:**

I suggest that the Inquiry discusses this with TIE as TIE was managing the SDS



contract.

- f) What procedure was in place for updating or amending the programme, delays and seeking an extension of time (see clauses 7.1.2 (p26), 7.4 (p32) and clause 7.5 (as substituted by Appendix 1, "Schedule of Amendments to the SDS Agreement" (p262-263))?)

**Response from SF:**

I suggest that the Inquiry discusses this with TIE as this requires technical input.

- g) What was the purpose of the "criticality" provisions for determining the order in which the SDS services were carried out (see clause 7.2 (p26) and Schedule 1, Appendix 2, "Programme Phasing Structure" (p100-101))?

**Response from SF:**

I suggest that the Inquiry discusses this with TIE as this requires technical interpretation.

Approvals and consents

- h) What was the responsibility of the SDS provider for obtaining necessary statutory approvals and consents (perhaps with reference to clause 5 (p25) of the SDS contract and paras 2.6.1.2 and 2.6.2.4 of Schedule 1 (p83))?

**Response from SF:**

I suggest that the Inquiry discusses this with TIE as this requires technical input.

Price and payment

- i) What were the main provisions in relation to price and payment of fees (perhaps with reference to clause 11 (p37) and Schedule 3, "Pricing Schedule" (p105-108))?

**Response from SF:**

I suggest that the Inquiry discusses this with TIE as this requires commercial input from TIE.

- j) What were the main payment milestones?

**Response from SF:**

I suggest that the Inquiry discusses this with TIE as this requires commercial input from TIE.

k) Were there incentives for meeting the milestones early or on time?

**Response from SF:**

There was payment on meeting the Milestone - no bonus

l) Were there penalties for not meeting the milestones on time and/or for late delivery of design?

**Response from SF:**

TIE was not obliged to pay SDS any Milestone Payment if the Milestone pertaining to that Milestone Payment was not achieved by SDS. There was a contractual right for TIE to be indemnified for breach of contract/non-performance/delay in performance.

Other

m) Who was the Client's Representative (in terms of clause 10 (p35)?

**Response from SF:**

I suggest that the Inquiry discusses this with TIE as TIE was responsible for appointing the Client's Representative.

n) What was the proposed procedure for novating the SDS contract to the INFRACO contractor (perhaps with reference to recital F (p1), clause 29 (p66) and Schedule 8, "Novation Agreement" (p256-261)?

**Response from SF:**

The detail is in the referenced clauses.

o) Recital E of the SDS contract (p1) stated that "*TIE intends to appoint an infrastructure provider (the 'INFRACO') to complete the design, and carry out the construction, installation, commissioning and maintenance planning in respect of the Edinburgh Tram Network*" (p1). What was your understanding of the work that would be undertaken by the INFRACO contractor to "*complete the design*" i.e. once the Detailed Design had been completed by SDS, and all necessary approvals and consents had been obtained, what further design work remained?

**Response from SF:**

I suggest that the Inquiry discusses this with TIE as this requires technical input from TIE.

35. On 6 October 2005 [DLA00002141] you asked Gerry Henderson whether someone within the TIE team gone through the TSS/JRC/SDS contracts to

check that all information/actions which should have been done within fixed time periods had or were being done?

- a) What were your concerns? Were you concerned that this was not being done as a matter of course?

**Response from SF:**

I was checking to ensure that TIE was not in breach of any contractual obligations and check that contract administration was being carried out. I think my concern was triggered around whether the SDS/JRC agreement had been signed or not. This is good practice to check with the client on matters such as this. However, TIE had the responsibility for administering the SDS contract.

36. On 7 October 2005 [DLA00005402] George Tedbury, TSS, emailed Willie Fraser, TIE, to clarify whether there was any possibility that that TIE may end up paying twice for work done on the 'C4 estimates'.

- b) What was your understanding of that matter? Was there a good understanding between SDS and TIE of what overheads were covered in the SDS price (and if not, why)?

**Response from SF:**

I was not aware of this issue. I suggest that the Inquiry speaks to George Tedbury and Willie Fraser.

37. By email dated 24 January 2006 [CEC01867255] AF notes with IK that you had mentioned "push-back" from PB and indicated that PB had begun their own collation of evidence on alleged client-side shortcomings.

24 January  
2006 should be  
24 March 2006

- a) This suggests problems with the SDS contract at a very early stage. What was your awareness, and understanding, of any such problems? In your view was there any merit in the alleged client-side shortcomings?

**Response from SF:**

Ian Kendall wanted to terminate PB's appointment because of poor performance. There were delays in PB's mobilisation and design delivery. PB had promised additional resource and recovery of the delays, but this was not being delivered.

In my view, the push-back may have been that it was alleged that the TIE team was not sufficiently resourced to carry out review of the SDS design in



accordance with the process and timescales which were laid out in the SDS contract. This had led to delays in the design reviews being carried out. At one point (I am not sure of dates), Trudi Craggs from D&W and Damian Sharpe (ex Scottish Executive) were involved in the TIE design team. Also, I remember latterly Ailsa McGregor being tasked with reviewing SDS performance. I suggest that the Inquiry pick ups this issue with TIE, Trudi, Damian and Ailsa.

39. By email to you and members of tie dated 3 March 2006 [CEC01857440] Ian Bowler raised a number of concerns, one of which was the lack of Evidence of Delivery by SDS.

a) What prompted this email?

**Response from SF:**

Lack of input from SDS in respect of the specification for the tram vehicles which was to be included in the TramCo Contract. Lack of decisions in respect of key issues such as tram length.

b) What were your views on the concerns raised?

**Response from SF:**

In my view, this was indicative of the same issues with SDS which were also apparent in respect of the Infraco procurement: slow delivery in respect of input required for the technical specifications which were to be included in the Infraco Contract.

a) What action was taken in response to this email?

**Response from SF:**

The concerns of the DLA team were discussed with Ian Kendall and others. Andrew Fitchie and I kept the Leeds team in the loop (and vice versa), at all times. Ultimately, input was provided by SDS. I suggest the Inquiry needs to discuss this with TIE and SDS.

40. On 24 March 2006 [DLA00000763] Fenella Mason of DLA noted down the specific failures of PB including failure to produce an adequate updated programme timeously, failure to complete the Requirements Definition Phase (RDP) and failure to obtain traffic regulation orders [CEC01881981]. In May 2006 [CEC01881982] Ms Mason noted her view that it would be counter-productive to serve a Persistent Breach Notice on PB at that time because

serving a contractual notice in these terms may create an adversarial relationship between TIE and Parsons Brinckerhoff which, as a consequence, may have a detrimental effect on the project as a whole. [CEC01789432]

- c) What was your awareness of, and views on, these matters

**Response from SF:**

I was aware that the TIE team was consulting with Fenella. As per the letter, the view on service of a persistent breach notice being counter-productive was on the basis of an improvement in SDS performance as reported to DLA by TIE. Our original advice had been to serve a notice.

- d) As the time for performance of Services was allied to and measured by the Consents Programme and the Design Delivery Programme [CEC00652331] was adherence to these schemes essential to compliance with the contract?

**Response from SF:**

I can't comment on these Programmes as they were not referenced in the original executed SDS Contract.

- e) To what extent were the Consents Programme and the Design Delivery Programme subject to change?

**Response from SF:**

As above.

- f) If tie did not wish to terminate the contract what other remedies could they have employed?

**Response from SF:**

TIE could have considering raising an indemnity claim against PB.

41. There was a meeting on the 6th of June 2006 [CEC01628981] between TIE and DLA at their offices, to understand the background to the SDS contract and what happened during the Requirements Definition Period (RDP), the March 2006 claim preparation, and up to the submission of the Preliminary Design at the end of June 2006.

- a) Did you attend this meeting? What was your understanding of the background to the SDS contract ?

**Response from SF:**

I did not attend this meeting.

42. Delay in progressing design and in obtaining necessary statutory approvals and consents was regularly reported during 2006 and 2007.

a) What was your awareness during that period of the delay in progressing design and in obtaining statutory approvals and consents?

**Response from SF:**

I was aware of it.

b) What was your understanding of the cause or causes of the delay?

**Response from SF:**

The Inquiry should address this question to TIE and SDS. A contributory factor could have been lack of resource from PB and Halcrow - perhaps they had not appreciated how much work was required.

c) What was your understanding of the steps taken to try and address these delays and why these steps do not appear to have been successful?

**Response from SF:**

As far as I was concerned, TIE pushed for improvements in performance. I can't comment on the apparent lack of success. I suggest the Inquiry speaks with Trudi Craggs, Damian Sharpe, Ailsa McGregor and Gavin Murray (TIE).

d) Did the delay in completing design and in obtaining statutory approvals and consents cause you, or others in DLA, any concerns in relation to the risks created for the procurement strategy (including, in particular, obtaining a fixed price for the INFRACO contract and transferring design risk to the INFRACO contractor)?

**Response from SF:**

Yes

e) If so, what did you, or others in DLA, do in relation to any such concerns?

**Response from SF:**

This was constantly raised by DLA and the rest of the team (including TSS) in respect of the preparation of the procurement documents and contracts. We all



knew that TIE senior management was aware

- f) Do you, or others in DLA, bring any such concerns to the attention of CEC?

**Response from SF:**

Personally, I did not raise separately any concerns with CEC - concerns were raised to senior TIE management. See earlier comments on our duty of care letter.

42. By e-mail dated 22 November 2006 [CEC01787157] Geoff Gilbert sought advice on "the extent of work that we require SDS to undertake post novation to INFRACO", the issues for TIE being principally "access to PB post novation to complete the Utility Diversions designs and possible to support the TRO process". Mr Gilbert queried whether partial novation of the design contract of the INFRACO contractor was possible.

- a) What was your understanding, at that stage, as to why Mr Gilbert was considering the possibility of partial novation of the SDS contract?

**Response from SF:**

Geoff Gilbert had queried whether partial novation of the design contract to the INFRACO contractor was possible. I think DLA ended up being involved because of the crossover with MUDFA. I understood at the time that the concern was associated with the delay in the production of the design for the utilities. I think Geoff was looking to ensure that he would have the ability post-novation to still instruct utilities design work to the PB team. The utilities design was being undertaken by Halcrow, they sat as a sub-consultant to PB.

- b) Gilbert noted that one of the reasons for his query was "access to PB post novation to complete the Utility Diversion designs". How did that sit with the provision in the SDS contract noted above that SDS were to provide "critical design"?

**Response from SF:**

See comments above. The phrase "critical design" is perhaps a bit of a red herring. See previous comments at question 34.

- c) Did the suggestion that completion of the utility diversion designs was being considered post novation cause you any concern in relation to how that may impact on the INFRACO contract and the procurement strategy? If so, did you discuss any such concerns with others in DLA, TIE or CEC?

**Response from SF:**

At the time of this email, I didn't know the extent of the lack of completion of the design. I therefore couldn't assess whether there should be concerns or not. It goes back to the principle, that MUDFA and INFRACO couldn't be in the same work site at the one time. However, if we had been talking about discrete completion of something on a part of the tram network before INFRACO got to that particular part of the tram network then that would not necessarily be something that was concerning.

These issues were being managed principally by TIE and by Geoff Gilbert. I saw my input as being able to assist in respect of the interpretation of the contracts rather than managing the commercial risk associated with what was happening. I think Andrew Fitchie alongside Ailsa McGregor (TIE) may have also been involved in that exchange.

**Utilities**

43. The MUDFA (Multi-Utilities Diversion Framework Agreement) was entered into between TIE and Alfred McAlpine Infrastructure Services Ltd in October 2006.

- a) To what extent were you, and others in DLA, involved in (i) procuring and (ii) drafting the MUDFA contract?

**Response from SF:**

Myself, Andrew Fitchie and others from DLA were involved in procuring and drafting the MUDFA contract.

- b) When, why and by whom was the decision taken to use a non-standard form of contract for this element of the works?

**Response from SF:**

MUDFA was based on an ICE standard form of contract as amended to suit the requirements of the project. One of our construction partners, Keith Bishop, had an early meeting with Tom Blackhall of TIE to discuss the form of contract which would be suitable for MUDFA. They discussed the form of contract with a view

to the types of works which were to be undertaken i.e. the civil engineering street works. The ICE form was considered to be a suitable base, however, because of the nature of the tram project, bespoke amendments had to be made to the standard form. The Heads of Terms explained this in detail.

Examples where bespoke amendments were required included the land agreements, arrangements with the utility companies, interface with INFRACO, tram legislation and the assignation to CEC and Scottish Ministers. We took the standard form and customised it to suit the Edinburgh tram project.

The Heads of Terms were the means by which we took instructions from TIE in respect of the amendments which were required to the ICE standard form. The Inquiry will note that the Heads of Terms follow the structure of a standard ICE contract. Following discussion with TIE on the Heads of Terms, we were able to prepare an initial draft. This was then subject to a number of iterations which were reviewed by the TIE team before the contract was finalised.

44. A paper by tie dated 17 August 2005 [CEC01879755] on the Heads of terms of MUDFA noted that amendments for the Multi-Utilities Diversions Framework Agreement had been circulated by DLA and that the draft contract would be subject to CEC/Scottish Executive approval.

a) Did CEC or the SE have any major comments/ raise any concerns in respect of the MUDFA contract?

**Response from SF:**

I drafted this particular paper. It wasn't a paper drafted by TIE. Although the paper has the TIE logo on it, it is my words in the paper.

In the paper I suggested that it be circulated to Scottish Executive and CEC. I don't know whether that happened. This would be something to check with TIE. At that time it would be Ian Kendall, Gerry Henderson and Dave Ramsay who were the TIE persons involved.

I remember presenting the final version of the MUDFA contract to Keith Rimmer (CEC's Director for Transport) later on. Keith latterly worked at TIE. I think he became a TIE employee. That meeting happened on Tuesday 7 February 2006. We were joined by Ian Kendall, Gerry Henderson, Willie Fraser, Dave Ramsay and Gary Easton. There was also supposed to be attendance from



SDS, I think it was Dave Simmons, however I am not completely certain on that detail now. The meeting occurred following Keith Rimmer writing to TIE. Our internal team was then asked to address Keith's comments.

From email correspondence with Ian Kendall there seems to have been a discussion with Keith at the next TEL Board. Keith must have either sat on that board or been an attendee. There is also a draft letter to Keith in response to his comments. I only have a draft that was sent to me by TIE and it is not clear if this letter was actually sent. Copies of final documents were issued to CEC. I know that ultimately there was a review and discussion with CEC on the terms of the final contract. I do remember Duncan Fraser (CEC) saying that we needed to ensure that the MUDFA contractor correctly reinstated the road surface after the MUDFA works were completed. There was an interaction with CEC and the DLA team looking to make sure that the concerns of the Council were addressed in the documents. As far as Scottish Executive were concerned, Lorna Davis (TS) raised various questions on MUDFA prior to MUDFA being signed as part of the stakeholder engagement process. That is the extent of my knowledge of involvement of stakeholders.

45. By email dated 18 November 2005 [CEC01856183] DLA's resource of colleagues in Leeds who had reviewed issues on Utilities in relation to other tram schemes was discussed. Was this resource used and if not, why not?

**Response from SF:**

We did consult with our colleagues in Leeds. However, they hadn't been involved in detailed MUDFA-type arrangements on any of the projects that they had been involved in. From memory, the reason for that was that the tram schemes they had been involved in didn't have a carve out for the utilities works (i.e. the tram contractor carried out the tram infrastructure and utilities diversion works).

It had been my suggestion that there may be someone within DLA that had experience of this type of structure. I later realised that there was no one who had experience of this type of structure because it was novel to the UK. The structure came out of discussions with PUK and the review of the National Audit Office. It also came from Ian Kendall's experience on the Croydon tram project.

46. By email dated 7 December 2005 [CEC01859054] you noted the implications of having two MUDFA Contractors rather than one. On balance, from a legal perspective, you noted that the risks of having two MUDFA contractors outweigh the advantages.

- a) In your view what were the risks and advantages from a legal perspective of having one or two MUDFA contractors?

**Response from SF:**

The context of this email is that I was highlighting the fact that there was a potential procurement issue around what was being proposed. The timing of this discussion was after the contract notice had been published. I don't know where the suggestion had come from. In my email I explained that *"given the extensive market response, the risk of procurement challenge may be low however, a risk remains that a party might seek to challenge the award of two contracts on the basis that it may have bid if it had been known that the contract was for a lower value and that the risks of delivery of the MUDFA works were to be shared with another contractor"*.

In general, my concerns about having two contractors were that TIE would have ended up with two contracts for TIE to administer, two contractors dealing with the utility companies, two sets of overheads and half the volume of work to be priced. As part of the MUDFA concept, TIE was looking for volume discount. If there were two contractors bidding for half of the work each they may think *"I may only be getting part of the works here and therefore I can't provide a discounted price"*. There were a number of issues around having two contractors.

In terms of the advantages of having two contractors, one might be that TIE could have two contractors pushing on with the work that needed to be done and getting the work done quicker. A further advantage could have been that if one contractor underperforms then at least TIE had the other contractor to pick up the slack. Another benefit may have been in respect of the contractors being approved contractor for certain utilities. This could have been an interesting advantage as one utility company could have said that they had AMIS as an approved contractor and another saying that they had Morgan Sindall as an approved contractor. If TIE had contracts with each of AMIS and Morgan Sindall, then each contractor could do the work for the respective utility



companies where they had approved contractor status. However, after weighing it all up, my view was that, from a legal perspective, there were a number of contractual difficulties surrounding having two contractors rather than having one.

At that time I also understood that CEC had said to TIE that there could only be MUDFA works on-going in four areas in the City at any one time. That was to try and minimise the impact on traffic in Edinburgh. Because of this, any benefits in having two contractors may have been illusory.

47. By email dated 13 December 2005 [CEC01864079] you raised a concern with your line manager Andrew Fitchie that TIE were chasing "C+W" for a meeting while these Utilities works were minimal in comparison to others. This concern was raised following AF's email noting that DLA were spending "quite a deal of time trying to find the right place to get specific instructions" and "the need for Scottish Power commercial management buy-in to the MUDFA/ forcing of the issue with SP ". You also noted that Ian Kendall who was dealing with the procurement was not around at the time/ engaged.

a) What was your understanding of these matters?

**Response from SF:**

My understanding was that the lack of engagement from the utility companies meant that the scope which the utility companies would permit the MUDFA contractor to carry out was not agreed. That resulted in the scope of works not being finalised prior to the MUDFA procurement commencing. Each utility had a slightly different position in terms of what the MUDFA contractor was permitted to do. For example, Scottish Water had said "*we are comfortable with the MUDFA contractor doing anything at all in respect of our apparatus*". Scottish Power, however, didn't want the MUDFA contractor to be dealing with high voltage cables.

The important thing for the MUDFA contract was agreeing what the MUDFA contractor was and wasn't doing. It was also important to agree what the requirements of the utility companies were in terms of technical specification. We could only get that information through engagement with the utility companies.

b) Was tie's prioritisation of the tram project an on-going concern around this time or was this a one off?



**Response from SF:**

I didn't see the concern which I expressed on this occasion as being an issue of prioritisation of the tram project. My comment was intended to highlight an apparent focus by some members of the team on the more minor elements of the MUDFA works.

- c) Was it difficult to get instructions from tie officials?

**Response from SF:**

I do make a comment in my email about Ian Kendall not being around and not being engaged. To be fair to Ian, my email was sent on 13 December. I was perhaps being quite hard on him. I would say, generally, I don't remember there being any issue on getting instructions from Ian. I think the problem really at this time was the lack of engagement from the utility companies. There needed to be an escalation to senior management within TIE and those utility companies to try and unblock any issue that there was in terms of agreeing documentation.

- d) Did the delay in getting agreement from SP (or other utility companies) in relation to the MUDFA works cause or contribute to the delay in the utilities works later down the line?

**Response from SF:**

I can't really speak to the impact of these issues because, ultimately, engagement did happen and the agreements were entered into with the affected utilities. I therefore can't assess whether there was a correlation between the delay in reaching agreement and a wider delay on the project. I would suggest John Casserly and Geoff Gilbert (TIE) may be able to provide further comment on this area.

48. By email dated 12 January 2006 [CEC01872282] you noted that the best position was for the MUDFA Contractor to do the works, second best was to appoint a named/nominated sub-contractor.

Can you explain what this related to and why you were of this view?

**Response from SF:**

I make the particular comment on the MUDFA contractor being the preferred option because TIE would be better able to control the costs and timing of the

works if that was the case. If, as is suggested in the email, TIE did respond to Telewest and say "okay you can manage the cable" then my view was that it would not be in the interests of TIE. This was because TIE's control over the timing and cost of those works would be lost. They would be relying on Telewest's priorities in terms of doing that element of the works.

What was being sought in terms of the MUDFA contract, was the MUDFA contractor opening up a particular trench, assessing what utilities were in that trench then, if the MUDFA contractor had permission from the affected utilities to do the work, TIE instructing the MUDFA contractor to do that work. For the purpose of streamlining the utilities element of the project, the comment was that it was better that the MUDFA contractor did everything. Second best would be MUDFA being required to use a Telewest approved contractor. Third best would be Telewest coming in and doing the works themselves.

49. On 14 January 2006 a note from Duncan Fraser, CEC, [CEC01782048] made reference to the difficulty of employing the limited powers with the Utilities Act (1991) to assist in seeking reparation or encouraging good practice. He recommended that TIE ensure that there was a proof positive performance based design and construction mechanism in the contract. He also asked that it be explained to the Council more comprehensively how the tender assessment and future processes would ensure that an appropriate quality of works would be assured on this high profile project. You responded [CEC01782049] noting that the CARP Stage and Pre-Construction Stage provided the opportunity to seek improvements.

14 January  
2006 should be  
14 July 2006

a) What was meant by a proof positive performance based design and construction mechanism? Was that built into the MUDFA contract?

**Response from SF:**

I don't know what was meant by a proof-positive performance based design and construction mechanism. Duncan Fraser would be better placed to comment.

I think the comment was probably made against the backdrop of Duncan being concerned about how trenches had been backfilled in Edinburgh previously and the fact that there had been subsidence. Duncan's issues were always around making sure that the reinstatement of the road surfaces were carried out to an appropriate level. Duncan had expressed those concerns to the TIE team previously. I would suggest it would be useful to speak to Gary Easton (TSS) on

this area.

- b) How the tender assessment and future processes help to assure an appropriate quality of works?

**Response from SF:**

When I checked back on my emails, I tried to find a response from Duncan. I couldn't find anything specifically in response to my email. I do believe that Duncan was invited to attend site visits with the contractors who were involved in the CARP stage in MUDFA and that there were discussions with Duncan. However, in terms of what exactly happened, that would be a discussion with Duncan, the TIE team and Gary Easton (TSS). There was a formal report sent by John Low (TSS) to CEC in respect of CARP submissions.

- c) How did the contract ensure appropriate quality of works?

**Response from SF:**

There were a number of contract clauses in the MUDFA contract dealing with quality of the work. For example, the requirement to carry out extensive pre-construction work and the requirement to comply with technical specifications. There was a substantial completion process that was set out in the contract. When a particular work sector was complete from the perspective of the contractor, there was a process of notification to TIE followed by steps which TIE would take before they could say "*here is a certificate, you have completed the works*". Payment would have been made on that basis. TIE and TSS should be able to give more detail.

- d) What approach was taken to incentivisation [CEC01879755]?

**Response from SF:**

There was a mechanism in the contract called the "value engineering incentive". SDS were carrying out the design not MUDFA. MUDFA was involved in looking at the buildability of the design. The value engineering incentive was all about trying to incentivise the MUDFA contractor, SDS, TIE and the utility companies to work together to see if there was a more effective way of carrying out the works. If a more cost-effective way was found by the MUDFA contractor, a sharing of savings would be made under the contract.



50. By email dated 18 January 2006 [CEC01858524] you advised John Low of TIE that *“the concept of having a MUDFA Contractor is to introduce the concept of single point responsibility for the utility diversion works needed in respect of the Edinburgh Tram Project. This concept removes the risks associated with TIE having to manage separate contracts with each of the affected Utilities. The biggest of these risks is the late delivery of the Utilities diversions and the impact of this late delivery on the INFRACO contractor carrying out the construction of the works. TIE is seeking to select a MUDFA Contractor with the requisite technical and programme management experience to manage out the risks associated with these works. Having one contractor and its supply chain carrying out the works also has potential cost savings for TIE.”*

- a) What were the potential advantages and cost savings associated with having one central contractor manage the separate contracts with each of the affected Utilities?

**Response from SF:**

I was concerned that John was diverging from the MUDFA principle which was for the MUDFA contractor to carry out not manage works for affected utilities.

I had the feeling that there was a view of *“it doesn't really matter how much MUDFA does just so long as we get an agreement with these utility companies”*. What I was trying to say is that MUDFA is all about single point responsibility, it's about cost, it's about programme and we really needed to be pushing through the fact that, as far as possible, MUDFA needed to do all of the works associated with the apparatus in question.

The agreement with BT was different because BT weren't as keen on having MUDFA deal with its apparatus. They wanted their own contractor to do that. I was really just saying that the BT model wasn't the model that TIE wanted to roll out for the remaining utilities. My email was saying that it was better to carry on trying to secure as much work scope for the MUDFA contractor from the utility companies.

An advantage of the MUDFA structure was achieving cost savings through having one central contractor centrally managing the contracts. It was about streamlining the works that would be done in a particular trench and making sure that the MUDFA contractor responsible for carrying out those works on time couldn't say *“sorry we can't close that trench because 'x' utility hasn't been out to do the work, sorry not our fault, you can't hold us responsible under the contract for the delay”*. It was really about trying to transfer the responsibility

onto the MUDFA contractor to carry out the works and manage out the risk.

On other projects, quite often what happened was that the clients would ask the relevant utility company to do the particular diversion work. However, because the tram project involved multi-utilities in a city centre setting, TIE's view was that this approach wouldn't work. The concept of the MUDFA contractor was about trying to resolve interface issues, and not having individual contractors doing the work.

It was quite an undertaking to engage with all of these utility companies and obtain agreements. During the procurement process for the MUDFA we had briefing sessions with the utility companies. I recall presenting to the utility companies along the lines of *"this is what TIE would like to do, would you consent to a contractor appointed by TIE working on your apparatus"*. The important principle was about making sure TIE's procurement was able to deliver a contractor with the requisite experience across the range of the utilities that were required to be moved. For example, where a particular contractor didn't have Scotland Gas network experience, that contractor would need to have in their team a subcontractor who could do that kind of work. All this was about transferring to the MUDFA contractor, the responsibility for managing and carrying out all of these works.

51. An e-mail dated 28 March 2006 [CEC01621730] attached a Report on the Key Contractual Terms of MUDFA [CEC01621731]. The report noted that the MUDFA contractor would not be required to carry out any design in relation to any of the utility diversion works (p1).

(a) Who was to carry out the design in relation to the utility works? (see, also, the query noted above in relation to the SDS provider only being required to carry out "critical" utility design).

**Response from SF:**

SDS was to carry out the design in relation to the utility works. In terms of the SDS Contract, SDS was to carry out a defined list of Services (the scope was described in Schedule 1). This included the Design and Technical Services described in paragraph 2. This is a very wide description which refers to Deliverables for the Preliminary and Detailed Design Phases. This included a number of deliverables - e.g. drawings. Also, detailed pricing was given by the



SDS in respect of the work scope for utilities.

I suggest that the Inquiry checks with TIE in terms of reference to "critical", (see my response to question 34). My view is that the reference to "critical" was not meant to mean that there was "non-critical" design being carried out by others. NB this drafting is in section 3 "general technical support" - so doesn't contain all of the design services being provided by SDS. So, there is a need to read schedule 1 in totality.

52. Slides relating to a "Report to the MUDFA Group on the evaluation of the ITN Tender Submissions for the procurement of the MUDFA Contractor for the Edinburgh Tram Network" on 6 July 2006 [CEC01877967] noted (p6) that "*None of the Programmes submitted can be assessed as deliverable*"...

a) What was your awareness and understanding of that matter?

**Response from SF:**

This particular presentation was on the back of the ITN tender assessment. This was the assessment of the four tenders which were submitted. This wasn't the final assessment. I would suggest that the Inquiry should discuss the comment that "*None of the Programmes submitted can be assessed as deliverable*" with the lead evaluators for that part of the evaluation. They were Alastair Slessor (TIE), Alan Hill (Scott Wilson) and Gary Easton (TSS). They may be able to provide some insight.

From my perspective, the CARP stage was the 'clarification and refinement process stage' which was to be used as a means of resolving, stress testing and clarifying any issues which had been raised as part of the evaluation. As far as I was concerned, the most important aspect of the evaluation was really the evaluation of the final CARP tenders. Looking back at the CARP documentation, I think there were revised programme dates. I am sure there were discussions in respect of programme, however, you would need to confirm that with those who were responsible at TIE and TSS for this element of the evaluation.

b) Incidentally, it would be helpful if you could confirm the code name for the successful bidder (i.e. Glasgow, Edinburgh, Dundee or Aberdeen)?

**Response from SF:**



The code name for the successful bidder was 'Glasgow'.

53. On 12 July 2006, DLA provided TIE with a list of the key commercial issues that required to be resolved in the procurement of the MUDFA contractor [CEC01715235]. This document discusses the level of liquidated damages and the consequences of a delay in the MUDFA works on the INFRACO works.

- a) What were your views on whether the level of liquidated damages in the MUDFA contract were set at an adequate level? What were your views on the awareness, and level of concern, within TIE on the impact of MUDFA delay on the INFRACO works?

**Response from SF:**

The decision on the level of liquidated damages is always a commercial decision for a client. What any client needs to be aware of in coming up with the quantum of liquidated damages is that the quantum represents a genuine pre-estimate of loss. In some occasions, the genuine pre-estimate of loss can be potentially so high that, if you were to extrapolate that amount into the contract, the contractor wouldn't sign up to the contract. This is a general observation on liquidated damages.

In terms of this paper, basically I pulled together the questions associated with what was outstanding at CARP from a legal/commercial perspective. I was looking for the TIE team to be engaging in response to those questions. One of the MUDFA bidders had sought to dilute the quantum of the liquidated damages. That prompted this discussion.

The comments in the paper were made by Stewart McGarrity (TIE Finance Director). Stewart's comments were a reply to me, the TIE team and to Andie Harper (TIE Project Director). A month or so later, I forwarded these particular comments from Stewart to Andie and said "*these are for discussion prior to the execution of the MUDFA contract, do they still represent your position on how you would like to deal with this risk under the contract?*". There was an awareness and level of concern within TIE. I can say this based on the discussions that I had with TIE. TIE was aware of the impact of any delay. Very early on in the project there was a view that there was sufficient float in the programme to absorb the delay and, if there was delay, then there could be a reprogramming of INFRACO and MUDFA works. The important thing to note is that MUDFA was a construction which involved the diversion of utilities across a

long distance of track. It was therefore perfectly feasible that diversions could be carried out in an area by the MUDFA contractor, and then INFRACO could be coming in and then carrying out what it needed to do in that particular area. The TIE team was aware of that.

54. In October 2006 TIE appointed Alfred McAlpine Infrastructure Services Ltd under the MUDFA contract to carry out the utility diversion works for the tram project.

(a) What were your views on whether there was significant delay in commencing, and carrying out, the utility diversion works?

**Response from SF:**

I was aware of there being delay in commencing, and carrying out, the utility diversion works. However, I can't comment on the precise detail of the reasons for the delay. This is an area for comment by TIE and TSS. The persons who might be able to provide comment are Martin Hutchinson, John Casserly, Graeme Barclay, Susan Clark and Gary Easton. In terms of my understanding of the causes of the delay, I think there may have been an issue in terms of the MUDFA contractor taking longer to mobilise. There was also the delay in the design work which was being carried out by SDS.

(b) What was your understanding of the cause or causes of any such delay?

**Response from SF:**

See above.

(c) What was your understanding of the steps taken to try and address any such delay and whether these steps were successful?

**Response from SF:**

See above.

55. There is a suggestion that the Utilities design and Utilities works for phase 1b (the Roseburn link) were, at least initially, carried out before the Utilities design and Utilities works for phase 1a (i.e. the line from the Airport to Leith Waterfront).

a) Is it the case that, at least initially, the utility design and utility works for phase 1b were carried out before the utility design and utility works for phase 1a and, if so, why?

**Response from SF:**

This is an area that I cannot speak to. This is a technical issue which TIE or TSS should be able to comment on.

- b) Was the programme changed (and, if so, when and why) so that utility design and utility works for phase 1a were carried out before utility design and utility works for phase 1b?

**Response from SF:**

This is an area that I cannot speak to. This is a technical issue which TIE or TSS should be able to comment on.

56. On 7 February 2007 MUDFA AMIS Project Director Andrew Malkin wrote to Susan Clark [CEC01792998] noting that the contract documents signed by TIE and AMIS "*still appear to be incomplete and do not represent what was agreed during the last few days of the negotiations*". That was described as a "*fundamental*" contract issue and a list of the missing documents (comprising various Bills of Quantities) was set out. What was your awareness and understanding of that issue including why there appear to have been "missing documents" when the contract was signed, why the contract was nonetheless signed and how agreement could be reached while documents were missing from the contract? Did these matters cause you any concern?

Whose responsibility was it to produce the Bills of Quantities referred to in the letter?

**Response from SF:**

It was Turner and Townsend's responsibility to produce the Bills of Quantities.

No one, and that would include TIE, AMIS and the advisory team (including DLA), appreciated at the time when the contract was signed that certain pages from the Bills of Quantities were missing. I don't know if the wrong version was printed out by Turner and Townsend or if there had been a problem with the actual printing itself which led to pages being missed rather than the wrong pages being inserted. Gary Easton (TSS) should be able to clarify what happened.

As far as I was concerned it was a genuine error. In terms of production of the engrossed contract, the DLA team was responsible for printing the "front end" of the contract and the schedules other than the Bills of Quantities. The Bills of Quantities themselves were negotiated at the last minute by TIE, AMIS and



Turner and Townsend, and were printed by Turner and Townsend. The printed Bills were slotted into the rest of the contract which had been printed by DLA .

- a) How, and when, were these issues resolved?

**Response from SF:**

I suggest that the Inquiry speaks with TIE and Turner and Townsend. There was an all parties meeting on 16 March 2007 and BoQs was on the agenda. I became aware of the matter because there was email correspondence and there was a telephone call from Martin Hutchinson to me at that time. I was contacted because of the letter having been received from AMIS.

- b) Did these issues cause or contribute to any delay in commencing or carrying out any of the MUDFA works?

**Response from SF:**

I don't know what the impact of this issue was, if any. I believe that the letter was sent by AMIS when perhaps AMIS were not able to fully comply with terms of the contract. It is not unusual in this sort of circumstance for the contractor to be blaming the client and saying "the delay isn't our fault". To say that AMIS were saying that here would be speculation on my part. In terms of "did it actually cause a delay?" I suggest that the Inquiry speaks with TIE and Turner Townsend on that.

57. In another letter dated 7 February 2007 [CEC01792999], Mr Malkin noted that "Amis had continued to express concern that the execution of the Contract was incomplete and the interfaces, demarcation, roles and responsibilities of the parties was, as a result not adequately defined and understood". The letter notes that at a Utilities Technical Design and Liaison Meeting held on 17th January, TIE Limited Project Management staff had erroneously stated that AMIS MUDFA were responsible for the supply, jointing, testing and commissioning of Scottish Power cables.

Mr Malkin noted that "The deficiency in appreciation by tie Limited Project Management staff of the Employers specific obligations and responsibilities under the Contract represents a major concern and risk to the successful delivery of Construction Services, unless immediate action is taken".

Amis suggested the preparation of a comprehensive Demarcation Clarification Schedule which sets out each of the Utilities categories and the party responsible for each of the components and/or deliverables, and appraisal of the executed Contract Documents to determine the veracity and totality of the

documentation prepared and issued by the legal entity.

- a) What was your awareness and understanding of these issues? Did these issues cause you any concerns? Did you discuss any such concerns with others in DLA, TIE or CEC?

**Response from SF:**

I don't believe that I was aware of these issues until I was invited to a meeting on 16 March 2007.

- b) How, and when, were these issues resolved?

**Response from SF:**

I would suggest speaking with the TIE and TSS team for comment on how these issues were resolved. There was a meeting on 16 March where this was on the agenda. I think this was on the agenda alongside the Bills of Quantities issue.

- c) Did these issues cause or contribute to any delay in commencing or carrying out the MUDFA works?

**Response from SF:**

I can't comment on whether the issues caused or contributed to any delay in commencing or carrying out the MUDFA works. That would be for TIE and TSS to comment on.

- d) Were you concerned about TIE's awareness of what the contract meant?

**Response from SF:**

In terms of TIE's knowledge of what the contract meant, most of the TIE personnel involved in the MUDFA procurement had changed. I believe Phil Douglas from TIE was still involved, however, I did get the impression it was to a lesser extent. From the TSS team, Alan Hill, John Low and Gary Easton were still involved. You would need to check with them the extent to which they were involved. I would say that there was some continuity of personnel but not complete continuity.

I was concerned that all of the team did not have knowledge of the terms of the contract

- e) Was a comprehensive Demarcation Clarification Schedule?

**Response from SF:**

I don't know whether a comprehensive Demarcation Clarification Schedule was produced or drafted. TIE or TSS would be able to comment on this. There was, within the MUDFA contract, a description against each utility as to what MUDFA was permitted to do. It may be that what was meant by Demarcation Clarification Schedule was some sort of more user-friendly guide at a glance that said *"this is what MUDFA can and cannot do with regard to certain apparatuses"*. I don't know, and this is speculation on my part. I suggest that the Inquiry discusses this with TIE, TSS and AMIS.

58. An e-mail exchange on 22 and 23 March 2007 noted that the MUDFA contractor wanted wholesale improvement to the working arrangements, which TIE considered unnecessary [CEC00212881]. You suggested that a number of activities be undertaken and noted that *"What we need to do is to try and achieve minimal adjustments to the contract to reflect that the intended information and design was not available to the MUDFA Contractor and tie in order to complete the Pre-Construction Deliverables as originally anticipated"*.

You repeated an offer to TIE of a *"teach-in"* on the MUDFA contract and expressed concern that none of the proposed TIE attendees at a meeting with AMIS was involved in the tender process and contract negotiations.

- a) It would be helpful if you could explain your understanding of the matters noted above including what information and design was not available to the MUDFA contractor and TIE in order to complete the Pre-Construction Deliverables, why that information and design was not available and who was responsible for providing that information and design?

**Response from SF:**

My particular concern was that the MUDFA contract should only be adjusted to the extent that the circumstances had changed. In other words, if what the MUDFA Contractor was supposed to do hadn't been done because of a MUDFA Contractor-generated issue then it wouldn't be appropriate to then give the MUDFA Contractor relief under the MUDFA contract. That said, if there had been something that wasn't the MUDFA Contractor's responsibility e.g. it was a TIE adjustment to what they wanted the MUDFA Contractor to do, then it would be appropriate to adjust the MUDFA contract.

Thinking with my "procurement hat" on, clearly there had been a major procurement competition in respect of the MUDFA Contractor and, as part of



that procurement competition, a defined risk transfer had been expressed in the MUDFA contract. It therefore wouldn't have been appropriate to start changing that risk transfer unless it was absolutely necessary and arose out of circumstances that had changed in respect of the MUDFA contract. In terms of why information and design in respect of the Pre-Construction Deliverables was not available and who was responsible for providing that information and design, the design should have been provided by SDS. I don't know if the missing information related to information which was to be provided by SDS or any of the utility companies. For comment on the actual detail of the issue, the Inquiry should speak to TIE, TSS and SDS.

- b) Why was amendment of the contract required? Was the contract amended and, if so, when and in what way? Did the fact that amendment of the contract was required cause you any concerns? Did you discuss these concerns with others in DLA, TIE or CEC?

**Response from SF:**

AMIS had requested amendment of the contract. I responded to a paper prepared by Geoff Gilbert. Following this email exchange, the contract was not amended to deal with the issues described in Geoff's paper and the AMIS MOU.

I have looked at DLA's file and there is separate correspondence between myself, John Casserly (TIE) and others in my team in respect of amendments to the MUDFA contract arising out of Scottish Power and Edinburgh Airport Ltd. At one point, John had also been looking at including incentivisation drafting. There was a Schedule of Amendments prepared on that basis by me. John took these amendments to discussions with AMIS. I don't know whether the incentivisation drafting was ever used. I think the drafting vis a vis other utilities must have been used. I don't know how that was effected. This area would be one for John Casserly to comment on.

My concern as per my email to Geoff was that AMIS were "seeking to achieve greater commercial advantage out of this situation than is reasonable."

- c) Did the matters noted above cause or contribute to any delay in commencing or carrying out the MUDFA works?

**Response from SF:**

In my view, delay by SDS in the provision of design had an impact on the MUDFA programme. I suggest that this is discussed with TIE and TSS.

- d) Why did you offer TIE a “teach-in” on the MUDFA contract? Do you recall whether that offer was accepted?

**Response from SF:**

I offered a teach-in because there had been so many changes in TIE personnel and I believed that AMIS was trying to take advantage of that. A contract teach-in didn't happen, although, I do remember sitting down with John Casserly to discuss the operation of the MUDFA contract.

On other projects, I have carried out teach-ins for clients - this is good practice and ensures continuity of understanding between the procurement of the contract (including what has been negotiated) and the administration of the contract. Teach-ins are normally big affairs involving a PowerPoint presentation and standing in front of a group of 10-30 people (depending on the size of the client team).

- e) Are you aware whether any of the TIE staff who had been involved in the tender process and contract negotiations ended up attending the meeting with AMIS and, generally, were involved in attempting to resolve these problems?

**Response from SF:**

In terms of my original email, I didn't believe that any of the original TIE team involved in the tender process and contract negotiations ended up attending the meeting with AMIS or were, generally, involved in attempting to resolve these problems. I recall that, at this point, Alistair Slessor had left TIE and Phil Douglas was not involved in the discussion. There may have been some TSS involvement (e.g. Gary Easton or Allan Hill), and the Inquiry should confirm that with TSS. As the Inquiry will note from my email, I suggested who at TSS would be able to provide input.

- f) Were the Council informed of the matters noted above?

**Response from SF:**

I didn't personally report to CEC on these matters. See my earlier comments in respect of the duty of care letter. TIE should be able to confirm whether they did

report to CEC. I would have expected that the performance of the MUDFA contract would have featured on the reports that TIE should have providing CEC as part of the governance process. Also, I would have assumed that the performance of the MUDFA contract would have been a topic for discussion at the Board meetings which CEC attended.

- g) Damages if MUDFA fail to complete [CEC00212887] – were the estimates correct?

**Response from SF:**

The paper is a summary of what the MUDFA bidders were seeking to amend at the CARP stage of the procurement. The Inquiry should discuss the calculation of liquidated damages with TIE. DLA had recommended that a paper backing up the calculation of liquidated damages needed to be prepared by TIE. In general terms, the level of liquidated damages in a contract, must be balanced between the client being financially protected (as far as possible) if there is a delay, and the level of liquidated damages being too high leading to bidders not bidding for a contract or a price being given which is too expensive. The decision, therefore, on the level of liquidated damages in the MUDFA contract was a commercial decision for TIE. See further comments in response to question 53.

59. On 23 March 2007 DLA commented on the "MUDFA CONTRACT IMPROVEMENTS BRIEF" [CEC01621732].

- a) It would be helpful if you could explain the need for and purpose of that paper?

**Response from SF:**

This paper was drafted by Geoff Gilbert. Geoff was writing it in response to comments which had been received from AMIS.

- b) The listed objectives included "*minimise changes to contract*", "*include meaningful incentivisation*", "*include more effective 'penalties'*" and "*include Phase 1b as a separate option in contract*". What incentivisation and penalty provisions were included in the MUDFA contract? Why was it considered desirable or necessary to amend these provisions? What were your views on these provisions?

**Response from SF:**



The MUDFA contract included certain value engineering incentives. There were also liquidated damages. The way that the incentivisation payment process worked was such payment was made to the MUDFA contractor following achievement of particular milestones. The drafting reflected TIE's instructions at the time.

- c) It may be suggested that the need to re-visit the MUDFA contract so soon after it had been entered into with a view to including the matters noted above suggests that the contract was defective. What are your views on any such suggestion?

**Response from SF:**

On the back of this particular paper, the contract wasn't amended. I gave Geoff Gilbert and the team very detailed comments on the paper. Looking back, I think my concern really was that Geoff was coming into all of this "cold" without having spoken to anyone who was involved in the MUDFA procurement. I was suggesting that, in respect of a number of the issues that he raised, he needed to speak with the TSS team. For example, I was saying that he needed to talk to them about overheads. I was also flagging the fact that, if there was a renegotiation of some of the commercial positions in the contract, that could undermine some of the work that had already been done with AMIS. Again, it was indicative of one TIE team having been involved in instructing and procuring the contract and then a second TIE team coming in to administer that contract without knowledge of what had gone before, rather than there being any defect in the contract.

I would say that it does happen on other infrastructure projects that you have turnover in staff as you go along. Sometimes you have got particular teams of people where the specialism is more in the procurement side and then you have other teams whose specialism is more in the contractor side. In this project there was a particularly high turnover of TIE staff. In my view, this had an adverse effect in respect of certain issues.

I recall working particularly closely with Gary Easton in respect of the MUDFA procurement. If Geoff had had a conversation with Gary, a number of the questions that Geoff raised in his paper (CEC01621732) could have been answered. This isn't to say that Geoff hadn't picked up on something. It was more just Geoff being provided with an understanding of what happened at the

time of certain decisions, why that had been considered, what had been the reaction of the TIE team, whether that had gone into the procurement or not and what had been the reaction of AMIS. It was just to allow him to contextualise the procurement. I think, at this point, that context was missing when Geoff's paper was delivered. This is what triggered me saying "do you want a contract teach-in".

I would agree that we were often sitting in meetings with TIE staff who weren't aware of what had gone before and that we had to explain the background. We didn't mind doing that. But I didn't want to become an apologist for decisions that had been taken previously. Those decisions had been taken by the TIE team at that time. Turner Townsend and DLA were advising. Ultimately TIE, as the client, was making the decisions on the issues such as the level of liquidated damages and the other commercial provisions in the MUDFA contract.

d) What was the response of AMIS to the attempt to amend the contract?

**Response from SF:**

AMIS initiated the request to amend the MUDFA contract. Geoff had responded to that request and had sought to bring in other issues which he didn't see as being covered in the contract. That would have prompted, no doubt, another AMIS email, or letter, saying "why are you trying to deal with matters that have already been included in the contract or have been otherwise negotiated". That was why it was important for Geoff to get the context and speak with the team before he had a conversation with AMIS.

e) Was the MUDFA contract amended and, if so, in what way?

**Response from SF:**

On the back of Geoff's paper, the contract wasn't amended to deal with the particular issues that were reflected in the paper. During my day to day involvement in the project, the only amendments which I was involved with were related to the Edinburgh Airport works and the additional utilities, and John Casserly's consideration of the inclusion of an incentivisation mechanism.

f) Were CEC informed of these problems?

**Response from SF:**

The Inquiry will need to check with TIE. The contract wasn't amended and issues seem to have, as far as I was aware, been resolved at that particular time. I am not aware that there was a problem to be reported. I would expect "how is the MUDFA contract going?" would be something that would be a standing item on the TIE and TEL Board agendas.

- g) Did these matters cause you concern and, if so, did you discuss these concerns with others in DLA, TIE or CEC?

**Response from SF:**

See above.

60. A CEC note following a meeting of 30 May 2007 between CEC, DLA and TIE on "CEC LIABILITY UNDER UTILITY AGREEMENTS" [CEC01567363] noted that the process of negotiating with the statutory Utilities companies (SUCs) had been a laborious one, with each utility taking different positions, in some cases disproportionate to the scope and volume of the actual diversion works.

- a) What was your awareness and understanding of the matters in the note?

**Response from SF:**

I was aware of this issue, however, I can't comment on the detail. Andrew Fitchie would be the person from DLA to comment on the wider impact of the delay. He would have been in discussions with the TIE team on this. The likely persons at TIE dealing with this would have been Graeme Barclay, John Casserly and Geoff Gilbert.

- b) To what extent, if at all, did any delays or difficulties in obtaining agreement from the SUCs cause or contribute to delay in commencing or carrying out the utility diversions works (whether through causing delay in producing or agreeing design drawings for Utilities diversions or otherwise)?

**Response from SF:**

See above.

61. By email dated 4 July 2007 [CEC01641228], Andy Conway noted that the MUDFA works would be delayed by CEC refusing to become party to the Scottish Power and Telewest agreements. CEC wished to acquire a better understanding of why it was necessary for them to become party when they had not been involved in the negotiations. DLA advised that the agreements could be



signed.

- a) What was your understanding as to why CEC were hesitant in signing the agreements? Did CEC's hesitance cause any delay in signing the agreements and in commencing or undertaking the Utilities diversion works ? [CEC01556713] [CEC01641244] [CEC01567363] [CEC01641402]?

**Response from SF:**

I can't comment on the details of this.

- b) To what extent, if at all, was pressure placed on CEC by TIE and/or DLA to sign the contracts [CEC01712270] [CEC01641276] [CEC01567362]

**Response from SF:**

In terms of "pressure placed on CEC by TIE and/or DLA", as far as I was concerned, I didn't see any pressure being exerted from DLA. Clearly I can't speak on behalf of TIE. I think the CEC team was robust enough to be, even if there was pressure, only doing what they deemed right in the given circumstance. I note there is a reference in Andy Conway's email to CEC being kept out of the loop. There does seem to be email traffic between Andrew and Trudi Craggs where Trudi refers to CEC being asked months earlier about the particular agreements. I would suggest that the Inquiry should speak to Andrew and Trudi in respect of those comments. It may be that Andy Conway wasn't aware there had been requests from TIE and DLA but the request had gone to someone else at CEC. That, however, would be speculation on my part and is only formed from my reading of the email correspondence.

On 29 August 2007 [CEC01682315] Willie Gallagher wrote to Graeme Bisset and Stephen Bell querying whether, given the experience of SDS, it would be worth setting up a work-shop to walk TIE through the detail of the MUDFA contract so that everyone was clear on content and dispute resolution. He notes that "*We must ensure that we manage it properly - statement of the obvious but we have failed in the past. Also, we should perhaps build a monthly statement of compliance in our monthly report to TPD*".

- (a) We appreciate that you were not a recipient of this email but can you confirm if a work-shop was set up and whether the practice of including a monthly statement of compliance in our monthly report to TPD, was adopted"

**Response from SF:**

The first time I saw this correspondence was following the Inquiry providing

it to me. A workshop was not set up. I cannot confirm whether the practice of including a monthly statement of compliance in monthly reports to the TPD was adopted. This particular email chain was at the time when DLA had been asked to "down tools". Perhaps that explains why I wasn't involved. I would suggest that this is something to check with Willie Gallagher, Graeme Bisset and Steven Bell of TIE.

- (b) Can you provide any insight into why Tie failed to manage the SDS contract properly as Mr Gallagher's email suggests?

**Response from SF:**

My personal view was that the TSS resource was not being deployed by TIE as had been envisaged or was required for a project of this scale and complexity. The whole rationale of SDS and TSS being procured at the same time was to ensure that, when SDS was novated to INFRACO, there would be a technical support resource available to TIE. That technical resource support should have been working side by side with the TIE team through all of these procurements and the administration of the contracts which had been procured. Without use of TSS, there was limited corporate memory and consistency in terms of the actions which were being taken by TIE. The Scott Wilson and Turner Townsend team should have been involved in the SDS design review process. That role does seem to have been more undertaken by Trudi Craggs, Damian Sharp and Gavin Murray in the initial stages of the SDS design review process. I am sure there were TSS people involved at a later stage, however, in my view there should have been more involvement. I did query this at the time but was told that the TSS resource was too expensive.

- (c) Finally, can you provide any insight re the later exchanges in the chain between WG and Steven Bell?

**Response from SF:**

I can't provide any insight into the later exchanges in the e-mail chain between Willie Gallagher and Steven Bell in terms of myself, other than at some point during the time when DLA weren't working on the project (May to September 2007), Andrew Fitchie told me that he had been told by Willie Gallagher that Willie Gallagher considered me to be a "blocker". I didn't

understand what was meant by this but understood this to be the reason why my role in the project changed after DLA was re-engaged in September 2007. I would also observe that it is a bit worrying that Willie Gallagher didn't know who worked on the MUDFA contract.

### The Infrastructure Contract (to December 2007)

62. In general:

a) To what extent were you involved in the procurement of the INFRACO contract?

**Response from SF:**

I was involved in drafting various documents for the Infraco procurement including: contract notice, pre-qualification documentation, invitation to negotiate and drafts of the Infraco Contract itself.

I was also involved in initial negotiations with bidders. The bidders who were involved in negotiations were Bombardier/Laing O'Rourke and a consortium between BB and Siemens (BBS). I recall Alastair Richards, Geoff Gilbert, Bob Dawson and others from TIE in meetings with me.

As part of the negotiation of the Infraco contract, each Infraco bidder came back with its own mark-up and comments on the contract.

The negotiation of the Infraco contract was carried out as part of an on-going thorough process with TIE.

As mentioned previously, DLA Piper was stood-down by TIE in May 2007 during the Infraco contract negotiations. It was an unusual situation for us to go from being heavily involved on a daily basis to not being involved.

I am not sure what the reason(s) were for DLA Piper being re-engaged in September 2007. Lesley McCourt left TIE around this period which may have had something to do with it. I also anticipate that TIE was struggling to deal with the complexities of the Infraco procurement and negotiation.



After September 2007, my involvement in the project was limited. I had some involvement in discrete matters and schedules. For example, I reviewed the Employer's Requirements on short notice at a relatively late stage. I also reviewed comments from BBS on the dispute resolution procedure.

b) To what extent were you involved in the drafting of the contract itself?

**Response from SF:**

I prepared the first draft of the Infraco contract with input from other DLA colleagues and TIE. The Infraco contract was developed from precedent documentation from other light-rail projects. I recall meetings with Ian Kendall and his team at TIE doing a page-turn of the draft heads of terms for the Infraco contract and discussing the provisions and risks. Close engagement with different members of the TIE team (e.g. Alastair Richards, David Powell and Mark Gardener) continued throughout the drafting of the Infraco contract.

c) To what extent was Andrew Fitchie involved in drafting the INFRACO contract?

**Response from SF:**

I prepared the first draft of the Infraco contract with input from other DLA colleagues and TIE. Andrew reviewed this first draft together with myself. It was quite a complex contract in terms of needing to have other contracts (such as SDS and TRAMCO) "folded in" under the INFRACO contract. Iain Bowler reviewed the drafting which related to the interface with the Tramco contract to make sure that everything aligned and dovetailed with that contract. Iain and I maintained regular contact in terms of drafting the Tramco and Infraco contracts.

d) It would be helpful if you could explain the arrangement put in place when Mr Fitchie was seconded to tie in late 2007 and early 2008? Was, for example, Mr Fitchie an employee of TIE during that period or did he continue to provide advice to TIE on behalf of DLA? Do you recall during what dates Mr Fitchie was seconded to TIE? While Mr Fitchie was seconded to TIE, to what extent did you, and others in DLA, advise TIE and/or CEC on the terms of the draft, and final, INFRACO contract?

**Response from SF:**

I was aware of TIE asking for Andrew to go on secondment. This was in the period when DLA were not involved in the project (May to September 2007). Andrew's secondment was expressed to us as being the means under which we

were to be re-engaged in respect of the INFRACO contract i.e. Andrew would be providing legal advice and leading the DLA team as a secondee to TIE. Andrew wasn't employed by TIE, he remained a partner in DLA. Our office managing partner, Bruce Westbrook, and I had discussed with Andrew how Andrew would be able to manage effectively the exclusive arrangement of working for TIE vis a vis his other client commitments. It was agreed that Andrew would work for TIE on the basis he ultimately did. He was still in the office a lot of the time but he spent a lot of time in TIE's offices at meetings. In summary, Andrew continued to be a partner at DLA, it was just that he was working in that period for one client i.e. TIE. I believe that Andrew was on secondment from October 2007 until June 2008.

As I said above, my view was that Andrew's secondment was just the new principal means by which DLA would be providing legal support to TIE. Andrew was providing the primary legal support to TIE. That support didn't entail a second partner reviewing everything that was done by Andrew. Andrew had support from other team members within DLA during this time. Iain Bowler was still involved in the Tramco procurement. I was only involved in ad hoc matters. Andrew was supported by associates and solicitors in DLA's Edinburgh office and by the Leeds team led by Iain Bowler.

63. A summary of the major outstanding issues with the INFRACO procurement as at 28 July 2006 [CEC01856446] was prepared by DLA. This document notes you as having responsibility for preparing the Heads of Terms for the INFRACO Contract and Schedules and with reviewing TIE's first draft of scope/their requirements and for the ITN Tender Submission requirements.

a) What were the main challenges you faced in undertaking this work?

**Response from SF:**

There was a lot to do in a short space of time. There were challenges in terms of receiving input from SDS. I think the biggest challenge was in drafting an INFRACO contract that dovetailed with all of the other contracts i.e. DPOFA, SDS, MUDFA and Tramco.

64. TIE issued an Invitation to Tender in respect of the INFRACO contract in October 2006.

a) Do you recall what the Invitation to Tender said in relation to (i) how much of the



design would be completed when the INFRACO contract was entered into and (ii) how much of the Utilities diversion work would be completed?

**Response from SF:**

TIE issued an ITT in respect of the INFRACO contract in October 2006. In terms of the precise level of detail on the design and the utilities diversion work and programme, that is really for TIE, SDS and TSS to confirm. The rationale in the procurement documentation referring to the issue of design and MUDFA information, was so that the INFRACO bidders could carry out their due diligence in respect of that design and on the proposals from the MUDFA Contractor for carrying out the utilities work. At the point the INFRACO ITN was issued, the MUDFA contract was being signed. It was anticipated that there would be further releases of information during the currency of the INFRACO procurement. I note at this juncture the ITN said *"the MUDFA works will be carried out in advance of and in conjunction with the implementation of the INFRACO contract. Successful INFRACO will be required by the INFRACO contract to liaise with the MUDFA contractor and co-ordinate the work stipulated under the INFRACO contract with the utilities diversion works being carried out under the MUDFA"*.

65. On 23 October 2006 BBS submitted a document responding to the INFRACO contract procurement [CEC01795948].

- a) That document did not raise any express concerns in relation to the design available? Are you aware of when BBS (and/or the other INFRACO tenders) first raised concerns in that regard?

**Response from SF:**

I am not aware of when BBS first raised their concerns. The Inquiry should check this with TIE. I would suggest speaking with Geoff Gilbert and Bob Dawson.

66. Supplemental Instructions to Tenderers [CEC01824070]

Were issued on 9 January 2007 and provided that "it is recognised that there may be certain issues around which complete agreement on the

- a) INFRACO Contract and the Infrastructure Maintenance Agreement cannot be reached until after return of the final Consolidated Proposals and on-going engagement in the Facilitated Negotiations phase" (p1). It also provided that between 12 January and 16 April 2007, Tenderers would be provided with further project information relating to *"significant development to the Preliminary Design, including surveys, carrying price or risk implications"* and *"key structures*



*detailed design*". What were the main issues in respect of which it was anticipated that complete agreement may not be able to be reached until after return of the final Consolidated Proposals?

**Response from SF:**

Reading the supplemental instructions paper, I think the issue which was anticipated was that there would not be complete agreement in respect of phase 1b in terms of the negotiations with Tramco and the negotiations with the SDS leading up to novation. There may have been other reasons for the issue of these supplemental instructions. I suggest that this is an area which should be discussed with Geoff Gilbert.

- b) Do you recall whether, between January and April 2007, INFRACO bidders were provided with "significant development to the Preliminary Design" and "key structures detailed design"?

**Response from SF:**

I don't have any knowledge of whether, between January and April 2007, INFRACO bidders were provided with significant development to the preliminary design and key structures detailed design. This would be a question to discuss with Geoff Gilbert and Bob Dawson.

Given the problems, by that stage, experienced with delays to design, approvals and consents, what consideration, if any, was given to delaying the procurement of the INFRACO contract until these matters had been resolved?

**Response from SF:**

I don't know whether consideration was given to delaying the procurement of the INFRACO contract until these matters had been resolved as the production of the design by SDS was being managed by TIE. I would suggest discussing this with Geoff Gilbert, Bob Dawson and Willie Gallagher.

67. The note of a meeting between Stephen Bell and Fenella Mason on 4 October 2007 [CEC01637617] noted various problems with design, including that the SDS Contract was not commercially managed at the outset of the contract.

68. What was your awareness and understanding of the matters in that note?

**Response from SF:**

I was aware of delays and issues with the delivery of the SDS design. In terms of the detail of what caused those delays, the Inquiry should check this with the TIE team. I think there was an issue in terms of TIE resourcing but I wasn't directly involved.

68. What was your awareness in late 2007 of the delay in the Utilities programme and in obtaining statutory approvals and consents [CEC01653317] [CEC01881980]

- a) What was your understanding of the cause(s) of that slippage and delay?
- b) To what extent were you involved in discussions between TIE, SDS and BBS on the issue of the design delay [CEC01399489]?

**Response from SF:**

The Inquiry should check with TIE, SDS and TSS in respect of this issue. I was not involved in these discussions.

**The Infrastructure Contract (January to May 2008)**

69. By e-mails dated 11 and 14 January 2008 [CEC01400524] Colin Mackenzie raised certain queries relating to the issue of the notice of intention to award the INFRACO contract. Andrew Fitchie replied, advising that you were "*with tie at the moment working on the Employers' Requirements*".

- a) What was your involvement in relation to drafting and negotiating the INFRACO contract? Were you involved in the exercise to bring the Employers' Requirements, the SDS Design and the Contractors' Proposals into line?

**Response from SF:**

I was involved in the preparation of the initial drafts of the Infraco contract and negotiations involving the two bidders in the project. That would have been up until the period of early part of 2007.

From my perspective, the exercise involving the Employer's Requirements which I was asked to do, was not an exercise to bring the Employers' Requirements, the SDS design and the contractors' proposals into line. I was being asked to carry out a legal review of a technical document, the Employer's

Requirements, which entailed tasks such as a consistency check of the use of defined terms, making sure that there was no conflict in the drafting (e.g. additional grounds for relief events having been added) and a contractualisation exercise (making sure that the drafting is clear from a plain English perspective). Bringing these documents "into line" was a task which should have been carried out by the technical advisory team.

- b) It would be helpful if you could explain the work you were involved in in relation to the Employers' Requirements?

**Response from SF:**

Please see above. To the best of my recollection, my work included trying to pick out anything that just looked odd (from a legal perspective) in the context of the Employers' Requirements. I prepared a commentary. I believe there were follow-up sessions with the TIE team i.e. we page turned on the comments. It is important to add that there was some time pressure associated with doing the exercise. Clearly I wasn't looking into the technical efficacy of the Employer's Requirements. I was just trying to align defined terms and deal with anything that was ambiguous in the drafting from a legal perspective.

70. By email dated 11 January [CEC01432000] Geoff Gilbert noted an issue relating to mandatory TIE changes.

- a) Were you involved in that matter at that stage and, if so, what were your views?

**Response from SF:**

My day to day involvement in the project had ceased by this time. I was only involved in dealing with ad hoc matters. This wasn't a matter I had an involvement with.

71. By internal e-mail dated 18 January 2008, Colin Mackenzie advised Gill Lindsay that there were a number of significant risks which had still to be resolved or minimised, including the novation of the SDS contract to BBS [CEC01400601].

- a) Were you aware of concerns on the part of CEC officers around that time in respect of the risks to CEC arising from the INFRACO contract?
- b) What steps did you or others in DLA take to address these concerns?

**Response from SF:**



My day to day involvement in the project had ceased by this time. I was only involved in dealing with ad hoc matters. This wasn't a matter I had an involvement with.

72. The report to CEC's Internal Planning Group on 18 January 2008 [CEC01398148] noted that TIE were to provide a list of exclusions from the INFRACO contract with a value against each item and that CEC required a statement on the percentage of costs that were fixed, the percentage outstanding as provisional sums and a programme for moving these to fixed costs.

Confirmation was awaited from BBS of the emerging quality of the design. Full details were required from TIE of the status and degree of completion of design work, including prior and technical approvals. If approvals risk was not being transferred to BBS, the Council needed to know the impact and likelihood of the risks and the strategy for managing the risks.

- a) While we appreciate that you were not involved in meetings of the IPG, what was your understanding at that time of the works that were excluded from the INFRACO contract and the value of these works?
- b) What was your understanding of the percentage of costs that were fixed, the percentage outstanding as provisional sums and the process whereby provisional sums would move to fixed costs?
- c) What was your understanding of the nature and purpose of the due diligence exercise being undertaken by BBS on the design?
- d) In relation to risks arising from design, prior and technical approvals, what was your understanding at this stage, of (a) who bore these risks, (b) the impact and likelihood of these risks arising and (c) the strategy for managing these risks?

**Response from SF:**

My day to day involvement in the project had ceased by this time. I was only involved in dealing with ad hoc matters. This wasn't a matter I had an involvement with.

73. In an email to Geoff Gilbert dated 21 January 2008 [CEC01544498], Andrew Fitchie set out his views on various matters arising from "*where SDS has reached under its programme and the risks to BBS on that*".

- a) What were your views on the matters in that e-mail?

**Response from SF:**

My day to day involvement in the project had ceased by this time. I was only

involved in dealing with ad hoc matters. This wasn't a matter I had an involvement with. I suggest that the Inquiry discusses this with Andrew Fitchie.

74. A draft Risk Management Report [TIE00694362] produced by TIE around 28 January 2008 (see covering e-mail of that date, [TIE00694361]) noted "Risks relating to the procurement of INFRACO and the on-going contract negotiations may release approximately £6.4 million pounds at contract award provided the contract is 100% fixed and firm thereby eliminating all the INFRACO (and other) procurement-related risks.

*These risks include:*

- *INFRACO does not have detail to achieve contract close.*
- *Poor definition of design and Employers Requirements in INFRACO tender documents ...".*

- a) What was your awareness of, and views on, these matters?
- b) What did you consider were the prospects of achieving a 100% fixed and firm INFRACO price which eliminated all the INFRACO (and other) procurement related risks
- c) Did you consider that INFRACO had enough detail to achieve contract close?
- d) Did you consider there was a poor definition of design and Employers Requirements in the tender documents and if so why?

**Response from SF:**

My day to day involvement in the project had ceased by this time. I was only involved in dealing with ad hoc matters. This wasn't a matter I had an involvement with. I suggest that the Inquiry discusses this with Andrew Fitchie.

75. By e-mail dated 5 February 2008 Alan Coyle of CEC advised Susan Clark of TIE that he was "disappointed" with the quality of information provided by TIE in respect of risk registers and that it was "unacceptable" that there was no quantification of "black flag" risks [CEC01508100] and [CEC01508101].

- a) Were you provided with copies of the TIE risk registers and, if so, are you in a position to express a view on the quality of the information in these registers?

**Response from SF:**

My day to day involvement in the project had ceased by this time. I was only involved in dealing with ad hoc matters. This wasn't a matter I had an involvement with. Given that this is an internal exchange between Susan Clark

and Alan Coyle, I suggest that the Inquiry discusses this question with them.

76. DLA sent various letters to CEC advising on the terms of the INFRACO contract, namely (i): letter dated 17 December 2007 [CEC01500975], (ii) letter dated 10 March 2008 [CEC01393822], (iii) letter dated 12 March 2008 [CEC01347797], (iv) letter dated 18 March 2008 [CEC01347796], (v) 20 March 2008 [CEC01544970] and (vi) letter dated 28 April 2008 [CEC01312368]

a) Which individuals in DLA drafted these letters?

**Response from SF:**

Andrew Fitchie drafted these letters.

b) What part, if any, did you play in drafting, or providing advice in relation to, these letters?

**Response from SF:**

On the basis that I wasn't leading on the advice on the project at the times these letters were drafted, I didn't draft the letters.

There were certain discrete issues where Andrew and I did have discussions where I still had involvement e.g. the exercise which involved the Employers' Requirements. On those particular issues obviously Andrew and I were in discussion.

Andrew was the Senior Partner involved in the project. He had an intimate knowledge and overview of the status of negotiations. There wasn't really anyone else at DLA who could have written those letters.

c) Are you aware of whether any individuals in TIE played a part in drafting any of these letters? (it appears, for example, that Graeme Bissett had an input into drafting the letter dated 12 March 2008 – see [CEC01541242] and [CEC01541243])

**Response from SF:**

Andrew would be able to confirm whether Graeme Bissett had an input into drafting the letter dated 12 March 2008. I have been shown Graeme's comments by the Inquiry. I see them as being the type of comment along the lines of *"this is what CEC would be expecting to be expanded or explained in the letter"*. That is what I think those comments relate to. You would need to



Speak with Andrew and Graeme in terms of how this was handled at the time.

77. By e-mail dated 10 March 2008 [CEC01393819] Graeme Bissett sent the Council drafts of the Close Report (v7, 10.03.08) [CEC01393820], DLA Risk Matrix [CEC01393821], DLA letter to CEC dated 10 March [CEC01393822] and DLA Report on INFRACO Contract Suite [CEC01393823].

The e-mail noted that while, generally, the documents were in final form, negotiations on a range of issues continued.

The main outstanding issues in the draft Close Report included, *“the section on the pricing schedule (being finalised)”* and *“the Appendix on design and consents will require to be updated to the final position on submission and consent status”*.

The draft Close Report noted, under “INFRACO price basis and exclusions” (p24-25), *“Crucially this price includes for normal design development (through to the completion of the consents and approvals process – see below) meaning the evolution of design to construction stage and excluding changes if design principle shape form and outline specification as per the Employers Requirements”*.

- a) What part, if any, did you play in drafting, or advising on, each of the documents noted above?
- b) Who drafted the Risk Matrix, DLA letter to CEC and DLA Report on INFRACO Contract noted above? How was it prepared? What purpose was it intended to serve? Did any individual from TIE play any part in drafting these documents and, if so, who?
- c) The Risk Matrix was dated 14 December 2007. Are you aware why it does not appear to have been updated as at 10 March 2008? (we noted, for completeness, that a DLA/TIE Risk Matrix was produced on 22 April 2008 [CEC01312367])
- d) What was your understanding as to (i) when TIE and BBS first reached agreement as to who would bear the risks and liabilities arising from incomplete design and outstanding approvals and consents and (ii) what that agreement was?
- e) What was your understanding at that stage of how the INFRACO price and pricing schedule would reflect the risks being borne by each party in relation to incomplete and outstanding design, approvals and consents?

**Response from SF:**

This post-dates my day to day involvement in the project. Andrew Fitchie would be the person to speak to in terms of providing comment on these areas.

78. A letter dated 12 March 2008 from DLA to CEC [CEC01347797] advised that *“an agreed form of draft Novation Agreement has been negotiated to close today. The terms of the Novation transfer responsibility for design, as required by*

*the procurement strategy, to BBS (subject to the above)" (para 4).*

In contrast, a draft letter e-mailed the previous day by Graeme Bissett to Andrew Fitchie stated, *"an advanced draft Novation Agreement is in play for negotiation to close. The terms of the Novation ... result in retained SDS performance risk for TIE"* (para 3.4) [CEC01541243].

- a) Did you play any part in drafting these letters and, if so, can you explain this discrepancy?

**Response from SF:**

This post-dates my day to day involvement in the project. Andrew Fitchie would be the person to speak to in terms of providing comment on these areas.

79. A letter from Parsons Brinckerhoff to TIE [CEC01401629] advised of further reviews that were required to ensure full alignment of the Employer's Requirements and the INFRACO Proposals.

- a) Were you involved in the further work aimed at ensuring alignment of the employer's requirements, the design and the INFRACO contract [CEC01510192] [CEC01510193] ?

**Response from SF:**

There was an exercise which involved reviewing the Employer's Requirements which I carried out in January 2008, and then I think in March, subsequent to various comments being received from BBS at the last minute. I remember having to carry out a "page turn" of the Employer's Requirements with various parties involved in that discussion to try and close things out, and to reflect the agreement of the parties at the meeting in an updated version of the Employer's Requirements. Andrew Fitchie asked me to help on that particular issue because I had been involved previously with a review of the Employer's Requirements from a legal perspective.

I don't remember seeing the letter at the time from PB. What I was asked to do was to look at comments which had been made by BBS on the Employers' Requirements and then facilitate discussion between all parties (including technical advisers) on any adjustments that needed to be made. As far as I was concerned, I wasn't carrying out an alignment exercise between the Employer's Requirements and the Infraco's Proposals. In my opinion, this was more of a



discrete task for me to deal with mark-up from BBS that had come in and to ensure, for example, the consistent use of defined terms in the Employer's Requirements.

How a procuring client would normally counter misalignments of Employers' Requirements with the head contract would be to make sure they applied robust technical and legal expertise throughout the procurement, tender evaluation and award to ensure that there was no misalignment. The procuring client would want to ensure that what they have asked to be built does get built and that the contractor's proposals don't somehow change what it is they have asked to be built. How I was involved in this exercise by TIE wasn't ideal as our involvement was quite late on in the process. It appeared that there had already been a great deal of discussion at technical level on the Employer's Requirements but no input had been taken in respect of the legal drafting in respect of what had been agreed. Classically, this would entail a check on the consistency of the use of defined terms and checks to ensure that no drafting in the Employer's Requirements undermined a contractual clause in the head contract.

b) What was the issue that had arisen, was it resolved and, if so, how?

**Response from SF:**

See above.

On some of the other infrastructure projects that I have worked on, there has been a more of constant interface between the lawyers and the engineers in terms of the drafting of the technical schedules. We as the legal team can only advise clients on the consistency or ambiguity of the drafting from a legal perspective. We can't advise on the technical content. Really at this juncture, TSS should have been looking over the shoulder of SDS to ensure that what SDS was writing in the Employers' Requirements reflected properly what TIE wanted. The fact that defined terms weren't aligned or the punctuation wasn't great pales into insignificance in terms of the importance if the technical content is not right. TSS should have carried out that audit. Whether that happened I don't know. I would have expected TIE and TSS to be "all over" that process. I suggest that the Inquiry checks with TIE and TSS.

80. By e-mail dated Tuesday 18 March 2008 an INFRACO Risk Allocation Matrix



produced by TIE and DLA was sent to CEC [CEC01399118].

- a) Did you play in part in drafting that document? What was the purpose of the document? Do you consider that the document fully and accurately set out the various risks that arose including, in particular, the risks arising from incomplete and outstanding design, approvals and consents?

**Response from SF:**

I was not involved in drafting this document. Andrew Fitchie would be the person to speak to in terms of providing comment on these areas.

81. On 20 March 2008 DLA sent a further letter to CEC providing an update on the Draft Contract Suite as at 13 March 2008 [CEC01544970].

The letter stated, "*We understand that TIE will confirm with BBS settled pricing for all major fixed price elements of the INFRACO contract. If TIE has achieved these objectives and BBS has been able to confirm its commitment to abide by these positions including programme, TIE should have every confidence in closing the contract suite efficiently, commencing with the issue of notification of intention to award. We would stress that full cooperation of the BBS Consortium on this objective is essential and this has been confirmed by letter from BBS to TIE yesterday*" (the changes from DLA's letter dated 18 March are shown underlined; the letter dated 19 March 2008 from BBS appears to be CEC01464830).

- a) Did you play any part in drafting, or providing advice in relation to, that letter? What is your understanding of the meaning of, and reasons for, the additions shown underlined above?

**Response from SF:**

I was not involved with drafting this correspondence and the content post-dates my day to day involvement in the project. Andrew Fitchie would be the person to speak to in terms of providing comment on these areas.

82. By e-mail dated 15 April 2008 [CEC01245223] Alan Coyle forwarded CEC officers an e-mail of the same date by Stewart McGarrity attaching Schedule 4 of the INFRACO contract [CEC01245224] and a cost analysis spread sheet (CEC01245225). This was one month before the contract was signed.

- a) When did you first see a copy of Schedule 4?
- b) Are you aware of which individuals from TIE negotiated and agreed Schedule 4?
- c) Which individuals from DLA were responsible for providing advice on Schedule 4?

- d) Did you, or anyone else from DLA,, provide advice to TIE in relation to Schedule 4 (and, if so, what advice was provided, when and how)?
- e) Did you, or anyone else from DLA, provide advice to CEC in relation to Schedule 4 (and, if so, what advice was provided, when, and how)?
- f) In particular, did you, or anyone else from DLA, provide advice to CEC in relation to the risks to TIE/CEC arising from schedule 4 (and, if so, what advice was provided, when and how)?
- g) It appears that the various elements of the contract had to be signed off within TIE. Are you aware of who had responsibility for final approval of Schedule 4?

**Response from SF:**

In respect of Schedule 4, I can only comment on what I was told by Andrew. He told me that, on the back of the Wiesbaden agreement, Schedule 4 was drafted.

I recall Andrew telling me how upset he was when he learned about the Wiesbaden Agreement and that he had not been involved in the Wiesbaden discussions in December 2007 and that, when he sought to challenge the commercial deal, his instructions were to reflect the Wiesbaden deal in the INFRACO contract rather than seeking to unpick or renegotiate it with BBS.

There was, I believe from Andrew, some discomfort on the part of others at TIE (such as Alastair Richards) regarding what had been agreed at Wiesbaden.

Andrew told me that the Wiesbaden deal had been negotiated by Willie Gallagher (TIE), Matthew Crosse (TIE) and Geoff Gilbert (TIE). I remember that Andrew commented to me that we (DLA) had spent months developing the INFRACO Contract on behalf of TIE, and years implementing TIE's procurement strategy, and now there was an agreement by TIE, in respect of a key schedule in the INFRACO contract, which basically opened up pricing issues on the INFRACO contract. I just remember the conversations with Andrew on that. It was a very tough negotiation for Andrew throughout that whole period as he could not change the Wiesbaden deal which TIE had agreed with BBS.

83. On 16 April 2008 by email to which you were recipient [CEC01373206], Mr Fitchie advised that he needed to report "*with realism despite perhaps unpopularity*", noting that there were various remaining actions and issue resolution outside tie's control which, even if BBS responded on that day, would leave DLA no time whatsoever to carry out anything but a rudimentary QA on the entire suite.

- a) What was your understanding of the purpose of Mr Fitchie's e-mail and the pressures to complete the contract?
- b) Do you consider that DLA were sufficiently involved in negotiations, and had sufficient time, to properly consider the suite of contracts and advise TIE and CEC on the main risks arising?

**Response from SF:**

Although I am copied into this email, this post-dates my day to day involvement in the project. The Inquiry should speak to Andrew Fitchie in respect of this question.

84. DLA circulated the contractual allocation of risks in the draft INFRACO contract as at 22 April [CEC01312367]

- a) What in your view were the main risks?

**Response from SF:**

This post-dates my day to day involvement in the project. The Inquiry should speak to Andrew Fitchie about the contractual allocation of risks.

85. Later on 22 April 2008 [CEC01305699], you emailed Suzanne Moir at Pinsent Masons noting some adjustments that had been made to the INFRACO contract.

- a) What was your involvement, at that stage, in drafting, and advising on, the INFRACO contract?

**Response from SF:**

I was involved in drafting the schedule which related to works at Edinburgh Airport. This was because it linked in with some of the drafting I had carried out in respect of the the MUDFA contract. I had discrete involvement on that particular schedule at that time. I don't know if it was around about this same period but I also remember discussions with Suzanne Moir (who advised Bilfinger Berger) in terms of the disputes resolution schedule.

86. The contract between TIE and (1) Bilfinger Berger UK Limited; (2) Siemens plc; and (3) Construcciones Y Auxiliar De Ferrocarriles S.A. the "INFRACO Contract") was duly signed on 13 and 14 May 2008. What was your understanding, at that time, of the following matters:

- a) The risks and liabilities in relation to design, consents and approvals that had been transferred to the private sector and the risks and liabilities in relation to



these matters that had been retained by TIE/CEC?

- b) The sum allowed for these risks in the Quantified Risk Allowance?
- c) The provisions of the Pricing Schedule of the INFRACO contract (Schedule 4) **[USB00000032]**, including, in particular, the consequences likely to arise from the fact that the Base Date Design Information was fixed with reference to the design drawings issued as at 25 November 2007 (at which point detailed design was not complete and the majority of statutory approvals and consents had not been obtained)?
- d) In respect of Notified Departures:
- Whether one or more than one Notified Departure was expected from BBS following the signing of the contract,
  - The matter or matters any such Notified Departure(s) was likely to relate to, and
  - The estimated cost of any such Notified Departure(s).
- e) Why the "Base Date Design Information" was defined in para 2.3 of INFRACO Schedule 4 as meaning "*the design information drawings issued to INFRACO up to and including 25<sup>th</sup> November 2007 listed in Appendix H*" and yet Appendix H did not contain any list of drawings and, instead, simply stated "*All of the Drawings available to INFRACO up to and including 25<sup>th</sup> November 2007*".
- f) How clause 80 (TIE changes) of the INFRACO contract would work?

**Response from SF:**

I wasn't involved at this point in the project.

**The Infrastructure Contract (from May 2008 onwards)**

87. Various disputes arose between TIE and BBS in late 2008 and continued throughout 2009, 2010 and 2011 until a settlement was reached in September 2011 (following a mediation at Mar Hall in March 2011).

- a) To what extent if at all, were you involved in providing advice in relation to the disputes that arose from late 2008 onwards?
- b) Which solicitor or solicitors in DLA were principally involved in advising on the disputes that arose from late 2008 onwards?

**Response from SF:**

At this point in the project, Andrew Fitchie was supporting TIE. I was not involved. My litigation colleagues, including Stuart Jordan and Bruce Bentley were also supporting TIE.

88. In late May 2009 TIE instructed Senior Counsel to advise on the interpretation of the INFRACO contract [CEC00901461]. A consultation with Counsel took place on 1 June following which Counsel issued written advice ([CEC00901460] and [CEC00901462]).

a) To what extent, if at all, were you involved in these matters? What were your views on the cause or causes of the problems that had arisen?

**Response from SF:**

At this point in the project, Andrew Fitchie was supporting TIE. I was not involved. My litigation colleagues were also supporting tie.

89. On 27 July 2009 DLA provided a note of advice to Stephen Bell summarising the significant pieces of legal advice provided to TIE by DLA on up to 24 July 2009 [CEC00652331]. Advice provided was summarised under the following four themes:

*“1. Entitlement; which concerned such matters as Schedule Part 4 (Pricing); Compensation Events; Notified Departures; SDS; and INFRACO Change;*

*2. Design; which concerns such matters as BDDI; BDDI to IFC; relationship between INFRACO and SDS; and Misalignment;*

*3 Programme; which concerns such matters as Extension of Time 1 and Extension of Time 2; and*

*Compensation Events; Notified Departures; SDS; and INFRACO Change;*

*4 Rationale; which encompasses issues such as "On Street" challenges.”*

The note states that the *“the time for performance of Services is allied to and measured by the Consents Programme and the Design Delivery Programme the SDS Provider is to give notice of it becoming aware of a likelihood of delay to the performance of the Services (Clause 7.4 of the SDS Agreement) and on the occurrence of certain specified events is entitled to an extension of time and amendment to the Consents Programme and/or the Design Delivery Programme (Clause 7.5 of the SDS Agreement).”*

a) Were you involved in the preparation of this advice note? If so, what were your views on the main matters in the document?

**Response from SF:**

At this point in the project, Andrew Fitchie was supporting TIE. I was not involved in providing this advice.

90. On 16 November 2010 Richard Jeffrey advised Alastair Maclean of certain serious concerns he had in relation to events at the time the INFRACO contract was entered into. On 17 November 2010 [CEC00013342] Mr Maclean produced a Note setting out Mr Jeffrey's concerns.

- a) What was your awareness, if any, of the matters in that Note?
- b) Did you have any concerns relating to events around the time the INFRACO contract was negotiated and agreed?
- c) Are you aware whether others had any concerns relating to events around the time the INFRACO contract was entered into?

**Response from SF:**

This is not an area that I would be able to comment on as it post-dates my involvement in the project. I wasn't aware of Richard Jeffrey's concerns.

91. Mediation talks took place at Mar Hall in March 2011 following which an agreement was reached which, ultimately, resulted in a reduced tram line (from the Airport to York Place) being built for a total cost of approximately £776m

- a) Did any solicitor from DLA advise tie in the preparations for the mediation and/or attend the mediation talks?
- b) It would be helpful if you could provide your views on the problems that arose with the tram project and why the tram project ended up costing so much more than originally estimated (for a shorter section of line)?

**Response from SF:**

This is not an area that I can comment on as it post-dates my involvement in the project. I wasn't involved in the mediation at Mar Hall. I am sure that there wasn't any DLA attendance at that mediation.

**TIE**

92. In general:

- a) Did you have any concerns, at any stage, about the performance of TIE, either as an organisation, or in relation to individual board members or employees?



**Response from SF:**

I would comment that in any project, from time to time, there are instances of individuals not being perfect. I can't draw any general observation in terms of TIE staff or board members other than there wasn't a consistency in the TIE staff and, at one point, TIE did seem to be relying on a number of self-employed consultants in lieu of relying on TSS resource and TIE employees. Clearly, I didn't have oversight in terms of what the TIE and TEL Boards were doing. I can't comment on the behaviour of TIE and TEL board members. Any concerns DLA had in terms of whether it was meetings not being progressed or staff not understanding the contract(s), we raised at the time.

- b) Did you have any concerns, at any stage about TIE's reporting to CEC including, in particular, whether information was always fully and accurately reported?

**Response from SF:**

In terms of TIE's reporting to CEC, I didn't have visibility of that reporting.

The governance arrangements, including the TIE and TEL Boards, and the enforcement of the operating agreement between TIE and CEC, should have been the means by which reporting on the project took place.

- c) Did you have any concerns, at any stage, about a lack of continuity in senior TIE staff?

**Response from SF:**

Yes. I think the changes at Project Director level had an adverse effect. There did also seem quite a high turnover in terms of MUDFA personnel and personnel managing the SDS contract. I wasn't sure at that time how the delays were all being managed. I knew there were particular people within TIE tasked with that. I believe there was a continuity issue when Ian Kendall left. Others within senior management should have picked up on the issues of the delays both with MUDFA and the SDS. Ian was quite "hands on" in terms of managing the procurement strategy. I don't know if he was replaced with a similarly hands on senior management team.

- d) Are you aware whether others in DLA, at any stage, had concerns in relation to any of the above matters?

**Response from SF:**

I had many discussions with Iain Bowler and Andrew Fitchie. Andrew, myself and Iain did share concerns about the lack of continuity in the TIE senior management team. However, we didn't have any influence in terms of dealing with that as it was an internal matter for TIE. I don't know if the lack of continuity was because it was perceived the project wasn't running well or if there were internal issues.

- e) By what means did CEC exercise oversight or control over TIE?

**Response from SF:**

It would be for CEC to comment on by what means they exercised oversight and control over TIE. From my perspective there was an operating agreement, there was CEC membership of the TIE and TEL Boards and there were reporting requirements. I would also suggest it might be useful to discuss this area with Trudi Craggs (D&W). I believe at one point Trudi was facilitating an interface between TIE and CEC. That may have been in respect of more discrete consents/approvals related issues. Trudi may be able to provide an insight into the interface and working relationship between TIE and CEC.

- f) What was your impression of the working relationships between TIE and CEC?

**Response from SF:**

It is difficult for me to comment on the working relationship between TIE and CEC as I didn't work at either entity. It is worth observing that TIE employed a number of ex-CEC employees (e.g. Alex Macaulay, Lindsay Murphy, Keith Rimmer, Ken McLeod etc). There were CEC people on secondment. So, there should have been a close working relationship. However, I was aware that there were instances where the TIE team was frustrated with the relationship with CEC because TIE weren't getting input from CEC in terms of attendance at meetings, no comment at all on documents or comments on documents coming late. Equally, I have seen internal correspondence presented to me by the Inquiry that shows CEC had concerns about the relationship with TIE. This is an area really for CEC and TIE to comment on.

## Governance

93. It would be helpful to receive your views on the following matters:

- a) What role, if any, did you, or others in DLA, have in devising, implementing or reviewing the governance arrangements for the tram project?

**Response from SF:**

I had no role in devising, implementing or reviewing the governance arrangements for the tram project. I think D&W advised CEC in respect of the operating agreement.

- b) What were your views on the governance arrangements for the tram project including whether each of the relevant bodies etc. were able to, and did, exercise effective governance and control over the project

**Response from SF:**

I would say that it is for the TIE and TEL boards, the Gateway reviewers and all the others involved in providing independent scrutiny of the project to comment on whether they were able to, and did, exercise effective governance and control over the project.

- c) Did you consider that the roles and responsibilities of each of the bodies etc. involved in the delivery and governance of the project to be sufficiently clear?

**Response from SF:**

I didn't have an oversight role with regard to governance so it is difficult for me to comment on whether I considered that the roles and responsibilities of each of the bodies etc involved in the delivery and governance of the project were sufficiently clear. It was really up to the parties involved to be clear in respect of what they were supposed to be doing vis à vis the project.

- d) Do you consider that any body or organisation was able to, and did, exercise independent oversight over the project?

**Response from SF:**

There were a number of Gateway reviews. Those Gateway reviews involved people from Scottish Government and others who had been involved with major infrastructure procurement. The Gateway review process continued throughout the process. There were also a number of ad hoc reviews. There were also



reviews undertaken by Transport Scotland, KPMG and PWC. For me, the key thing is really what the TIE and TEL Boards were doing in respect of the project. The Boards included non-executive directors as well as representatives from CEC. A number of those non-executive directors were transport professionals independent of CEC and TIE. I can't comment on what was done by those directors. In my opinion, it would be in the Inquiry's interests to seek the views of those Board directors. Those Board directors will be able to comment on everyone's state of knowledge on the project and why particular decisions were taken at respective times.

- e) By what means did DLA provide advice to Council officers in relation to the tram project?

**Response from SF:**

Personally, I didn't provide day to day advice to Council officers but I did make occasional presentations to Council officers (such as Keith Rimmer) when requested by TIE (e.g. presentation on the terms of the MUDFA contract). I did speak with Duncan Fraser when he was on secondment to TIE. I had some contact with CEC's legal team (Gill Lindsay, Nick Smith and Colin Mackenzie) at meetings organised by TIE.

- f) Did DLA ever provide advice directly to members (including e.g. the Council Leader, the Finance and Transport Convenors, Group Leaders and individual members)?

**Response from SF:**

Personally, I did not.

- g) What were your views on the working relationship between TIE/CEC, DLA/TIE and DLA/CEC?

**Response from SF:**

I would say that DLA and TIE had, throughout the project, a very good working relationship. In terms of the relationship between DLA and CEC, I was less engaged with the CEC team. However, any engagement at occasional meetings was always very cordial. What I understood from Andrew was that, as the project was heading into the close phase, he had a particularly good working relationship with Gill Lindsay (Head of CEC's legal team).

- h) How was your working relationship with Mr Fitchie? Did you ever have any concerns in relation to Mr Fitchie's work on the tram project? Are you aware whether others ever expressed such concerns?

**Response from SF:**

I would say my working relationship with Andrew was very good. We got on very well at a personal level. We worked well together as a team. I never had any concerns in relation to Andrew's work on the tram project. None at all. Andrew is a very good lawyer. He was very committed to delivering the tram project and providing robust legal advice to TIE. I am not aware of any concerns having been expressed by anyone about Andrew. As far as I was concerned, Andrew was highly regarded by the client and the other advisors on the project. As you can imagine, it can get quite challenging when you are doing these big negotiations, however, I think if the Inquiry was to speak with Suzanne Moir (who advised Bilfinger Berger) or Martin Gallagher (who advised Siemens), the Inquiry would find that they had a professional respect for Andrew in terms of how the negotiations were managed.

- i) To what extent, if at all, did you have any involvement with Scottish Government or Transport Scotland officials?

**Response from SF:**

I had involvement with two officials from Transport Scotland: John Ramsay and Lorna Davis. I don't remember meeting any Scottish Government officials. I believe there were Scottish Government personnel involved in at least one of the Gateway reviews. I would observe that I was surprised that there wasn't more engagement from Transport Scotland in the project. My surprise was on the basis that the Scottish Government was providing a significant amount of funding into the project. I didn't have insight in terms of the discussions which were being had between the Scottish Government, Transport Scotland, CEC and TIE. It may well be that there was a whole echelon of other discussions which were happening which I wasn't party to.

- j) What was your understanding in relation to which body or organisation was ultimately responsible for ensuring that the tram project was delivered on time and within budget?

**Response from SF:**

In my view, CEC was ultimately responsible for ensuring that the tram project was delivered on time and within budget.

**ANY MISCELLANEOUS / FINAL THOUGHTS?**

**Response from SF:**

In my opinion, the TIE and TEL Board members' views on the procurement of the tram project is the critical area for the Inquiry to be looking at. They would be the people to speak to in order to gain an understanding of why particular decisions were taken. I base this opinion on the fact that a number of questions which have been posed to me relate to the governance of the Project.



Dr Sharon Fitzgerald