

Ian Laing – Areas for Discussion

This note identifies the broad subject areas which we would like you to include in your statement. We have tried to include all documents that may assist you in answering the Inquiry's questions. We would be grateful if you could, in addition, provide a full CV setting out your vocational qualifications and experience.

Bilfinger Berger have intimated to the Inquiry that they insist on legal professional privilege and that they will not permit disclosure of documentary or oral evidence of communications either giving legal advice or created for the purposes of such advice being given. The questions in this Note are therefore framed to avoid encroaching on issues that would be covered by this privilege. If, despite this, you consider that you are unable to respond to a question in whole or on part because to do so would involve disclosure of privileged material, please indicate where this is the case.

1	What was your involvement in the negotiations concerning the proposed Infraco Contract in 2007? Who were the negotiating parties for the Consortium? Who were the negotiating parties for TIE?	<p>I represented Bilfinger Berger (UK) Limited (now Bilfinger Construction UK Limited) ("BCUK") in relation to the proposed Infraco Contract in 2007.</p> <p>I received instructions from BCUK largely through Richard Walker, BCUK's Managing Director.</p> <p>Siemens PLC were represented by Biggart Baillie. The Siemens personnel that I was aware of were Michael Flynn, Herbert Fettig and Basil Wetters.</p> <p>tie were represented by DLA Piper. The tie personnel that I was aware of were Geoff Gilbert, Steven Bell, Bob Dawson, Jim McEwan, Alastair Richards and Willie Gallagher.</p>
2	The Inquiry has evidence of the discussions that took place at Wiesbaden in December 2007. What was the purpose or function of those talks?	I did not attend the discussions which took place in Wiesbaden in December 2007 and so I am unable to comment.

3	Were you involved in revising the document produced later in December which sought to document the agreement (CEC01123856)?	I was not involved in revising the document which sought to document the agreement at Wiesbaden (CEC01123856)
4	What was your involvement in the negotiations concerning Part 4 of the Schedule to the proposed contract in 2008?	I was involved in drafting and negotiating (with tie, DLA Piper, Biggart Baillie and Siemens) the terms of Part 4 of the Schedule to the proposed contract.
5	How was Part 4 drafted? What factors determined the content and wording of Part 4? Were you involved in discussions <u>with TIE and/or its representatives</u> regarding the wording?	<p>I was involved in discussions with both tie and DLA Piper regarding the wording of Schedule 4.</p> <p>Insofar as factors that determined the content and particular wording of Part 4 of the Schedule were derived from discussions with my client and advice given, they are subject to legal advice privilege and I am unable to answer. However, my recollection is that the principles that drove the content of Schedule Part 4 were:</p> <p>(a) to reflect factual assumptions made within the BBS bid price - for example that design work would be completed by SDS prior to the commencement of the Infraco works; and</p> <p>(b) to allow a 'fixed price' to be included in the Infraco contract against the background of evolving factual circumstances. In particular, elements of the works scope remained uncertain as a consequence of, for example, delays in the utilities works, incomplete utilities diversions and incomplete design.</p> <p>The Infraco contract therefore assumed a certain state of affairs to exist for pricing purposes. If these assumptions proved to be inaccurate (as I believe the parties knew in cases that they would) then a Notified Departure arose and Infraco would be entitled to additional time and money.</p>
6	In response to an email from Bob Dawson of TIE (CEC01447268) dated 16	The attachment referenced in document CEC01448377 has not been

	<p>January 2008, a revised draft of Part 4 was sent by Scott McFadzen of BB to Bob Dawson and you on 4 February 2008 (CEC01448377 and attachment). The changes are very substantial and, in effect, amount to a redraft. Had you been involved in preparing this? What was the basis for inclusion of the Base Case Assumptions? In relation to design, there is a requirement that it will, "not, in terms of design principle, shape, form and/or specification, be amended from the Base Date Design Information". From where or from whom was this wording derived? Why was it sent client to client rather than from you to Andrew Fitchie?</p>	<p>provided so I am unable to comment on how substantial the changes were or the content of that document.</p>
7	<p>CEC01448752 is an email dated 12 February 2008 from Richard Walker to Geoff Gilbert of TIE which he copied to your colleague Suzanne Moir. What did you understand was meant by the comment, "Schedule 4 was clearly dealt with"? Is the document that had been signed 'last Thursday' the one that was known as the Rutland Square Agreement (CEC00825620) Clause 2.5 of the Schedule to the Rutland Square Agreement refers to "Schedule 4" and his appears to be a reference to Part 4 of the Schedule to the Infraco Contract. In your view, which elements of this meant that the matter of drafting of Part 4 was closed? Can you explain what had been agreed in relation to Part 4?</p>	<p>I am not able to say what Richard Walker's e-mail of 12 February 2008 was intended to convey.</p> <p>Given the date of the email (on 12 February 2008), I assume that the document referred to as having been signed "last Thursday" was the Rutland Square Agreement which was signed on Thursday 7 February 2008.</p> <p>The communications I had with my client and any advice given in regard to these documents are subject to legal advice privilege and therefore I am unable to answer any questions in relation to this document.</p>
8	<p>On the same day, Andrew Fitchie emailed you to thank you for a private conversation about the need, "to get Schedule 4 on the table" (CEC01540594). What were the contents of your conversation? What did he mean by "[getting] Schedule 4 on the table"</p>	<p>I do not recall the conversation between myself and Andrew Fitchie referred to in his e-mail of 12 February 2008.</p>
9	<p>A number of drafts of Part 4 exchanged directly between the parties. Why was it done this way rather than via solicitors? Thereafter, on 22nd February 2008 you sent out a version of Part 4 marked up to show BBS revisals</p>	<p>I cannot comment on why drafts were exchanged directly between the parties except to say that that negotiations were long and intensive and I suspect, on occasions at least, this was done simply for convenience</p>

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(CEC01449876 and attachment – CEC01449877). Are you the author of the notes on the front page of the draft? This draft makes substantial changes. How was that reconciled with the statements noted above? Why did you decide to take the different approach to what was then Clause 2.4? What was the reason behind the footnote relating to normal design development on page 5. Why did you exclude any concept of materiality (page 6)?

as the legal teams were involved in parallel activities.

I confirm that I was the author of the notes on the front page of the draft.

As regards the reconciliation between the notes on the front page and the changes made to the drafting, the footnotes to the drafting provide examples of where that will be required. So, for example, inconsistency with the drafting of the Infraco contract referred to on the front page is then picked up in footnote 1 and the notes in the body of the draft on page 11. The requirement for robust and objective technical terminology is picked up in footnotes 3, 4, 5, 6, 7, 8 etc.

The reasoning for the approach to Clause 2.4 is explained in the body of the document at the commencement of that clause. That note was made contemporaneously with the drafting and I cannot add to it. In any event the drafting amendments made will have reflected communications I had with my client and advice given in regard to these documents and are subject to legal advice privilege. I am therefore unable to answer any questions in relation to reasons why certain amendments were made.

The logic of the exclusion of materiality is clearly addressed in footnote 8. As is stated there:

"It simply begs the question what is material and what is not. The commercial position is that these are tie risks. Furthermore a "minor" change may have a material cost/time impact and a material change may not."

I have nothing to add to that statement as regards the exclusion of the concept of materiality.

10	It is apparent from an email dated 3 March 2008 from Geoff Gilbert that was copied to you (CEC01450185) that there was to be a meeting the next day at which one matter to be considered was what was meant by "normal design development" Why did this matter? What was discussed and what was the outcome?	The need to consider what amounted to "normal design development" was so that both parties had clarity on the degree of design development which was included in the price, and what was excluded. This is why it mattered.
11	On 6 March 2008 Bob Dawson sent an email to you and others with a further draft (CEC01450309 and attachment – CEC01450310). It appears that this did not innovate on the issue of normal design development. Do you agree?	The wording in relation to normal design development set out in CEC01450310 is what it bears to be.
12	Bob Dawson emailed you and others on 10 March 2008 (CEC01450544). Can you explain the background to and import of this email?	This email appears to refer to a telephone conversation which I did not attend. I am therefore unable to comment on the background to this email other than to say it was part of the negotiations of the Infraco Contract between the parties and that this closely reflects the wording ultimately found in clause 3.5 of the Infraco Contract.
13	A meeting took place on 11 March 2008 and, the next day, Bob Dawson sent out a further version of Part 4 reflecting the discussions at the meeting (CEC00592628 and attachment – CEC00592629). Your colleague then sent out a 'legal' version on 13 March (CEC01545414 and attachment – CEC01545415). What was the thinking behind clause 3.5 in the first draft (which became clause 4.1 in the 'legal' draft)?	As noted in my response to question 5, the Infraco contract assumed a certain state of affairs to exist for pricing purposes. If these assumptions proved to be inaccurate (as I believe the parties knew in cases that they would) then a Notified Departure arose and Infraco would be entitled to additional time and money. The mechanism set out at Clause 3.5 goes some way to achieving that ambition. The requirement for this to be a mandatory change arose from the recognition that these were not optional items and so it could not be open to tie to withdraw the tie Change.
14	You then sent out a further version on 19 March (CEC01451012 and attachment). What were the discussions that had taken place which you refer to in your email? Which parts of the Part 4 did they concern? This draft is in a	Discussions between the parties were, as mentioned previously, long and intensive. For several months these occurred almost on a daily basis which makes recollection of particular meetings challenging. The

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	<p>new form that means there is a Notified Departure if the designs, "in terms of design principle, shape, form and/or specification be amended from the drawings forming the Base Date Design Information". Why was this change made? You have omitted reference to 'normal design development'. Why did you do this? There was then a six-hour meeting on Schedule 4 on 20 March 2008 (see appointment - CEC01518014). What was discussed during this meeting? The fact that the meeting was fixed for so long suggests that there was still a great deal to discuss. Do you agree? Philip Hecht of DLA sends out a version reflecting the discussions the same day (CEC01451053 and attachment). What was the purpose and effect of the changes made in this draft?</p>	<p>attachment to CEC01451012 has not been provided so I am not able to comment on the changes that were made.</p> <p>In any event the drafting amendments made will have reflected communications I had with my client and advice given in regard to these documents and are subject to legal advice privilege. I am therefore unable to answer any questions in relation to reasons why certain amendments were made.</p> <p>In relation to the meeting, the appointment reference document you refer to does not refer to any timescale and it is not clear who was at the meeting. As mentioned, there were a significant number of meetings over a prolonged period. A 6 hour meeting would not have been particularly unusual at the time and many negotiation meetings lasted considerably longer.</p> <p>The attachment to CEC01451053 has not been provided so I am unable to comment on the changes made.</p>
15	<p>On 26 and 31 March 2008 you sent emails which appear to be addressed primarily to Steve Bell and Jim McEwan (CEC01451185 and CEC01548431 – some way down the string). Is that correct? In these you draw attention to the fact that there will be an immediate Notified Departure on execution of the contract. Why did you do this? Why did you chose to correspond directly with the clients from 'the opposite side' when that is often forbidden as a matter of professional rules? Did you get a response to these emails? If so, who was it from and what was it?</p>	<p>The e-mail communications referred to (CEC01451185 and CEC01548431) are addressed to <i>inter alia</i> both DLA Piper, as legal advisers to tie, and Steven Bell and Jim McEwan of tie. The reference to the named tie personnel in the body of the e-mail is likely intended to bring their attention to a factual technical matter (and its consequences) which had been discussed. I cannot now recall whether I received a response to these emails. I will have drawn attention to the <i>possibility</i> (not the "<i>fact</i>") that there would be an immediate Notified Departure for the reasons mentioned in the e-mail, namely that this was an "unusual position".</p>
16	<p>On 2 April 2008 you send out a further version (CEC01423746 and attachment</p>	<p>I confirm that I added wording to Clause 3.2 in the terms set out in</p>

<p>- CEC01423747). You had added wording to clause 3.2? Why did you do this? Had you included such a clause in other contracts you had negotiated before this date?</p>	<p>CEC01423747. That wording reflects communications I had with my client and advice given in regard to these documents and so is subject to legal advice privilege. I am therefore unable to answer any questions in relation to reasons why this amendment was made. I had not included such a clause in other contracts I had negotiated before.</p>
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Terms of Certificate

I confirm that the facts to which I attest in the answers contained within this document, consisting of this and the preceding 6 pages are within my direct knowledge and are true. Where they are based on information provided to me by others, I confirm that they are true to the best of my knowledge, information and belief.



Ian Laing

..... 30/6/17

Dated

Ian Laing – Areas for Discussion

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Ian Laing has provided the supplementary responses below following on a review of the documents referred to in the relevant questions and which were not available to him at the time of providing his initial responses.

6	<p>In response to an email from Bob Dawson of TIE (CEC01447268) dated 16 January 2008, a revised draft of Part 4 was sent by Scott McFadzen of BB to Bob Dawson and you on 4 February 2008 (CEC01448377 and attachment). The changes are very substantial and, in effect, amount to a redraft. Had you been involved in preparing this? What was the basis for inclusion of the Base Case Assumptions? In relation to design, there is a requirement that it will, “not, in terms of design principle, shape, form and/or specification, be amended from the Base Date Design Information”. From where or from whom was this wording derived? Why was it sent client to client rather than from you to</p>	<p>I have now reviewed the attachment (CEC01448377) to the e-mail from Scott McFadzean of 4 February 2008. I have no recollection of this particular document. However, it is clear from the language of the document and its style that this was a document prepared by me, no doubt with input from both the technical team at Bilfinger Berger and the team advising Siemens.</p> <p>My assumption, given their nature, is that the content of the Base Case Assumptions came principally from the technical team. The technical team would have had in mind the principles that I mentioned in my</p>
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	Andrew Fitchie?	<p>response to question 5. Clearly both the technical and legal team also had in mind the content of the Wiesbaden Agreement as that is referred to within the body of the draft. I don't recall when I first saw the Wiesbaden Agreement but it was certainly after the document had been signed by the parties and obviously before this draft was finalised. The requirement that it will, "not, in terms of design principle, shape, form and/or specification, be amended from the Base Date Design Information" appears to have been derived from the Wiesbaden Agreement.</p>
14	<p>You then sent out a further version on 19 March (CEC01451012 and attachment). What were the discussions that had taken place which you refer to in your email? Which parts of the Part 4 did they concern? This draft is in a new form that means there is a Notified Departure if the designs, "in terms of design principle, shape, form and/or specification be amended from the drawings forming the Base Date Design Information". Why was this change made? You have omitted reference to 'normal design development'. Why did you do this? There was then a six-hour meeting on Schedule 4 on 20 March 2008 (see appointment - CEC01518014). What was discussed during this meeting? The fact that the meeting was fixed for so long suggests that there was still a great deal to discuss. Do you agree? Philip Hecht of DLA sends out a version reflecting the discussions the same day (CEC01451053 and attachment). What was the purpose and effect of the changes made in this draft?</p>	<p>I have now reviewed document CEC01451012 that was sent by me on 19 March. Unfortunately, I do not recall the specific discussions that led to this version of Schedule 4. However, given the extent of the amendments made it is clear that the discussions concerned many of the Pricing Assumptions.</p> <p>The reference to "normal design development" does not appear to have been omitted in the document I have been provided with. The wording has been moved within the body of the draft but has not been altered. Looking at the draft, we (by which I mean Bilfinger Berger, me and the Siemens team) appear to have had two key concerns in relation to Notified Departure No. 1, namely (1) the reference to the "design intent of the scheme" as being part of the test for "normal design development", which looking at it now appears to be imprecise and so I am sure that will have been my view at the time, and (2) the reference to " design principle, shape, form and/or specification". I do recall some unease within the Bilfinger Berger technical team that this did not exclude all the risks that it needed to. In particular, I recall that Scott</p>

	<p>McFadzean was concerned that this did not cover the scope of the works and he was keen to include that. On the face of it, it appears that an attempt has been made to address that through the introduction of a new Notified Departure No. 3. Looking at the subsequent drafts it appears that negotiations with tie led to the deletion of this proposed Notified Departure as it appears as "not used" in a later version of Schedule 4.</p> <p>I have also now reviewed document CEC01451053. Clearly this version shows a fairly significant number of amendments which would be consistent with a meeting of the duration that has been suggested. The principal purpose of the amendments made would be to reach a conclusion on the drafting that was acceptable to both BBS and tie.</p>
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Terms of Certificate

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Ian Laing

22/11/17

Dated