



PROJECT RESOLUTION

(incorporating Carlisle and Notice)

Report to Tram Project Board
December 2010

Reference No 05 Dave Anderson
Privileged and confidential - prepared in contemplation of litigation. FOISA exempt. Do not copy.

Version	Summary	Date	Modified	Checked	Approved
2.0	Final following TPBO presentation	22/12/10	SC	SMcG/SB	RJ
1.2	Formatting	14/12/10	JS	SC	
1.1	Incorporation of A Richards comments & MHL check	13/12/10	SC		
1.0		10/12/10	SC	MHL	
0.9	Incorporation of Exec Summary and appendices	09/12/10	SC		
0.8	Incorporation of conclusions and recommendations	08/12/10	SC		
0.7	Incorporation of AJ Rush comments	07/12/10	SC		
0.6	Incorporation of R Jeffrey & M H Little comments	07/12/10	SC		
0.5	Incorporation of S Bell comments	6/12/10	SC		
0.4		2/12/10	SC		
0.3		1/12/10	SC		
0.2		24/11/10	SC		
0.1		21/11/10	SMcG		

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	1

Contents

1. Executive Summary
2. Introduction
3. Pitchfork Recommendations – March 2010
4. Workstreams Mar 2010 to Present
 - 4.1. Contract Administration/Delivery Progress and Behaviours
 - 4.2. DRP's/Adjudications
 - 4.3. Carlisle
 - 4.4. Notice
 - 4.5. Incremental Delivery Strategy / Updated Business Case
5. Process & Governance - Mar 2010 to Present
 - 5.1. Governance
6. Termination of Infraco Contract
 - 6.1. Legal risks & consequences
 - 6.2. Legal opinion on grounds for termination
7. Mediation
8. Appraisal of Options available now
 - 8.1. Continuing as is
 - 8.2. Carlisle
 - 8.3. Terminate & Reprocure
 - 8.4. Terminate & Postpone or Cancel
 - 8.5. Summary evaluation of Options
9. Resolution – Delivery of the project
 - 9.1. Workstreams – to June 2011
 - 9.2. Management arrangements
 - 9.3. Process & Governance
 - 9.4. Timescales, Costs and Funding
10. Conclusions & Recommendations
 - 10.1. Conclusions
 - 10.2. Recommendations

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	2

Appendices

1. Tram Project Board minutes March 2010.
2. Tram Project Board presentation March 2010
3. Full Council Report June 2010
4. Full Council Report October 2010
5. BSC correspondence 25.1.201/KDR.6860 (29/09/10)
6. Correspondence example of misuse of clause 80 (XXX)
7. Siemens 36 Tracker (3/12/10)
8. MUDFA DRP decision reasoning (26/7/10)
9. Design Assurance Statement correspondence (09/08/10)
10. Informative Tracker (P9 2010/11)
11. Scott Wilson Integrated Design Report (November 2010)
12. Remit for Robin Blois-Brooke design review
13. Design Audit (March 2010)
14. BSC correspondence replacement of deputy project director (24/11/10)
15. Notes of tie/BSC meeting (12/10/10)
16. Draft MOU (10/05/10)
17. Draft HoT Agreement (15/0/10)
18. BSC correspondence end of Carlisle projects (14/10/10)
19. Deloittes Report (July 2010)
20. Deloittes Report (August 2010)
21. McGrigors Report (December 2010)
22. Scotsman letter (15/11/10)
23. Tram Project Board minutes (17/11/10)
24. Tram Project Board presentation (17/11/10)
25. CEC emergency motion (18/11/10)
26. tie correspondence mediation (15.11.10)
27. BSC correspondence mediation (19.11.10)
28. tie correspondence to CEC outlining mediation scope (22/11/10)
29. Letter from CEC agreeing to mediation (6/12/10)
30. TPB presentation (15/12/10)

Other Reference Material available

- A DRPs & decisions
- B Carlisle correspondence
- C RTNs & UWNs & responses
- D TPB/TEL presentations and agendas
- E Key contractual correspondence

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	3

Glossary

Acronym	Meaning
BSC	Bilfinger Berger, Siemens, CAF – Infracore Consortium
DAS	Design Assurance Statement
DRP	Dispute Resolution Procedure
DWA	Designated working Area
HoT's	Heads of Terms
ICP	Independent Competent Person
IFC	Issue for Construction Drawing
MOU	Memorandum of Understanding
OFRS	Open For Revenue Service
PSSA	Princes Street Supplemental Agreement
RTN	Remediable Termination Notice
SDS	System Design Services
TPB	Tram Project Board
TEL	Transport Edinburgh Limited
TMA	Tram Maintenance Agreement
TSA	Tram Supply Agreement
UWN	Underperformance Warning Notice

Reference No 05 Dave Anderson
Privileged and confidential - prepared in contemplation of litigation. FOISA exempt. Do not copy.

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	4



1. Executive Summary

1.1. Recap from March TPB/Pitchfork

The purpose of this report is to provide an update on the current status surrounding the Edinburgh Tram Network Infraco Contract between **tie** Ltd and the Infraco Consortium consisting of Bilfinger Berger, Siemens and CAF (BSC) and to make recommendations relating to:

- The next steps in relation to gaining certainty on the Infraco Contract between **tie** and BSC, and
- Planning for a future of the Edinburgh Tram project following any termination of the Infraco Contract – whether by agreement or through a contested termination.

The report builds upon the analysis and recommendations of the March 2010 report on Project Pitchfork and assumes familiarity with the contents of that report and the basis of the recommendations therein which were approved by the Tram Project Board on 10th March 2010 which was attended by TEL Board members.

The Pitchfork Report outlined the following options:

- Option 1 – Termination of Infraco Contract*
- Option 2 – Partial or full exit of Bilfinger Berger*
- Option 3 – Continue “As is”*
- Option 4 – Enforced adherence*

and the following recommendations were agreed:

1. Eliminate Option 3 - continuing “as is”.
2. Continue to pursue **tie**’s rights under the existing contract with vigour and seek acceptable resolution to the main disputes.
3. Rigorously monitor the opportunity to achieve a partial or full exit of BB from the primary contract role on acceptable cost and risk transfer terms.
4. Reach a resolution on these matters with BSC in the form of a revised version of the existing contract which remains compliant with procurement regulation.
5. Confirm a new way of working with BSC which mitigates against further dispute risk.

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	5

6. **Retain the termination option – Option 1, not as an option to be pursued currently but kept under review for serious consideration if evidence emerges which merits this.**
7. **Assess affordability and re-phasing options, including operational and financial viability.**
8. **Report regularly to the TPB formally reassess the revised arrangements as soon as practical.**

1.2. Enforced Adherence

Physical progress on the ground has been extremely limited since we reported in March 2010. Overall % completion has moved from 15.7% to 27.4% compared to a planned % completion of 99% against Revision 1 of the programme. The majority of progress has been at the Depot, however this is still not in a position to be able to take delivery of the Tram vehicles. On street, no new significant work has commenced due to lack of a completed integrated assured design from BSC. Progress with the tram vehicles has been good with 20 now complete.

Design has remained behind plan and continues to be a source of frustration with BSC continually using 3rd party consent issues as a reason they cite for delay. Analysis shows that in fact, delays are caused by BSC failing to close out informatives (a condition set by CEC subject to which approval is given). Additionally, the delivery of an assured and integrated design is being hampered by the integration of the systems and civils design – this is entirely a BSC responsibility. Provision of an assured design is an example of broken promises from BSC. In fact, they will claim to have delivered such a design. A full summary of progress is provided in Section 4.1 of this report.

Since March we have continued to pursue **tie**'s rights under the Infraco Contract and to date 25 separate items have been referred to Dispute Resolution Procedure (DRP). The decisions emerging from these have been mixed. We have agreed a total of 7 prior to the external stages of DRP, 2 have been agreed through mediation and 11 through adjudication. This process has driven the values of BSC claims through their submitted Estimates down from £24.0m to £11.2m – a reduction of 115%. However, the decisions relating to design development have not been clear cut and have not provided a clear interpretation which would give cost certainty going forward. 5 DRP's still require to be resolved through the process.

The decision relating to the use of Clause 80 did not provide clear direction on the use of this change clause. It gave guidance on the use of Clause 80.13 indicating that BSC did not have to proceed with works until **tie** had agreed an Estimate but it did not rule on Clause

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	6

80 overall. Additional contract administration is underway based on the DRP decision to refine the use of Clause 80.

Finally the MUDFA 8 DRP relating to delays caused by utility diversions was decided. This was useful for **tie** in that it gave very limited Extension of Time to BSC, but did provide them an opportunity to revisit further delays caused by utility diversions, albeit some of the reasons behind the decision are helpful to **tie**. A summary of the adjudicated DRP decisions is provided in Section 4.2 of this report.

In March discussions commenced between **tie** and BSC relating to an option to agree a revised scope for the project – this became known as Project Carlisle. In parallel to this work commenced on issuing Remediable Termination Notices. This formed part of the pursuit of **tie**'s contractual rights and the strategy to rigorously enforce the contract. This is Project Notice.

Overall, whilst there may have been some isolated signs of improvement in the behaviour of the consortium, there has not been an overall improvement. There is still significant delay by BSC in providing Estimates for alleged **tie** Changes, there has been reticence and refusal to participate in audits, particularly relating to design and until the decision from MUDFA Rev 8 DRP, there was no movement on programme mitigation. In September 2010 the behaviour took on a new dimension when BSC advised that they were ceasing works at a number of locations. They cited a list of 99 Infraco Notices of **tie** Changes where they considered **tie** had not agreed the Change and so according to the Clause 80.13 DRP decision, they considered they did not have to continue the works. They proceeded to demobilise contractors and make their own direct and contract staff redundant.

Senior level engagement by BSC has been sporadic and it is still not clear who is actually in control and who are the key decision makers within the Consortium.

Key events are:

- April – discussions commence on Project Carlisle
- June – Consortium appoint new spokesman
- July – BSC provide Carlisle offer
- August – **tie** issue first RTN
- September – final Carlisle offer provide from BSC
- October – BSC cease works across most sites
- October – **tie** reject first RTN rectification plan
- October – BSC indicate they would like to discuss a mutual termination

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	7

One final point to consider in respect of enforced adherence is team endurance. Whilst the **tie** team has shown remarkable sense of resilience to date and has experienced low levels of people attrition, this is unlikely to continue the longer the enforced adherence option continues and the future of the project and InfraCo contract remains uncertain. This means that there is a high risk of not being able to maintain the appropriate experience and project knowledge required, particularly if future forensic analysis and litigation is required.

1.3. Project Carlisle

Late in 2009/early 2010 the Infraco were promoting an extension to the Princes Street Supplemental Agreement which applied the same terms and therefore regime to all future on-street works. Analysis of the Princes Street Supplemental Agreement showed that extending such an approval was unlikely to achieve best value.

In April 2010 Project Carlisle was created to explore an alternative way forward. There were a series of meetings and offers and counter offers made between the parties but at present, the parties remain some distance apart on the key aspects of the Carlisle principles. The negotiations on Project Carlisle indicated that BSC might be seeing this as an opportunity to re-price the project, to complete only the off-street sections and to move risk back to **tie**. Full details of the process followed and progress is contained in Section 4.3 of this report. Neither party has stated that the negotiations have irrevocably broken down at present, however, discussions have not progressed since September 2010. It may be possible to use mediation to reach a settlement on the lines of Project Carlisle, but as the signs are that there is disagreement between Infraco Members as to what may be an acceptable settlement it is likely that the settlement would be substantially less favourable than the parameters placed on Project Carlisle.

BSC has advised **tie** in writing that they do not see how an acceptable agreement can be reached on Carlisle and in October 2010 BSC approached **tie** with a view to exploring an exit from the Infraco Contract.

1.4. Project Notice

In June 2010 we embarked on an enhanced process of exercising the contractual provisions to notify BSC of alleged breaches and underperformance which require that they provide details of how they would make good. The contractual mechanisms to be used were continued DRP's, the Remediable Termination Notices (RTNs) and Underperformance Warning Notices (UWN) which were contained within Clauses 90 and 56 of the Infraco Contract. This became known as Project Notice. This strategy was to continue to administer the Infraco Contract robustly and in so lead to 3 potential outcomes to the existing dispute:

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	8

- 1) Reach agreement on the Carlisle option
- 2) Termination under Clause 90 of the Infraco contract through an Infraco default. This was likely to be a contested termination and lead to litigation, or alternatively,
- 3) Make the current situation and potential consequences so undesirable to BSC and potentially painful contractually that it may lead, not necessarily to a litigious Termination through the Infraco Contract, but may lead to a mediated settlement in respect of Termination of the Infraco Contract.

The details associated with Project Notice can be found in Section 4.4 of this report. In summary, **tie** has issued 10 RTN's and received 4 rectification plans from BSC, none of which are acceptable and which have been rejected. This put us in the position of technically being able to move to the next stage which is the issue of a Notice of Termination to BSC. However, of particular significance is the legal advice provided in respect of potential consequences of termination of the Infraco Contract which can be found in Section 6 of this report.

1.5. Governance

Since March **tie** has been active in ensuring that regular reports have been given to the TPB. Additionally, CEC Officials and Councilors, Transport Scotland and Scottish Government Ministers have all been updated on progress. An events log has recorded the dates of all key meeting with the consortium and Stakeholders.

Additionally **tie**, as part of its internal audit process asked Deloitte to undertake a review of the Infraco commercial strategy. This was done in June and a full report produced with a short follow up in October. No major issues were identified through these audits.

1.6. Options now facing us

Section 8 of this report identifies the following options now available to us:

- Enforced adherence – continue with the current Infraco Contract and the difficulties it has presented over the past 2.5 years. It is unlikely that this will deliver a tram network with any degree of cost or programme certainty at all and current progress across nearly all the route has stalled indefinitely. Carrying on is unlikely to act as a catalyst for improved behaviours by the Consortium – infact we are likely to see more of the same. Additionally, the impact on **tie** and it's team becomes harder to manage and predict;
- Revive Project Carlisle, or
- Terminate the Infraco Contract – either unilaterally or by agreement with sub options of carrying on, postponing or cancelling the project.

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	9

1.7. Mediation

Section 7 outlines an alternative approach to reaching an agreed settlement to the dead lock between the parties to the Infraco Contract. Mediation is a key feature of the Infraco Contract Dispute Resolution Procedure and mediation has been carried out on a number of the issues submitted by both parties to the DRP process. A motion passed at the full Council meeting on 18/11/10 agreed that mediation surrounding the overall Infraco Contract should be attempted.

1.8. Recommendation

It is recommended that:

- 1) **tie** enters into mediation with BSC.
- 2) The scope of this mediation is to include options for an amended scope of the project along the lines of Project Carlisle or an agreed termination of the Infraco Contract.
- 3) The mediation to be short form with legal agreements reached at the end of the mediation. All agreements to be subject to Full Council approval.
- 4) The mediation result to be presented to TPB following an outcome on mediation.
- 5) Continue with enforced adherence of the Infraco Contract in the short term.
- 6) **tie** to continue to work on the scenarios for re-procurement following any mediation. Recommendations on workscope along with budget requirement for the first 9 months of 2011 to be presented to the TPB once the outcome of mediation is understood.
 - Any proposals for re-tendering should be presented to TPB before they commence and stagegate review held before any new construction contracts awarded.
 - Before any new construction contracts are awarded, all design should be complete, integrated and assured.
 - Before any new construction contracts are awarded all third party agreements should be concluded to reduce the risk to the Tram project of negotiation positions being taken by 3rd parties.
- 7) Work should continue, regardless of the output of mediation, on the review of SDS and potential for legal action for poor design services.
- 8) Work should continue with building the "body of evidence" for use in any potential litigation associated with a contentious termination of the Infraco Contract by the parties.

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	10

2. Introduction

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

- The next steps in relation to gaining certainty on the Infraco Contract between **tie** and BSC, and
- Planning for a future of the Edinburgh Tram project following any termination of the Infraco Contract – whether by agreement or through a forced termination.

The report builds upon the analysis and recommendations of the March 2010 report on Project Pitchfork and assumes familiarity with the contents of that report and the basis of the recommendations therein which were approved by the Tram Project Board on 10th March 2010 (Appendix 1) which was attended by TPB Board members. The presentation to the March 2010 TPB is Appendix 2 to this report.

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

This report describes the following activities, collectively constituting “Project Resolution”:

- The activities undertaken by **tie** supported by our legal, technical and commercial advisors in the period between March 2010 and December 2010 seeking to achieve satisfactory resolution of the disputes, lack of progress and unsatisfactory deliverables which have plagued the delivery of the project since contract award in May 2008;
- Present an appraisal of the options identified to progress the project and achieve cost and programme certainty from this point in time going forward including potential termination of the Infraco Contract through either contractual mechanisms or a mediated settlement, and
- Describe the activities which if approved would be undertaken by **tie** in the event that the current Infraco contract is brought to an end.

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

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	11

3. Pitchfork Recommendations – March 2010

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

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

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

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

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

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

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	12

At the TPB meeting on 10th March 2010 the following recommendations were agreed:

1. Eliminate Option 3 - continuing “as is”.

A reinforcement of the elimination of this option is provided by the appraisal of delivery progress and behaviours since March 2010 (see section 4.1) and the updated option appraisal (see section 6).

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

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

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

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

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

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

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

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

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

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

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

This has been addressed at section 4.5

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

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	13

Regular reporting and briefing to the TPB and to CEC senior officers, CEC group leaders, Transport Scotland and at Ministerial level have continued on a very regular basis since March 2010. This report presents a formal reassessment of options and recommendations.

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

Action identified	Ref to action in this report
Mobilise action on Clause 80	Section 4.2 – DRP's
Seek conclusion on impact of utility diversion delays and overall EOT claim, with consequent revision to a new agreed programme	Section 4.2 – DRP's
Respond to OSSA and offer the Clause 65 alternative route	Section 4.3 - Carlisle
Refine argument over SDS management and deploy as appropriate	Section 4.1 – Contract Administration/Ongoing progress
Omnibus approach to resolution of outstanding BDDI – IFC disputes ; Expedite response to INTC's (other matters)	Section 4.2 – DRP's
Quantify and execute amended position on prelims	Section 4.2 – DRP's
Seek to resolve the Airport – Edinburgh Park disputes	Section 4.1 – Contract Administration/Ongoing progress
Action plan for implementing more collaborative working style	The lack of progress on Carlisle has resulted in this not being pursued at this time

(Table 1)

Since March, TPB, TEL, CEC and Transport Scotland have been kept fully apprised of the ongoing status of the Infraco Contract. Section 5 outlines the Governance since March 2010. Additionally, all CEC Members have been updated through formal reports being presented to full Council in March and October 2010 (Appendices 3 & 4).

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	14

4. Workstreams March 2010 to Present

4.1. Contract Administration/Delivery Progress and Behaviours

4.1.1. Contract Administration

In addition to the effort that has been applied to Project Carlisle and Project Notice, it has also been important to maintain the day to day administration of the contract, including significant effort and resource dedicated to the various disputes resolved by the DRP. The ongoing administration of the contract has continued with the following basic controls continuing:

- Weekly issues meeting between tie/BSC
- 4 weekly progress meetings between tie/BSC
- Weekly production of “flash” reports by production team and topics register to identify issues preventing progress
- Project Directors review of progress/costs every 4 weeks – attended by CEC
- Production of 4 weekly TS report and TPA reporting
- Change Panel meetings every 4 weeks – CEC invited
- Twice weekly review of correspondence by senior team
- Successful conclusion of the Gillion Mediation to close out the MUDFA final account and contract
- Ongoing valuation of all 4 weekly applications for payment for all contractors
- Continued HSQE activities including audits, safety verification
- Continued review of design submitted by BSC through Schedule Part 14 (BSC did not supply civil engineering design through this process)
- Work with CEC/BSC to ensure a shared view on CEC approvals – trackers in place
- Production of trackers associated with key themes such as Clause 34, Cessation
- Construction of the PITA database – a more sophisticated storage and search system which will support any ongoing contract administration and any litigation

Specific focus has been applied to the contractual topics of Clause 80/65/22, particularly in relation to emerging DRP adjudication decisions as follows:

Clauses 80

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

- Provision of adequate information to support the nature of the change;
- Value of Estimates;
- Time taken to provide estimates;

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	15

- Clause 80.15/80.13 and 34 instructions – progressing with the works with due expedition, and
- Use of Clause 80 rather than Clause 65 (Compensation Events).

As an example of the unreasonableness of BSC's estimate for all disputes which have been resolved through the DRP process the value of the change has been reduced from BSC's initial Estimate of £24.09m to £11.2m – a reduction of 115%. The behaviour of submitting high initial Estimates continues.

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

The Estimates provided are rarely complete. In general, impact on programme is not provided and evidence of the change being implemented in the most cost effective manner is not provided.

Since **tie** started to issue RTN's to BSC, **tie** has seen an increase in the level of changes being submitted by BSC. Many of these items have been the subject of RTN's 8 & 9.

Cessation of Works by BSC

In September 2010 BSC wrote to **tie** advising that they were about to stop works at a number of locations where they advised that they were carrying out works on a "goodwill" basis. On 29th September 2010 a letter was received 25.1.201/KDR/6860 (Appendix 5), which listed 99 Infraco Notices of **tie** Changes (INTCs) where BSC believed changes had not been agreed and therefore they were ceasing works at all those locations. They systematically started to demobilise their own resources and those of a number of their sub-contractors from the end of that week. **tie** believes this to be a response to the RTN's being issued by **tie** and has written to state we do not agree with this approach and have been systematically responding to each INTC and explaining why BSC are wrong in this approach. **tie** believes that this is yet another breach of BSC's contractual obligations.

Clause 65/22

BSC have consistently spurned the use of Clause 65 – Compensation Events and have instead opted to try and use Clause 80 – **tie** Changes. **tie's** assumes is that this is because Clause 65 requires BSC to continue working whereas BSC prefer their interpretation of Clause 80 where they argue that the change must be agreed before they can continue or commence work. Clause 22.5 of the Infraco contract requires, under certain circumstances that BSC deal with an event as a compensation event – Clause 65. We have seen a consistent behaviour by BSC in denying **tie** the use of Clause 65 by insisting that events are treated under Clause 80 and most recently an attempt to justify this by virtue of the fact that they have not notified **tie** in

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	16

accordance with Clause 65 (within 20 days) and so are then entitled to pursue this under Clause 80 an example of this is attached as Appendix 6. Where BSC have submitted compensation event claims, they have provided insufficient substantiation to allow tie to confirm if a Compensation Event has occurred.

4.1.2. Actual Physical Progress

To set this into context it is important to remember that at Infraco Contract award the Edinburgh Tram was expected to be open for revenue service in July 2011. This was amended by Revision 1 of the programme to September 2011 following contract award to take account of design delays at contract award. This was further amended by the adjudication decision on MUDFA Rev 8 (INTC 429). The current forecast of delivery is as reported in the BSC progress report and assessed by tie is as follows:

Sectional Completion	Description	Contract Programme (Revision 1)	INTC 429 (Rev 1A)	BSC Forecast	tie forecast
Section A	Depot completion	1 June 2010	2 Nov 2010	30 Aug 2011	19 Aug 2011
Section B	Test track available	1 July 2010	30 Nov 2010	25 Sep 2012	12 April 2012
Section C	Phase 1a construction complete	10 March 2011	10 March 2011	26 June 2013	17 Dec 2012
Section D	Open for revenue service	6 Sept 2011	6 Sept 2011	23 Dec 2013	15 June 2013

(Table 2)

The actual progress achieved since March is shown in the table below:

Rev 1 Open For Revenue Service date	March 2010 Infraco Progress	November 2010 Infraco Progress	Planned progress – Rev 1	Projected OFRS at this rate of progress
Sept 2011	15.7%	27.4%	99%	November 2014

(Table 3)

At March 2010, 15.7% of the Infraco works had been completed. Each period, progress advanced at a rate of between 1.4 - 2.1% per period, which would mean at this rate the Infraco works would take another 52 periods to complete – 4 years or 2014.

Since March, progress can be split into 2 categories – on street and off street.

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

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	17

- Slow mobilisation of the Infraco and failure to appoint sub-contractors in accordance with the Programme;
- Failure of the Infraco to submit preparatory paperwork – method statements , work package plans;
- Design slippage;
- BSC’s interpretation of Clause 80 which has resulted in BSC refusing to commence works they class as tie Changes until tie have agreed the Estimate or put the tie Change into the dispute Resolution Procedure (DRP);
- Time taken by Infraco to advise of changes and then time taken to supply compliant Estimate, and
- MUDFA – delay to the utility diversion programme.

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

The following gives a summary of the key progress issues both on street and off street at a section level and compares this to what should have been achieved.

Period 09 2010.11	Period		Delta	Cumulative		Delta	Project
INFRACO PERIOD 09 PROGRESS (Contract Rev 01 Programme)	Plan	Actual		Plan	Actual		Wtg
Section 1a Newhaven to Foot of the Walk	2.1%	0.1%	-1.9%	97.1%	8.5%	-88.6%	16.2%
Section 1b Foot of the Walk to McDonald Road	0.0%	0.0%	0.0%	100.0%	1.3%	-98.7%	7.4%
Section 1c McDonald Road to Princes Street West	2.9%	0.0%	-2.9%	95.2%	0.0%	-95.2%	10.8%
Section 1d Princes Street West to Haymarket	0.0%	0.0%	0.0%	100.0%	42.1%	-57.9%	7.6%
Combined Sections 1A-1B-1C-1D (On-Street) Newhaven Road to Haymarket	1.6%	0.1%	-1.5%	97.6%	11.2%	-86.5%	42.0%
Section 2 Haymarket to Roseburn Junction	0.0%	0.0%	0.0%	100.0%	35.1%	-64.9%	4.2%
Section 5a Roseburn Junction to Balgreen Road	0.9%	0.0%	-0.9%	100.0%	10.0%	-90.0%	13.9%
Section 5b Balgreen Road to Edinburgh Park Central	0.0%	0.0%	0.0%	100.0%	43.4%	-56.6%	13.2%
Section 5c Edinburgh Park Central to Gogarburn	0.0%	0.8%	0.8%	100.0%	24.8%	-75.2%	7.2%
Section 6 Gogar Depot	0.0%	2.9%	2.9%	100.0%	73.1%	-26.9%	11.9%
Section 7a Gogarburn to Edinburgh Airport	0.0%	0.2%	0.2%	100.0%	47.2%	-52.8%	7.6%
Combined Sections 2A-5A-5B-5C-6A-7A (Off-Street) Haymarket to Edinburgh Airport	0.2%	0.7%	0.5%	100.0%	39.0%	-61.0%	58.0%
FULL ROUTE PHASE 1A NEWHAVEN ROAD TO EDINBURGH AIRPORT	0.8%	0.4%	-0.3%	99.0%	27.4%	-71.7%	100.0%

(Table 4)

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	18

Off Street

Off street works have seen more significant progress, work has progressed (38.3%), most significantly in sections 5B, 6 (Depot) and 7 (Airport – Gogar). It was in the sections 6 & 7 that Siemens proposed a focussed attempt at resolving changes to get works progressing – this was originally known as the Siemens 25 initiative since there were 25 changes, or alleged changes, in this section. Despite tie's efforts, including issuing BSC with a weekly status report, BSC's attempts to resolve outstanding changes in this area were slow and an agreement on drainage in section 7 drainage was only reached between both parties in October 2010 following referral to DRP. At time of writing there are 36 changes in this area and only 9 have been agreed. See the Siemens 36 tracker attached as Appendix 7.

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

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

On Street

As can be seen from Table 6, works have only really progressed in Section 1A (Newhaven – Tower Place) and Princes Street. In reality, since November 2009 when Princes St was completed, the only on street works to progress have been at Tower Place Bridge and at Lindsay Road – both in Section 1A, and these have both progressed slower than the original plan.

Work had been completed in Princes St in November 2009, but by the end of 2009 it was clear that there were a large number of defects which required to be rectified as well as snagging items not completed by the time Princes St re-opened to traffic. BSC were repeatedly asked to provide a plan to show how they were going to carry out these remedial and snagging works. No overall plan was received. There have been a number of remedial works carried out on Princes Street to manholes and repair the road surface, particularly at the interface between the track and road on the following dates:

- 2nd to 5th July 2010
- 22nd to 25th October 2010
- 20th to 22nd November 2010
- 25th to 26th November 2010

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	19



Also there have been:-

- Repairs to a failed westbound manhole on 09/04/10 close to Sth Charlotte St
- Access was granted to temporarily repair a failed eastbound ACO channel by the Mound on 19/08/10
- Access was granted to install a steel plate over a hydrant, eastbound by Primark on 1/09/10
- Access also approved on 2 occasions to repair an area of wearing course that failed eastbound outside Superdrug

This led to **tie** issuing 2 Remediable Termination Notices in accordance with Clause 90 of the Infraco Contract in respect of the works on Princes St.

During April 2010, BSC were also pushing to start works on the Haymarket – Lothian Road Junction section of works. **tie** by this time, based on the Princes St experience were insisting that all information to allow works to commence was provided in advance of a Permit to Work being issued to BSC. This included an assured approved integrated design for all works and in particular for the track. To date an integrated assured design has not been provided and the track design has only recently been submitted to CEC as statutory Roads Authority for approval. **tie** was not able to provide a permit to work to Infraco to commence works until these were provided along with approved sub-contractor arrangements.

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

Trams

CAF have progressed with the manufacture of the trams very well. At the end of Period 9 the first 20 trams are complete. Tram 1 is in storage following being on display on Princes Street since it was delivered to Edinburgh in April 2010. The remainder are in storage in Irun, Spain at the manufacturing plant. BSC do not want to take delivery of the trams in the depot yet. **tie** had hoped to deliver the 1st Tram to the depot when it was removed from Princes Street. BSC prevented this from happening.

Programme Management and Progress Reporting

MUDFA

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

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	20

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

This award compares to the offer of 9 months Extension of Time which **tie** had made prior to the DRP. The detailed reasoning to this decision can be found in Appendix 8. However, in summary the Adjudicator found that he did not agree with BSC's interpretation of a Designated Working Area (DWA) and in effect the impact of delays had been over amplified as a result. He also stated that as he did not have substantiation for delays in a number of areas he could make no award – this is similar to what **tie** has experienced throughout the life of the contract. Following this, BSC submitted a revised programme to take account of this decision but **tie** was unable to accept this programme as many of the errors found in previous resubmitted programmes had not been rectified, including compliance with the Employer's Requirements.

Subsequently (September 2010) BSC has submitted a notification of **tie** Change – INTC 536 for the majority of utility delays up until 31st July 2010. In the Estimate BSC has taken account of the decision in respect of DWA's but appears to be making a claim for all the delays again, even though the adjudicator made an award for delays until March 2009. As part of **tie**'s analysis we are looking at whether the design delays are now dominant or at least a have a major concurrency impact, so reducing **tie**'s liability in respect of Extension of Time and costs.

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

Progress Reporting

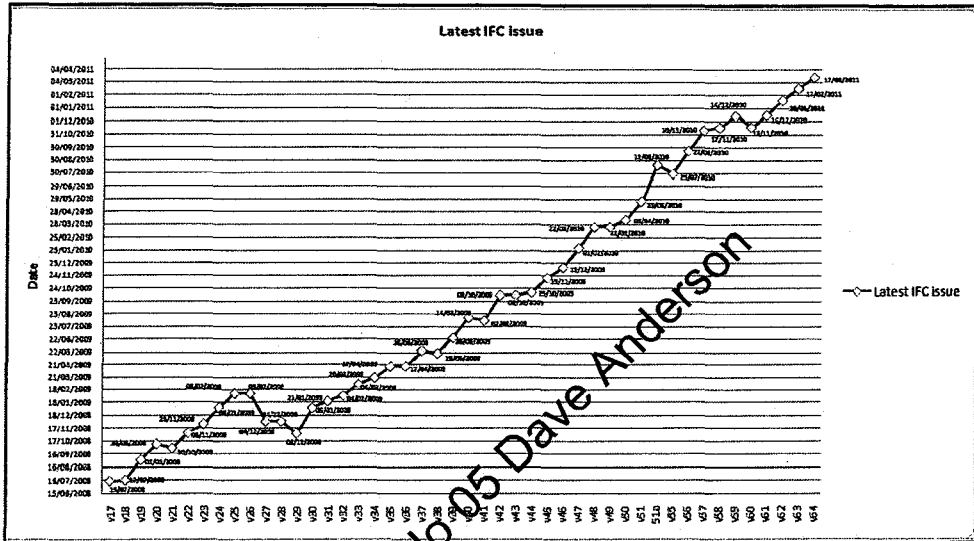
tie has carried on with routine 4 weekly progress meetings with BSC and weekly "Issues" meetings and these continue to be minuted. However, at a section level, the engagement with BSC has been patchy with some **tie** Project Managers getting reasonable engagement from their BSC counterparts but others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

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

4.1.3. Design

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	21

In March we reported that design should have been completed across the route 19/08/10. We are currently reporting that design will now not be complete until 17/3/11 based on the latest design programme from SDS through Infraco. BSC has consistently failed to provide any detailed explanation as to the reasons for design slippage. However, it is thought that the completion and integration of the systems design into the overall design has been a key driver of this. The history of design slippage is shown in the graph below:



(Table 5)

Change in Design Delivery Status March – December 2010

The table below shows progress made by BSC in achieving CEC approvals for the design along with the release of issue for Construction (IFC) drawing packages from March to December 2010 along with what should have been achieved.

Phase only	1a	Number Required			Actual	
		May 2008	March 2010	Dec 2010	March 2010	Dec 2010
	V26	v31	V55*	V64	Granted	Granted
Prior Approvals	44	49	56	60	52	54
Technical Approvals	53	71	91	63	79	55
IFC	71	81	231	229	128	186

(Table 6)

Note that there are only 112 contractual IFC packages at contract award (v31 of SDS Design programme which attract a potential incentive/penalty regime.)

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	22

V64 was submitted to tie on 09 November 10 with a progress date of 25 October 10. There are 26 Issue for Construction (IFC) drawings with a slippage of 28 Calendar days or more in the period with no explanation for these delays reported by BSC.

It should be noted that the above programmes are for the SDS element of design only and do not show the detailed programme for the integrated assured design. tie has not received an update of such a programme since May 2009, despite requests for such.

The production of an integrated and assured design (which gives BSC assurance that all elements of the design such as utilities, alignment, levels, drainage, ducts, roads, lighting, depot equipment, track, OLE, signalling and trams - are all integrated and fit together spatially and from an operating perspective and do not interfere with other systems, including 3rd party systems such as utilities and Network Rail) has consistently fallen behind programmed dates and has not been aligned to the construction programme for the Infraco Works. An integrated and assured design is a key element of verifying the safety of the system and getting approval from the Regulator and Independent Competent Person, to put the system into Operational Service. The main issues have arisen from:

Client biased issues

- approvals
- third party requirements
- client changes
- misalignment issues

Infraco/SDS issues

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

During the preferred bidder stage of the contract negotiations for Infraco, BSC assumed that they could start work 20 days after receiving an IFC drawing and this was built into the Infraco programme. Additionally, as part of the novation negotiations, SDS was incentivised to complete these IFC drawings, although it was anticipated that these would be completely assured drawings. At the point of novation SDS had been incentivised for the timely production of IFC packs so that construction could commence in earnest. At that time SDS had adopted an exceptionally hard commercial stance, claiming that the 'change' work being

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	23

demand of them was outwith their contract. At contract award the SDS design programme and therefore BSC construction programme contained 112 IFC packages which triggered the ability to commence construction works associated with those packages. The number of IFC's has risen considerably since contract award and now sits at 229.

BSC explain this as:

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

Additionally, BSC has consistently issued multiple revisions of IFC drawings as the design has progressed. Many of these later revisions form the basis of claimed Compensation Events under Clause 65 of the contract although BSC has consistently failed to provide the substantiation to back these claims up and allow **tie** to make an assessment of any entitlement. Further, whilst the systems design has been progressed and submitted to **tie** for review under Schedule Part 14 of the contract, the civils design has consistently not been submitted in this way. **tie** has written to BSC several times on this subject and to date BSC has not provided a response. This lack of visibility means that **tie** has not had any insight at all into changes being made to the civils design until it is finalised and a change (BDDI – IFC) is submitted to **tie**. An audit undertaken by **tie** into design changes revealed that discussions had been held between BSC and SDS and an agreement entered into in respect of payment to SDS for making design changes. This forms the basis of RTN 5 – SDS Agreement.

However, what BSC has still not provided is a fully assured integrated design. Despite **tie** being promised this consistently over the past six months it has consistently been delayed. During senior level meetings held between **tie** and BSC on 16th June 2010, BSC advised **tie** that they would present a fully integrated assured design by mid July. BSC have produced Design Assurance Statements – DAS's (9th August 2010) which claim to give this assurance of an integrated design but these have been incomplete and incapable of approval by **tie** – see Appendix 9. At time of writing a fully integrated design remains outstanding to be delivered.

CEC Approval Informatives

One reason cited by BSC for failing to complete the design or provide a fully assured integrated design, is that CEC failed to approve technical or planning drawings. In fact, CEC has consistently complained about the quality of design being produced by BSC/SDS however, they have adopted a pragmatic approach to approvals which has involved giving approval subject to "informatives" being closed. The informatives are basically comments on a whole range of issues which require to be addressed by BSC. During the summer of 2010 it became apparent to **tie** that BSC did not have a handle on the size of this problem and so **tie**, along with CEC undertook analysis to get an agreed set of informatives and ownership with BSC. At time of writing there are still a large number of informatives outstanding by BSC and the full data relating to this is attached as Appendix 10. This appears to have spurred BSC into action

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	24

and since then a number of workshops have been held in an attempt to close out BSC informatives a total of 120 out of 969 informatives have been closed with agreement in principle to a further 372 subject to additional information being provided.

Due to ongoing concerns relating to design delivery, **tie** has commissioned 2 special reviews on design as follows:

- 1) Review of status of design completion – this was done using the Technical Support Services (TSS) contractor – Scott Wilson. A copy of this report is attached as Appendix 11. This report concludes that an integrated and assured design is not complete which correlates with **tie**'s own view.
- 2) Independent report being undertaken by Robin Blois Brooke. The remit for this design review is found in Appendix 12.

In summary, **tie** has not seen any real improvement in BSC's management of design, and in particular the integration of the design and provision of an assured design. Design has formed the basis of RTN's 5 and 6 and UWN 3 which are supported by the work done by Scott Wilson and audits (Appendix 13).

4.1.4. General Behaviours

In **tie**'s opinion the Consortium does not act as an integrated consortium in the manner envisaged by the Infraco Contract. They have consistently communicated as 3 separate bodies. Simple examples are: that **tie** receives 3 separate invoices from individual Consortium members; there is no common sub-contract documentation; design is managed independently with integration apparently being reactive rather than pro-active. CAF are lobbying hard to be re-negotiated back to **tie** and **tie** is aware that there are outstanding disputes between sub-contractors and the individual Consortium members and between consortium members. These all have the the ability to create conflict between the Infraco Members which militate against an agreed approach to resolving differences with **tie**.

An example of friction between Siemens and Bilfinger has recently been experienced at the depot. Siemens were keen to progress with track laying but were consistently being prevented from doing so by BB not handing the site over to them for such activities. Siemens eventually employed a civil contractor to carry out final remedial works on levels to allow track laying to progress. It had been hoped by **tie** that the 1st Tram could be transferred to the Depot site for storage when it was removed from Princes St for the Christmas festival. However, **tie** understands that BB were not willing for this to happen, despite support from Siemens having made moves to have track in place as well as CAF and so this did not happen and the tram is now in temporary storage elsewhere. This is demonstration that whilst there is tension between BB, Siemens and CAF they have not overtly broken ranks contractually for fear of being in breach with one another.

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	25

There is increasing evidence of BSC attempting to limit their exposure on the project (or to apply more pressure to **tie**) and moving into “close down mode” as follows;

- On 24/11/10 BSC (Appendix 14) wrote to **tie** indicating that they were replacing their Siemens Project Director on the project. The Siemens Project Commercial Director would be covering the role of Siemens Project Director as well.
- The move made by BSC in ceasing works at a number of locations resulted in the demobilisation of a number of their sub-contractors along with them making contract and direct staff redundant.
- Finally, Siemens have been keen that **tie** pay for materials that they have had delivered to the UK, albeit **tie**'s valuation absorbs these as milestones as completed because of the mobilisation payment made at contract award. Currently they have a warehouse at Broxburn which contains materials associated with power and Overhead line equipment. Additionally, over the past few weeks, significant volumes of sleepers and rails have started to be stored across the sites, particularly at the depot.
- Summary view that it appears BSC are now attempting to minimise their cash flow by stopping works and reducing headcount wherever they can and are attempting to store as many materials on site as they can with a view to agreeing payment for such materials as part of any valuation with **tie**.

CAF has worked closely with **tie** throughout the period and even though they are part of the Consortium they have maintained a close relationship with **tie**. CAF delivered the first tram to Princes Street in April 2010 and it was understood that they had done this against the will of the other 2 consortium members who grudgingly agreed eventually to a Minute of Variation to allow the delivery to be made under the Infraco Agreement.

Senior Level Engagement

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

In June 2010 BSC appeared to take a step forward in introducing a spokesman on Project Carlisle only. He has recently been named as the Technical Director. It became clear that although Mr Ed Kitzman was operating on behalf of the Infraco he had more cooperation from BB than Siemens. Siemens lead, Mr Michael Flynn experienced a bad accident in summer 2010 and his replacement was not visible at all in the process to try and negotiate an alternative Project Carlisle agreement, although Mr Gordon Wakeford of Siemens was involved.

There have been a number of meetings at a senior level with BB and Siemens and details are found in the events log. However, it has never been clear how the Infraco would reach a joint position between Consortium Members or in BB's case within BB. There have been meetings with BB involving Mr Kenneth Reid, Mr David Darcy and Dr Keysberg. Most recently Mr

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	26



Kenneth Reid left BB; Dr Keysberg has assumed a more senior position and BSC now state that they do not need the services of Mr Ed Kitzman anymore although he is still present as Technical Director.

PR

BB appointed Mr Donald Anderson, former leader of City of Edinburgh Council to advise on PR issues. There has been a high level of briefing to the press which, if by Infraco, is in breach of the Infraco contract requirements. Most latterly with the retirement of David Mackay from tie/TEL we saw BSC attempt to take legal action. This was dropped at the last minute in the Court of Session and a press release issued making statements about the circumstances of the case being made which were unfounded. Finally, there has been deterioration in media relations with a source close to the Consortium openly commenting on their behalf.

Positions

On 11/10/10 (Appendix 15) BB and Siemens met with tie to discuss an option for a “mature divorce” or settlement resulting in the Infraco contract being brought to an end. In this both BB and Siemens outlined that they felt that negotiations were not proceeding and they were willing to discuss with tie options to mutually agree a termination of the contract. tie left BSC to come back with proposals in this respect. Siemens stated that they would be willing to remain and assist tie complete the project but would be unwilling to do so under the Infraco Contract. CAF were unable to attend this meeting due to travel disruption.

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

4.2. DRPs / Adjudications

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

- the Infraco's position that in any case where it puts forward an Estimate in respect of a tie instructed variation to the Infraco Contract or a Notified Departure (a form of mandatory tie Change), the Infraco has no obligation to carry out the works comprising the variation unless and until tie either agrees the Estimate or places it into dispute resolution;
- the Infraco's position that any amendment to design which altered the so called Base Date Design Information (a limited set of drawings frozen at a point in time – November 2007) as opposed to the final design of the ETN Scheme) represents an event which entitles the Infraco to automatic additional payment and time relief regardless of the reasons for such alteration; and

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	27

- the Infraco disregard of contractual time scales in which it is obliged to produce reasonable Estimates in respect of variations.

A discrete number of disputed matters were initially selected for dispute resolution. This followed concerted efforts to reach compromise through informal mediation in June 2009. It should be understood that the DRP was commenced with full recognition that, despite reasonable levels of confidence on outcome, there could be adverse findings. The proposition was that without DRP, Infraco would continue with damaging obstinacy and no resolution on either entitlement or value on their claims would be reached unless **tie** simply conceded across the board to demonstrably inflated claims. Understood in this context, the use of DRP was the only route open to **tie**, indeed not deploying DRP would have meant ignoring the proper contractual mechanism for resolving difference. Additionally, the DRP contains an internal process to achieve settlement by agreement and **tie** wished to engage this to ensure that all effort had been used to avoid formal external proceedings. In numerous instances this has resulted in **tie** driving Infraco to a compromise on the Estimate which would not have been achievable without either using or threatening to use DRP and encouraging the Infraco to revisit its valuation of the variation in question.

4.2.1. General Overview

To date a total of 25 items have been referred to DRP, 16 by **tie** and 9 by BSC. Where the issue referred has been one of valuation the reduction in value awarded to BSC has been substantial. This has reduced the claims made by BSC from £24.0m to £11.2m – a reduction of 115%. A high level summary of the stage each reached through that process is as follows:

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	28

No	Topic	Subject	Stage	Complete
1	Bus lane on Princes Street	Initiate Work	Settled at internal stage	✓
2	% uplift in prelims	Costs	Mediation	✓
3	Hilton Car Park	Contract definition	Adjudication	✓
4	EOT1	Costs	Mediation	✓
5	Gogarburn	BDDI – IFC	Adjudication	✓
6	Carrick Knowe Bridge	BDDI – IFC	Adjudication	✓
7	Russell Road Bridge	BDDI – IFC	Adjudication	✓
8	Haymarket	BDDI – IFC/ Costs	Settled at internal stage	✓
9	Baird Drive	BDDI – IFC	Settled at internal stage	✓
10	Balgreen Road	BDDI – IFC/costs	Settled at internal stage	✓
11	Depot Access Bridge	BDDI – IFC/costs	Adjudication	✓
12	MUDFA Rev 8	Time	Adjudication	✓
13	Section 7 track damage	BDDI – IFC/costs	Adjudication	✓
14	Tower Bridge	BDDI- IFC/costs	Adjudication	✓
15	Murrayfield Underpass	Clause 34.1/80.13 (ability to instruct works before an estimate is agreed).	Adjudication	✓
16	Landfill Tax	Costs	Adjudication	✓
17	Sub contractor terms	Principle	Adjudication	✓
18	Preliminaries	Costs / payment	Adjudication	×
19	Section 7 Drainage Valuation of ND 6 & 7	Costs	Referred by BSC. CEO meeting held 13 October 2010. Agreed valuation.	✓

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	29

			Included now in total of DRP on Section 7 above (item 13).	
20	Valuation of PSSA	Costs	Mediation Part settled at mediation	×
21	Section 5B track drainage	BDDI – IFC/ Costs	Settled at internal stage	✓
22	Section 5C track drainage	BDDI – IFC/ Costs	Settled at internal stage	✓
23	Lindsay Road	Costs	Internal stages	
24	South Gyle Access Bridge	Costs	Internal stages	×
25	Bankhead Drive Retaining Wall	Costs	Internal stages	×

(Table 7)

4.2.2. Overview of Individual Decisions

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

Hilton Hotel Car Park

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

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

Gogarburn Bridge and Carrick Knowe Bridge

Infraco and tie did not agree as to the extent to which the matters depicted on the

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	30

Issued for Construction Drawings in respect of the structures known as Gogarburn Bridge and Carrick Knowe Bridge constituted a Notified Departure in terms of *Pricing Assumption 3.4.1.1 of Schedule Part 4 (Pricing)* (referred to generally as the "BDDI to IFC issue"). **tie** then referred both matters to the Dispute Resolution Procedure.

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

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

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

Russell Road Retaining Wall 4

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

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	31

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

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

Notwithstanding the issues of principle rehearsed before and examined by the Adjudicator, the substantive dispute concerned the contents of Infraco's Estimate. It was acknowledged that certain of the defences proposed by **tie** to the monetary claims made by Infraco (as set out in the Estimate) might not succeed. Those defences did not, by and large, succeed but it was the case that Infraco's Estimate was initially in the amount of £4,597,847.4, **tie** having assessed an amount of £701,467.95 in respect of Foundations (LO) having been withdrawn by Infraco as part of the dispute resolution process and both Infraco and **tie** agreeing that Contamination was to be dealt with separately) and the Adjudicator decided that the amount of the Foundations to be £1,461,857.21.

Section 7A Track Drainage

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

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

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

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	32

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

[The matter of valuation of that Notified Departure was not put before the Adjudicator. That was subsequently settled during the internal DRP stage of a valuation dispute raised by Infraco at £755,000.]

Tower Place Bridge

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

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

Depot Access Bridge

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

The Adjudicator (Mr. Porter) decided that the Depot Access Bridge did not form part of a larger single integrated structure affected by the same Notified Departure, and so the associated walls did not require to be valued in the Estimate. Mr. Porter valued the Notified Departure in the sum of £1,230,624.80.

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	33

(It would be open to **tie** to intimate a separate Notified Departure to Infraco in respect of the associated walls. This has now been notified by **tie**).

MUDFA 8

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

In the adjudication, **tie's** principal position was that the Estimate was incompetent because it did not comply with the requirements of Clauses 80.4 and 80.7 of the Infraco Contract and, in particular, it did not show that the **tie** Change would be dealt with in the most cost effective manner and did not deal with costs (Infraco argued that there was an agreement to deal with costs once the time element had been agreed - **tie** disputed that such an agreement had been made). **tie's** alternative position was that even if the Estimate was competent, Infraco had failed to prove its entitlement to the extensions of time sought because its delay analysis was flawed. **tie** argued, inter alia, that the delay analysis did not consider readily available and cost effective mitigation measures (including accelerative measures) available to it. **tie** also argued that so far as Infraco's calculation of its entitlement to an extension of time was based on its right to exclusive access to Designate Working Areas, which it equated with Intermediate Sections, it was bound to fail.

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

At a second hearing, Infraco led evidence in support of its claim for an extension of time. Mr. Howie decided that in respect of Section A, Infraco was entitled to an extension to 2 November 2010. In relation to the other sections, Mr. Howie found that Infraco had failed to prove its case. In his Reasons, Mr. Howie held that Infraco had

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	34

wrongly equated Designated Working Areas with Intermediate Sections. He also held that Infraco were under no obligation to include acceleration measures as part of the Estimate.

Murrayfield Underpass - 80.13 Instruction

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

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

Lord Dervaird did not decide whether clause 34 empowers **tie** to issue an instruction where the claimed Notified Departure is disputed and in advance of that dispute being determined.

Following this decision, **tie** has categorised INTC's according to the adjudicator's decision and is refining actions based on this categorisation.

Landfill Tax

Lord Dervaird gives his reasons as to why the Infraco Works would not have been an eligible project qualifying for exemption, the reasons being that he found that it is not proposed that any more material be removed than is necessary for the tram line to be constructed, and that the tram line as constructed will be surrounded by ground containing pollutants. There is no analysis of the evidence provided to Lord Dervaird, which included expert reports and a statement from David Balmer, and the basis upon which Lord Dervaird arrived at the conclusions he did are not explained.

As Lord Dervaird found that no exemption would have been granted, there was no need for him to come to a decision as to whose responsibility it was to apply for the exemption. In paragraph 13, he never the less expresses the view that it was for **tie** as the beneficiaries from an exemption to make the application, although he gives no reason for this conclusion and there is no consideration of the legal arguments put forward by **tie** in support of its position that Infraco were under an obligation to apply for the exemption (presumably because there was no need for Lord Dervaird to come to a decision as to whose responsibility it was).

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	35

Lord Dervaird grants the declarators sought by the Infraco, which can be summarised as follows: (1) provided Clause 80 is complied with Infraco are entitled to be reimbursed landfill tax; (2) Infraco were not obliged to apply for an exemption from landfill tax; (3) no exemption if applied for would have been granted; and (4) the amounts to be reimbursed to Infraco for landfill tax do not require to be discounted. The wording of the first declarator is important. Infraco are entitled to be paid or reimbursed landfill tax "always provided the Notified Departure Mechanism is complied with". In circumstances where there is a more cost effective way of dealing with contaminated material than disposing of it to landfill, for example, such as treating the contaminated material, then Infraco should not be entitled to dispose of the contaminated material to landfill and claim reimbursement of landfill tax.

Sub-contractors

The primary outcome of the decision is that Infraco will have to have subcontracts for Key Subcontractors to which clause 28 applies exercised by each of the Infraco Members (unless tie waives the requirement for that to be done in a particular case), as tie is entitled as a result of the declarator in its favour to refuse approval of any such Key Subcontract where it is not executed by each of the Infraco Members.

Future matters

A number of other Estimates submitted by Infraco have been identified as being potential candidates for referral to the Dispute Resolution Procedure, principally on the basis of those Estimates being very significantly overstated, but also to drive home tie's interpretation of the Infraco Contract that the lump sum Construction Works Price is not circumscribed by what is depicted on the Base Date Design Information but rather represents the price for constructing the entire Infraco Works in accordance with the Employer's Requirements.

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

4.2.3 DRP Outcome

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

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

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	36

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

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

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

In summary, DRP is not a basis on its own to resolve the differences between the parties and to date has not delivered certainty or acted as a catalyst to progress the works in line with the Programme. DRP is management resource hungry and an expensive process for all parties. This was recognised at the December 2009 TPB and resulted in Project Pitchfork as reported in the PF1 report as a means to find a new way to deliver certainty of cost and programme for the Edinburgh Tram Project. For all disputes which have been resolved through the DRP process the value of the change has been reduced from BSC’s initial Estimate of £24.0m to £11.2m – a reduction of 115%.

4.3. Carlisle

4.3.1. Initiation of Carlisle

Late in 2009/early 2010 the Infraco were promoting an extension to the Princes Street Supplemental Agreement which applied the same terms and therefore regime to all future on-street works. They were doing so under the mistaken threat to tie that there was little time left before Infraco would withdraw from the Infraco Contract. By late April in 2010 tie had made it clear that extending the agreement wasn’t acceptable and that the outcome of the Princes Street Agreement was not seen as being a success. There had been unacceptable disruption to the City; the quality of the work was in some areas defective; and the cost was unacceptable. Moreover, the Consortium had not delivered a final integrated design for the remaining areas of on-street work and this was one reason why tie had refused to issue a permit to Commence Works at Haymarket.

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	37

To enter into an extension to the Supplemental Agreement would have committed **tie** to unknown costs and an unknown programme as well as having reduced control on the disruption to the City streets. In recognition of the fact that the on-street works had been delayed by late utility diversions **tie** were offering to deal with the whole matter by way of Clause 65 - Compensation Event.

An inconclusive and unsatisfactory meeting was held with the Infraco Consortium on the 16 April 2010, after which Michael Flynn (Siemens representative on the Infraco Board) contacted Anthony Rush with an invitation to meet on a one-to-one basis to see whether there could be an agreement on an agenda for change.

A meeting took place in Carlisle on 21 April 2010 at which it was agreed to investigate a sensible way forward, being to truncate the Infraco Contract at or about the East end of Princes Street/St Andrew Sq on the basis of a guaranteed maximum price with a new completion date. It was also agreed to investigate allowing **tie** to step in and take over the Civil Engineering Works between Haymarket and Shandwick Place. Mr. Flynn and Mr. Rush were in agreement that each party should nominate a "clean team" and that any negotiations should be under the strictest confidentiality and without prejudice. It was very clear and in the open that "price certainty" was a cardinal requirement of any truncated agreement. This became known as Project Carlisle.

The purpose of the first meeting held on 21 April 2010 above was to discuss an initiative for the Edinburgh Tram Project to:

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

Given the difficulties being encountered in discussions with BSC in relation to on-street works, starting works in relation to Clause 80 etc, it was decided that **tie** would engage in these discussions (which aligned with one of the key recommendations made at the TPB in March – monitor the opportunity to achieve a partial or full exit of BB) to see if a successful outcome could be achieved. The concept of this was that civil engineering work beyond a terminal point would be descoped from the Infraco Contract whilst **tie** maintained the aspiration of keeping the Infraco Contract intact and Siemens involved.

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

- Monitor opportunity for BB Exit on acceptable cost/risk terms;

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	38

- Wrap it into a revised Infraco Contract compliant with procurement regulations, and
- Find a new way of working with BSC which mitigated against further dispute risk.

4.3.2. Carlisle Governance

This process was managed by **tie** using a separate “clean team” using Mr Anthony Rush and advisors from GHP associates and DLA. This team was authorised to discuss options, but had no power to agree or commit. All discussions were held on a without prejudice basis.

This resulted in a draft Memorandum of Understanding - MOU (draft 2) (Appendix 16) being sent to BSC on 4th May 2010 and a programme was set out anticipating an agreement being reached by early July 2010.

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

Included:

- All work from the Terminal Point (to be agreed but expected to be at St Andrew Sq) to the Airport; Enabling Works on or adjacent to the Forth Ports' Estate;
- Provision of all Trams;
- Completed, integrated and assured design
- Testing, Commissioning and Maintenance, and
- Certification leading to full Service Commencement as provided under the Infraco Contract.

Excluded:

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

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

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

- Purchase unused equipment from Siemens;
- Provisional contract with Siemens to provide electrical and mechanical services(E&M) from Terminal Point to Newhaven, and

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	39

- Provisional contract with Siemens and CAF to Commission and Maintain from the Terminal Point to Newhaven.

Step-in rights for **tie**

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

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

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

An essential condition was that the Infraco Contract remained extant with variations which:

- Permitted **tie** to omit Civil engineering Works from Haymarket to Newhaven
- Permitted **tie** to instruct works from the Terminus on a “provisional” basis
- Retained Siemens as the Provider of E&M works
- Retained CAF as the Train Provider
- Retained SDS as the Design Provider
- Satisfied the requirement of the ICP

It was intended that any work omitted from the Infraco Contract would be re-procured by **tie** in accordance with competent EU procurement regulations.

Draft Heads of Terms & Assignment Agreement

tie also developed a draft Heads of Terms (HoT's) (Appendix 17) which was shared with BSC on 9th June 2010 to reflect the MOU. The purpose of this document was to start the process of formalising what was outlined in the MOU in anticipation of the legal agreement being reached.

4.3.3. Carlisle Progress

On the same day as **tie** sent the HoT's to BSC, BSC formally wrote to **tie** confirming their desire and commitment to complete the Infraco works under Project Carlisle, but also including a sting in the tail which documented their qualifications for such an agreement. These qualifications related to programme and LAD's, confidentiality agreements and finalisation of scope. This was followed up by a letter dated 11th June

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	40

2010 re-iterating that BSC could not meet **tie**'s desired completion dates for the project as set out in the HoT's. At this point, BSC had not engaged with their sub-contractors to start the pricing exercise for the GMP.

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

However, during June, BB introduced a new face into the equation – Mr Ed Kitzman. By end of June the negotiation team was reporting a very positive approach from Kitzman.

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

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

tie responded to the 9th June letter and were advised during week of 22 June to expect a response by end June.

The sequence of events was then as follows:

- The response which was promised by 22nd June was actually received on 29th June. This contained an ongoing commitment to work on Carlisle. The letter also contained a number of "clarifications" to the GMP and a programme which only indicated delivery from Airport to Haymarket. This missed a Tram Project Board deadline but also missed a date of a meeting **tie** had with the Minister.
- Whilst work had started on the GMP within **tie** with the creation of templates and sharing of information between the **tie** team and its advisors,

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	41

as at 20th June BSC had still not started this pricing exercise by speaking to sub-contractors. It had been agreed that **tie** would have a seat at the table for the meetings with sub-contractors. Whilst the exercise hadn't started, BSC had committed additional resources including resource from Asia to assist. By late June/early July this process had started and a GMP was delivered to **tie** on 29/07/10.

- Mackay and Jeffrey had a telephone conference with Darcy and Wakeford on 5th July. Again, the tone of the meeting was positive. An integrated assured design was promised by 16th July & BB advised that they expected sub-contractor prices by the end of the week. A further meeting was arranged for 26th July 2010.
- As of 23rd July, **tie** had not seen the design but BSC assured us that it had been delivered to them from SDS. Meeting arranged with **tie** on 26th July to review the design. The first tranche of what purported to be the assured design was delivered to **tie** on 9th August - these were reviewed but were not capable of acceptance by **tie**. **tie** had reviewed the GMP offer and planned to make a counter offer to BSC during week commencing 23/08 with further discussions held with BSC that week. Offer was made on 24/08/10.
- During the next 2 weeks further discussions were held with BSC which culminated in a senior level meeting on 13/09/10 (Jeffrey, Rush, Mowatt from **tie**, and Wakeford, Darcy, Walker and from BSC). Just in advance of this meeting **tie** received, without warning, a revised offer from BSC. It was clear at this meeting that any Carlisle agreement was still some way off.
- There then followed 2 meetings between Richard Jeffery of **tie** and Richard Walker of BSC to discuss DRP items. At these meetings Richard Walker suggested to **tie** that BSC would be interested in seeing if there was a way achieving a "mature divorce". This was followed by a formal meeting on the subject on 11/10/10 with Richard Jeffrey and Susan Clark of **tie** and Richard Walker and Michael Flynn of BSC.
- On 14/10/10 **tie** received a letter from BSC (Appendix 18) which stated "we see no point in meeting again to discuss anything and everything but the fundamental difference between the Parties, that being the difference in scope, programme, T&C's" **tie** sought clarification from all 3 Infraco parties that they were formally withdrawing from the Carlisle process. No individual responses have been provided but the Consortium wrote on 29/10/10 to advise that they no longer felt the need for Ed Kitman's involvement, that they were not withdrawing from Carlisle but insisting that it was **tie** that had to compromise to make Carlisle acceptable. BSC's final correspondence was short but outlined their ongoing and combined interest in finding a compromise solution with **tie**. Carlisle was not mentioned in this letter and it was sent at a time when discussions had been ongoing with BSC about a "mature divorce".

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	42

4.3.4. Carlisle Status

Detailed discussions took place between the Infraco (represented by Ed Kitzman) and for tie (Rush and Molyneux). These discussions were on a without prejudice basis and neither parties' representatives could commit the party they represented. In line with the timetable agreed the Infraco made a proposal on the 29 July 2010. The said proposal was not compliant with tie's essential requirements of price certainty. It in effect retained the Infraco's ability to apply Schedule 4 to an increased price for a reduced scope of work.

Having discussed the offer with CEC tie made an offer based on the principles of fair valuation to the Infraco on the 24 August 2010. This offer was based on the detailed discussions with Mr. Kitzman and if accepted it would have achieved tie's requirements: a working tram system (Airport to St. Andrew's Square) for a certain price within the budget for ETN and a design for the completion of the ETN to Newhaven. It is true to say that there had been indications from the Bilfinger Berger's Site management that they were not in favour of the proposal, but more senior members of member companies had expressed a strong desire to see the proposal work.

It was the Infraco Representative on Site who responded by making a "Full and Final Proposal" on the 11 September 2010. The offer again achieved none of tie's essential requirements; it in effect sought to worsen tie's position. Nevertheless further discussions took place with Mr. Kitzman subsequent to which a revised offer was made by tie on 24 September 2010 which was agreed by Mr. Kitzman to be a framework on which the parties could reach a commercial settlement.

There has never been an explicit rejection from the Infraco of the principle of tie's last offer but it could be said that as their letter dated 1 October 2010 rejected tie's price the offer was de facto rejected unless tie was prepared to substantially increase the revised price. Moreover, the Infraco have a desire to truncate at Haymarket and for Siemens to provide materials only to Newhaven from Haymarket.

The difference in the price of tie's offer and the Infraco's counter offer is not easy to assess because they are predicated on different parameters.

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

Offers	Date	GMP	Programme	Scope	Reference
BSC	29/7/10	£443.3m & Euro 5.8m	19/11/12	Airport to Princes Street East plus Newhaven Enabling Works	25.1.201/EKI/6338

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	43

tie	24/08/10	£267.3m	06/06/12	Airport to St Andrews Square plus Enabling Works at Newhaven	INF CORR 5858 Part A - excludes SDS/ PSSA costs
BSC	11/09/10	£405.5m 7 Euro 5.8m	18/12/12	Airport to Haymarket plus Newhaven Enabling Works	25.1.201/EKI/6682
tie	24/09/10	£282.3m	06/06/12	Airport to St Andrews Square plus Enabling Works at Newhaven	INF CORR 6275 (Appendix 11.9 10) + £8m for contamination

(Table 8)

It should be noted that tie's proposal excluded payments to SDS and for Princes Street Supplemental Agreement and assumed purchase of a reduced number of trams. Taken together these items account for £43.8 million of the Infraco's price. In addition tie has offered to include a provisional sum of £8 million for the removal of contaminated material.

The fundamental differences between tie and Infraco can be summarised and explained as:

tie Proposal

Negotiating Position

Price – tie's offer is based on a fair valuation a fair valuation putting the parties back where they would have been in May 2008 if they had known the full extent of the difference between BBD and IFC. Whereas the Infraco are claiming full recompense for their additional costs calculated by reference to a schedule of fixed rates given in Schedule Part 4 with fixed percentages for preliminaries and profit. They also seek to retain the "mobilisation payment of £45.2 million. Whereas tie's fair valuation absorbs this payment because it was de facto a payment in advance. In addition they are looking to recover their prolongation costs from tie whoever is responsible for the

tie has conceded from the start that the revised price was open to negotiation upwards. Moreover, various Infraco executives have suggested that they will reduce their aspirations.

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	44



prolongation.

Payment for Princes Street – tie’s offer excluded payment for Princes Street, making it subject to further negotiation.

tie always saw this as a negotiating point.

Payment to SDS – tie’s offer made this subject to separate agreement.

tie always saw this as a negotiating point.

Completion Date – tie’s offer sets these at those determined at adjudication.

tie always saw this as a negotiating point.

Scope – tie’s offer unambiguously makes the Infraco responsible for all additional costs however so arising except for unforeseen utilities costing more than £50,000 and Contaminated Land up to £8 million.

Agreeing to the Infraco’s proposal would reduce the risk to the price but **tie** would not have price certainty and the Infraco could still act in a delinquent manner.

Whereas the Infraco are attempting to keep Schedule Part 4 extant.

The benefits of Project Carlisle in the form desired by **tie** are described in the essential principles described above. In addition to that any agreement based on the concept of Project Carlisle, even one which retains Schedule Part 4 in part but reaches a full and final settlement on a defined scope, would reduce the burden of forensically investigating and formulating its case as described above.

The subsequent correspondence on this matter also clearly shows that as far as BSC were concerned they were not willing to compromise on any of the core deliverables and effectively withdrew from the Carlisle process from mid October and started to explore alternatives around “divorce” where Siemens indicated they would be happy to remain as a supplier but did not want to continue through the Infraco Contract.

Separate discussions with CAF reveal that they are keen to be novated back to **tie**, even if the Infraco Contract is not terminated and they also indicated a willingness to become more involved as a management contractor for systems using Siemens as a supplier.

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	45

4.4. Notice

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

In June 2010 we embarked on an enhanced process of exercising the contractual provisions to notify BSC of alleged breaches and underperformance which require that they provide details of how they would make good. The contractual mechanisms to be used were continued DRP's, the Remediable Termination Notices (RTNs) and Underperformance Warning Notices (UWN) which were contained within Clauses 90 and 56 of the Infraco Contract. This became known as Project Notice. This strategy was to continue to administer the Infraco Contract robustly and in so lead to 3 potential outcomes to the dispute:

- Reach agreement on the Carlisle option
- Termination under Clause 90 of the Infraco contract through an Infraco default. This was likely to be a contested termination and lead to litigation, or alternatively,
- Make the current situation and potential consequences so undesirable to BSC and potentially painful contractually that it may lead, not necessarily to a litigious Termination through the Infraco contract, but may lead to a mediated settlement in respect of Termination of the Infraco Contract.

The objectives of the strategy were to:

- Draw from BSC their reaction/response to allegations of breach of contract
- Present BSC with a clearer view of our position and the possible consequences of their conduct and delivery deficiencies if improved performance and/or Carlisle did not bear fruit
- Bring matters to a head – in a way which DRPs of their own were not delivering certainty or resulting in progress on the ground
- Shift the focus strict from legal interpretation of design development and the change mechanism to wider failures of BSC to perform – this is important as it is a core reason why we do not believe the project can be completed with BSC as currently constitute and managed - it is not just commercial as there are also many examples of it lacking core competencies and behaviours
- Provide a clear platform on which to collate evidence of InfraCo default (including how they respond to RTNs) and get it assessed by legal and QC as a basis for termination if it came to that.
- Use the tools of DRP, RTN's and UWN's as negotiating tools to strengthen tie's position for a Carlisle settlement, force discussion on a mediated settlement and exit of BB or, ultimately for use in a contractual Termination, albeit this was likely to lead to litigation if contested by BSC.

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	46

4.4.1. Notice Preparation

In **tie**'s opinion there was evidence of breach of contract in a number of areas, but since March 2010, the team had been continuing to assemble, structure and refine the detailed evidence for use in any Remedial Termination Notice or Notices. Whilst there were no guarantees that this strategy would lead to a clear cut case for termination it could also be used for the purposes of applying pressure to a dysfunctional Consortium. Subsequent audits, the continued commercially assertive strategy and the lack of shift in behaviour, particularly of BB, had all provided additional evidence of breach in a number of areas as identified in the list of RTN's in Table 9.

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

At the meeting on 16th June 2010 which was attended by Mackay and Jeffrey from **tie** and Wakeford and Darcy from BSC, **tie** advised BSC that the alternative to Carlisle was for **tie** was to initiate Clause 90.1.2 letter of breach in accordance with the Infraco Contract.

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

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

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

Senior Queens Counsel was instructed on 22 June 2010 and a consultation arranged for 8th July to discuss the strength of the case for Termination and the format for RTN's. This consultation session was useful in that Senior Counsel advised that there were a number of strong areas which support the issue of a Clause 90.1.2 letter leading to potential Termination if BSC did not remediate the breaches. QC advised

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	47

that a number of RTN's should be issued rather than one covering a number of breaches and so this advice was taken and a number of RTN's identified and the drafting commenced.

Counsel did also confirm that it would be necessary for **tie** to provide evidence of adverse breach of contract to substantiate termination. However, it was not necessary to compile and test the body of evidence prior to the issue of RTN's. We took a conscious decision in light of time pressures from CEC to issue RTN's without having complied this evidence but recognising that such evidence would need to be completed prior to any termination. An exercise to collate this evidence had now started and continues and this "Body of Evidence" is being stored electronically in a "virtual" data room accessible to **tie**'s advisors and replicated in hard copy.

4.4.2. Notice Initiation

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

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

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

TPB on 28th July endorsed the strategy presented which outlined that a commercial decision needed to be made in respect of the issue of RTN's. On 9th August, **tie** issued the first 3 RTN's and the 1st UWN. As at 13/12 the status of these is as follows:

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	48

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

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	49

RTN 9	Course of conduct – relates to some 99 breaches of contract.	30.09.10	11.11.10	None received		
RTN 10	Design (Gogarburn Retaining Wall) – relates to management of the design of the above structure and the failure to get approval of a key stakeholder – BAA.	12.10.10	23.11.10	None received		

(Table 9)

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

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

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

QC also confirmed that the process of issuing Underperformance Warning Notices (UWN's) as per Clause 56 of the Infraco Contract could be used, although some questions were raised as to the validity of these notices.

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	50

This advice has been acted upon as follows:

UWN (material breach)					
	Topic	Date of issue	Issued	Response from BSC	tie response
UWN 1	Princes Street (Defects)	09.08.10	✓	Yes – stated that this was a non valid use of UWN	Noted BSC response
UWN 2	Programme	08.09.10	✓	Yes – stated that this was a non valid use of UWN	Noted BSC response
UWN 3	Design (trackform)	12.10.10	✓	Yes – stated that this was a non valid use of UWN	Noted BSC response
UWN 4	Non compliance with instructions/miscellaneous design integration	Not yet sent			

(Table 10)

tie has now issues 10 RTN's but has only received 4 rectification plans from BSC. Of these and after due consideration, tie has rejected these plans. Having rejected these plans, coupled with BSC not supplying plans for the remaining 6, tie is now in a position where it could proceed to terminate the Infraco Contract.

Section 6 of this report deals with the legal advice around termination at this point in time

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	51

4.5 Incremental Delivery Strategy / Updated Business Case

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

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

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

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

Financial and operational viability

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

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

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

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	52



The overall conclusions reached were:

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

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

Economic viability

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

Affordability

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

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

The negotiations under Carlisle and the planning we have undertaken for procurement following a termination have been undertaken with a view to

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	53

delivering the identified viable first phase of operations from Airport to St Andrew Square within the currently available funding of £545m. However, as long as there remains significant commercial uncertainty with BSC, it is not possible to provide a robust estimate for either the full cost of Phase 1a or for Airport to St Andrew Square.

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

Other key advantages from incremental delivery

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

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

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	54

5. Process & Governance - Mar 2010 to Present

5.1. Governance

Since March 2010, it has been a requirement to keep all key Stakeholders informed as to the ongoing status of the Infraco Contract. In doing so, the following has been undertaken:

- TPB – has continued to meet every 4 weeks
- TEL Board continued to meet and be updated
- Strategic Options Group – this meeting between **tie** and CEC has been formed and latterly has met almost every week
- Group Leaders – **tie**'s CEO has met with all Group Leaders on an ongoing basis
- Transport Scotland – as well as the 4 weekly report, **tie**'s CEO has met with TS Officers on an ongoing basis
- Scottish Government – **tie**'s CEO has met with Ministers on an ongoing basis
- Events log – this has been kept up to date to record all key meetings including those involving Stakeholders
- TEL also wrote to CEC in accordance with its operating agreement to advise them of the likelihood of the project exceeding £545m. This has been reported in the CEC report dated 24 June 2010.

5.2. Audit

As part of the internal audit programme, Deloitte carried out a high level review of the commercial strategy adopted by **tie** since contract signature in May 2008 (Appendix 19). the key items identified in the Executive Summary are:

- That **tie** had adopted a robust decision making process since the nature of the disagreements with BSC became clearer following contract signature.
- **tie**'s approach to change estimates and their administering public funding could be viewed in the context of driving down amounts claimed by BSC.
- It identified ongoing liaison with CEC and Transport Scotland and that governance matters were clearly recorded in a number of documents.
- **tie** had made use of external advisors at key point in the process and had implemented a challenge process prior to launching DRP's.

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	55



- Disputes appear to originate from negotiations concluded prior to contract signature.
- Risks associated with elements of the contract not complete prior to signature, such as design, had had risk items identified.
- Performance of design had been identified as a key issue in the overall management of the Infraco contract.

In October 2010, **tie** requested that Deloitte reviewed the processes adopted since March in progressing the options outlined in the Pitchfork Report (Appendix 20). There were no significant issues identified as a result of this review.

Reference No 05 Dave Anderson
Privileged and confidential - prepared in contemplation of litigation. FOISA exempt. Do not copy.

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	56

6. Termination of Infraco Contract

6.1. Legal Risks & Consequences of a contested Termination

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

- 1) Infraco may submit a comprehensive rectification plan setting out how it intends to remedy the Infraco Default. This must be within 30 Business Days of the date of the RTN (or longer if **tie** agrees).
- 2) **tie** has 10 days to consider this plan and determine if it is acceptable or not.
- 3) If **tie** does not accept the rectification plan, or Infraco does not submit a rectification plan, **tie** may after giving 5 Business Days notice in writing to the Infraco terminate the agreement.
- 4) Following termination under the agreement **tie** may enter upon the Infraco Works and any part of the site and expect Infraco.
- 5) Where **tie** has entered upon the Infraco Works, **tie** may complete or carry out the Infraco Works itself or employ any other contractor to complete the Infraco Works.
- 6) Where **tie** has entered upon the Infraco Works, the Infraco shall, if instructed by **tie**, use reasonable endeavours to assign to **tie** any agreement as soon as practicable which the Infraco may have entered into and which are, in the reasonable opinion of **tie**, material to the completion of the Infraco Works.

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

Senior Counsel opinion (dated 22/11/10) has been received on the mechanics of the clauses in the Infraco Contract in respect of Termination of the contract. Whilst BSC may accept Termination of the contract, there is a risk that they may decide to challenge such a Notice. The response to the Remediable Termination Notices indicates that they do not agree with **tie**'s claim of an Infraco default. Such a challenge would proceed by way of adjudication and then litigation. The time involved in such a process could be at least a year and could be a number of years. During the period of such adjudication and litigation **tie** would probably not be able to secure access to carry on the Works. Any attempt by **tie** to enter upon the Works while such a challenge was ongoing would

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	57

probably be the subject of an application for interdict *ad interim* by Infraco. If Infraco maintained that **tie**'s notice of termination was invalid and that they wished the contract to continue then in it is possible that interim interdict would be pronounced against **tie** preventing us from entering up on the works. BSC would be able to seek unlimited damages against **tie** if they were able to prove wrongful repudiation of the contract. Senior Counsel's advice dated 22/11/10 and 1/12/10 concludes that in the event of **tie** giving notice of termination of the Agreement in reliance upon the 3 of the specified RTN's he reviewed, there would be a material risk of their acting being found to be a wrongful repudiation of contract.

6.2. Legal opinion on grounds for termination

McGrigors were appointed to lead the workstream on any potential termination of the Infraco Contract. McGrigors have produced a full report and this is included as Appendix 21 to this report. The summary of this follows.

Additionally Senior Counsel opinion has been sought and a series of consultations were held. Senior Counsel opinions are contained in Appendix 21 to this report.

In summary, legal opinion on termination of the Infraco Contract at this moment in time raises a number of issues as outlined below:

- To constitute a valid RTN, the document must specify the nature of the Infraco Default which has occurred – there are at least some respects in which the RTN's issued can be criticised for lack of specification. This means that there is a material risk of BSC claiming wrongful repudiation of the Infraco Contract if **tie** were to use these as the basis of the Termination.
- Rectification plans – **tie** cannot decide to reject such a plan in bad faith. If **tie** rejects the rectification plan but does not terminate the Infraco contract, BSC are required to proceed with the contract.
- On Termination, **tie** is entitled to enter upon the InfraCo Works and expel Infraco. This is likely to provoke a legal challenge – interim interdict or DRP. During the period of litigation **tie** would not be entitled to require Infraco to proceed with the InfraCo works, nor would it be entitled to get others to carry out and complete the works. This process could last a year or a number of years to resolve.
- An alternative approach could be that **tie** could raise proceedings to test entitlement to terminate or refer such breaches to DRP.
- **tie** should continue to undertake the forensic analysis to identify the areas which have greatest prospect of establishing that an Infraco Default has occurred.
- **tie** can only recover the costs of completing the project from BSC if **tie** win any litigation and the full project is completed. This recovery is capped at 20% of the Construction Works Price.

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	58



- If BSC is successful in challenging a termination by **tie**, then **tie's** exposure is likely to be significantly greater than if it had made out a case to be entitled for Infraco Default.

6.3. Notice – Mitigation Plan

Legal advice has outlined the consequences should BSC successfully challenge an attempt by **tie** to terminate the Infraco Contract through Infraco Default. As a result of this advice, it is recommended that **tie** undertake some further testing of the robustness for the **tie** RTN's and defaults to which they refer.

This will be done by submitting to DRP examples of the contract areas which **tie** believe BSC have breached and where BSC claim in response to the RTN's issued that there is no breach. Should the adjudicator find in **tie's** favour then this is strong evidence of provendefault which can be used should **tie** proceed to terminate the Infraco Contract on this basis and then BSC proceed to challenge this in court. If the adjudicator disagrees with **tie**, then further examples of breach will be tested through the DRP process and eventual adjudication.

Additionally, **tie** will continue to gather the forensic evidence relating to all identified breaches, populating the data room for potential termination and subsequent litigation. This evidence will be useful for any further RTN's or DRP's.

Reference No 05 Dave Anderson
Privileged and confidential – prepared in contemplation of litigation. FOISA exempt. Do not copy.

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	59

7. Mediation

Mediation is a key feature of the Infraco Contract Dispute Resolution Procedure and mediation has been carried out on a number of the issues submitted by both parties to the DRP process. There has been mixed results from mediation. To date, mediation of the entire contract and relationship has not been attempted since the parties were attempting to find a solution through the Project Carlisle negotiations. Whilst neither party had agreed that those negotiations had irrevocably broken down, it was clear from correspondence and discussions with BSC, that they did not see a successful outcome on Carlisle being possible. Furthermore, they had actively sought discussions with tie relating to an agreed exit for BB and Siemens from the Infraco Contract.

This coupled with events during the week of 15th November 2010 have led to a widely held view that the time is now right to enter into a mediation with BSC on the Infraco contract. The events during wc 15/11/10 were:

- 1) Discussion at TPB on 17th November 2010 - see Appendices 23 & 24
- 2) Emergency motion approved at Full Council meeting on 18th November 2010 which endorsed an approach being made to BSC with a view to mediation. See Appendix 25.
- 3) Open letter to the Scotsman from a leading Senior QC offering to mediate between the parties – See Appendix 22.

BSC were approached in writing - see Appendix 26 and responded (Appendix 27) to say that they would engage in mediation. Subsequent to this CEC met with BSC on 3rd December 2010 to discuss this option.

Richard Jeffrey has written to CEC (Appendix 28) to outline views on the scope of the mediation.

Assuming that the scope of mediation is to find an acceptable end to the relationship/contract between tie/BSC the benefits and dis-benefits to this option are:

Benefits

- Removes uncertainty around Termination due to Infraco Default being challenged through litigation
- Removes risk of injunction being taken out against tie preventing them from carrying on with works until the termination litigation complete
- May allow Siemens to carry on with systems work which, in many cases are proprietary and would require re-design if another supplier was procured
- May allow an easier novation of the SDS contractor back to tie

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	60



- Still allows for CAF to be novated back to tie and potential options for surplus trams to be investigated
- Allows **tie** to carry on with re-procurement of the remainder of the project
- Takes away litigation costs for the duration of court action – these costs would include legal and claims consultant costs
- Removes an element of cost uncertainty by entering into litigation as if litigation lost then CEC exposure is effectively not capped
- Removes uncertainty for project team and helps to provide a platform for key team member retention
- Allows a new programme for completion of the project to be produced providing certainty for the city, limiting business impacts caused by the past few months uncertainty
- Stakeholder support through having reached a conclusion
- PR benefits as project now has a defined path going forward

Dis-Benefits

- Costs of mediated settlement may be higher than winning any Infracore Default termination
- May lose ability to “claim” costs of completion from BSC
- May lose ability to call bonds

Reference No 05 Dave Anderson
Privileged and confidential – prepared in contemplation of litigation. FOISA exempt. Do not copy.

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	61

8. Appraisal of Options available now

Section 4 of this report outlines the workstreams that have been active since March 2010. These are:

- Contract administration/Review on progress and behaviours;
- DRP's;
- Carlisle, and
- Notice

These workstreams have been undertaken in order to lead us to a range of outcomes or options for the Edinburgh Tram Project and the Infraco Contract. The following summarise the resultant options that are, at December 2010, available for the project:

- 1) Enforced Adherence;
- 2) Carlisle;
- 3) Termination – which has the sub-options of being followed by re-procurement, postponement or cancellation of the project and
- 4) Mediation - mediated settlement resulting in mutually agreed termination or other solution to complete the project. This option has the same Termination sub –options as outlined above.

Each of these options is outlined in more detail below and a full summary of costs of each option will be produced prior to any final decision being endorsed by TPB.

8.1. Enforced Adherence

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

The behaviours and actions of the consortium since March, as evidenced by the matters which have been the subject of RTNs and UWNs, lead us to the conclusion that we have not resolved our principal commercial differences to any material extent:

- The issue regarding design change (BDDI-IFC) remains, albeit there are interim adjudication decisions to act on;

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	62

- Programme dispute and cost of time – despite the MUDFA rev 8 DRP the issue of delay due to utilities remains unresolved and we have no meaningful or compliant programme for the completion of either the off-street or on-street works;
- Clause 80 – failure to commence the works until estimate agreed continues and tie is now analysing individual INTC's in light of adjudication decisions and QC advice;
- Failure to deliver best value;
- Notified departures continue because the design is not complete;
- Continued failure to mitigate delays;
- Continued failure to manage design including non delivery of an integrated design for on-street works or value engineering opportunities;
- Supply-chain mismanagement including failure to deliver Collateral Warranties and contracting as individual Infraco members;
- Failure to integrate design leading to rework and delays;
- Lack of control over sequencing on-street works, and
- Issues with defective works on Princes St and the rejection of BSC's rectification plan associated with these works.

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

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

There is no evidence that Siemens are willing take a more active role in resolving matters with their joint and several liability for performance under the contract. They did not work with Bilfinger to find a way forward with the "Siemens 25" to enable work to progress from the depot to the airport and the failures to manage and deliver on design are as much their responsibility as Bilfinger. It's also true that Siemens approach to pricing their element of the BSC Carlisle proposal reflects no more respect for the original contract price than Bilfinger.

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

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	63

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

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

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

8.2. Carlisle

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

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

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

tie presented a fair value for the works in the negotiations on Carlisle based on actual costs of market tested sub-contractor quotations and Siemens original contract price adjusted for scope with an allowance for fair and reasonable preliminaries, overheads and profit. The offer excluded the Princes Street Supplemental Agreement (PSSA) and SDS which were to be agreed separately and a reduced number of 17 trams. It also offered a provisional sum for the removal of contaminated material. It wasn't an adjustment to the original contract price.

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	64

Infraco's approach was to ask for expenditure to-date: plus cost to complete: plus additional risk cost for incomplete design. It was in effect their claim for adjustment to the original contract price. The said proposal was not compliant with tie's essential requirements of price certainty. It in effect retained the Infraco's ability to apply Schedule 4 to an increased price for a reduced scope of work.

8.3. Terminate & Reprocure

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

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

The determination of the timing of any contract termination is in large part a function of the assessment of legal risks and legal opinion on the grounds we have for termination (including evidence to support an Infraco default) as further discussed at Section 6 of this report.

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

Termination Benefits

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

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	65

- Value is secured from the investment in the project so far
- The first phase of the project interchanges with the Governments' new railway station at Edinburgh Gateway
- This allows **tie**/CEC to control the respect for the city agenda by giving control for staging of the works back to **tie** and effectively brings into control and end to the reputational damage suffered.

Termination - Disbenefits/risks and uncertainties

- Absent a justifiable out of court settlement we will be entering into litigation which would take 2 years at least – the impact of the litigation outcome on outturn costs would not be known until then;
- Uncertainty surrounding potential legal action by BSC resulting in the inability to continue with the project until it is resolved. Could mean 2 years of “do nothing”
- Possible further loss of political and public support for the project
- Uncertainty re whether the Government Grant of £500m will be available for a first phase to St Andrew Square.
- In the short term the affordability of the first phase from Airport to St Andrew Sq is still an issue.
- Reprocurement strategy to be clarified developed which will deal with: Interface risks between civils and systems works
- Compatibility of newly procured systems with Siemens work already installed and the CAF vehicles
- Maintenance solution cover all infrastructure delivered by both BSC and newly procured contract
- Liability for work completed to date including design
- Assuming we novate the TSA / TMA back to **tie** we will have too many vehicles for the initial service to St Andrew Sq unless and until we secure a lease or sale of the surplus vehicles.

Section 9 outlines the current thinking on re-procurement should the Infraco Contract be terminated. some of these issues required to be considered as part of the termination process and these include:

- Are the TMA and TSA contracts with CAF novated back to **tie**?
- Is the SDS contract novated back to **tie**?
- It is assumed that 100% of the Infraco performance bonds and retention bonds are called in a forced termination event.

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	66

8.4. Terminate & Postpone or Cancel

8.4.1. Terminate and Postpone

In addition to the terminate and reprocure option we have assessed the option of postponing the project and reprocurement after winning litigation - in a nutshell this adds 2 years to the programme.

8.4.2. Terminate and Cancel the Project

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

Option of cancelling the project right here and now has not formally been evaluated however, the downsides of cancellation include:

- No immediate prospect of securing value (the benefits detailed in section 3 below) for the investment made to date;
- An extended period of continued uncertainty and costs in pursuing commercial settlement with the existing infrastructure consortium;
- No possibility of recovery of costs to complete the project via Infracore;
- The costs associated with any reinstatement or safeguarding of incomplete works;
- Additional costs of reprocurement and mobilisation of a new infrastructure provider if and when the project is restarted;
- Uncertainty about market appetite and required risk premium included in the pricing of a reprocurement although the re-procurement exercise underway suggests market may work in our favour in this respect given the current fiscal environment, and
- Damage to the reputation of Edinburgh and Scotland as a place to do business with local and national Government.

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	67

8.5. Mediated Settlement

Given the risks associated with a forced termination through the contract at this time, an alternative proposal is to mediate on the whole Infraco Contract. This has been proposed and agreed via a motion from CEC and tie has been instructed through the Tram Project Board to review this option.

For this option it is assumed that we enter into short form mediation with BSC. tie then goes on to re-procure the remainder of the project on a phased basis and without the risk of litigation. The respective risks and benefits of this option are explained in Section 7. The table below indicates the evaluation of costs associated with this option.

8.6. Summary evaluation of Options

The following table summarises the options available to us with some the key decision making criteria:

Option	Cost Certainty	Programme Certainty	Stakeholder/PR acceptability
"As is"	x		x
Carlisle	x	x	x
Termination	x	x	√
Mediation	√	√	√

(Table 11)

Additionally, it is worth remembering that the construction phase is the final part of the tram journey and to re-state what we have spent to date and what we have achieved for this. A large infrastructure project such as the tram project requires a substantial amount of work to be undertaken in advance of construction works.

- The budget for tram infrastructure represented 46% of the overall project budget with the most significant construction elements within this expenditure to date related to Gogar Depot (73 % complete), the structures along the off-street section and tram works along Princes Street.
- Significant progress has been made on the construction of the 27 tram vehicles with 19 complete and ready for delivery to Edinburgh. This part of the project represents 11% of the original project budget.
- The diversion of utilities has resulted in a significant enhancement of the utility assets in the City including faster broadband services and cleaner water supplies.

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	68



- The primary reason for undertaking these diversions is to ensure that tram and other traffic are not disrupted as a result of utility companies servicing assets or reacting to emergencies in the future.
- Costs related to completed design and land account for 12% of the project budget expenditure to date.
- Design costs represent some 11% of the project budget and are estimated by TSS to be 90% complete.

Reference No 05 Dave Anderson
Privileged and confidential - prepared in contemplation of litigation. FOISA exempt. Do not copy

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	69

9. Resolution – Delivery of the project beyond Termination

Contingency planning work has commenced to identify the tasks required should a termination of the Infraco contract result from this work to date. The following identifies the key workstreams that the team need to focus on over the next few months.

9.1. Workstreams – to Sep 2011

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

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

It is envisaged that these workstreams will require some amendments to the way that tie is resourced and advisors engaged as well as clarification of the ways in which we will engage with CEC officers. In many cases these workstreams have already commenced and the joint deliberations of tie and CEC are being considered through a series of working papers presented to CEC.

The totality of these workstreams is envisaged as being completed by September 2011 at which time the strategy for completion of the project would be presented for approval. In addition to the regular reporting to the Tram Project Board it is envisaged that a regime of milestones or stage gates will be defined appropriate to each activity.

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

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

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	70

9.1.1. Ongoing works

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

Completion of utilities – In any event it will be necessary to complete all existing utility works underway including the recovery of betterment due from SUCs and satisfactory agreement of final accounts with contractors (the final account with Carillion having already been settled). Over the next 9 months the scope of utility works to be completed includes:

- Telecoms cabling works
- SW abandonments
- SGN abandonments
- Limited remedial works

No new commitments will be made to utility works in the on street sections, the most significantly additional diversion has been identified as being necessary at Baltic Street.

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

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

The criteria above are not necessarily discreet – for instance the completion of works because it is commercially sensible to do so is closely related to the assessment of how close they are to completion. The test of commercial sensibility will in turn be dependent upon the willingness of existing sub-contractors (and perhaps Siemens) to engage in completion of the works concerned on acceptable terms (compared on a value for money and time basis to the procurement of the works concerned) and our compliance with public procurement law – see below.

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	71

Reinstatement and remedial works – In the event of termination there are reinstatement works which CEC would require to be carried out in the on-street sections in particular in recognition that it is not intended to commence new on-street works till early 2012. It is also considered necessary to carry out the necessary remedial works on Princes St to mitigate against any further deterioration of the work completed and on safety grounds. Again, a joint assessment has been carried out with CEC Officers and a schedule of the works to be carried out is in place.

9.1.2. BSC Engagement

Here the workstreams are predicated on settlement of all outstanding matters under the Infraco contract in the most satisfactory manner with due regard to the relative time and cost consequences of each course of action and the imperative to remove continuing uncertainty regarding the existing contract. This is shorter for a mediated solution but could take many months under a forced termination and then litigation.

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

Determination of exit premium option – Immediately as part of a mediated settlement or immediately following termination we will engage with the consortium on whether they are willing to consider settlement of all outstanding liabilities without recourse to the costs and uncertainties associated with litigation, and at what additional cost to us (if any). Each party will be heavily influenced in this regard by their respective legal advice on the strength of their case – ours is considered in detail at Section 6 above. In extremis there might be a justification for payment from the consortium back to tie but it is unlikely that will be an attractive option to them.

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

Siemens – It has always been a strand of our efforts to resolve matters with the consortium to have continuing arrangement with Siemens for the delivery of the systems element of the project. Much of the proposed Siemens installation and

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	72

associated design is proprietary in nature and constitutes the more complex engineering elements of the project and the critical interface with the tram vehicles. Siemens responsibility for ensuring their installation is ready to operate, is reliable and then maintain it in the initial years of operation will be the most difficult element of the BSC contract to replace in a reprocurement – see below.

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

CAF – This paper is prepared on the presumption that the tram supply and maintenance contracts will be novated back to **tie** in the event of termination. CAF are keen to be novated back to **tie**. The reasons for this are:

- To date we have spent £47m under the CAF supply contract out of a total contract sum of £58m. We have taken delivery of one tram vehicle and have the right to take title to the 19 vehicles which are complete and being stored in Spain.
- If on termination we do not take title to the completed trams and novate the TSA and TMA back to **tie**:
 - We will have spend £47m and have very little to show for it other than the one tram delivered to Edinburgh.
 - On the assumption we could make a competent call on the CAF performance bond (which seems unlikely as CAFs performance under the TSA has been very good) we would realise a maximum of £2.8m (5% of the contract sum).

We would have the prospect of seeking to recover the lions’ share of what we have paid to CAF under the TSA through litigation with the BSC consortium and undertaking an uncertain reprocurement of tram vehicles for the Edinburgh Tram Project.

- Our assessment of the current demand for tram vehicles is very strong and it is thought that new vehicles may be as much as 50% higher than the price which we secured through the CAF procurement. This is being explored with PwC who are also advising **tie** on potential leasing options for the additional trams not required to operate a service between Airport and SAS.
- To operate a tram service from airport to St Andrew Sq we have determined that we would need 17 out of the 27 tram vehicles – the best outcome in the circumstances would be one where the 10 tram vehicles which are not

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	73

required to run the airport to St Andrew Sq can be leased to another operator until such time as they are required to operate a service to Newhaven.

- We have had encouraging discussions with TfL regarding the possibility of leasing a number of the surplus trams for use on Croydon Tramlink. In terms of capex the entire 27 trams would still be counted as sunk expenditure even if we have a cash income over the period of any lease as a return for that investment.
- A complete disposal of the 10 trams which are initially surplus to requirements would also be an attractive option from a risk management perspective.
- The timing of engagement and negotiation with CAF on the terms of the novation back and discussions with both CAF and TfL on the terms of a leasing deal will be important.

For the purposes of modelling the financial outcomes of termination and reprourement we have assumed that we acquire all 27 vehicles but that up to 10 of the vehicles are then leased for 7 years at an annual yield of 7.5% to another party until they are required to operate the service to Newhaven at the end of 2017.

The immediate engagement with CAF would focus on:

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

9.1.3. Reprocurement

In parallel with the Carlisle negotiations we have been assessing the possible outcomes from a termination of the current Infraco contract and delivering the project on a phased basis beyond procurement. The workstreams we would undertake beyond termination to undertake such a reprocurement exercise are described at section 8 below. The base programme assumptions are indicative and dependent on procurement timescales and on no legal challenge being made by BSC:

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	74

- Airport to Haymarket physically complete by Dec 2012;
- Airport to St Andrew Sq complete and open for revenue service by Dec 2013 (respecting the principle that we will not work on Haymarket to Lothian Road and Waverley Bridge to St Andrew Sq concurrently), and
- Remainder of project to Newhaven procured and constructed progressively from 2013 to 2017 contingent upon availability of funding and successful delivery and operation of airport to St Andrew Square.

Existing subcontractor arrangements – BSC have employed a number of sub-contractors although it would appear most of these arrangements are on the basis of letters of intent or limited orders to proceed and consequently without collateral warranties to tie. Following termination we will review all existing sub-contractor arrangement to assess our ability to step-in to those arrangements. This exercise will inform the extent to which existing contractors may be used to complete Interim Works and/or form part of the overall reprocurement strategy if:

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

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

- Novation of SDS back to tie
- Use existing TSS contract to complete design
- Re-procure a new designer

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

- Off-street – where substantial work has completed or is in progress and where the timescales and uncertainties associated with redesign and consent/approval thereof is likely to be unattractive in terms of impact on outturn cost. Nevertheless opportunities exist e.g. with respect to the requirement for retaining walls not yet started, drainage specification and trackform through Edinburgh Park.

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	75

- On-street – where an assured trackform design has not been delivered by BSC and where the nature and extent of road construction will have a significant impact on outturn costs and programme. **tie** has engaged Scott Wilson already through the TSS Contract to review options for on-street trackform design.

Development of Reprourement Strategy and Phasing – Initial workshops have taken place on the development of a reprourement strategy and **tie** has appointed Cyril Sweett to assist with this exercise. Following a mediated settlement or termination we would embark on full development of a strategy with the assistance of Cyril Sweet and legal resources.

For planning purposes we have assumed that **tie** engages in a 9 month exercise to develop and refine a reprourement strategy which would not in any case involve any further on street works until Jan 2012 – the attendant costs including redesign where necessary are acceptable to CEC. At the end of the 9 month period a gateway review will be undertaken to determine validity of reprourement strategy and costs thereof alongside then extant funding and affordability constraints.

The essential characteristics we envisage the reprourement strategy having and the principal challenges to be overcome are as follows:

Essential characteristics

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

Challenges to overcome

- Procurement law with sub-contractors / Siemens
- Design integration risk – civils v systems
- Systems using Siemens kit
- Maintenance and overall liability for making it work
- Secure outstanding consents and approvals
- Programme & phasing
- Integration

These challenges change dependent on whether we find a mediated settlement to the Infraco contract or embark on a Termination route for Infraco Default.

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	76



Operational readiness planning

There are a number of operational planning activities which will continue as follows:

- Design support – the finalisation and/or taking on of the design by a new Designer will require to be checked that it delivers an operationally satisfactory system;
- Re-procurement support – the tenders for individual sections and packages of work will each require to be analysed and scored from an operations and maintenance perspective;
- Interim works support – as discussed below, the interim works offer the opportunity to achieve limited tram operations in the shortest possible time but will require operations and maintenance personnel working within a safety management system to realise;
- Management of completed assets essential to retain value – all assets whether in storage or being used to a limited extent require management in order to retain their value and minimise the degree of degradation, caretaker maintenance as a minimum will require to be performed and monitored;
- Test & commissioning management – the incremental delivery approach changes the scale of testing and commissioning. Adding on new sections to an operational system requires careful planning and management. The disaggregation of the contracts means that the responsibility for managing this effectively will sit with the Client;
- Integration management – the onus of managing the integration and configuration between systems, the trams, the track and the civil works increases under all the options under investigation. We may retain Siemens capabilities or increase the role played by CAF in this regard, however the ultimate responsibility for achieving a satisfactory outcome on this will be heavily on the Client organisation to ensure that it works;
- Tram vehicles project management – whilst the production of the tram vehicles in the factory is nearing a conclusion, the integration and configuration of them to run satisfactorily in Edinburgh has yet to be undertaken. It is imperative that they are tested and proven on the infrastructure in Edinburgh at the earliest opportunity in order not to degrade sitting in storage and to identify and rectify

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	77

any defects that have not yet emerged, and to setup the infrastructure and location specific elements;

- Tram vehicles lease management – the tram vehicles are likely to require modification in order to make them compatible with an alternate infrastructure, they will then require to be tested, commissioned and configured for that infrastructure and thereafter the standard of maintenance and their care by the other operator will require to be audited on a regular basis in order to maintain the value of the leased asset;
- Ticket vending machine procurement – we are nearing the point of being able to award a contract for the supply of the equipment, the first phase of the supply will be to agree on the user interface and design of the equipment and thereafter to manage the manufacturing, testing and commissioning of the initial batch of equipment for the first section of tram route to enter public service.

Communications and stakeholder engagement

Stakeholder and City Collaboration

In the few months when redesign and / or procurement are taking place the scale of operations for the stakeholder team is likely to remain, like now, at a lower level of activity. Work is already underway to identify how best to deploy the team on the following core activity areas.

Branding

One of the priorities will be to maintain confidence in the trams as well as keeping high the awareness that they will be coming to the City. To this end an assessment is underway of the key infrastructure points including park and ride, overhead poles and structures which can continue to be branded in keeping with other Citywide marketing campaigns.

In addition the exhibition material from the tram vehicle is being redesigned currently as a mobile and flexible public information unit which will promote the tram in a range of venues. A leaflet will also be produced to this effect.

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	78

Larger exhibition material and schools programme

There is still a good deal of work to be done on the larger exhibition which is due to take place in the City Museum in 2012. The collation of all the necessary material and cataloguing of this will continue.

The schools programme is being trialled with a range of schools across the route and will also be piloted and promoted through some of the City libraries.

Press and media and political activity

Day to day activity with press and media explaining the whole integrated transport story will be vital in the months following any change in working. The project continues to be one of the highest scrutinised projects nationally in construction terms and therefore gaining and maintaining confidence with a broad range of media, politicians and stakeholder groups will take the largest proportion of time amongst the team. Also the broader task of mending relationships with many stakeholder and business groups is likely to be very intensive.

9.2. Management arrangements

It is recognised that there is the potential for a number of workstreams to be in play post any mediated settlement or termination as described above. The impact of this is being reviewed and an organisational structure being developed. At present this is very dependent on a decision on whether a litigious Termination route is likely or whether a mediated settlement is achieved. However, it is likely that the size and shape of the will change slightly over the next few months and a more radical re-structuring developed as the future becomes clearer.

Since April 2010 we have had a decrease in employee numbers (including secondees). We had 97 employees in April; in December 2010 this has decreased to 74 employees and 8 secondees, a total of 82. This will decrease further in January 2011 to 71 employees and 8 secondees resulting in a new total of 79.

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	79



9.3. Process & Governance

The Tram Project Board will continue to meet every 4 weeks to review direction and monitor costs and programme associated with the option adopted.

Additionally, following any re-procurement exercise and before any further construction contracts are awarded a stagegate process will be invoked to approve any decision of moving forward with the completion of the project.

Reference No 05 Dave Anderson
Privileged and confidential - prepared in contemplation of litigation. FOISA exempt. Do not copy.

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	80



10. Conclusions & Recommendations

10.1. Conclusions

The foregoing has described the efforts made by **tie** to find a solution to the dilemma of having to manage a project under contract terms which have proved to be unclear and open to interpretation resulting in many being the subject of dispute between the contracting parties.

Despite our extensive efforts, and the strategy approved by TPB, since March 2010 there has been no improvement in the behaviours being demonstrated by BSC and indeed positions, whilst these might have improved over the summer with the introduction of new personnel on both sides, they now seem to have returned to the previous level if not deteriorated.

The results of DRP's and adjudications on contract terms have not always been conclusive or favourable to **tie** and have certainly not delivered the clear interpretation of the Infraco Contract which we might have hoped for, albeit they have given guidance which is now being used in day to day contract administration. However, they have de facto saved the taxpayer tens of millions of pounds. Where associated with works which were stalled due to alleged **tie** Changes, **tie** were able to issue associated Clause 80.15 instructions to get work started, but the BSC response to this has been slow.

Generally, BSC have continued issue Notification of Change for alleged Changes and been slow to provide Estimates. They have also continued to use Clause 80 of the Infraco Contract which they allege allows them to stop work until the Estimate is agreed, as opposed to Clause 65 which requires them to continue to work.

The overall management of programme and design management by BSC have not seen any improvement since March 2010 and the Open for Revenue Service (OFRS) date has continued to slip.

A number of workstreams have continued since the TPB in March 2010 and are reported on in Section 4 of the report. Section 6 outlines the options available to the project. The options now facing us are:

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	81

- Enforced adherence
- Revive Carlisle
- Terminate (mutual and contentious) - followed by cancel, postpone or carry on with the project
- Mediation

10.1.1. Enforced Adherence

In this option we continue to seek to get BSC to perform using the existing contract. This would include continuation with Clause 80, clause 34.1, revisiting other parts of the contract and abiding with DRP/Adjudication decisions.

This could end in BSC compliance or, a stronger case for termination or, continued deadlock. There are a number of factors to consider in this option which includes:

- Trust between the parties is broken
- Contract is ambiguous
- Work has almost stopped
- No certainty on cost or programme
- Do we keep going until money runs out – tie default
- Political patience
- tie and CEC test on resilience

10.1.2. Carlisle

The latest position from BSC would mean Airport – Haymarket for £640m by end 2010 (but now out of date). A deal would contain get out clauses for BSC, not a GMP. Factors to consider include:

- Design is still not finished/approved
- Trust
- Ambiguous contract doesn't disappear
- Procurement risk

More recently, a letter from the Infracore (25.1.20/RJW/7586 dated 2 December 2010) suggests mediation on a concept of Project Carlisle.

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	82

It may be possible to use mediation to reach a settlement on the lines of Project Carlisle, but as the signs are that there is disagreement between Infraco Members as to what may be an acceptable settlement it is likely that the settlement would be substantial less favourable than the parameters placed on Project Carlisle.

10.1.3. Terminate

tie has now issued 10 Remediable Termination Notices and rejected 4 of the rectification plans received back from BSC. **tie** is now in a position to proceed to issue a Notice of Termination to bring about a contractual end to the Infraco Contract. This could be done by one of two ways which both have different considerations:

1) Mutual agreement

- What payments for work done to date?
- What commercial settlement?
- Status of Deliverables (especially design)
- What will it cost us to finish (which design will we use) and how long it will take.

2) Unilateral Action (contentious)

- Consequences – how much could we lose or win
 - What are the essential elements of our case
 - What are our strengths and weaknesses
 - What are our chances
 - How long will it take and how much will it cost
 - What is the possibility of an out of court settlement
 - Resources to manage this process
- Risk of BSC seeking judicial review and interdict
- What do we do with the Trams
- What do we do with SDS
- What do we do with the works already started
- What do we do with the remedial works required

tie and its advisors have been, and continue, to collect the body of evidence to defend any litigation. Additionally, **tie** plan to test the breaches through DRP which will give further confidence in **tie** should a forced termination of the Infraco contract be the only option left.

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	83

The use of issue of RTN's, whilst seen as a mechanism to terminate the Infraco Contract, if required, was also seen as a mechanism to exert commercial pressure on BSC which could lead to a successful conclusion being reached through Project Carlisle or alternatively might lead to BSC being inclined to discuss an end to the Infraco Contract.

Following termination, there are decisions to be made on the future of the project – cancel, postpone or carry on, again each have considerations:

Cancel

- What re-instatement works
- Dismantling project management structures
- Tram Acts
- Vehicles
- Land

Postpone

- How long?
- What re-instatement works
- Dismantling project management structures
- Tram Acts
- Vehicles
- Land

Continue

- Stage 1 – until late summer 2011
 - Close out InfraCo contract
 - Plan re-procurement
 - Complete design
 - Continue with interim and remedial works
 - Take trams
 - Costs
 - Report back to CEC for go/no go
- Stage 2 – following late summer 2011

Meantime, risk of interdict by BSC remains.

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	84

10.1.4. Mediation

Over the past few weeks, BSC has intimated that it would be willing to undergo mediation for the range of the disputes over the Infraco Contract. A proposition has been made and motion agreed at full Council in respect of mediation between the parties to see if a mediated solution can be found. **tie** formally contacted BSC on 22/11/10 who are in favour of this approach. CEC have also met with BSC to discuss this and CEC is agreed that mediation should take place (Appendix 29).

The scope of the mediation is to be agreed but currently is proposed as:

- BSC complete airport – mid point terminus, or
- BSC leave in an orderly fashion.

There are options around timing of the mediation – now or in 4-6 months and the style – fast and commercial or in a slow and detailed manner. The preparation for mediation is key and will include a) what does good look like, b) resources and parties involved and c) governance.

10.1.5. Re-Procurement

tie has commenced work on the range of options available for reprocurement and management of the project should any termination or alternative scope of the project be realised – mediated or otherwise. The range of this includes completion of design, reprocurement, any reinstatement or remedial works and organisation required to support such activities.

tie also continues to collect the body of evidence to support any DRP or forced termination and also to support any other legal/commercial workstreams.

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	85

10.2. Recommendations

It is recommended that:

1. **tie** enters into mediation with BSC.
2. The scope of this mediation to cover options for an amended scope of the project along the lines of Project Carlisle or an agreed termination of the Infraco Contract.
3. The mediation to be short form with legal agreements reached at the end of the mediation. All agreements to be subject to Full Council approval.
4. The mediation result to be presented to TPB following an outcome on mediation.
5. Continue with enforced adherence of the Infraco Contract in the short term.
6. **tie** to continue to work on the scenarios for re-procurement following any mediation. Recommendations on workscope along with budget requirement for the first 9 months of 2011 to be presented to the TPB once the outcome of mediation is understood.
 - Any proposals for re-tendering should be presented to TPB before they commence and stagegate review held before any new construction contracts awarded.
 - Before any new construction contracts are awarded, all design should be complete, integrated and assured.
 - Before any new construction contracts are awarded all third party agreements should be concluded to reduce the risk to the Tram project of negotiation positions being taken by 3rd parties.
7. Work should continue, regardless of the output of mediation, on the review of SDS and potential for legal action to poor design services throughout the life of the SDS contract.
8. Work should continue with building the “body of evidence” for use in any potential litigation associated with a contentious termination of the Infraco Contract by the parties.

tie Ltd
22nd December 2010

DOC.NO.	VERSION	STATUS	DATE	SHEET
RESOLUTION	2.0	Final	22/12/10	86