

PROJECT RESOLUTION

(incorporating Carlisle and Notice)

Report to Tram Project Board
December 2010

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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 project (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

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Glossary

Acronym	Meaning
BSC	Bilfinger Berger, Siemens, CAF – Infraco 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

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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.**

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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, albeit, 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

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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

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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:

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- 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 Councillors, 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.

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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.

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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.

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3. Pitchfork Recommendations – March 2010

Project Pitchfork was the name given to the workstreams which took place from January 2010 until March 2010 which investigated options available to **tie** and CEC in respect of the ongoing Infraco Contract and relationships with the consortium partners who were party to that agreement. The report also served as a compendium of analysis and 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 it’s 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.

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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.

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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).

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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 TPB reporting
- Change Panel meetings every 4 weeks – CEC invited
- Twice weekly review of correspondence by senior team
- Successful conclusion of the Carillion 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;

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- 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 (INTC's) where BSC believed changes had not been agreed and therefore they were ceasing works at all those locations. They systematically started to demobilise their own resources and those of a number of their sub-contractors from the end of that week. **tie** believes this to be a response to the RTN's being issued by **tie** and has written to state we do not agree with this approach and have been systematically responding to each INTC and explaining why BSC are wrong in this approach. **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

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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:

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- 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)

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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 (BDDI), failing to provide Estimates timeously and insisting on utilising the Change mechanism even though some of the events were covered under Clause 65 (Compensation Events) which meant BSC should have continued with the works, being compensated for costs on a demonstrable cost basis.

On Street

As can be seen from Table 4, 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

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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:

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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

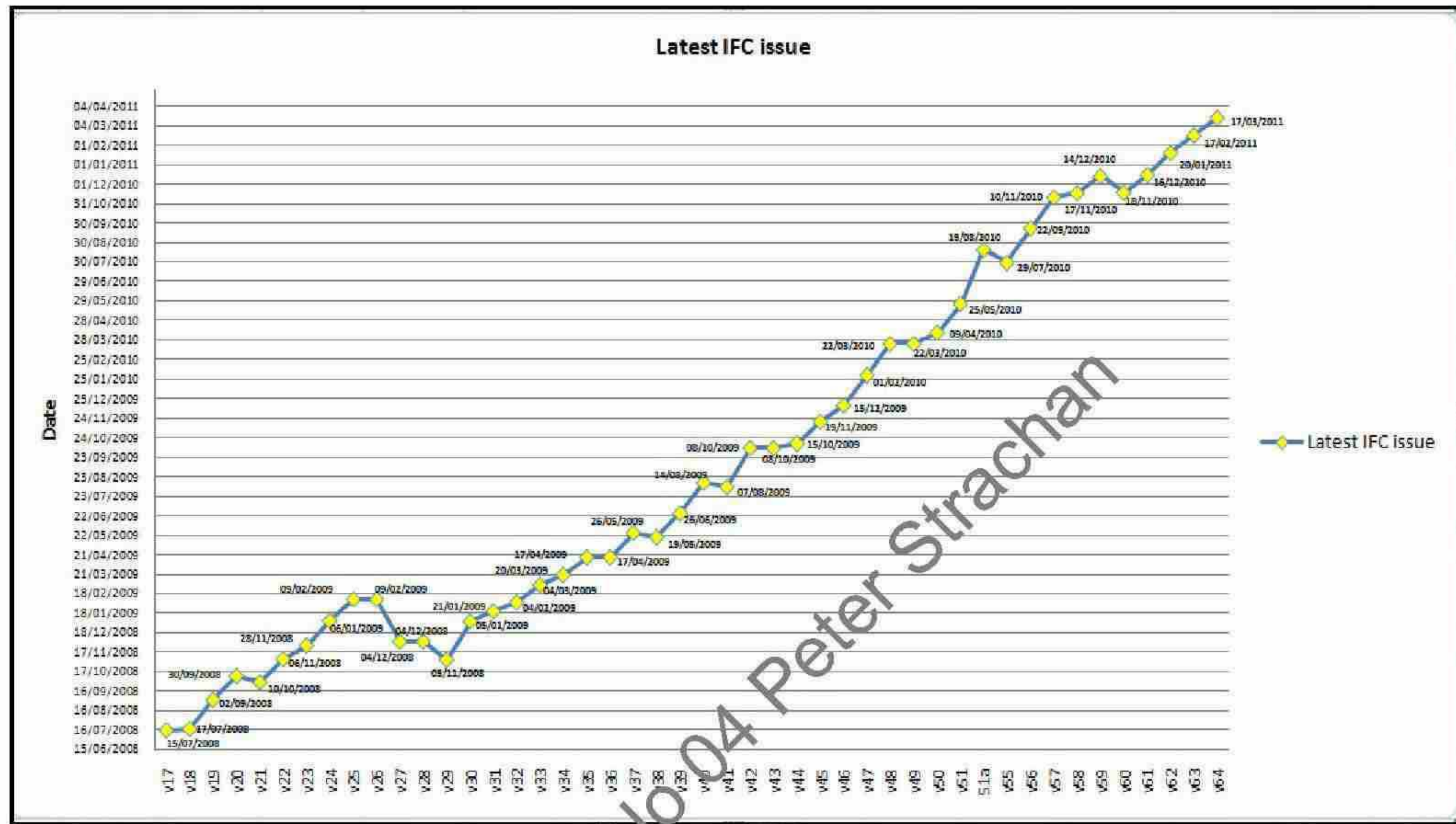
tie has carried on with routine 4 weekly progress meetings with BSC and weekly “Issues” meetings and these continue to be minuted. However, at a section level, the engagement with BSC has been patchy with some **tie** Project Managers getting reasonable engagement from their BSC counterparts but others 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

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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.)

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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

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demanding 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

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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-novated 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.

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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

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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

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- 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:

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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 drainage	BDDI – IFC/costs	Adjudication	✓
14	Tower Bridge	BDDI- IFC/costs	Adjudication	✓
15	Murrayfield Underpass	Clause 34.1/80.13 (ability to instruct works before an estimate is agreed).	Adjudication	✓
16	Landfill Tax	Costs	Adjudication	✓
17	Sub contractor terms	Principle	Adjudication	✓
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.	✓

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			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

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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)

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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 £4,597,847.03, **tie** having assessed an amount of £701,467.95 in respect of Foundations (LOD having been withdrawn by Infraco as part of the dispute resolution process and both Infraco and **tie** agreeing that Contamination was to be dealt with separately) and the Adjudicator decided that the amount of the Foundations to be £1,461,857.21.

Section 7A Track Drainage

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

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

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

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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.

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(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

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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 34.7 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).

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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 executed 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.

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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.

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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;

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- 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

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- 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 Tram 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

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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 Molyneaux 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,

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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 Kitzman'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".

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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

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