

In the matter of a Mediation between

Carillion Utility Services Limited

and

tie Limited

Expert Report

regarding

Carillion Utility Services Limited's

Schedule 4 Rates and Prices Submission of June 2010

in relation to the

Multi-Utilities Diversion Framework Agreement

for the Edinburgh tram Network

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October 2010



CEC00100005_0001



Table of Contents

Executive Summary	i
Section 1 Introduction.....	1
1.1 Formal details.....	1
1.2 Synopsis of the dispute	1
1.3 Instructions and Issues to be addressed	3
1.4 Disclosure of interest	3
1.5 Meetings held	3
1.6 Format and content of this report	3
Section 2 Contractual basis of claim	5
2.1 Generally	5
2.2 Comment on contractual provisions.....	5
Section 3 Overview of 'valuation' methodology adopted by CUS	8
3.1 Generally	8
3.2 'Fair rates and prices'	12
Section 4 CUS claim in respect of Work Section Preliminaries	13
4.1 Generally	13
4.2 Preliminary costs claimed by CUS	13
Section 5 CUS claims in respect of Traffic Management	15
5.1 Generally	15
5.2 Method of 'valuation'	15
Section 6 CUS claims in respect of Work Section Labour	17
6.1 Generally	17



6.2	Basis of CUS claims.....	17
6.3	“Work Site Specific Labour”	20
6.4	“Average Actual Rate”	21
6.5	Event-Focussed Approach.....	21
6.6	CUS contentions regarding labour ‘entitlement’	21
Section 7	CUS claims in respect of Work Section Plant.....	23
7.1	Generally	23
7.2	CUS contentions regarding ‘plant’ entitlement	25
Section 8	CUS claims in respect of Work Section Reinstatement	26
8.1	Generally	26
Section 9	CUS position in respect of Price Fluctuations	27
9.1	Generally	27
Section 10	CUS position in respect of “MUDFA Mark-up”	28
10.1	Generally	28
Section 11	CUS claims in respect of “Claim Preparation costs”	29
11.1	Generally	29
Section 12	Declaration	30



Executive Summary

I include below a summary of my observations and opinion in respect of the CUS claim submission dated 14 June 2010.

1. The current CUS claim does not appear to comply with the terms of the Agreement. The current CUS 'model' proceeds on the premise that it is entitled to re-rate all works under clause 46.6 on the basis of "*fair rates and prices*". It is noted however that different contractual valuation provisions apply to different circumstances. Clause 46.6 *does not* in my opinion apply in every instance as the CUS valuation 'model' and position presently imply.
2. The current valuation methodology adopted by CUS attempts to set aside the whole value of the Work Order Proposal for each Work Section in respect of the labour and plant amounts. It then attempts to substitute a *single* factored or revised labour and plant allowance for all work in each Work Section. CUS *does not* attempt to revise any particular / specific rates. That process is not in my opinion sanctioned by the terms of the Agreement.
3. CUS has adopted a 'global' / 'total cost' approach to its claim submission (although in this instance "*total cost*" should read "*total value*" in certain instances). The CUS claims are also highly fluid; the sum ultimately claimed being dictated by recovery elsewhere in the project account. This also points to a global / 'total cost' ('total value') type claim. In essence, the model presented merely represents a hypothetical 'total cost/total value less recovery' claim. CUS has not "*... recalculated the labour and plant element of the Schedule 4 rates using appropriate multipliers to reflect the reduced productivity **caused by** the matters set out in its claim submissions in order to arrive at fair rates and prices*" as it alleges.
4. Importantly CUS has not separated out the reduced productivity claimed to have been caused by any one cause or event. While CUS makes the statement that the increased value claimed was caused by matters for which **tie** is allegedly responsible, it does not link, nor does it attempt to link, those matters to the alleged reduction in productivity or increase in quantum claimed. CUS merely proceeds on the overriding assumption that the increased value claimed was incurred as a result of **tie** culpability. That assumption is unreasonable because it is based on supposition rather than an analysis of fact. It is not evidenced, nor can that position be properly evidenced.
5. In addition, investigations show that the multipliers and values used in the CUS valuation 'model' are not "*appropriate*". Those 'multipliers' and values contain errors and are incorrectly applied.



6. CUS has yet to correct a number of errors, anomalies and areas of duplication identified in its analysis. However, merely correcting those errors, anomalies and areas of duplication is insufficient. To do so merely affects (i.e. reduces) the top-line gross 'value' of the CUS claims. Whilst that process is in many ways necessary (since the claims at present appear to be significantly overstated), it does not consider the central questions of contractual entitlement and causation, and hence culpability, for the alleged increase in 'value' or cost.
7. It is noted that in recent weeks CUS has supplied some, but not all, of the information requested, and in my opinion reasonably required, by **tie**. Some further information has yet to be provided, the absence of which continues to prevent a sufficiently comprehensive review of the current claims.
8. Importantly, CUS has accepted in discussions that it cannot overcome fundamental evidential issues in respect of large proportions of its labour and plant claims. That is to say, CUS cannot establish for the most part, and cannot identify to any reasonable degree, what the various operatives and/or plant resources were doing when they are said to be on site; this problem I believe goes to the core of the CUS claim. It is therefore unreasonable in my opinion to hold **tie** responsible for those hours and resources, and the resultant increased 'value' / cost claimed, when CUS itself cannot establish why those hours were worked or costs incurred.
9. In light of the foregoing, it is my opinion that the current CUS submission fails to prove an entitlement to the sum(s) claimed. As a consequence, and in particular due to (i) the lack of evidence, (ii) the absence of a proper cause and effect analysis and (iii) the inherent errors and anomalies in the CUS claim model, it is my opinion that CUS has failed to prove any entitlement beyond the £1,200,000 allowance currently certified by **tie**.



Section 1 Introduction

1.1 Formal details

1.1.1 This report has been prepared by **Robert Elliot Burt** (BSc(QS) LLM (Const Law) DipArb MRICS MCIArb), Director of Acutus, Merlin House, Mossland Road, Hillington Park, Glasgow G52 4XZ. I have been assisted in the investigations by **Anne Connolly**, BSc(QS) LLM (Const Law) MRICS MCIArb, also of Acutus. Notwithstanding the assistance provided by Anne Connolly I confirm that any opinion expressed within this report is my own.

1.2 Synopsis of the dispute

1.2.1 On 4 October 2006, **tie** Limited ("**tie**") entered into a Multi-Utilities Diversion Framework Agreement with Carillion Utility Services Limited ("**CUS**") relating to the Edinburgh Tram Network.

1.2.2 During the course of the carrying out of those Works delays occurred. Two settlement agreements have been reached by the parties in respect of the following periods:-

- a) The period up to and including 30 September 2007; and
- b) The period from 1 October 2007 up to and including 30 September 2008.

1.2.3 Further delays have been incurred to the MUDFA Works as a result of matters which occurred beyond the dates covered by the above settlement agreements. As a consequence, CUS submitted further claims to **tie** for alleged delay and disruption incurred during the period from 1 October 2008 until, initially, 31 May 2009 and latterly to circa 4 December 2009. CUS generally refers to those claims as '*Submission re: Schedule 4 Rates and Prices to Work Section Resulting from matters which entitle the Contractor to additional payment*'.

1.2.4 Various claims have been submitted by CUS in this regard. The principle claims being as follows (Note: each subsequent claim submission supersedes the earlier submissions, they are not cumulative):-



- a) CUS submission dated 28 August 2009 totalling **£2,663,865** (for only 3 nr. Work Sections up to 30 April 2009) which I understand CUS extrapolated at that time to circa £11M for all Work Sections^[1];
- b) CUS' submissions during September/October 2009 totalling **£9.449M**^[2] (for 8 nr. Work Sections: 4Nr up to April/May 2009 and 4Nr. up to 31 August 2009)³;
- c) CUS submission dated 21 December 2009 totalling **£13,144,871.00** (for 11 nr. Work Sections up to Aug/ November 2009); and
- d) The CUS submission dated 14 June 2010 which claimed a revised total of **£8,848,839.00** (for 11 nr. Work Sections up to 4 December 2009).

1.2.5 That latter submission, dated 14 June 2010, is entitled "*Carillion Claim Valuation that Supersedes the Quantum Entitlement Analysis Previously Submitted as part of the Claims Submissions re Schedule 4 Rates and Prices*". It is that claim which (i) was addressed in the **tie** Certificate for Payment No.43 dated 16 July 2010; and (ii) forms part of the CUS 'Written Notification of Dispute' dated 3 August 2010 concerning same.

1.2.6 As a consequence, this report has been prepared in relation to the content of the CUS submission of 14 June 2010 in the amount of **£8,848,839.00**.

1.2.7 In this regard, I note that both parties accept that some disruption will have been experienced by CUS during the period from 1 October 2008 to December 2009. This is evidenced by the fact that **tie** has certified an 'on account' interim payment in respect of same in the amount of £1,200,000. The current difference between the parties relates to the method of assessment and measure of that disruption.

¹ It is relevant to note that whilst the build up of the submission amounted to £2.66million the CUS covering letter suggested that this value should be extrapolated to arrive at its anticipated overall sum of £11 million in respect of the relevant work sections.

² The precise amount claimed at that time is difficult to state with any certainty due to the fact that the claims submitted by CUS were being constantly revised and remained 'fluid' (due to CUS linking same to its recovery under Change Control and other areas such as re-measurement).

³ Within its interim application for payment November 2009, CUS, again by a process of extrapolation, contends that its overall delay and disruption claims total circa £13,554M.



1.3 Instructions and Issues to be addressed

1.3.1 My instructions were originally to review, and provide an independent opinion on, the CUS claims as set out in its earlier submissions. Most recently those instructions were extended to provide an opinion on the quantum of the claim dated 14 June 2010.

1.4 Disclosure of interest

1.4.1 I confirm that I know of no actual or potential conflicts of interest that exist which preclude me from acting as expert witness in this matter.

1.5 Meetings held

1.5.1 Various meetings were held with **tie** personnel over the course of my involvement in the investigations, analysis and reporting process.

1.5.2 In addition, several meetings have been held with CUS representatives during which the quantum and contractual basis of the CUS claims were discussed. During those meetings certain requests were made of CUS in respect of the provision of information underpinning the recent claims. Whilst some information has been received from CUS in this regard, some information remains outstanding⁴. I have identified within the subsequent sections of this report where information remains outstanding.

1.6 Format and content of this report

1.6.1 This report has been structured in a manner which addresses the key elements of the CUS claims, as follows:-

- a) The contractual basis of the claim (Section 2 refers);
- b) Overview of 'valuation' methodology adopted by CUS (Section 3 refers);
- c) CUS claims in respect of Work Section Preliminaries (Section 4 refers);
- d) CUS claims in respect of Traffic Management (Section 5 refers);
- e) CUS claims in respect of Work Section Labour (Section 6 refers);
- f) CUS claims in respect of Work Section Plant (Section 7 refers);

⁴ In respect of that outstanding information I acknowledge that CUS provided some further information by email on 13 October 2010. However, due to the timing of the provision of that information I have been unable to review same and incorporate any further comments or observations into this report. The said information will however be reviewed prior to the mediation proceedings.



- g) CUS claims in respect of Work Section Reinstatement (Section 8 refers);
- h) CUS position in respect of Price Fluctuations (Section 9 refers);
- i) CUS position in respect of "MUDFA mark-up" (Section 10 refers);
- j) CUS claims in respect of "Claim Preparation costs" (Section 11 refers);



Section 2 Contractual basis of claim

2.1 Generally

2.1.1 I have noted the CUS position in respect of the contractual and/or legal basis of its claim as detailed within its previous submissions (as listed at paragraph 1.2.4 above) and within various items of correspondence. In particular, I have noted the contents of the CUS letter ref. 3111 dated 18 March 2010. That letter appears to summarise the CUS position.

2.1.2 I also note the contents of Section 4 'Valuation Rules' of the **tie** Mediation Statement.

2.1.3 In my opinion, as a Chartered Quantity Surveyor familiar with the operation of such valuation clauses, the current CUS claims do not comply with the terms of the Agreement as further explained in section 2.2 below.

2.1.4 I have commented further on the valuation methodology adopted by CUS in Section 3 below.

2.2 Comment on contractual provisions

2.2.1 In my opinion, the current CUS valuation methodology attempts to set aside the whole value of the Work Order Proposal for each Work Section in respect of the labour and plant amounts. It then attempts to substitute a *single* factored or revised labour and plant allowance for all work in each Work Section. That process is not in my opinion sanctioned by the terms of the Agreement. For example, CUS' entitlement under the Agreement where adverse physical conditions or artificial obstructions are encountered is to the payment of the direct additional cost incurred as a result of same, not a re-rating exercise (clause 10.4). It cannot therefore, in my opinion, roll-up all claims into the current 're-rating' exercise.

2.2.2 I also note that the CUS process does not attempt to revise any given / specific rates. Instead, at best, it attempts to revise all Work Order Proposal rates by reference to an overall output factor. The implication of this process is that all operations within that Work Section were disrupted to precisely the same extent. That, in my opinion, is not a reasonable assumption or conclusion which could be drawn from the CUS submissions in respect of the causes of delay and/or disruption.



2.2.3 Whilst CUS has stated that it is entitled to revise the Schedule 4 rates and prices, even where that position is correct in the appropriate circumstances, it should do so in accordance with the Agreement. For the reasons stated above and further addressed below, it is my opinion that it has failed to do so.

2.2.4 I do accept that the provisions of the Agreement provide *in certain instances* for the revision of the Schedule 4 rates and prices where for example, *“the item of work varies materially from the work described in the Bills”* (Schedule 1 paragraphs 2.36/3.3); or in respect of **tie** Changes (Clause 46).

2.2.5 In such instances the terms used within the Agreement in my opinion envisage, and indeed require, that the measurement and valuation process will be carried out on specific ‘items of work’ and the specific rates and prices applicable thereto. For example, paragraph 3.3 of Schedule 1 provides that:-

*“Where the MUDFA Contractor considers that **an item of work** varies materially from the work described in the Bills of Quantities, the MUDFA Contractor shall provide details, including estimates of labour, plant and materials from the original Bills of Quantities for the proposed item of work, for approval by tie”* (emphasis added)

2.2.6 Similarly Clause 46 provides that the valuation of any **tie** Changes shall be carried out as follows (where clause 46.6.1 does not apply):-

“46.6.2 if such rates and prices do not apply by measurement and valuation at rates and prices deduced therefrom insofar as it is practical to do so;

46.6.3 if such rates and prices do not apply and it is not practicable to deduce rates and prices therefrom by measurement and/or valuation at fair rates and prices; or

46.6.4 if the value of the tie Change cannot properly be ascertained by measurement and/or valuation, the value of the resources and labour employed thereon, as appropriate, in accordance with the basis of rates for provisional work set out in Schedule 4 (Bills of Quantities)”



2.2.7 I understand the various provisions quoted above to mean that CUS will provide details of revised rates and prices for the individual 'items of work' affected by any qualifying event or issues. It is notable however that different contractual provisions apply to the different circumstances as noted above. That is to say, in my opinion clause 46.6 *does not* apply in every instance as the CUS model and/or position would imply.

2.2.8 In addition, I note that Clause 51.5 requires that the following information will be provided by CUS in support of its valuation exercises:-

*"51.5 The MUDFA Contractor shall furnish to tie's Representative such **records, receipts and other documentation as may be necessary to prove amounts paid and/or costs incurred.** Such returns shall be in the form and delivered at the times tie's Representative shall direct and shall be agreed within a reasonable time"* (emphasis added)

2.2.9 In this regard I note that CUS has supplied some but not all of the information requested, and in my opinion reasonably required, by tie. Some information has yet to be provided the absence of which in my opinion prevents a sufficiently comprehensive review of the current claims. As noted in paragraph 1.5.2 above, I have identified within the subsequent sections of this report where information remains outstanding.



Section 3 Overview of 'valuation' methodology adopted by CUS

3.1 Generally

3.1.1 As noted at paragraph 1.2.4d) above, CUS contends that it is entitled to reimbursement of **£8,848,839** in respect of revised Schedule 4 Rates and Prices. That sum is calculated by reference to the following four main claim heads:-

Claim Head	Amount claimed
1 Work Section Entitlement	7,218,256
2 Work Section Preliminaries Entitlement	105,272
3 Traffic Management	225,311
4 Claim Preparation Costs	1,300,000
Total	8,848,839

[Source: individual CUS Work Section Quantum Calculations, Page 3]

3.1.2 The 'Work Section Entitlement' claim head totalling £7,218,256⁵ (please refer to row 1 in the table above) comprises various components, the key elements of which are (i) the CUS labour and plant valuation 'model' (columns 2 to 5 in the table below); (ii) claims in respect of reinstatement works (Column 6); (iii) a claim in respect of fluctuations (at 7%; column 7); and (iv) a claim in respect of an 8.8% "MUDFA mark-up" on the above (column 8). The 'value' of those elements can be summarised as follows (split by individual Work Section):-

1	2	3	4	5	6	7	8	9
Work Section	Overall full value of claim [Labour & Plant only]	Alleged Recovery from orig. Rates	Alleged recovery via Change Control	Sub-total	Claim regarding Reinstatement	Fluctuations claimed	CUS 'Mark-up' claimed	Total
						7%	8.80%	
1 1A-01-01	628,443	-130,062	-33,403	464,978	3,688	32,807	44,130	545,603
2 1B-01-01	1,031,998	-147,243	-31,144	853,611	3,733	60,014	80,728	998,086
3 1B-01-02	979,748	-145,412	-93,766	740,570	9,298	52,491	70,608	872,966
4 1C-04-01	1,094,460	-370,832	-205,175	518,453	31,711	38,511	51,803	640,479
5 1C-05-01	1,126,571	-227,844	-133,818	764,909	17,490	54,768	73,671	910,838
6 1C-03-01	1,723,019	-730,362	-95,306	897,351	65,569	67,404	90,669	1,120,993
7 1C-01-01	1,368,853	-249,441	-498,689	620,723	8,863	44,071	59,282	732,939
8 1D-01-01	1,681,286	-483,445	-258,680	939,161	44,033	68,824	92,578	1,144,595
9 2A-01-01	422,715	-150,948	-108,825	162,942	19,372	12,762	17,167	212,243
10 5B	41,138	-26,209	-7,444	7,485	3,722	784	1,055	13,047
11 5C	207,302	-90,472	-103,845	12,985	9,752	1,592	2,141	26,470
Totals	10,305,533	-2,752,270	-1,570,095	5,983,168	217,231	434,028	583,830	7,218,257

⁵ The table at paragraph 3.1.2 shows a total of £7,218,257 (in column 9) as opposed to £7,218,256. The difference (of £1) is simply due to 'rounding' within the CUS model.



3.1.3 Section 4 to Section 11 below address the individual CUS claim heads. It is relevant however to provide the following general comments on the method of analysis adopted by CUS.

CUS 'global' approach to its delay and disruption claims

3.1.4 In my opinion CUS has adopted a 'global' / 'total cost' approach to its claim submission (although in this instance "total cost" should read "total value").

3.1.5 In this regard, I note the comments made by CUS within its letter of 18 March 2010⁶ denying that the Schedule 4 Rates and Prices claim is a global claim. CUS further contends that the legal authorities on global claims do not apply. Notwithstanding the contents of that letter, I remain of the opinion that the CUS valuation is to all intents and purposes, a global claim as explained below.

3.1.6 I note the following definition of global claims as contained within Hudson (at pages 1086-1087 paragraph 8-200):-

*"Global claims may be defined as those where a **global or composite sum, however computed, is put forward as the measure of damages or of contractual compensation where there are two or more separate matters of claim or complaint, and where it is said to be impractical or impossible to provide a breakdown or sub-division of the sum claimed between those matters"*** (my emphasis added)

3.1.7 The above is in effect what CUS has done with its current claim and earlier submissions. CUS has arrived at a total of all labour and plant resources allegedly committed to the utility diversion works⁷, converted the original labour and plant rate to a single revised labour and plant 'rate'/'total value' using a multiplier for each Work Section (which is based solely on the labour resources) and then, after reconciling the alleged recovery under the original rates and change control, claimed the resultant total as the measure of compensation for the various matters for which it holds tie responsible. That in my opinion is a global or composite claim.

⁶ At pages 3 of 5 and 4 of 5 of said letter

⁷ After deduction of an allowance for matters for which CUS admits responsibility (please refer however to paragraphs 3.1.9 to 3.1.13 regarding the 'validity' or otherwise of that approach).



- 3.1.8 I accept that on the face of it at least CUS has presented a complex valuation 'model' as the basis for its claim. In essence however, the model presented in my opinion merely represents a hypothetical 'total value less recovery' claim. CUS has not in my opinion "... *recalculated the labour and plant element of the Schedule 4 rates using appropriate multipliers to reflect the reduced productivity **caused by** the matters set out in its claim submissions in order to arrive at fair rates and prices*" as it alleges⁸.
- 3.1.9 Importantly CUS has not separated out the reduced productivity claimed to have been caused by any one cause or event. While CUS makes the statement that the increased value claimed was caused by matters for which **tie** is allegedly responsible, it does not link, nor does it attempt to link, those matters to the alleged reduction in productivity or increase in quantum claimed. CUS merely proceeds on the overriding assumption that the increased value claimed was incurred as a result of **tie** culpability. That assumption is in my opinion unreasonable because it is based on supposition rather than an analysis of fact. It is not evidenced, nor can that position be properly evidenced as CUS has accepted in recent discussions. In addition, my investigations show that the multipliers used in this valuation 'model' are not "*appropriate*"⁹. Those 'multipliers' contain errors and in my opinion are incorrectly applied to the plant resource (as more fully explained in detail in the subsequent sections of this report). Those matters have been discussed with CUS. CUS has yet to correct the errors identified. Importantly CUS has accepted that it cannot overcome fundamental evidential issues in respect of large proportions of its labour and plant claims.
- 3.1.10 I should also stress that merely correcting the errors and/or anomalies identified is in my opinion insufficient. To do so merely affects (i.e. reduces) the top-line gross 'value' of the CUS claims. Whilst that process is in some ways necessary (since the claims at present appear to me to be significantly overstated), it does not consider the central questions of contractual entitlement and causation, and hence culpability, for the alleged increase in 'value' or cost. Additionally, in some instances the CUS entitlement is in my opinion to receive "*additional payment for any reasonable, demonstrable and direct additional costs incurred*" not revisions to rates.

⁸ CUS letter dated 18 March 2010 Page 3 of 5, third paragraph

⁹ See quotation from CUS letter dated 18 March 2010 as included earlier in this paragraph



- 3.1.11 As a consequence, it is not possible in my opinion to identify from the current and previous CUS valuation methodology, what additional resource and/or additional costs or values attach to any one issue or event which CUS claims to be the responsibility of **tie**.
- 3.1.12 Issues such as sufficiency (or insufficiency) of tender, contractor or sub-contractor inefficiencies and/or errors, costs incurred as a result of neutral events and the like are all masked by such global / composite claims.
- 3.1.13 For those reasons, and those set out in the subsequent sections of this report, it is my opinion that the present CUS approach does not demonstrate the actual measure of disruption or additional cost / value incurred as a result of **tie** culpability. That approach is therefore in my opinion inappropriate. This is particularly so where in this instance CUS cannot establish for the most part, and cannot identify to any reasonable degree, what the various operatives / plant resources were doing when they are said to be on site (Section 6 and Section 7 below refer). It is therefore unreasonable in my opinion to hold **tie** responsible for those hours, and the resultant increased 'value' claimed, when CUS itself cannot establish why those hours were worked or costs incurred.
- 3.1.14 Whilst CUS has stated that it is entitled to revise the Schedule 4 rates and prices, even where that position is correct in the appropriate circumstances, it must in my opinion do so in accordance with the Agreement by establishing that the revised rates claimed are "fair" and, it is submitted, that they are also 'reasonable'. That is a prerequisite even on CUS' own case. For the reasons stated within Section 2 above and further addressed below, it is my opinion that CUS has failed to do so. My investigations show that the CUS claim appears significantly overstated even *before* questions of culpability for that increased 'value' are considered (Section 4 to Section 10 below refer).

Fluidity of CUS present claims

- 3.1.15 It is also noted that the sums presently identified and claimed within the CUS Schedule 4 Rates and Prices submissions are dependent upon recovery elsewhere within the MUDFA 'account'. That is to say, if the CUS recovery *reduces* within the Change Control process (or elsewhere), the CUS delay and disruption claims will *increase* by a corresponding amount. Similarly if the CUS recovery *increases* in the Change Control process the delay and disruption claims will *reduce*. This point was accepted by CUS during the 2009 meetings and dialogue with its representatives.



3.1.16 As such the CUS claims are not claims relating to delay or disruption incurred by a specific set of events or causes. They are more 'fluid' than establishing the actual loss / increased 'value' incurred by the events relied upon. This again points to a global / 'total cost' ('total value') type claim. In my opinion, whether this has occurred by design or by default, the CUS claims do not establish the true measure of CUS' entitlement for the matters for which **tie** is responsible.

3.2 'Fair rates and prices'

3.2.1 CUS contends that it is entitled to valuation on the basis of "*fair rates and prices*"¹⁰. If CUS is successful in its position in this regard, then in my opinion CUS must also demonstrate the following 'tests' in respect of the sums claimed:-

- a) That they should be demonstrably "*fair*" and "*reasonable*";
- b) They should be properly substantiated and be underpinned by fact rather than assumptions;
- c) The sums claimed should be auditable and capable of verification;
- d) They should be demonstrably free of contractor culpability and other matters for which the contractor has borne the contractual risk; and
- e) Should not circumvent the provisions of the contract in terms of risk allocation.

3.2.2 For the reasons discussed in more detail below, it is my opinion that the current CUS claim submission fails to satisfy the 'tests' set out above.

3.2.3 In light of the foregoing, and the further comments included in the subsequent sections of this report, it is my opinion that the current CUS submission fails to prove an entitlement to the sum(s) claimed. As a consequence, and in particular due to (i) the lack of evidence, (ii) the absence of a proper cause and effect analysis and (iii) the inherent errors and anomalies in the CUS claim model, it is my opinion that CUS has failed to prove any entitlement beyond the £1,200,000 allowance currently certified by **tie**.

3.2.4 The following sections of this report provide observations on the various elements of the CUS claim.

¹⁰ See for example CUS letter dated 18 March 2010, paragraph 1 on page 2 of 5,



Section 4 CUS claim in respect of Work Section Preliminaries

4.1 Generally

4.1.1 CUS claims a total “entitlement” of **£105,272** in respect of the ‘value’ of additional preliminaries for the Work Sections which are the subject of its ‘Schedule 4 Rates and Prices’ claims. That total is set out at page 14 of each of the CUS individual Work Section claims. This sum is ‘split’ by CUS between the various Work Sections as follows:-

Work Section	Prelims claimed
1 1A-01-01	11,012
2 1B-01-01	2,390
3 1B-01-02	4,986
4 1C-04-01	23,659
5 1C-05-01	17,996
6 1C-03-01	9,833
7 1C-01-01	7,321
8 1D-01-01	20,934
9 2A-01-01	6,933
10 5B	0
11 5C	208
Totals	105,272

4.1.2 I set out below my observations in respect of this claim head.

4.2 Preliminary costs claimed by CUS

4.2.1 CUS has based its calculation on an assessment of the average actual preliminaries site cabin resources (which appear to be derived from its Weekly [labour and plant] Summary sheets). This average resource is then multiplied by (i) a rate per week¹¹ for each cabin type; and (ii) the period of alleged prolongation. An example of the relevant calculation (for Work Section 1C-03-01) is included below¹²:-

¹¹ Note: the CUS claim states “Rate per day” rather than per “week”. That however is a typographical error which has been confirmed with CUS.

¹² Extract taken from CUS Work Section claim details page 14



PRELIMINARIES PROLONGATION				
Description	Ave Items per week	Prolonged Weeks	Rate per day	Prolongation £
Site Cabins				
Welfare	1.2	39	£ 190.00	£ 9,063.00
Portaloos	1.1	39	£ 18.00	£ 770.40
Storage Container	0.0	39	£ 12.00	£ -
Totals				£ 9,833.40

Planned Finish Date	27/02/2009
Actual Finish Date	27/11/2009
Total Prolongation	39 weeks

4.2.2 In principle I have no objection to this method of calculation. I note however that CUS has omitted to reconcile (i.e. deduct) the relevant recovery which was certified under the normal certification process for extended preliminaries. In this regard I note that the tie certification for November 2009 certified accommodation preliminaries up to and including 27 November 2009. The extent of reconciliation required is presently unclear, but will clearly reduce the sum claimed.



Section 5 CUS claims in respect of Traffic Management

5.1 Generally

5.1.1 CUS claims a total "entitlement" of **£225,311** in respect of the 'value' of additional traffic management. The CUS method of analysis is set out at page 13 of each of the CUS individual Work Section claims. The total claimed however has not been allocated or apportioned to individual Work Sections. The claim appears to relate to a 'project wide' hypothetical 'assessment'.

5.1.2 I set out below my observations and conclusions in respect of this claim head.

5.2 Method of 'valuation'

5.2.1 In my opinion the CUS valuation methodology in respect of traffic management is inappropriate in terms of the Agreement. The claim does not attempt to demonstrate loss (or increased 'value') caused by the events relied upon. Rather CUS presents a hypothetical analysis of its original allowances multiplied by a factor derived from the alleged prolongation of the individual sections. This does not necessarily represent a reasonable measure of any increase in resource, costs or value. This is simply a hypothetical model which may or may not reflect reality.

5.2.2 I note that CUS does not attempt in its claim 'model' to evidence whether in fact the traffic management resources increased to the extent claimed. In my opinion this cannot reasonably be inferred or deduced from the present hypothetical analysis of labour and plant resources claimed for the Work Section activities (as is CUS' present case).

5.2.3 It is, in my opinion, insufficient for CUS to claim an increased traffic management resource commitment or entitlement, without any demonstration of same. To do so fails to satisfy the burden of proof placed upon CUS and fails to establish whether the sum claimed is in fact reasonable.

5.2.4 I acknowledge that, pursuant to a request from myself, CUS has now produced further information (supporting spreadsheets provided 22/09/10) detailing its alleged traffic management costs and resources during the relevant period. However, as previously noted the CUS approach to its traffic management claim is based on a hypothetical analysis and it is not clear from the further information provided exactly how it relates to this hypothesis.



- 5.2.5 Without a proper analysis to demonstrate the traffic management claim (at least in principle) it is not possible for me to establish whether or not CUS, using its current approach, has properly considered the separate 'traffic management' claims submitted by CUS and certified by **tie** elsewhere.
- 5.2.6 I accept that the further information provided by CUS does indicate that there has been a thickening of at least the TM labour resources over the period covered by the claim. That is to say a thickening over the CUS planned resources. However, what it does not do is demonstrate if and why **tie** is responsible for that thickening when there are other possible explanations such as: sufficiency of original pricing; costing errors; poor site management; general inefficiencies and/or traffic management required for remedial works and the like.



Section 6 CUS claims in respect of Work Section Labour

6.1 Generally

- 6.1.1 Please see earlier comments at Section 3 regarding the 'global' / 'total cost' basis upon which CUS has based the current (and previous claims).
- 6.1.2 At this stage I reiterate my earlier comments that in my opinion the CUS valuation methodology is inappropriate in terms of the Agreement and also that the claim does not attempt to demonstrate the loss (or increased 'value') caused by the events relied upon. It lacks transparency and CUS cannot provide the necessary data which would allow either tie or a third party to verify what operatives were doing on the dates and during the periods claimed.
- 6.1.3 While CUS has presented its claim in respect of labour and plant in one valuation 'model', it is relevant, indeed necessary in my opinion, to review and analyse each of those two resources separately. The main reason for this opinion is that the extent of delay and/or disruption to labour compared to plant is not necessarily the same. While the most recent CUS claim has been revised in an attempt to address this point it fails to fully address same. The result is that the current claim contains a number of errors and CUS continues to misapply 'labour factors' to plant resources.
- 6.1.4 This section (**Section 6**) addresses the CUS claims in respect of Labour. **Section 7** below addresses the CUS claims in respect of Plant.
- 6.1.5 I set out below my observations in respect of the 'labour' element of the CUS claim.

6.2 Basis of CUS claims

- 6.2.1 For the labour element CUS claims alleged actual resource hours at the alleged actual rate per hour. In essence, the CUS claim in respect of labour is simply a cost plus claim. For the reasons already set out earlier in the document, this is an approach which is not supported by the Agreement. Furthermore, CUS is unable to evidence what the majority of the operatives were doing during the hours it claims.
- 6.2.2 In order to arrive at the total resource hours claimed CUS relies on its "*Weekly Summary Sheet - Labour and Plant Returns*". In arriving at its actual rate per hour CUS calculates an average hourly rate from the hourly rates it alleges it has paid to its two major labour only



sub-contractors. It is relevant to note that to date CUS has not yet satisfactorily demonstrated actual payment of those alleged hourly rates. This information remains outstanding.

6.2.3 In my opinion a significant flaw in the CUS approach is that where the Weekly Summary Sheets contain descriptions, CUS is seen to deduct hours for what it terms “*remedial works*”. Where no descriptions are present in those Weekly Summary sheets CUS proceeds on the assumption that all hours are claimable against **tie**. The flaw in this approach should be self-evident. This however cannot in my opinion prove **tie**'s culpability for those hours. At best this can only show that CUS appears to have incurred a potential liability for those hours the cause of, and culpability for, which remains to be established. CUS however proceeds on the assumption that **tie** is responsible for those hours.

6.2.4 I accept that CUS contends that it has removed, from its entitlement calculation, labour hours for which it does not hold **tie** responsible (referred to as “*Contractor Culpable Hours*” in the recent submissions). However, upon closer inspection it is apparent that there remains a lack of transparency in the CUS approach. The terminology used by CUS with regard to deductions and the like can be misleading and some of the reductions it has made are, at least in part, unsubstantiated. Examples include:

- a) CUS has deducted a number of hours (4,290hrs) from its claim which it contends “*is an estimated allowance*”¹³ assessed on the basis of conversations with site personnel. CUS has not provided any substantiation and/or explanation on how it arrived at 4,290 hours. CUS has indicated at recent meetings that it cannot provide any evidence of how this deduction was assessed. It is therefore impossible to verify the validity or otherwise of the extent of this deduction. Absent any point of reference it is not possible for **tie** or others to establish whether the 4,290 hours deduction is sufficient (or whether that should more realistically be 42,900 hours);
- b) in some instances hours marked for deduction by CUS as ‘x’ (remedials) or ‘c’ (non-conformances), have not actually been removed from the overall claimed hours;
- c) a number of hours marked ‘x’ (circa 9,053 hrs) appear to relate to reinstatement works for which there is a separate head of claim. To refer to such hours as remedial works is therefore slightly misleading and goes towards overstating the actual

¹³ CUS (TL) email to tie (FD) dated 24 September 2010 08:48.



deductions made by CUS for “Contractor Culpable Hours”. Owing to the nature of the CUS claim in respect of Reinstatement (see Section 8 below), it is likely that those hours have not been removed from the claim instead they simply form part of the claim under a different head – Reinstatement.

6.2.5 The table included below broadly summarises CUS’s claim in respect of the total labour hours included in and/or excluded from its ‘Entitlement Calculation’¹⁴:

Review of CUS Appendix 2		hrs	
1	Total Number of Labour Hours Recorded on Allocation Sheets and EJB Hours	417,853	
2	Labour Hours not recorded as Work Section Labour (DEDUCT) <i>Hours Allocated to Contractor Culpable Hours/Hours recovered elsewhere and never carried to a Work Section Labour Database or the claim calculation</i>	-53,238	** See 'Work Section Hours Not Carried to Claim' Database (Appendix 2A)
3	Total Number of Labour Hours carried to Work Section Databases	364,615	** See all Work Section labour databases (previously issued - Appendix 1)
4	Contractor Culpable Hours In Work Section Databases (DEDUCT)	-19,270	** See X's and C's on Appendix 1
5	Assessment for Additional Deductions to Labour Hours (DEDUCT)	-4,290	**see Appendix 2B
6	Total Labour Hours to Carry to Claim Calculation Split Across Work Sections	341,055	

6.2.6 The “Total Labour Hours to Carry to Claim Calculation Split Across Work Sections – 341,055 hrs” (Row 6 in the table above) represents the total hours claimed by CUS prior to any reconciliation in respect of hours already recovered under the contract (either through measurement and/or change controls).

6.2.7 The fundamental problem with CUS’ approach to its labour claim is a lack of verifiable and auditable labour allocation records. As previously stated CUS is unable, in the majority of instances, to identify what the operatives were doing during the hours claimed. CUS advises that it is unable to provide any data and evidence in this respect. That in my opinion is unreasonable. It appears to me that a large part of the ‘success’ of the CUS claim relies on its failure to record construction activity descriptions and carry out basic / proper cost management. If those descriptions were present I have no doubt that the extent of hours ‘claimable’ by CUS, even at a global level, would be considerably reduced.

¹⁴ The information included in the table above has been extracted from the further information provided by CUS under cover of its letter dated 18 August 2010, Appendix 2 “CUS Labour Hour Deductions”.



6.2.8 Other data relied upon by CUS in support of its position contains inconsistencies in the hours claimed versus hours worked. That is to say, CUS includes labour hours which should not be included.

6.3 “Work Site Specific Labour”

6.3.1 With regard to the detail of the “*Work Site Specific Labour*” hours claimed by CUS recent discussions have highlighted a number of issues which have an effect on the ‘value’ claimed by CUS in respect of labour, including:

- a) Hiab driver hours: CUS has duplicated its claim for this resource by at least **6,445hrs**. At the claimed amount of £18.80/per hour (plus claimed mark-up) this equates to a reduction of circa **£132,000**;

The ‘balance’ of 8,895hrs (Hiab driver hours) are simply derived from the CUS CPA database (see comments at Section 7 below). CUS cannot evidence where those drivers (or the corresponding Hiab equipment) were. In addition, despite recent requests, CUS has not yet demonstrated the process by which such ‘unallocated plant’ was actually verified and allocated on its CPA system in the first instance.

In terms of labour (Hiab driver hours), this equates to a further **£182,000** which CUS cannot evidence in terms of location or usage – but still claims against tie. It is simply a ‘cost’ that CUS appears to ‘want’ to recover but cannot evidence;

- b) Embargo hours: it has also become apparent that CUS has duplicated embargo hours in the present claim with CC203 (Change Control Reference for the Embargo claim). CUS has yet to confirm the extent of duplication in terms of hours.
- c) Paid hours: There also appears to be an issue between hours claimed and hours actually paid by CUS. It is relevant to note that the information recently provided by CUS (received 22/09/10) does not actually demonstrate payment. Rather, it includes lump sum values which CUS contends were invoiced by its sub-contractors and then paid by CUS during the relevant period. CUS has yet to provide the relevant information to demonstrate actual payment in respect of its two main sub-contractors Lothian Utility Networks (LUN) and Welsh Civils (WC).

6.3.2 The above are only examples of the errors and anomalies identified in the CUS submissions. Those issues however do serve to reduce the top-line ‘value’ of the CUS claim



before it is even appropriate to address culpability for the subsequent balance of hours claimed.

6.4 “Average Actual Rate”

6.4.1 As previously noted, in order to arrive at its average hourly rate of £18.80 CUS uses what it contends is its average cost per hour for LUN and WC during the period October 2008 until December 2009.

6.4.2 From the labour data provided by CUS (14/09/10) it is apparent that the hours for at least another six contractors (including CUS direct labour) form a substantial part of the CUS claim. Whilst it is accepted that LUN and WC makes up the larger proportion of the claimed hours, the other contractors account for more than 45,000 hours (around 13% of the total hours claimed); with CUS' own direct labour accounting for approximately 23,000 hours alone.

6.4.3 Following a recent request in this regard, CUS provided copies of sub-contracts in respect of some of the sub-contractors. This however in itself does not demonstrate payment nor the rates actually paid. CUS has yet to provide verifiable details of the rates actually paid.

6.4.4 As previously noted, consideration of the above will only serve to reduce the top-line 'value' of the CUS claim **before addressing culpability** for the subsequent balance of hours claimed.

6.5 Event-Focussed Approach

6.5.1 In discussions with CUS during late 2009, **tie** requested that CUS adopt an 'event based approach' to its analysis and 'claims'. That is, an analysis which was capable of demonstrating the actual extent of disruption caused solely by the events relied upon by CUS. CUS initially agreed to consider presenting its claim on this basis. Later however CUS declined to do so.

6.6 CUS contentions regarding labour 'entitlement'

6.6.1 For the reasons stated above and in the earlier sections of this report it is my opinion that the 'new rates' arrived at by CUS are inappropriate and merely compound inherent errors and invalid assumptions. As such the revised rates claimed cannot in my view be considered to be a measure of, either (i) CUS' entitlement to a re-rating exercise; or (ii) a



measure of the disruption incurred solely as a result of the matters for which **tie** is responsible.



Section 7 CUS claims in respect of Work Section Plant

7.1 Generally

- 7.1.1 The recent claim submitted by CUS changes the method by which CUS calculates its alleged entitlement to increased plant values. Previously CUS claimed that plant disruption was directly related to, and indeed identical to, the disruption incurred to its labour resource. That approach has now changed to an analysis of *alleged* actual plant resources.
- 7.1.2 Over the course of August and September 2010 CUS provided access to the data underlying its current plant analysis and claims.
- 7.1.3 My analysis of that data however has identified a number of errors and anomalies in the CUS model which require correction. It is my understanding that CUS accepts the existence of those errors and anomalies and the need to correct its claim for same. In my opinion the consequence of those anomalies is to *significantly* reduce the top-line value claimed by CUS *prior* to allocation of responsibility for same. I note however that CUS has yet to provide further information requested in this regard.
- 7.1.4 The current CUS claim 'value' for the plant element totals £4.6M (before reconciliation of any amounts recovered by measurement and under the change control process). This can be summarised as follows:-

1	2	3	4	5	6	7
Reconciliation of Plant Totals					65.46124%	
Section	Value derived from Weekly Summary Sheets	Main plant items value extrapolated by CUS from CPA		Main Plant value claimed	Addition made by CUS for plant balance, small tools	Total "Value" Claimed
CUS data source:	<i>Weekly Summaries</i>	CPA			CPA	
		<i>i.e. CUS cannot evidence by daily / weekly plant returns</i>			<i>i.e. CUS does not evidence by daily / weekly plant returns</i>	
1A0101	105,586	167,603	159%	273,188	178,832	452,021
1B0101	91,229	171,189	188%	262,418	171,782	434,199
1B0102	75,702	168,268	222%	243,970	159,706	403,675
1C0101	106,136	83,770	79%	189,905	124,314	314,220
1C0301	214,965	216,447	101%	431,413	282,408	713,821
1C0401	178,545	163,732	92%	342,277	224,059	566,336
1C0501	157,213	115,642	74%	272,855	178,614	451,469
1D0101	283,127	212,332	75%	495,459	324,334	819,793
2A0101	83,174	67,727	81%	150,901	98,782	249,683
5B	6,596	16,875	256%	23,471	15,364	38,835
5C	48,733	51,888	106%	100,622	65,868	166,490
Totals	1,351,005	1,435,473	106%	2,786,479	1,824,063	4,610,542



- 7.1.5 I have summarised below the main issues arising during both the discussions with CUS and my analysis of the data provided.
- 7.1.6 Basis of CUS plant claim (data source): Only a small proportion of the CUS plant 'value' claimed is actually derived from an analysis of its Weekly Summary Sheets. The main plant is in fact simply derived from the **CUS CPA system** (i.e. the CUS project cost database). That is to say, CUS 'knows' it has incurred a cost for this type of plant which exceeds the Weekly Summary sheet resource records (by an average of circa 100% in terms of alleged 'value'). As a consequence, CUS simply works out the alleged actual resource levels from the cost incurred; then multiplies this by the original planned rate. Crucially, CUS doesn't know where this unallocated plant was, why it was there or what it was doing. It simply appears to want to recover the corresponding 'value' (which itself is considerably more than the actual 'cost'). That in my opinion is unreasonable and cannot be said to establish a fair rate or price for the utility diversions.
- 7.1.7 Small plant claimed (basis of calculation): CUS calculates its alleged entitlement purely on the basis of cost from its CPA system. CUS has still to provide substantiation of the sums claimed. As such, the amount claimed is not calculated by reference to the contemporaneous Weekly Summary sheets. In my opinion CUS incorrectly applies a percentage for small plant and tools and in arriving at that percentage includes costs which are inappropriate.
- 7.1.8 As a consequence, the whole plant claim resource data and value claimed is driven and dictated by the CUS CPA data. It is not (ultimately) reliant on the Weekly Summary sheets at all (CUS has accepted this point).
- 7.1.9 Importantly, during recent meetings CUS also accepted that its allocation of plant to specific Work sections within the CPA system, 'CC' codes and the like is unreliable and subjective. Therefore the data from the CPA cannot itself be relied upon in terms of plant allocation and use.
- 7.1.10 During recent discussions with CUS it also became apparent that CUS has not deducted plant associated with all remedial works and for example, 'embargo works'. This again serves to overstate the plant 'value' claimed by CUS. CUS has yet to provide details of the relevant plant deductions.



7.2 CUS contentions regarding 'plant' entitlement

- 7.2.1 For the reasons stated above and in the earlier sections of this report it is my opinion that the 'new rates' arrived at by CUS are inappropriate and merely compound inherent errors and invalid assumptions. As such the revised rates claimed cannot in my view be considered to be a measure of, either (i) CUS' entitlement to a re-rating exercise; or (ii) a measure of the disruption incurred solely as a result of the matters for which **tie** is responsible.



Section 8 CUS claims in respect of Work Section Reinstatement

8.1 Generally

8.1.1 In previous claims CUS had based its claim for delay and disruption to the reinstatement works on the basis of a percentage addition to the total 'entitlement' calculation. However, the most current claim submitted by CUS on 14 June 2010 purports to relate the sums claimed for disruption to its reinstatement operations to a proportion of actual costs incurred. Page 9 of the individual CUS Section claims refers.

8.1.2 Overall, CUS claims a total of **£217,231.21** for this head of claim (before addition of the 8.8% 'MUDFA Mark-up'). That sum is divided between each of the eleven section claims on the basis of the alleged actual meterage carried out during the period from October 2008 to December 2009. It is therefore merely a hypothetical apportionment of a hypothetical overall sum claimed.

8.1.3 During recent discussions the following errors in the CUS 'model' were identified:-

- a) Original allowance: CUS has not properly (fully) reconciled the original planned allowance. CUS accept that this error requires to be corrected. This will clearly reduce its claim.
- b) CUS Allowance for remedial works: CUS accepts that the allowance for remedial works presently applied is incorrect and requires to be corrected. That however is dependent upon proper auditable records being available (please see paragraphs 6.2.7 and 6.2.8 above). As such, the correct percentage to be applied is in my opinion likely to be higher than CUS presently accepts.



Section 9 CUS position in respect of Price Fluctuations

9.1 Generally

- 9.1.1 The CUS claims include an amount for the addition of price fluctuations (based on a percentage addition of 7%). CUS adds the percentage claimed to the net amount of all sums claimed after reconciliation of other sums recovered.
- 9.1.2 It is relevant to note that in principle I accept that addition of amounts for price fluctuations is a valid head of claim when properly applied, where appropriate and only where culpability for the underlying costs/values has been properly established. As noted throughout this report I do not believe that CUS has satisfied those tests / criteria.
- 9.1.3 In respect of labour, CUS presently claims an average rate of £18.80/hour for all labour (section 6.4 above refers). CUS contends that this is the actual rate paid by it to its sub-contractors. It is relevant to note that responsibility for the alleged increased labour rate per hour remains a matter in dispute between the parties. I accept that as part of its additional hourly labour rate calculation CUS attempts to reconcile its recovery through fluctuations such that no duplication of recovery is present. However, I note that CUS has omitted to reconcile the appropriate element of the amount agreed with and certified by **tie** in relation to 'indices'. This serves to duplicate and overstate the CUS claim at least in part.
- 9.1.4 The above is also true of the CUS reinstatement and plant claims.
- 9.1.5 Specifically with regard to the plant element of its claim, in my opinion the CUS methodology renders the application of fluctuations inappropriate. It is clear from the data underlying the CUS current plant analysis and claims (Section 7 refers) that the actual 'cost' of the plant is considerably less than the corresponding 'value' CUS seeks to recover through its claim. It is therefore inappropriate in my opinion to then add a further 7% to that element of its claims. To do so only serves to *further* overstate the amount claimed in respect of plant. That in my opinion is unreasonable and cannot be said to establish fair rates or prices for the work.



Section 10 CUS position in respect of "MUDFA Mark-up"

10.1 Generally

- 10.1.1 CUS claims 8.8% mark-up on all 'values' claimed. The source of that percentage appears to be the pricing details as set out in the Agreement. The total claimed by CUS in the current claim is **£583,830** (please see column 8 of the table at paragraph 3.1.2 above). A further **£18,223.69** is claimed in respect of the CUS Traffic Management 'model'.
- 10.1.2 CUS' entitlement to an addition for overheads and profit will depend on the contractual / legal basis of its claims. For example, CUS' entitlement under clause 10.4 is "*... additional payment for any reasonable, demonstrable and direct additional costs incurred ...*" as a result of matters covered by that clause. Entitlement under that, and similarly worded clauses, would therefore not necessarily include an addition for overheads and profit.
- 10.1.3 As a consequence, CUS' entitlement under this claim head will depend on (i) the appropriate contractual / legal route for each event claimed; and (ii) the net sums due in respect of same. At present, in my opinion CUS is not entitled to the sums claimed as set out at paragraph 10.1.1 above due to the various errors, anomalies and overstated elements present within the underlying claim heads.



Section 11 CUS claims in respect of "Claim Preparation costs"

11.1 Generally

11.1.1 CUS claims the sum of **£1,300,000** in respect of what has been referred to as "*Claim preparation costs*". To date CUS has failed to provide any explanation of the contractual and/or legal basis for such a claim. In addition, CUS has provided no vouching whatsoever in respect of this claim head.



Section 12 Declaration

1. I confirm that my report includes all facts which I regard as being relevant to the opinions which I have expressed and that attention has been drawn to any matter which would affect the validity of those opinions.
2. I confirm that in preparing this report I have assumed the same duty which would apply to me when giving my expert opinions in a court of law under oath or affirmation. I confirm that this duty overrides any duty to those instructing or paying me, that I have understood this duty and complied with it in giving my opinions impartially and objectively, and that I will continue to comply with that duty as required.
3. I confirm that I am not instructed under any conditional fee arrangement.
4. I confirm that I have no conflicts of interest of any kind other than those already disclosed in my report.
5. I confirm that my report complies with the requirements of the Royal Institution of Chartered Surveyors (RICS), as set down in *Surveyors acting as expert witnesses: RICS practice statement*.



Robert Burt

19 October 2010