



For the Attention of Martin Foerder – Project Director
Bilfinger Berger – Siemens – CAF Consortium
9 Lochside Avenue
Edinburgh Park
Edinburgh
EH12 9DJ

Our Ref: INF CORR 5526

Date: 13th July 2010

Dear Sir,

**Edinburgh Tram Network - Infraco
Information and Audit Access – Management of Design**

We refer to your letter dated 5 July 2010 (reference ETN(BSC)TIE\$Q&AB#051041). We do not accept your protestations of surprise at our letter date 30 June 2010 (reference INF CORR 5464/RB). Infraco has persisted in failing to provide all of the relevant information and this is why the audit has been extended (as explained in tie's letter 5464). tie requires the audits because this information, explanation or evidence is not otherwise made available to tie in accordance with the Infraco Contract. We have to remind you yet again that tie is a public body managing the design, construction, commissioning and operation of the Edinburgh Team Network under delegated statutory authority and of your commitment and responsibility, pursuant to the terms and conditions of the Infraco Contract, to support tie in those functions.

We also refer to your letter dated 6 July 2010 (reference 25.1.20/KDR/6175) and the attached Paper Apart which inter alia records the causes of the Audit Meeting held on 5 July 2010 being postponed.

Response to your assertions 1 – 8 in letter 051041

- 1 Infraco's obligation under Clause 10.4 is to establish and maintain an extranet which tie, and any tie Parties and any other party reasonably required by tie may access remotely by computer to view and store or print any Deliverables. Such facility is intended to assist tie and its associated parties to enjoy remote discretionary access as afforded by Clause 10. Infraco's only point of objection is if tie's request for access (therefore including timing and availability) is unreasonable. Clearly in month 26 of a 38 month contract it is not unreasonable of us to assert that Infraco are in breach of this requirement and to expect them to provide alternative and comprehensive forms of access.
- 2 Your assertion that Pinsent Masons was only acting for Bilfinger Berger contradicts the statement made by Mr. Russell at the General Issues meeting on Monday 5th July 2010, when he advised that they were representing Infraco. Your solicitors are not the custodian of or party to any Deliverables and there should be no reason for them to be involved in the audit process. You are reminded that the Infraco Members are jointly and severally bound to the Infraco Contract and full authority is vested by Infraco Members in the Infraco Representative (currently Mr. Foerder).

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Clause 65 provides an explicit obligation on Infraco and related process for providing information in relation to Compensation Events, with which the Infraco is not complying and has not complied. The information requested has largely not been made available to **tie** (this is subject to separate detailed correspondence between the Parties).

tie refutes any assertion, stated or implied, that its audit requirements go beyond what it is entitled to under the Infraco Contract and which inter alia permits **tie** to determine whether Infraco is in breach of any terms of the Infraco Contract and the materiality of such breach and its adverse impact on any aspect of the carrying out the Infraco Works, and on **tie's** obligations. Such breaches may be, but not limited to, breaches of the terms referred to herein and Clauses 6.3.1, 7.3.12, 7.3.13, 7.3.15, 10.3 and 73.

3 Your response is inadequate and circuitous by asking for us to explain in the generality what we have already explained and does not respond to our requests. Your delinquent conduct towards audits is explained herein. Please now provide all information requested under audit and in letter 5464 which remains outstanding.

4 Your response is unsatisfactory and inadequate because:

- a. the Infraco has not provided the minutes of meetings "of all BSC/SDS Meetings which includes commercial matters" as requested;
- b. It is difficult for **tie** to accept the Infraco's response that "*There are no minutes of meetings related to commercial issues*", when other matters such as design, are minuted: and
- c. **tie** seeks explanation of what the Infraco means by the commercial issues related to "changes".

5 The Infraco Contract contains audit provisions (reflecting the fact that this is a public contract and **tie** owes audit and best value commitments to its stakeholders). **tie** is entitled to exercise the audit provisions (in accordance with the Infraco Contract terms) as they, acting reasonably in good faith, see fit. Infraco are required to exercise good faith in responding to them. The Infraco was notified of the audit scope in advance of the audit and has been directed to questions/examples as part of the audit meetings process, to which the Infraco has not always responded. The Infraco has therefore been asked these specific questions in follow up correspondence (emails referred to in **tie's** letter 5464 and letter 5464 itself).

The Infraco has been given the opportunity to reduce the time spent in giving information by giving **tie** access to the extranet or, in the absence of an extranet, a "Document Control Room". The Infraco has rejected this, and **tie** are entitled to establish why and to what extent Infraco is being unnecessarily difficult throughout the audit process, rather than being open and responsive, as it should be in accordance with its contractual and project partnering commitments.

- 6 The schedule presented with our letter details the documentation that was issued by Infraco in response to the meeting of 25 May 2010. The documentation was received on 10 June 2010, and inter alia identifies the additional information required as a result of **tie's** review of this information. Infraco are instructed to provide this additional information.

(**tie** note that the version sent under cover of our letter did not, as intended, include the schedule of information requested at our meeting of 7th June 2010. This schedule is now attached. We note that Simon Nesbitt took full details of all information requested at that meeting and that provision of this information remains outstanding.)

- 7 This is now the subject of separate correspondence and by reference to our response to your letter dated 6 July 2010 (reference 25.1.20/KDR/6175) given below.
- 8 The SDS/Infraco Design Minutes (17 June 2009) recorded that: "*BSC will instruct SDS to complete the design*". We do not understand the need or reason for such an agreement.

The audits

It is clear that if Infraco was acting as a body under the full authority of its Representative and accordance with Clause 7.2 audits should be dealt with efficiently and quickly. Infraco is responsible for making available the resources and capability to service the audit requirements.

Notwithstanding that the allegations in your second paragraph are totally without foundation and reason, we strongly refute them. In part the audits are required to understand why the design is late and what is being done to remedy/mitigate that fact. To suggest that what we ask for should obstruct those engaged in the design process challenges credibility and we require a detailed list of the personnel affected and their duties and just how they have been hindered in fulfilling Infraco's "*contractual obligations and the delivery of the design*".

There can be no doubt that an extranet at the outset of the contract (which should have taken a matter of weeks) would have helped both parties. Please provide written evidence of the steps you have taken to comply with Clause 10.4. An extranet would substantially reduce our need to have access to your Document Control Room and to engage in meetings with your staff. However we do draw reference to Clause 10.16 which does not actually call for a "Document Control Room", but it reinforces the need for you to provide access to an "orderly documentary record" of the proof you rely on in relation to any claims for additional costs or expenses (including that required under Clauses 65, 66 and 80).

Inter alia the audit will allow **tie** to gain an understanding of the process which the Infraco Parties have engaged in to produce an integrated assured design. This is a reasonable request pursuant to clause 104, as this is a significant element of the Infraco's management of SDS Provider and integration of the Infraco Design with the SDS Design, (the subject of the audit as notified). **tie** do not accept that you have provided all of the information requested.

tie is entitled to exercise its audit right (in accordance with the terms of clause 104) as it sees fit. Both clauses 104.2 and 104.3 set out the right for **tie** to audit documentation held electronically (as well as by other media). The Infraco is expressly obliged pursuant to clause 104.2 to make records available for inspection by **tie** (or any **tie** party/other party). The Infraco is expressly obliged in clause 104.3 to provide the documentation requested to **tie** (or other party). In the first instance, **tie** sought to access the information by requesting it from the Infraco (at the audit and follow up communication and correspondence). However, as the Infraco has failed to comply with the audit requests by these methods, and in the failure of provision of access to an extranet, **tie** wishes to inspect the documents held in the "Document Control Room", or elsewhere within an office or offices, in relation to the audit topic. This refers to and includes all Deliverables held at the SDS Provider's offices.

Audit completion

Participation by Infraco in the audits is a clear term of the Infraco Contract and it is up to the Infraco how they resource these so that it does not have an effect on its other obligations and duties under the Infraco Contract. In addition, **tie** remind the Infraco that if the Infraco adhered to its contractual commitments along the way, and engaged with **tie** over the matters which **tie** needs to understand then the need to hold audits may have been reduced. (The Paper Apart to this letter records how Infraco have dealt with the audit).

The audit was initially expected to take no more than three days. However, as the Infraco has not complied with **tie**'s reasonable requests through the audit process, including the provision of the extranet facility and compliance with Clause 10.16, this has led to the necessity to extend the audit by eight days. As **tie** has expressly stated in letter 5464, if the information flow is improved upon, both teams can benefit from a faster conclusion to this matter (the audit). This would also reduce any costs of the audit process. It is not beneficial to either party for **tie** to have to raise repeated requests for the same information (prior to audit, at the audit, through email and other correspondence and in dialogue between the Parties).

tie strongly refutes the allegation that this is "tantamount to interference with the rights of the Infraco". This is has no foundation because **tie** is exercising its rights under the Infraco Contract. Moreover, until such time as we are able to bring the audit to a conclusion we cannot finally respond to your letter dated 28 May 2010 (reference 25.1.201/RWa/5688).

Your letter dated 6 July 2010 (reference 25.1.20/KDR/6175).

Your final paragraph confirms to us that there is an agreement or there are agreements between Infraco, Infraco Members or Infraco parties with the SDS Provider. It also confirms Mr. Russell's verbal admission given to our Mr. Bell (referred to below) to a separate agreement with SDS. Clause 11.5 is explicit in requiring you to obtain our approval to any amendment to the SDS Agreement which includes the SDS Services. Moreover, any new agreement would fall to be approved by us pursuant to Clause 28.4. You are therefore called upon to disclose all agreements that either Infraco, or an Infraco Member or Party acting unilaterally, may have entered into with the SDS Provider or any member of the SDS Provider.

The existence of such an agreement was confirmed by your Mr. Russell at a meeting dated 21 June 2010 and further in his email dated 28 June 2010 by stating:

"Your comments are acceptable save for item 214. BSC explicitly stated that the information pertaining to the contents of this item (an additional BSC/SDS agreement) was "off the record" and would not be recording them in the formal MOM."

The attached SDS Issues Paper was attached to Meeting Notes dated 8 April 2008 (assume this is an error and should be 8 April 2009, as 2008 would have been pre-contract signature and the other dates in the Minutes refer to 2009). This issues list catalogue SDS Provider's complaints about the management of the design process by you. It is wholly reasonable to deduce that it is a precursor to further discussions/exchanges between BSC and SDS Provider, leading to the Minute of Agreement which *inter alia* required SDS Provider to reiterate its undertaking to assist in securing tie changes.

One such exchange being your letter to SDS Provider on 28 May 2009 (reference 25.1.201.CBr.2707), which *inter alia* explains your position on the scope of the services to be provided post-novation and the state of the design at novation. Without prejudice to our rights pursuant to Clause 109, we confirm your explanation in principle. However, we draw your attention to it being at odds with the representation by Mr. Reid in his letter to our Chairman dated 5 March 2010 when he asserts that Infracore Contract was based on the premise that *"the design would have been substantially completed at time of signing the Infracore Contract."*

You will be aware that your Mr. Baltazar provided us with a copy of the draft Minute of Agreement together with explanatory notes on 9 December 2009. We require your explanation as to the purpose and need for these arrangements and why they have not been disclosed to us.

Instructions

Pursuant to Clause 34.1 we instruct you:

- To provide with immediate effect an extranet to comply with Clause 10.4.
- Provide written evidence of the steps you have taken to comply with Clause 10.4.
- Until such time as you comply with Clause 10.4, and in addition to our rights of access pursuant to Clause 10.16, you are instructed to provide us with unlimited access to your Document Control Room (for the purposes set out in Clause 10.16) during normal business hours. (We are content for a member of your staff to be present when we make use of such access.) We will, in future interim payments, deduct a reasonable sum for your failure to provide the extranet.
- Provide an orderly documentary record as required by Clause 10.16 for any additional costs or expenses you have claimed or intend to claim. We will take account of whether the absence of such record prevents us or hinders us from considering your entitlement to additional cost and expenses and may rely on such absence in future proceedings.
- Provide immediate access as required pursuant to Clause 10.16.
- Explain the presence of Pinsent Masons at audit meetings.


- To confirm that the Infraco Representative has full authority to act for all Infraco Members as required by Clause 26.4.2
- To confirm that all Key Personnel and other superintendence are being managed and co-ordinated by the Infraco Representative in accordance with Clause 26.4.3.
- Provide us with a copy of any arrangements or agreements between Infraco, Infraco Members or Parties and SDS Provider or SDS parties, and/or any other amendment to the SDS Agreement, together with an explanation for such agreements or arrangements.
- To confirm that in future Infraco will meet the requirements of Clause 104.
- To confirm that in future Infraco will not seek to recover additional expenses and costs without having conformed with the requirements of Clause 10.16.
- Provide a detailed list of the personnel affected and their duties and just how they have been hindered in fulfilling Infraco's "*contractual obligations and the delivery of the design*".

We assume that you required Pinsent Mason's presence at audits because you are concerned about the potential impact the audit may have on the conduct of future adjudications and our obtaining evidence for future proceedings against you. Whilst, if you continue with your current obstructive conduct, it is open to us to implement the provisions of Clause 90.1.2, we can also as an alternative in this matter apply to the Courts inter alia for specific implement of Clauses 10.4, 10.16 (for specific claims for additional cost or expense) and 104. We refer you to paragraph 3 of Schedule Part 9:

"Neither Party shall commence any court proceedings until the procedures in paragraphs 9 to 54 have been completed, under exception that the provisions of this Schedule Part 9 shall not apply so as to prevent either Party seeking interim order or interim relief in the Scottish Courts."

However such actions would not reflect the improved situation Mr. Reid acknowledged in his letter dated 5 March 2010 as being desirable. We trust therefore that you will comply with our instructions and voluntarily cease any further claims for additional cost and expense until you have fully done so.

Yours faithfully



Steven Bell
Project Director – Edinburgh Tram

Paper Apart to Inf. Corr. 5526

1. Our letter 5464/RB repeated our request that BSC provide facilities in accordance with Clause 10.4 of the Infraco contract by 12:00 noon on Friday 2nd July 2010. BSC failed to implement this reasonable request. **tie**'s Bob Bell discussed this with BSC's Kevin Russell on Friday afternoon 2nd July 2010. Kevin Russell advised that this facility would not be made available to **tie** until such time as he had discussed it with Martin Foerder. Mr Russell further advised that any future access to information would be on a very limited basis and that documents which were of a commercially confidential nature would not be made available to **tie**. It was Mr Russell's stated opinion that **tie** were using this audit process as a "fishing" exercise to obtain information. Mr Russell stated that he envisaged **tie** becoming quickly frustrated by Infraco not providing access and that our next course of action would have to be to raise a dispute on this matter.
2. Our letter 5464/RB advised that the remainder of the audit would commence on Monday 5th July. An electronic invitation was issued to BSC on 30th June 2010 advising of a 09:00am start time. BSC's Bal Ochoa & Simon Nesbitt met with our Bob Bell at 09:00am on Monday 5th July 2010 and requested the audit start time be put back to 10:00am, due to the late arrival of one of BSC's team. Bob Bell agreed to this postponement but requested a meeting facility be made available as the **tie** meeting room was only booked for 1 hour. Mr Bell reminded Mr Ochoa that the reason for such a short duration was that the audit would now be conducted at individual workstation's and the BSC document control centre. Mr Ochoa immediately replied "That is not going to happen". Mr Bell advised that given the similar statement from Kevin Russell on Friday 2nd July 2010, he was not surprised by Mr Ochoa's remark, however **tie** still wished the audit to continue.
3. The audit teams met at 10:00am. Both audit teams were introduced to each other. Our Mr Bell advised that the **tie** audit team had changed as a result of staff holiday arrangements. Additionally **tie** advised they were now being supported by DLA Piper as our legal advisors. Immediately following the introductions, Mr Ochoa asked for a break in proceedings and left the room, returning shortly afterwards to advise that BSC would not continue with the audit while **tie** had legal support and BSC did not. Mr Bell reminded Mr Ochoa that it was BSC who initially brought legal support to earlier meetings and **tie** were entitled to have such support. Mr Ochoa undertook to advise Mr Bell later that day as to when BSC would be in a position to reconvene the audit. At the time of writing, BSC have yet to contact **tie** to confirm their availability. There is no obligation on either party to provide advance notice of the attendance of legal advisors. Previous audits carried out by **tie** have also involved legal support and whilst there was an initial reluctance by BSC to engage in these due to this, these audits were not postponed and/or significantly delayed as a result.
- 4) Given Mr Ochoa's previous statement that access to workstations and the document control centre were "not going to happen", Mr Russell's similar statement and BSC's position on the presence of **tie**'s legal support, **tie** had no alternative but to postpone this audit.

**Bilfinger Berger – Siemens – CAF Consortium : Edinburgh Tram Network
Meeting Notes**

Subject	Design Management Review	Location	Project Office
Date	8 th April 2008	Time	
Attendees	Representing	Attendees	Representing
Colin Brady	BSC		
Stefan Rotthaus	BSC		
Jason Chandler	SDS		
Distribution	M Foerder R Brueckmann D Steele	S Nesbitt D Ross	S Reynolds

		Action	Date
1	General		
	<p>Purpose of Meeting – this meeting was the first of a series of management level reviews to be held over the next few weeks into areas of concern with design management and performance. This meeting dealt only with issues raised by BB, SDS have raised a number of issues (attached) which will be covered in the next meeting. Siemens have been invited to produce a schedule of issues for discussion.</p>		
2	MX Design Deliverables		
2.1	Cross sections, defining and labelling MX strings, will be issued in the week commencing 13/4/09. Issue date to be confirmed on 10/4/09.	JCh	10/4/09 17/4/09
2.2	A further meeting is to be arranged, to be attended by representatives of the work groups producing MX design and S Nesbitt from BB, to review unresolved issues in detail and agree resolution. A close out session at the end of this meeting will be attended by J Chandler, C Brady/S Rotthaus and a management representative from Halcrow, at which any necessary actions will be briefed by the work groups and endorsed.	JCh	w/c 13/4
2.3	Identify a single point of contact within SDS for resolution of MX issues.	JCh	w/c 13/4
2.4	Review the need for a SDS engineer to be based at the Project Office.		

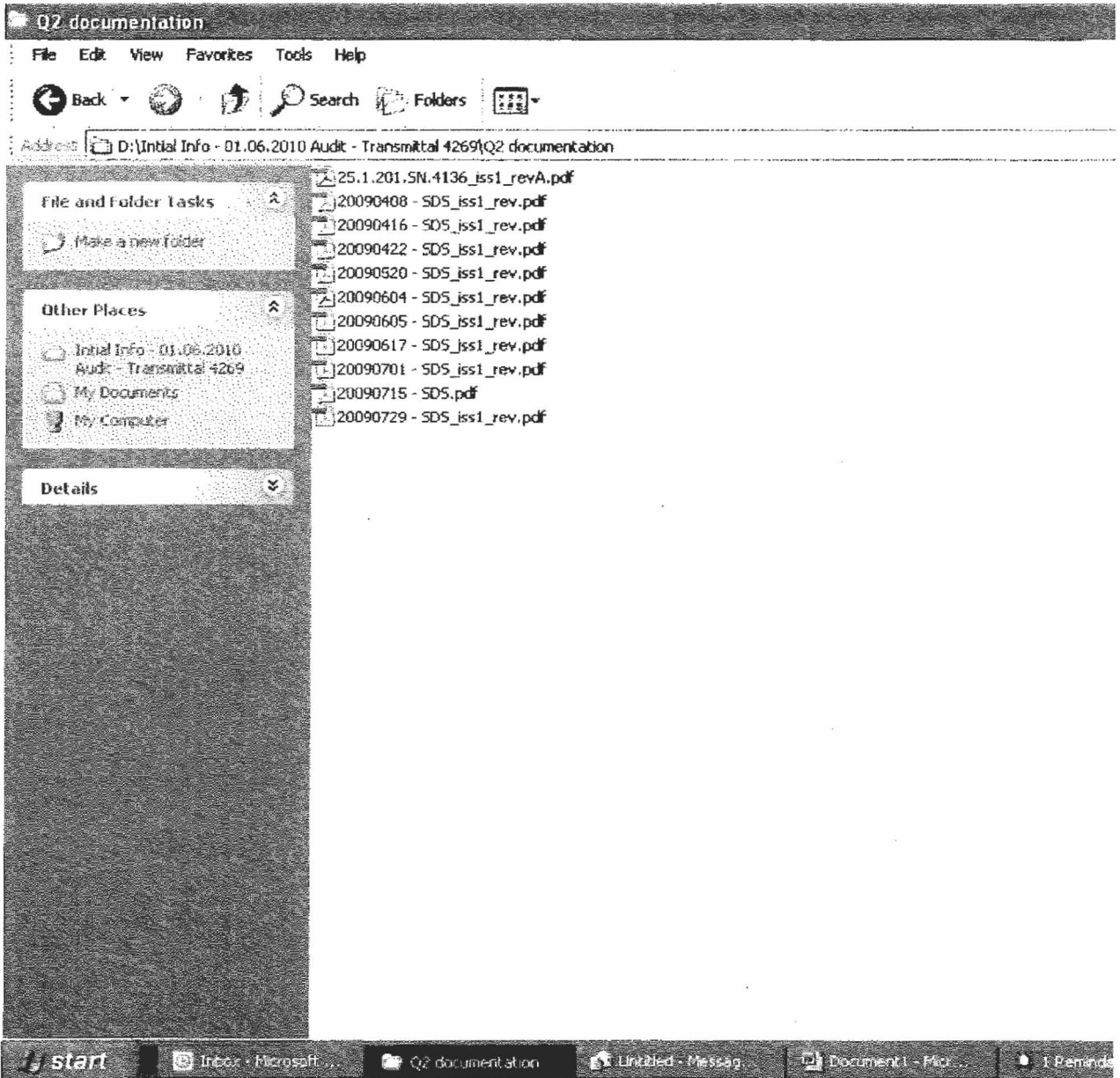
4.4	Changes from Original IFC Issue. SDS will provide details of changes on all up-revisions from original IFC status (not just future revisions). SDS will check revision description box on all up-revised post-IFC drawings and replace comments such as ("General Amendments" with more specific information)	ongoing, review progress in 2 weeks	JCh
4.5	Design Reporting BB to review design reporting requirements after receipt of Drawing Register on 15/4/09	SRo	w/c 20/4
4.6	Incomplete Stage 3 Design Works BB acknowledged that further progress on interface resolution with Siemens is necessary before the issue of whether or not any stage 3 design remains incomplete can be resolved (depot is an urgent area for resolution).	CBr/SRo	ongoing
4.7	Site Visit Report submissions. BB did not agree with submission record tabled by SDS. BB to mark up with "as received" dates and both parties to investigate whether there is a communications problem here.	SRo	asap
	Next Meeting : Wednesday 22 nd April at 10:30, in Project Office	All	
	Schedule of SDS issues to be discussed in next meeting is attached.		

Programme

- It would be beneficial to SDS to receive a 1 month look-ahead construction programme from both Siemens and Bilfinger Berger.

Document Control

- SDS has still not received the 'Document Management Plan'. There is therefore no point of reference of how documentation should be dealt with.
- There are inconsistencies in the manner that BSC issue information, for example, NCRs.
- PB distribution groups advised to BSC for BIW distribution are not used by BSC as requested



Audit meeting on SDS Programme management -07.06.10

audit question no.	lie question	BSC response	Action to/Answer rec'd from BSC?
1	Has anything done in mitigation by imposing / considering sanctions on SDS?	I don't know. Unsure. Need to come back on this one.	Baltazar Ochoa - No
2	Anything in a position connotation? i.e. incentives.	The instructions are really the incentives. Will have to check to see if there are others.	Baltazar Ochoa - No
3	BSC to provide the meeting minutes referred to in letter ref 4720	will check to see if there are any minutes	Baltazar Ochoa - No
4	BSC to confirm if there is any response to letter ref 4721	BO to confirm if response received from SDS on this	Baltazar Ochoa - No
5	Q5 How do you assess whether this is a failure to achieve issue by the date in the programme, especially where there is more than one IFC version?	I need to come back to you on this.	Baltazar Ochoa - No
6	Q6 & 7 Drawing number - 90170-00104 and 103 From v6 onwards - At the last count of IFC this drawing was at rev 19. What checks were carried out for each revision and details of those checks etc?	Need to go back through what SDS and BSC have done.	Baltazar Ochoa - No
7	Q6 & 7 how do you instruct SDS or how do you do reviews on IFC drawings?	There is a series of development workshops held to highlight other issues for SDS to clarify. And then another series of meetings.	Simon Nesbit - No
8	Q6 & 7 Drawing number - 90170-00104 - 20 versions in BIW	The process is described in the DMP. It doesn't go into the detail of where comments are stored. I will check where they are.	Simon Nesbit - No
9	Q6 & 7 Within the Design Management Plan is it not the case that all comments have to be on the BIW? I can understand if there minor adjustments but minutes of IDR meetings	It is the process in Ian Braziells IDW drive. I'm processing that just now.	Simon Nesbit - No
10	Q6 & 7 Drawing number - 90170-00104 - Rev 6 May 2008, or Rev 12 from August 2009; can you show me any comments, any design review you've done on that design?	There'll have been an initial review, then the IDR - up to 3 different set. I need to go back and get that info.	Simon Nesbit - No
11	Q6 & 7 Can you please clarify that you are working in accordance with the DMP? Or if the DMP isn't that detailed, confirm that to us?		Baltazar Ochoa - No
12	Q7 "request for design change" search in BIW under furthe wordsearch "Depot"	11 found 1-4 relate to VE deletions - BSC to provide	Baltazar Ochoa - No

	BSC to also provide
1	letter ref 4720
2	letter ref 4618
3	letter ref 1893
4	letter ref 2940
5	letter ref 5371
6	letter ref 4136
7	letter ref 3924
8	letter ref 3178
9	letter ref 2792
10	letter ref 2173
11	letter ref 1641
12	letter ref 4791
13	Audit Report - 01.06.10
14	Audit Report - 051012
15	letter ref 4389
16	letter ref 3434
17	letter ref 1896
18	letter ref 1831
19	letter ref 169
20	letter ref 420
21	letter ref 1103
22	letter ref 1100
23	letter ref 1099
24	letter ref 1723
25	letter ref 1680

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letter ref 1637
letter ref 1549
letter ref 1560
letter ref 1373
letter ref 1346
20090405 7A EAL works
07.01.09 Graham Project meeting
letter ref 4255
Drawing number - 90170-00104 - Rev 6 May 2008
Drawing number - 90170-00104 - Rev 12 August 2009 -