

# **Report of Meeting**

Between Representatives of City of Edinburgh  
Council, Bilfinger Berger and CAF

at

City of Edinburgh Council, Waverley Court, 4 East Market  
Street, Edinburgh

on

Friday, 3rd December 2010

**Present:**

Mr Alastair Maclean, Head of Legal & Administrative  
Services, C.E.C.

Mr Donald McGougan, Director of Finance, C.E..C.

Mr Richard Walker, Managing Director, Bilfinger Berger

Mr Antonio Campos, Area Director of CAF

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MR WALKER: We have a few things for you to look at so I hope we can facilitate that. What I would like to do firstly, thanks very much for the opportunity, we have been kind of crying out to talk to somebody for quite a while. What I'd like to do to start with is look at a little bit of the history as to how we got into the contract, what that meant in our interpretation, how the contract was then commenced and how it developed and where we are now, and potentially where we can go forward, okay.

MR MACLEAN: Yes, I should just say we are by and large in listening mode obviously.

MR WALKER: Yes, I am. Hhopefully you will reading some salient points that we have got. I'm not going to ask you to read the whole lot.

MR MACLEAN: We can speed read but not accurately.

MR WALKER: There is some stuff. [Documents sic]. The first one is that in, I suppose you'd call them a paper about "Financial Close and Notification of Contract Award to the City of Edinburgh". Our belief, is having looked at this, is that the members of the Council were

misinformed and it comes down to the section I have highlighted in green, that's the salient bit.

MR MACLEAN: I'll just read that. What is this? "Edinburgh Tram – Financial Close Notification of Contract Award Edinburgh Council May 2008. There has also been a substantial amount of work undertaken to minimise the Council's exposure to financial risk with significant elements of risk being transferred to the private sector. This has resulted in 95% of the combined Tramco and Infraco being fixed with the remainder being provisional sums which TIE Limited have confirmed as being adequate", yes?

MR WALKER: Yes, so all the while I believe that the City of Edinburgh Council must be under the impression that the contract was left with the Infraco price 95% fixed. This is attached to a letter from us to Geoff Gilbert who was TIE's Procurement Director at the time and it basically attaches, this is September '07 so nine months in front of that, but this is [Council Report] the premise upon which our tender was put together. You don't have to read it by any stretch but it is a schedule of clarification as to the contract and you might just like to flick through them and see the extent, and I'll maybe just read one or two of them to see the nature and the kind of things that when we submitted our tender...

MR MACLEAN: Sorry, this is yours

effectively, September 2007.

MR WALKER: Yes, before the announcement of preferred bidder, this is the premise on which we tendered.

MR MCGOUGAN: So, presumably all of this was subject to negotiation after the preferred bidder stage, or during it?

MR WALKER: During the preferred bidder that transferred itself into Schedule Part 4 of the contract. So, that's the start if you like. [Schedule 4].

MR MACLEAN: But this is what we ended up with is it?

MR WALKER: Yes, I'd just like to take you through a couple of salient points on this as well.

MR MACLEAN: So, just summarise for us, what do you think the relevance of the precursor is?

MR WALKER: Well, there is a significant amount of uncertainty about the project. There were caveats too in price fixity in our bid, so in our interpretation it was not a fixed price bid. We were selected as preferred bidder, I think on the 22nd of October 2007, and we then entered into the negotiation to try and either put some money to those and close them out or to negotiate [Clarification] with TIE that they carried the risk for the unknowns all being transferred into the Schedule

4 which I'm sure you have heard of, if not seen.

MR MACLEAN: We have heard and seen it.

MR WALKER: I'm still going to be a little bit laborious if I may and take you through some parts of this. The first one being--what I intend to do today is to try and, everything I say is to try and back up with some measure of evidence for you. Clause 3.1 of this possibly, can I...?

MR MCGOUGAN: Do you want to come round and show it to Alastair?

MR WALKER: Well, I'll show it to both of you. This is Schedule 4 of the contract. Inevitably you know we believe the difficulties on this contract are with the civil partner in the majority, the systems partner to a lesser extent and the tram supplier to very little extent. Let me take you back, the contract, I don't know how familiar you are with it, but the contract comprises 121 clauses and 44 schedules, okay?; and Schedule Part 4 is Pricing which is this one and it starts off "General; Special definitions of this schedule; Construction Works Price". So, if we go to, it's not very well paginated, but if we go to Construction Works Price, 3.1 "The Construction Works Price is a lump sum, fixed and firm price for all elements of the work required as specified in the Employer's Requirements as Schedule Part 2 and the Infraco Proposals as

Schedule Part 31 and is not subject to variation except in accordance with the provisions of this Agreement”.

MR MACLEAN: Yes.

MR WALKER: And then this one, “It is accepted by TIE that certain Pricing Assumptions have been necessary and these are listed and defined in Section 3.4 below”. 3.4, it goes all the way down to Clause 43; s Some of them have multi parts.

“The Parties acknowledge that certain of these Pricing Assumptions may result in notification of a Notified Departure immediately following execution of this Agreement. This arises as a consequence of the need to fix the Contract Price against a developing factual background. In order to fix the Contract Price at the date of this agreement certain Pricing Assumptions represent factual statements that the Parties acknowledge represent facts and circumstances that are not consistent with the actual facts and circumstances that apply”.

MR MACLEAN: So, can I just summarise that, I think what you are saying there is that a fixed price contract but based upon certain factual understandings that were made at the time?

MR WALKER: Yes.

MR MACLEAN: And they can only vary in accordance with the terms of the agreement?

MR WALKER: Absolutely, that's correct, and that both parties knew that the facts and circumstances upon which they were basing the price were not those of the client they would find. So, we were quite up front about the situation and tried to explain it in, not words of one syllable but fairly clearly, that there were going to be major changes ton this because of what the price is based on is not what we are were going to find out there, and for the avoidance of doubt the commercial interpretation is that they notified the departure mechanism would apply.

MR MACLEAN: Can I just be clear that I am acknowledging what you are saying but I am not necessarily agreeing.

MR WALKER: You are here to listen. In addition there are certain exclusions and I will just draw your attention to the first one which is utilities. So, you might say, 'well, where is this, this is a schedule to the contract, where does it sit in relation to the contract?' On that basis I will draw your attention to Clause 4 which is the Priority of Contract Documents and specifically to Clause 4.3.

MR MACLEAN: "Nothing in this agreement shall prejudice the Infraco's right to claim additional relief or payment pursuant to Schedule Part 4".

MR WALKER: Okay, so basically this is

our document. [Action: is at the top of the pile].

MR MACLEAN: Okay, so effectively you are saying that there are rights to vary and the fixed price nature was based upon certain assumptions?

MR WALKER: Yes, now, the thing that horrifies me, just returning back to that note to the City of Edinburgh Council, is that that ~~acknowledges~~ states that it is 95% fixed price. ~~;~~ In my belief it was about 45% fixed price.

MR MACLEAN: What do you think that means? Do you think that is just a misunderstanding or do you think it has a greater significance than that?

MR WALKER: Potentially it has a greater significance than just a misunderstanding. I'm of the belief that both sides were aware that at the end of the day this contract could significantly increase in size and in the timescale and scope because of the detail of what is in these schedules which I'm sure you can get access to and look at; and if you recall from a minute or two ago, it said that certain of these Pricing Assumptions may give rise to a notified departure immediately upon execution of the contract. ~~;~~ And that was essentially because during preferred bidder, which we got on 22nd of October, we were trying to give some price fixity, that's what TIE wanted. ~~;~~ And the amount of new information coming from the designer, which was under the control of TIE at the



time, and had been for two years plus or whatever, it was in the order of up to 20 new drawings per day. We just could not keep pace with the level of new information that was requiring re-pricing. So we agreed with TIE that we would have a cut off date at which the pricing would be measured up to and, a mechanism to adjust it thereafter for change. That cut off date was fixed at the 25th of November 2007 and at the time we had a design delivery programme called Version 26 which was the SDS's design programme. Our construction programme was based on delivery of information for construction that was given on that programme. By the 14th of May when the contract was awarded the SDS were up to Version 31 of their programme and the [Delivery] dates had slipped somewhat, and that is the incidence that is referenced in here where some of the Pricing Assumptions may give rise to a Notified Departure immediately upon execution. Why? As soon as you sign it there is a variation there, and what had happened between the V26 and V31 is slippage of the design delivery dates, so that meant, in the construction programme we basically had the issue of a piece of design information for construction, so it had gone through its technical approval, its planning approval, issued to us ready to build. From the date of issue of that, a four weekly lead in period; we prepared method statements, safety statements, procurement planned temporary works, materials etcetera and

then we started. So, any slippage in this issue for construction dates slips the start of our construction works start, okay?

MR MACLEAN: Yes.

MR WALKER: It's not unfortunately, with the constraints in here, it's not always the fact that if that date slips a week the construction date slips a week because we have certain embargo periods – Edinburgh Festival, Christmas shopping in various parts of the city etcetera. So, it could be that something slips say two weeks and it puts the end date of that activity into the embargo period.

MR MACLEAN: I understand the practicalities of that, yes.

MR WALKER: So, on or about the 27th of June we assessed the implications of this, ~~and~~ I was in the contractual requirement of having regular meetings with the Chief Executive, myself and colleagues of course, Willie Gallagher at the time, and we submitted our, I have to call it a claim I suppose, I can't call it anything else really, for delays associated with the slippage on the design from Version 26 to 25th of November and we submitted in the period of 45 working days, okay?

MR MACLEAN: Yes.

MR WALKER: The first thing that Willie Gallagher said was “I cannot possibly go back to the Council and

ask for more time and more money within a few weeks of awarding this contract”.

MR MCGOUGAN: How much was the claim Richard?

MR WALKER: I'll come to that if I may very shortly. I can't possibly ~~come-go~~ back to Edinburgh City Council a few weeks in when ~~we-you~~ haven't done anything apart from put a few notices up, put up some fencing and you haven't put a shovel in the ground, and at this stage I said “Well, I understand, you know, the political pressures, ~~we're-we will~~ working away on it, working away on the rest of the job as best we can over the summer period and then we'll try and sort it out”. Before I get on to the money Donald, we put in for 45 working days. TIE's response to that was five working days and they predicated that on instructions issued on the 11th of July 2008. So, it is acknowledged in here that the claim might be applicable on day one 14th of May. It took us 'til the end of June to calculate what it was, we submitted it and then because of instructions issued some two weeks later TIE said you haven't got any entitlement. ~~-a~~And that ~~[Gentlemen]~~ isn't quite the way it works. It may be, in my experience and judgment, ~~-is~~ that entitlement was due on day one, we should be awarded that entitlement and then if there's another instruction that comes some time afterwards that draws things back in, then that's a

negative variation.

MR MACLEAN: Okay, but your argument there is effectively your claim was made timeously and, therefore, it should apply. Okay, I understand the point.

MR WALKER: Yes, the mechanism for change in here, and this is where we've come to a lot of the problems, essentially it requires under the contract that any claims or variations are agreed before the work is carried out. In the case of our extension of time that doesn't really apply but it has a knock on effect to other changes shall we say. What actually happened with that extension of time claim is it took seven months before we got agreement of the time with TIE, and we agreed 38 days and it then took a further seven and a half months before we got agreement on the money which was about 3 point something million overall between the three of us – Bilfinger Berger, Siemens and CAF.

What happens with the change mechanism is that you only get one shot at working out your estimate. The aim is to try and do it within 18 days but, there's a mechanism in here which allows a further extended period to be agreed in circumstances which justify it. Basically, if we have this extension of time claim which is valid, because we've got 38 days agreed and a sum of money agreed, until we know what time you we are going to be awarded, in that then if there is a subsequent variation we can't

judge what ~~the~~ its' time element will be until we know what the first one is. ~~a~~ And it became very, very difficult as we were looking through this as to how we address the time. There was quite a period where, and it became so manifest that it was almost, almost impossible, I'd say it was impossible with the resources that we had available and anticipated having available to actually calculate these claims within 18 days in respect of the time element. ~~There's~~ There is a mechanism for extending that period, and every time we have asked, and on all but four or five occasions we have asked within the requisite five days, for an extended period of time, and on every single one of those occasions our request for an extended period has been rejected. So, we're left by the time we get to even the period where the first extension of time claim is agreed, [7 months], we're left with more than 200 variations on the table with estimates that are not fully prepared because they've got time elements in it. [Which cannot be overlooked]. There are some where we haven't got ~~\*\*\*~~ direct work cost element because what we tried to do was prioritise resolution of these not so much in a sequential order but in the order in which they affect the programme but, of course, they got raised as we found them as we are bound to do. So, we started [tie/Infraco] getting into a mess in terms of the management of changes.

MR MACLEAN: And fairly early on by

the sound of things.

MR WALKER: Yes, extremely early on.

MR MCGOUGAN: Can I take you back a wee bit Richard?

MR WALKER: Yes.

MR MCGOUGAN: You showed us the Letter of Conditions and then Schedule 4 which is the Contract Close. There's quite a significant adjustment in price between the initial bid and the Contract Close. Can you tell us your understanding of what that adjustment in price was supposed to be for?

MR WALKER: Well, essentially if you try and do a read across, as I'm sure you will in time, you will see that a number of the clarifications have transferred directly across and a number of them don't appear. Where they don't appear is because an agreement has had been reached in terms of who carries the responsibility. If we carry the responsibility, if something is able to be priced, if further information has come through during this process we will attempt to price it. That's gone up and down. There's one that went down, there was the omission of a retaining wall on the A8, we knocked out £3.2 million. The stuff came in [information] and the price went up. There are elements in terms of carrying the design risk where the money went up slightly, the money went up a lot and we carried

part of that design risk but we didn't carry it all, and that I believe is one of the misnomers and that's why it hurts me, not as much as it hurts probably you and the people of Edinburgh, this was put across as being 95% fixed price apart from the provisional sums. The provisional sums were in there, value engineering was in there, but again the caveats [with VE] were if certain conditions weren't met, particularly in terms of approvals of third parties and they weren't met in time for the design to be varied, bearing in mind the length of the technical design and then the technical approval and then the planning approval and the process which we'll talk about later, that has been gone through and that is still going through. If these conditions weren't met then the ~~value~~ Value engineering ~~Engineering~~ couldn't be applied because we needed to build the job.

MR MACLEAN: Presumably the feeling of both parties then was one of uncertainty?

MR WALKER: Well, not at the time because I had quite a good relationship with Willie Gallagher, and when Willie said "Look, I can't possibly go to the Council and ask for more than a million now ~~in~~ and X weeks that you are looking for when you haven't done anything", so I said "Fine, I understand the political situation, we will work in good faith in a grown up gentlemanly fashion over the summer and then once we've got, you know, some cranes ~~ø~~ and some pilings going in

and diggers in, and concrete in the ground we'll sort all this out".

So, we started;

WWe started in Leith Walk, and the one pricing exclusion we'd like you to look for was the utilities, and there is one more clause that I'd like you to look in here which is the Access Clause and this is 18.1.2.

MR MACLEAN: "TIE grants a non-exclusive licence to Infracore to enter and remain upon the land for the duration of the term and an exclusive licence to Infracore to enter and remain upon a designated working area for the duration of time required, for completion of the works to be executed". So, it's a mixture of a non-exclusive and an exclusive licence, yes.

MR WALKER: Yes, okay, in the early, and this is Leith Walk, this is October 2008, the area designated in black is what we term the designated working area for that section of Leith Walk and it's a separate programmed item on our construction programme between chainage, whatever it is, 100 and 2150, so it's a 250 metre section. Theoretically we are entitled to have exclusive access to that.

MR MACLEAN: Okay, that's fine.

MR WALKER: You can see the bits highlighted in red are the bits where we couldn't go because the utility contractor was there.



There has been in my opinion no co-ordination between the utility contractor and ourselves at all.

What we did because, you know, Willie had asked me to work in, you know, a gentlemanly mature fashion over the summer period, we went in there and tried to work. It ended up where we couldn't even get...

MR MACLEAN: So, in summary you are saying that part of the area that you are meant to have an exclusive licence over you couldn't get in because the utility provider was there?

MR WALKER: Yes, rather a large part in actual fact, but what we did, the bits that we could get into are in these two blue areas. We couldn't get into here (indicating) because of a Scottish Power connection, that's another road, Manderson Street, and what we also found was a lot of minor utilities, each of them maybe costing £500,000 to put right, but notwithstanding that, they needed putting right, they're in the way, they weren't in the utility contractor's brief to relocate them and that will bring me on shortly to another issue going forward if you like, but neither were they included in our contract price as per the specific exclusion. So, we started working, we started relocating them. We identified that what happens when we find something that is the subject of an exclusion or a Pricing Assumption is: theoretically either party can generate a notice of

TIE change. If we generate it it's called an Infraco Notice of TIE Change and if TIE do it's just a Notice of TIE Change. So, we generated these and carried on with the work. According to the contract we're not supposed to, [carry on with the work], we are supposed to get each and every one agreed in terms of direct works impact and the time impact before we start work, that was is what the contract requires, so we're actually in breach of contract but the arrangement, the understanding I had with Willie Gallagher is it was an impossible political situation for him over the summer months and we got on with it. We get into the end of September. I meet again with Willie after the summer holidays and I said "Willie, this is getting ridiculous, we're spending money like it's going out of fashion". We are submitting the Notice of the TIE Change and the problem we are getting, is the complete rejection by the operating levels in TIE, for want of a better description, the guys on the ground, the Construction Director and downwards, complete rejection that there is a change at all. We are getting our applications for payment rejected and we're getting to the stage now where the cost of the actual works done is falling or is getting greater than the value of the works we get. Notwithstanding the mobilisation payment which I want to talk to you about, if we have the time to do that.

MR MCGOUGAN: We want to spend time

on the way forward Richard.

MR WALKER: Yes, but this went on, and to cut a long story short I said to Willie at the end of October, another month gone by, no acknowledgement, and that was the main thing, no acknowledgement of any entitlement, but he needed now to get his house in order such that we could invoice, put an application in at the end of November to bring us back up to speed by the end of the year. By which stage we had had the contract for seven months. This he promised to do. Three weeks later ~~that time was up~~ he resigned. We then had Mr MacKay ~~came~~ come over for a while, big arguments, not a penny more, it's a fixed price contract etc. We sort of said well, we don't believe it is and we are going to have to open it up, [the Cutworks], and start working to the letter. That is when we ended up with the Princes Street debacle, but what I'm trying to say here is that we started off in good faith trying to do all these bits which quite clearly from what I have shown you today are not within our price, we've just had no acknowledgement of them. Okay? tThe situation just really went from bad to worse with little or no acknowledgement at any time of any entitlement that we had got.

MR MACLEAN: Yes.

MR WALKER: We tried over Princes Street, we managed to get an agreement on a way forward to

overcome the change mechanism in here. We still haven't got that resolved, the thing has been not completed, not attempted to be handed over, or finished but open to traffic, we pulled off basically a year ago and we are still in dispute with the contract with TIE over the monies due, But the biggest issue that we've got, if you like, is one of not dealing with the problem. We've had something in the region of 700 changes. I'd like to show this you first really, Time line of Change. This represents, basically this is the on-street section, section 1a - 1d, that's starting down at Newhaven and coming down to Haymarket.

MR MACLEAN: Sorry, what we're looking at, this is a GANT chart is it, a programme, a chart of the various sections? Showing changes.

MR WALKER: Yes, this is the time lag across here, this is the current end of November ones here. What the colours represent is, the red is an issue date of the Infracore Notice of TIE Change. So, contract order here, and once we started getting into the document and finding stuff [Changes] we started issuing them. The green is where we have a TIE Notice of Change, so we've got a price estimate agreed and this is the time lag, okay? The orange represents Unresolved Notices of TIE Change which is about two thirds of what we've got.

MR MACLEAN: The red ones are the ones

that you guys have issued and the green is when it's effectively been agreed?

MR WALKER: Yes, and the orange is if it isn't agreed yet, and there are various reasons, it's not 100% TIE's fault, we're not lily white.

MR MACLEAN: Yes, just on average, just help us out here, what do you think the gap is between the red and the green?

MR WALKER: There's an average of 411 days to resolve anything and that's increasing by the day because these remain unresolved [the orange] and this is two thirds of it. This is the off street section which goes from Haymarket down the railway corridor out to the depot, and again these orange ones represent, this is now at the end of November and these are still unresolved.

MR MACLEAN: So, an average for the off street section...?

MR WALKER: So, the average is overall, I haven't worked it out for the off street. There is on the bottom here, there's a table which tells you the detail.

MR MACLEAN: I think what you are trying to tell us in summary here is that there is a delay between you...

MR WALKER: It's not so much about the

delay, it's about the management of the change process. The change process has just plainly not been managed. It's not the right change process, this contract...

MR MACLEAN: I was going to ask you a question here. What's the reason here, is the reason it's not being managed by either party or is the reason that it's just a cumbersome change process which doesn't actually fit the practicalities of the job?

MR WALKER: It's both, it is a cumbersome process. This contract is basically a take off from a PPP contract. I have a PPP contract 40 miles down the road on the M80 at 277 million, I think we've had three employers' changes and I think we've had four contractors' changes and that's what this mechanism is designed to do. eg. 'Can we build a bridge in steel rather than reinforced concrete?' Well, what is the cost implications, what is the time implications, get it all agreed up front, get it identified early on and then it's a yes or a no but it [the Cutwork] doesn't cope with stuff like this [Changes].

MR MACLEAN: I don't want to put words in your mouth but let me try, is it your feeling that the contract is either not right for the job or just not workable, what is your thinking around that contract?

MR WALKER: It's the wrong contract for

the job in my opinion. Having the, I was going to say a layman's knowledge, but I'm not really a layman, I'm an engineer, but if anybody had any experience of digging up the streets of Edinburgh or any city they would recognise that this change mechanism is not adequate for what it's intended to be, and there were various iterations between myself and Geoff Gilbert. I've tried to modify the change mechanism but unfortunately all this lot was agreed with me and my lawyer and TIE and their lawyer four ways across the table – no disrespect to your profession. I'm sure the TIE Lawyers will say that what TIE haven't done is manage it properly, but there are mechanisms in here to facilitate a swift process through any change and that is basically if I say that 'that is changed with that' in my opinion the client would say "Yes, I agree, what's the cost and time implication?" and I would say "Well, that's going to cost me £40 and take me an extra day". Now the mechanism will be "I agree it's changed, I don't agree that it's going to cost you £40 and take you a day. Let's run through the official dispute in an amicable fashion. I'll give you an instruction under Clause 80/15 to progress the works on a demonstrable cost basis while we sort out our differences". In that way the project should then work, you would have a tram here.

Where's there's a cul-de-sac for want of a better description in the contract is when I say "I believe that that is a change from

that” and you turn round and say “No, it isn’t” and then there’s nowhere to go. ~~b~~Because I believe it is, [a change], quite firmly believe that it is, I mean I consider what I’m looking at, I still think that’s a change so I try again to persuade the client that I think that’s change. ~~h~~He says no. I can’t, in terms of the contract where a change is notified and it comes in, I’ve forgotten what the words are now, but there’s a mechanism in the contract that does not permit me to build it until we’ve got the ~~change over~~ change order. So, if I am firmly of the belief that I’ve got an entitlement I can’t actually go on and do it. ~~and it’s~~ this ‘no it isn’t, no it isn’t’. [That is the problem].

MR MACLEAN: So, your concern isn’t so much you think the contract covers issues around price and time delay where there’s an agreed change but it doesn’t actually cover properly or at all where there’s a dispute around whether or not there is in fact a change?

MR WALKER: That’s correct, that’s the whole cul-de-sac or whatever you want to call it, and the way, my way, would be, of managing that is to just accept that it is a change and value it at zero or value it at a pound and then there’s a mechanism to sort out the evaluation of it through the official dispute mechanism and that could be done quite amicably. There doesn’t have to be antagonistic, aggressive disputes, it just basically means you are going to rely on either a third party to



help either through mediation or adjudication or whatever.

MR MACLEAN: Where do you think we are right now, right this second? I suppose there's two parts to the question, one is relationshipwise and just generally and, secondly, where do you think we are in relation to the designer programme?

MR WALKER: This is a graphical representation of the route, sorry, wrong way round, and again I've tried to use the traffic light system, that one goes on to there, okay?

MR MACLEAN: Right, we've got basically...

MR WALKER: This is Princes Street, Haymarket, it then comes down the railway corridor, Edinburgh Park Bridge, depot and out to the Airport. The traffic light system, the green ones are changes which are agreed.

MR MACLEAN: Are agreed?

MR WALKER: Yes, the orangey ones are ones which are unresolved, the blue ones are partially agreed so we may have the price agreed but no time. The red ones are where they have been rejected by TIE in principle, and the yellow background boxes are where even though we've got some changes, they have rejected them or, unagreed, we have, up until the 1st of October, we have proceeded with the works to try

and get the job built. That includes the whole of the depot, there's a significant amount of change unresolved and a significant amount of change completely rejected and the depot is almost complete. Edinburgh Park Bridge, A8 underpass, Carrick Knowe Bridge and Russell Road retaining walls.

MR MACLEAN: So, basically what I see there, that plan there is showing me an awful lot of oranges.

MR WALKER: Yes, unresolved stuff, it's the same as on the time chart.

MR MACLEAN: Okay.

MR WALKER: So, that's still not sorted out two and a half years into the job. ~~It~~We essentially adheres to the contract, as I said we are, now because of the situation we've got into, almost no work is going on and that's the problem, and we have felt pushed.

MR MACLEAN: I'm sorry, why is there no work going on, what do you think the reason for that is?

MR WALKER: Well, if there's a change then the contract requires that the change is agreed unless it's been tested through adjudication, that the change is agreed, the estimate is agreed and the change ~~over-order~~ issued prior to the works starting. ~~a~~And that's really the throwback to the contract being taken from a PPP where the client wants to know the implications of the change before he decides to spend money.

MR MACLEAN: I've got that, but if you can just bear with me, because I don't want you to see this as an awfully difficult question but I'm just going to ask it. There are some greens there, what's the status of the few greens I can see there?

MR WALKER: Well, let me say that last month, even in this crisis situation, we undertook over £3 million worth of work. We'll do the same in November, when I say last month we're just into December. In October we undertook over £3 million worth of work. In November we were doing about £2.8 million worth of work and we're still working.

MR MCGOUGAN: Is that mostly at the depot?

MR WALKER: We're still working at the depot even though there's so much change.

MR MCGOUGAN: I'm just trying to get an idea of the scale that we're working to Richard, so is it mostly the depot?

MR WALKER: No, it's mostly the depot, mostly the depot and partly we're doing that to work with our colleagues. Antonio here has got 20 odd trams built and in storage. Siemens have got miles and miles of track that they want to put down. So, we're working to let Siemens put the track down in the depot and he [Antonio] can bring his trams

over, it helps Siemens along the way. They have a different spend profile than we do. They outlay for their equipment before they get paid but because of the breakdown if you like with TIE where we have a change which is not agreed and is not going through the dispute process we've stopped because we just need to get a resolution really. We are somewhere in the region of about £20 million that we believe we are entitled to as we sit now and then futurewise there's significantly more if this thing ever gets built all the way. So, we need to resolve the impasse of where we're going with this.

MR MACLEAN: Okay, thank you, that tells me where you think you are in relation to the programme. What do you think the relationship is between the contracting parties, between the consortium and TIE?

MR WALKER: Well, let's just look at the ways forward. One way forward is to continue as we are which would mean grinding it out and that is working to the letter of the contract, resolving our differences through external or, it's an internal followed by an external dispute process. That takes time and costs an awful lot of money and there are issues with that which I want to show you as well. The other way is to agree with the client exactly what they want and fix the price as far as it can be fixed because most of the issues are now resolved. There are three risks if you like which we don't feel able to take

which were always in there, and one of those is the time taken for stakeholder approval bodies to actually approve which is a major, major problem. The other one is contaminated ground. We don't know what's there but we have just had a ruling this week on the contaminated ground, so that should unlock anything like that and will basically be in our favour on that one, and the third one is the utilities. In terms of the utilities you've conducted in Edinburgh a multi-utility diversionary framework for want of a better word, initially with ~~CAF~~ Carillion and drilling them out and although you have finished with them, ~~and~~ you have still got two contractors there. When those utilities contractors undertook to divert the mains out of the path of the trams, what they didn't do was address the domestic mains. What I'm going to show you here is a section from Lothian Road to halfway round Shandwick Place, 389 metres, and these, that is Shandwick Place (indicating), you will recognise that, and it comes through and gets up to near Lothian Road.

MR MACLEAN: I'm assuming that's the worst section is it?

MR WALKER: It's one of the worst, yes, but I would say particularly if you went further down [towards Leith] that's reasonably typical, that is certainly very bad. For each one of these the utility has still to be moved and as a utility which is still to be moved it was excluded from our price. That

gentlemen [Utilities in Shandwick Place and Lothian Road] I would suggest is four to six months work and several million pounds, and to get on to the on-street and take the risk of doing that in terms of the time and the money is just something that we couldn't take up, that's why it was always excluded [from our price] - and ~~f~~For each one of those [conflicts] there is a schedule which actually details the nature and extent of what this-it is, and this [Schedule] basically is 24th of September, so a couple of months old.

MR MACLEAN: Can we cut to the chase and ask maybe two questions. The first one is what do you want to achieve and the second is what do you think is achievable?

MR WALKER: Right, in terms of what we want to achieve, I mean we came to build a tram and we didn't necessarily come here to build a new road system for Edinburgh, and nor did we come here to upgrade all the utilities, albeit we knew we might have to do some of it, but we came here to build a tram. We would like to build whatever the City of Edinburgh wants us to build but we don't want to build it for nothing and we certainly don't want to build it for a loss. We are what you would call a PLC Company based in Germany and it has shareholders and our job is to, our first job is to make sure that all our workforce and interface people, public, whatever aren't injured by what we are doing and get home safely. The second

thing is to make a return for our shareholders, the third being to give the client what they want and we'd like to build something, that is what we came to do. We don't want to get thrown out of here, it doesn't do anybody's reputation any good, whatever we do, rightly or wrongly, it doesn't do the City of Edinburgh or ourselves any good if this contract is terminated, but the primary thing we want is a speedy resolution. Things are getting dragged out and dragged out and dragged out even to the extent of the Council Leader two weeks ago called for an emergency motion in the Council for mediation between the parties. I've now written to Richard Jeffery three times requesting a meeting and suggesting what we should talk about, what we can possibly mediate about and all I've had is rejection, rejection, rejection and we haven't got the time but I do have the letters here. That's two weeks ago, nothing has happened apart from us trying to suggest ways to go forward. So, we've had initiatives over the last 12 months, we've had initiatives over an on-street agreement to get things going. We've had initiatives over trying to get an agreed programme between us, and in both of these initiatives we've worked closely with TIE's operational people, and the answer pops out at the end of the sausage machine "It's not right and your initiative is rejected", and yet they're joint ~~job's~~ initiatives which were decided at a meeting at the Novotel out by Edinburgh Park with Richard Jeffery and his people and my

boss and our people. So, we want a speedy resolution because going through the dispute process is killing us. TIE have told the Council that they've saved the public purse £12 million – they've probably cost it £20 million in terms of the time it's taken, plus whatever it's cost for the legal fees – £12 million I can't reconcile anyway. When we put an estimate together we basically get one shot at it so we look at the information we've got and we make an estimate. Typically what is called the rolling problems is retaining walls down the railway corridor because Network Rail required an emergency access track between their rails and the tram so the retaining walls got bigger and heavier. On the drawing from the designer it showed temporary sheet piles to support the existing railway embankment. There's a note on the side saying "Temporary piles may be required depending on the ground conditions. No ground investigations ~~will be had~~ been undertaken before the award of this contract" which was criminal really. So, we put our estimate in and we have included for these sheet piles. When we get access we go in and we dig and we find out the actual nature of the soils and what they will support. We can adjust our estimates and we have adjusted all those estimates to take out the sheet piling to prop up the existing rail embankment walls because ~~they~~ it didn't need it, that's probably saved 4 or 5 million against those estimates anyway. I don't believe that's



~~taking~~ taken into account, our own ~~excesses~~ process. [In reducing the estimates].

MR MACLEAN: Okay, I think seriously we've got a feeling for where you and we know where TIE is so what do you, if there was a fairy godmother out there and you could suddenly get whatever you wanted, what is it you think you guys want and what do you think is achievable?

MR WALKER: We want to build it but we want to build it for a client who's got a Project Manager who know what they're doing and is trustworthy. We have zero trust in TIE, we don't want to work with TIE. We'd far rather that you employed somebody like...

MR MCGOUGAN: Sorry, you've got the contract with TIE?

MR CAMPOS: I want to say something about that.

MR MACLEAN: Yes, just where are you?

MR WALKER: I believe the contract is grinding through the dispute process.

MR MCGOUGAN: We have all that.

MR WALKER: What we would like is to deliver a tram system for you but we think you need another Project Manager to do it.

MR MACLEAN: What do you think is

achievable?

MR WALKER: I think you've got...

MR MCGOUGAN: Does that mean another contract? I'm being stupid here, does that mean another contract, you've got a contract with TIE so...

MR WALKER: We could tear that up and write a new one if you like.

MR MCGOUGAN: We were asking what you wanted so...

MR WALKER: Well, there's a process in here where TIE can assign that contract to whoever they want.

MR MCGOUGAN: So, you want them to assign it to the Council?

MR WALKER: Yes, because we don't trust them I'm afraid, plain fact of the matter, and there's much evidence around, not the least that we have shown you that somebody has told the Council it's 95% fixed price when clearly it's not and it never was.

MR MACLEAN: Okay, to be fair I've had two things, one I certainly hear what you said about TIE there, we'll reserve our position. The other is that the contract was or is potentially unworkable.

MR WALKER: It's unworkable with the people that we have, and we would be prepared to change people

as well although it should be noted that both Siemens and ourselves have changed our senior site people just in case it was a people clash.

MR MCGOUGAN: Yes, but you did say it wasn't suitable for the type of project.

MR WALKER: No, it's not suitable, and I will-would be having stiff words with the guys who put that on the table but it's not for me to say. It's basically a modified PPP contract.

MR MACLEAN: So, number 7 of your Agenda is way forward. So, I'm guessing you've come here with a sort of idea as to what you would like to be the way forward so just tell us what it is?

MR WALKER: Well, if we can come up with an agreed scope to go forward which we couldn't agree with TIE under their project Carlisle initiative, we couldn't even agree the scope. We couldn't agree the timescale, but if we **can** agree a scope and a timescale we can then agree a price and we can then build it, but there will still be three risks which we would take and that would be: the approval sequence. (With respect your Council Planning Authority is still trying to spend money like they've won the lottery. We've got the subway through from Murrayfield Stadium to the tram stop. We proposed a solution that would cost £50,000 and they're insisting

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on something that was going to be £650,000. Two weeks ago they changed their mind, a week ago they changed their mind again and it just goes round and round and round in circles.)

MR MCGOUGAN: Yes, but is the design now Richard in a state that would allow that risk to be taken away? You didn't mention that as a risk other than the approval.

MR WALKER: It's the approval that's the real risk element.

MR MCGOUGAN: The design's finished?

MR WALKER: We've got a completed design, 2,477 drawings that we have put on the table to TIE but they're not all approved by the City of Edinburgh Council.

MR MCGOUGAN: Okay, so it's a completely integrated design?

MR WALKER: Yes, but it hasn't got the approval (of the Council) and that's what the problem is.

MR MACLEAN: The approval of, sorry the Planning Department but presumably it hasn't got the approval of TIE, or has it got the approval of TIE?

MR WALKER: No, it doesn't get the TIE approval (until CEC approve it) so in a way, yes, you have theoretically but, in actual contractual terms no you haven't because they (CEC) haven't got the approval in place.

MR MACLEAN: And is that completed

design fully costed and timed?

MR WALKER: Yes.

MR MACLEAN: It comes as a complete programme costed and timed?

MR WALKER: Yes.

MR MACLEAN: When was that, can you remember the actual date of that, do you remember?

MR WALKER: When we undertook it yes, but it was unfortunately never accepted by TIE. This was the Project Carlisle initiative which started up in April. We submitted a first bid, okay?:-

MR MCGOUGAN: Against a completed design programme and time, yes.

MR WALKER: But this was only to Haymarket, which was what we were asked to do.

MR MACLEAN: Sorry, hold on, this is the original proposal it says here, is that as per contract or as per something else?

MR WALKER: We were asked by TIE and Tony Rush.

MR MACLEAN: Sorry, Carlisle?

MR WALKER: Yes, Project Carlisle, to put a guaranteed maximum price together for the Airport to the east end of Princes Street, including all the work we had done

already and that was our price, but we said when we submitted it...

MR MACLEAN: 433 million, okay.

MR WALKER: Yes, that's for the three of us. We said when we submitted that that we hadn't had time to negotiate with our sub-contractors and we would do that. So, we did that, we negotiated with our sub-contractors and we then...

MR MACLEAN: And it comes down to 405?

MR WALKER: Yes, down to that. Yes, TIE acknowledged receipt of these but that was it. They came back with    - not really a counter proposal because they didn't reference these at all, they came back with this figure. (Pointing)

MR MACLEAN: £262m?

MR WALKER: (Then) ~~T~~they subsequently altered the scope.

MR MACLEAN: £269m?

MR WALKER: Okay, and then verbally we've had that off them. (Pointing to price of £311m)

MR MACLEAN: So, in September £311m, so the difference effectively is your latest proposal of £405m and TIE's latest proposal of £311m?

MR WALKER: ~~And~~ Apart from the fact it's never been confirmed in writing, only verbally.

MR MACLEAN: And that's from the Airport to the east end of Princes Street?

MR WALKER: No, this is the Airport to Haymarket.

MR MACLEAN: Right, so your £405m is the Airport to Haymarket and TIE's £311m is...?

MR WALKER: Is to York Place.

MR MACLEAN: The Airport to York Place?

MR WALKER: And that's why we have never agreed the scope or agreed the programme and that's what I'm hoping that this( new) mediation, if it ever takes off we can do. Let's agree a scope between us on what can actually be done but agreeing, not have us, you know, them saying they want more and more and more each time we meet, let's agree that's the line. If that can't be agreed or if City of Edinburgh feel that they can procure it a different way or elsewhere, we'd be very happy to hand over sub-contractors, hand over what we've got to facilitate it and even get someone else to do it. We'd not be looking for loss of future entitlement because it's been taken away.

MR MACLEAN: And has there been a conversation around a sort of walk away point?

MR WALKER: I've had a number of

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conversations with Richard Jeffery but never really got to anywhere. What we are getting is that new TIE is going to terminate our contract and if they terminate our contract we will fight tooth and nail as hard as we can for future entitlement as well, but we don't want to do that. We'd rather build it. If we can't build it for the money that City of Edinburgh finds acceptable we are willing to try and help for you to find somebody else and transition our project management skills out, utilise our sub-contractors', use TIE to manage them, various ways.

MR MACLEAN: So, the options you have mentioned there are, were/are, don't know which, grind on, build out in part *question mark* around what that part is and what the cost is, and a third is a walk away?

MR WALKER: Yes.

MR MACLEAN: And it sounds like the walk away is maybe the least developed of those three, have there been any conversations around a walk away to or by price?

MR WALKER: Not insomuch as discussion on the price. We've had internal discussions about it. I mean the price is developing in three ways for ourselves which is basically to recover the position as is now. You are probably aware we haven't had prelims since March, which is going through a dispute and we are quite happy to allow those disputed

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items to be decided by a third party, by an Aadjudicator. We have then got, dependent on which way it goes forward, is risks against our supply chain, our sub-contractors, they've had certain delays. Now, if it went forward that TIE took them on directly to undertake the works that would disappear in relation to delay and disruption because they will have the contract directly with TIE, and then so we have profit so it comes into three elements. Siemens are slightly different because they procure the equipment and pay for it and they can't make an application to TIE until it's bolted into the ground, if you like. So, they have the same as us but they have an equipment cost and that comes down into two parts. There's a generic equipment cost which anybody could use and there is Siemens systems specific proprietary stuff that isn't compatible with someone else, that is you know take computers ~~screens~~ and so on, screens and keyboards are probably faring better ~~than the keyboards~~, but the actual ~~ba~~ docking stations for your laptops even today shows...

MR MACLEAN: At the risk of a gross over simplification here though I think when people talk about a walk away, or we talked there about a walk away, is that a get the payments up to date so to speak and take on the risk of the sub-contractors?

MR WALKER: Yes.

MR MACLEAN: As a walk away at that,

right, so I understand that one.

MR WALKER: They're not big sums for Bilfinger.

MR MACLEAN: What numbers are you talking about there?

MR WALKER: Bilfinger itself is probably about 20 million and you've got whatever the sub-contractors, maybe another 10 for the sub-contractors.

MR MACLEAN: So, walk away is say 20 or 30 million. So, that's one figure on the table, one option, and the other option effectively is an extension of Carlisle if I can put it that way?

MR WALKER: Yes.

MR MACLEAN: The other one is termination and the other one is grind on?

MR WALKER: Yes.

MR MCGOUGAN: And Antonio Tony wanted to say a few words I think.

MR CAMPOS: We beat Siemens and were selected as preferred bidder for trams and ~~Siemens~~ were to be a sub-contractor for the consortium. During the negotiations it was decided that we would join the ~~construction~~ Consortium so we could have our work load arranged for our own purpose which we did, and we joined in contract at the negotiations and it

is not part of our scope, Siemens is a contractor, so we have a strange position, we are sub-contractor and also we were on the consortium. Because our work is about a factory mainly we haven't been so much experiencing all these problems mentioned here. We have suffered the consequences of the delay but during the negotiations between TIE and all the parties agreed that the trams shall be manufactured in a very professional way and everybody is playing their part, and when we negotiated the terms of our general construction work it was foreseen that termination of some kind of contract may happen and that was supposed to be related--re-novated back to TIE in case this happened, because as I said everybody is happy with the scope, that is what we are doing just now on the table and that is our target to deliver our part as a sub-contractor of TIE or whoever who takes the contract over.

MR MCGOUGAN: So, your preference if things are terminated is to release various things back to TIE?

MR CAMPOS: Sorry, yes, and it would maybe simplify negotiations on the future for work if our sub-contract is related back to TIE and is clarified for all the parties.

MR MACLEAN: Okay, I appreciate that Siemens aren't here. What do you think Siemens' position is, dangerous to ask you to speak for them I know, but with that heavy caveat?

MR WALKER: Their equipment costs I understand are around the 40 million mark. Their walk away costs are likely less than ours, they haven't got so many people and they haven't done as much work. If the tram system is built in Edinburgh the vast majority of it will be used but we really want to try and build something, that's the thing. The grinding out isn't favourable, it costs us approximately £90,000 per adjudication. If you adjudicate over something and quite often have to go through two, when Mr Jeffery came he said "I find it impossible to make judgements on this and we'll get some third party views. So, we'll use the adjudication process or the dispute resolution process and we'll try some major principles, get those agreed and then hopefully the party which is not successful will accept that it is in the wrong and move forward". The first two on principle that he raised are Gogarburn and Carrick Knowe. Gogarburn I think we got 12 out of 14 points adjudicated in our favour and at Carrick Knowe we got 8 out of 12. We then resubmitted our estimates for those taking account of the points where we thought we hadn't got the adjudication in our favour. I think Gogarburn we submitted on something like 220,000 and TIE came back with an offer of 1% of what we got or what we put in, and that went through another process to try and get a reasonable amount and I think we got another 180,000, but by that stage we had spent 180,000 on external legal and expert

witness costs. So, it's not a satisfactory process for us, you can't get your costs back of adjudication. It takes time, typically if you have to go through a dual process like that it can take six to nine months in simple form. The dispute process is running into three to four months anyway. The latest round, the last four disputes that we have raised TIE have forced mediation on us which is the default position if we can't agree.

MR CAMPOS: I think my view is that the cost to bring it to dispute is introducing costs and delays far higher than what it's actually saved or discussed.

MR MACLEAN: Yes, I understand.

MR WALKER: It's a war of attrition, payments have been stopped, we don't understand why, we have gone to adjudication. They've deducted landfill tax from us which we felt was incorrect. That was forced to mediation, that failed, we went to adjudication, we won completely. That's probably over the course of the project it'll cost over £8 million. It's worth taking from our point of view but it's cost probably quarter of a million, half a million to actually reach that position which I'm convinced, having sat across the table from you for an hour and a half, that even looking at the documents and say yes, they're right and I don't enjoy having... The contract affects both of us the way it's been administered, most of the disputes I feel that I am going to win on. I don't like winning because at

the end of the day the poor people out there have to stump up some more money. The understanding was that this was fixed at 95% and it was left, and if research had been done on Nottingham tram and Manchester and Croydon the average prospective costless would have been quite apparent. Neil Scales who sits I think on the Tram Board, had similar difficulties on Mersey tram, realised the cost of the tram system for the city before they actually started work, and cancelled it. Unfortunately the rails were bought, the rails are still there. I don't think anybody has done the proper research about the difficulties of doing something in an inner city, particularly in an established inner city like this one.

MR MACLEAN: Okay, right, anything else you want to say? It's been a good run through.

MR WALKER: What I'm trying to say is that we have tried to open TIE's eyes and we believe we did as to what this meant in terms of its profile and costs. Maybe they were blinkered, didn't want to know or knew and didn't want to admit it and that leads to an investigation at some stage as to how we have got where we are, but quite clearly we have been put across as being the big German ogre that comes and tries to deliberately under bid it and all this sort of stuff that's recently been in the press. We have made it quite clear, very very upfront statements as to what we and TIE were getting into and why it

has got to this stage. I don't know, it's a very, very sorry state of affairs. In 32 years in this game I've never seen anything like it and I don't want to again quite frankly.

MR MCGOUGAN: There is nothing like it anywhere else in the world.

MR WALKER: No, it's very, very sad.

MR MCGOUGAN: And your company is not involved in similar issues elsewhere?

MR WALKER: We have disputes but we have never had one where the management of the contract has been attributable-risk. Of course we have disputes. We've got one that you are probably aware of, an ongoing dispute in Canada where the ground conditions were deemed to be hard rock. That's what we bid on. When you are tunnelling you need different machines for different ground conditions, and when we got into the middle of the mountain it's (the ground conditions) water bearing gravels, it's not hard rock, and the machines are still there, you can't get them out, they're stuck. The contract terminated, there's a big legal dispute going on, but basically the ground information was incorrect, they never drilled bore holes down from the surface to the actual level which was a mile underground. So, yes, of course you get problems when you do that amount of work, but equally we've got many, many fabulous jobs, the largest hard rock tunnels in the world,

Brisbane North - South recently opened. Malmö City Metro in Sweden opened this week, a fantastically successful job, you know there's jobs all around. We've had problems at Cologne as well. We don't shy away from them, we wish we didn't have them, but if you are turning over that volume of construction, it's not all construction, there's probably about Euro 4.9 billion of it is construction in the world. Several construction contracts you do get problems, but I've never seen and I don't think we have ever seen one that has been mismanaged like this one, ~~where~~, I'm ~~told~~ sorry, it hasn't changed and when I'm saying ~~that~~ there I'm talking about a simple L shaped retaining wall that sits on the ground to something that now sits on 13 to 18 metre deep piles that are a metre and 50 diameter each and, for nine months that's not changed, and eventually through dispute process and adjudication ~~it~~ this has changed.

MR MCGOUGAN: Yes.

MR MACLEAN: Okay, well, that's been helpful to hear where you are and what your thinking is, so thank you very much.

MR WALKER: We'd welcome a joint round the table two days, three days with; you ~~know~~, my boss as well, with TIE present, you know calm, open discussion about what to do, anything to try and get out of this deadlock. The *status quo* is not acceptable to anybody, it costs far too much (for



all parties), it doesn't build a job.

MR MACLEAN: Thank you for coming armed with all your paperwork, you will have to take it all back now.

MR WALKER: A lot of it are the actual adjudication decisions which I'm not sure whether you've seen, I thought you might like to look at them, but essentially on the adjudications we have now had 10 – we have won 7, drawn 2, lost 1 which is slightly different from the one ~~on~~ ~~each~~ ~~of~~ and the rest ~~of our drawings~~ which the Transport Convener puts across on the TV, he's misinformed unfortunately.

(At this stage the meeting was closed).