EDINBURGH TRAM INQUIRY

GREGOR ROBERTS – Q&A

The structure of this note is:

- Introduction
- Infraco schedule part 4
- Miscellaneous records and reports
- Revised estimates, etc., 2009 – 2010
- Project Carlisle
- MUDFA costs
- Preparation for mediation
- Mediation, March 2011
- Settlement Agreement, September 2011
- Governance
- Tie bonuses
- Final comments

Introduction

1) a) What was your role on the Edinburgh Tram Project (with reference to dates)?

Deputy Finance Director (August 2008 to November 2010)

Finance Director (December 2010 to October 2011)

b) To whom did you report? Who reported to you?

Deputy FD – reported to Stewart McGarrity

As FD for the last I reported to Richard Jeffrey

My direct reports were Hamish Shepherd (management accountant) and Stuart Lockhart (finance manager)

c) How did you come to be involved in the project?

I applied for the job via Search recruitment agency.

d) What qualifications and experience did you have at that time, relevant to the role you performed on the tram project?

I am a CIMA qualified accountant. At the time (2008) I had around six years industry experience working in traditional industry and commercial contracting environments.

e) In particular, what previous experience did you have of transport infrastructure projects?

My accounting and commercial contract management experience was relevant. I did not have transport infrastructure project experience.

f) It would be useful if you could supply a CV.

I don't have a current up to date CV, but will look to provide a copy.

2) a) Did you sit on, or attend, any committees or boards relevant to the tram project?

Yes

b) If so, which ones, and between what dates?

Tram Project board; TEL Board; BROR; Audit committee. This would formally have been from appointment as FD in Nov-10 /Dec-10. I would have been invited to attend some other meetings before that (by board invite).

c) What were your roles on them?

From Nov-10 I was Company Secretary for tie and TEL, and also audit committee secretary. I would have also presented at both meetings (from Dec-10) as Finance Director following Stewart McGarrity leaving tie in November 2010.

3) a) What was your understanding of the overall state of the tram project when you first started work on it?

I didn't have a preconception of the tram project before I started to work on the project.

b) If there were any issues of concern, what were they?

My initial concerns only arose once I had joined tie. There were delays in completion of the MUDFA works, and that the Infraco contract had not started on time. Alongside that tie had received a claim for EoT from the Infraco contractor (before I had joined).

4) What were your first impressions of tie?

A professionally run company with experienced senior level employees (Willie Gallagher, Steven Bell, Stewart McGarrity).

5) A major dispute arose between tie and BSC. In overview, what was your understanding of the main matters in dispute and the main reasons for the dispute?

Key reasons would have included:

Who had responsibility for design and completion of issued for construction drawings

The delay in MUDFA works having a knock-on effect on Infraco works, or the contractors ability to progress works/ complete design.

Base date design to issued for construction changes, and who bears the cost of change.

Failure to agree (between tie/ BSC) who is responsible and for delays, and the value attached to agreeing prices of changes, and potential delay costs.

Infraco schedule part 4

6) Schedule part 4 of the Infraco contract contained provisions on pricing (USB00000032).

a) To what extent were you familiar with this, and to what extent were you involved in considering its implications, during your time at tie?

I have read Schedule part 4 of the Infraco contract, and would be required to reference separate parts of the contract as and when required. The contractual interpretation of commercial elements of the contract was mainly led by Commercial, but this reading of the contract was required to join up my understanding of the numbers. Schedule part 4 was the area of the contract used mainly by Commercial (Commercial Director/ QS in ensuring that certification of Infraco applications was properly followed etc., in line with the Infraco agreement).

b) What was your understanding of the extent to which the price was fixed, and the extent to which increases in the price were expected? (See, e.g., clauses 3.2.1, 3.4 and 3.5 of schedule part 4.)

My understanding was that no contract price can be fixed if changes are made to a contract. A schedule of rates was included in the contract and a process documented for Changes. I would expect a price increase if there was any change from original tender price, which had increased the scope of works (in any contract).

c) What was your understanding of the extent to which the risk of notified departures from the base case assumptions had been quantified in the project risk allowance?

Project risk allowance was quantified before my joining of tie. Within this risk allowance included specific risks which had been quantified and *measured at the time of tender/ procurement which would have involved (head of Risk/ Project Director/ Procurement and I would expect TPB/ TEL board agreement). From memory 'risk allowances' were to the value of circa £33ml.*

d) What was your understanding of the extent to which the project risk allowance quantified the risk of delay in the notified departure procedure itself? (See clause 3.5 of schedule part 4, which required tie to pay BSC for loss and expense arising from delay in issuing a change order.).

My understanding was that the project risk allowance quantified and anticipated a minimal amount of delay allowance. This is because it did not anticipate the final design to be an extensive departure from the original design, or for tie to notify changes to the design which would result in additional works scope and in-turn potential delay and Extension of Time claims.

7) The Construction Works Price, of £238,607,664 was broken down in appendix A of schedule part 4 (USB00000032). It included deductions totalling c. £12.5m for value engineering (£9.965m and £2.67m), and included provisional sums of c. £19m. The schedule provided for adjustment in specified circumstances of the parts of the price relating to these items.

What was your understanding of the treatment of value engineering and provisional items in the contract price?

VE opportunities were built as part of (a reduction in) the contract price and separated into two categories on the face of the contract (Firm Price and Further VE).

Provisional sums were also classified as defined and undefined provisional sums. These provisional sums would require specific procedures for drawdown to take place, and for pricing to be firmly agreed with the Infraco contractor.

a) What was your understanding of the extent to which:

i) the value engineering deductions were in fact achieved; and

The Commercial Director regularly assessed the position of provisional sums, with (in the QS view of tie) a number had been assessed as instructed and secured, and other VE items required further work to secure in-full, with specific commercial and operational actions required to be put in place to crystallise the price deductions.

ii) the provisional sums were sufficient?

Commercial assessments of the provisional sums were made on the provisional accuracy of those sums. These views and assessed values would be clarified on the Infraco Change register (recoding INTC's and QS commercial assessments). The final position negotiated/agreed at mediation would indicate that provisional sums were not sufficient.

My own assessment of Commercial pricing assumptions at tender stage would be a speculative assessment as I do not know what was discussed with BSC at the time of tender/ setting of those provisional sums.

b) To the extent that the value engineering deductions were not achieved, or the provisional sums were not sufficient, what was your understanding of the reasons for that?

My understanding was that some VE should have been achieved. Other VE items required further action to crystallise the VE savings e.g. tie still required to instruct the Infraco to secure VE savings. The Commercial assessment of VE achievement was that some had been achieved, and others had not yet been achieved/ some may or may not be achieved.

Miscellaneous records and reports

Actual and projected spending

On 24 January 2011, you supplied a spreadsheet entitled "*Edinburgh Tram Phase 1a: Projected and actual spend to date*" (TIE00685233, TIE00685234), which Steven Bell forwarded to Audit Scotland.

a) Please explain in overview what this shows.

The spreadsheet shows the formal changes in TPB approved budget increases over a period of time. From: Final Business Case £498ml; Financial Close Budget £511ml; Adjusted budget increase formally increasing to £533ml; Updated spend profile of budget including full funding available up to the total approved *funding £545ml.*

1) ***Change registers***

Tie maintained change registers, e.g.:

- 27 November 2008 CEC01126459
- 4 October 2010, CEC00150871
- 16 May 2011, CEC02025818

Can you please explain, in overview,

a) what these show; This is a tie Ltd QS change register showing Infraco Notices of tie changes INTC (potential scope/ cost increases), and the QS classification of these INTC's.

b) what they were used for; For QS's to understand where a change might link to budgeted risk, provisional sums or changes to cost. The Senior QS's on the Infraco Contract maintained and owned the change registers. They were also used to anticipate upcoming spend drawdown from project risk allowances or align change requests to provisional sums.

c) who prepared them; The QS team working at the Infraco (Michael Paterson and Chris Bartynek). This assessment would be regularly reviewed with the Commercial Director (Dennis Murray).

d) what (if any) role you played in relation to them; and

i) This schedule would be used by Commercial to inform the Project Directors Reviews of potential increases in spend or differences in BSC costs to those assessed by the tie Commercial team. It would also inform which changes required to be taken to the project change panel for risk drawdown approval.

e) what information they were based upon?

ii) Formal Infraco Notices of change/ estimates provided by the Infraco, and Estimates by tie Commercial QS team.

In reference to CEC01126459 (27 November 2008):

Tab 1 (*"Summary sheet for PD"*)

f) What, in overview, does this show?

iii) QS sheet of Infraco Changes

iv) The summary shows BSC estimate an additional change cost of £36.28ml; that values are then summarised as differences (between tie and BSC); If a budget should have been MUDFA works originally (not Infraco); Value allocated to risk (original QRA risk); values expected to be funded externally (per QS's/ tie commercial view of the contract allocations); values allocated to costing provisional sums; additional budget costs anticipated.

Tab 2 (*"Infraco notices"*)

g) What, in overview, does this show?

v) This is the QS owned change register for the Infraco contract. It identifies each individual change request received by tie from BSC.

h) Please explain the following columns:

"*BSC Estimate*" (£36.2m); *the original cost submitted by BSC or anticipated cost which would be submitted by BSC relating to the change which BSC had informed tie of.*

"*Await Estimate*"; *tie do not yet have an estimate submitted by BSC relating to the change (INTC).*

"*Estimated final cost*" (£32.6m); *the tie QS view of what the total cost would be excluding disputed values*

"*Disputed value (quantum)*" (£7.1m); *the quantum that tie QS's disagree with the INTC cost submitted by BSC*

"*Disputed value (principle)*" (£200k); *a value allocated to principle rather than value of dispute for a particular or number of changes by the QS's.*

In reference to CEC02025818 (16 May 2011):

Tab 1 ("*Change summary*")

i) What is shown in the table headed "*QRA value comparisons*"?

From memory this is supposed to be a summary of anticipated changes which either have or have not yet been approved. I can't remember using this particular part (summary / QRA schedule) regularly, as this is something which would have been used and updated by QS/

Commercial. Values are not easy to follow as links have been 'valued' on the summary template.

Tab 4 ("*Infraco notices*")

The infraco Notices sheet is the detailed sheet of notices of changes on line items as kept up to date by QS/ Commercial leads on the Infraco contract.

j) What, in overview, does this show?

BSC cost estimates submitted £137ml
tie estimated change order value £88.7ml
Difference in view £48.3ml

k) Please explain the following columns:

"*BSC Estimate*" (£137m); this would be the price/ anticipated price which BSC had submitted with their original change request.

"*Estimated final cost / change order value*" (£88.7m*); tie commercial assessment of the value of change at that point in time.*

"*Disputed value (quantum)*" (£40.3m); *the value which tie QS dispute in terms of value (price submitted/ measure/ price x quantity) per QS assessment.*

"*Disputed value (principle)*" (£7.88m). *per the description this was a QS classification of disputed items for internal purposes.*

l) To what extent does this spreadsheet capture the scope of the parties' dispute over change by the time they resolved their disputes?

This spreadsheet would be updated and assessed/ re-assessed by QS's/ Commercial on an ongoing basis and the assessment of change values/ disputes informed by any DRP precedents set/ informed advice etc.. It is not possible to assess this, as all changes were negotiated at Mediation as an updated contract price (block sum / re-baselined price effectively). There are over 1000 lines of change requests on this sheet, with QS assessment which could move on a monthly basis.

2) ***FM Summaries***

The following are examples of tie "*FM Summaries – Cost Reports*"

- Period 5, 2009/2010, CEC00782620
- Period 12, 2010/2011, TIE00136719
- Period 12, 2011/2012, CEC01943133

Please explain, in overview

a) what these show;

- a summary of the cost of work done to date against last months forecast by workstream.

- an update of the forecast outturn (annualised spend), forecast each period

- total Cost of Work Done (COWD) to date against the phased Current agreed Budget

- Project Managers AFC – showing Current Agreed Budget and AFC (the sum of the current contract + QS view of changes).

b) what they were used for;

- to assist management in assessing where additional changes required to be raised in the change panel.

- they would be used in the Project Directors monthly review pack.

c) who prepared them; and

- These were prepared by tie Finance with inputs from Commercial on all Commercially Assessed QS documents relating to change and when this might be phased. Reporting inputs came from the Infraco and MUDFA QS teams, or managers responsible for PD review workstreams.

d) what information they were based upon.

Each Manager responsible for each workstream would feed into the Project Director Review monthly and would report upon their workstream including COWD to date, forecast outturn for the year and any anticipated changes to AFC. These numbers would be collated by Hamish Sheppard (management accountant) and details reviewed at PD review, with Stephen Bell leading these reviews with senior team input. This is all from Memory of a process which took place around 6 or 7 years ago, so I am aware that the description of process may not be 100% accurate.

3) *PD Review Summary*

The following is an example of a tie "*PD review summary*"

- Period to 14 August 2009, CEC00783570

Please explain, in overview

a) what it shows;

It is the Infraco PD review reporting template. This shows in summary that prior to PD review that the Current Approved Budget (changes approved) was £248ml; the current AFC was £300ml; that there was potential additional change cost of +£52ml.

b) what reports such as this were used for;

to provide the Project Director Review meeting with a summary of the Infraco contract update as part of the Monthly project reporting routine.

c) who prepared them; and

This particular file was an Infraco file. It was Owned by the tie Infraco Director (Frank McFadden), but the Excel file and assessment would have been prepared for him by the lead Infraco QS (Michael Patterson).

d) what information they were based upon.

The most recent change schedule assessments and information received by tie Infraco management and QS's.

4) *In overview, what records and reports were you responsible for (focussing especially on those which related to project changes, cost estimates and budgets, and project expenditure)?*

I was responsible for presenting the PD review with the Consolidated Project Spend to Date (COWD); outturn forecast (in year spend forecast); and updating AFC in-line with PD review reports submitted by QS and Commercial.

These PD review reports formed the basis for all consolidated reporting, and highlighted any items taken to be raised by QS's for budgeted change requests/ risk drawdown at change panel meetings (as run by Mark Hamill head of risk).

Revised estimates, etc., 2009 - 2010

1) After the disputes had arisen under the Infraco contract, work was done to assess the likely outturn costs of the project under various scenarios.

a) Please explain in overview what that work involved.

I was the Deputy FD in this period reporting into Stewart McGarrity. I am not entirely sure which 'revised estimates' are being referred to, so the answer is fairly generic. My role would be to assist in reviewing the consolidated workstream numbers (COWD; Outturn Forecast; AFC), which would entail bringing together all QS views and Managers updates for PD review. Main workstreams included MUDFA and Infraco commercial assessments as submitted by senior QS's and reviewed by the Commercial Director, Project Director and Finance Director at PD review meetings.

b) What was your role? Who else was involved, and what were their roles?

My Role as Deputy FD was to consolidate the picture for the Finance Director with inputs from the Management accountant for PD Review meetings. I would also provide forecasts of likely funding movements to Transport Scotland with Stuart Lockhart (Finance Manager) providing TS with monthly forecast funding short term '2-3 month look-aheads'..

c) What difficulties were there in making these assessments?

As this is not specific the general issues were: changing assessments of MUDFA works 'to go', and time to complete the MUDFA works. A changing programme of Infraco works due to disputed pricing/ changes preventing works progress. The 'unknown' element of not knowing when changes or INTC's would cease (new changes were being submitted on an ongoing basis/ daily); the programme then would move as a result of all of these changes, and a lack of agreement of values further extending programme. In-turn there was no fixed view or assessment available of programme, EoT, or the final value of 'change'; there was not any commercial agreement on the assessed values of change between tie and the Infraco.

2) On 13 July 2009, Stewart McGarrity circulated an update of a costs estimate spreadsheet with some additions "*for the derivation of the low outcome of £560m intimated to CEC last week*" (CEC00766675, CEC00766676). The email was in preparation for a meeting you were to have with Alan Coyle of CEC. Mr McGarrity added: "*Don't spare the gory details as to the level of uncertainty but make sure he knows the QS view column includes a big healthy chunk of moving towards the BSC position.*"

a) Can you explain in overview the lower figure of £560m, and why it was the one being reported to CEC (having regard to the higher figures in the spreadsheet, including the "*QS view*" at £584m and the worst case at £618.5m)?

From the e-mail sent by Stewart McGarrity the £560ml was the best case which included the view that the tie were correct in their commercial view, and that work then starts immediately. I do not know if this is the one reported to CEC, or if they had the full document with the range as provided by Stewart. Stewarts e-mail noted that the £560ml was to be caveated, so it sounds like Stewart has discussed this number with CEC in advance of me meeting with Alan Coyle (probably in person or over the phone) of CEC, and noted that I would take him (Alan) through Stewarts assumption of a Low view, but with the caveat that this would most likely go up.

b) Why was there a range of estimates?

There would be a range of estimates as there were a range of Scenarios, with variables around additional risk allowance required, Delay costs (EoT); Who is responsible for Design changes (BDDI); Ground conditions and full depth road reconstruction costs. The largest unknown related to programme and time, and who contractually was responsible for the delay/ cost of delay.

What were the most significant differences between the estimates? What was your understanding of the issues underlying those differences?

As above because there were a range of Scenarios, with variables around additional risk allowance required (view that BSC would have vs tie Commercial delta), Delay costs (EoT is a view of what may be claimed for EoT and what might be due to be paid would differ); Who is responsible for Design changes (BDDI), and if these changes impact contract price (QS quantity assessments differed to BSC).

c) Can you explain what was meant by the QS view including a "*big healthy chunk of moving towards the BSC position*"?

I don't know what this is referring to specifically or what Stewart meant by this other than the price had increased in the tie assessment and in particularly the range, which would be more aligned to the view that the Infraco (BSC) would have (submitted originally via INTC's) of how much tie would be due to pay.

3) The two largest elements in the revised risk allowance (see CEC00766676, tab 1) were "*Delay - EOT2 and future*" and "*Design (incl BDDI to IFC)*".

a) What was your understanding of these matters?

EOT2 & Future – is the Commercially estimated view of the cost of project over-runs and in-turn the likely Extension of Time claim values to be claimed and due for payment to BSC.

BDDI – IFC was a classification of changes or INTC's which had been sent from the Infraco to tie. They were changes where the Infraco believed that scope had changed from Base Date Design to Issued for Construction Drawings. Those changes would then have an impact upon prices as the scope of works had changed from procurement to actual construction.

b) What was your role, if any, in quantifying them?

It was a commercial role to quantify EoT and BDDI values.

c) What work was done to quantify them?

Dennis Murray (Commercial Director) would have done a significant amount of detailed work to quantify the background to the range of EoT claims/ scenarios.
BDDI/IFC came from the Infraco change register and rolled-up the QS view of the cost of Base date to Issued for construction changes in the project scope/price impact. The detailed work would have been carried out by Senior QS's working on the infraco contract supporting Frank McFadden.

d) What particular factors (if any) had the greatest upward impact on delay and BDDI-IFC costs?

I don't have the detail to hand and didn't quantify this myself. This was a QS/ commercial role.

e) What conclusions were reached?

From memory, the Final mediation cost which was negotiated between CEC/ tie and BSC captured large additional costs for both, but the final agreed cost was in lump sum form, so any comparison on original view to final agreed cost was not possible (from the information made available to myself).

4) You were involved in discussions with Ailie Wilson (of CEC?) about a £568m figure which you described as the sum of all of the PM reports, but which you emphasised was not a consolidated forecast view (CEC00703076, 2 November 2009). You also said the figure included nothing for EoT1, EoT2 or any further delay.

a) What was the £568m figure and why had it been supplied to CEC?

This figure would be a collation of all (Project Director) PD review submissions, which was a monthly occurrence with CEC. I noted this clearly to Ailie that this was not an AFC estimate (Consolidated forecast view), as it would not capture any costs for EoT / delay for example (as this was a moving target, and should be assessed/ quantified by with an *experienced commercial construction QS). I am warning Ailie (correctly) that this is just a sum of monthly reports, and not a cost estimate for the whole project.*

b) What were your views at the time about the likely outturn cost (taking into account, for example, delay-related costs)?

I didn't have a fixed view of the likely cost outturn, but did understand that the longer that there was a delay in tie and infraco reaching an agreement, that the larger the cost of the project would be. There was no certainty around cost or programme (time related claims) due to the failure of BSC/tie to agree upon 'changes'/ cost of change.

5) You appear to have had a role in a "*BSC change audit*" carried out by tie (see, e.g., CEC00760010, CEC00760011, CEC00760012, 24 November 2009).

a) What did this involve?

I can't remember what was involved specifically. My recollection is that a number of team members were to audit the infraco processes, and that they were being followed in line with the contract. The process was supported by Peter McNay (?) – from one of the big 4 firms.

b) Why was it done?

To verify if processes were being followed in line with contractual procedures.

c) What was the outcome?

The audit didn't have any impact upon the impasse.

6) On 1 December 2009, you emailed Stewart McGarrity about a proposal to "*knock millions off the cost*" if tie "*abandoned some of the track slab and current design*" (CEC00551870; see CEC00551920 and CEC00551921 for context).

a) What was your understanding of this, and what (if anything) was done about it?

It looks like this e-mail was sent following a conversation with Colin Neil (tie Infraco Senior employee). Colin would have discussed this with Stephen Bell and whether the suggestion was valid before making a decision.

7) On 3 December 2009, Stewart McGarrity circulated an email (CEC00617854) referring to a difficult discussion on governance and operational structures which had taken place that morning. He noted that he had

> "*been unable since the days of the business case to exercise any significant influence over or bring certainty to the resolution of the*

situation".

a) What was the nature and content of the discussion referred to by Mr McGarrity?

I think that this was a note following a team meeting update with the finance and ICT teams from the e-mail.

b) What were your views?

Stewart must have had a difficult meeting with the team by the note on Ken McLeod's e-mail. I don't have a view on the note either way.

8) On 2 March 2010, you emailed a spreadsheet to Stewart McGarrity with the heading "*Analysis of increase in BSC related costs presented to CEC on 11 December 2009*" (CEC00556418, CEC00556419). This appears to show an increase in the cost of Infraco-related works of £110m; and a revised project cost of £641m.

a) What was the purpose of this spreadsheet?

The spreadsheet is an internal high level tie view of potential project outturn. This had been collated by starting with PD review reporting information, and adding in the risk of each area of the project as assessed by the tie commercial team, in conjunction with an updated view of tie PM costs (resource, legal etc.).

b) Please explain what it shows.

It shows – Final business case cost including stage 1b was £518ml

That the Commercial view at the time was an additional risk of £108ml

Other resource costs would increase by £8.7ml and the view was that £3ml of additional cost would come from unsecured VE

Other net increases were assessed at £2.5ml

The QS/ Commercial risk assessed view of project outturn at that time coupled with tie resource costs came to £641ml

9) In February 2010, you raised a concern about an apparent failure by tie to follow the Delegated Authority Rules in relation to £8.8m of change (CEC00627586, CEC00627587, CEC00627588).

a) Can you explain this issue and how it was resolved? *- the issue was that the tie Infraco QS team had raised changes to change panel, but final agreement hadn't been made (although an initial paper may have been presented to the change panel for authorisation). Only change papers included as formal changes had been approved per the monthly change panel. This issue would have been resolved with Michael Patterson covering the correct value of change. I was ensuring* *that the change panel and DARs were being followed and correctly asking the infraco team to bring Admin up to date.*

See also:

- CEC00786666 (22 October 2009) in which you had raised concern about staff needing to know their budgets and codes. - t-codes were the project cost codes to allocate costs against. For the management accountant to get the position correct and align budgeted changes to 'actual' spend required QS's to align change requests with the correct t-code. This would be resolved with a one-on one meeting between finance and commercial to ensure that QS's understood the full budget, so that they could then raise changes to PD review and change panel correctly.
- CEC00797688, especially Steven Bell's comment at the end

I met with Tony Glazebrook and his team and took the team through the DARs in detail. My meeting with Tony was one-on-one. A change was then raised for the difference in the NR budget and approved formally through the change panel.

10) On 22 February 2010, Stewart McGarrity sent an email to you and Dennis Murray

> "*really as an aide memoir to myself and a dump in one email and attachments of everything I know or have about BB and S pricing make-up*".

References: CEC00555847, CEC00555848, CEC00555849, CEC00555850, CEC00555851 and CEC00555852.

a) Please explain, in overview, why Mr McGarrity sent this email and what is shown in the attachments.

Stewart was sharing all of the original correspondence that he had from procurement and history from procurement. I am not sure exactly why he chose to share it at that point in time.

555848 – shows an excel summary of BSC (Siemens and BB) infraco budget based upon a pivot of the original infraco milestone payments

555849 – shows the original Siemens submitted price at Tender

555850 – further original Siemens Pricing documentation

555851 – further original Siemens Pricing documentation

555852 – looks like a PDF from an original contract extract

11) In March 2010, tie produced a report entitled *"Project Pitchfork"*, CEC00142766. It described its purpose as being

"to capture in one document the important aspects of the dispute between tie and the Infraco Consortium and to provide the TPB with a reasoned recommendation on the approach to resolving the dispute, progressing the project to completion and achieving the best value possible for the investment of public funds within an affordable cost envelope."

a) What was your role, if any, in the production of this report (see, e.g., the cost estimates quoted for various scenarios at page 13 and page 74)?

From memory the cost estimates in Pitchfork would have been collated by Stewart McGarrity, but this would have been collated with key commercial inputs from Dennis Murray. I am not sure if Tony Rush (Commercial Specialist) had been engaged with by tie by this point in time.

b) What was your understanding of these cost estimates and the basis on which they were prepared?

I didn't prepare the documents, and there isn't a Pitchfork excel document referenced here to check

c) Please explain in particular the quantification of the risks and uncertainties.

As above

d) Were you involved in decision-making leading to the principal findings and conclusions (page 15)?

No

e) If so, what were your views on these?

As above I was not involved in the decision making on Pitchfork

12) On 26 April 2010, Stewart McGarrity circulated an update on estimating the costs of incremental delivery options (CEC00316561, CEC00316562). This analysis appears to have taken into account different finishing points (Haymarket, York Place, Foot of the Walk, Ocean Terminal).

a) What was your role, if any, in producing these figures?

I didn't produce these figures. From the e-mail these figures were produced with key inputs from Dennis Murray to give Stewart his best estimate of a number of scenarios at that point in time.

b) Can you explain, in overview, the differences between the estimates?

Cost options are being provided for two scenarios of build. The first described (2b2) in the e-mail assumes tie step in and deliver without

BSC (re-procure etc.) The second option 3c assumes BSC continue and complete the works. For each option there has been a priced estimate of scenarios for truncated builds to Haymarket; York Place; Foot of the Walk and Ocean Terminal.

c) What were your views on the estimates, and how reliable they were?

My view is that the estimates would be the best estimates that Dennis and Stewart could have given at that point in time given the uncertainty with programme, and having not agreed costs with BSC.

13) On 2 May 2010, Stewart McGarrity raised concerns with Steven Bell about the reporting of MUDFA costs (CEC00348327, CEC00348328; see also CEC00557060, CEC00557061).

a) Can you explain this issue and how it was addressed?

The issue being raised was that as at period 13, that there was an anticipated budget (CAB) shortfall against expected AFC of -£8.5ml on the MUDFA works (utilities). This was flagged as an issue to ensure risk was known, and changes to Budget could be addressed and highlighted to all relevant parties.

b) Can you explain in overview what the spreadsheet (CEC00348328) shows?

The spreadsheet shows that the updated AFC for the MUFA works at period 13 was now expected to reach £70.6ml, but the total budget (CAB) at period 13 was £62.1ml – an -£8.5ml shortfall.

Princes Street works

14) On 3 June 2010, you sent an email to Dennis Murray about the cost of works on Princes Street under the Princes Street Supplemental Agreement (CEC00327714, CEC00327718, CEC00327719). You noted that the cost increase over the negotiated price was £9.3m.

a) What was your understanding of the extent to which works on Princes Street were more expensive under the PSSA than they would have been if carried out under the Infraco contract?

My understanding is the BSC would not start works on Princes Street until an agreement was reached on works. The agreement differed from the original Infraco contract in terms of scope of works, and in-turn cost more (was effectively treated as a large value change).

b) What were the reasons for that?

Because what was being asked of the contractor changed from the original contract scope. This included change in track slab, acceleration of works, changes to works due to utility conflict and changes in the *depth of the road (full depth road reconstruction).*

The spreadsheet (CEC00327718) indicates that the price for the Princes Street Works under the Infraco contract (i.e., the assumed price forming part of the Construction Works Price) was £2.789m.

What was your understanding of the reasons why the outturn cost of work on Princes Street (whether done under the Infraco contract or the PSSA) was so far in excess of the price in the Infraco contract (3 or 4 *times as much)?*

The assessment of the build-up of cost and comparison was a commercial and QS driven exercise. My understanding was that the time to deliver and scope had changed since procurement.

(See also TIE00089467 (password Edinburgh), a draft report to Council dated 27 May 2010, at paragraphs 3.53 to 3.63.)

c) How were the Princes Street works ultimately paid for? For example, did they form part of the On Street Price agreed after Mar Hall and, if so, what element of that price related to the Princes Street works?

A change was raised and presented to the Change Panel before Mar Hall. I was not an attendee at Mar Hall as from memory I was on annual leave at the time of that event.

Project Carlisle

1) From mid to late 2010, there were discussions aimed at resolving the dispute between BSC and tie, under the project name "*Project Carlisle*".

a) What was your understanding of this endeavour?

Project Carlisle was a project which included bringing in Tony Rush and his team to lead an independent agreement between tie and BSC to deliver the remainder of the Infraco Contract. Tie engaged with Tony Rush and employed him and associates in GHP.

b) At whose instigation did it take place?

I am not 100% sure. This would either have been the tie Project Director (Stephen Bell) or CEO (Richard Jeffrey). I was not closely involved in Carlisle.

c) What, if any, role did you play in relation to it?

I didn't play a close role in Project Carlisle. I would have tried to use the numbers generated by Carlisle and the project to make some comparisons for Stewart McGarrity of Price estimates from Carlisle vs. current AFC/ CAB. Further input and analysis would have then been *made with input from the Commercial Director of tie Ltd.*

See, e.g., an email sent to you and Susan Clark by Stewart McGarrity on 21 July 2010, attaching key emails "to and from me and the Carlisle team ... since I started engaging with them in May" (CEC00332123, and its attachments numbered up to CEC00332152).

2) By letter dated 29 July 2010 (TIE00885457) Martin Foerder sent BSC's "*Project Carlisle 1*" proposal (CEC00183919) to TIE.

Under the proposal BSC offered to complete the line from the Airport to the east end of Princes Street for a Guaranteed Maximum Price of £433,290,156 and €5,829,805 (less the amounts previously paid), subject to a shortened list of Pricing Assumptions.

BSC's proposal was rejected by TIE by letter dated 24 August 2010 (CEC00221164), in which TIE responded with a counter-proposal of a construction works price, for a line from the Airport to Waverley Bridge, of £216,492,216, £45,893,997 to CAF, the amount to SDS to be determined and a sum of just under £4,922,418 in respect of Infraco maintenance mobilisation, Tram maintenance mobilisation and Infraco spare parts. There was separate provision for "*Construction Works Price Part B*" (£22.595m in relation to the sections from Waverley Bridge to Newhaven; and £9.8m for trams).

a) What was your understanding of the Project Carlisle 1 proposal?

I don't recall this document. Project Carlisle was managed closely by Tony Rush's team with a direct interface to the tie Exec (of which I was not a member at the time). My understanding of the detail is limited, other than the general view that the Infraco's proposal would not give price certainty.

b) What were your views on it?

My view was limited as I had little exposure to Project Carlisle at the time. I had hoped that the project would bring an agreement and a way forward with the contract.

c) Why did it not resolve the dispute?

Because it seemed that tie and BSC did not have a common understanding required to get to an agreement. BSC caveated that there would be a higher baseline price in this summary document, and that there would also be a change process put in place (similar to the process already in place). Tie management (in the Stephen Bell letter) note that they do not think that the proposal gives a 'Guaranteed Maximum Price'. It therefore did not resolve the dispute.

3) On 17 August 2010, Stewart McGarrity sent an email to you and Dennis Murray about Project Carlisle, noting

"I don't recognise many of the numbers – hopefully you do but if not we probably should get up to speed pdq on what's going on" (CEC00041958).

Alan Coyle of CEC was concerned that Dennis Murray had not in fact been involved in putting together tie's counterproposal and was having difficulty reconciling it with his own view (CEC00013665, 18 August 2010).

a) Why were Mr McGarrity and Mr Murray unfamiliar with these aspects of the Project Carlisle proposals?

Tony Rush had been nominated to Run Project Carlisle and provide an independent view of how to bring tie and BSC together. From the correspondence noted it seems that Tony had been difficult to track down to get a run through of this proposal.

b) Did it strike you as odd that they had not been more directly involved?

No. I was not closely involved with the running of Project Carlisle as noted earlier.

c) Who was responsible for assembling tie's counterproposal?

As above. I would expect that Stephen Bell would have led any response/ counterproposal, with inputs from Dennis Murray and the Executive team.

d) What was your understanding of the papers sent to you by Mr McGarrity?

I am not too sure which 'papers' this question is referring to? My recollection of the Carlisle proposal was that the tie commercial view was that this proposal was closer to a re-pricing proposal from BSC, which would still not have given the Tram Project Price or programme certainty.

4) On 18 August 2010, Tony Rush supplied a note on Project Carlisle entitled "*Explanatory note - Project Carlisle Scope Terms and Price*" (CEC00112862, CEC00112863). It referred to BSC's Project Carlisle offer of 29 July 2010 and "*outlines the parameters for a Counter Offer*" (page 1).

a) What is your understanding of that note, and the use to which it was put by tie?

I recall that I will have had access to the project Carlisle notes like this after the event. I was not closely involved in the project as it materialised, so do not know how this note was used specifically. Per Stewart's note I was forwarded this note in November, but the initial note was dated August.

b) What were your views on the approach it took for tie's counter-offer?
As noted above I would not have had sight of tie's counter offer on Carlisle until after the event. tie's counter offer from Stephen Bell seems reasonable, but with the benefit of hindsight this did not work in getting

an agreement with the Infraco.

The report noted that "We are ... unable to quantify and evaluate prolongation as a matter of fact." Stewart McGarrity's email to you (CEC00112862) said "...we assumed the negotiation would be about their prolongation costs – we included £20m (£3.5m for EOT1 ... plus a further £16.5m".

c) What was your understanding of the extent to which it was possible for tie at that time to calculate prolongation and associated costs? Please explain your answer.

Prolongation could not be accurately assessed commercially without the knowledge or agreement upon a defined and firm programme of works. The issue was circular because without a finished design and agreed price it would not be possible to agree a programme. tie and BSC could not agree prices for 'design change' and in-turn could not agree a programme.

5) On 20 August 2010 CEC officials were given a high level summary of TIE's Project Carlisle Counter Offer (CEC00079797).

The cost of a proposed phase 1 (Airport to St Andrew Square) was estimated at between £539m and £588m, the cost of a proposed phase 2 (St Andrew Square to Foot of the Walk) was estimated at between £75 million and £105 million and a combination of these phases was estimated at between £614 million and £693 million.

a) How and by whom were these estimates calculated?

I was not present at the CEC presentation. If this is a Carlisle document, and led by Tony Rush, then I would expect that Tony Rush had taken the lead on the numbers presented.

b) What part, if any, did you play?

None

c) What were your views on these estimates?

I cannot recall my view at the time but on reading appendix C this doesn't look to give price certainty with Tony Rush noting 'Possible extra swing factors of £80m'.

d) Did you attend the presentation?

No – I am certain that I didn't (this is all 7 years ago).

e) Can you recall the response of CEC's officials to these estimates?

No

6) On 6 September 2010, you sent a spreadsheet to Stewart McGarrity (CEC00108258, CEC00108259).

Can you explain in overview what the spreadsheet shows and what its purpose was?

The spreadsheet looks to compare Current Approved Budget (CAB) with the Option 3c as provided by Stewart McGarrity, and then compare 3c with QS / Project Director review submissions (from QS/PM's).
The purpose would be to flag if there were any potential anomalies following the latest PD review meeting versus 3c and Budget, and to help flag potential changes in forecast (3c) required for Stewart to take cognisance of; and in turn budget changes required in the future.

7) By letter dated 11 September 2010 (TIE00667410), BSC submitted its "*Project Carlisle 2*" proposal to TIE, in which BSC offered to complete the line from the Airport to Haymarket for a Guaranteed Maximum Price of £405,531,217 plus €5,829,805, subject to the previously suggested shortened list of Pricing Assumptions.

By letter dated 24 September 2010 (CEC00129943), TIE rejected BSC's proposal.

Mr Foerder responded by letter dated 1 October 2010 (CEC00086171).

a) What were your views in general on the Project Carlisle 2 proposal and why it did not resolve the dispute?

As with Carlisle I cannot recall a specific break from Carlisle to 'Carlisle 2' or certainly can't remember that name 7 years on. As I was not close to this initiative I cannot give my views on it (at the time) other than it was not a success, as the proposals did not unlock the dispute: the two parties (BSC/ tie) were not able to reach an agreement.

8) It appears that by October 2010, payments certified by tie exceeded the value of the work done by Infraco by c. £30m (see, e.g. Stewart McGarrity's email to you of 11 October 2010, CEC00111694 and its attachments (numbered in sequence to CEC00111702)).

See also, e.g., Stewart McGarrity's email of 11 March 2010 (CEC00556759).

a) Can you explain this issue?

I am slightly confused with the order Chronologically with the way that this question is structured. The first part of this question relates to October 2010, and various attachments (sequence ref. which I can't find), but then

the Question relates to an e-mail from March 2010? This doesn't seem to align logically?
The original contract procured allowed for milestone payments to pay for Infraco materials/ preliminary costs/ contract mobilisation etc., which added to £45.2ml split equally for BSC and Siemens.

b) Were there concerns about tie's ability to recover this sum if the Infraco contract were to be terminated?

Stewart was correctly raising this as a potential issue which tie/ CEC would need to recover. By including milestone payments etc. (but excluding EoT) it looked like more value had been paid to BSC than value of work completed.

c) To what extent, if at all, did this issue influence tie's approach to resolving the disputes?

From my knowledge, this would not have been a major factor for tie in resolving the disputes as the approach taken would have been the best approach possible to try and unlock the dispute. All funding parties (TS/CEC) would have understood the structure of milestone payments in the original contract at contract sign off.

d) Did the extent of the 'overpayment' affect tie's negotiating leverage? Please explain your answer.

Having paid 20% milestones in advance would not have helped the negotiating position. The fact that the Infraco got to the stage of 'ceasing works' may have happened earlier (when BSC became cash negative on the contract) had an advance payment mechanism not been in place in the contract.

9) On 20 October 2010, you reported on a meeting with Transport Scotland (CEC00110273). TS had indicated that they wanted to

> *"re-phase their grant allowance so that they do not make a final payment until completion of a stage of the project. This will obviously have some quite serious funding implications…".*

a) Did this proposal come to fruition?

TS were looking for tie's best view of spend, but with the complication that tie did not have an agreement on 'change values' or programme. Hence TS asked for 'silver bullet' or Termination scenarios. I can't recall if this proposal came to fruition or not (it was a long time ago and quite a specific question). From recollection Stewart McGarrity collated the first line of options costing with inputs from Dennis Murray on the 'Deckchair' *spreadsheet (known as this because of the number of stripes/ colours on it). This included a 'Silver bullet' option, so my view is that this should have been communicated to TS.*

b) If so, what were the funding implications?

Drawdown and funding had slipped because work had slowed down almost to a standstill. It is likely that the funding provided 'phased' view of 2011/12 would have remained low (it had dropped from £142.2ml to £86.7ml in the latest look ahead per the e-mail).

10) On 8 November 2010, Stewart McGarrity sent you and others an email explaining figures relating to Project Carlisle (CEC00112862, CEC00112863).

a) Can you explain in overview what these documents show and what, if anything, they were used for?

Stewart McGarrity resigned and left tie during November 2010. This was being provided as handover material (as noted in the e-mail), so that any information that Stewart had to hand was shared. The e-mail shows a breakdown of how the Carlisle options costings had been built up and the logic of assumptions that had been used in pulling the high level numbers together.

11) On 12 November 2010, you circulated a "*deckchair cost options sheet*" (CEC00113758 (email), CEC00113762 (your accompanying note), CEC00113763 (spreadsheet)).

a) Can you explain in overview what the spreadsheet shows?

The deckchair spreadsheet was a sheet which Stewart originally started with the Carlisle options and per TS request the Silver Bullet Scenario was added to it. The sheet shows: COWD to date at the end of P7 and then Commercially assessed 'Options' costed. Options included 'Continue as is'; Carlisle pricing; Termination & re-procure; Terminate & postpone the works.

b) What was its purpose?

The purpose was to give all stakeholders tie's most informed view of the options available. Commercially assessed cost breakdowns would be attached to each of those options (TS had asked for 'silver bullet' in the previous question (9); this was one of the options costed).

c) Can you explain briefly the figures which appear on the first tab for:

i) existing change ("Princes Street" and "other");

Exiting change and other would be costs (commercially estimated) which (1) related to Princes Street (+circa £9.0ml) and (2) related to all Other known changes (commercially assessed range +£11.8ml to +£45ml dependent upon the outcome of litigation/ DRP) which had been quantified by tie QS's on the infraco change register.

ii) existing prolongation;
Commercial estimate of the range of prolongation costs to date depending upon the outcome of litigation/ DRP.

iii) further on-street change; and
The range of costs estimated commercially for on street scope changes, plus delay and disruption from scope change.

iv) further allowance for risks and delay (especially the £150m figure in column E).
Stewart McGarrity's comment on the deckchair sheet specifically notes: "Not capable of being estimated with any certainty but included an additional 3 years prelims for BSC = £80m plus estimate for on street premium costs £40m plus movement to top end of on-street design = £30m."

12) You are noted as having attended the TPB on 17 November 2010, at which Richard Jeffrey was authorised to approach BSC to propose mediation (TIE00780943). The minutes note that

> "*The opportunity to initiate third party mediation was debated in detail by the Board*".

The January minutes (TIE00896989) note that the recommendation of the previous TPB had been to "*commence mediation as soon as possible*".

a) What was the nature and content of the TPB discussion on mediation?

Item 2.0 of the Strategic Workstream Update provides a fairly comprehensive assessment of the discussion at the board meeting or certainly actions from it. I don't recall any additional detail of the discussion and would rely upon the minutes for this record.

b) Was there any discussion about the strength, or weakness, of tie/CEC's negotiating position?

(Cf. the paper for the CEC IPG meeting on 21 January 2011 (CEC01715625) which described tie's position as 'weak')

I don't recall any specific discussion with regards to strength of position.

c) Was consideration given to delaying mediation, with a view to improving tie/CEC's negotiating position? If not, why not?

I don't recall the discussion in the meeting specifically (it was almost 7 years ago), so I would be speculating to answer this question.

13) An email from you dated 2 December 2010 (TIE00108776, attachment TIE00108777) suggests you needed

> *"GHP to explain to us (tie) as to what the key differences in our final Carlisle offers were (£'s) and why GHP believe there is such a Delta"* (TIE00108776).

An earlier email in the chain from Tony Rush had explained the Carlisle history, and noted that

> *"The difference in the price of tie's offer and the Infraco's counter offer is not easy to assess..."*

a) Can you explain this exchange?
Yes, the Tony Rush (Carlisle position) was to assess the contract price as a full repricing (per Tony Rush's e-mail). The financial assessment was to compare versus the original budget. As a result of this, the breakdown of the Tony Rush numbers was initially difficult to align with the original budget and Current Agreed Budget (CAB).

b) Why were tie themselves unaware of the difference between their own offers?

tie would not have been unaware of the differences in offers. The information with regards to offers (and differences) was presented in a different format to budget, and all previous reporting. My job was to give stakeholders a familiar comparison and re-align the offers with how the project had been reported on since inception.

c) Did you get the explanation you were looking for?

Yes – the e-mail on 22nd December contained the reconciliation which I was looking for (referenced in Q15).

14) Stewart McGarrity, tie's finance director, left tie in around December 2010.

a) Why did he leave?

Stewart would require to answer that question.

b) What impact did his departure have, (i) on tie; and (ii) on your role?

When Stewart left the Project, tie lost a very experienced finance professional and finance Director with knowledge of everything that had *happened on the project since inception. I had been deputy finance Director under Stewart. When he left I took the step up into his role of Finance Director for the (short) but remaining time that tie were involved in the project.*

15) On 22 December, you circulated a reconciliation of the Project Carlisle offer to "*our deckchair analysis and then the SooC column (H) view*" (TIE00108837, TIE00108838, 22 December 2010).

Can you explain in overview the purpose of this document, and what it shows?

The documents purpose was to show tie Management a clear reconciliation of the tie position at Carlisle (£216.5ml+£191.9ml)= £408.4ml (HYM) and the key messages of why there were increments to Carlisle. Any assessments made would have had commercial input from Dennis Murray.

MUDFA costs

1) The risk drawdown paper for the TPB on 15 December 2010 (TIE00896978_23) noted that the Carillion final account had been agreed at £62,500,757. To reconcile the budget with the final cost, a drawdown from the risk allowance was required of £8.3m. The minutes for the TPB on 17 November 2010 (TIE00896978_6 at 3.3) noted that the arrangements were shared with the board, but they were not reported in the minutes.

a) What was your understanding of the terms of the settlement with Carillion?

The Carillion Commercial settlement was negotiated by John Casserly, with Steven Bell from memory (although this may not be 100% accurate). John Casserly had demonstrated in Project Director reviews that there had been a large increase in the scope of the MUDFA contract since the original budget was set. In turn the cost of final settlement was significantly greater (£8.3ml) higher than the originally procured budget. From memory, the utilities replacement metrics were close to double the length (linear meters) of underground utilities having to be replaced in comparison to original close budget.

Preparation for mediation

1) Mediation talks were arranged for March 2011. In the run up to mediation:

a) What preparations did tie undertake?

Tie Mediation preparation was co-ordinated by Richard Jeffrey (CEO) and Steven Bell (TPD) across Operations, Programme, Commercial and Finance.

b) What part, if any, did you play in these preparations?

My role was to work with Alan Coyle (seconded to tie) of CEC to ensure that both tie and CEC had a clear view of what all of the cost option scenarios meant in terms of outcomes. This involved getting commercial assessments of each cost option to tie and truncation option, and clearly demonstrating price make up. Myself and Alan Coyle worked on all cost options together before and during Alan's secondment to tie and the Tram project. We shared all information, and I updated tie, whilst Alan kept CEC in the loop as to any changes in project assessments.

c) What were the main objectives of tie/the Council going into the mediation? (See e.g. the Project Phoenix Statement dated 24 February 2011 (BFB00053293).)

The main objectives were to get certainty with regards to a price and programme for the remainder of the Tram project.

d) What were your expectations, prior to the mediation, about what could be achieved?

There was a large gap in assessed AFC between BSC and tie. Both tie and CEC believed that an agreement and way forward was possible. I did not have a preconception of how Mediation might go.

e) To what extent were tie involved? To the extent that they were not involved, or had a lesser role, why was that?

I did not attend Mediation. Alan Coyle from CEC attended the mediation.

f) To what extent was there consensus in the tie/CEC team prior to, and at, the mediation on:

i) The reasons why the project was in difficulty;
I did not attend mediation so cannot comment on what happened at mediation.
It was well documented as to why the project was in difficulty (scope change; unable to agree price change; design delays;

programme delays; contract clarity). Both tie and CEC would be aligned in their understanding of the key issues.

ii) The forecast costs of the various options under consideration; and The forecast costs (and ranges) of options had been worked on and agreed/ communicated clearly by myself to tie execs and Alan Coyle of CEC to CEC. *We (Alan Coyle and I) worked together (sitting next to each other) and shared all of the information that we had with each other and our key stakeholders on a daily basis (tie/CEC).*

iii) The strategy to take, and outcome to seek, at the mediation?

Tie Ltd's final strategy would have been agreed by Richard Jeffrey and Steven Bell with CEC. The mediation was led by Sue Bruce on behalf of CEC/ tie. The outcome desired was a fixed programme, with a firm (fair) price and cost certainty.

2) A highlight report to the CEC Chief Executive's Internal Planning Group dated 21 January 2011 (CEC01715625) noted (page 8) that tie were

> "*in a weak position legally and tactically, as a result of the successive losses in adjudication and service of remediable termination notices which do not set out valid and specific grounds of termination. It was also clear from the documentation produced at the meeting by Bilfinger Berger that the Infraco was extremely well prepared. ... However, there was a desire commercially and politically to move towards mediation notwithstanding tie ltd's (apparently) relatively weak tactical and legal position. That is likely to have a financial implication with the Infraco as the party in the stronger position fairing rather better out of it than might otherwise have been the case.*"

The report also noted (page 7) that CEC's QC had advised that it appeared probable that, if properly investigated, valid grounds of breach could be articulated effectively in due course, and that he had advised the best option was to seek to enforce the contract until grounds of termination could be established. That would, it was noted, place tie in the strongest position with regard to any negotiated settlement.

a) What was your understanding of, and view on, these matters (in particular, the strength or weakness of tie's position, the reasons for that, and the relative preparedness of the parties for mediation)?

The key issue for tie and CEC (key CEC board members were regular attendees at tie board meetings) was that the longer the project was *delayed the greater the PM (project management) and overhead costs, and the likely larger the EoT claim. To date none of the previous legal advice (from heavy hitting lawyers and commercial heavyweights) had unlocked the dispute. Both tie and CEC had taken legal advice from various sources throughout the whole of the Tram project. From memory tie Ltd had been given legal advice that a position was strong on some disputed points, but then the outcome of DRP was unclear with BSC being awarded a change, but not to the value which had been sought in the first place. This counted as a BSC win, but tie would have spent significantly more on individual INTC's had the change values originally claimed not been disputed (which is a conundrum). The key theme was that the project continued to be delayed and outcome unclear.*

b) Why was the preferred option to proceed to mediation despite the weakness of tie's position?

I have not (or cannot remember) reading or being sent this (CEC internal) paper before, but do note that the CEC document caveats the position with "tie Ltd's (apparently) relatively weak tactical and legal position". From the word "apparently" it seems that the statement is slightly uncertain and is conjecture to an extent.

As noted previously legal advice and opinion had been provided on the strength of tie's position, and that 'perceived' strength fluctuated throughout the period of the Tram Project. tie (and CEC board attendees) made decisions on the project based upon that advice. It should also be noted that although the paper indicates that "CEC were not involved in the detailed operation of the infraco contract": from memory Nick Smith (of CEC legal) was an attendee from time to time at tie Board meetings.

The report also noted that work had continued to refine the cost estimates on the range of possible outcomes (page 9). It was noted that BSC had been paid £33m more than the value of work done, and that that was attributable to the upfront payment of £45.2m made to them. The estimates of the cost of re-procuring the project were reported to have been reduced following advice from Cyril Sweett. It was noted (page 9) that

> "*the current numbers show that delivery of the project to St Andrew Square can still be achieved for £600m (£633.8m - £33.3m) if BSC are not paid the delta between the cost and value of work done, though this will be subject to the negotiations.*"

A table on page 10, showing a range of cost estimates for settling out of court and reprocuring works showed a range of £692m to £773m for the whole of phase 1a, with a range of £621m to £680m for a line to St Andrew Square.

c) Can you explain the passage quoted above, which stated that delivery to St Andrew Square could still be achieved for £600m?

The bottom part of the spreadsheet shows the potential 'truncated routes'. The QS view range of options costing included Truncated values. (a) to Haymarket £614.6ml; (b) to St.Andrews Square (SAS) £633.8ml; (c) Foot of the Walk £668.9ml; Newhaven £714.8ml.

The assumption being made in the CEC paper was that the Milestone payment had resulted in a potential -£33ml credit vs the £633ml, resulting in a possible £600ml price to SAS. This view would have significantly increased with project Phoenix.

d) Do you consider that that was a realistic assessment, at that time? Please explain your answer.
At that point in time I believe that Alan Coyle (Alan will have prepared this paper) would have thought that this was a realistic estimate. Given the benefit of hindsight we know that the final cost agreed exceeded the value in this document.

3) A paper for the TPB (TIE00109241, 12 January 2011, approved by the FCL subcommittee on 8 February 2011: TIE00109243, TIE00109240) proposed a drawdown of £1.88m to cover an overrun on spending on dispute related items (forecast to be £4.87m by the end of period 11 2010/11).

A further paper seeking £1,615k for mediation costs, and a further £861k for PM staff costs, was dated 13 April 2011 (TIE00106735; approved, TPB, TIE00897056_8, para 3.8).

a) Please explain in overview the impact on project costs of the disputes and the attempts to resolve them.

In overview the longer that the project was in operation, the more costs that the project would incur from a headcount (tie Ltd) and legal perspective. As with all projects 'over-run' will increase costs. All of tie (and CEC) Tram related people costs and legal costs would increase the longer the project was expected to run. Steven Bell, Richard Jeffrey and the tie management team would forecast PM (tie costs) by headcount and look to reduce / plan for exits where appropriate as workstreams were completed.

4) On 9 February 2011, Richard Jeffrey forwarded you an email with his thoughts about the mediation (TIE00106325).

a) What was your understanding of these matters?

Richard has made a high-level assessment which makes sense. This is more of a helicopter view of how Richard was summarising the position and rationalising what would/ would not be a variable element of mediation (i.e. not up for debate).

b) To what extent did the mediation progress in accordance with Mr Jeffrey's thoughts?

I did not attend mediation.

5) You appear to have participated in a conference call with Nigel Robson and others "*to deal with the deckchair figures*" (email from Nigel Robson, 17 February 2011, TIE00109194). You circulated figures for "*Tie Phoenix, BSC Phoenix and Separation*" (TIE00109194, TIE00109195).

a) Please explain in overview the figures you circulated

109194 – shows a high level position explaining the differences in potential AFC position with the tie Phoenix commercial position (£639.5ml); the BSC Phoenix position as we understood it to be (£748.1ml); and cost of Separation (£639.5ml).

109195 – shows a slightly more granular split of the comparison, (and some movement in cost +£2.9ml in tie and BSC view) between tie Phoenix; BSC Phoenix and BSC Infraco offer costs at the point of Carlisle (informing BSC Phoenix from tie's perspective.

b) What matters were the subject of discussion?

I can't recall the discussion specifically (around 7 years ago), but the purpose would be to discuss the delta and range between the tie and BSC views in advance of mediation to understand the starting points.

c) Which, if any, were of particular significance to the mediation?

From memory the tie view of the BSC Phoenix position was the closest assessment of the numbers to the final costs (lump sum) agreed cost at Mediation.

6) On 21 February 2011, you forwarded an email from Tony Rush which you described as "*quite interesting*" (TIE00109208; see preceding email and its attachment, TIE00109202, TIE00109203).

a) Please explain the issue being discussed, and why you considered it to be interesting.

The note from Tony was interesting because I had been asked to send a *note to clarify accounting treatment: why COWD had been recognised from an accountants perspective, and the logic by which COWD had been measured and set up in the original Infraco Milestones schedules. Tony Rush had then provided a commercial view on what he thought should have been due Commercially (value assessment) against Initial payments if measuring against progress etc. The view was different between the accounting treatment and the commercial position that Tony thought tie should take going into mediation.*

b) What impact did it have (if any) on preparation for, and the outcome of, the mediation?

This would have clarified the difference in potential contractual positions from a commercial position in terms of COWD recognition as originally set out and applied, versus the potential Commercial position which Tony was suggesting to take at Mediation against 'pro-rata' value/ works progressed plus any changes to come.

7) On 24 February 2011, you received a paper by Dennis Murray entitled "*Infraco entitlement*" (TIE00106499, TIE00106500).

a) What was your understanding of this document, what it was intended to show and how it had been prepared?

The document was a document collated by Dennis Murray (Commercial Director). My understanding is that the document sets out the Commercial Assessment of each position with the BSC Consortium showing the methodology used to build up each commercial assessment of Civils, Systems, Design (SDS) and CAF costs. An assessment is also collated to show the differences in Commercial assessment of EoT between tie and BSC.

What use was made of it at the mediation?

I did not attend the mediation so cannot comment on this.

8) On 24 February 2011 BSC provided its "*Project Phoenix Proposal*" to complete the line from the Airport to Haymarket, plus certain enabling works in section 1A and work already done in sections 1B, 1C and 1D, for a total price of £449,166,366, subject to a shortened list of Pricing Assumptions (BFB00053258).

a) What was your understanding of, and what were your views on, that proposal?

The Phoenix proposal was BSC's proposal in response to tie's request to the infraco to provide a proposal for consideration at Mediation. The

Phoenix proposal (from the summary letter) was to cover taking the tram to Haymarket. I cannot remember what my view or opinion was on this particular proposal at that point in time.

b) How did that proposal compare with the proposals made by BSC in Project Carlisle:

- *"Carlisle 1":* £433.29m plus €5.8m for a line between the Airport and Princes Street East, with trams (29 July 2010, CEC00183919) (i.e., was Phoenix both more expensive, and shorter in scope?)
- *"Carlisle 2":* £405m plus €5.4m for a line between the Airport and Haymarket, with trams (11 September 2010, TIE00667410) (i.e., was Phoenix more expensive, but with the same scope?)

a) Is it correct to consider the Project Phoenix proposal as more expensive than the Project Carlisle proposals?

On the face of it the Phoenix proposal looks to be more expensive than the Carlisle 1 and Carlisle 2 proposals as the price offer (excluding any caveats in previous proposals) is for £449,166 from Airport to Haymarket.

If so, why had BSC's offer become more expensive?

Without having a summary comparison collated by a construction QS (to analyse) I could not explain the difference of these large value proposals. These proposals took place almost seven years ago, and one of them alone is over 200 pages long in this instance.

b) What was tie/CEC's attitude to that increase in cost?

(See, e.g., your initial view that, *pro rata,* this represented 220% of the *original price: TIE00109264, 26 February 2011.)*

I had tried to put into some context for Richard Jeffrey the change in pricing which had been offered by factually stating what the pro-rata offer was in comparison to the original contract price from a linear perspective (price x quantity perspective). I have highlighted to Richard that despite the price 'increase' that the price is still uncertain and quite heavily caveated from a commercial point of view.

9) On 25 February 2011 (TIE00670627, TIE00670628), you circulated another version of the 'deckchair' slides.

Please explain any significant differences between this and the earlier *version (circulated on 18 February: TIE00109195).*

The slides had been slightly updated following a review of the document with the expert consultants (legal and commercial) noted in the e-mail

17/02/2011 16:55 from Nigel Robson.

On analysis of the summary pages the key differences were (from 18th to 25th February):

- Classification of tie Phoenix/ BSC Phoenix headers were replaced with tie view/ BSC Offer.
- Non-BSC costs to go increased +£3ml (£2.5ml - £5.5ml) in both tie view /BSC Offer (Phoenix Carlisle in the first document)
- There was a reclassification of 'other highly variable costs' from the 18th following commercial review to classify this cost as settlement and Further delay risk to go on the front sheet.
- In summary, the tie Phoenix position (tie view) moved from £642.4ml to £638.2x (with x being "further EoT").
- In summary, the tie view of BSC Phoenix (BSC Offer) moved from £751.0ml to £760.3ml following the review sessions.

10) ***Report by GHP***

CEC02084612 is a draft report by GHP dated 25 February 2011. It says it gives

> *"a quick opinion on the Project Separation costs as prepared in the 'deckchair' PowerPoint presentation by tie, to identify, in headline terms, any costs or 'premiums' not included, together with any other assessment/overview/comment on the credibility of the figures. We have also been asked to provide an assessment/overview of the costs to complete Airport to Haymarket and from Haymarket to St Andrew Square".*

It estimated the cost of an agreed separation from BSC, and re-procurement to complete the line to St Andrews Square, at £765.27m (page 7). Further risks, of up to £30m, were also noted. It estimated the cost for Project Phoenix as £661m (or £700m with a 5% risk factor) (page 10).

Richard Jeffrey's email of 2 March 2011 noted that GHP's report "*gives figures for separation and phoenix which give a markedly different perspective to tie's figures*", and attached a reconciliation of tie's figures and GHP's: CEC02084602, TIE00109273, TIE00109274. The reconciliation was prepared by you.

GHP's estimate for Project Phoenix was c. £100m lower than tie's; and their estimate for Separation was c. £145m higher than tie's.

a) Who are GHP, and who were they advising?

GHP are the Company / team which Tony Rush's worked with in Phoenix, Carlisle etc. GHP and Tony Rush were advising tie Ltd, and were consultants paid by tie.

b) What use was made of their report?

Their report was used to help assess the tie position/ tie view of the BSC Phoenix position. The assessment made by GHP was a sense check from an independent commercial resource of potential costs at separation.

c) Do you have any comments on it?

No

d) What was your understanding of the differences between tie's and GHP's estimates?

The differences between tie, tie's view of BSC, and GHP's estimates were highlighted on the spreadsheet (TIE00109274) with comments on each line item. The reconciliations are from tie's view of BSC costs to complete explaining the -£99.2ml difference in GHP's view: tie assessment £760.3ml vs. GHP £661.1ml for completion with BSC and tie assessment of Separation £624.1ml vs. GHP view of £769.7ml.

e) Which did you consider the more reliable? Please explain your answer.

With the benefit of hindsight, the final tie assessment of £760.3ml to continue with BSC, and to complete the works based upon the tie view of BSC position was the more accurate assessment, but was made against a Phoenix offer which was not believed to give price certainty.

11) Shortly before the mediation, Alan Coyle asked you about what he thought was a new extension of time claim from BSC for £40m in relation to INTC 536 (TIE00354521).

a) What was your understanding of this matter?

This question is not in chronological order from the previous query. The GHP and tie assessments and e-mails from question 10 were dated at the start of March, but this e-mail on INTC536 is dated 31st January.

INTC536 was BSC's formal claim for EoT with all of their substantiation, logic and workings attached to it.

To what extent did it reflect calculations tie had already made?

This EoT value was reflected in the tie assessment noted in Q10 in the tie view of BSC Phoenix position.

b) What impact did this claim have on the mediation?

I did not attend mediation, so cannot comment on the impact of this individual claim in relation to those discussions. I do not formally know how this individual claim impacted mediation, as all issues would have been considered together at mediation for an agreement to be reached.

Other papers

12) In the run-up to the mediation, many documents were circulated setting out estimates for the project costs under different scenarios. Examples are listed below. Please identify any which you consider to be of significance in demonstrating tie's approach to the mediation and the outcome of the mediation, and explain why they are significant:

12 November 2010: CEC00113758, CEC00113762, CEC00113763

17 November 2010: CEC00114547, CEC00114548, CEC00114549

26 November 2010: CEC00116094, CEC00116095

16 December 2010: TIE00108822, TIE00108823, TIE00108824

28 January 2011, TIE00109041, TIE00109042, TIE00109042

last TIE00109042 should be TIE00109043

16 February 2011, TIE00106391, TIE00106390

17 February 2011, TIE00354822

18 February 2011, TIE00106431, TIE00106432, TIE00106439, TIE00106440, TIE00109194, TIE00109195, TIE00109200,

Most of the earlier documents would not have been relevant as each price would be superseded by a more recent scenario or update/ information to hand. The file CEC00114549 which was a cost assessment collated by Stewart McGarrity helped shape how costs were assessed from an overall project perspective from that point (Nov-10) forwards.

All of the documents being sent around 16th, 17th and 18th February 2011 would have informed both tie (and CEC - see Alan Coyle and Colin Smith on the e-mail distribution lists)

The updated Phoenix assessment TIE00106391 (Feb-10) showing the tie Phoenix position and the BSC Phoenix position was a useful comparison for tie and CEC to identify key areas where both tie/ CEC and BSC's positions required to come together in order to get an *agreement at mediation.*

tie and CEC attended the mediation together. I did not attend mediation, but the feedback which I received was that CEC had led the mediation discussions with tie supporting CEC.

Mediation – March 2011

1) Mediation talks took place at Mar Hall between 8 and 12 March 2011. Tie prepared a mediation statement (BFB00053300) as did BSC (BFB00053260).

We understand that a document entitled "*ETN Mediation – Without Prejudice – Mar Hall Agreed Key Points of Principle*" was signed by the parties on 10 March 2011 (CEC02084685) (the principles of which were then incorporated into a Heads of Terms document (CEC02084685, from page 2)).

Were you present at the mediation? If so, what role did you play and what advice, if any, did you provide?

No – I was not present at mediation

a) What discussion, and negotiation, took place between the parties during the mediation? Was there, for example, a series of offers and counter-offers?
As above – I was not in attendance at mediation (n/a)

b) Were there issues about which there was consensus at the mediation? If so, what were they?

n/a

c) What issues were the subject of greatest contention at the mediation?

n/a

d) To what extent, if at all, did tie/CEC's position change over the course of the mediation?

n/a

e) To what extent, if at all, did BSC's position change over the course of the mediation?

n/a

f) Were there any particularly significant developments or breakthroughs? If so, what were they?

n/a

g) Were there any particularly significant concessions made? If so, what were they?

n/a

h) When were the Heads of Terms agreed i.e. were these terms agreed at the mediation or in the weeks and months following the mediation?

n/a – I believe that the heads of terms were agreed at mediation.

i) Why was the agreement divided into two parts, the off-street works (in relation to which a price of £362.5m was agreed) and the on-street works (in relation to which a price remained to be agreed)?

n/a – I was not in attendance at mediation, so do not know the background as to why the price was compartmentalised in this manner. It is likely that there is less risk attached to off-street works (due to utilities etc.) than on-street works, and in-turn different commercial caveats were agreed to be attached to each scenario.

j) How (if at all) did the settlement agreed at mediation relate to the Project Phoenix offer? For example, did it improve upon it in any material sense and, if so, how?

Without a direct comparison from the mediated settlement to Phoenix I cannot make this comparison.

k) What were your views (and those of other tie officers) on the outcome of the mediation?

I did not have an 'opinion' on the position, but it was clear that the final agreed cost positon with BSC at mediation had been more closely aligned to the BSC Phoenix offer than the tie Phoenix offer.

l) To what extent did the outcome reflect your expectations prior to the mediation?

I did not have specific expectations prior to Mediation, other than that it was clearly important for consensus to be reached between the two parties. The outcome of mediation was positive in that the project would have an agreed way forward, and from the discussions and agreements made at mediation it seemed that BSC and CEC (with tie) would be able to deliver the Infraco works.

m) Did you (and others at the mediation) consider this to be a good deal? Please explain your answer.

n/a – I was not at mediation.

Were there any matters which, in your view, precluded tie/CEC from doing a better deal? If so, what were they, and how might they have *been avoided?*

The attendees at mediation on behalf of CEC (and tie) would have looked to deliver the best possible value for the City at that point in time. Key issues which impacted a deal or position on the project need to be looked at in relation to the original Infraco contract agreement, and procurement of the project. What was let at procurement, and what did the Infraco promise to deliver.

n) What did parties envisage would happen after the mediation to give effect to what had been agreed, and within what timescale?

n/a – I was not in attendance at mediation.

2) A report by Colin Smith and Alan Coyle dated 27 May 2012, "*Edinburgh Tram Project, Review of Progress and Management of the Project, January 2011 to June 2012*" (WED00000134) includes (at chapter 7, from _233) a "*Financial Briefing Report*", which includes a summary of the mediation (especially at 7.2 to 7.7; the appendices referred to are at _243 onwards).

a) Do you accept that as an accurate summary of the matters it reports?

I left tie Ltd in October 2011, and that that report was circulated in May 2012.

In the statement "it has become apparent from the pre-mediation work outputs that tie's commercial assessments of the likely outcomes were of a very hard line when compared to the assessment of where the culpability of delay fell" – this statement is written by Colin Smith (who led the mediation agreement which was closer to the BSC view than 'tie' QS view). It might bring more balance to also ask Dennis Murray of his assessment of this statement as tie Commercial Director at that time.

The £760.3ml view referred to as the Tony Rush view, from memory of the documents reviewed was 'tie view' of the BSC position based upon the BSC Phoenix offer rather than the "Tony Rush view" as reported here. It seems that the report might have misaligned where these costs originated or who originally collated the comparisons/ or employed Tony Rush (tie ltd).

As a comment without physically auditing the dates of the documents in the appendices it is difficult to assess the timing (original dates) of the Deckchair v1 numbers and the Phoenix numbers referred to here. The

Phoenix spreadsheet references a Tony Rush's spreadsheet originated at tie (appendix 1 deckchair vs GHP comparison – Phoenix and Separation).

b) In particular, can you comment on the following remarks:

   i) that the dominant cause of delay was MUDFA utility diversions (7.2);

   A detailed analysis of the programme and impact on programme would be required to verify if this statement is correct. It is accurate to say that MUDFA works were delayed and over-ran due to increased scope, but naming this as the dominant cause of delay would require to be looked at in more detail with expert verification of where works could have been progressed, and where they could not. Agreement of change/ delay in design (IFC) must also have been a key factor in works being delayed.

   ii) that the analysis underlying tie's preferred strategy of settling with Infraco and re-procuring the project was flawed (7.4);

   I did not attend mediation, but I do not recall that "settlement with the current contractor to be tie's preferred strategy". Is there evidence of this in any e-mails, or was this just looked at as one of a number of options? This statement should be verified by Richard Jeffrey and Stephen Bell.

   It should also be noted that tie (Richard Jeffrey/ Steven Bell) took the decision to engage with Tony Rush to give clarity on differences in tie/ BSC pricing assessments and to help with Carlisle/ Phoenix in order to get commercial clarity on both tie and BSC's positions and differences. Tony Rush noted in his report pre-mediation that the likely outcome of Termination was not positive (cost/ claim perspective), and this advice will have been taken cognisance of in the run up to mediation. This was my understanding of one of the key reasons as to why tie Ltd employed Tony Rush as a commercial consultant on the project.

   iii) that tie's preference went against all of the advice that was given by independent advisers at the time (7.6)?

Tie Ltd employed Tony Rush, so it seems to be at cross purposes to suggest that "tie went against all of the advice that was given by independent advisers at the time". Tony Rush's advice and papers were used by tie to understand the BSC position and potential cost out-turns.

Again, I do not recall that tie's preference was to terminate and re-procure? This statement would need to be clarified by Richard Jeffrey and Stephen Bell. I did not attend mediation, so if this was intimated before mediation, then I did not know that this was a 'tie' preference. At the time of writing this report tie was not an operational entity, and no-one from tie would have been able to challenge it.

c) Can you explain what is shown at _248 (in particular, the right hand column)?

this looks to be an option scenario taken from Project Pitchfork (one of the first initiatives to understand / capture options available to tie/CEC). The format of the sheet does not look familiar to me. From reading the spreadsheet on P 248 this looks like the assessment would be that there would be a further £23,234k of 'Project Management' costs assessed to be incurred with a 'Termination' option from the date that this assessment was made (baseline costs to date).

3) Sue Bruce's opening statement to the mediation is at CEC02084575. It noted that BBS's overall price had increased by £38m between Project Carlisle to Project Phoenix (page 13).

a) What was your understanding of that price increase?

Without having a detailed comparison of the costs to hand I would not be able to identify what made up the price increase. This statement was made in March 2011, and I cannot recall the specific differences in two prices referred to now (in June 2017).

To what was the increase attributable?

As above – without an analysis or comparison to hand I could not comment on this – it was over 6 years ago.

b) How, if at all, was that addressed at the mediation?

I did not attend mediation.

Ms Bruce also noted (page 13) that Siemens' price in Project Phoenix was for £136.5m, "*a 100% increase despite virtually no change*".

c) What was your understanding of that price increase?

As above – without an analysis or comparison to hand I could not comment on this – it was over 6 years ago. I would need to see specific analysis completed at the time of mediation.

d) To what was the increase attributable?

As above – without an analysis or comparison to hand I could not comment on this – it was over 6 years ago – I don't recall the specifics.

e) How, if at all, was that addressed at the mediation?

I did not attend mediation.

4) CEC02084577 is a note of Jochen Keysburg and Richard Walker's opening statements at the Mar Hall mediation.

At 5.1, Richard Walker is reported as having said that "*essentially tie are the problem*".

a) What is your response?

tie was an arms-length organisation, which through TEL were owned by CEC. CEC had a significant influence over tie, and key interfaces at board level and across financial, commercial and (formal/ informal reporting structures) operational structures. It might have been a way forward for the BSC consortium to take this approach from a relationship point of view with CEC in order to solidify relationships and agree a way forwards of working together with the council. Reading the letter, it might have been the intention of BSC to side-line tie Ltd. Politically this might have been a sensible approach for BSC to take, with tie being a company set up to deliver key projects but with CEC being the end client.

At 9, he is noted as having said that tie had, on awarding Infraco, decided to accept the risks arising from the incomplete utilities works, design and third party agreements.

b) To what extent did you, and others on the tie and CEC teams at the mediation, accept that view?
I was not a member of the tie team at the mediation. I did not attend.

c) To what extent did you, and others on the tie and CEC teams, accept that it was the occurrence of these risks which had caused the increased cost and duration of the project?

If the Infraco contract (which was let at procurement) was intended to minimise risk it seems that the contract did not fulfil its purpose; from a cost perspective (and delivery) the contract did not provide the certainty or levers for tie/ CEC to ensure that the project was delivered by BSC within the parameters of the original budget.

5) Tie's mediation statement, and its related exhibits (CEC02084530 to CEC02084561), specified a number of legal arguments in support of its

position.

a) To what extent were you familiar with these arguments?

I am not familiar with the detail, or cannot now remember the detail of these legal arguments, but would have been updated on the tie position and principles of some key legal arguments which came from the legal advice given to tie Commercial (for specific larger change DRP items). Specific legal arguments would be dealt with by the Commercial Director in conjunction with legal advisors (with reporting lines directly to the Tram Project Director).

b) To the extent that you were familiar with them, which did you consider to have had the greatest significance for the cost and duration of the project?

I cannot remember the specific legal arguments being referred to (it was 6/7 years ago).

c) How strong did you (and other members of the tie/CEC team) consider the arguments to be?

Each position would have been considered individually according to specific legal advice provided to tie Ltd by DLA or other legal advisors. It is not possible for me to specify how 'strong' I thought the arguments to be as the detail of the Legal interface for tie was with the Commercial Director (CD) and the Tram Project Director (TPD). This was also six/ seven years ago.

To what extent had the investigations and analysis necessary to support a concluded view on the strength of tie's legal position been carried out?

Key the legal interfaces for tie were the TPD and CD as noted above.

d) If a full investigation had not been carried out, how practicable (in terms of the cost and time required) would it have been to do so?

As above

e) Tie never tested any of its legal arguments in court. Why was that?

As above. It should be noted that tie did follow the DRP process in the contract on a number of occasions with varied success. CEC legal also attended the TPB on several occasions, and as the owner company of tie would have also had an opportunity to become involved in tie legal strategy.

f) To what extent were tie/CEC prepared seriously to contemplate litigation as an alternative to a negotiated outcome? To what extent did BSC believe that?

CEC and tie looked at all options available to them from a commercial and cost perspective (e.g. tie employed Tony Rush and his team for independent expert commercial advice on 'carry on with BSC' or 'terminate/postpone' etc.). BSC would have to comment upon how seriously they believed litigation to be a possibility.

g) To what extent was there discussion (and, if relevant, concession) at the mediation about the various legal disputes which separated the parties?

I did not attend mediation.

h) To what extent did those legal arguments serve to reduce the price which was agreed at and after the mediation?
I did not attend mediation so do not know how the agreement was structured in terms of which 'ground' had been conceded by each party and why.

6) ***Adjudication decisions***

By the time of the Mar Hall mediation, there had been a number of adjudication decisions on the project. BSC considered these to have decided in their favour certain key issues of principle about the various disputes under the contract (see BSC's mediation statement, CEC02084511 at 8.1). Tie emphasised that the adjudication decisions were binding only within their own scope, and had no general application (see tie's mediation statement, BFB00053300 at 4.3 and 4.4).

a) To what extent was there discussion about the adjudication decisions at the mediation?

I did not attend mediation.

b) To what extent did tie and/or CEC privately hold the view that the adjudication decisions reflected badly on their prospects of success with their arguments in litigation?

The detail of each claim/ adjudication finding requires to be looked into individually. For a number of the adjudication claims my recollection is that despite the 'principle' of BSC cost being awarded (which on paper looks like a BSC award) the actual substance of the findings were that many of the claims had been reduced by large sums in value (£000's) from the original claimed submissions.

c) To what extent did that influence the outcome of the mediation?

I did not attend the mediation, so cannot comment upon how positions *influenced discussions.*

A letter from the consortium to CEC dated 8 March 2010 (CEC02084513) noted, at page 3, that tie and BSC had discussed using the adjudication decisions as precedents for the resolution of similar disputes, but that tie had failed to acknowledge or accept the rulings. That suggests that at some stage tie had changed their attitude towards the adjudication decisions.

d) Do you agree that they had changed their attitude in that way? Why had that happened?

The legal interface and adjudications for tie were led by the TPD and CD for tie ltd. I do not recall the attitude of 'tie' or the TPD / CD changing towards disputes or adjudication decisions.

7) ***Remediable termination notices and underperformance warning notices***

Tie had, prior to the mediation, served 10 Remediable Termination Notices and 3 Underperformance Warning Notices on BSC. BSC's mediation statement noted (7.5) that tie's failure to act on its assertion that it was entitled to terminate the Infraco contract had "*seriously compromised the credibility of its position*".

a) Do you know why tie had not in fact taken further steps towards terminating the Infraco contract?

The decision to terminate the Infraco contract would not be down to tie, but would have involved all key stakeholders involved (CEC/ TS etc).

b) To what extent do you agree with the statement quoted above?

This was a BSC statement of their position in a letter to CEC, which from the wording of the document was setting out the BSC position regarding its relationship with tie (or lack of it), and looking for a way forward with CEC. The timing of the letter was just before mediation.

c) To what extent were tie/CEC prepared, by the time of the mediation, seriously to contemplate termination of the Infraco contract as an alternative to a negotiated outcome? To what extent did BSC believe that?

tie and CEC would have seriously contemplated all options open to them at that point in time. I cannot comment on the BSC position, as I was not at the mediation.

d) To what extent was there discussion of that option at the mediation?

I did not attend mediation.

e) To what extent did the existence of that option serve to reduce the price which was agreed at and after the mediation?

I did not attend mediation. Mediation set out new ground rules and agreements between CEC and the consortium. I do not recall price reductions taking place following mediation.

8) ***The Off Street Works Price***

The Heads of Terms included an agreed price of £362.5m for the Off Street Works (broadly, the airport to Haymarket, certain enabling works and the Prioritised Works).

a) What was the basis for that figure?

I did not attend mediation, so was not involved in the detail of the agreement during this process.

b) How (if at all) was it broken down?

The information/ high level costing sheets which I had sight of following mediation were mainly lump sum values with specific risk items caveated. If this was broken down, then it was not shared following mediation.

c) How was it agreed at the mediation?

I did not attend mediation.

d) What steps did tie/CEC take to ensure that it represented the best value available?

I did not attend mediation, so do not know exactly how the final value was agreed in terms of what the 'give and take' had been during mediation discussions.

9) Two versions of a cost summary, which was to be an appendix to a report to the Council's Governance, Risk and Best Value committee dated 6 November 2012, noted features of the Off Street Works Price:

BFB00101644 was circulated by Colin Smith on 2 November 2011; cover email, BFB00101642; other attachment, BFB00101643. The spreadsheet noted:

- (Note 1, line 79) that, "*as members are aware from the confidential appendix to the 25 August 2011 Council Report*", the c. £360m price was for:
  - The off street work
  - Settlement of claims in relation to the off street section

- Settlement of claims in relation to the on street section
- Settlement of claims in relation to system wide work; and
- "*In order to ascertain an allocation of that figure for the purposes of this summary we have calculated that:*

  a) £204m relates to off street work;

  b) £25m relates to settlement of claims in relation to off street;

  c) £82m relates to settlement of claims in relation to on street; and

  d) £49m relates to settlement in relation to system wide work"

CEC01952969 was circulated by Alan Coyle on 5 November 2012 (CEC01952968; other attachment, CEC01952970). On Tab 1 ("*numbers*"), a figure of £130.7m is given for the BBS off-street works element of the budget post-settlement agreement. On Tab 2 ("*notes*"), note 6 reconciles the £130.7m figure to the off street works price of £362.5m, by deducting from the off street works price:

- £2.44m for Forth Ports 'descoping'
- £82m for Extension of Time claims
- £49m for the MoV 4 mobilisation and materials payments
- £98.35m for "*system wide costs from cert 47*"

a) To what extent do these accurately break down the off-street price?

   I had left tie Ltd in October 2011, and Alan Coyle had continued to support the Tram project with Colin Smith. Colin Smith had been responsible for agreeing the detailed price breakdown on behalf of CEC and managing the application process with BSC/ payments to the infraco. The costs presented in this assessment seem to have moved to align with the updated agreed price structure following mediation. The price seems to be compartmentalised in larger sections (rather than the previous budget/ PD review report structure).

b) To what extent do these spreadsheets accurately (or approximately) state the extent to which the off street works price of £362.5m included payment to settle claims which had accrued under Infraco by the date of the Mar Hall mediation?

   Without an analysis of this being provided it is not possible for me to make this type of assessment from memory. Alan Coyle worked closely with me at tie Ltd throughout my time at tie (not just during his secondment at the end). Alan was an able individual, so I would expect *that Alan will have provided an accurate assessment. Without an actual comparison document I cannot provide a view.*

BFB00101644 suggests that the total settlement which CEC/tie agreed to pay in respect of those claims was at least £156m (£25m + £82m +£49m).

a) Do you agree?

The note at the bottom of the sheet indicates that off-street, on-street and systems wide settlement figures amounted to this figure. However, what it does not show is the increment from the previous tie assessment of BSC position (phoenix), or the previous tie assessment / QS view. An understanding of what the 'premium' paid here for a settlement could only come by comparing INTC's (changes submitted/ changes previously agreed/ claims included in previous views). i.e. to compare previous AFC assessments before and after the mediation agreement by original budget area to get a like with like comparison.

b) Was that in fact the basis of agreement on the Off Street Works Price?

I was not at mediation so cannot comment on the detailed make-up of the pricing structure reported here. Following mediation CEC (under Colin Smith) effectively took the lead on the commercial management, and reporting of the Infraco Contract works progress and certification of works/ payments.

c) Is that a net figure, taking account of any claims which tie had accrued under the Infraco contract?

As noted in question (a) this comparison shows cost of work done (COWD) versus budget. What is required to understand the detail is a budget (before) vs. budget (after) mediation comparison, and an assessment of where additional changes and EoT were included in the amended mediation budget price.

If you disagree that the settlement at Mar Hall amounted to tie/CEC accepting £156m as the net value of claims accruing to BSC under the Infraco contract, please explain:

d) What you consider to be the correct figure; and

I do not disagree. However a comparison of budget (CAB) to date rather than cost to date before Mar Hall would be required to assess if this was a net increase or not.

e) Why matters were reported as they were in these cost summaries.

I was not at Mar Hall. This report was dated September 2012, and I had left tie Ltd one year (October 2011) before this report was written.

Colin Smith led reporting and certification of the Infraco contract following Mar Hall. Reporting was then presented in-line with the updated mediation budget agreement. Using the original budget would not have been of relevance for the project (and would have added complexity) as it moved forwards.

f) Can you explain the reference to "*system wide costs from cert 47*" (quoted above from CEC01952969), and what the £98.35m allocated to that was for?

No – I can't explain this, as this spreadsheet was dated September 2012, and I had left tie Ltd one year (October 2011) before this report was written. Alan Coyle or Colin Smith would be better positioned to answer this query.

10) ***The On Street Works Target Price***

For the On Street Works (i.e., Haymarket to St Andrew Square), the parties agreed a target price of £39m (BFB00053262, clauses 6.1, 6.3).

a) Why was it not possible to agree a fixed sum for those works?

I was not at mediation so do not have detailed knowledge of why it was 'not possible' to agree a sum for On Street Works. The logic behind compartmentalising this agreement would be that there is more risk (unknowns such as utilities (etc.)) and design may not yet have been completed, and in turn a target price set and agreed. The detail of the logic behind this would require to come from Colin Smith (or Alan Coyle).

b) What was the basis for the £39m figure?

I did not attend mediation and was not provided with this detail following mediation.

c) How (if at all) was it broken down?

As above

d) Did it include the cost of the Princes Street works?

As above

e) How was it agreed at the mediation?

As above – I did not attend mediation.

11) ***Reconciling the Mar Hall agreement with the previous proposals (Project Phoenix and Project Carlisle)***

Can you reconcile the agreement reached at Mar Hall with the various proposals which preceded it (to explain the key differences between them), being:

- BSC's Project Carlisle proposal dated 29 July 2010 (CEC00183919);
- BSC's revised Project Carlisle proposal dated 11 September 2010 (TIE00667410);
- BSC's Project Phoenix Price Proposal (BFB00053258)?

No – I could not do this without expert commercial advice on each document having been carried out in detail. Such an exercise would take weeks. There are already documents in place which would show that this exercise had been done in the past (by Dennis Murray/ Tony Rush)? Although it might look like the numbers are a like with like comparison from a high-level 'numbers' perspective a proper commercial assessment (of each document scoping paper of 100 pages+) would require to assessed by a commercial professional expert (not by a finance professional, or accountant). Only by having a proper commercial assessment could all commercial caveats within each of these large document be correctly priced; assessed for risk and compared like-with-like.

12) *One key difference between the Project Phoenix proposal price (£449m) and the Off Street Works price agreed at Mar Hall (£362.5m) is that the former included £65m for the tram supply, but the latter did not.*

  a) *Do you agree?*

  Yes. It is clear that CAF (£65ml) costs on P10 of this report relate to the building of trams, and have nothing to do with off-street works.

Excluding the cost of the tram supply, the Project Phoenix Proposal price was as follows (see BFB00053258_10):

- *Bilfinger - £231.8m*
- *Siemens - £136.8m*
- *SDS - £15.1m*
- *Total - £383.7m*

  b) *Do you agree?*

  On the face of the figures alone and without an expert commercial *assessment of exclusions and risks, then the price on paper is £383.86ml (£449.166ml-£65.306ml = £383.860ml).*

c) *To what extent is that £383.7m figure directly comparable with the Off Street Works price agreed at Mar Hall (£362.5m)?*

A commercial assessment is required to understand what was excluded from the original Phoenix offer (£383.86ml) back to the Mar Hall number (£362.5ml). The Mar Hall agreement purpose was to get a GMP for stakeholders to have cost certainty for the project, but the original Phoenix offer was noted to have a number of exclusions (commercially which did not give certainty, and the possibility of scope and price creep).

d) *What accounts for the differences between them?*

I was not at Mar Hall, so do not know what was included/ excluded in the detailed negotiations. Documentation must be held by CEC (Colin Smith) of exactly what was agreed at mediation and the differences assessed commercially by a commercial expert such.

e) *Are there any documents which reconcile them?*
See above note.

f) *What are the other key differences apart from price (if any) between the Project Phoenix proposal and the deal done at Mar Hall?*
A commercial assessment of the exclusions included in the original offer, and the value of those exclusions (is referenced in Colin Smith's CEC report to the Council which I was asked to read in an earlier paper/ question). From memory of what had been noted in that report to the Council, Colin Smith had evaluated the exclusions in Phoenix, and assessed the value of differences in the offers/ mediation agreement.

13) *Excluding the cost of the tram supply, the Project Carlisle price proposal of 29 July 2010 was as follows (CEC00183919_1 and _11):*

Bilfinger - £234.3m

Siemens - £126.9m`

SDS - £16.3m

Total - £377.5m

g) *Do you agree?*

On the face of the figures alone and without an expert commercial assessment of exclusions and risks, then the price 'on paper is' (£377.5ml).

h) *To what extent is that £377.7m figure directly comparable with the Off Street Works price agreed at Mar Hall (£362.5m) and the £383.7m* *element from the Project Phoenix proposal discussed above?*

This comparison could not be made without an expert commercial assessment on each document having been carried out in detail.

i) What accounts for the differences between them?

As above - an expert commercial assessment is required to understand the differences in the offers from a scope and pricing/ risk perspective.

j) Are there any documents which reconcile them?

I do not have the documents to hand, but do expect that this document would exist, and that Colin Smith would have analysed all cost comparisons during the mediation negotiations. I do not recall being provided with any detailed assessment of this following mediation.

k) What are the other key differences apart from price (if any) between that Project Carlisle proposal, the Project Phoenix proposal and the deal done at Mar Hall?

I would need to be provided with a commercial assessment of the numbers / offer to answer this question. This question is better answered by Colin Smith (CEC), or Dennis Murray as it is a commercially orientated question and both attended mediation (I did not).

14) BSC made a revised Project Carlisle proposal on 11 September 2011 (TIE00667410). The equivalent price elements to the above appear to be as follows:

Bilfinger - £215.3m

- Siemens - £118.6m
- SDS - £15.8m
- Total - £349.7m

a) Do you agree?

As above – numerically this would be the position, but this does not account for exclusions or any commercial assessment of risk/ differences in scope of the contract offers.

b) To what extent is that £349.7m figure directly comparable with the Off Street Works price agreed at Mar Hall (£362.5m), the £383.7m element from the Project Phoenix proposal discussed above and the £377.7m figure from the original Project Carlisle proposal?

I did not attend Mar Hall, and I do not have a commercial assessment of *this information to hand. Comparisons exist between Phoenix and Carlisle, but I do not recall having seen any comparisons like with like to the Marr Hall price.*

c) What accounts for the differences between them?

As above

d) Are there any documents which reconcile them?

Dennis Murray had originally compared (commercially) the Carlisle offers, and I am sure that I have commented upon summary sheets (which I collated from Commercial inputs) in earlier inquiry questions. Comparisons have also been made in earlier attachments, upon which questions were based comparing Carlisle with Phoenix. I do not know if any single document exists which compares all offers historically (Carlisle, Carlisle2, Phoenix, Mar Hall).

e) What are the other key differences apart from price (if any) between this revised Project Carlisle proposal and the others discussed above?

A commercial assessment of the exclusions included in the original offer, and the value of those exclusions would be required to understand the detailed differences in offers.

15) ***Minute of Variation 4: Mobilisation payment of £49m***

On 20 May 2011, tie, Bilfinger, Siemens and CAF entered into Minute of Variation 4 in respect of the prioritised works (CEC01731817). It gave priority to certain works including the depot, the mini-test track, Haymarket Yards and the Princes Street remedial works.

Clauses 6, 7 and 8 of Minute of Variation 4 provided for the payment by tie to BBS, in instalments, of a sum totalling £49m.

The report by Colin Smith entitled *Report on Progress since Completion of Heads of Terms to 8 April 2011* (7 April 2011, WED00000134 from _6) noted, at 5.2.1 (_19) that there had been discussion at Mar Hall on the cost of remobilising for the project and that at workshops on mobilisation costs a

> *"difference of view had been clearly expressed ..., with the BBS requirement noted as £49m and tie's opinion at £19m. ... BBS confirmed that they could not mobilise on the basis of a £19m payment. After discussion it was agreed to take a proposal to the Principals."*

The proposal was for payment of £49m (part of the off-street price of £362.5m) in instalments (£27m, £9m and three payments totalling £13m).

In an email dated 7 April 2011 (TIE00687649), Richard Jeffrey had expressed concern about the £49m figure, and said the tie team believed a *"more reasonable and supportable, but still generous number is £19m".*

On 10 May 2011, you raised concerns with Richard Jeffrey about £27m having been paid under Minute of Variation 4 when you were on annual leave (TIE00107170).

a) What was the purpose of the £49m payment?

The purpose of MOV4 was to assist both parties to re-mobilise the Infraco contract effectively. The value had been agreed between CEC's Colin Smith / BSC. The MOV4 'remobilisation' valuations were large and in turn this would be likely to provide BSC with comfort of being able to operate the remainder of the contract 'cash positive'.

b) What concerns did you and Mr Jeffrey have (about both the payment made during your absence and the £49m amount)?

My concern over payment of MOV4 was not around my absence, but rather that a (very large) payment had been made against a Minute of variation without that minute having been formalised or signed off by tie Ltd or the Consortium, or CEC. See the signature dates for BSC on CEC0173817_0014 (dated 20th May). A payment of £27ml was made before formal sign-off, and this payment had been made on the advice (authorisation) of a third party consultant employed by CEC. This in my view was a concerning breach of governance. What would the scenario have been if BSC had then reneged on their agreement in principle with CEC?

CEC0173817 should be CEC01731817

c) How was the agreement to pay a mobilisation payment reconciled with the fact that, in tie/CEC's view at least, BBS had been overpaid prior to the mediation relative to the value of the work they had done?

Per Richard Jeffrey's e-mail, Sue Bruce and CEC had (rightly) led mediation. Per Richard's e-mail "Sue Bruce exercised her authority as CEO of CEC, our shareholder, and a deal was reached". Tie and the Tram Project Board (TPB) would not have authorisation to sign MOV4, without shareholder (CEC) approval. Richard Jeffery requested that the tie Council papers 'reflect that MOV4 had not been scrutinised by the TPB', and that Richard was satisfied that tie management had made their views on MOV4 known to the authors of those council papers.

16) ***Other matters relating to the mediation***

a) Are there any other matters, relating to the mediation at Mar Hall, which you think are of importance to the inquiry's terms of reference?

I did not attend mediation at Mar Hall.

b) If so, please explain what they are and why you think they are of importance.

n/a

c) Do you consider that any documents material to the mediation at Mar Hall, and the preparation for it, and about which you are aware, have not been made available to you with this note?

n/a

d) If so, what are they and where are they likely to be found?

n/a

Settlement agreement, September 2011

1) Following the mediation, negotiations continued leading to the signing of a settlement agreement between CEC, tie and BSC on 15 September 2011 (BFB000054640). BFB000054640 should be BFB00005464

This was (except in respect of specified exceptions) in full and final settlement of all claims arising out of or in connection with the Infraco Contract and Infraco Works.

a) To what extent were you involved in the work leading up to conclusion of the settlement agreement?

I was not involved in this work at all. Following mediation CEC took the lead on the Commercial and Financial management of the contract, with tie's involvement being limited.

b) To what extent had an attempt been made to value all of the claims (by Infraco against tie, and tie against Infraco) which were being settled by this agreement?

As above - I was not involved in any of the work which went into this settlement agreement at mediation. After mediation, the commercial management of the Infraco contract was very much lead by CEC's consultant; Colin Smith.

c) What was your role (if any) in relation to that?

n/a – as above

d) What element of the price agreed in this agreement represented the claims which were being settled?

n/a – as above

e) Are those matters documented anywhere?

n/a – as above

2) A new budget for the project was fixed at £776m (see reports to Council: 25 August 2011, TRS00011725; and 2 September 2011, CEC01891495; minutes,

CEC02083194 and CEC02083154).

The following reports appear to have informed the Council's decision to proceed with the settlement agreement and to set their budget for the project thereafter at £776m:

- Cyril Sweett, Extension of Time Commercial Report, May 2011 (TIE00097227)
- Atkins Independent Review, June 2011 (CEC02085600)
- McGrigors, *Report on Certain Issues Concerning Edinburgh Tram Project – Options to York* Place, 29 June 2011, USB00000384 (and what appear to be its appendices: CEC01942219, CEC01942220, CEC01942221, CEC01942222, CEC01942223, CEC01942224 and CEC019422125) **CEC019422125 should be CEC01942225**
- Faithful & Gould, *Post Settlement Agreement Budget Report,* August 2011, CEC02083979

a) To what extent (if any) were you involved in the instruction and/or preparation of these reports?

I was not involved in the instruction/ or preparation of these reports. Note: I could not locate file CEC019422125 in the index. **CEC019422125 should be CEC01942225**

b) If you were involved, please explain the nature of your involvement.

n/a

c) Do you have any comment on the reports?

No

d) To what extent do you consider them to have been an appropriate basis for the decision to proceed with the settlement agreement and to set the new budget?

n/a – I did not have involvement in procuring these reports. On a general observation basis and from the information provided it seems reasonable to have taken a range of legal and professional advice from expert external organisations prior to making any informed decision upon a way forwards.

Governance

1) Did you have any concerns at any stage about:

a) TIE's project management of the tram project or the performance of any of TIE's senior personnel or Board members?

No.

b) the performance of senior CEC officials or councillors?

No

c) the TPB or any members of the TPB?

No

d) the performance of TEL or any directors of TEL?

No

e) the performance of TS or any senior officials of TS?

No

f) the performance of any of the main contractors, or the senior personnel employed by these contractors?

Yes.

g) If so, please explain your concerns, whether (and if so how) you raised them, and what (if anything) was done about them.

Throughout my time at tie Ltd there was a concern operationally that the Infraco contractor (BSC) were not progressing works as efficiently as possible, and that BSC had been setting out a position to increase the price of the contract using the contract effectively as leverage. When I joined tie Ltd the Infraco contract was already delayed (with an existing EoT claim) and INTC change orders had started to be raised. I was informed by senior management that before works had commenced that the Infraco had raised a number of 'changes' commercially including an initial claim for Extension of Time against the MUDFA works.

2) a) Did you have any concerns at any stage about the governance arrangements for the project?

The only major concern that I had regarding the governance of the project was that following mediation tie Ltd still had responsibility formally both commercially and financially for delivering the project. CEC took the lead (through Colin Smith) in remobilising the contract and agreed the terms and a way forwards with the Infraco. I was concerned at the time with the approach taken with MOV4 to pay BSC £27ml in advance to 'remobilise' the contract, but without having had the MOV4 document signed off in advance *by signatory authorities of CEC/ BSC.*

b) If so, please explain what they were, whether (and if so how) you raised them, and what (if anything) was done about them.

Per the note above my concern was with the financial governance of element of MOV4, and the fact that this had been approved by Colin Smith on behalf of CEC prior to the agreement being signed off. The value was significant at £27ml, and potentially could have been a very large issue had MOV4 or the amended heads of terms not been agreed following MOV4.

I raised my concerns directly to the Non-executive directors of the TPB of the process that had been followed. I also formalised my concerns with Richard Jeffrey in the e-mail (TIE00107170) as noted in question 15 (Minute of Variation 4: Mobilisation payment of £49m). Richard then responded in confirming that from a governance perspective that myself and Richard had clearly communicated the concerns of tie Ltd to the relevant parties from a finance, and operational governance perspective.

3) In an email on 3 December 2009 about governance and future operational structures (CEC00617854), Stewart McGarrity said:

> "*I found the discussion around governance and future operational structures to be very difficult indeed this morning, partly because I was speculating with a lot of it and partly because I have been unable since the days of the Business Case to exercise any significant influence over or bring certainty to the resolution of the situation (which I sure as hell had no part in creating). This is about much more than just clear business models and leadership – it's also about the dark world of politics and getting people to share their toys.*"

a) What was your understanding of the matters referred to by Mr McGarrity?

I am not really sure what is being referred to here. I think that this was a note following a team meeting with the "finance and ICT" teams (from the e-mail circulation list).

b) What were your views?

As above, I am not too sure what the reference is here.

4) a) To what extent was there a conflict between the need (on the one hand) to report fully to the TPB and to council members, and (on the other) not to reveal matters which might undermine the strength of tie's negotiating position against BSC?

(See, e.g., your comments on a draft of the report to council in August 2009 (CEC00795031, 20 July 2009)

a) How might this issue have been resolved?

I had been asked to comment on a council paper which was going to be open to FOISA (and would be read by BSC). It would not be wise to discuss all of the commercial options in this paper (in detail) as it automatically weakens the entity (tie/CEC's) negotiating position. As with all businesses (public sector or private) ensuring that the information provided is correct is absolutely imperative. The communication and content of that information has to, in some instances be tailored to that audience. It was important that tie always ensured that they communicated clearly, honestly, and openly with all key stakeholders, but also should be responsible and take cognisance of the wider distribution of material (in reports available to the public) and what that audience might be able to do with certain information. The impact of sharing some information/ strategy might well in-turn weaken the Tram Projects commercial position and significantly increase cost.

Tie bonuses

1) We understand that tie ran a bonus scheme for staff and contractors. In November 2010, Stewart McGarrity sent you a "*complete download*" of material on bonuses (CEC00114348). The email noted that bonus payments to consultants and Andrew Fitchie in 2008 were of particular interest at that time.

a) What was your role in relation to bonuses?

I didn't have an 'involved' role in relation to tie bonuses. I was deputy FD at that time that any bonus was paid during my tenure, and I was not involved in the REMCOM. Only one bonus was paid when I was at tie Ltd, and from memory that was reduced for every employee by -75% or -90% of the original proposed/ contract values. Individuals bonus potential were part of tie employee contracts. Individuals were scored against personal objectives, and Bonuses paid according to individual performance. Bonuses were reduced significantly on instruction from David McKay on account of the issues which the project and tie Ltd faced.

b) Why did Mr McGarrity send all this material to you?

Because he was leaving the business (Stewart had resigned), and he was sharing all of the information that he had prior to leaving (the title of the e-

mail page in bold is "HANDOVER").

c) Please explain the particular interest in bonuses paid in 2008.

Stewart had this information, and I do not think that anyone else had the full background on the 2008 bonus payments.

d) What were the criteria for paying bonuses? Who decided what would be paid to whom?
Bonuses were linked to individual performance and line manager review scoring. Individual scores would then be verified by the executive and the bonus % weighted according to grade and allowance. Colin McLauchlin (HR Director) had introduced the scheme.

e) To what extent, if at all, did CEC exercise control or oversight over tie bonuses?

I do not know the answer to this as no bonuses were paid when I was involved in REMCOM. This is something which would have normally had to have been signed off at REMCOM (with non-exec Directors signing off on payments). Stewart notes that hard copy information is available in his covering note including "contracts, letters and Remuneration Committee papers and minutes".

f) What control or oversight was exercised by tie?

As above – this will be noted in the REMCOM minutes/ papers. I do not factually have the information to hand.

g) Did you have any concerns at any stage about the bonus scheme? If so, what were they?

I was not at tie Ltd in 2008 when these bonuses were paid.

h) To what extent (if any) were bonuses linked to the financial close of the Infraco contract in May 2008 (particularly for senior staff)? What had to be achieved in that context for bonuses to be paid? Broadly, how many staff received bonuses, and how much were they paid?

I was not at tie Ltd in 2008 when these bonuses were paid, so do not have the background information to hand. The formal "approver" of paying these bonuses (whether it be Colin McLauchlin or Willie Gallagher) should be able to answer this question.

i) What was your understanding of the bonus paid to Andrew Fitchie? Why was it of interest? What was the basis for paying it to him?

I was not at tie Ltd in 2008. My recollection is that this was of interest to

Stewart because Andrew Fitchie was a DLA employee, but had been seconded to tie Ltd. The note from Stewart suggests that an incentive provision was part of Andrew Fitchie's secondment agreement from DLA.

Final comments

1) By way of final comments:

a) How did the Edinburgh Trams Project compare with any similar projects you have worked on (both previously and subsequently)?

The project did not compare with specific projects or workstreams that I have previously worked on as the Governance structure was unique:

tie were set up to run the project as an arms-length organisation wholly owned by CEC; and

TEL owned and was the parent company of tie Ltd;

CEC also own Lothian Buses (and the tram airport link was a threat to the Buses most lucrative route); there was a natural conflict here for senior Lothian Buses board members being also members/ attendees of the Tram Project Board (TPB).

Transport Scotland were the main funder, but until late-on did not get involved operationally in the running of the project; this seems to be an unusual set up for (the funder with £500ml input not to ensure that they were informed of goings on, on a daily basis).

the original funding agreement (£45ml CEC/ £500ml TS), budget £512ml including risk, but CEC bearing all costs over £545ml.

The funding structure and involvement of key parties (TS) seem in hindsight to be misaligned. As TS were funding up to £500ml it would be reasonable to expect that senior TS execs would be involved in the steer/running of the project and attend board meetings?

b) Do you have any views on what were the main reasons for the failure to deliver the project in the time, within the budget and to the extent projected?

Key reasons include:

- *MUDFA works and Infraco works being let at the same time.*
- *MUDFA works original scope was underestimated and this in turn resulted in delays.*

- *Risk increased because the Infraco works design for the final budget was completed before all on street MUDFA works were completed.*
- *Responsibility for design (or cost of change) did not seem to have changed tie Ltd's cost /risk position when the designer (SDS) novated to the Infraco.*
- *Base date design changes to issued for construction (BDDI/IFC) drawings changed the scope of the project, and in-turn increased cost from the original design. This also resulted in delays and further EoT.*
- *The contract did not work in favour for tie Ltd, so it seems that the contract which was let at procurement did not achieve what was set out to be achieved.*

c) Do you have any comments, with the benefit of hindsight, on how these failures might have been avoided?

- *Better information to have been available at the time of MUDFA works scoping?*
- *MUDFA works completed before the Infraco contract procured (allowing BSC a clear run at the full works area).*
- *Full Infraco issued for construction design to be in place before procurement of the Infraco contract begins.*
- *A better worded contract (and more standard/ less complex contract) to allow the client to press the contractor to continue works in the case of dispute or to have a 'real and clear option' to terminate the contract.*
- *A less complex structure with the Council and TS jointly managing the project and employing/ seconding experts into their organisations (rather than setting up tie Ltd). Or for either TS or CEC to take responsibility for delivering the full project stand-alone. The complex governance structure may have made reaction to issues slower than it could have been.*
- *Dealing with the impasse with the BSC contractor more quickly and escalating the position to TS to become involved in the project and use their perceived procurement strength to better leverage the projects position with the Contractor.*

d) Are there any final comments you would like to make that fall within the Inquiry's Terms of Reference and which have not already been covered in your answers to the above questions?

- *No*

I confirm that the facts to which I attest in the answers contained within this document, consisting of this and the preceding 65 pages are within my direct knowledge and are true. Where they are based on information provided to me by others, I confirm that they are true to the best of my knowledge, information and belief.

Witness signature...[redacted]...

Date of signing............8/7/17....................