

23 March 2018

Dear Mr McNicoll

I refer to your letter dated 18 March 2018 in which the Inquiry seeks my responses to a number of further questions.

I can confirm as follows:

Q.1	<p>At the hearings (14 September 2017, transcript pages 84-108, 137-141 and 165-167), you were asked about the report to Council on 24 June 2010 by the Directors of City Development and Finance (CEC02083184) including, in particular, the sentence in the report that <i>"The outcome of the DRPs, in terms of legal principles, remains finely balanced and subject to debate between the parties"</i> (paragraph 3.12 of the report). We have since identified an email dated 11 June 2010 from you to Donald McGougan and Dave Anderson which notes that you had given the draft report "a fresh read, agreed a few comments from Richard and drafted some conclusions and recommendations" (CEC00246713). The tracked changes in the draft report attached to your email suggest that you inserted the sentence in the report, <i>"The outcome of the DRPs, in terms of legal principles, remains finely balanced and subject to debate between the parties"</i> (CEC00246714, password "edinburgh").</p>
	<p>(a) Did you insert the sentence in the report, <i>"The outcome of the DRPs, in terms of legal principles, remains finely balanced and subject to debate between the parties"</i>?</p>
A.	<p>Although I could not recall it when giving oral evidence I can confirm that I did.</p> <p>Given the passage of time, I am unable to explain precisely why I chose that particular wording. For the purposes of this response, I have assumed that the wording was initially drafted by me without comment from anyone else. I cannot recall whether or not this was the case. The phrase <i>"finely balanced"</i> does not sound like my usual language. I note that in an email dated 1 June 2010 recording a discussion about the project I refer to this phrase in discussing Richard Jeffrey's preferred description about recent progress [see Doc Ref NS1.1].</p>
	<p>On reflection, the only explanation for that sentence which I can offer the Inquiry is that at the time I likely intended to convey to Council that it was the consequences of the DRPs on the wider legal principles which were still subject to significant legal debate between the parties. With hindsight I do not believe that I intended the sentence to be a summary statement on the outcomes of the specific adjudication decisions.</p> <p>Following insertion of this wording on 11 June, the report was subject to review by a number of individuals from the CEC and DLA, including members of the Tram Project Board and the report signatories. Dave Anderson circulated a further version on 16 June after his thorough editing [see Doc Ref NS1.3]. I now note that this draft changed my original wording slightly, although the sense of the sentence remained fundamentally the same. I also note that Andrew Fitchie made no comment on this wording when he provided his views on the report [see Doc Ref NS1.2a and NS1.2b].</p> <p>Despite the multiple reviews of the report between 11 June and formal signoff by the Directors, I do not recall any discussion or challenge in relation to that wording.</p>
	<p>(b) Did that sentence represent your views of the outcome of the DRPs at the time?</p>

Doc Refs  
NS1.1-NS1.9 all  
Doc ID  
WED00000652

A	On reflection I do not believe that it did or was intended to, although please see the answer to question 1(a) above.
	(c) Did there come a time when your views on the outcome of the DRPs changed and, if so, when and why?
A	<p>Unfortunately I cannot now clearly recall my views on the outcomes of specific adjudications at that time. However, my views on them and their ultimate consequences at the time were heavily influenced by the views of tie and their advisers whom I accepted were more expert in construction matters.</p> <p>I believe that my views on the consequences of tie consistently appearing to lose the arguments they put forward did change during 2010. From memory I was querying matters and requesting further information and analysis to help inform the Council's understanding of the overall contractual position. For example, in my email to tie dated 27 August 2010 [see Doc Ref 1.4] I sought, amongst other matters, detail of the potential consequences of the adjudication decisions on a wider basis in relation to the contract. I do not recall such analysis and information being provided.</p>
	<p>The report to Council on 14 October 2010 by the Directors of Finance and City Development (CEC02083124) also includes the sentence, <i>"The outcome of the DRPs in terms of legal principles, remains finely balanced and subject to debate between the parties"</i> (paragraph 2.50). We have since identified the following emails: (i) an email dated 6 October 2010 from Alan Coyle to Dave Anderson and others (CEC00013930) which attached a draft (v1.5) of the report to Council (CEC00013931, password "14.5") which contains a discussion of the outcome of the DRPs but does not contain that sentence, (ii) an email dated 7 October 2010 from Alastair Maclean to yourself in which Mr Maclean stated, "Can't open as I don't know the password but suffice to say I don't like the idea of going into the detail of DRPs for reasons I have already made clear at the meeting earlier today. The agreed position was that we would not extend the risk beyond that taken inadvertently in June so I am surprised if Richard wants to do the exact opposite of that now. Please remove any wording that goes beyond June" (CEC00012663), (iii) an email dated 8 October 2010 from yourself to Alan Coyle (CEC00036170) in which you suggested a new paragraph in relation to the DRPs, which paragraph included the sentence, <i>"The outcome of the DRPs, in terms of legal principles, remains finely balanced and subject to debate between the parties"</i>, which paragraph then found its way into the final version of the report (as paragraph 2.50) and (iv) an email dated 8 October 2010 from you to Mr Maclean (and Carol Campbell), forwarding your said email to Mr Coyle, including your proposed paragraph in relation to the outcome of the DRPs (CEC00036173).</p>
Q.2	(a) In his email of 7 October 2010 Mr Maclean referred to not extending the risk "beyond that taken inadvertently in June". What was that a reference to?
A	I do not know what this was a reference to.
	(b) You appear to have inserted the sentence <i>"The outcome of the DRPs, in terms of legal principles, remains finely balanced and subject to debate between the parties"</i> in the report to Council on 14 October. Is that correct?
A	<p>That is correct.</p> <p>However, I would highlight that I also added the word "overall" between "The" and "outcome" in the October Council report and, as set out above, I believe my intention at</p>

	the time was to reflect that the consequences of the DRPs remained in dispute between the parties.
	(c) Did that sentence represent your views of the outcome of the DRPs at that time?
A	As stated in answer to question 1(b), I do not believe that it did, although please also see the answer to question 1(a) above.
	(d) What did you understand Mr Maclean to mean by the request in his email of 7 October 2010 to "Please remove any wording that goes beyond June"?
A	<p>On 6 October 2010, following views expressed by Mr Maclean on the DRP aspects of the draft report, I circulated a further version (1.6) of the report [see Doc Ref NS1.5a and NS1.5b]. As referred to in that email, a meeting of "bosses" was arranged to take place on the morning of 7 October to discuss. During the afternoon of 7 October I sent a short paragraph to tie in relation to the DRP decisions [see Doc Ref 1.6] which appears to be a shortened version of para 3.5 from the June 2010 report. This wording, with updated figures, was incorporated into the draft which was then sent by Alan Coyle to tie for final comment [see lower part of Doc Ref NS1.7a]. The "<i>finely balanced</i>" wording was not included in this draft.</p> <p>By email that evening [see Doc Ref NS1.7a and NS1.7b], tie requested that the report should include the following further wording at the end of what later became para 2.50 - "<i>Suggestions in the press that BSC have 'won 13 out of 15' adjudications are without any foundation and factually incorrect</i>". This followed an earlier email from tie [see Doc Ref NS1.8] which indicated that the inclusion of the DRP information in the report was important to them.</p> <p>What I believe I took from Mr Maclean's email (CEC00012663) was not to accept the additional sentence proposed by tie, but rather to effectively mirror what had been stated in June. Whilst I cannot now clearly recall, I suspect that I imported the final sentence from para 3.12 in the June report in an effort to find a middle ground between what tie had requested and what the Council could accept. A more comprehensive report was proposed to be brought back in December 2010 and the Council had instructed independent legal advice from Shepherd &amp; Wedderburn that week in this regard [see Doc Ref NS1.9].</p> <p>The wording was then sent to Mr Coyle, Mr Maclean and Ms Campbell (CEC00036173). The report would then have been sent to the Directors for their final sign off prior to being put into the public domain for a week before the Council meeting.</p>
	(e) Did you have any concerns that if the wording in the report to Council on 14 October 2010 was not to go beyond that in the report to Council on 24 June 2010, the report to Council in October 2010 would not fully take into account the further adjudication decisions between June and October 2010 and may, therefore, be misleading or potentially misleading?
A	I do not recall having any concerns in this regard but, as set out above, I believe that I was referring to the wider legal position rather than to the specific DRP outcomes.
	(f) Did you have any concerns at the time that the sentence " <i>The outcome of the DRPs, in terms of legal principles, remains finely balanced and subject to debate between the parties</i> " in the report to Council on 14 October was misleading or potentially misleading? If so, did you bring that to Mr Maclean's attention?

A	No I did not. I would never have knowingly drafted or proposed wording for a report which I considered would mislead or potentially mislead the Council. I do not believe that my colleagues in the Council would have knowingly done so either.  Whilst I can now see that the wording could have perhaps been clearer, its inclusion was not questioned at the time.
	(g) Did you have any discussions with Mr Maclean in relation to your proposed paragraph in the report in relation to the outcome of the DRPs after your email to Mr Maclean of 8 October 2010?
A	Given the passage of time I cannot recall.

As with my previous submission, I have tried comment to the best of my recollection and belief. Inevitably, given the volume of data and passage of time, there is a possibility that my recollection is incorrect or based on wrong assumptions or information.

I hope this is of assistance to the Inquiry.

Yours sincerely



Nick Smith