

IN THE MATTER OF THE EDINBURGH TRAMS INQUIRY ANTHONY RUSH'S RESPONSE TO 97 QUESTIONS

Introduction

These responses should be read in conjunction with my covering letter, or email, dated 24 July 2017.

All my responses to the questions are limited to my memory of the circumstances at the time.

In the time given to me to answer these questions I haven't been able to collate what documents I have. Consequently, my answers may reflect poor powers of recollection.

I do apologise for lack of paragraph numbers, but my limited typing skills don't extend that far.

To the best of my knowledge:

- I never attended on a TPB meeting although I may have met individual board members a few times.
- Unless authorised by Richard Jeffrey, the Chairman, or Dame Sue Bruce I never had responsibility or power to communicate directly with Infraco, TIE directors, CEC or any other stakeholder. I did not take decisions or reach agreement with Infraco, other than was required for Project Carlisle.
- I accompanied Richard Jeffrey in a supporting role to some meetings with CEC and with Scottish Government ministers.

Many of the questions refer to TIE without specifying who or what "TIE" means in the context of the question. I am therefore unable to answer questions which ask me what TIE's position was unless it's clear what is meant by "TIE". Generally, when I refer to TIE in my answers I refer to them as a body.

I would explain that it was a practice of mine to address correspondence I thought should be held as “confidential” through a client’s solicitor. There are many such pieces of correspondence referred to in the questions.

There are references to my “crib-sheets”. I explain that it was a practice of mine to prepare such notes prior to key meetings and sometimes circulate them to colleagues before the meeting. They are not intended to be definitive.

Appointment and in response to questions 1 to 6 inclusive

In the year leading up to my 65th birthday in 2011 I was extricating myself from my consultancy businesses prior to retirement. Apart from one other major mediation I effectively retired after the Trams Mediation reached a legally binding agreement on finalisation of the mediation.

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I gave time to assisting CBI Scotland after that. I represented CBI to the “Review of Scottish Public Sector Procurement in Construction” which inter alia advocated “*an approach to public sector procurement which achieves better collaboration in design led procurement*”.

In 2015, I served as a Commissioner on the Independent Commission for Competitive and Fair Taxation in Scotland. As a simple explanation of my career their “pen picture” may suffice in place of a CV:

“Anthony (“Tony”) Rush served for over 30 years in Senior Executive posts in Scottish Industry until his retirement in 2013. He is most remembered as being parachuted in as chairman of ailing construction group Barr Ltd, the Paisley-based construction company. A lesser known part of his career is the work he has done advising public bodies on large infrastructure projects.

Throughout his career Anthony served two terms as Chairman of the minerals trade body in Scotland and represented the Construction industry through the FCEC. He has also served as a Member of his Local Area Committee and Community Planning Board.

He served several terms as a Council Member of CBI Scotland and was recognised by that body for his knowledge and expertise in infrastructure, planning, government spending and renewable energy. He also has a life-time experience of house building in the UK and of hands-on investment."

I believe that my services were recommended by Brandon Nolan, then a Partner with McGrigor Donald Solicitors. Termination of my appointment was mutually agreed with Richard Jeffrey, Vic Emery and Dame Sue Bruce.

My services were procured from Anthony Rush Limited by way of a "Contract for Services" dated 18 January 2010 between TIE Limited and Anthony Rush Limited. The said agreement was extended on the 11 March 2010, 28 May 2010 and 4 October 2010. The latter extension was for 6 months and to terminate on 8 April 2011.

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TIE00135223

The Scope of Services was defined in the Contract for Services as "General contractual advice in relation to the Edinburgh tram project". The position was described as Commercial Advisor reporting to Richard Jeffrey, TIE Limited.

The reference on the page 55 referred to in question 5 is I believe a fair summary of my role at that outset. I assisted in the preparation of certain contractual letters which were vetted by Richard Jeffrey and Steven Bell and usually by solicitors advising TIE.

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CEC00541334

I do not agree that the table referred to in question 5 (CEC00541334) confirms I had at any time the responsibility for the "use of contractual Mechanisms". It confirmed that I was to lead one of 8 (Project Pitchfork) workstreams to provide "a robust basis for decisions at the TPB meeting on 10 March 2010. I didn't at any time have responsibility for contractual mechanisms.

I have no recollection of seeing the report prepared by Susan Clark prior to its recent disclosure as a document to these questions. Nor did I attend the TPB meeting referred to, or any other TPB meeting.

However, instigated by a direct approach to me from Michael Flynn (Siemens' Infracore Board member) leading to Project Carlisle, my role metamorphosed into one where I was required by David MacKay and Richard Jeffery to act more as an officer than advisor to TIE. A change which I did on occasion draw to Richard Jeffrey's attention.

On a number of occasions prior to the 18 January 2010 I had met the then Chairman (David McKay) and then CEO (Richard Jeffrey). We discussed the state of the project and why they were looking for assistance. (See question 22). I wasn't presented with a "starter-pack" of information but I was given access to whatever information was thought necessary by, principally, Richard Jeffrey and Steven Bell.

Apart from Brandon Nolan, with whom I have worked on numerous cases since 1983, only Dennis Murray had any previous near working relationship with me. I believe that he had been employed in a senior quantity surveying role by two companies I had managed in the past. I had also worked with Vic Emery in the past. There may have been others employed by TIE and Infraco who had worked for companies managed by me in the past. I had managed one of Infraco's sub-contractors, Barr Limited.

Overview and responses to questions 7 to 9 inclusive

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CEC02084200

By any measure Edinburgh Trams Project was a major infrastructure project. In my experience, it was different from the normal major infrastructure project by not being ultimately backed by guarantee from the UK Treasury. I believe this was an important factor which was overlooked by Infraco at the time of contract award.

In common with many, maybe the majority, of major infrastructure projects, I understand that the Price submitted by the Preferred Bidder was in excess of the project's original cost estimate. This led to renegotiation of the terms and scope. No doubt the Inquiry will address the conduct of these renegotiations and the highly charged political atmosphere surrounding them. An atmosphere which could have been influenced by the dramatic collapse of the UK economy happening at the same time. Without Treasury assistance, any cost overrun would become a financial burden to the City of Edinburgh Council at a time when budgets were coming under pressure. This no doubt had an influence on the project.

Two alleged circumstances stand out to me which indicate there could have been an unusual level of desperation on behalf of TIE's purchasing team:

1. Legal advice from DLA Piper was set aside
2. There was an alleged private understanding – a “gentleman’s agreement” see question 21 – that there were substantive issues unresolved at time of Financial Close.

With respect, I would also ask the Inquiry to consider whether the choice of letting the On-street and Off-street Works under one common “fixed price” contract was sensible. The only certainty about building on-street infrastructure involving any, let alone major, utility diversions is “uncertainty”. Doing so in a city (a World Heritage Site and major tourist destination) with a long-established utility infrastructure, which would not have been accurately mapped or even mapped at all, could be thought reckless.

I also note that Bilfinger Berger let out the Works to sub-contractors in sectional packages.

Of significance was the fact that the Contract was a bespoke document consisting of a number of parallel agreements and sub-agreements. As such there was no precedence to fall back on when there was a difference of opinion about the meaning of the terms. This was the cause of many circumstances becoming disputes. It was clear to me from the outset of my involvement that TIE had good reason to believe that Bilfinger Berger’s intention from the start was to get the project on to a “cost plus basis” without cost and programme certainty.

I was given anecdotal evidence that it was Infraco’s intention to “get the contract on to cost plus”. As the contract wasn’t underwritten by the Treasury this aim seemed to me to be misjudged. The Employer and its stakeholders were looking for cost certainty. At the highest level, this was indeed confirmed by John Swinney when he met Richard Jeffrey in August 2010.

A bearing on my thinking would be the accepted psychology of successful mediation between parties who are unable to settle their differences. It is to present to the parties the potential damage of not reaching agreement. For this reason alone, investigating the likely outcome of all options including termination was necessary. As was giving Infraco to believe that it would be the result of not achieving a settlement.

The meeting referred to in question 66 may have been something of a “confession” by Mr Walker. He asserted that it was known when the Contract was entered into that the design was only 45% complete and that there would be many changes. He also admitted that this made the form of contract unsuitable.

I understood that Ed Kitzman had been involved in a similar contractual problem - I think in Canada - before he came to Edinburgh. Whenever I spoke about Bilfinger Berger’s track record for terminated contracts and turning them into cost-plus, he never denied it. But I cannot say he admitted it either.

The relevance of this is that compensation for design changes was to be settled pursuant to clause 80. Infraco had to provide certain estimates of extension of time and cost involved with their notice. They habitually failed to provide complete estimates. Consequently, many of these “notifiable departures” had or would end-up as disputes leading to Adjudication. Infraco asserted that they were not obliged to carry out any change until the extension of time and payment was agreed.

Question 83 refers to a letter from Infraco dated 22 September 2010. I draw reference to the letter’s author – “KDR”. I think this individual was a Bilfinger Berger commercial manager from Germany (HQ in Mannheim) who had been the driving force behind the contract terms and subsequent practice of managing changes. An important reference in that letter was Infraco’s opining on TIE’s inability to fund the Project. To say the least, TIE thought his influence to be un-helpful.

Infraco had intentionally or unintentionally got quickly to a point after starting work where I believe they thought TIE would have to agree to a cost-plus contract to deal with the administrative nightmare of clause 80 and pricing assumptions. They had in fact achieved such a position on Princes Street, where TIE was under pressure to re-open the road before the Christmas rush and for various reasons the nightmare was a reality. They took the opportunity to propose a similar agreement for all on-street works.

As well as misjudging the availability of additional funds, Infraco’s weakness was in thinking that the contract terms “prevented” them from carrying out changed work until the time and price was agreed. In answering the questions,

the importance of the last phrase in clause 80.13 will emerge. Moreover, TIE could require Infraco to work in designated areas within Sections of the Project. These matters are discussed in answers to questions 75 – 81.

At the end of 2009 It was reasonable for TIE to think that there was a conflict of interest between Siemens and Bilfinger Berger. At that time Michael Flynn was canvassing Richard Jeffrey to instigate a “mature divorce” with Bilfinger Berger. Richard was led to believe that Siemens were against (even objected to) Bilfinger Berger’s scheme to turn the contract into cost plus and in doing so deliberately delay progress.

I think that Siemens were genuinely concerned at the lack of progress. Later they did look to lay off-street track where ever possible. For example, they were keen to get access to the Depot site, where there was extensive track laid.

I think it fair to say that the prevailing view in TIE was that Bilfinger Berger was acting unreasonably and that there was little if any mutual trust between Infraco members. This view was supported by Michael Flynn briefing against Bilfinger Berger – even to the extent of promoting in TIE’s mind that they should terminate Bilfinger Berger’s contract through an agreed “mature divorce” procedure. I think it safe to say that the view within TIE was that any outcome shouldn’t reward Bilfinger Berger.

In early March 2010 Bilfinger Berger was looking to explore options with TIE. In correspondence and discussion between the Chairman and Kenneth Reid, an Executive Director of Bilfinger Berger AG (Mannheim). Inter alia they emphasised the administrative difficulties caused by some 500 design changes and seen as promoting the idea of a cost-plus solution along the lines adopted for Princes Street. I think that both accepted that “something had to change”. David MacKay was always encouraging about Project Carlisle.

I think that by late March 2010 the “penny had dropped” with certain individuals in Infraco that cost-plus wasn’t going to happen, or at least was highly unlikely. On the 16 March, I received a call from Michael Flynn, the Siemen’s director on the Infraco Board, as a result Project Carlisle came about.

As will be referred to later it became apparent that Siemens had forward bought materials and may have under-priced their Work.

It would not be unreasonable to ask in hind-sight whether Michael Flynn's approach was in some part an attempt to extricate himself from an embarrassing position. However, it was progress from Kenneth Reid's proposal which had been rejected by TIE. The parties agreed that Project Carlisle would be conducted by "clean teams" and that the Contract would remain extant whilst negotiations took place. Kenneth Reid had proposed that the Contract should be suspended. To do so would have protected Infraco from the consequences of default.

At the outset of Project Carlisle, Michael Flynn took the lead on behalf of the three Infraco members. However, he suffered a serious accident and was absent for most of the Project Carlisle process. I do remember that when he returned he was extremely hostile to the solution which had been mapped out with Edward Kitzman . Ed Kitzman was appointed by and reported to Bilfinger Berger (Mannheim). In the absence of Michael Flynn, he took the mantle of representative for Infraco members.

Throughout the Project Carlisle process Bilfinger Berger, through Ed Kitzman, were cooperative, including permitting us access to their sub-contractors to obtain an estimate of cost to complete a truncated project. They sub-contracted all the works up to track level in sectional packages. I had more faith in the assurances that he gave about Bilfinger Berger's agreement than some in TIE did, including Richard Jeffrey who I don't think was ever convinced.

To the best of my knowledge at the time CAF were agreeable to Project Carlisle subject to them being re-novated back to TIE. They also took the stance that they could not dispose of surplus trams to other customers. I remember that Siemens were uncooperative throughout but raised no objections until Michael Flynn returned from his leave of absence.

I am not clear about the actual chronology. I think it was shortly after Michael Flynn came back on the scene that Infraco submitted a GMP proposal in late July. This led to TIE making an offer in late August based on Project Carlisle and Infraco responded with a revised counter offer some short time later. In this

period Ed Kitzman was in the background and not actively involved. I think at that time the Project Carlisle process was put on hold by the Infraco members.

We analysed the differences between TIE's offer and Infraco's counter offer. The difference in relation to Siemens work was disproportionately higher than Bilfinger Berger's. I think I regarded both sums as being "negotiable claims". Because Siemens work content was substantially unchanged from BDDI my reaction was that their element was largely opportunistic and likely intended to correct tender errors.

There were fruitless exchanges between TIE and Infraco at project level right up to the end of October. At that time Ed Kitzman literally disappeared from the scene without any contact or explanation, and mediation was being actively spoken about.

Project Carlisle involved a huge amount of detailed work in a short space of time. I realised that its importance to bringing about a settlement for a viable ETN with cost certainty couldn't be underestimated. But it exposed conflicts of interest amongst the Infraco members which I don't think were fully understood before. It also brought me into contact with the issues alleged as preventing Infraco with proceeding with the Works. In some cases, I tried to resolve issues as we went along.

Ed Kitzman told me that Bilfinger Berger (Mannheim) wanted a guarantee that whatever the solution TIE would be able to fund it. No doubt this was an important factor in their reaction to Project Carlisle. But, he did accept that there would only be a deal if it gave TIE and its stakeholders price and programme certainty.

A significant factor was that recovering the value of advanced payments to Infraco members could only be achieved through "work in the ground". TIE had paid Infraco an exceptionally large up-front payment – around £23 million to each of Bilfinger Berger and Siemens. Plus, by the time I was involved, I think they had paid CAF over a half of the full amount due for 27 trams. This put the Infraco members into a position where their operations were "cash positive".

On top of which TIE certified Preliminaries on a basis of monthly tranches without reference to milestones. In effect, I think Bilfinger Berger could get £1 million a month even if they did nothing. This could well explain, at least in part, their unwillingness to progress the Works. I instigated a change and TIE stopped paying Preliminaries until what had been paid reflected what had been done. I think this hit Siemens more than Bilfinger Berger.

Another factor I believed any settlement should address was the poor performance of Parsons Brinkerhoff. However, one may measure it, the design was substantially incomplete and Parsons Brinkerhoff's poor performance appears to have been recognised by the TIE purchasing team at Financial Close.

My attention was inevitably turned to Parsons Brinkerhoff's position and performance. Why had the design development led to such massive change (at the cost to TIE) and why was the design so incomplete?

Put very simply, delay was caused by the time it was taking to get approval from TIE. The reasons for that delay were multi various including getting approval from CEC for individual elements and slow processing by both Infracore and TIE. It was also apparent that Parsons Brinkerhoff had problems resourcing the design.

As I got more deeply involved through Project Carlisle I became more aware of the history of the design. For example, in July 2010 I was made aware of an Audit Report which inter alia asserted that the Best Value was not being achieved, confirming the conclusion I had already come to.

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IDs:
CEC00443389
CEC00443401
CEC00443402

Later I was acquainted with an email which had been sent to TIE in late 2009, by mistake, from Bilfinger Berger to their solicitors. It made me aware that Parsons Brinkerhoff's design responsibility was now solely for Bilfinger Berger's work. There was a draft agreement which intentionally excluded Siemens – and their work - from Parsons Brinkerhoff's scope. The agreement also suggested that Bilfinger Berger were concerned that they had delayed the design. Moreover, Parsons Brinkerhoff were asked to help Bilfinger Berger with their claims.

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TIE00032850

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CEC00215951

Then in late December 2010 Richard Jeffrey copied me in with a contemporary email from Graeme Bisset. The papers attached to the email confirmed to me that at the time of Financial Close there were misgivings about the design work carried out by Parsons Brinkerhoff.

I also became aware that Parsons Brinkerhoff had been paid substantial additional payments. To a level which I thought was unsupportable especially as I was concerned that the design development did not take account of the "best value" duty. My concern was initially raised by the design of a heavily reinforced insitu-deck for the Haymarket Viaduct.

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CEC02083060

I was also concerned at the insistence by Parsons Brinkerhoff that the "Trackform" should be supported on-street (but not off-street) by a reinforced concrete slab. This was a design departure from the BDDI with substantial cost and intrusive impact. I attempted to find an answer to this but none was forthcoming.

Doc IDs:
TIE00305139
CEC00547597

I was also concerned that the surfacing to the track was not fit for purpose. This was later admitted by Bilfinger Berger and led to the remedial work to Princes Street.

Of further concern was that the designers of the track could not agree to design integration.

Doc ID:
CEC02084200

Later, after I had seen the email from Bilfinger Berger to their solicitor, I suspected that Infraco had created a problem for themselves by splitting the design responsibility. The result being additional cost to TIE and I suspect a dispute between Siemens and Bilfinger Berger as to who would "sign-off" the for an integrated design.

Doc ID:
TIE00032850

All of this made me determined that TIE should seek to recover additional payments through whatever settlement was reached with Infraco.

Bearing in mind the fact that there were outstanding issues with Planning Consent, major issues of design such as the flood relief measure at the airport, and the uncertainty of utility diversions, it could be said that TIE's project management team was "fighting a losing battle".

I am asked for my overall impression of TIE management and staff. Generally, I found them diligent and hard working. Most were concerned at the reputation the project had. I am sure that many felt it unfair. I think there was a sense of loyalty to the project and the management. But I think the absenteeism rate may have been high.

Under the circumstances and external pressure for a solution it cannot be difficult to understand that there were tensions – strains – disagreements and sometimes confidence was understandably lacking. The tension increased as 2010 went by. I felt it increased more rapidly in the last quarter of 2010, especially when David MacKay and Andrew Fitchie suddenly left the project. “Did they jump or were they pushed”? There were changes in the City Council with what seemed like a “new broom” attitude and Transport for Scotland became more engaged.

I do not think it an exaggeration to say that the senior management of TIE were “submerged” in public relations – disasters – involving briefings against them. Sometimes by Infraco, or Officers of Edinburgh City Council and local and national politicians. I think there were (well founded) suspicions that briefings were being given for Infraco by a prominent and influential ex-councillor who had opposed the Trams. Dealing with all of this was a tremendous and unwanted distraction which I think got on everybody’s nerves. As an example, one very unusual happening was Bilfinger Berger taking out an action against TIE’s Chairman for defamation.

In my career, I have worked in some highly stressful circumstances. Since one case, some 30 years ago, I have been engaged as a consultant or as a consultancy, in solving difficult problems in the construction and allied industries. These involved risks to a company’s survival, a large numbers of jobs and some very bruised management. I realise the benefits of having professional counselling and at times have employed them in bringing about successful outcomes.

In my experience, it is unhelpful if the people relied upon to bring about a solution are made to think they are failures. In my opinion, the stress levels placed on TIE employees, particularly the senior managers, were at least on a

par with anything I had experienced before. For individuals, such as Richard Jeffrey and Steven Bell, I would venture it was abnormal. Coupled with that on a day-to-day basis the project was extremely dynamic with new issues arising constantly.

From their body language at meetings I think it was evident to me that both Michael Flynn and Richard Walker were also suffering from stress.

It is recognised that stress causes individuals to lose their perspective. Was this something either stakeholders didn't want to discuss or to recognise? I think that the consequences arising from stress could have been significant to the decisions taken (on both sides). Even at financial close.

I have no doubt that the individuals in the project management team TIE put together were competent in their disciplines. But for such a unique and complex contract they lacked the experience and cohesion that was required, even without the peculiar circumstances surrounding the project. I found TIE's team under resourced for the task facing them. It was necessary to bring "people" in to supplement TIE's staff on a reactionary basis rather than planned from the outset.

This raises the question as to why TIE decided not to employ a professional Project Management consultant. An essential benefit of employing a consultant would have been that there was a clear distinction between the Employer, TIE, and the project management team. This would have mitigated to some extent the impact on the project management of the political and public criticism – in some circumstances "outrage" – the Project and individuals were subjected to.

In my experience for a project like this, a private client would commission a regular cost update from an Independent Cost Consultant. They would use it to satisfy themselves and stakeholders that the project remained viable and capable of being completed within funding facilities. As the layers were peeled away, the question became how much can we afford to build not how can we force Infracore to build what was intended?

Doc IDs:
CEC00316561
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CEC01928167

I refer to question 27 – asking me if I agree that “matters came to a head in early 2010”. If the intention of the question is to ask me to confirm whether I agree that it was not until early 2010 that strong action to resolve or prevent matters getting worse was needed – my answer is no. Strong action should have been taken at Financial Close.

Doc ID:
CEC00623955

My understanding of the timeline is that the CEO responsible at the time of Financial Close resigned in May 2009 and was replaced by Richard Jeffrey. There may have been a change in Director of Finance as well. It seems that within a reasonable time frame of 4 months Mr Jeffrey was recognising that strong action was needed and he instigated, with the approval of his Chairman and Directors, “Project Pitchfork”. Maybe his choice of title gives a clue to his preferred solution for strong action.

Doc ID:
CEC00488524

An example of “strong action” was the action of Dame Sue Bruce at the mediation. She recognised that there was a price to pay to exit from or renegotiate the Contract entered into in May 2008. Having a workable and worthwhile tram system arising from the “ashes” with cost certainty was thought to be the best option and she took on the challenge of making it happen.

I would explain that Richard Jeffrey maintained a locked dedicated project room where he held meetings (workshops) in pursuance of several – sometimes overlapping - projects to evaluate the options, as referred to in question 7. Both Andrew Fitchie and Brandon Nolan would attend some of these meetings. I am not sure now whether they ever attended together but Andrew Fitchie was a regular attendee, usually accompanied by an assistant. As was Brandon Nolan.

Andrew Fitchie was the Partner for DLA Piper and I think had acted throughout the procurement process and contract implementation, up to his sudden departure. Incidentally I believe he had been previously employed by Bilfinger Berger. Brandon Nolan was initially charged with preparing a report on the “Contractual issues concerning Edinburgh Tram Project”.

I think I was concerned that there was the potential for conflict between the two solicitors. In fact, I think I drafted a protocol to prevent it getting out of

hand. Later, Brandon Nolan was charged with supervising litigation and Andrew Fitchie with the on-going contract, including reviewing all letters.

I think I “got on very well” with Andrew Fitchie. I think his “hourly basis” claim was an exaggeration but at that time I was attempting to understand the issues and Andrew was one of the people who could provide answers. So, I had regular contact with Andrew.

Doc IDs:
CEC00651418
CEC00219041

Question 16 is a leading question in so far as it does not specify the correspondence it refers to. Steven Bell was carrying a very heavy workload, maybe an unreasonable one, with inadequate backing from subordinates. Steven was the “fulcrum” about which TIE operated. Being asked to approve all the letters I drafted and respond to my inquiries must have added to his burden. But, I do not remember any “falling out” between Steven and me.

My lasting memory of Steven is one which could be categorised as “admiration” for his efforts, particularly his input at the mediation. They were widely appreciated. The dedication he showed then was no more or less than he showed throughout the time we worked together. He was always diligent and careful in what he did. I believe that he, rightly, saw it as his duty to question the work I was engaged in post March 2010. I questioned his work directly with him and no doubt with Richard Jeffrey. In the circumstances, it shouldn’t come as a shock to hear that our relationship was “strained” at times.

Steven Bell would have been the best person to answer question 13. He had some responsibility for managing the Base Date Design prepared by Parsons Brinkerhoff who were the SDS Provider contracted to TIE. He could answer to the extent the BDDI in terms of design principle, shape, form and/or specification (except for Value Engineering) had reached a level where any changes would not substantially increase the Price.

It was clear there were a very large number of (alleged) design changes. Steven had to be deeply involved in the Adjudications. He was involved in the design process and agreeing the Pricing Assumptions as well as having responsibility for the project’s implementation.

I only had a minimal involvement in Adjudications. They were instigated by Richard Jeffrey by agreement with Richard Walker. Reference to Adjudication was an optional step following a meeting required under the Dispute Resolution Procedure. The process was then taken over by Steven Bell and a DLA solicitor. I believe his name is Keith Kilburn. He appeared to act separately to Andrew Fitchie by reporting to a partner in London.

In response to questions 10 to 12

In response to question 10. I didn't "suggest that perhaps mediation towards a new deal would be the best way forward". What I said was, "instead of a "mature divorce" we may think of suggesting a mediation process towards a new deal." It would seem sensible that TIE considered all possibilities and of course it could have led to the same conclusion as a "mature divorce". Interesting to note that the Peer Group suggested the same in June 2009.

In response to questions 11 and 12 I can offer nothing other than "delayed".

Response to questions 17 – 19 inclusive.

We were told by Infraco that Edward ("Ed") Kitzman was an American consultant regularly employed by Bilfinger Berger (Mannheim) to solve difficult issues. He was appointed by them to negotiate the terms of Project Carlisle on behalf of the three Infraco partners. In practice, his position was that he reported to Bilfinger Berger's directors in Germany and only provided a conduit for input from Siemens and CAF.

Torquil Murray regularly acted as my assistant on assignments. He is a Commercial Attorney, chartered quantity surveyor and dispute resolution consultant. It would have been a requirement of mine that his services were available to me. He later provided additional quantity surveying resource to deal with the back-log of responses to notifications of change from Infraco.

Nigel Robson was a leading solicitor practicing in Construction Law and Dispute Resolution with an international reputation. I had worked with him once before in the matter of Expert Determination on a dispute arising from the termination of a contract due to design errors. I was concerned that in

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pursuing the mediation for this project there was a need to mediate between the various parties involved on “our side”. I was also aware that there was a lack of trust between the parties to the mediation. On top of which Dame Sue Bruce and Vic Emery were new to the project and the issues and probably having to decide on conflicting opinions. I don’t think either had experience of major mediation. My judgement was that Nigel would bring parties together and help get the best out of the mediation. I think I was right and that he did play a key role in getting to a settlement.

In response to question 20

I think there is a side letter from DLA Pier written before but included in the Close Report papers I had seen. The additional information provided by Graeme Bisset in December 2010 also points to it. It is worth noting that there was a “contingency” (totalling £35 million) allowed in the final estimate of cost.

Doc IDs:
TIE00305139
CEC00547597

Response to questions 21 and 22 are given above

Response to questions 23 to 26 Inclusive

My role is described in the Overview above. My comment in CEC00550332 was caveated “Based on what I currently know”. As I learnt more I may have changed my opinion on a number of issues.

Doc IDs:
CEC00585079
CEC00656394
CEC00548222
CEC00548223
CEC00586386

I think the reference is to “On street supplementary agreement”. When referring to “public law” I assume that we were thinking inter alia of EU Procurement rules and responsibility to obtain best value.

Doc ID:
CEC00649869

At that time, I think Richard Jeffrey was attempting to decide on the “strategy” under the guise of Project Pitchfork referred to in the Overview.

There is a written report of the Peer Review. I think it was a requirement of the governing regulation for building a tram network. I am not able to comment on how it performed against what was expected of it, or how it could be improved.

Doc ID:
CEC00584282

In response to question 27 - 28.

Doc ID:
CEC00623955

I have no knowledge of when exactly Richard Jeffrey concluded that strong action was needed but no doubt the Peer Review Report on 29 June 2009 had some bearing on his thinking.

Doc ID:
CEC00584282

As it lacks specification I am unable to answer question 28.

Response to questions 29 – 39

The letter drafted by me on the 5 February was a step in a chain started by a meeting between Richard Jeffrey and David Darcy. David Darcy had recently been appointed as the “boss” of Bilfinger Berger Civil UK and a director of Infraco. He heralded a new beginning in relationships, which did not live up to expectations.

Doc IDs:
CEC00655624
CEC00655625
CEC00655626

In response to question 30. The subject of the email from Brandon Nolan refers to Project Pitchfork. The one from Andrew Fitchie refers to “Clause 80 and others”. Brandon Nolan was preparing his report referred to above and delivered on 23 March 2010. It was intended to explain the meaning of the contract terms including but not limited to Clause 80. Andrew Fitchie is providing background information as to how Clause 80 and other contract terms came about. I don’t agree that in either case the emails show that I commissioned them but I would have found the legal opinion of the meaning of the contract an essential to going forward.

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CEC00619255
CEC00619256

In answer to question 31, I am unable to identify the handwriting. As one note refers to “RJ” I think we can safely say it wasn’t either Richard Jeffrey or me. This letter was received at a time when there were arrangements being made for a meeting between David MacKay and Kenneth Reid together with an exchange of correspondence. TIE’s letter dated 12 March 2010 (INF CORR 4417) replied to several letters including the one referred to in question 31. The extent of my agreement to the handwritten notes will be reflected in TIE’s letter.

Doc IDs:
CEC00648426
CEC00548448

In response to question 32. Clause 6.5.1 (a) is a step in the Contract for parties to review any matter which adversely affected the completion of Infraco Works. The meeting was held on the 2 March, as both versions record, in accordance with that requirement. I cannot speculate as to what it achieved, but it was step in the process which eventually led to settlement a year later.

Doc IDs:
CEC00574841
CEC00574842

Infraco were advancing a number of reasons as to why they couldn't start work in terms of the contract. Some were credible reasons, but it was not true that they were completely prevented from working.

One difference was the proposal that the On-street works should be executed under a supplementary agreement. The agreement proposed would have been substantially different to the contract advertised and subsequently tendered for in competition. It would have put TIE in a position of not having cost or programme certainty.

In answer to question 33, the email explains my thinking.

Doc IDs:
CEC00548645
CEC00548646

In answer to question 34, my involvement and input to Project Pitchfork is referred to above. Delays to both MUDFA and design would have delayed completion of the whole Works. It was up to Infraco to re-programme in accordance with Clause 60 and apply for an Extension of Time. Their failure to do so was one subject referred to at the meeting on 2 March 2010.

Doc ID:
CEC00488524

I cannot say why MUDFA was delayed other than I don't think there was one reason. Nor can I hazard a guess as to how late MUDFA was. The Inquiry will no doubt be aware that the original contract for service diversions was terminated. I was not involved in that issue but it would have added to Steven Bell's workload.

My thoughts on the design delays are covered above in the Overview. I cannot hazard a guess as to how late the design was at that time.

I have no recollection of being involved in the cost comparisons given on page 14. I note that my input was defined as being in relation to "contractual mechanisms"

Doc ID:
CEC00488524

In response to question 35. This goes to the essence of the difference in interpretation of the intention of the meaning of the words in the contract terms. It was TIE's contention that the last phrase of Clause 80.13 – "unless otherwise directed by TIE" and Clause 80.15 gave TIE the power to instruct

Doc ID:
CEC00405689

Infraco to proceed with alleged changed work before a TIE Change Order had been issued. Infraco insisted they required a TIE Change Order.

In response to question 36 I think the question is conflating two separate matters. I suggest that:

CEC00442927 is an early copy of a letter from Richard Jeffrey sent the following day to Richard Walker.

CEC00299893 is an administrative note to circulating the response from Richard Walker.

CEC00299894 is the response from Richard Walker date 23 April 2010

CEC00444028 is an exchange between Richard Jeffrey and me explaining why I tabled the "skeletal agreement". It also includes my minute of a meeting I had with Michael Flynn on 21 April 2011. This is a separate subject to the matter referred to in CEC00442927.

CEC00335475 is Andrew Fitchie's comments on CEC00299894

I am unable therefore to answer question 36

In answer to question 37 I believe that this refers to one of the meetings referred to above. I think all meetings at this level were recorded in some manner. The emails you refer to record views at the time, including how we judged the relationship between Michael Flynn and Richard Walker.

Doc IDs:
CEC00266715
CEC00445284

In the Spring of 2010 we were attempting to "shake" Infraco's confidence. It seems that it had some effect as Michael Flynn contacted me directly which led to Project Carlisle.

Doc ID:
CEC00444028

In answer to question 38, this meeting was a step in Project Carlisle which is dealt with in my answers above.

Doc ID:
CEC00444028

In response to question 39. Of course, there were tensions, as explained in the Overview.

Doc ID:
CEC00438929

Response to questions 40 – 49

Stewart McGarrity was TIE's "Director of Finance" at the time and had the responsibility for preparing and presenting cost estimates for Project Pitchfork. I cannot comment on what his role was in advising the TPB on liabilities. I would draw attention to his last paragraph. "Isn't all of this highly uncertain ...". Nor can I answer as to how he arrived at his estimates.

Doc ID:
CEC00316561
CEC00316562

I think my record of the conversation I had with Michael Flynn on 27 April 2010 speaks for itself.

Doc ID:
CEC00335481

Project Carlisle was instigated by a direct approach to me from Michael Flynn (Siemens' Infracore Board member). Prior to that there had been a relatively cordial exchange and meetings between David MacKay and the Chairman on Bilfinger Berger, Kenneth Reid.

Doc IDs:
CEC00336104
CEC00336105

Underlying such exchanges and meetings was a desire on behalf of TIE and Infracore parties to find a "solution" – albeit there was a gulf between the parties on what the form the solution should take. David MacKay's enthusiasm can be seen from his email to me dated 27 April 2010. Project Carlisle was instigated in the manner summarised on page 38 of the report on Project Resolution CEC2084200 (see question 8).

CEC2084200
should be
CEC02084200

To answer, in addition to what I have said herein, as to why it was necessary to go to mediation would be speculation on my behalf. I do remember thinking that the political intervention and its publicity were unhelpful. I believe that suggestions that the Tram Project could be abandoned and that new funding wouldn't be forthcoming weren't at all helpful and may have made settlement more difficult.

Question 42 asks me to speculate on the intention of the parties. I cannot do so. However, it does draw reference to a problem Siemens had with their track design.

Doc ID:
CEC00444577

In response to question 43 I don't think I can add anything to the explanation given in the email and referred to in the Overview.

Doc ID:
CEC02083060

In response to questions 44 and 49 I can add nothing to the reasoning given in my draft letter for contacting the most senior executive in Parson Brinkerhoff. I cannot remember why it was decided that I write directly.

Doc IDs:
CEC00336104
CEC00336105
CEC00303395

The purpose of the Memorandum of Understanding referred to in question 45 is stated in its header.

Doc ID:
CEC00379576
CEC00379577

In answer to question 46. Was there a change in focus on termination? It was always one option. Richard Jeffrey hadn't decided to terminate. I think his reference to John Swinney supports the idea that it wouldn't be his decision. Termination was always an option being considered.

Doc ID:
CEC00302039

In response to question 47 I think the email speaks for itself.

Doc ID:
CEC00216187

In response to question 48, establishing and agreeing the Scope of Project Carlisle was a fundamental step in the process. The documented agreement we finally came to with Ed Kitzman was based on the Scope, or variations of it reflecting negotiations. Those negotiations only addressed the Scope. I resolutely held to the position that the revised price was for others to agree. My intention was to create the way for the parties to reach a financial settlement in a mutually agreed manner.

Doc IDs:
CEC00302027
CEC00337100

Response to questions 50 – 59

In response to question 50 the context of the email stream is clear from my draft letter for Richard Jeffrey. In general, it confirms that all parties were to some extent engaged in Project Carlisle.

Doc ID:
CEC00337344

The *"bullet points from my meeting"* are a record of a meeting I held with Ed Kitzman on what he had told me. In order of bullet point:

1. Allegedly, the cash flow benefit of the large up-front payment had apparently run-out for both Siemens and Bilfinger Berger. I was sceptical at that time. But I later when I discovered that Siemens had

forward bought materials and had pricing errors in their bid I thought that they may be having cash-flow difficulties.

2. Speaks for itself
3. Not certain. "Miquel" was employed by Siemens, "Russell" was employed by Bilfinger Berger and it would seem safe to think the "row" was about interface of the track I was advocating pressing them on. The Inquiry may refer to TIE's letter dated 15 June 2010 (INF CORR 5346) and other correspondence in the chain at that time. The chain including TIE's letter dated 30 June 2010 (INF CORR 5464/RB) refers to audit.
4. The Contract allows for TIE to ask for the removal of individuals. We used it as a piece of pressure.
5. Demonstrated that the UK arm of Bilfinger Berger led by David Darcy may not have been in harmony with their German based bosses who had appointed Ed Kitzman. However, the agreed intention was that Project Carlisle followed a "clean team" principle and that the parties continued to exercise their position under the Contract.
6. Very high "margins" for UK projects.
7. Speaks for itself
8. Speaks for itself
9. The documents attached to this question don't include the letter dated 29 June 2010 referred to, nor can I locate it in my files. However, there is a substantial exchange of correspondence in June and July which will inter alia have a bearing on Ed Kitzman's acceptance that "at the end of the day we will only do a deal if its price and programme certain"

Doc ID:
CEC00336789

Doc ID:
CEC00340936

Richard Jeffrey's email is clearly a record of a "short" conversation he had with David Darcy on the 5 July 2010, to "discuss the progress of Project Carlisle.

Doc ID:
CEC00337344

1. The assurance was never met.
2. Self explanatory
3. Self explanatory
4. Self explanatory
5. The wisdom of these comments may be questioned. Did it place ideas in Infraco's mind as to who was in control?
6. Self explanatory.

In answer to question 51. I cannot remember what my reaction was to Acutus report. It didn't deflect my focus on Project Carlisle.

Doc ID:
CEC00443389
CEC00443401
CEC00443402

In response to 52. It was agreed that TIE could have access to Infraco's sub-contractors to establish a price and programme for each section of work. I think it was reasonably successful with Bilfinger Berger but that we were never able to have access to Siemen's sub-contractors.

In answer to question 53. I think David Darcy at some time had told Richard Jeffrey that they were preparing something that "TIE wouldn't like". As far as I remember the reaction of TIE management varied within the bounds of despondency to resignation. For my part I saw it as an attempt to pressurise TIE and its "shareholders and funders". Note that it was sent a day after Richard Jeffrey had met the Cabinet Secretary. I am sure that I would have seen it as being potentially a figure to negotiate down from.

Doc ID:
CEC00183919

In answer to question 54. I cannot remember who the meeting was with, but there should be a record of it. I suspect the first slide was an attempt to remind individuals that they had a "duties" to observe, including to get best value and not to disclose the estimate in a manner that it could be prematurely obtained by Infraco.

Doc IDs:
CEC00183602
CEC00183607
CEC00183606

The presentation is clearly setting out the Project Carlisle team's assessment of a fair guaranteed maximum price for a truncated project. At that time, I was of a mind that Bilfinger Berger's work should be reduced to Off-street (apart from completing Newhaven). TIE would appoint new contractors to complete the On-street work to a new "best value" design.

Doc ID:
CEC00183607

Doc ID:
CEC00183606

My thinking was to present a cost for what I perceived as the minimum scope to make the ETN worthwhile. I thought that to terminate at the east end of Princes Street (Waverley Bridge) met that requirement. But I recognised that others who could influence the decision had different views. I remember that Michael Flynn was very determined to go to York Place.

Doc ID:
CEC00183606

The detailed costing was prepared by the quantity surveyors in the Project Carlisle Team with my input. I draw reference to the Executive Overview for its cautionary highlights and comments.

Doc ID:
CEC00183606
page 1

With reference to question 55. I note that the chain referred to in the question starts on the 9 August 2010, that is 6 days before the presentation referred to in the previous question. I think it safe to assume that that presentation is an integral part of this chain and will have addressed Richard Jeffrey's "several questions" as far as was possible.

Doc ID:
CEC00041959

I cannot answer question 56. It is clearly an initiative taken by Richard Jeffrey.

Doc IDs:
CEC00097962
CEC00097966
CEC00032056

Question 57 asks several questions:

1. I was involved.
2. There was a concern that in truncating the works we didn't breach EU Procurement regulations. Doing it by way of a TIE change order avoided this and retained the structure of the various agreements which made up the Contract.
3. I think the idea was to ensure that as far as possible the re-pricing was analogous to the Contract Price. To what extent this influenced Michael Flynn's reaction to what we had agreed with Ed Kitzman requires me to speculate. However, if Siemens had under-priced their bid the loss would not have been corrected by Project Carlisle or TIE's counter offer. In all that followed, right up to and including mediation I think it is reasonable to conclude that Siemen's felt that Project Carlisle was a better deal for Bilfinger Berger – and CAF - than themselves.
4. I think that it was widely thought that the BDDI was inadequate long before August 2010. What is meant by "re-close" is inadequately specified. However, I would be surprised if there were many by that time who didn't think that the £35 million contingency was inadequate. I think it was about that time that I instigated a changed approach to paying Preliminaries.

Doc IDs:
CEC00221163
CEC00221164
CEC00221165
CEC00221166
CEC00221167

In response to question 58 I cannot add anything to the explanation given in the email in so far as it reflects my record of the meeting. However, the reference Ed Kitzman makes in note 10 to "Siemens had taken a corporate decision in Berlin based on Flynn's reporting" is interesting in hind-sight. It can

Doc ID:
CEC00216318

be explained by Siemens having under-priced their Works and forward bought materials.

In response to question 59. I don't think its correct to assert that I was "aware that the Council's preference was to terminate the contract". All I was aware of was that it was possibly Nick Smith's preference. I think that sometime in December Alastair Maclean expressed a view that CEC's preference was to have an agreed termination.

Doc ID:
CEC00210811

I was of the view that termination should (always) be a "last resort". We had conferences with Richard Keen QC who also gave written Opinion. He confirmed my own misgivings that termination in this case was a procedural matter under clause 90 which inter alia gave Infraco an opportunity to rectify their breach. He also confirmed that unless Infraco accepted it termination would freeze the Works - maybe until the matter had been decided by the highest authority – leaving a scar on the City.

I cannot answer for Andrew Fitchie as to how he estimated the potential costs of litigation.

Doc ID:
CEC00212352

Responses to questions 60 –68

In response to question 60. I think my email is offering a view as to why I think Nick Smith's email demonstrated that he didn't fully understand the issues. As the question confirms TIE was advised by two solicitors and Leading Counsel.

Doc ID:
CEC00098258

In answer to the questions asked by question 61:

1. The letters were sent to leading Consortium representatives to inform them.
2. The email to Andrew Fitchie was for his file – he had been involved in drafting the letter.
3. The mails to David MacKay and Richard Jeffrey were for their files, they had approved the letter.

Doc ID:
CEC00157664
CEC00157665
CEC00157666

Doc ID:
CEC00098455

Doc IDs:
CEC00221324
TIE00667409
TIE00667410

In answer to question 62. I have referred above to what I believed were issues with Parsons Brinkerhoff's and Bilfinger Berger's performance. Not only didn't TIE have the resources to carry out such an investigation, to be credible it needed to be subject to independent scrutiny. Robin Blois-Brook is recognised as a leader in Expert evaluation of design issues. I think the matter was wrapped up in the mediated settlement.

Doc IDs:
CEC00099032
CEC00099033
CEC00129475
CEC00129476

In answer to question 63. If I had disagreed with the draft email at the time there will be a record of my disagreement.

Doc ID:
CEC00209015
CEC00213487

Clause 87 provides for TIE to suspend the Works or part of them. I had misgivings about the possible outcome and it was one of the questions I thought we needed Counsel's opinion on.

I think it is a matter of fact that there wasn't a settled strategy in so far as TIE and its stakeholders hadn't agreed on the next steps. On reflection, this may have been true until Dame Sue Bruce took charge. In the pejorative sense, it is not for me to judge whether it is "fair comment".

In response to question 64. RTN's were a step in the Contract. To say how much they served a purpose in reaching a settlement would be speculation on my part. They were intended to.

Doc IDs:
CEC00044539
CEC00044540
CEC00044541
CEC00044542
CEC00044543
CEC00044544
CEC00044545

No response from Infracore was a "surprise" to me.

I think the contents speak for themselves. The email is clearly me explaining my thoughts on how we should consider the next steps and our reply.

Doc ID:
CEC00218055

I would draw attention to the comments on Princes Street.

In response to question 65. I don't agree that my email implies that I was "unhappy" with Counsel's opinion.

Doc ID:
TIE00683946

In response to questions 66 and 67. I cannot say "how the meeting came about" or what Infracore's intention for holding the meeting was. In the event Siemens weren't represented. I don't know whether it was unintentional because Siemens were not in agreement with what was said. I would admit

Doc ID:
TIE00683949

thinking it a possibility. My note explains why there was “friction between CAF and their partners”.

Doc ID:
TIE00683974

In answer to question 68. Refer to point 8 in TIE00683974

In response to questions 69 -73

In response to question 69. Paragraph 1.1 of the Executive Summary explains the purpose of the report. It was customary for Susan Clark to draft such reports and I have no reason to think that she didn't draft this one. My input would have been sought by her directly and through Richard Jeffrey's workshop meetings. I have no recollection of making specific written submissions for this report, although no doubt Ms Clark referred to documents I had prepared in the past.

Doc ID:
CEC02084200

I agree that delays to design integration was one cause of delay.

In response to question 70. The question refers to decisions arrived at by various Adjudicators on design development. Defining the meaning of Pricing Assumption 3.4.1.1 expended a substantial amount of thought by many, not just Adjudicators, including solicitors and Counsel. I think it is true to say that there was far from unanimous agreement as to its meaning. However, each Adjudicator had to decide upon its meaning.

Doc ID:
CEC02084200

In response to question 71. I believe that to answer I would have to speculate on whether there were motives other than those set out in the Conclusions. Therefore, I cannot answer this question.

Doc ID:
CEC02084200

In response to question 72. To be pedantic, the report recites opinion given principally by Leading Counsel as to the possible outcomes of termination, including legal challenge. It does not assert that it would be “unlawful” to terminate the Contract.

Doc ID:
CEC02084200

The Opinion wasn't a surprise. I think I found the way that Counsel explained the issues and emphasised the pit-falls helpful. I remember him emphasising that TIE only needed one Notice to Terminate to succeed and warning that Infraco could use the Dispute Resolution Procedure to challenge termination.

In response to question 73. I cannot speculate as to what extent the events of week commencing 15 November 2010 influenced the individual stakeholders to agree to mediation.

Doc ID:
CEC02084200
pg 60

The matter referred to in question 74 is dealt with above.

Doc ID:
CEC00215951

Response to questions 75 to 81 – “Adjudications”

I think it safe to say that adjudicated decisions never “surprise” me. In this case the meaning of a bespoke contract was to be determined by each Adjudicator to reach a decision. With respect to the various Adjudicators, I don’t think I was overly influenced by their interpretation of the meaning of the contract terms. I realised that if the meaning of certain terms were to be conclusively decided it would be by a much higher authority than an Adjudicator.

Doc IDs:
Gogarburn
Bridge
CEC00479432
Carrick Knowe
Bridge
CEC00479431

Moreover, we had the opinion of the solicitors who played a part in drafting the terms, a leading construction solicitor and Leading Counsel.

Doc IDs:
CEC00653304
CEC00653305

Having said that, I was more annoyed than surprised that Lord Devaird had not taken account of the last phrase in clause 80.13, “unless otherwise directed by TIE”. I cannot say now whether this was a fault of TIE not emphasising its importance or the fact that he just ignored it. Whichever, his decision did not deter us from accepting the advice given by solicitors and Counsel.

Doc ID:
CEC00567896

I did get more involved around late September 2010. Not with the actual adjudications but more with giving some oversight to instructions given to Infraco by TIE’s project management team that reported to Steven Bell. I think that this was a result of Lord Devaird’s Decision and Richard Keen’s Opinion referred to in question 80.

Doc IDs:
CEC00129399
CEC00129395

In response to question 75. For the reasons outlined above I cannot speculate on what action others took.

Doc IDs:
CEC00653304
CEC00653305

In response to question 76. With respect, I do not think “balance of power” is an appropriate phrase to use. Clearly Infraco used the adjudicated decisions in their PR approach to the project’s difficulties. I cannot say as to how much this

Doc ID:
CEC00567896

influenced stakeholders. In my mind, I saw no change in the parties approach until late September when we revised the approach to giving instructions.

I cannot speculate as to who or what TIE refers to in context with this question or whether TIE understood “the facts”.

In response to question 77. I would think that that any adjudicator’s decision is “binding until the dispute is finally determined by legal proceedings, by arbitration or by agreement between the parties”. With respect, I would venture that Branon Nolan can best answer the question as to why he thought a decision may be binding.

Doc ID:
CEC00619994

In response to question 78. With respect, I can see no reason why Infraco would be persuaded to abandon its position on the back of Mr. Wilson’s comments in the paragraph referred to in question 76.

Doc ID:
CEC00567896
para 65

In response to question 79. I think my reference to “strengthened position” refers to an overall approach to the management of the contract not just adjudications. I think the last paragraph of my email dated 21 June 2010 to Richard Jeffrey’s articulates why I thought we should ask Brandon Nolan to take over for at least one adjudication.

Doc ID:
CEC00437836

I think that MUDFA was important in my eyes because of the dominant delay considerations referred to elsewhere herein. I think to me the interpretation of “Designated Working Areas” and “Intermediate Sections” was an important issue in demonstrating that INFRACO were in default. Infraco were asserting that they had to be given possession of whole sections of the project before starting any work in that section. TIE’s position was that they had to start work on parts of a section designated by TIE. Mr Howie agreed with TIE.

Doc ID:
CEC00129399
CEC00129395

In answer to question 80 see above.

In answer to question 81. I would suggest that losing more adjudications than winning could be said (and thought) that “we have lost heavily”. I have attempted above to articulate as I see the effect on the direction of the approach to managing instructions and disputes.

Doc ID:
CEC00209592

Question 82 refers to Project Carlisle. There are a number of separate questions.

1. I can best summarise my work as “managing Project Carlisle on behalf of TIE”.
2. At the outset, it was agreed that the parties would put up a “clean-team”. I was assisted by James Molyneux, an experienced Chartered Quantity Surveyor, to face up the collecting together of information from and through Ed Kitzman; William Mowatt, an experienced Chartered Quantity Surveyor – with experience in PFI contracts – to work with DLA Piper in drafting the documents this question refers to. DLA Piper had a dedicated solicitor, Jo Glover, reporting to Andrew Fitchie. Gordon Harris & Partners, Chartered Quantity Surveyors, provided back up services.
3. The content was arrived at by a process of discussion and agreement with Ed Kitzman, with constant reference back to TIE and approval of TIE (note CEC00129803 was signed-off by Richard Jeffrey).

Doc IDs:
CEC00129799
CEC00129800
CEC00129801
CEC00129802
CEC00129803
email plus 4
attachments

4. With regard to the investigation of Parsons Brinkerhoff I can add nothing to what is articulate on page 4.

Doc ID:
CEC00129803
page 4

In response to question 83. I cannot say with absolute certainty that CEC00084813 is the letter referred to, but it would seem relevant.

Doc ID:
CEC00220060
CEC00084813
CEC00210272

1. I would venture that the minute records that there was no doubt that the revised counter-offer should be made. Surely it was right for the question to be asked.
2. I suggest my response indicates the general feeling towards the letter.

Doc ID:
CEC00220060

Doc ID:
CEC00210272

In answer to question 84, I have no recollection of the draft Report referred to or to any input to it. Under explanation that it is only a draft and that I assume it is intended to be a summary – rather than detailed explanation – of key issues I make the following comments:

Doc ID:
CEC00088220

- There are references to TPB meetings none of which I attended.
- I agree that the individuals referred to as the “core project team” had input but I cannot say whether they were “core”.

Doc ID:
CEC00088220
pages 3, 10

- Section 3 would seem to be a fair record of actions being pursued. I cannot say whether it was comprehensive.

Doc ID:
CEC00088220
page 10

- With regard to section 4, the schedule would appear complete I cannot comment on the introductory paragraph as to how TIE was performing to a prior TPB approval. The bullet point comments seem to reasonably reflect matters at that time.

Doc ID:
CEC00088220
pages 12-13

Doc ID:
CEC00088220
page 15

- With reference to section 5. The comment at the bottom of sheet 25 gives the wrong impression. We knew that Ed Kitzman was reporting and directed by a senior executive in Germany. The Project Carlisle team thought this a good thing.

Doc ID:
CEC00088220
page 16

- With reference to section 6. I don’t disagree with this section in its generality.

Doc ID:
CEC00088220
pages 21-22

- I am unable to verify the estimates given in Section 7 and have no knowledge of TEL’s business plan.

Doc ID:
CEC00088220
pages 26-32

- I have no knowledge of what is reported as being at the “full council meeting on 24 June” referred to in section 8.

Doc ID:
CEC00088220
page 32

- I cannot comment on section 9.

Doc ID:
CEC00088220
page 33

I think the background to my email referred to in question 85 was that it was a courtesy email following a meeting I had held with CAF. I believe that the intention was to attempt to get CAF to put pressure on their Joint and severally bound partners and to get a better understanding of their position.

Doc ID:
CEC00086102

I obviously cannot answer question 86 without speculating as I had little direct contact with CEC in 2010 and none prior to that.

In response to questions 87 – 89. - 2011

Question 87 raises a number of questions:

1. With respect, I did not make the decision. This question would best be answered by Dame Sue Bruce.
2. I would best describe my role as “managing the mediation”, without any responsibility or power to communicate directly with Infraco, make decisions or reach agreement with Infraco unless required by Sue Bruce in the course of the mediation.
3. My belief is that the strategy was to reach a settlement to build a viable ETN at the best possible certain price within a reasonable time frame. To do so we had a full team to support Sue Bruce who was to be the “deciding person” together with Vic Emery and the representative of Transport for Scotland in face to face meetings with Infraco. The strategy was determined by several pre-meetings.
4. I don’t think there was a change of strategy during the mediation. It was a long and somewhat gruelling process involving an exceptional number of people on both sides. In my opinion, our team, under great pressure, performed and interacted well responding to an evolving situation.
5. Over the three or four days at Marr Hall we held many internal discussions – late into the night and on the final day into the late morning - which were underlined by the understanding of what the options were if mediation failed.
6. Early in the (I think 4th) morning it appeared that the mediation was about to break down. I drafted a skeleton of what I thought would break the dead-lock and Sue Bruce was enthusiastic about it. It had the majority backing of those involved, including Vic Emery, Andrew Maclean and the representative from Transport for Scotland. At that point, I had no further input. Sue Bruce, Vic Emery and I think Nigel Robson met the three executives from Infraco’s partner companies. An

agreement was reached. After which we spent the next two or three days bringing together the legal agreement.

7. I think in the interests of confidentiality I left my papers with Brandon Nolan because I don't have a record of what was agreed. I think the terms agreed gave price certainty for a viable ETN. The price was more than we had offered in the counter-offer, but that was to be expected. Without speculating, I cannot answer why Sue Bruce and Vic Emery decided to settle at the price they did, or whether they could have achieved a reduced price.
8. I believe that there was consensus between the stakeholders, TIE, CEC and Transport for Scotland. I cannot speak for others in the team present at the time. However, throughout Sue Bruce led the mediation team in an impeccable manner. She gave all the opportunity to express their opinion before meeting with Infraco.

In response to question 88. I was only involved in briefing Sue Bruce once she was in post. I think that this was in early January 2011. We discussed tactics and strategies as well as the performance of the Contract. I cannot say whether there were minutes taken of the meetings which involved others.

In answer to question 89. I think Brandon Nolan was tasked with preparing the mediation statement and Sue Bruce prepared her own Opening Statement. I would have seen and commented on drafts.

In response to questions 90 – 91

In response to questions 90 and 91. I think this exchange was about a comparison of estimates for terminating at Haymarket instead of St Andrew's Square.

Doc ID:
TIE00106424

Doc IDs:
TIE00106431
TIE00106432

In response to questions 92 - 97

In answer to question 92 I could only react not respond. My reaction is dealt with above. I don't think we got a satisfactory response before the mediation.

Doc ID:
TIE00685959

In answer to questions 93 and 94. After the passage of time I can only comment broadly on the various cost estimates that were being prepared by TIE with and without CEC involvement. I think that I was concerned that TIE's estimates were habitually "optimistic". In my experience, this is common when forecasts are being produced in the circumstances prevailing on the project. I worked with James Molyneux of Gordon Harris and Partners on preparing forecasts. They were Cost Consultants experienced in preparing cost estimates for infrastructure projects.

Doc ID:
CEC01928167

My estimates were distributed through Richard Jeffrey. I cannot say who he gave them to other than they were included in the "deckchair". As I have no memory of him deliberately "hiding" my estimates, I think he was open about the fact that I disagreed with some of TIE's estimates. I think at that time we were meeting with Dame Sue Bruce and her team. As recorded elsewhere CEC were made aware of my thoughts on cost estimates, if not at those meetings certainly with Colin Smith. But I think I made it clear at the meetings with Sue Bruce.

As CEC01928167 articulates, I no doubt referred to Infraco's Project Phoenix offer as a guide. I cannot say for certain to what extent I did. I think I would have thought that one reason for doing so was to give CEC a bench-mark to obtain a level of funding which they would not have to go back on later. Nor, can I say what CEC were doing about obtaining funding, especially, as I understand, the Scottish Government had declared "no extra funding" from them. I don't think I ever asked Sue Bruce what her "walk away" position was, nor did she tell me.

I cannot speculate whether it was TIE's settled preferred view to terminate and re-procure. I think it was Richard Jeffrey's view at some point. At that time, he was the "front-man" for TIE until Vic Emery was appointed Chairman. I think Vic quickly saw that there was no certainty in termination and re-procurement, but no doubt he will confirm his thoughts to the Inquiry.

Doc ID:
CEC02084651

I think the mediation team relied on Colin Smith's verification of cost estimates at the mediation. I remember James Molyneux and me having meetings with him on the subject prior to the mediation.

Doc ID:
CEC01890186

About what was the “dominant” cause of delay. Delays caused by MUDFA and by design ran in parallel. MUDFA delays, which were TIE’s responsibility didn’t impact design delays which were Infraco’s responsibility.

Doc ID:
CEC00653726

There is much case law about “dominant delays” and the effects in this case would most likely have been the subject of more. However, my proposition was that Infraco would have been entitled to extension of time for delays caused by MUDFA, but not all loss and expense, as they had caused their own loss through delays in design. This was a view I would have had in early 2010.

Of note is the design delay to On-street works. TIE couldn’t issue a permit to work until the design had been accepted by CEC. At the time of mediation, an integrated design hadn’t even been put to CEC. Consequently, the design wasn’t complete.

In answer to question 95. I would explain that my practice was to prepare for myself a “crib-note” before important meetings which I would at times circulate to others for information purposes. They were not intended to be a definitive document, more a guide.

Doc ID:
CEC02084651

I think what note 2 is referring to is that we had used the time from September to clear-up outstanding approvals from CEC and solve outstanding issues with third parties. For example, the flood risk at the airport, new station at Gogar and some outstanding land deals.

In answer to question 96. A principle underlining Project Carlisle was to put Infraco into a position where an experienced design and construct contractor could arrive at a firm price which took account of design risk. This was the subject of agreement with Ed Kitzman.

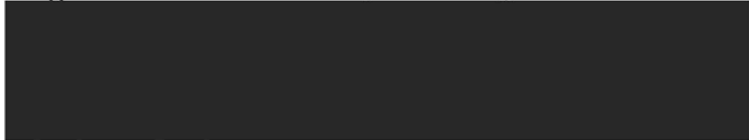
Doc ID:
CEC02084651

In answer to question 97. I think this refers to the Project Phoenix price and the steps taken to explain this to Infraco are explained above. However, James Molyneux had based the pricing of individual elements of Bilfinger Berger’s work on estimates obtained from their sub-contractors. I think we both thought that in open tender it could have been possible to obtain a better price. However, I also think we were minded that prices obtained by re-

Doc ID:
CEC02084651

tendering the unfinished Works in open tender would have large premiums above market because of the toxic reputation the project had.

I confirm that the facts to which I attest in this witness statement of 37 pages are true to the best of my knowledge and belief.



Anthony Rush

24 July 2017

ADDENDUM TO ANSWERS TO QUESTIONS 87 – MEDIATION

(Refer to Document Bundle 1 dated 10 August 2017 – Sections 1 and 4)

Overview and expanded answer to question 87

In his email dated 23 February 2011 Nigel Robson gives a succinct overview of the mediation. He says:

“This is an unusual mediation in that it is essentially a facilitated negotiation of a revision to an existing contract. The issues to be addressed are not only complex, technically, factually and financially, but they are also extremely sensitive given the public interest.”

In preparing the documents required on 31 July 2011 I have discovered my “travelling file” from the time of the mediation. It is disclosed within Document Bundle 1 – Sections 1 and 4. I cannot confirm that these documents are a complete record. They do not for example include information showing how the settlement sum was calculated, if it was. Nor do they provide a minute of the mediation. Others may be able to provide a contemporaneous record. I think both Colin Smith and Steven Bell made notes at the time.

Doc ID:
WED00000592

But, I can expand on my previous answers to question 87. In “general terms” I think that my previous answer to question 87 and the various sub-questions were answers to the best of my belief and knowledge at that time, as are my other answers.

This Overview refers only to Bundle 1 and expands on, but does not retract any of my previous answers to question 87.

I understand that it may have been a CEC Emergency Motion in November which instigated the mediation. I suggest that Dame Sue Bruce would be the best person to explain why and how CEC decided to initiate mediation.

I think that there was some uncertainty in the minds of some that mediation was the answer or that it would succeed. However, I think BSC’s letter of 2 December 2010 reflects the fact that it was an agreed process. Albeit the last

Doc ID:
CEC00220897

paragraph appears to be optimistic. I comment on that letter in an email to Brandon Nolan dated 5 December 2010. I conclude that email by suggesting a draft response (I haven't got a copy of a response if it was sent). In that draft, I confirm that Project Carlisle should be the "positive way" referred to by Richard Walker. I note that this was confirmed at the solicitors' meeting held on 2 February 2011.

I think my email to Brandon Nolan is a fair record of some of the issues at that time which may have determined the actual time-line from the beginning of December to the beginning of March – 3 months. It also gives a summary of some of the key issues the mediation would have to address.

It may be helpful for me to comment on TIE's role when the key decisions were taken to go to mediation; in formulating the strategy for mediation; and when taking the decisions at mediation. In a letter dated 6 December 2011 Alastair Maclean confirmed to Richard Jeffrey that it was "CEC's preferred strategy (for commercial reasons) to move to mediation on a short-term basis, ideally with a view to both sides 'walking away' from the Infraco contract". I also think that shortly before this John Swinney had declared that it was the Scottish Government's wish that the parties mediated. I think they had also declared that there would be no more funds coming from the Scottish Government.

Doc ID:
TIE00668156
6 December
2011 should
be 6 December
2010

It isn't clear to me now what Alastair Maclean meant at that time by "commercial reasons", "short term basis" and "walking away". These requirements are open to interpretation. But I think it was reasonable for TIE's executive to accept that CEC and the Scottish Government not only wanted the parties to mediate, they wanted TIE to facilitate mediation, not stand in its way. Moreover, I believe the preferred outcome of all stakeholders was that which I confirm in my previous answer 3 to question 87.

This wasn't a strategy I would have found any disagreement with. It was clear that whatever option was decided on, TIE Ltd would require additional funding. Even if they were successful in terminating the Infraco Contract - as Richard Keen QC had confirmed- they would have to complete, at their expense and risk, the whole works (to Newhaven) to recover their losses. In the absence of additional funding from Holyrood, CEC and its own borrowing powers TIE Ltd could be said to have been "approaching insolvency" (maybe

they were even from the outset). In the absence of additional help from Holyrood, CEC was in effect in sole control of TIE Ltd and the future of the ETN. Funding by CEC was recognised in the agreement with Infracore.

I think it fair to say that when she came on board Dame Sue Bruce rapidly gave meaning to Alastair Maclean's explanation of strategy. I think that up to that time TIE Ltd's (executive) was assuming they would lead the mediation. Certainly, Richard Jeffrey's file note of 14 January 2011 gives that impression. I cannot say whether TIE Ltd or Richard Jeffrey had been told otherwise until Sue Bruce took charge. I don't think this was harmful to the outcome, because TIE, with direction and input from CEC, were carrying out various exercises and studies which would be helpful in the mediation. I welcomed it when Sue Bruce took charge immediately she met with us. She made it clear she was leading the mediation and the project's future.

Doc ID:
TIE00684546

My email to Brandon Nolan refers to the dysfunctionality of the consortium. Although Richard Walker had the title of "Chairman BSC Consortium" in reality he only represented Bilfinger Berger. It could also be said that he only represented his own views in many instances. The email also confirms that CAF had no influence and that they "didn't matter" to the other two consortium members.

Doc ID:
WED00000592

When it came to the mediation I think it was clear that Dr. Jochen Keysberg (Bilfinger Berger GmbH) and Dr. Joerg Schnependahl (Siemens AG) were in empathy with each other and that Richard Walker and Michael Flynn were "frozen out" in the manner that Richard Jeffrey was. CAF insisted on having separate dealings with us. I think that on the Friday matters got fraught with them because we were concentrating on construction matters.

In Section 4 of the Document Bundle I include my short file note of the mediation. It confirms that the whole process spanned from Tuesday 8 March to Saturday 12 March. We had an internal preliminary meeting at Mar Hall on Monday 7 March. As noted in my file note, Transport for Scotland and CEC were verifying for themselves information given to them including that disclosed in sections 2 and 3 of Document Bundle 1. CEC had appointed its own team, including Colin Smith, with heads of department present at the mediation.

Doc ID:
WED00000592

The following notes are relevant:

1. In the seventh bullet point I assert that Richard Jeffrey was “in the main frozen out of the decision-making process”. I think that this is confirmation that in reality CEC and the Scottish Government (they had an investment in the project) had the power and interest to reach a decision, not the directors and executive of TIE Ltd. The note records that Richard Jeffrey was given his place to comment and object “which he did”. Both Steven Bell and Dennis Murray were also consulted.
2. The file note records that there was “an understanding that the trigger point for rejecting a Project Phoenix offer was in the region of £740 million for all costs”. This may be seen to be at odds with my last phrase in paragraph 3 on page 35 of my answers. But I don’t think I ever asked, or was told by Sue Bruce the level she was hoping to settle at.
3. There were opening submissions on the Tuesday—which took longer than is normal for a mediation. In a short opener I think it was clear that Dr. Keysberg was giving Richard Walker his opportunity to present his “case” and the (clear) impression that it was not necessarily BSC’s hard and fast position.
4. Tuesday afternoon and Wednesday were taken up by cross examination, in full session with the mediator, of each parties priced submissions. I think there were also exchanges by smaller gatherings, without the mediator, on the state of design; information required from CEC; Princes Street and programme.
5. I see from my file note that a spread sheet prepared by me formed the basis of discussions. I cannot say whether it was something I prepared on the day. Again, others may be able to produce it.
6. I think that by late evening there was agreement in principle on how the contract terms would be revised. There was still a gulf between the parties on price. The crunch came late in the evening or early morning because Dr. Keysberg and Dr. Schnependahl “had a plane to catch”.

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7. I remember drafting by hand some heads of terms and price which Sue Bruce said she could accept. It was put to BSC and they accepted it.
8. I think that the agreement referred to in the file note was reached in the early hours of Thursday 10 March.
9. It is noted that Alan Coyle, CEC's Financial Accountant confirmed that the agreed settlement figure produced an all-up cost "within the trigger point discussed on Monday"
10. I also think we left Mar Hall on the Thursday and met at Gleddoch House on the Friday and in McGrigor Donald's office on the Saturday. These two meetings had reduced teams present. The Heads of Terms were agreed there by individuals given power to agree on behalf of the parties.

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&
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I think that for the sake of completeness I should expand my previous answers about the "deal".

With respect, I must point out that the "deal" should be measured against the potential outcome of not reaching a deal, not against previous or similar offers.

The deal fulfilled the parameters of the strategy to obtain a viable ETN at a certain price in a reasonable time frame. I also suggest that it met the requirements set out by Alastair Maclean on 6 December 2010. The mediation was completed in 3 months, the settlement sum was within CEC's trigger point and therefore "commercial". Moreover, it eliminated those toxic terms in the contract which had given rise to the need negotiate a revision to an existing contract addressing the issues Nigel Robson referred to on 23 February 2011.

Doc ID:
TIE00668156

I cannot answer: "What was there a change of heart (sic)?" Not only would I have to decipher its meaning but I think I am being invited to assume as to who may have had a "change of heart" and when.

Doc ID:
WED00000591

My reflections on the mediation are that the leadership of Bilfinger Berger and Siemens got their act together at a time when CEC appointed a leader who

took control of the situation. As a result, I am certain that throughout the process there were many “changes of heart” and for that matter “changes of mind”.

I confirm that the facts to which I attest in this witness statement of 6 pages are true to the best of my knowledge and belief.

A large black rectangular redaction box covering the signature area.

Anthony Rush

18 August 2011

Tony Rush

General and Introduction

1. Please provide a copy of your up to date CV.
2. When did you start at TIE? The records include emails involving you from the end of 2009 (eg TIE00034200). What had happened at that time that lead to you being instructed?
3. How were you recruited? On what basis were you recruited – that is, as a consultant, through a company or as an employee? Was it an invitation from someone already there and, if so whom?
4. How were you recruited? Were you known to one or more of the company directors? Were you recommended by another consultant engaged by TIE? Had you worked with the directors previously and, if so, on what project and in what capacity? Had you worked with other members of TIE's professional team previously? If so, who, on what project and in what capacity?

5. What was the description of your role and what was it that you were told you were to do or achieve for the company? Was your role confined to the relationship between TIE and the INFRACO Consortium or did it cover all? In a report prepared by Susan Clark in March 2010 (CEC00541334) you are described as having responsibility for “Use of contractual Mechanisms” (page 19). What did this entail? How was this different from the role envisaged when you joined? A description of the basis on which you were recruited is on page 55.

6. When and why did you cease work for TIE?

Projects

7. There were various Projects generated in 2009 and 2010 – eg Pitchfork, Notice, Termination, Carlisle. Can you explain what they all were and how they related to one another?

8. CEC02084200 is a report on Project Resolution (Including Carlisle and Notice) dating from December 2010. On page 38, there is a discussion about how Project Carlisle came about. It appears that you were a prime mover in this? Do you agree with the position as it is stated here?

Initial views

9. When you first started work at TIE, what investigations did you make to determine the position and what information was provided to you as part of this exercise? What were your initial impressions / thoughts as to the position? What were the principal issues that existed? Up to that date, what had been done by TIE to address those issues? What options had been considered and rejected? What had been the results of the efforts undertaken? Did you consider that the actions were appropriate and/or had been properly carried out? Did you consider that there were other actions which could more usefully have been undertaken?

10. In your email of 14 December 2009 (included within TIE00034200) to Richard Jeffrey you suggest that perhaps a mediation towards a new deal would be the best way forward. What made you suggest this at this early stage?

11. At that time, what was the position in relation to INFRACO programme?

12. What was the position in relation to the MUDFA works?

13. What was the position in relation to the services being provided under the SDS contract with Parsons Brinckerhoff?

Personnel

14. With whom at TIE did you work? Was it mostly Richard Jeffrey? To what extent did you work with other TIE executives, Board Members or the members of the Tram Project Board? What was your impression of the performance of these people? DLA00006390 is a DLA file note recording some comments by you on TIE management. Can you explain what the problem was? Who were the people that you considered presented the biggest problem and why? Who were the ones that were doing the best? Again, why? What 'errors' did you consider that TIE may have to admit? It is apparent from this document that you had had a disagreement with Stuart McGarrity. What was the subject matter of this? How were matters resolved or left?

15. You appear to have dealings with both Andrew Fitchie (DLA) and Brandon Nolan (McGrigors). How were you to determine which firm was dealing with a particular issue? Did difficulties arise for you as a result of having two firms involved? Was there overlap / conflict in advice? How was work divided up between you and the legal team? It appears that there was much reviewing of letters prepared by the other? Is this correct? In an email dated 16 February 2010 (CEC00651418), Andrew Fitchie refers to requests from you for feedback "basically on an hourly basis". Can you comment? How would you describe the relationship that you had with Andrew Fitchie [CEC00219041 – he and I work very closely and have few secrets]?

16. It appears from some correspondence that the relationship between you and Steve Bell was strained? Do you agree? What was the cause of the difficulty?

17. Who was Ed Kitzman and what was his role?

18. Who was Torquil Murray – what did he do and who determined that he should be involved

19. Who was Nigel Robson and what was his role? Who determined that he would be brought into the team?

Contract close

20. Although you were not at TIE at the time, in an email of 12 December 2010 (TIE00305139) you state that the risk arising from development of design after BDDI was described in the Close report. CEC00547597 is a version of the close report. Where is the risk identified?

21. What are you referring to when you mentioned a 'gentleman's agreement' in this email in relation to claims immediately after the contract award?

2009

22. What was your involvement in 2009?
23. What was your role in relation to consideration of the legal issues that had arisen and were still arising? In an email from 20 December 2009 you express yourself to be in agreement with the position that TIE had argued at mediations in relation to Schedule 4 (CEC00550332)? How did you reach your view? CEC00585079 is an email from you to RJ in which you appear to be of the same view. On the other hand, in your email to Andrew Fitchie of 10 January 2010 (CEC00656394) and 1 March 2010 (CEC00548222 and CEC00548223) you seem less confident. Why the change?
24. What was the story in relation to the idea of an Off Street Supplementary Agreement referred to in the email of 10 January 2010? What was your view in relation to his? When had it first been mooted? CEC00586386 is an email to you from early 2010 setting out the background. CEC00649869 includes an email from you dated 12 February 2010 in which you say that any test of reasonable behaviour would expect them to put a proposal for OSSA which is consistent with public law. What was the basis for this view?

25. What was strategy at this point? How and by whom had it been determined? What was your role in that strategy?

26. What was the Peer Review (see CEC00584282 for a record of the meeting you attended)? How did it work and to what extent was it effective? How could it have been improved?

2010

27. It seems that matters came to a head early in 2010 (see email from Richard Jeffrey of 13 January 2010 - CEC00623955). Do you agree?

28. Had the strategy changed? How was it decided and how was it implemented? What were the results?

29. CEC00655624, CEC00655625 and CEC00655626 is an email with attachments from you dated 5 February 2010 with a draft letter for the consortium. Can you explain what the position was then and the purpose of the letter?

30. CEC00618952 is an email string containing an email from Brandon Nolan of McGrigors dated 1 March 2010 to various people including you together with four attachments (CEC00618956, CEC00618957, CEC00618958 and CEC00618959). Can you explain the attachments and why you wanted them? Further details of legal advice were provided by Andrew Fitchie to you and others by email and attachments dated 3 March 2010 (CEC00619254, CEC00619255 and CEC00619256). Again, can you explain the attachments and why you wanted them?
31. At the same time, there was correspondence (3 March 2010) from the Consortium setting out their views as to how the suggestion for an On Street Supplementary Agreement, had come about (CEC00648426). There is a version with handwritten comments on it (CEC00548448). Do you know whose comments they are? Do you agree with any or all of the sentiments expressed?
32. CEC00574841 is a written record of a meeting the two parties on 2 March 2010. Can you comment on this meeting, its purpose, the issues discussed and what if anything was achieved? What was the basis for the claim by BSC that they were unable to start work in terms of the contract? NB there is a further version of the same Meeting Notes at CEC00574842 where it is stated that the meeting was on 4 March 2010. For completeness, do you know which is correct?

33. On 7 March, you sent an email to Andrew Fitchie with a draft of a letter to be sent to the BSC (CEC00548645 and CEC00548646). Can you explain the thinking behind your letter?
34. Not long after you arrived a report entitled Project Pitchfork was prepared in March 2010 (CEC00488524). This records the onset of problems and the consideration by TIE of the options open early on 2010. It also sets out the various components of the response by TIE. Do you agree with or have any comments on the account given there? Page 5 notes that MUDFA was 24 months late and that design work was 18 months late. What impact had each of these had on the INFRACO works? Are you able to comment on the reasons suggested for the late running of MUDFA (page 5)? Are you in a position to comment in the reasons noted for poor performance on the design contract (Page 6)? It is recognised on page 14 that all of the options available result in costs in excess of the available budget? Were you involved in any consideration of this?
35. Can you comment on the letter from the consortium dated 31 March 2010 (CEC00405689)?
36. CEC00442927 is a draft is an email which appears to have been from Richard Jeffrey to Richard Walker. It refers to a meeting that you and Richard Jeffrey had had with Richard Walker and Michael Flynn on 14 April 2010. It appears that this letter or another version of it was sent (see email reply, CEC00299893 and CEC00299894).

That meeting is also the subject of your email to Andrew Fitchie of 21 April 2010 (CEC00444028). Can you comment on the meeting and what is said in this letter about the impressions taken from it? Why had the meeting been arranged and what had you hoped to achieve? Your email appears much more encouraging about the meeting than Richard Jeffrey's draft. Can you comment on this? Can you comment on the terms of the email reply? You were asked by Richard Jeffrey for your comments on a draft further reply (CEC00335475). What was your view of this?

37. It appears from an email to TIE Board Members from Richard Jeffrey on 16 April 2010 (CEC00266715) that you had had a meeting with representatives of BB and Siemens shortly beforehand. There are further comments on the meeting in an email from you to Andrew Fitchie dated 16 April 2020 (CEC00445284). Can you comment on the discussions at the meeting? Was a record kept of those discussions? If so, by whom and where was it kept? Can you comment on the approach of each of the Consortium Partners to your discussions?

38. Can you elaborate on the meeting that you had with Michael Flynn around 21 April 2010 (see email from you to Andrew Fitchie dated 21 April 2010 - CEC00444028)? How had the meeting come about? What was it intended to achieve? What was discussed? Was it a success?

39. The email exchange you had with Andrew Fitchie on 22 April 2010 (CEC00438929) suggests that there were tensions in the management of the situation with the contractors and that various persons were, in effect, acting against one another. Can you comment?
40. CEC00316561 and CEC00316562 are an email dated 26 April 2010 with attachment from Stuart McGarrity to many people including you which appears to suggest a very different scale of tram can be built with the available funds. What was the background to this email and why was it prepared? What was the purpose of the cost estimates referred to in the email? Why were they prepared? On what information were they based? What, if anything, was done with this information?
41. A further call with Michael Flynn on 27 April 2010 appeared to make real progress with Project Carlisle (CEC00335481). Can you comment on the discussion that you had with him? Despite this apparent step forward, Project Carlisle was not in place by the end of 2011. What were the reasons for that?
42. An email from you to Andrew Fitchie and others dated 28 April 2010 (CEC00444577) appears to show that there was an intention that the matter be resolved by discussions by senior personnel from the companies involved. Is this correct? Why was this thought to be a useful line to pursue?

43. CEC02083060 is an email from you to Richard Jeffrey dated 20 May 2010. Can you explain the comments you make there regarding design? What was the problem with the design of the track that you refer to?

44. What was the reason for your approach to Parsons in June 2010 with a view to seeking their assistance in relation to the other consortium members (see email and attachment, CEC00336104 and CEC00336105.)

45. What was the purpose of the proposed Memorandum of Understanding in relation to Project Carlisle (CEC00379576 and CEC00379577) from June 2010?

46. By June 2010, Richard Jeffrey was contacting both you and Andrew Fitchie to say that thought should be being given to how TIE could terminate the INFRACO contract (CEC00302039). What was your role in relation to this? What involvement did you have in the change of focus to termination? Had you been involved in this decision?

47. Can you explain the purpose and outcome of the meeting referred to in your email of 10 August 2010 (CEC00216187)?

48. Can you spell out the Project Carlisle Explanatory Note dated 20 June 2010 (CEC00302027). What function was it intended to perform? How and by whom was it produced? What happened in relation to it? It appears from your email to Mr Kitzman of 20 June 2010 (CEC00337100) that you were the one that sent them on.

49. By the end of June you were sending letters directly to the MD of Parsons (CEC00303395). Why were you getting involved in this rather than having it dealt with by TIE?

50. Can you explain / comment in the email string of 6 July 2010 (CEC00337344). What are you telling Richard Jeffrey what he should say to his counterpart at BB? Can you explain the various issues that you note arose out of your meeting?

51. In July 2010, DLA emailed you a copy of a draft report from May that had been prepared by Acutus (CEC00443389 and CEC00443401/ CEC00443402). This report attributed much of the responsibility for delay of the INFRACO works to TIE. What effect did this have on your thinking and strategy?

52. At about this time TIE sought to carry out an audit of INFRACO subcontracts. What was the purpose of this? To what extent did it achieve its goals?

53. CEC00183919 is the Consortium letter with the Carlisle Proposal dated 29 July 2010. Can you comment on this? What was the reaction to this within TIE? Had they been expecting that it would come in at this sort of cost?

54. In August 2010 you emailed Andrew Fitchie and others with a presentation (CEC00183602). Could you explain the PowerPoint presentation (CEC00183607) and the accompanying Explanatory note (CEC00183606)? Who produced the various figures given in these documents? Who was to attend the meeting and what was it intended should be decided? What was the outcome of the meeting?

55. CEC00041959 includes an email from you of 16 August 2010 considering what should be in a counter offer. What was your role in relation to the counter offer? Can you explain the contents of the email and the justification for your approach?
56. CEC00097962 is an email from Richard Jeffrey to you and others dated 20 August 2010 with a different Powerpoint presentation (CEC00097966) for display to the Council. Why was a different presentation requires? What was the source of the figures in this presentation? How was the risk allowance figure (pages 5 and 18) determined? Is CEC00032056 a note of the meeting with CEC in relation to this? Can you explain what is meant by the reference to "CEO's risk allowance" on the second page?
57. TIE wrote to the consortium on 24 August 2010 (CEC00221164) setting out their proposal for what they termed the Guaranteed Maximum Price TIE Change. You delivered this letter and other documents to Ed Kitzman (CEC00221163 to 67). Can you confirm that you were involved in preparing these documents? What was the thinking behind the GM TIE Change and how was it intended that it should work? On page 2, there is a statement that the intention is to put the parties in the position that they would have been in when concluding the contract had all the changes that had come to light since that time been known about. Is this, in effect saying that the contract could be re-priced on the basis of the new information? Had a view been taken that the design was inadequate at the time of close and there was a necessity to 're-close' with the additional information?

58. With reference to your email to Andrew Fitchie and others dated 29 August 2010 (CEC00216318), can you describe what happened at your meeting with Ed Kitzman to hand over the TIE Proposal? What was the issue with Siemens?
59. It appears from the email exchange that you had with AF and RJ on 31 August 2010 (CEC00210811) that you were aware that the Council preference was to terminate the contract but you were of the view they should not. Is that correct? What did you understand AF to mean when he said he would endeavour, “to ease Nick Smith into a world where termination is untidy and litigation is not fun for anyone and is extremely costly”? Did this influence the costs given for litigation? In particular, did it influence the estimates in the email from Andrew Fitchie to you and RJ of 2 September 2010 (CEC00212352).
60. Your email to RJ of 2 September 2010 (CEC00098258) appears to be offering a view as to how the contract should be interpreted. Do you agree? As both counsel and solicitors were, by then, engaged, why were these matters not put to them? What was your view at that time as to whether Clause 80.20 should be pursued? You set out an argument as to why the INFRACO interpretation is ‘absurd’. In what context did you intend that this should be used?
61. What was the rationale for the letters sent to various Consortium representatives on 7 September 2010 (CEC00157664, CEC00157665 and CEC00157666)? Also, can you explain what was behind your email to Andre Fitchie of 8 September 2010

(CEC00098455) and your email to David Mackay and Richard Jeffrey of 13 September 2010 (CEC00221324)? The latter may require to be read with an email of the same date forwarding the revised INFRACO proposal to you (TIE00667409 and TIE00667410).

62. In an email to Andrew Fitchie of 20 September 2010 (CEC00099032 and CEC00099033) you suggested that the proposal being put to BSC should include a requirement for an Investigation of the Design carried out. Why did you want this and what was the purpose of including it as part of a proposed settlement rather than TIE simply carrying it out themselves? You proposed a later wording on 22 September 2009 (CEC00129475 and CEC00129476). What became of it?

63. CEC00209015 contains a draft of an email to Richard Keen QC from September 2010 that reflected comments made by you (see CEC00213487)? Do you agree with the summary of the position given in this email? What options for further action were under consideration and what were the concerns that you or others had in relation to the proposed course(s) of action. The instruction give the impression that there is no clear plan / strategy. Is that a fair comment?

64. What was the intention behind serving Remediable Termination Notices (RTNs)? Did they serve a useful purpose? It appears from the correspondence that the response was simply to serve notices rejecting them (samples of such rejections can be found

in CEC00044539, CEC00044540, CEC00044541, CEC00044542 and CEC00044543 to CEC00044545. Was this response a surprise? You set out your thoughts in an email to Andrew Fitchie of 21 September 2010 (CEC00218055). Can you explain the contents of this email?

65. It appears from your email of 2 December 2010 (TIE00683946) that you were unhappy with the advice that had been obtained to the effect that if TIE issues notice of termination on the basis of the Remediable Termination Notices served up to that date there would be a material risk that TIE would be found to be in breach of contract. Can you explain?
66. By early December there has been an emergency motion before the council and BSC had requested a meeting with CEC as opposed to TIE (see your email to Richard Jeffrey and others dated 2 December 2010 - TIE00683949). Were you aware how the meeting had come about? Had there been involvement of the Scottish Ministers? What were your concerns in relation to this meeting?
67. In your email of 3 December 2010 to Richard Jeffrey and others (TIE00683974) dealing with the meeting between CEC and BSC you refer to tension between CAF and their consortium partners. Please explain this.

68. What was the intent or purpose behind being “commercially aggressive”? What did it involve? It appears that up until this time there had been a policy of sending large volumes of contract documentation to the consortium. Was this what was meant by being commercially aggressive? What was it thought would be achieved? Was it successful?
69. CEC02084200 is a document entitled “Project Resolution (incorporating Carlisle and Notice) Report to Tram Project Board” dated December 2010. Why was this produced? What was your role in preparing it? Within the document there is a claim that the delays arose from the provision of integration of the systems and civil designs (pages 6 and 24). Do you agree with this?
70. The report was provided to the Tram Project Board. On page 6 there is a statement that the decisions relating to design development have not been clear-cut and also that they have not provided a clear interpretation which gives certainty going forward. Do you agree with this? Do you think it accurately represents the Adjudication decisions in relation to the Gogarburn Bridge and Carricknowe bridge?
71. The recommendation in this report is that TIE should enter into mediation. How had this come about? During much of 2010 the focus of been on changing the scope of the contract or terminating it. In particular, in the latter months of the year, the the focus appeared very much on terminating the contract. DO you agree? What gave rise to the desire to enter into negotiations?

72. This reports notes that there are doubts as to whether TIE could lawfully terminated the INFRACO contract (page 58). As legal advice had been taken throughout the process followed in 2010, was this a surprise.? What was your reaction and the reaction of others to this news?
73. In the section in mediation, there is reference to “events during the week of 15 November 2010” (page 60) and these are then identified. Were these really the factors that lead to greater consideration being given to use of mediation?

The Secret Agreement

74. In mid 2010, it came to light that there was a ‘secret’ agreement between Parsons and the Consortium. This was mentioned in a number of documents such as an email from yourself of 11 August 2010 (CEC00215951). What was the concern? What was done about it and how was it resolved?

Adjudications

75. Were you surprised at the outcome of the Adjudication decisions in relation to Gogarburn Bridge (CEC00479432) and Carrick Knowe Bridge (CEC00479431)? What difference did these decisions made to the discussions that you were having with the

Consortium? Were you involved in discussions at TIE to determine what the response(s) to this should be to these decisions? On 15 January 2010 you were emailed a copy of legal advice in relation to the decision (CEC00653304 and CEC00653305). What difference did this advice make? Was action taken in reliance on it?

76. It appears that the TIE interpretation of the contracts was largely supported by Mr Wilson in the Russell Road Retaining Wall ('RRRW') Adjudication (CEC00567896, paragraph 65). Do you agree? What difference did *this* make in the discussions with the Consortium? Was there any significant change in the balance of power or willingness to be flexible / discuss issues? Despite the fact that Mr Wilson appears to favour the TIE interpretation of the contract, it is apparent that he then decided against TIE on applying that to the facts. What was the TIE response to this? It seems to show that TIE were not properly understanding the facts even if their legal approach was accepted. Do you agree?
77. In an email from Susan Clark from 12 March 2010 (CEC00619994), she states that at the Wilson adjudication the parties agreed that the Hunter decisions would not be binding. Do you know about this? Exactly what was agreed? Was it that the Hunter decisions did not bind Wilson who could apply his mind afresh or was it that it should be treated as irrelevant for all purposes in future?

78. Despite the RRRW decision, is apparent that the deadlock in the contract remained. Why was this?
79. In June 2010, an adjudication was to be dealt with by Brandon Nolan of McGrigors rather than Andrew Fitchie at DLA (see email chain between you, Andrew Fitchie and others CEC00437836). Why had the decision been taken to have different representation for this Adjudication? What was the relationship between McGrigors and CEC at this stage What was the relationship between McGrigors and TIE? What was the basis for your statement that the adjudications to date had strengthened TIE's position in relation to INFRACO? What did you mean by your comment that, "if we lose MUDFA8 you should look to the whole strategy and DRP team.'
80. CEC00129399 is the decision of Lord Dervaird on the Murrayfield Underpass adjudication. What effect did this decision have on the strategy adopted by TIE? CEC00129395 is an Opinion from Richard Keen QC dated 23 September 2010 on issues arising out of Lord Dervaird's decision. Why was this obtained – what was the practical issue that had arisen an on which TIE considered the need for guidance?
81. In your email to Andrew Fitchie and others of 23 September 2010 (CEC00209592), it appears that you now accept that TIE have "lost heavily" on many issues at adjudication. Was that the view of everyone? Was it recorded formally? What bearing did it have on the decision(s) as to future management of the contracts?

82. An email from Jo Glover of DLA to you and others dated 24 September 2010 attaches the suite of documents making up the new Carlisle Proposal (CEC00129799 to CEC00129803). What work had been undertaken by you to get them to this stage? Who provided the input for them and/or took the decisions as to what was to be included and what was not? What was the role of each of TIE/TEL/TPB/CEC in this process? Can you describe the principal elements of the proposal at this time? The final version does not include a requirement that there be an investigation of design and instead says that TIE will carry out an investigation and that there are to be no further payments to the SDS provider meantime (See CEC00129803 page 4). Why was this change made? It appears that this was something you discussed at the meeting discussed in the following paragraph.
83. The day before that, you had attended an internal meeting where there was some discussion as to whether any counter offer should be made in light of a letter received from BCS on 22 September (see note of meeting - CEC00220060). Is CEC00084813 the letter? Why was there doubts as to whether the counter offer should be made? An email from Andrew Fitchie to you and others dated 26 September 2010 contains a draft response in strong terms (CEC00210272). Did this reflect the general feeling in relation to the BSC letter?
84. CEC00088220 is a draft Report on Project Pitchfork (ie Project Carlisle plus Project Notice) prepared by Susan Clark. This draft is dated October 2010. What input did you have into the preparation of this report? Do you agree with its contents?

85. What was the background to your email of 1 October 2010 (CEC00086102) to representatives from CAF?

86. What role had been played by CEC in the period up to the end of 2010?

2011

87. In general terms, can you explain the decision to proceed to mediation, the preparations leading up to the mediation and what occurred at the mediation? What was your role in relation to preparation for the mediation? Please consider what the strategy was for the mediation and how it was determined? Was there any change in strategy in the course of the mediation? Had there been discussion as to best and worst case scenarios and what were they? What was the process undertaken that lead to the deal that was eventually done? Do you agree that is it is significantly more than had been discussed before and is similar to offers from the Consortium that had already been rejected as too expensive? What was there a change of heart. Was there consensus that the agreement should be made in these terms.

88. Were you involved in briefing the incoming Chief Executive of CEC, Sue Bruce? What information was she provided with? Did you discuss the tactics and strategies of the mediation and target outcomes with her before the mediation? Was any record kept of these discussions and, if so, by whom?

89. What was your role in preparation of the TIE mediation statement and Sue Bruce's opening statement?
90. TIE00106424 is an email from Nigel Robson to you and others dated 17 February and your reply. Can you explain its purpose? Was this part of the preparations for mediation? What is meant by dealing with the deckchair figures? Is estimating likely outcomes for TIE/CEC based on various scenarios?
91. The next day, Gregor Roberts emailed you with various figures (TIE00106431) can you explain these? Why did you want these? How were they being produced? Was there any independent verification of them? The follow up email (TIE00106432) may also be relevant.
92. You got the Consortium proposal for what was by then termed Project Phoenix in February / March. What was your response. In particular, what was the response to the increase sought by Siemens in their prices (see your email to Richard Jeffrey and others dated 3 March 2011 - TIE00685959)? Were you every given a satisfactory answer in response to this issue?

93. CEC01928167 is a CEC Briefing to the incoming Transport Convenor on the project and attempts to get agreement. The first pages note that the costs estimates provided by TIE were less than ones advised by you. Can you elaborate? How did you arrive at your estimates? To whom were they given and when were they given? At the mediation was a decision ultimately taken to proceed on the basis of your estimates rather than those of TIE? Can you comment on the suggestion in this document that the preferred view within TIE was to terminate the existing contracts and re-procure? Can you comment also on the note that MUDFA was the predominant cause of delay as opposed to design issue? If it helps, the text for this briefing appears to be taken from a report prepared by Colin Smith (CEC01890186). Earlier, in February 2010, an email from you (CEC00653726) described design as their (ie BSC's) MUDFA. What did you mean by this?
94. CEC02084651 is an email from you to Brandon Nolan and others dated 27 February 2011. You claim there that the cost of separation will be greater than that forecast by TIE. How did you come to your conclusion? When did you reach the view that the separation costs would be much higher? Did you make that known to TIE? If so, to whom and when?
95. Your email says that the Infracore are now in possession of sufficient information to give a fixed price. What information had been made available to them to mean that they could for the first time be expected to do this?

96. How did the offer set out to de-risk the risks that Infracore had created by poor design management (point 4)?
97. Point 13 notes that the price for the BB element was greater than market price. What was done in relation to this? How had you assessed market price? Were TIE given the information which point 18 notes is required?