

EDINBURGH TRAM INQUIRY

NOTE TO WITNESS

COLIN SMITH

This Note covers the following matters:

- Introduction
- Prior to mediation at Mar Hall
- The Mar Hall mediation, 8 to 12 March 2011
- The outcome of the mediation
- Minute of Variation 4 (Priority Works)
- Reports to CEC, 16 May, 30 June and 25 August 2011
- Settlement Agreement, 15 September 2011
- CS's role after Mar Hall
- Operation of the project under the Settlement Agreement
- Utilities conflicts
- Scottish Water
- Change control
- Final account
- Impact on the public
- Fees paid to you/HG Consulting
- Third party agreements
- Surplus Trams
- General and conclusions

Introduction:

Meeting Held at HG Consulting offices, Glasgow 17th & 18th July 2017

1) Can you please supply a brief CV?

- I confirm that the CV provided to the Inquiry in 2016 is accurate and that I am happy for the Inquiry to use it.

2) Over what period did you work on the Edinburgh Tram Project?

- I was actively involved from January 2011 – May 2014
- I continued to do some other work items to 2016 in my capacity as the Independent Certifier and to date I continue to be involved in my capacity as a consultant completing third party agreements.

3) Who recruited you, and how did you come to be involved?

- I was interviewed by Sue Bruce and Councillor Jenny Dawe. I was initially appointed as a Special Advisor to work with City of Edinburgh Council. (CEC)

4) Please describe your roles and responsibilities throughout the period you worked on the project.

- When I commenced work for CEC in January 2011, I was acting in an advisory role. I was supporting CEC at mediation and making sure that the Council and the Council team were in good shape and well researched in order to conduct themselves well at the mediation session.
- The mediator brought parties together in large groups and sub groups. I was asked to chair a sub group as an Interlocutor. This meant that I was working between the various parties and with the principals of Siemens, Bilfinger and CAF, as well as the Council and Transport Scotland.
- At the first sub group meeting I recall that the Principals were sitting behind me. I sat at the head of a long table, with Infracore on one side and TIE on the other. The process I was asked to engage upon was to have people articulate what they believed their position to be. I was probing them to find out the differences so that we could identify the distance apart.
- This sub group process lasted 3 or 4 days and I can only assume that while I was observed by the Principals in the room, they felt that it would be helpful for me to stay on to take the parties through the transition period of mediation on to what should be controlled and managed on site and as such I was asked to stay on following the mediation.

- In summary, in my first role I was Special Advisor to the Council regarding mediation
- My second role was as Chairman of the sub working groups: Interlocutor
- My third role was as Independent Certifier, which was a role to sit between the parties and again, to encourage them to articulate their differences and hopefully bring them to a common point.
- That job title was added to when I then became SRO, Senior Responsible Officer, to the Council.
- In the first and third roles my duty of care was to the Council whom I was seconded to work for and I was acting in their sole interest. In the second role, the role of Independent Certifier, as Bilfinger Berger, Siemens and CAF had all seen me perform, they were content for me to take the role of SRO while still involved as Independent Certifier to them and to the Council. I recall that Sue Bruce made quite an effort to ensure that if I were appointed as SRO when Dave Anderson left the Council, that Infracore and CAF were entirely comfortable with that position and that they did not feel that my Independent Certifier's role was compromised. As CAF, Bilfinger and Siemens had seen me in action for probably about a year to 18 months by this point in time, they were comfortable that my additional responsibility was to report back to the Council and wouldn't compromise my role as Independent Certifier.

5) What qualifications and experience, relevant to that role, did you have at the start of that period?

- My professional association is the Royal Institution of Chartered Surveyors of which I have been a Fellow since 1985.
- I am a member of the Association of Project Managers
- I have been involved in contract disputes relating to PPP and traditional JCT contracts, in addition to other projects that had experienced difficulties, including the Glasgow Science Centre. The Millennium Commission, the co-funder of the Glasgow Science Centre, subsequently invited me to advise on applications for funding for Scottish projects. As such, I have been involved in a number of projects that needed some care to bring them back on track again.

6) Please briefly explain what work you have done since leaving the project.

- I have worked on a variety of projects e.g. working for the City of Edinburgh Council on the St James Centre project. This involved guiding CEC and THRE through the Compulsory Purchase Order processes for the

St James Centre, land acquisition, planning matters and funding arrangements.

- Other projects have involved light rail disputes where I have acted as mediator.
- Most recently I have been working on land assembly and planning of two heavy rail terminals

7) In broad overview, what was the state of the tram project when you joined it?

- I really had no prior knowledge other than what I had read in the newspapers.
- Basically my understanding was that there was a contract dispute with the contractor having walked off the site. There was a question mark over the budget and again, reading from the newspapers, there was no way forward. It appeared that the partners involved in the project had become entrenched and relationships were broken.

8) How did it compare to other similar projects you had been involved in?

- It was unlike other projects I had been involved in. Extreme positions were being taken by the parties. Everything had become so entrenched and whilst I had come across similar situations in other projects, there was no movement between the parties' positions in this project with their positions being more extreme than I had seen in other projects.

9) What was going well, and what was going badly? What in your view were the reasons for that?

CEC02084515, BSC's period report to 29 January 2011, may assist in answering this question.

- The document you have asked me to look at is dated 29 January 2011. As at 29 January 2011 I had not seen the document referred to. I had no idea what was going well or badly at that time. I think I had my first meeting on 29 January 2011, which Sue Bruce chaired and which was attended by representatives from TIE and the Council. I can't remember if Transport Scotland were at that meeting.

10) What was your understanding of the role which had been, and was being, performed by tie at the time you joined the project?

- On 29 January 2011, my reading of relationships was that CEC was the

client and TIE was an agent acting on behalf of the Council. I knew TIE had a team but at that time the size and shape of that team and their technical or financial knowledge was unknown to me.

11) Had it performed, and was it performing, that role well, or badly? Please explain your answer.

- At that time it really wasn't for me to judge what was going well or badly, nor who was working well.

11) A) Did you know anything about the people involved?

- Some people were known to me. I had worked with Sue Bruce at East Dunbartonshire Council where I had been involved in projects. Tony Rush was known to me as I had come across him when he was working with Barr Construction as I had been involved in a number of contracts with Barr. I knew Brandon Nolan as we had worked on contract disputes previously for other parties. David Anderson was known to me as I had worked for Dunbartonshire Enterprise where he was the Director at the time. I had met Vic Emery post my interview with Sue Bruce and Councillor Jenny Dawe. The meeting with Vic was basically an informal one over a cup of coffee, when I think Vic was taking the measure of me and effectively interviewing me. Other than that, I didn't know anyone else.

12) To what extent was tie set up and resourced sufficiently to perform its role in the tram project, having regard, for example, to staffing, procedures and internal management structures?

- In that early period, I was the special advisor, with no measure to test anything against. From my file, you will see that post 29 January 2011 I was very keen to find out more about the contract, more about the programme and more about the consents for technical sign off. Of course when you start to ask these questions that then leads you into understanding structures and procedures. By summer 2011 I understood there was a pretty full complement of people who could deal with, and look at, matters of consent, programming, financial control and contractual control. Therefore, it seemed that by summer 2011, my understanding was that there was a sufficiency in terms of the number of people to take on a project of this size.

13) Who did you work with? To whom did you report? Who reported to you?

- Again that changed over the period of the tram project. Initially I was Special Advisor to the Council, primarily giving advice and assistance to

Sue Bruce through the mediation process. I believe I quickly established a working relationship with Vic Emery, who was the chair on a number of internal client meetings and was very helpful. Three officers from Transport Scotland were also helpful as they were able to act as a sounding board. Graeme Porteous was one of the names I remember. He was a wise head and was particularly helpful. I found all of the Transport Scotland team to be supportive and they helped to progress matters.

- As far as who I reported to. One of the issues that I suggested early on that needed to be looked at was the reporting structure and level of governance within the project. While the structure became more sophisticated as time went on, the basic framework was to have a situation where consensual and collective decisions were made. Coming out of mediation it was important that all the principals understood where the project was going. Going forward I had suggested that we have an all-party working group to try and take the politics out of the project. I was reporting to a number of people in different forums, but my view was that they all should get the same information. My thinking was that it is better to give more information than less, so I would give the full menu of information and then try and narrate on the day depending on who the audience was but it was the same information given.
- It may help if I explain what I would be doing each week. I would chair maybe 13 or 14 meetings on site. I would then take the information to meetings with CEC and Transport Scotland every Tuesday and Thursday morning at 8 o'clock and around the table we would have Sue Bruce, Vic Emery, Ainslie McLaughlin, Alan Coyle, Bob McCafferty and Gavin King. From those recorded meetings, which I think you will have the minutes of, I would then gather that information and take it to the all-party quarterly meetings, which were usually chaired by Andrew Burns; the Councillors would get the same information but presented in a way which would encourage them to ask questions. I would then take a monthly report to Bilfinger, Siemens, CAF, Transport Scotland and the Council who would hear about issues such as the radical traffic management plan. Meanwhile sitting over all of that was a quarterly meeting attended by Dr Keysberg and Dr Schnependahl from Bilfinger and Siemens respectively and Antonio Campos from CAF, together with senior people from the Council and Transport Scotland to provide an overview of the project.
- Again, if there were issues of interpretation or project needs, some of which had to be dealt with under the Certifier's Agreement, I would give the Certifier's opinion, which would be circulated to Infracore, CAF, Transport Scotland, Turner & Townsend and CEC.
- The all party oversight groups were encouraged to ask questions. If there

were project difficulties they would be informed.

- The meeting groups stayed the same from the beginning to the end with the only difference being when TIE dropped out and Turner & Townsend came in.

Prior to mediation at Mar Hall

Project Carlisle

The parties made a number of attempts to resolve their disputes, before finally doing so after the mediation at Mar Hall. These included two proposals by BSC under the umbrella of 'Project Carlisle':

- 29 July 2010, CEC00183919:
 - Airport to Princes Street East
 - Completion (section D) by 19 November 2012
 - Price - £433.29m, plus €5.8m
- 11 September 2010, TIE00667410 :
 - Airport to Haymarket
 - Completion (section D) by 18 December 2012
 - Price - £405m. plus €5.4m

16)What is your understanding of the reasons why those discussions did not lead to agreement?

- I don't know why Project Carlisle fell through. It was referred to in the initial meeting on Saturday 29 January 2011, which was held in TIE's offices. A whole variety of documents and initiatives were talked about, but they were not being offered up as ways forward, they were just in reference to what had been done.

Project Phoenix

Introductory: Report “Edinburgh Tram Project, Review of Progress and Management of the Project, January 2011 to June 2012”

In or around 27 May 2012, you circulated a report by you and Alan Coyle entitled “*Edinburgh Tram Project, Review of Progress and Management of the Project, January 2011 to June 2012*” which, amongst other things, summarised events at the Mar Hall mediation (WED00000134)

17) Can you explain the purpose of this report, and what it was used for?

- It was a baseline reference for the new Council administration. I felt that it was a worthwhile exercise to ensure that the project had a baseline record of all that had gone on during the period January 2011 to June 2012 with the change of administration within the Council from Lib Dem/SNP to Labour/SNP. It was really trying to provide a snapshot of all that has gone on in that period. I didn't want that information to be lost or people to forget where we had come from and where we were targeting.

Project Phoenix

In the period prior to the Mar Hall mediation, the tie/CEC team(s) worked on 'Project Phoenix'. Their work included analysis of the costs of various alternatives for the project, including: the project Phoenix proposal (essentially, the construction of a line from the airport to Haymarket at a newly-negotiated fixed price); separation (essentially, the termination of the Infraco contract); and continuing under the existing contract.

18) What was your role in that process?

- I had no role as it was prior to my involvement.

19) Who else was involved, and what were their roles?

- I am not aware of who was involved nor their roles.

20) Can you describe in overview what work was done?

- Looking back on the discussions it struck me when I was hearing about it on 29 January 2011, that some of the work was optioneering. However, in respect of the quality and detail I had no knowledge at that time.

21) To what extent did tie/CEC obtain professional advice and expertise to assist

with that work?

- I cannot comment on this as I was not involved.

Meeting on 29 January 2011 to prepare for mediation

Your report from 27 May 2012, "Edinburgh Tram Project, Review of Progress and Management of the Project, January 2011 to June 2012" (TRS00023933, and CEC02083824 to CEC02083835) noted, at 2.0:

"At the instigation of ... Sue Bruce, an all-day project review to assess readiness for mediation was held on Saturday 29 January 2011. The notes attached ... are the opinion of the author, not that of the Council. The meeting was the first of many that followed as the tactics and detail were examined and refined in the lead up to mediation in March 2011."

22) Are the "notes" referred to there at CEC02083835? If not, can you explain what that document is?

- These are the notes referred in the compendium report that goes up to June 2012 and is cross referenced at CEC02083835. I wanted to come away from that meeting with something that I could offer back to the Council to say "entirely my thoughts, it's just a first thinking on what I have heard and seen on the day". I think I actually start under section 4 to paint a picture of what a "back page solution" might look like.

Your observations in that document included the following:

- Richard Jeffrey had *"no sense of alarm at prospect of tie being "sacrificial lamb" at the mediation"*
- Tony Rush thought there was *"not enough time to [prepare for Phoenix and Separation], concentrate on Phoenix. I would agree ... although Phoenix should be developed to some degree as a negotiating lever."*
- At 2.0 and 3.0, there are references to the objective being to a line to St Andrew Square

23) Can you explain, and expand upon, each of these points?

- On the day it was very much a case of taking stock and capturing impressions of people's behaviours. I hadn't come across Richard Jeffrey before. I was surprised that he wasn't more protective of his organisation TIE or his client the Council. But that is very much a personal view.
- I thought what Tony Rush said was sound. Two fairly big pieces of work were being discussed: Phoenix and Separation and it seemed to me that in the time available it would be more favourable to devote the effort to Phoenix. The contract separation option provision, from what I heard, wasn't readily available so I agreed with what Tony said.

- It struck me that if you were to go to mediation without looking to have a positive outcome or an outcome agreeable to both parties, you would be going into mediation in bad faith. You should be going in armed with options that hopefully would be compatible, not only with your own aims but hopefully with the other side's. That is where I listed the delivery of operations, the cost recovery with a full contingency. The mechanism to deal with the design sign off, land acquisition, remaining consents and also the remedial works at Princes Street all had to be addressed in a way that was agreeable to all parties.
- The reference at paragraph 3.0 refers to the early days of my involvement. I felt that partners were not using the contract in a collaborative way.
- As this project had not used a standard form of contract, there was no precedent to follow interpretations and in my opinion this meant that anyone could open up an argument to explore to their own purpose and end. I felt that the contract was cumbersome and made things difficult, for a difficult, although not complex, engineering project.

A list of points for the team meeting on 29 January 2011 noted

"Are the key points of dispute clear/identified and are differences known and understood? ... Are our position points of argument based on a solid, technical contractual position?"

24) What was the position on these issues at that time?

- It seemed everything was up for debate. My question was what was the certainty? Were arguments and consequences fully understood? I didn't get a feeling there was a landing point when you were able to say "that could be agreed and then built upon"

"Deckchair"

There is reference in many of the documents around this time to 'Deckchair'.

See, e.g.,

- TIE00355078
- TIE00109194 and TIE00109195, 18 February 2011: email from Gregor Roberts and power point attachment entitled "Deckchair Update".

25) Can you explain what this refers to?

- The deckchair spread-sheet was so called as it was multi-coloured spreadsheet. There seemed to be an effort on the part of Gregor Roberts from TIE, and I believe latterly, but prior to my involvement, the Council, to try and capture all the possible options and outcomes in a single place, i.e. the multi-coloured spreadsheet. I recall that when I became involved in the

January, it was being used as a working tool between the Council and TIE but I don't know who originated it.

26) Who was responsible for the 'deckchair' work?

- I don't know who was responsible but it was used between CEC and TIE. It seemed to me to be a précis of opinions as people were discussing costs to go. I observed how the options would play out, the BSC/Phoenix/Separation options. Separation caused me greatest concern as in my opinion there was no feel for what the cost implications of separation might be. I had no sense of what the penalty payment, compensation that might potentially be demanded by Infraco, would be.

The Project Phoenix Pricing Proposal

The Infraco Project Phoenix Proposal, dated 24 February 2011, is at BFB00053258.

27) What was your understanding of this proposal at the time?

- On the client side CEC/TIE were laying out the position and different options and what those costs and possibilities might be.
- The contractor and the document referred to was signed by Martin Foerder from Bilfinger on behalf of the Infraco consortium. My understanding was that Infraco was tabling what they believed Phoenix should cost prior to mediation.

28) What were your views about it (e.g., the proposed price, programme, scope and conditions)?

- I didn't have enough knowledge at that time to have a view on the price. The programme period seemed sensible on the face of it. What was a bit more difficult to comprehend was why the programme would be the contractor's programme. In my experience a programme is a working tool between two parties which is jointly owned and can be worked on together. However this programme was the contractor's so you could have a view on whether you thought it was good, bad or indifferent but it really wouldn't matter because it was the contractor's programme and you wouldn't get access to change or influence it from the client side. On the scope, in my opinion it was starting to appear that the St Andrews Square option presented a better business case than Haymarket.

Report by GHP

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

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

See also Richard Jeffrey’s email of 2 March 2011, and the email it forwards (plus attachment which reconciles GHP’s figures with tie’s) (CEC02084602, TIE00109273, TIE00109274).

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

- GHP are Gordon Harris Partnership. I don’t know who commissioned them nor what they were commissioned to do.

30) What use was made of the report?

- I think going back to Richard Jeffrey’s comment in email 2/5/2011 that some use was made of the report but without qualification.

31) Do you have any comments on it?

- I have no comment to make on the report.

GHP’s estimate of the cost of separation (at £765.27m) appears to be more than £100m higher than tie’s estimate (see, e.g., TIE00109194 and TIE00109195, 18 February 2011: email from Gregor Roberts and power point attachment entitled “Deckchair Update”).

32) Can you comment on, and/or explain, this difference?

- The period we are looking at is 18 February 2011 when we are still leading up to mediation. I was special advisor to the Council to take them through the mediation. As the special advisor to the Council on the mediation process I didn’t comment on the numbers. My role was to listen, observe and report to the Council.

GHP’s estimate of the cost of Project Phoenix also appears to be higher than tie’s: a range of £661m to £700m (compare to tie’s figures in, e.g., TIE00109194 and TIE00109195, 18 February 2011, of £642m and £639m).

33) Can you comment on, and/or explain, this difference?

- I cannot comment on the difference between the GHP figures and TIE’s figures. TIE were getting advice from Gordon Harris. I had previously heard

Cyril Sweett being mentioned, another firm of surveyors; TIE had their own internal quantity surveying department headed up by Dennis Murray. At that time I was not sure who had complete ownership of the numbers and I felt that the wide range produced was not helpful.

Tie / CEC analysis of cost of alternative options

In an email dated 25 February 2011, CEC02084653, Richard Jeffrey quoted the following 'high level provisional numbers':

- £736m plus risk for a line to St Andrew Square, based on BSC's Project Phoenix proposal for the line to Haymarket
- £559m plus a settlement premium for BSC for separation, but including the cost of a new contractor to finish

He then said: "*We have cut these numbers arrange [sic.] of different ways, and added or subtracted various risk items, whatever we do, we end up between £100m and £150m apart.*"

34)What was your understanding of Mr Jeffrey's thinking at that time?

- My recollection is that he was trying to develop the case for Separation. However in my opinion no one seemed to be able to consider what the premium any new contractor would put on the project would be if they re-tendered, or indeed whether any contractor would be willing to risk their reputation taking on the tram project, given its reputation at the time.

35)Did you understand his £559m estimate to include a line to St Andrew Square?

- No but I have noted and circled plus and a settlement premium.

36)Was he in broad terms saying that, in tie's view, the separation option was £100m to £150m less expensive than the Project Phoenix alternative?

- That was my reading of the email.

Tony Rush sent an email on 27 February 2011 with his reaction to Infraco's mediation statement (CEC02084652).

37)What was your understanding of the following point he raised, and to what extent did it influence the mediation:

- That it was an "*exaggeration*" to suggest that MUDFA delays, whilst '*massive*', had dominated the whole project, since they affected only the on-street works and CEC were "*left agreeing with tie that the dominant cause of delay is more likely for the same reason that the Infraco have not completed*"

the design”

- The contractors had a high level of concern regarding utilities. At one point during mediation Infraco said that they would come back to conclude the work, but only to Haymarket to avoid the on street. I’m not sure that the statement as such influenced mediation, but certainly discussions at mediation made it quite clear that the contractor had grave concerns about the utilities which still had to be overcome.

37A) To what extent would the Utilities Issue be a surprise to an experienced contractor

- I don’t think there was any surprise about it. It was more the extent, the number, the depth and the location. It was the extent of the unknown, but what was known was that utilities would have to be overcome.

Tony Rush sent an email dated 27 February 2011, CEC02084651, which he described as *‘crib notes for tomorrow’s meeting’*. His comments included the following:

“1. The cost of separation will be substantially more than forecast by tie in their “Deck chair” presentation. A prudent estimate places the potential cost as being between £765m and £800m ...

2. The Infraco are now in possession of sufficient information to give a fixed price ...

4. The offer sets out to de-risk the risks the Infraco have created by poor design management and the difficulties of integrating the Systems design with the Civil Engineering design ...

7. Only £5m of the increase of £15m in Bilfinger Berger’s Offer (Carlisle to Phoenix) arises from direct costs ... The balance appears to relate to extended preliminaries ...

9. There is (again) no explanation of Siemens’ price ...

13. The Bilfinger Berger price is substantially greater than current market price and greater than they would be entitled to under the current terms of the Infraco Contract. The risk for the Clients is that by rejecting their offer increased costs of delay will accrue which may outweigh the difference between entitlement and what could be negotiated through Phoenix...”

At paragraphs 14 to 16, there were comments on the Siemens’ price, including that it was double their original price despite their work having changed little since tender; that they were seeking to recover their tender errors; and that their price *“is effectively a retender”*.

38)What was your understanding of each of the issues noted above?

- (1) My reading of the email at the time was that Tony Rush and Jim Molineaux tried to address the issue of what separation would really cost because we have seen in an earlier email the separation factor. The payment to the contractor was an exclusion and what I thought Tony was trying to say here is "If it is separation, including payment to the contractor, it will be more than what was spoken about by TIE"
- (2) I don't think I would have enough knowledge at that time to either agree or challenge.
- (4) I wouldn't have challenged that at the time. I know differently now, but at the time I would have accepted that at face value.
- (7) It is a reasonable observation, but I would not have challenged or engaged with this.
- (9) I wouldn't have challenged that.
- (13) I wouldn't have enough knowledge to comment.
- (14) I would be taking note of it but wouldn't be giving advice.
- (15) I recall the conversation with Tony and others about the euro/sterling exchange but I didn't have enough knowledge to contribute anything.
- (16) I wouldn't have had enough knowledge at that time to add anything.

39)Did a meeting take place to discuss these points, and were you present at it?

- I don't recall if I attended a meeting to discuss these issues but if one was held, then I would have expected to be there as I attended all the joint meetings between January and March . I cannot recall a specific meeting, but I know that the points were being actively circulated and being commented on by others. You can see the extent of the email group so I would imagine, without me actually being able to be specific about the meeting, that I was there. The scribbled notes on the copy are in my handwriting.

40)What was discussed?

- I can't recall what was discussed

A slide show dated 28 February 2011 set out revised cost estimates of the various options (CEC02084643).

41)What were the key differences between this and the version dated 18 February 2011 (TIE00109195)?

- I didn't know the key differences between CEC and TIE positions in the run up to mediation.

42) What factors underlay these changes?

- I don't know what underlay the differences. I recall that Tony Rush and Dennis Murray had different thoughts

42 A) At mediation did TIE and CEC have different positions? Did they come up with different numbers?

- In my view there were differences within TIE. Tony Rush, who was advising TIE, was in a different place in respect of the finances to Dennis Murray from TIE.

In an email of 1 March 2011 (TIE00685898, Richard Jeffrey expressed the view that BSC's *"proposal suggests they are not being very conciliatory"*, and wondered whether this was *"just standard negotiating tactics"*.

43) What is your comment on that view?

- In my view this comment indicates the lack of trust and communication between the parties.

An exchange of emails between Richard Jeffrey and Tony Rush on 1 March 2011 (TIE00685894) includes a discussion about price.

Mr Jeffrey's comments included the following:

- *"the price – we can see no justification for this level of price increase. The original Civils/System price was £240m for a depot and 18km, roughly £13m/km, the new price is £390m for a depot and 11km, roughly £35m/Km, nearly 3 times as much"*

44) What is your understanding of, and comment on, these remarks by Mr Jeffrey?

- Alan Coyle, Sue Bruce, Alastair Maclean and I didn't go into mediation with any pre-set figure, fixed view or thought of what the outcome in financial terms would be. We were collectively listening and observing. Alan, for his part was trying to pin down with some degree of accuracy, the deckchair spreadsheet, so that we could understand the various outcomes.
- I think the comments are Tony Rush and Richard Jeffrey exchanging thoughts on the Phoenix proposal. I don't recall either me or the Council interjecting into this debate to say that you are right or wrong.

45) How, if at all, were they taken into account in preparing for the mediation?

- I think all those comments were kept in circulation because the first hurdle, certainly in my view, was to see if there was a willingness for the contractor to participate further in completing the work. Thereafter, the cost of that

work, including due allowance for risk, was to be determined.

46) In the first bullet, is Richard Jeffrey contrasting the Infraco construction works price with BSC's Project Phoenix Proposal?

- That was my interpretation.

In two emails dated 2 March 2011 (CEC02084606 and CEC02084603), Tony Rush made the following comments:

"Amongst the many unknowns is the cost of completing the works from Airport to Haymarket. I haven't seen any output from Cyril Sweett so my only comment is that I understand that it is limited to civils works (Bilfinger Berger) and it is claimed to be current market prices.

...

"I don't want to start hares running but having seen the PPP I am concerned that Siemens Contract Work Price is substantially under bid"

...

"I haven't seen any output from Cyril Sweett but the civils work may be the least of our worries. We have no clear handle on the market cost of the Systems.

...

"I will be happy to look again at Gregor's numbers because the potential cost of separation is a critical threshold on which we may decide to ditch Phoenix or conversely decide to agree on a price for Phoenix which is higher than we needed to. "

47) What is your understanding of Mr Rush's observations?

- My understanding was to narrow down the cost of the two options, rather than having a wide range. He says in his email to Richard "my job is to challenge and I do challenge the deckchair numbers".

48) What information did tie/CEC have to compare to, and assess, the prices sought by BSC in Project Phoenix and at the mediation?

- CEC had whatever TIE shared with them at that point. TIE had figures, together with advice from Gordon Harris Partnership, Cyril Sweett, Tony Rush and their own quantity surveyors. I would have expected that given the way TIE had tendered the work, they would have had the other tenders still to hand and would therefore have been able to use those as a comparison.

49) How robust was it?

- I would have anticipated that experienced quantity surveying practices would have provided accurate assessments.

- Within TIE they had just come through the tender process so I would have thought that the information should have been fairly robust.

50) What work, if any, was done in this regard by Cyril Sweett? See, e.g.,

- TIE00096738, an email dated 7 April 2011 from William Allan of Cyril Sweett, and attachments including a report entitled *Commercial Due Diligence Report – Initial Due Diligence*, April 2011 (TIE00096741, TIE00096740, TIE00096739)
- TIE00358213, TIE00358214, TIE00358215, TIE00358216, an email dated 20 May 2011 from Dennis Murray of tie attaching a report by Cyril Sweett entitled *Commercial Due Diligence Report, Update Nr 1*, and two spreadsheets entitled *Estimated cost of work carried out* and *Estimated cost of work to complete*; and
- TIE00356043, TIE00356044, TIE00356045, an email from Nigel Walker of Cyril Sweett to Dennis Murray and others attaching a summary of the Estimated Cost of Work to Complete and of the Estimated Cost of Work Carried Out
- Fiona Dunn was one of the surveyors who worked for TIE and she reported to Dennis Murray. Material was all shared between Cyril Sweett and CEC.
- TIE00096741 is I believe a commercial due diligence report which is telling us the current gross valuation of the amount certified to date.
- TIE00096740 – the report suggests to me that Cyril Sweett are trying to get an estimate of the value executed to date.
- TIE00096739 – I believe this is a projected milestone analysis certified end of February 2011.
- The documents ending 213, 214, 215, 216 appear as though Dennis Murray is sending information to McGrigors.
- Documents ending 43, 44, 45 I would believe that Cyril Sweett would have had to provide detailed figures and back up for the statements..
- I was never offered up any insight as to the instructions given to Cyril Sweett.

51) Can you explain Mr Rush's point about the cost of separation being a critical threshold on which tie/CEC might agree to a price for Phoenix which was higher than they needed to?

- I believe that goes back to the unknown costs of separation. I think Tony is trying to get to what he refers to as the "tipping point".

52) To what extent did tie/CEC do precisely that?

- In the TIE/CEC mediation room what I believe we didn't do is get to a place that said that the only option was separation and the cost is x and then work

back from that. It was quite the opposite. My recollection is that at mediation we were trying to find a way forward, not a reason for separation. We were trying to see whether we could do business with Infracore in this first instance.

- I recall that people from TIE, Transport Scotland and CEC were round the table. The client side made an offer which was rejected. A counter offer was made and a compromise sum was settled on, from my recollection we didn't ever say separation is looking like such and such and work back from that.
- I had no feeling by the time we reached the end of mediation that CEC was paying over the odds.

Alan Coyle circulated an updated version of the deck chair spreadsheet on 5 March 2011 (TIE00355077, TIE00355078). It took account of Steven [Bell's] work on exclusion risk, and Mr Coyle said:

"In a nutshell the tie view of Phoenix to St Andrew Sq is £682m (low) £749m (high) once these risk items are built in ... we can debate on Monday."

53) To what extent were you familiar with deck chair spread-sheets such as this during your involvement in the project?

- From 29 January 2011 I was becoming increasingly familiar with the expression "deckchair". It was being used by Alan Coyle to try and get close to and get detail around the figures.
- My involvement was advising Alan Coyle, Donald McGougan and Sue Bruce that we should try to narrow down the range by listening to what TIE and Tony Rush were saying. Most importantly was making sure that we had a risk provision price in the final analysis.

54) Can you explain in overview what it shows on tab 1 "Summary of Options", in particular by reference to: the different columns and the totals shown in them; the boxes in the bottom right hand column?

- I believe Alan Coyle is trying to get a feel for the determination costs.

55) In what way did these figures influence tie/CEC's approach at the mediation?

- They would have been taken into account.

56) Can you explain in overview what tab 2 shows ("Latest AFC Rec"), in particular by reference to the final line (721).

- I can't explain that point

In an email dated 6 March 2011 (CEC02084590), Tony Rush said:

"I am concerned (as I know we all are) on what is the Tipping Point in cost terms. By testing options against the top 5 thresholds of Price Certainty; Programme Certainty; Operational Certainty; Best Value; and a viable ETN, I think there is a premium value in obtaining these aims."

He then expressed the view that Alan Coyle's forecast separation costs [in the deck chair spreadsheet?] were probably too low. He added:

"One can only make a judgment without market testing the costings, but I think that in light of the pivotal importance of the forecast I would be inclined to add to Alan's forecast if only that I suspect the cost of completing the systems and track will prove very expensive."

(For completeness, the attachment to his email is TIE00686006.)

57) What was your understanding of Mr Rush's comments?

- I believe the observations made at the time in the email were valid. Alan Coyle was trying to capture, with as much detail as he could, the detail of the cost of the two options. The debate was led by Tony Rush and Dennis Murray who had the detail. I believe Alan was trying to record that information in a single point of reference. Tony's comments are to augment what Alan was doing, which I believe was right and sensible at the time.

58) What effect did that have on negotiations at the mediation?

- The greatest level of negotiation was within the CEC/TIE room. There wasn't a series of meetings with BSC to go through people's positions line by line, but there were sub group meetings where Dennis Murray was with the BSC surveyors and professional team and would then report back to the CEC/TIE room. Richard Jeffrey would make comment. Tony Rush would make comment. I don't remember Alan Coyle ever being challenged or having to challenge. Sue Bruce, David Anderson and I were not close enough to the detail to go behind the headline figures. We were listening to the conclusions and how the discussion was going.

59) Was the logical conclusion of these observations that the amount tie/CEC should be willing to pay to obtain certainty of price, programme and operation should increase, given Mr Rush's view of the likely cost of the alternative (viz., separation and re-procurement)?

- In my opinion, I am not sure that I would agree with that question as we didn't get price certainty at mediation. There was still the issue of schedule part 45 works and issues around utilities.

You sought information on various matters in advance of a meeting on 7 March 2011 (email dated 6 March 2011, CEC02084648).

60) What was the meeting, and who were the attendees?

- Attrition was also a factor and the fear that the contractors just wanted to hold their position. Tony Rush, Nigel Robson, Alan Coyle and I attended. I can't recall if Vic Emery or Sue Bruce were there. I would always report back

to Vic and Sue and to the wider Tuesday and Thursday groups.

61) What was discussed and agreed?

- A meeting to get to “bet your farm figure” sample figure. The number £876m which Tony is talking about is the possible outcome and that was then being compared to separation and Phoenix. The expression “bet your farm” was Vic’s phrase. I understood it to mean that you would stake everything on that figure and the frustration I think Vic was suffering from was that as the Chairman of TIE no one was actually giving him a single hard figure.

62) Can you explain the information you were looking for, particularly the “bet your farm on it budget figure” and the “tipping point cost of airport to Haymarket”?

- A sensible number you were able to do business on. A number with a clear audit trail. A sensible number that we could do business on as the contract sum to be considered. I cannot recollect the “tipping point” figure

Tony Rush’s response is in the same chain. He supplied figures, albeit describing them as “*very much quick guides and not adequately thought through*”. His figures included the following estimates:

- Airport to St Andrew Square under project Phoenix: £699.5m
- Tipping point cost of Airport to Haymarket: £740m to £765m
- Attrition cost, Airport to Newhaven: £876m
- Cost of separation: £740m to £800m
- Bet your farm on it budget: £143m

63) Can you explain these figures?

- I believe Tony Rush is trying to come out with a number for the airport/St Andrews Square. It is his judgement with input from others.
- I can’t fully explain the figures, they are Tony’s view based on collective conversations. I believe the £876m is a view from Tony if the contractor were to play the game of attrition.

64) What use was made of them at the meeting the following day?

- I can’t remember what detailed use was made of the figures, but I would have expected them to have been taken into account.

65) What influence did they have on tie/CEC’s conduct of the mediation thereafter?

- I shall describe the CEC/TIE room at the mediation to try and answer that question. We sat around the table almost in a board room layout with Vic Emery, Sue Bruce, David Anderson and Richard Jeffrey at head of the table. I sat next to David, Sue and Ainslie McLaughlin. Each day people would fall into the same pattern around the table. On one side of the table we had

Brandon Nolan, Tony Rush, Donald McGougan, Alan Coyle, Alastair Maclean and Bob McCafferty. Others came and went. The discussion was led by Tony on behalf of TIE and it focussed on "Can we do business", how would we structure the relationship? What needs to be done to the contract? I don't recall there being dissent from anyone around the table other than differences of opinion, rather than disagreements, where Richard would take one view and Tony another. The Council would listen to both sides of the exchange and ultimately, and I can't remember who came out with the first client offer, but after a very long discussion a figure was suggested. It was made to Infraco and then rejected. There was a counter offer and ultimately a compromise was reached.

There is a version of your email of 6 March 2011 with handwritten annotations (CEC02084586). These include the following:

- £950 [million?] for the "bet your farm on it" budget
- £800 + [million?] for separation

66) Whose is the handwriting?

- The handwritten comments are mine.

67) What does it reflect (e.g., discussions at the meeting on 7 March 2011)?

- Yes, it does

68)Why had these numbers increased from those proposed by Tony Rush in his email of 6 March?

- These are notes to myself as an *aide memoire*. They are what I thought the figure could become. These figures are my thoughts to myself.

6 What influence did these new numbers have on the mediation?

- These figures have no impact on mediation. I offered no advice on values at mediation nor on sums. My remit at that time was simply to help conduct the mediation process, make sure there was preparation for the following day in terms of structure and then, as I mentioned, I had not expected Michael Shane to invite me into the chair to act as interlocutor at the technical sub group meeting.

70)Throughout this period, how solid was the information on which tie/CEC's estimates were based?

See, e.g.:

- Tony Rush, email 17 February 2011, TIE00106424: "*The only hard factual numbers we have are costs to date, Infraco's Claims to date and their last*

Carlisle Submission.”

- Gregor Roberts and Dennis Murray, email, 18 February 2011, TIE00109200: “*further time/disruption*” claims were expected from BSC
- I believe this was the best available information tempered with the judgement of TIE’s advisors. Reliance was on the experience of the negotiators in the room. People who have come through commercial experiences such as Vic Emery, Tony Rush, Brandon Nolan and Steven Bell, who was there from TIE.

Your report from 27 May 2012, “*Edinburgh Tram Project, Review of Progress and Management of the Project, January 2011 to June 2012*” (TRS00023933, and CEC02083824 to CEC02083835) includes (at chapter 7, CEC02083829) the following remarks:

“It became apparent from the pre-mediation work outputs that tie’s commercial assessments of the likely outcomes were of a very hard line when compared to the assessment of where the culpability for delay fell. It has become clear that the dominant cause of delay to the works was the delayed MUDFA utility diversions.”

“The hard line tie were taking was also apparent in the position Tony Rush was advising versus the in-house tie commercial team. At that point tie was forecasting an estimated outturn cost of £638.2m to finish the line to St Andrew Square. The sum took no account of exclusions from the contract but did include tie’s assessment of delay costs. The settlement deal (named Project Phoenix) that Tony Rush was discussing with Infraco at the time would have resulted in an anticipated final cost of £760.3m with defined exclusions still sitting outside the settlement.” (See Appendix 1 for the detail of these two positions.)

7.4: tie’s preferred strategy appeared to be to settle with Infraco and re-procure. “*There are a number of fatal flaws in the assumptions that tie made in this scenario*”, including:

- Tie assumed the cost of settlement with Infraco would be £33m, but that was the balance of Infraco’s entitlement to payment for work done to date and did not take into account any entitlement Infraco had for delay “*(MUDFA delay being the dominant cause)*”, or for disputed design changes for work that had already been undertaken.
- It assumed a new contractor could step in without any risk allowance or bad project premium in the price.
- There was no indexation for the cost of materials

- The estimate of the on-street costs, of £19m, included no allowance for risks
- There was no allowance for extension to the programme arising from the need to re-procure.

7.6: tie's preference of terminating with Infraco and re-procuring "*went against all the advice that was given by independent advisors at this time*".

71 Can you please explain each of these points, with particular focus on:

- a) The view that the dominant cause of delay was MUDFA utility diversions (and the extent to which that was a widely held view in CEC/tie)
 - It was my understanding that TIE did not hold the view that MUDFA was the dominant cause of delay. By May 2012 what I had experienced was to carry on with further radar/CAT scans. I also asked for slot trenches to be carried out. The CAT scan will inform you that there is something there and the slot trench the depth.
 - My view was that if there were opinions of value on any issue, TIE's were at the lower end. I could not fully understand TIE's position on separation. If there was a separation then they would need to re-procure. Would the existing signalling systems and controls be comparable with new systems? TIE spent a lot of time discussing separation. While it cannot be discounted it was not the best solution in my view.
 - The difference between TIE and advisors was a cause for concern. A lot of the time in the lead up to the mediation was taken talking through what the various advisers were reporting in addition to what TIE was advising the Council. I think it fell to the leadership, and I say that in a positive, complimentary way of Vic Emery, that he was able to use his office as chairman to bring the debate to a close simply rather than allow more talk to continue about the ranges. This had an effect on mediation using more time than desirable but was necessary.
- b) Tie's forecasts of the costs under the different scenarios, their preference for separation from Infraco and the flaws in their analysis
- c) The differences between tie and their advisers (and CEC), and how that affected the approach to the mediation.

I think the feeling I had at that time, based on the experience from January 2011 to the point of writing the report, was that if there were opinions on value TIE's opinion was always in the lower range and in my experience it wouldn't be expected that one person was always the lowest, you would expect that to move around from person to person. From mediation right

the way through to that time they were always at the lower end of any value. Their view on their desire for separation I could never appreciate, because my fear would be that to go through separation you would have to have another contractor come in, or contractors willing to tender and then re-procure the contract; what would be the chances of a compatible design or design liability? Taking the interface between Siemens' systems, if another contractor came along would that be compatible with the then present system designs and if not you would have to take out all the equipment and re-design. The civil engineering work is not likely to change because the concrete slabs and so on and so forth are similar. I could never see how that could be a workable option at a reasonable price. In one of my emails I thought separation should be still thought about but only as a negotiating lever, don't ignore it but spend most of the energy on Phoenix and that's why I agreed with Tony in trying to get a workable Phoenix type of solution.

Preliminaries

Shortly before the Mar Hall mediation (on 2 March 2011), Lord Dervaird had issued his adjudication decision on preliminaries (CEC00208761, CEC00208762, BFB00094594). This did not resolve the dispute and, indeed, tie's position appears to have been that *"both parties historically have assessed Preliminaries on an incorrect and flawed basis"*, and that an adjustment would be needed (see tie's letter, 8 March 2011, BFB00095781).

The issue was the subject of discussion amongst tie/CEC's advisers prior to the mediation:

- Emails from Richard Anderson of McGrigors dated 2 and 3 March 2011 (CEC02084589, CEC02084588)
- Tony Rush's email dated 20 August 2010 (CEC00130677) described tie as having *"overpaid for preliminaries"*. In an email on 4 March 2011 (TIE00355060), Nigel Robson had said the implications *"could be quite a lot of money"*.
- Tony Rush's email dated 5 March 2011, and attached opinion (CEC02084593), in which he notes that Lord Dervaird *"repeated"* his opinion. He also said: *"My intention when I first raised it was to claw back overpaid preliminaries from future payments – but this was thought to be too provocative"*. His opinion was that *"tie are entitled to withhold further payments for Preliminaries until the amount paid reflects the value of the*

Construction Milestones achieved.”

- Tony Rush’s email dated 6 March 2011 (CEC02084641) noted that *“by my method of valuation the Infracore have been over-certified by >£21m subject to them being awarded additional costs for delay ... The Infracore have claimed £10.5m more than they have certified. Either way the generous method of valuing preliminaries has taken the pressure from them to give detailed particulars of additional cost.”*

75) Can you explain this issue?

- I cannot explain the issue or the financial implication.

76) What were the financial implications of it?

- I was never asked to look at the documentation nor pass an opinion and therefore I cannot talk about the implications.

77) Were its implications confined to cash flow, or did they impact on overall cost?

- I can’t talk about the implications to cash flow as I was never asked to look at this documentation

78) What impact, if any, did it have on the conduct and outcome of the mediation?

- I cannot recall if it was a topic of conversation at mediation.

Other matters

In an email dated 1 March 2011 (CEC02084611), Dave Anderson said: *“there is a very clear lesson from the experience of the project to date that ambiguously drafted, non standard clauses have been at the heart of the disputes between the parties”.*

79) To what extent do you agree with that?

- I think that is a fair comment to have made.

80) To what extent was there consensus about that at the mediation?

- By the time that we got to mediation anyone new to the mediation and the project was of the view that the contract was cumbersome and difficult to deal with. However, when required, what I tried to do as the Independent Certifier was to have parties look to the contract and encourage them to look behind the written words then re-connect with the original intent and consider what the parties had actually intended to provide in the first place.

An email to you from Nigel Robson (4 March 2011, CEC02084587) suggested you were to select a group to brief Sue Bruce and debate financials (see CEC02084600 for the group).

81)What briefing was Sue Bruce given on the financial issues prior to the mediation, and from whom?

- Sue Bruce was given a PowerPoint presentation with various outcomes. There was also a conference call to ensure that we had an understanding of the advice being provided.

Steven Bell sent you (and others) an email on 7 March 2011 with “a further refinement for your back page proposal” (TIE00687328).

82)Can you explain what was meant by “back page” and what relevance it had to the mediation?

In that regard, see also CEC02084631 (“Back page bullets”).

- Leading up to mediation there were a number of joint meetings between TIE/CEC. In preparation for the mediation I had started to set out what I thought was a possible best outcome that took into account revised governance and reporting to try and get the contractor back to site. There were matters such as the Princes Street repairs that needed to be dealt with at no cost to the contract. All of this I put to Vic Emery and Sue Bruce before one of the joint CEC/TIE meetings with a proposal that this may be a suitable “back page” outcome. This was an early shaping of a possible outcome from mediation.
- The visual prize was to let people see that something was happening, i.e. the Contractor being back to work and delivering.

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

- Only one other matter. I advised Sue Bruce to contact the German and Spanish governments to let them know the impact of the dispute and the reputational damage to Bilfinger, Siemens, CAF and the city of Edinburgh. An early test of whether that initiative had any effect was to then invite the Principals: Dr Keysberg, Dr Schneppendahl and Antonio Campos, to a meeting in the City Chambers with Sue Bruce, Vic Emery and myself. This was directed to people at the most senior level to discuss whether we could do business together. That early outreach at a senior level to Bilfinger, Siemens and CAF helped the mediation process and we could always refer back to the positive commitments given at that Principals meeting through to

the completion of the project.

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

- Nothing more to add

Documents of possible relevance include:

CEC02084654 (especially Steven Bell's remark to Tony Rush that "*I agree wholeheartedly that liability (or entitlement) are different from settlement value ... I expect that our assessment (as tie) will be different from your assessment as advisors*"), CEC02084657, CEC02084656, CEC02084650, CEC02084647, CEC02084645, CEC02084642, TIE00109202, TIE00109203, TIE00106439, TIE00106440, TIE00109200, TIE00106432, TIE00106446, CEC02084620, CEC02084628, CEC02084597, CEC02084630, TIE00670774 (and its attachments, TIE00670777, TIE00670778, TIE00670779 and TIE00670780).

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

- Nothing more to add here

Mar Hall Mediation, 8 to 12 March 2011

Overview

86) In overview, what did you understand to be the objective of the Mar Hall mediation?

- The objective was to see if parties could work together

87) What was your role at the mediation?

- Advisor to the Council on the mediation process.

88) Which entities (i.e., companies and other organisations) participated in the mediation?

- The mediator Michael Shane, who wasn't party to the contract but party to mediation. Transport Scotland other than that it was all the contracted parties, i.e. CAF, Bilfinger, Siemens as Infracore, TIE and CEC.

89) Which individuals had the most important roles at the mediation, and what were their roles?

- From TIE – Vic Emery, Steven Bell, Tony Rush, Brandon Nolan, Richard Jeffrey
- From CEC – Sue Bruce, Alastair Maclean, Bob McCafferty, Donald McGougan

- From Bilfinger – Dr Keysberg and Martin Foerder
- From Siemens – Dr Schnependahl, Julie Owens
- From CAF – Antonio Campos, Richard Garner, Alejandro Urriza

90) With whom did you mainly interact at the mediation (on the tie/CEC side and on the Infracore side)? What issues did you address with them?

CEC02084582, a “Suggested mediation resource structure” may assist in answering this question.

- This document is a diagram that I prepared to ensure suitable resources. The diagram was used to advise the Council about where they sat in relation to other parties.
- I interacted with all of the parties named there. I was effectively advising CEC but interacted with others.
- Michael Shane was involved going from room to room.
- Michael Shane suggested the interlocutor role for me, given that I was not previously involved. I could ask questions openly. Parties could give their view in the sub group meetings and then we could build from that, reconnecting the parties.

91) To what extent were tie involved?

- Completely. TIE were closely involved in all parts. TIE and CEC were working together.

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

- N/A

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

- I think it was probably a very simple ambition and that was to determine if partners could work together

94) How strong did you consider the parties’ respective negotiating positions to be? Please explain your answer.

- Both parties thought they had strong negotiation positions. In my view that was due to each side not seeing the other parties’ position through poor communication.

95) How strong did tie consider its negotiating position to be?

- In my view all parties thought that their position was strong, including TIE

96) To what extent was there consensus in the tie/CEC team about the strength of their negotiating position?

- I don't think there was consensus, not even within TIE.

97) What was tie/CEC's strategy for the mediation?

- The strategy was to present a united front to BSC, even if there were differences of opinion in private. There were robust discussions within the TIE/CEC room and I don't think anyone held back from offering up opinions, however there was a united front when we stepped out of the TIE/CEC room.

98) What approach did tie/CEC expect BSC to take at the mediation?

- I think they expected BSC to come out hard and to be uncompromising.

99) To what extent did the progress and outcome of the mediation reflect that strategy and those expectations?

- I was pleasantly surprised by the BSC approach and I certainly held a lot of store by the early senior officials/principals meeting at the City Chambers. I could see that people who were battle hardened at a certain level were still prepared to go along with that approach, but were now being steered away from that strategy and to one where they wanted to see whether they could make this project work.

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

- I don't believe there were any, however there was one concession that I think the Council did not make.

It would have been altogether easier to agree a price and a programme for the off-street work only and to deliver a project that would only take trams to Haymarket which, from all I had been advised, was contrary to the Business Case; the line needed to get into the city centre. The contractor really did not want to go on to on-street and we had quite a job to convince them that the right thing to do was to go through to, as it was referred to then, St Andrew Square and, subsequently, more accurately York Place

Your report from 27 May 2012 entitled "*Edinburgh Tram Project, Review of Progress and Management of the Project, January 2011 to June 2012*" (WED00000134) at chapter 7 (_233) summarises events at the mediation.

101) Is that a complete and accurate summary of the way matters progressed?

- Yes that was my view.

102) If there were other key matters, can you explain what they were?

- N/A

Opening statements

Sue Bruce's opening statement to the mediation is at CEC02084575.

103) Did she deliver a statement in broadly those terms?

- Yes, the statement was delivered as per the final draft.

The statement said that the CEC team and she

“approach these next few days determined to reach an agreement which will deliver the tram system between the Airport and St Andrew Square, on terms that are fair and reasonable to the City and the wider stakeholders” (_3).

She also said

“the Design was not as advanced as perhaps had been understood (_5) and “on the contract terms we signed – perhaps we have been naïve – particularly on the operation of Change Orders” (_6).

104) To what extent had there been disagreement over the tactics of this? See, e.g.,

- Richard Jeffrey’s email (1 March 2011, TIE00685898) that BSC had throughout *“relied on the fact that [tie] need a deal more than they do”* and that tie/CEC *“must prepare our strategy, and our opening statement in a manner which does not convey desperation to do a deal”*.
- Vic Emery’s email (2 March 2011, TIE00685906) that BSC’s *“current offering displays a high level of arrogance and they clearly believe that the signals coming from our ‘collective side’ would indicate that we have no desire for separation of termination ... a ‘divorce’ would be the most appropriate course of action. I think our opening statement should convey that message ...”*

Ms Bruce also noted that BBS’s overall price had increased by £38m between Project Carlisle to Project Phoenix.

- I certainly would agree with the line in the statement about the environment of mistrust. I had never before come across the level of distrust that there was at the opening day at mediation.

105) Can you explain that price increase?

- No

106) To what was the increase attributable?

- N/A

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

- I can’t remember if this was addressed at mediation

She also noted that Siemens’ proposal in Project Phoenix was for £136.5m, a 100% increase despite virtually no change in what was expected of them. See also:

- Tony Rush’s email to Brandon Nolan, 27 February 2011, which noted that there was no BDDI to IFC reasoning behind the increase and that *“... their*

price is effectively a re-tender”.

- The comments about costs in the Faithful & Gould report (CEC01727000), e.g. at 2.8 (“*grossly inflated prices from Infraco for the on street works*”); and 4.2.4.4 (“*the contractor has priced for the worst case scenario and ... certain items are overpriced...*”)

108) Can you explain that price increase?

- I believe that this relates to the Schedule Part 45 works
- The work I think they are talking about is pricing up the on street civil engineering work. The reference is the Infraco pricing for the on street work. The response, assisted by Alan Coyle, was to say that I didn’t agree with this and couldn’t make any recommendations to this level of cost. The solution I suggested on which we eventually managed to have Infraco agree to, was that if we were to put this work out to tender, they would still get their mark up as it was part of the contract
- We would have an open tender situation. I would attend meetings with contractors and subcontractors. Work would be paid in accordance with Schedule part 45, a new addition to the contract. The work would be measured by Turner & Townsend with rates paid per the lowest tender rates. Bilfinger would manage the sub-contractor and would take a percentage, but it would effectively be a re-measure based on tendered rates as opposed to figures proposed by BSC.

109) To what was the increase attributable?

- Again, I believe this to be Schedule Part 45. On the advice of Faithful & Gould, who were brought in to advise CEC given that Cyril Sweett and Gordon Harris Partnership had been employed by TIE.

110 How, if at all, was that addressed at the mediation?

- I don’t believe this was addressed at mediation.

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

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

111) To what extent did those on the tie and CEC teams at the mediation accept that view?

- The Walker statement at paragraph 9 was not accepted by CEC/TIE.

At section 21, he is noted as having presented a film on problems between Lothian Road and Haymarket. It is noted as having identified utilities as the key problem,

with 368 utility conflicts having been identified as a non-exhaustive list.

112) How does the summary noted there compare with your understanding of the impact of utilities on the on-street works at the time of the mediation?

- What I understood then and know now are different. At the time I thought it was a potential smokescreen and how could it be so bad when MUDFA had already been executed. We are dealing with experienced contractors who are in a city centre and they would expect to come across utilities. Looking back and having had the experience of being involved in the project, I think from memory, I was told by TIE that something such as £1.9m would cover the cost of moving the utilities.
- Notwithstanding the radical traffic management plan which I had asked for to improve the project, asking the contractors, BSC, to allow another contractor on their site, McNicholas, were concessions that were agreed once we were back on site again and working on the project. Today I would reflect back that £1.9m versus the final account of £19.8m tells me that, in hindsight, the Infracore utility conflicts statement was probably nearer the mark.

113) Were there other factors which precluded BSC from agreeing a fixed price for the on-street works? If so, what were they?

- In the main it was the utilities but there was also a concern around the time that it was taking for “deliverables”, which basically was consents. If these consents were not granted, there would have been an impact on the programme and consequently on the preliminaries and the cost. There was a concern that the consent process needed to be improved.

114) What was your understanding of the reason why utility conflicts were still, in 2011, interfering with work under the infrastructure contract?

- At March 2011 I couldn't understand why they were causing such interference given that I was told that MUDFA had already been executed.

115) How, if at all, might those problems have been avoided?

- Questions were asked in the Council Chamber by an elected member as to how we could get to a point of certainty. My answer was along the lines of there is no certainty. All that can be done is to reduce the extent of the risk by carrying out radar scans and slit trenches to try and minimise problems.

Tie's mediation statement, and its related exhibits, specified a number of legal arguments in support of its position.

116) How strong did you (and other members of the tie/CEC team) consider these

arguments to be?

- I recognised that TIE thought their position was strong

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

- I don't think I saw any investigations/analysis. I didn't see any third party view or analysis from a solicitor.

118) How practicable (in terms of the cost and time required) would a full investigation have been?

- I don't know

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

- I don't know

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

- I can't speak for TIE but understood from CEC that litigation was not ruled out.

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

- I don't recall

122) To what extent did they serve to reduce the price which was agreed at and after the mediation?

- I have no evidence of that happening

Adjudication decisions

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

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

- I acknowledge that the adjudication decisions had been given. I don't recall there being a re-examination nor comment on the validity of these.

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

- I don't recall being party to active discussion on that. I think Alastair Maclean would be the person to answer that question.

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

- I don't recall being party to active discussion on that. I think Alastair Maclean would be the person to answer that question.

Remediable termination notices and underperformance warning notices

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

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

- No

127) What impact did that have on tie's negotiating position?

- I don't know

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

- I don't know

CEC consents and approvals

Your papers for the mediation included a paper by Andy Conway of CEC about CEC approvals (CEC02084629, 9 March 2011). It makes points about difficulties for the approvals process arising from changes in the design (planning) and the process of obtaining staged roads and technical approvals on an iterative basis and without an integrated design (especially from bottom of _2 on to _3). It noted that if the design was indeed complete and integrated, the approval process should be relatively easy; but that the main threat to completion of the process was incomplete traffic modelling (_6): there were a number of areas where junction performance was poor and needed adjustment; "*It is unclear how Infraco can integrate and fully assure their design without having completed this workstream.*" A process was recommended for taking matters forward.

129) What was your understanding of these issues?

- Consent had to be achieved but my understanding was that due to previous behaviours and a lack of working relationship they hadn't been addressed.

130) What discussion took place about these issues at the mediation?

- Part and parcel of the back page solution which was emerging from my notes

was the process of consents being managed in a more effective way.

131) To what extent was the integrated design completed timeously after the mediation?

- Fairly quickly. I asked Andy Conway, CEC, to write the email to explain changes required. I had asked permission which had been granted for the ability to move various people within Council departments out to site. My view was that rather than have people trailing back and forth to meetings, they could stay on site and talk to each other.
- I wanted to encourage people to talk rather than send emails which is why I had people work on site.
- At the control meeting relevant to this topic. As Chair, I would have each of the three contractors and whatever Council department, whether it be planning or roads, in attendance because they were on site. Discussion was on the timescale required for that consent to be given and the information required to be provided in order to get the consent; that was all talked through and I would ask people to then commit themselves to a timetable. The meetings were being held weekly, therefore the attendees were only six days or four working days away from that person being held to account if they didn't work to the timetable. It was that process which brought the consents round and completed timeously.

132) To what extent did the CEC approvals processes work well, or badly, after the mediation? What were the reasons for that?

See, e.g., the report to CEC dated 30 June 2011 (CEC01914650) which, at 3.92, noted that "*Following agreement at Mar Hall, major progress has been made in clearing the vast majority of design consents for the project.*"

See also the email from Andy Conway to Sue Bruce (cc'd to you) dated 5 April 2011 (CEC02083973_118), showing that between 24 March 2011 and 5 April 2011, CEC had reduced the number of open technical approval comments from 2,782 to 85.

- I believe I drafted the report for Dave Anderson. The report refers to implementation of the new process for design consent per (131) and that it was working well. I had asked Andy Conway to email Sue Bruce to confirm that we were down from 2,782 issues to 85. I wanted to show that the new process was working and as soon as the consents were cleared people would go back into their city centre office.

133) Why was such progress made at that stage, if it had not been made before?

- I recall a consent meeting where 40 or so people were present but with no effective Chair and no decisions taken after talking for about 2 hours. It struck me that the meetings needed to be more focussed and with less people

in attendance. In my opinion that change could have been made earlier.

The outcome of the mediation

The parties recorded their "Agreed key points of principle" in a signed document dated 10 March 2011 (CEC02084685), which were expanded upon in the non-binding Heads of Terms dated 12 March 2011 (BFB00053262).

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

- In my view the outcome of mediation was that it was an acceptable deal. It was the best available to allow the project to be not just to be re-started but to be completed without the streets of Edinburgh being excavated again.

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

- In retrospect if CEC/TIE had had accurate information on utilities the risks would have been lessened.

136) On what basis did tie/CEC come to the view that these (especially the financial terms) were acceptable terms for a deal?

- With the people in the room having exchanged financial information. From January – March 2011 a view was reached that a deal was acceptable. When word came back from BSC that they would accept the figure and the package to go back on site, I don't recall anyone saying that they rejected that or were against it.

The Off Street Works Price

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

137) What was the basis for that figure?

- I was not in a position to challenge that figure and the detail behind the figure. I had no direct involvement, although I would be aware of it being talked around and where it sat within the various spreadsheets.

138) How (if at all) was it broken down? – N/A

139) How was it agreed at the mediation? – N/A

140) What steps did tie/CEC take to ensure that it represented the best value available? – N/A

Two versions of a cost summary which was to be an appendix to a report to the Governance, Risk and Best Value committee dated 6 November 2012 noted the

following about the Off Street Works Price:

- BFB00101644: that the £360m price was for:
 - The off street work
 - Settlement of claims in relation to the off street section
 - Settlement of claims in relation to the on street section
 - Settlement of claims in relation to system wide work; and
 - *“In order to ascertain an allocation of that figure for the purposes of this summary we have calculated that:*
 - a) *£204m relates to off street work;*
 - b) *£25m relates to settlement of claims in relation to off street;*
 - c) *£82m relates to settlement of claims in relation to on street; and*
 - d) *£49m relates to settlement in relation to system wide work”*
- CEC01952969, tab 2, note 6, which gave a figure of £130.7m for the Bilfinger off street works budget post settlement agreement, having deducted from the off street works price of £362.5m:
 - £2.44m for Forth Ports ‘descoping’
 - £82m for Extension of Time claims
 - £49m for the MoV 4 mobilisation and materials payments
 - £98.35m for *“system wide costs from cert 47”*

141) Who prepared these notes?

- The way we managed ourselves to report to the Governance, Risk and Best Value Committee was that Alan Coyle would talk to the details of the figures and I would talk about programme, risk, progress, behaviours and give a contractual overview report. Alan Coyle would always talk to finance.

142) Can you reconcile the different breakdowns quoted above from the two spreadsheets?

- I can’t reconcile the difference in the figures; Alan Coyle could.

143) To what extent do they accurately break down the off-street price?

- Again this is a question for Alan Coyle

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

- This would be a question for Alan Coyle and Gregor Roberts, who I think

was the finance director of TIE. Leading up to mediation they were working very closely together to get an agreed set of numbers.

145) They suggest that the total settlement which CEC/tie agreed to pay in respect of those claims was at least £156m (£25m + £82m +£49m). Do you agree?

- I cannot comment on the figures

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

- I don't know

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

- a) What you consider to be the correct figure; and
- b) Why matters were reported as they were in these cost summaries

- I don't know

148/149) Do not know

150)Can you explain the reference to "system wide costs from cert 47", and what the £98.35m allocated to that was for?

- I can't explain

BFB00101644 was circulated by you to the Project Directors of BSC and to Transport Scotland on 2 November 2012 (see BFB00101642 and BFB00101643). In your covering email, you noted:

*"You will be aware that the Tram update report went to Council on 25th Oct. At that meeting, the financial table presentation was queried, with a request from the chamber for more detail and a new form of presentation. I attach as a courtesy an advance copy of the response report. As of 8.30am today it was still being refined. The final document will become public. Final Cllr briefings are due this morning. This is not in the direct control of Tram project, but is driven by Council procedures. **In my view and interpretation, by analysis of this document, possible conclusions may be assessed. They include the value of settlement monies. The value of exclusions of the original contract and that full consideration of those values were not recognised or reported by Tie.** Please brief your internal relevant parties and be aware that there will be a media interest around this report. Please let me know of any queries."* (Emphasis added)

151)Please explain the point you are making in this email?

- What I was trying to do was ensure that we had a project united front and

understanding on any point that was being communicated externally and which may ultimately have become a public document. It was to make the project team aware that emails may be misconstrued or reported inaccurately.

152) What responses did you receive?

- I am not sure I even received a response. I would certainly recall if there was any rejection of what I was saying

153) The version of the spreadsheet which is published on CEC's website does not include the notes specified above.

- c) Can you explain why?
- d) Were those notes included in the spreadsheet circulated to the members of the committee?
- e) If not, why not?
- Alan Coyle might be able explain this.

The On Street Works Target Price

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

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

- Couldn't agree a fixed price due to lack of knowledge around utilities

155) What was the basis for this figure?

- Figure would be based on a quantity surveying estimate. I cannot remember the mechanics of how it was made up.

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

- I can't remember how it was broken down.

157) How was it agreed at the mediation?

- I don't think a figure was agreed at mediation. I seem to recall that figure, and certainly the mechanism, was determined post mediation at the Council's Waverley Court offices

Cost of design and trackwork

158) What was the cost of the design and trackwork for the section from York Place to Newhaven?

- This was before my time and pre mediation and therefore I don't know.

159) Was that included in either the on or the off-street works prices?

- I don't know

160) If so, is that documented anywhere?

- I don't know

161) To what extent was the design completed for parts of the network beyond that which has been built

- I don't know

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

162) Do you agree? (Questions 162 – 166: Answer I Don't Know)

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

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

163) Do you agree?

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

165) What accounts for the difference (c. £21m) between them?

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

Minute of Variation 4 in respect of the prioritised works on the Edinburgh Tram Network (CEC01731817)

Mobilisation payment of £49m

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

In an email dated 5 April 2011 (CEC01927616, attachment CEC01926717), you had noted "*Confirmation that BBS will accept cash flow proposal to mobilise as reported last Thursday.*" The attachment to the email shows sums totalling £49m.

Your *Report on Progress since Completion of Heads of Terms to 8 April 2011* (7 April 2011, CEC02083825, appendices: CEC02083973) noted, at 5.2.1 that there had been discussion at Mar Hall on the cost of remobilising for the project and that at workshops on mobilisation costs a "*difference of view had been clearly expressed*

..., with the BBS requirement noted as £49m and tie's opinion at £19m. ... BBS confirmed that they could not mobilise on the basis of a £19m payment. After discussion it was agreed to take a proposal to the Principals." The proposal was for payment of £49m (part of the off-street price of £362.5m) in instalments (£27m, £9m and three payments totalling £13m).

The certifier agreement in relation to the Prioritised Works (see BFB00097700, clause 2 and schedule part 1, paragraph 2) obliged you to issue certificates for these sums.

167) Can you explain this arrangement?

- What this was trying to do was to bring together in the one report the aspect of progress, but also to let CEC officers and elected members appreciate the requirement for cash flowing to bring the contractor back on to site and those were the sums of money mentioned in the various agreements. Effectively, the whole prioritised works package was to re-start the project and to bring resource back on to site, re-mobilise and, effectively, get the whole project up and running again.

168) What was its purpose?

- Cash flow required various headings to be addressed. I remember having a meeting with TIE and BSC on site and marking up the differences of values on a white board. Gregor Roberts and Alan Coyle sat in on the meeting with me, I asked them to review and come to an agreement on the actual values. In the agreements I think they are all in square brackets and headings to identify areas where there was no agreement on figures. I photographed the information on the white boards, with copies kept in the files.

169) What were the payments for?

- Payments were for preliminary matters

170) Were they made as provided for in these agreements?

- Payments made as provided for at Mar Hall.

171) How was the agreement to pay a mobilisation payment reconciled with the fact that, in tie/CEC's view at least, BBS had been overpaid preliminaries prior to the mediation?

- That was marked on the white board because there was a difference of opinion and I said "we've got to come good on the obligation but I need a basis of fact for the payment" which is why I tabled it in the fashion I did.

172) What was the purpose in you certifying these sums if (as seems apparent from the terms of the certifier agreement) you were doing so in implement of an obligation and not by exercising any judgment in the matter?

- The Certifier's agreement in essence was to ensure that all parties were

treated fairly. To listen to the reasons from TIE and Bilfinger and then come to a fair reconciliation.

In an email dated 7 April 2011, Richard Jeffrey had expressed concern about the £49m figure, and said the tie team believed a *“more reasonable and supportable, but still generous number is £19m”*. He noted the risk of paying it before the settlement agreement was signed. (See also Richard Jeffrey’s email of 5 April 2011, at CEC00211776_25).

173) Can you comment on these concerns?

- I noted Richard Jeffrey had concerns but cannot comment on these.

He expressed similar concerns in an email dated 27 April 2011 (TIE00686805), in which he noted that the agreement at Mar Hall had been for tie/CEC to *“see what we could do to help with cash flow”* and that *“both Colin Smith and Sue have been aware of tie’s view on the value of the payments contemplated under MoV 4 BEFORE they were agreed with BSC on 8 April.”*

174) Can you comment on these remarks?

- I cannot comment on Richard Jeffrey’s emails as I was not copied in to them.

In an email dated 10 May 2011 (TIE00107170), Gregor Roberts, the finance director of tie, raised concerns with Richard Jeffrey, the chief executive of tie, about a payment of £27m which had been made to Infracore when he was on holiday. £27m is the amount of the first payment due under clause 6 of MoV 4.

175) What do you understand to be the payment they are discussing?

I can only pick up on the second bullet point when he refers to HG1, which was prepared by me. I am not copied in so I am unclear what he is referring to and cannot comment beyond that.

176) In particular, is it the payment referred to in MoV 4 clause 6?

I don’t know

177) Can you comment on the exchange between Mr Roberts and Mr Jeffrey?

I cannot comment

178) In particular, what is your response to the following points:

- a) Mr Roberts’ comment that *“the valuation attached to the payment schedule is not supported by our own commercial analysis”*, Mr Jeffrey’s agreement and response that CEC were *“happy to accept the valuation certificate HG1 prepared by Colin Smith”*.
- b) The payment having been made in advance of MoV 4 being signed.

- c) Mr Jeffrey's comments that the strategy during the mediation evolved very quickly, led by Sue Bruce, that "*there were mixed views expressed and there was not necessarily consensus on the way forward*", that Sue Bruce exercised her authority as CEO of CEC and a deal was reached.

I cannot comment

Revised change procedure under MoV 4

MoV 4 provided for a revised change procedure to apply to the prioritised works, in place of that which applied under clause 80 of Infraco (clause 10.3).

179) Can you, in overview, explain the differences made to the change procedure and why they had been made?

- There was a difference in change procedure. I cannot remember the details of the previous process. I recall that the change procedure needed to be improved and streamlined but I can't remember the detail.

180) How did this new change procedure operate in practice?

- It was part of the control meetings. A change request would be considered at the Monday meeting with CEC, Turner & Townsend and Transport Scotland. My questions would be "what's it for; how much is it going to cost and why are we doing it?"
- If they cleared those 3 points I would then look to Bob McCafferty and Alan Coyle to sign off. It meant that there was never more than four working days when a change order was at large. If the change order was rejected the contractor would hear within two or three days that the change had not been agreed and resolution was sought. It was all done on site.

181) To the extent it operated well, what were the reasons for that?

- Shortened lines of communication meant that I reported back to the Tuesday/Thursday meetings with the Council, Vic Emery and Transport Scotland.
- There was always knowledge amongst the senior people of what was happening. If there was a question I had to ask it would be dealt with within the week's cycle. I could take it to the Tuesday meeting and then issue the change order decision on the following Monday and get things all done within five working days.

182) Was this change procedure similar to that which was introduced under the Settlement Agreement in September 2011?

- Yes

Automatic termination of MoV 4

MoV 4 (CEC01731817) provided (clause 3.3) that the Infraco contract would terminate automatically on 1 September 2011 if the settlement agreement was not entered into for reasons associated with funding and, in that event, that the parties would enter into discussions on mutually acceptable terms to deal with the consequences of that termination.

In an email about that (24 May 2011, TIE00690857), you said:

“Just to confirm BBS will advise on their view of a separation cost. The Team CEC last night agreed to ensure probity; all number should be subject to a third party QS review of the numbers would suggest three national practices with no previous involvement.”

183) Please explain this arrangement.

- In preparation for the June meeting to CEC I wanted to get an understanding of the cost of separation. There was always this question mark in my mind that no one seemed to give you an answer as to what separation costs would actually be. I was therefore given permission to ask for a third party quantity surveying view of that.
- The other document which I think needs to be read in line with it is that the contract would terminate automatically on 1st September 2011. I wanted people to understand that if the decision was to separate it would cost x and then also to be aware that if a decision were not made in June to commit, or not to commit, the contract would terminate in September. Therefore there were very real deadlines.

184) What figures did BBS supply, and what use was made of them?

- BBS would have provided all of the figures. What I was seeking was a fresh view from a third party quantity surveyor.

185) In particular, what influence did they have on CEC’s decision to fund the extra cost of building the line to St Andrews Square?

- I don’t remember separation costs being a big part, if at all, of the debate in Council Chambers. The issue was really to build the line or not. If I remember correctly there was a meeting in June 2011 where an amendment to the motions was proposed and that resulted in a decision from the Council to take the line to Haymarket.
- If you had asked me on the day as we went into the Council Chamber what the likely outcome would be, that would have been to build to St Andrews Square or walk away. I don’t remember a big debate around walking away. The proposal to go to Haymarket came by way of an amendment to a motion on the day of the Council meeting.

186) Was a quantity surveying practice engaged to review those figures; if so,

which one(s) and what view did they express?

- Faithful and Gould I think, although I don't remember seeing a report from them, as I don't recall separation questioning being pursued.

187) If they produced a report, where is that to be found?

- I don't know

Reports to CEC, 16 May, 30 June and 25 August 2011 (CEC01914650)

An update report to CEC dated 16 May 2011 (CEC01914650) noted the key mediation outcomes and that detailed design and costing work was needed to provide a more complete picture of the full costs and revised programme. The Council instructed the chief executive to provide detailed figures on the cost of cancelling the project.

The June report recommended approval of the construction of a line from the airport to St Andrew Square/York Place. It noted that neither of the alternatives (terminating the project, or continuing under the existing contract terms) was likely to be materially less expensive, and both carried significantly less certainty that a tramline would be built. Due to commercial sensitivity, members were being briefed confidentially (2.2).

The August report recommended funding proposals for the extra £231m that was required to complete the project (on the revised budget of £776m). It noted that the estimated costs for the consortium to walk away from the project if the Council was unable to secure funding to complete the line to York Place/St Andrew Square were £80m less than under unilateral separation. The Council rejected those proposals and decided the proposal with the least risk was to build a line from the airport to Haymarket.

Council meeting, 30 June 2011

- Report, CEC02044271
- Minutes, CEC02083232_22

At this meeting, the Council considered the various options for the project (the status quo, separation, progress to St Andrew Square/York place or, alternatively, Haymarket). Following a detailed presentation by officers, the Council decided to pursue the option of a line to York Place (subject to funding); authorised the priority works up to the existing £545m budget limit; and authorised entry into the settlement agreement (subject again to funding, and to the project being sufficiently de-risked).

The report refers to members being briefed confidentially (2.2).

188) What was your role, if any, in the preparation for, or presentation at, this meeting?

- For those Council meetings a data room was set up for elected members. Sue Bruce, Alan Coyle, Carol Campbell or Alastair Maclean would be in attendance. After I started writing reports to Council, I would send a draft to Sue, Alastair and Dave Anderson. I would pull together the information. My role was to assist in the collection of information to allow members to make a decision.

189) What information were the council members given (orally, or in documentary form) about the likely costs of the various options?

- The information required by members would be held in the data room. My recommendations would be given to the Tuesday or Thursday meetings. I would note the issues and suggest or make recommendations for solutions with advice from Turner & Townsend or any other party involved on the Council side of things. My recommendations were always around project operations rather than on the big decision of “where do you take the line to” That would be for the Chief Executive to sign off on. At that time Dave Anderson would be signing the reports in his capacity as SRO and I would be feeding in information for the report.

190) On what information did CEC rely in stating that the alternative options were not likely to be materially less expensive than the preferred option (a line to York Place) (2.1, 3.42)?

- This point goes back to my suggestion that we get a report from a third party professional quantity surveyor, not through TIE to the Council in order to get a clear, clean view based on external advice.

The June report refers to several matters as having been included in a confidential appendix. It is not clear exactly what documents are referred to. In the list below, we have identified references from the June report, and inserted what we think may be the documents.

191) Please confirm which of these documents were made available to Council members for the meeting:

- An estimate of the cost of attrition (McGrigors, 3.33)
 - a draft report by McGrigors entitled “*Report on Certain Issues Concerning Edinburgh Tram Project – Options to York Place*”, dated 29 June 2011 (USB00000384; and its appendices, CEC01942217 to CEC019422125)
- An estimate of the cost of separation (McGrigors, Cyril Sweett and Faithful & Gould, 3.37)
 - The McGrigors report referred to above

CEC019422125
should be
CEC01942225

- A report by Faithful & Gould (Atkins), CEC02085600
- A report by Cyril Sweett and its appendices, TIE00097226, TIE00097227, TIE00097228, TIE00097229
- A summary of the proposed terms of the settlement agreement (Ashursts, 3.39)
 - CEC02086430: a note (perhaps by Ashursts) dated 23 June 2011, entitled “*Revised Contractual Arrangements*”
- All the information would be available in the data room. Ashurst were instructed by Alastair Maclean and had expertise but no previous involvement. Alastair was of a similar view to me that he wanted to instruct someone fresh with expertise in transportation.

192) Were any other documents, important for the members when deciding between the different options for the project, made available to council members in preparation for that meeting?

- There were no other documents that I am aware of

193) If so, what were they?

- N/A

194) So far as you are aware, what other documents or reports held by CEC supported the recommendations made in the June report?

In relation to the note by HG Consulting, “*Settlement Figure Analysis*”, 22 June 2011, CEC02085602:

- There was nothing more as far as I am aware

195) What is this, and what was it used for?

- This was used as a briefing note for the Tuesday or Thursday executive meetings

196) Please explain the £50m, £100m and £80m settlement figures quoted in the report, and the use that was made of them

The information would be gleaned from McGrigors and supplementary reports from Cyril Sweett. In addition to the stance that I could see emerging in the behaviours from March to June 2011 from, primarily Bilfinger and Siemens, not so much CAF, there was a different train of thought. I was trying to create clarity of thinking on the part of the Executive Group by reporting that a negotiating figure could be around £50m. I noted for them that in negotiating with Bilfinger you are not negotiating with their sub-contractors and they too will put in a request if there is a settlement to be had. There

would be a conversation, particularly with Alan Coyle from the financial point of view. Alan would always attend the meetings with the quantity surveyors. Alastair Maclean would also be aware of where the opening negotiating stance would be. Suggest £50m + £20m = £70m for a quick win. £100m indicates it was a pretty broad brush approach at that time to raise awareness.

197) The McGrigors report (USB00000384, 11.14), the HG Consulting Note (CEC02085602) and the Council Report of 30 June (3.37) all refer to work by Cyril Sweett. Are you able to confirm if TIE00097226, and its attachments (TIE00097227, TIE00097228, TIE00097229) are that work?

- I believe that the document TIE00097227 is really just about an extension of time.

198) What was your understanding of the Cyril Sweett report and what it was used for?

The Cyril Sweett report in turn founds upon an *Extension of Time Risk Assessment* by Acutus dated 4 May 2011 (see TIE00097227, paragraph 2.1). That report is at TIE00899963.

- I notice that the covering email was to Fiona Dunn and to Alan Manual whom I don't know. Fiona is a QS as is Dennis. I can't say that it was used for by others. I used it to try and gauge and extrapolate the costs and in gathering what a settlement figure might look like.

199) Were you familiar with that report?

- No

200) What was your understanding of it?

- I don't know

201) What influence did it have on the settlement options?

- I don't know

202) To what extent were the cost forecasts available to CEC at the time of the June report to Council calculated or estimated with precision? See, e.g. the various disclaimers:

- The HG Consulting note (CEC02085602), paragraphs 1 and 3.
- The McGrigors report (CEC02085607), 1.5 to 1.7, 2.8 and 2.9; and the spreadsheet (CEC02085606, at the top).
- Atkins Independent Review (CEC02085600): (_4): "*Faithful+Gould has not had access to the contract documents nor had the time to scrutinise at a molecular level the build-up of costs/prices supplied*"; (_5): "*At present, given*

the current development of discussions and presentation by Infracore of claims for reimbursement, it does not seem possible to identify a likely level of tie liability.”

- Cyril Sweett, Extension of Time Commercial Report (TIE00097227), 1.0.
- Acutus Extension of Time Risk Assessment dated 4 May 2011 (TIE00899963): “...it is important that we note that the following information and estimations are, primarily, *based on our own judgment and **NOT** on a completed/ fully detailed analysis*” (second para.).
- On the first one I put in the caveat that factors which would be taken into account would be the prevailing commercial attitude of the contractors at the point of separation/attrition.
- I would say of the whole section in this question that it was the best available at the time. I do not recall anyone anywhere saying that there was an upper limit to where to research and analyse. In my view it depends on the commercial attitude of the contractors.

203) How robust did you consider these reports and cost estimates to be, as a basis for the decision which CEC had to take? Please explain your answer.

- Even today with the benefit of hindsight I cannot think what more could have been done.
- We were aware at the time that there was a pre-determined timetable of September where, potentially, the contractors would simply terminate. That is not to say that they would have, but there were so many different opinions in January that one of the issues was to actually narrow down the issues to get someone to form a particular view.

204) As far as you know, was any further or more detailed analysis carried out into the costs likely to be incurred under the various options?

- I don't think anything else was carried out.

205) Was any consideration given to doing that? If not, why not?

- I think with the level of expertise and experience around the table no-one was saying we should do more.

206) What elements of the overall estimates involved the greatest uncertainty (in terms of their impact on cost)?

- Utilities offered the greatest uncertainty in my view.

207) When forecasting the costs that tie/CEC might face under the different scenarios, to what extent was a prudent approach taken (that is, to err on the side of overestimating the costs rather than underestimating them)?

- I was keen that the figures were clear and had a prudent contingency so I was

keen to hear, from the team, from the quantity surveyors, how they had arrived at a particular number and that number settled in either a very narrow range or a stated figure.

- Thereafter, to ensure a further debate around contingency and to let the elected members know the contingency exists for unforeseen events. I think from memory the contingency was £40m, but I would like to confirm that.

208) Was that less of a feature in the estimate of the cost of the settlement agreement option, which to a large extent was based on a known sum (i.e., the off street price of £362.5m)?

- From memory the same approach would have been taken

209) Was there a risk that the forecast costs of the other options (being affected by more uncertainty) were more likely to be over-estimates?

- No, I think people were trying to get a reasonable balance applying the same logic to each of the options.

210) To what extent, if at all, was that taken into account in deciding whether, compared to the alternatives, the settlement agreement represented a good deal?

- People tried to take a balanced view with the best available information.

The McGrigors draft report, on the face of it, contains a comprehensive summary of the main disputes which existed under the Infraco contract and which might be expected to arise in the future under the different scenarios (see the version dated 29 June 2011, CEC01942218 (and what appear to be its appendices: CEC01942219, CEC01942220, CEC01942221, CEC01942222, CEC01942223, CEC01942224 and CEC019422125)).

CEC019422125
should be
CEC01942225

211) As far as you are aware, is there any more up to date or complete analysis of these issues?

- I think this is the last version of the McGrigors' report although marked "draft". I think the last issue was 29 June 2011.
- Document ending 2219, I am not sure of the date of this, but the spreadsheet used the same format as that used throughout the project. Document ending 2220 was the one which was used. Document ending 2221 was the draft marked up. Documents ending 2222; 2223; 2224 and 2125 were all used. As far as I am aware these were all the suite of documents used

2125 should be
2225

212) To what extent, if any, do you take issue with the summary it presents?

- I had no issue with the summary

213) To what extent was there consensus, or acceptance, within the tie/CEC team at the time on the views expressed in this report about tie's likely liability under the

various options?

- I don't recall there being any dissent on that question at all.

Under MoV 4 (CEC01731817, dated 20 May 2011), clause 3.3 and 3.4, a deadline of 1 July 2011 was set for the parties to enter into the settlement agreement (referred to there as MoV 5) and for CEC's funding to be confirmed.

214) To what extent did this place the Council members under time pressure to reach their decision on 30 June 2011?

- A timetable was set from March to September 2011. The general sense was that all participants wanted to get through matters as quickly as possible with the maximum amount of detail and information.
- Also taking into account that for every month that the site was lying dormant, it was costing money, so there wasn't the luxury to say that we can have a lengthy period.
- That information was being assembled and there were regular briefings to Leader of the Council. During this period the data room was open, the report was prepared, briefings were given one to one, group briefings were all given and then there was the Council meeting. I don't have any sense looking back that we were rushing at it in such a way that people couldn't say, "I don't understand, can you go over that point again". If someone asked a question they were given an answer. There was a reason for the timetable and that was to ensure that we didn't waste money,

215) How long had they had to consider matters, including any reports and advice made available to them, by the date of that meeting?

- I don't know how long Council members had access to material. You will need to ask Gavin King, clerk to the committee.

216) Why was the date for the meeting fixed so late, relative to the deadline in MoV 4?

- I don't know

217) Are you able to comment on the extent to which this time pressure affected the members' decision-making?

- No

CEC02085613 is a spreadsheet entitled "*Edinburgh Tram Project Mar Hall Budget Appraisal*" (password, 'marhall'). It appears to show estimated costs for the various options being considered by the Council at its meeting on 30 June 2011.

218) Can you confirm what this document is, and what it was used for?

- It was put together by Alan Coyle to members and made available in the data

room.

219) In particular, did it in any way inform either the report considered by Council on 30 June 2011, or the decision made by the councillors at that meeting?

- I can't say what effect it had.

The McGrigors report includes discussion about a £45.2m mobilisation payment that tie had paid to BSC. McGrigors advised that the prudent approach would be to assume that sum would not be recoverable in the event that the Infraco contract was terminated (see CEC01942218, section 12, and appendix 2 [CEC01942220]). They also expressed the view that, if the Infraco works were not completed, tie might not get the value they considered they were entitled to in return for the mobilisation payment.

220) What is your understanding of this issue?

- I don't disagree with the McGrigors advice.

221) Did it influence CEC away from terminating the Infraco contract?

- I don't think so. .

222) Did tie/CEC get full credit, in the £776m total outturn cost of the project, for the £42.5m payment tie had made?

- The £42.5m was part of the cumulative payment. There was no refund but it was not lost and became part of the gross sum.

TIE00688605 (covering email TIE00688604) is a note prepared by Mandy Haeburn-Little for Steven Bell and Susan Clark of the Council meeting on 30 June 2011. You are noted as having made the following points:

- That the completion of utility diversions remained a considerable challenge
- That you were taking nothing for granted about the accuracy of tie's reporting that 90%+ of utilities had been moved
- That you left the councillors in no doubt that utilities infrastructure moved by tie was in the way for tram infrastructure, such as OLE poles
- That you were of the view that tie had been a "*poor agent*" and that CEC would be better at running the project

223) Can you comment on these points?

- It is the first time I have seen this document. It wouldn't change anything. I am noted as saying that I stand by all these comments and I think that it is a fairly accurate position on how I would be feeling at the time.
- In respect of the comment regarding "*poor agent*", again I would hold on to my opinion. I couldn't see any evidence of strong lines of communication and

what the project plan was.

Delays in finalising settlement agreement

An email from Alastair Maclean (CEC) dated 11 August 2011 (CEC01720733) referred to you having identified that BBS and CAF did not, even at that late stage, have a technical solution to deliver an integrated system. This was identified as “*the real reason behind the difficulties in the contract negotiations*”. It also referred to a note to be produced by you on the issue.

224) Can you explain this issue?

- By August I had been on site and had moved people to cabins on site and I could see how they were all performing. There were differences due to nationality traits. The communication between Bilfinger and Siemens was good but with CAF matters were not so good due in my opinion to language difficulties.
- What was needed, which is what this note is referring to, was a technical co-ordinator, or an interface manager between CAF and Siemens and to a lesser degree Bilfinger. A tram system needs to talk to the control system, which was a big piece of work. It needs to go through all the testing from the independent competent person and I couldn't see anyone in post at that time doing that.
- An interface manager was needed as a technical co-ordinator. The interface manager was brought in by CAF. He came to the control meetings so he could explain to Siemens what was needed. This note says we need an interface manager which was provided. Iñaki Garin from CAF would come along to the control meetings as the interface point with Siemens.

225) Why had you come to that view?

- Again communication is the key and at that time we were not talking the same technical language which needed to be overcome, which is why I came to that view.

226) Did it cause a delay in the settlement agreement and, if so, by how long?

- I think BBS/CAF knew in their own minds that there was an issue and when we were sitting around about five or six o'clock on the night prior to the settlement agreement being signed in McGrigors' office, I had Siemens and Bilfinger in one room and CAF in another and asked them both what they thought the solution was. I brought the three of them together and proposed the interface role. The solution in principle was arrived at in a matter of hours.

227) Did it cause a delay in the project overall and, if so, by how long?

- No I don't think it caused a delay at all.

On 24 August 2011, the parties entered into a Memorandum of Understanding (MoU 1 – BFB00097699). It noted in the preamble that whilst the parties had proposed to enter into a settlement agreement on or before 30 June 2011, they had been unable to do so; and had entered into this Memorandum of Understanding to extend the time for doing so until 31 August 2011. (Bilfinger and Siemens had signed an earlier draft on 30 June 2011 (BFB00097076).)

228) Why had it not been possible to conclude negotiations by then?

- My recollection is that we were having difficulty finalising the CAF limb of the agreement.

The memorandum noted (schedule Part 4) that BBS had provided CEC with:

- a Target On Street Works Price of £52,608,034 (BBUK: £33,322,586; Siemens: £19,285,448)
- Termination amounts payable if funding was not arranged before the termination date (BBUK £27,761,517 and Siemens £38,488,963).

229) What was the basis for the Target on Street Works Price quoted in this agreement?

- I believe it was an estimate. I think it was based on probable cost rates and expected rough quantities, which formed the basis of the target price. The target price subsequently was the piece of work that went to tender.

230) What was your view, and what were the views of others, about it?

- I don't remember any adverse comments or views from others. Every decision made started off its life of approval at either the Tuesday or Thursday 8am meetings attended by Transport Scotland, finance and technical people from CEC, Vic Emery, Sue Bruce and myself and later on in the project there was another fortnightly meeting which Turner & Townsend attended. The target price was built up and I don't remember anyone looking to push it back or reject the suggestion from Infracore.

231) What was done in response?

- I don't think there was a response.

232) What was the purpose of the proposed termination payments?

- This was trying to gauge what Bilfinger and Siemens would accept simply to walk away from the contract.

233) On what basis had they been calculated? (See, in this regard, your email of 17 August 2011: BFB00095018)

- This was on the basis of trying to ensure clarity on what I understood was

coming out of the meeting on 28 July 2011 and in particular what the termination sums would be. I noted that there was no provision for CAF, no provision for demolition and reinstatement of the site back to its former condition and no provision for temporary works for traffic management. Those figures confirmed in my view that it really would have been a case of Bilfinger and Siemens handing the keys of the cabins back and walking away.

234) What was your view, and what were the views of others, about them?

- The figures were in line with what had been discussed within CEC so I wasn't surprised at those numbers. My view, which is very much a personal view, is that it would be a waste of money but if that is what elected members were wanting to do their decision was to be respected.

235) What was done in response? (See, e.g., schedule part 4 to MoU 2, 2 September 2011, TIE00899947, which suggests they had by that date been finally agreed.)

- By September 2011 that work would have been out to tender and back so in again so that the schedule could be populated with the numbers.

The August Council report (CEC01914650) noted that a detailed review of the key project risks had been carried out, validated by Faithful & Gould (2.3, 3.5). A summary was contained in a confidential schedule (3.7). The total budget requirement was now £776m (being a revised base budget of £742m and a quantified risk allowance of £34m), the change from the June budget largely being a move from the risk allowance into the base budget resulting from greater certainty on the cost of on-street works, greater knowledge of utility issues and further completion of the design. The new budget was £231m above the hitherto approved budget of £545m (3.13, 3.16, 4.1).

The Council rejected the funding proposals set out in the report for the line to St Andrew Square/York Place, decided that option had not been sufficiently de-risked, and decided that the proposal with the least risk was to build a line from the airport to Haymarket (minutes, CEC02083194_4).

236) Please explain your understanding of the change in the budget and the basis on which the level of the risk allowance had been changed.

- I had been consistent from more or less day one about having an adequate risk register and an appropriate budget to attach to that. When Alan Coyle and myself and maybe Bob McCafferty, but certainly the two of us, met with Faithful and Gould we went through a fresh risk register. As a result of that work coming back from Faithful and Gould, I certainly started to feel that the £776m figure took cognisance of all the various issues that had

been spoken of up to that point. The final figures was based on the risk analysis.

237) What was the greater certainty on the cost of the on-street works, and where had it come from? (The figures are not reported in the August report itself.)

- CAT scanning, which uses radar and slot trenching, helps to identify the impact of utilities. Slot trenching provides the greatest insight. Unfortunately it's the most disruptive of the two because you are literally digging up the road, putting down big steel covers. I would go out and look in a lot of the trenches myself, not just look at the reports.

The Council report refers to a confidential summary of a report dated 19 August 2011 by Faithful and Gould (CEC01914650, 3.16). See CEC02083979 for the report itself.

238) Is F&G's recommendation of a budget of £742.9m (paragraph 2.1 of their report) the basis for the budget in the CEC August report (paragraph 3.13)?

- I would say that the £742.9m does inform the August report, but in addition to the £742m there were built in figures for a contingency allowance. That would be my recollection of how the £776m was built up.

239) The "Budget Summary & Risk Model" at Appendix A of the Faithful & Gould report states a grand total of £753.54m, which does not tie in with the recommended budget of £742.9m. Can you explain that discrepancy?

(In case it is of assistance, see a spreadsheet sent by Alan Coyle to Gary Easton on 28 September 2011, in response to his request for the "*final F&G report and build up to the £776m*" (CEC01726999, password marhall; covering email, CEC01726998). The material at tab "High Level Budget" appears very similar to Appendix A, but comes out at the figures for the recommended budget (a grand total of £742.92m, and a risk figure of £34.5m).)

- I can't explain the discrepancy. I would have left Alan Coyle and Gary Easton to have that conversation with Faithful & Gould

240) Was the F&G report made available to council members, so far as you know?

(See, e.g., paragraph 3.16 of the CEC August report: "*...A confidential schedule summarising of [sic.] the findings of Faithful and Gould Review has been prepared and will be shared on a confidential basis with Elected Members*", suggesting the report itself was not given to them.)

- I think it would be given to them. I believe it would be available to

members in the data room. The summary was certainly in the data room. If any member had asked for it they would certainly have been given it.

241) Do you agree that the F&G report did not scrutinise the off street works price (£362.5m) (see paragraph 3.3 of the F&G report)?

- Yes I agree that the F&G report gave information in good faith.

242) How, if at all, was that figure scrutinised?

- I would expect them to say if they found anything out of place or incorrect. As professional quantity surveyors I would have expected them to have gone through every single line and brought anything untoward to our attention.

243) What did you understand by the qualifications in the report, e.g. at paragraphs 1.3 and 2.1, and their impact on the value of F&G's opinion?

- 1.3: *“due to time constraints ... the review relied on previously quantified items and project data”*
- 2.1: *“This figure [i.e. the £742.9m budget] is made up of various budgets from various sources and Faithful & Gould are relying on these budgets being correct as time does not permit the final checking of these budgets”.*
- In light of the qualifications I think it really just reiterates that they have based their information and reported on what was available at the time. Have they deconstructed and gone back and rebuilt first principles? No, but then again their practice was sufficiently large and experienced that I would expect them to be able to flag up any concerns. I felt that the Council could rely on Faithful and Gould and what they said.

244) In light of these qualifications, how robust a basis, in your view, was the F&G report for setting a budget?

- Again, there were many people around the table with lots of experience and no-one challenged Faithful and Gould. I certainly had no reason to be critical of what they were reporting. I thought they gave a straightforward and good service for what we were asking them to do.

245) F&G made comments to the effect that Bilfinger and Siemens were in a strong negotiating position and had submitted grossly inflated prices for the on-street works (totalling £53.4m) (see especially paragraphs 2.3, 2.6 – 2.8 and 4.2).

- a) Can you comment on this generally?
- b) Do you agree with these observations?
- c) The Target Price for the on-street works was, in the end, £47.38m (see

Settlement Agreement, appendix A to schedule part 45 (CEC02085627_11; the main body of the Settlement Agreement is at CEC02085622) but had increased from the £39m target price referred to in the post-mediation Heads of Terms. Can you explain the movement in the price?

d) To what extent, in your view, was the final cost of the on-street works inflated? Please explain your answer.

(a) Earlier on you asked me about the target price and how it had been made up and it was under note a) the bill of quantity to reflect the IFC drawings using contract rates, which is what I thought it might have been. I wouldn't disagree with any of the comments under 2.3, 2.6 – 2.8 and 4.2.

After some discussion, Bilfinger agreed that they would act as a main contractor with sub-contractors to carry out the on-street works and that those works would be carried out under measurement conditions and that they would be competitively tendered. The target price was based on a probable cost of the bill of quantities, as mentioned in Faithful and Gould's report. It then becomes a bill of quantities and put out to competitive tender and it is those rates which are then used and which are needed to prepare the final account, based on measurement of the works as actually executed. The Council and myself, in particular, had complete access to the tender, the interviews, the measurements and, indeed, the final account. Therefore, the point that they make was taken on board.

(b) Yes

(c) It was based on measurements with the tendered rates and the extent of the work as executed.

(d) The on street works cost, based on tender and based on measurement, I don't think was inflated. There was the additional main contractor's mark-up that had been in place from the original letting of the BSC contract. I wasn't entirely convinced that that presented value for money but it was an agreed contract provision prior to mediation and therefore it was not possible to make any adjustment to that mark up.

Paragraph 3.20 of the August report to Council noted an agreement at mediation that each consortium member would prepare a sealed envelope estimate of their costs for walking away from the project; and that further discussions now indicated that the cost of this would be £80m less than the cost of unilateral separation previously reported.

245A) Can you explain this in more detail?

- My understanding of that is that the first set of figures was an estimate. I

then recommended a process to move away from an estimate to that of an actual declared position and that is why the difference occurred.

246) How does this £80m reduction relate to the settlement figure proposed in your note, "Settlement Figure Analysis", 22 June 2011, CEC02085602, of £80m?

- From memory, I think the £60m was based on a sealed envelope bid from BBS. If my recollection is correct, the £60m + is based on sealed envelopes from Siemens and Bilfinger. That figure would compare with my £80m ball park estimate on the back page of the settlement figure analysis. I suggested a quick win might be around £80m if the conditions for a quick settlement were being offered. I believed that the basis of separation could be £50m + £20m which equals £70m and then if the contractors were aggressive it could be as much as £100m.

Governance

The reports to CEC noted proposals to improve the governance of the project (June report, 3.81 onwards; August report, 3.45 to 3.65, CEC01914650_74 onwards).

247) Does the summary there accurately describe the governance arrangements on the project thereafter?

- The governance proposals set out in CEC0114650 at p24 were not changed in substance. I think they were altered four maybe five times but that was to take into account, for example, that we were coming to the point where civils work was completing and we needed to think about integration with Lothian Buses.
- Lothian Buses appeared on the governance chart as well because I had asked Ian Craig, the CEO of Lothian Buses, to provide trainee drivers to go on to the trams because we were going through the integration and shadow running process. Therefore, the principle remained the same, but the chart was tailored at different times to suit the needs of the project.

CEC0114650
at p24
should be
CEC01914650
at p74

248) Were these revised arrangements successful, and if so, why?

- I believe they were successful given that a consensual approach was being used to manage the project, together with open reporting to an elected members all-party oversight group. It brought an openness to the project that all (the elected members, the officers, the project team, the consultants) understood that there was one target, i.e. to get the project up and running as quickly and as efficiently as possible.

CEC02083826 is chapter 4 of your *Review of Progress and Management of the Project January 2011 to June 2012*, and includes a summary of the project management structure. It may assist in answering this question.

Paragraph 3.55 of the August report referred to the *“introduction of an independent certifier to help ensure a speedier resolution of construction-related disputes.”*

249) Can you explain your role in that regard?

- I think I said in some of my earlier papers that a technical person who would be able to chair the various meetings, have the parties engage in communication and to be open and start to trust each other would certainly make a difference to the project.
- My role as independent certifier coming out of a mediation was to make sure that I would listen to the various aspects of an argument and make a recommendation back to the participants as to what the resolution should be. Any one person, and we made this very clear on each and every occasion, that I had to give an opinion whether it be CAF, Bilfinger, Siemens, Transport Scotland, the Council, later on Turner and Townsend, and prior to that TIE, could raise an objection to say, “I don’t agree with the Independent Certifier, he’s wrong”. That would take, again going back to the diagrams, the dispute up to the Principals’ Forum, which was the quarterly meeting with Dr Keysberg, Dr Schneppendahl, Antonio Campos, Sue Bruce and Ainslie McLaughlin. They would examine my paper and either agree or disagree. That escalation mechanism was never called upon, no one triggered that, but in the event that they had, and the matter had gone to this higher level, i.e. the Principals level, and that entity was still unhappy with the way the opinion had been cast, then they would fall back to the contract dispute resolution procedure. The process was to have a position paper provided and I often found that what was said to me at the control meeting compared to what was submitted in writing, would have moved a couple of degrees one way or another. The parties concerned had a chance, therefore, to think through the issue, I would then take the two or three position papers, give my reason and reference back to their documents. I would build up a picture as to why I thought X, Y and Z should be the outcome, and I was never put under any pressure whatsoever from any quarter or person to come to any view at any time. I would make my opinion known, to the Tuesday meeting or the Thursday meeting, it would then be sent to the parties involved and any one of them, or indeed Transport Scotland or T&T or CEC, could have stepped in to say, “I disagree” but that rejection situation didn’t happen.

250) Did it assist the project run smoothly; and if so, how?

- I think it helped the project to run smoothly because all parties were given the time and the respect that the project required.
- Therefore, when I made my opinion presentation, there was really little further that the parties could say.

- I believe it to be quite a satisfactory way of dealing with contract interpretation issues.
- I had previously used the approach in 2000-2010 on a fairly complex project which involved several commercial organisations and a works value of approximately £350m

Council meeting 2 September 2011

Following the Council's decision on 25 August 2011 not to pursue a line to St Andrew Square / York Place, but instead to stop the line at Haymarket, Transport Scotland wrote to Sue Bruce (letter dated 30 August 2011, CEC01891495_11) threatening to withdraw grant funding support.

Ms Bruce's report to the Council dated 2 September 2011 (CEC01891495) noted the implications of that loss of funding, and included an Appendix summarising steps taken following the Council's decision of 25 August. These included meeting with BBS on 29 August 2011. The Appendix noted that, as a result of the decision of 25 August, additional costs would be incurred (demobilisation, prolongation and lost profit; the possibility of a new switch at Haymarket; and revision of the Employer's Requirements).

By a Memorandum of Understanding ("MoU 2"; TIE00899947), the parties (in response to the council decision of 25 August 2011):

- Recorded that "*Infraco has an entitlement to additional costs and time as a result*", which the parties would agree and record in the settlement agreement (clause 3.1)
- Extended the funding satisfaction date to 2 September 2011 and the timescale for concluding negotiations to 14 September 2011.
- Made other changes to MoV 4 (clauses 3.2 and 3.3)

251) To what extent were you involved in, or aware of, these events?

- I would confirm that I was involved in the events from the period of March to August 2011. Progress had been made, MoV4, an agreed methodology for the on-street works, put in a structure that let all parties see that there was a workable way forward. I was at the meeting in the Council Chamber in September and was listening to the debate, including, ultimately, the Haymarket amendment when it was tabled. There were a number of issues from purely a technical point of view and I thought "How on earth do you get a switch in Haymarket?" The nearest switch is down at the ACAS building or thereabouts, from memory. Therefore, if you can imagine people coming from the airport on to the tram, stepping out at the group of developments where ACAS sits, then having to walk up the hill to get to the station, or to get

on a bus, in my view that didn't seem an attractive way to travel.

252) What was discussed at the meeting of 29 August?

- The meeting with BBS on 29 August 2011 was to allow them to say to the Council what they would do or not do and whether they were prepared to hold their team until a Haymarket switch solution was to be found.
- The other possible reaction from Infracore was that if there was no funding to complete the project then they would maintain their position and terminate. It wasn't an aggressive meeting at all. In fact, it was all very matter of fact.

253) What information did CEC have about the extent of the likely cost implications described in the report?

- Prior to the 2 September report, I had been asked what my feeling was with regard to the implications of reconfigured project to Haymarket and the likely level of cost if just going to Haymarket and to reconfigure the project; I indicated £3m to £4m and that we were looking at maybe eight to ten weeks delay.

254) What information, if any, was given to Councillors about it?

- All I am aware of is the question that was asked of me after the 25th August Council meeting, together with the content of the Council report dated 2/9/2011

255) What were the full cost and time consequences of the Council's decision of 25 August 2011?

- From memory I think it was about £4m

256) What was the effect of the changes specified in clauses 3.2 and 3.3?

- No effect

257) To what extent were the Council members under time pressure to reach their decision on 2 September 2011?

- Gavin King will be able to explain what access/briefings members have. My reading is that members would have to make a decision. No member requested further information of me to consider or needed more information.

258) How long had they had to consider matters, including Sue Bruce's report, by the date of that meeting?

- You will need to ask Gavin King, clerk, about that.

Settlement agreement, 15 September 2011

On 15 September 2011, the parties executed a Settlement Agreement

(BFB00005464, or CEC02085622). It was (except in respect of specified exceptions) in full and final settlement of all claims arising out of or in connection with the Infraco Contract and Infraco Works, founded on events occurring prior to 15 September 2011. The exceptions included claims relating to the Prioritised Works; entitlements listed in schedule part E (CEC02085641 – essentially ones which were included in the On Street Price, or where pricing was not possible due to lack of detailed design and scope information); and BBS's claim for payment (agreed in principle, but not on quantum) arising from the prolongation of the Infraco works between revisions 3A and 4 of the programme.

Compromise of claims (clause 3 of the Settlement Agreement)

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

- CEC relied heavily on McGrigors to ensure that everything was swept up in the agreement.
- The exceptions were that we knew that the design wasn't complete, consent still had to be granted and the extent of utilities wasn't fully known.

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

- I don't think I can answer that question as I was not involved heavily in previous claims.

261) Are those matters documented anywhere?

- I would need to refer you to Alastair Maclean

262) What was the combined value of the claims which were excluded from the settlement? Can you explain why, in broad terms, they were so excluded?

- I don't know, that question needs to be referred to the legal and finance teams.

Pricing

The Settlement Agreement introduced a new, revised schedule part 45 into the Infraco contract, which dealt with the price of the on street works (CEC02085627 and CEC02085628). It also introduced a new, revised schedule part 4 into the Infraco contract, which dealt generally with pricing (CEC02085642). It provided that the Contract Price was £413,102,911, including the Off Street Works Price of £362.5m and the On Street Works Contract Price of £47,384,510.

The On Street Works Contract Price was subject to variation under the terms of schedule part 45 (Appendix A, CEC02085627_11).

It is apparent from comparing the new schedule part 4 of Infraco, introduced by the Settlement Agreement (CEC02085642), with the original version that all of the pricing assumptions have been removed. Thus, they no longer applied to the off street works; schedule part 45 introduced new pricing assumptions which applied to the on street works.

We understand that changes totalling £9.8m were approved for the off street section, and £4.2m were approved for the on street section (e.g., the final account statement, WED00000101).

263) In broad overview, what were the reasons for these changes?

- The first one is the Schedule part 45. The next one is tender. The two lowest sub-contractors, one was Crummock and the other Lagan.
- CEC02085627. The reason for change is that a change had to be justified as to why it was required and what it would cost and what the impact would be, or betterment as the case turned out.
- That was first talked about at the Monday control meetings with CEC, T&T, Transport Scotland and chaired by me. Subject to sign off by Alan Coyle and Bob McCafferty, I would then promote it to the Tuesday meeting?
- Describing the process, the reason for change was many and varied but I would probably say design detail and design development, taking into account what is found once on site and once a street is opened up.

Negotiation of on-street price

264) Can you explain how the target sum of £47.3m for the on-street works stated in the Settlement Agreement came to be agreed?

- I think that what was being referred to is the Bill of Quantities. This was based on approximate quantities, contract rates then subsequently replaced by tendered rates from the two successful contractors on work that was then re-measured.

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

See, for example, the following (to which reference should be made insofar as material):

- The target price of £39m stated in the post-Mar Hall Heads of Terms (BFB00053262)
- The figure of £22.5m stated in the document entitled Mar Hall Budget Appraisal (CEC02085608)
- The figure of £52.6m quoted in schedule part 4 of the First Memorandum

of Understanding as having been supplied by BBS to CEC (being made up of £33,322,586 for Bilfinger and £19,285,448 for Siemens) (BFB00097076, 30 June 2011)

- TIE00688781, 8 July 2011: Dennis Murray's email explaining Siemens' quote of £20m for their part of the on-street works, only £4m of which represented the cost of the work. The explanation appeared to involve Siemens recouping a price deduction they had agreed at Mar Hall – their view being that *"the reduction [agreed at Mar Hall] was on the understanding that the cost of any programme shortfall was to be picked up in the onstreet Target Sum price"*.
- TIE00688781, 11 July 2011: Steven Bell's reply: *"I don't believe for a minute that the principals agreed that Siemens merely move £14m of their original "claim" to the Target Sum portion to enable a fixed price to be agreed for Airport to Haymarket."*
- TIE00691220, 15 July 2011, Steven Bell: *"basically they are just at it in our view. I hope to get Dave to hold firm but do not know what Colin may have promised. He was very quiet and a little uncomfortable when this was discussed in general forum with Siemens and Bilfinger"*
- TIE00688885, Vic Emery (draft), 21 July 2011: *"The Target cost [for the on-street works] is generally agreed to be £14 - £18 million too high and is driven primarily by Siemens who have admitted that they are trying to recover their pre-Mar Hall position for Airport to Haymarket and they see the only way to do this is to load the on-street price..."*
- TIE00688914, Sue Bruce, 24 July 2011: *"We need to dig in on this one. It is a contradiction with the overt agreement."*
- TIE00100987 (and attachments, TIE00100988, TIE00100989), Alfred Brandenburger, 2 August 2011: revised Siemens on street works price of £14.48m
- TIE00100990, Fiona Dunn, 3 August 2011: *"the original submission was £20,160k it is now £14,480k – tie's expectation is that the value should be approx. £9,500k"*
- TIE00691348, 8 August 2011: exchange between Dennis Murray of tie and Axel Eickhorn of Siemens
- TIE00691423, 17 August 2011, Steven Bell: *"Suggest there is still a £10 - £15m over statement of contract price but client should hold some/much of that as contingency."*
- TIE00691424, 16 August 2011, Steven Bell email attaching report by

Dennis Murray (TIE00691425, TIE00691426) to help “*fully inform the debate on how to best conclude a fair on street price...*”. The DM report noted the latest price proposal to be c. £47.7m. It included observations that the price was still too high, but concluded that at a commercial meeting on 10 August Infraco confirmed that “*the price was the price and if we did not like it then we could find another contractor*”.

- The discussion about the on-street works price in the Faithful & Gould report dated 19 August 2011 and discussed in the report to CEC in August 2011 (CEC01727000), in particular:
 - The £53.4m figure quoted at 4.2.2.1
 - The £41m figure proposed by F&G at 4.2.4.1
 - The budget at Appendix 1, which at _24 notes (in relation to the on-street price) “*Discussion on Pricing: CS to go back to contractor; view to be taken on holding contingency*”

ANSWERS:

- This is a list of documents that has various opinions and concerns about achieving the best value for the on-street works. When I look at this, again, looking back in time, the concerns that people have expressed on the way through are all very real and I don’t think in any way shape or form the Council ignores those opinions, but what they allowed was to negotiate with Infraco to say that it’s not acceptable to have an uncontrolled position where you simply tell us the outturn cost.
- I remember referring to the value of the public pound to Martin Foerder, in particular, to say that the only way I could stand by a final account at the end of the day was if I knew that I had seen every aspect of the tender process, including the bill of quantities, contractors having the envelopes opened in front of me, forming a tender record sheet, which I then copied to the Council; sitting in at the contractors’ interviews and with the contractors in order to close the contract. I then ensured that Turner and Townsend were fully resourced, on site, to ensure that the actual work executed was measured.
- All of the above was to ensure best value and that there was a clear audit trail of the work.

Your role(s) after Mar Hall

266) What was your role (or were your roles) in the project during the period after the Mar Hall mediation?

- At Mar Hall I advised the Council on the mediation process.
- After Mar Hall I reported to the Tuesday and Thursday executive group

- meetings and acted as the Independent Certifier
- I became SRO after Dave Anderson left the Council, which included report writing, reporting to the all party oversight group, all of that continued as it had done right from the summer of 2011 through to the project conclusion on 31 May 2014.

Role as Independent Certifier

You were appointed as the 'Independent Certifier' in May 2011 (see the certifier agreements, May and June 2011, CEC02025692; July and August 2011, BFB00097700; 15 September 2011, BFB00005677,).

267) How had this role come about?

- I believe it was on the recommendation of the mediator, but I wasn't party to any discussion about myself being the Independent Certifier. I had previously advised that a technically competent chairperson become part of the process.

268) Why were you selected for it?

- I don't know

269) When did your role as certifier begin?

- From memory I think it would be somewhere around the end of April maybe early May 2011.

270) Please explain the nature and responsibilities of the role (with reference, where material, to schedule 1 of the certifier contracts (CEC02025692, BFB00097700, BFB00005677) and clauses 41, 44, 45, 46 and 67 of Infracore (as revised by the Settlement Agreement: see CEC02085623)

By clause 3.3 of the certifier agreements, HG was obliged to carry out the services "*independently, fairly and impartially to and as between each of the, CEC, BBUK and Siemens*".

- The documents ending 692, 700 and 677 are all versions of the same Certifier's agreement.
- Clauses 41 and 44 indicate the litigation section complete
- In terms of the Independent Certifier's role, on a daily and proactive basis that would be chairing the control meetings and in the event of there being matters where the parties couldn't agree, it would become part of the Certifier's process to ask for position papers and, ultimately, to offer up a Certifier's opinion. As far as the settlement agreement, and with reference to those clauses mentioned 41 through to 67, that was taking a role whereby in the case of, for example, milestone payments the

surveyors working for the Council, Turner and Townsend, would set out a valuation and, ultimately, the valuation would be signed off by myself but it would be their recommendation of what the payment was. Similarly, when it came to the point of notification of service commencement, I would look on behalf of the project to the contractor offering up service commencement; that the independent competent person (the safety regulator) had also signed off that phase of the works and Turner and Townsend recommending that we were ready to commence running and, thereafter, I would make a recommendation to the tram project.

- If a proposal was instigated by a contractor and a request for payment made due to a milestone having been achieved, Turner and Townsend would be asked to consider, review and make recommendations as to the value being requested. I would then over-write a certificate to say, "I agree with what Turner and Townsend have recommended and you, the contractor, have requested".
- In the event that Turner and Townsend said that they were uncomfortable with a decision or request, or similarly, if someone in CEC or, indeed, Transport Scotland were to say, "No we're not comfortable with that request or that position" then the matter would be escalated to the Principals meeting.
- In this role I listened to the advice from the third party adviser, Turner and Townsend, as well as to the argument promoted by the contractor as to why they should be paid a particular sum.
- With reference to the certifier agreement CEC02025692 my role was impartial.

271) Was there any difficulty in doing this given your original involvement for CEC and the fact that they were responsible for payment of your fee (cl. 6.1)?

- I didn't find any difficulty. My original involvement was that of advising on the process of mediation and preparation. Moving into the Independent Certifier's role. An understanding of what had come out of mediation and the intent that was behind the agreement that was reached. I felt comfortable in carrying out the role, notwithstanding the fact there was open and full agreement by all the parties as to me executing that role and full awareness as to who was paying my fee, so I didn't feel there was any pressure to be anything other than impartial and fair.

272) If you were acting independently, who was arguing CEC's position on any matters where there was a difference between the parties? Who in CEC provided them with instructions?

- Instructions ultimately came from Sue Bruce with input from either Alan Coyle, who was financial, or if legal Alastair Maclean. If matters were technical Bob McCafferty
- The protection of the Council's position came from Turner and Townsend. They only had one client and only one duty of care and that was to the Council.

273) What benefits, in your view, did the existence of the role bring to the project?

- I acted as an honest broker with no history on the project and therefore could look at it with a fresh set of eyes.
- There were a clear set of rules that we had constructed coming out of mediation and I believe it is that role which won the trust of the project.

274) Did it have any disadvantages?

- Not that I am aware of and I certainly have not heard anyone say that there were any disadvantages.

275) Is the role one which would usefully be included in future infrastructure projects? Please explain your answer.

- I think it would be a useful tool to have in any large complex or multi-discipline project and my reasoning is that individuals tend to hold their own discipline's position and they can't quite see the wider picture, so if someone can take a strong, impartial lead in a chair role, endeavouring to win the trust of the project and the participants, that brings an openness and a communication that makes it easier for such a project. That also includes communication back to the client group because there is awareness and it's not in compartments of information.

You appear to have issued opinions as independent certifier.

276) Please explain this aspect of your role.

- Where matters would emerge where there was a difference of opinion or interpretation of either a factor or a circumstance, I would intervene in the conversation that was happening, identify the parties, meet with them, then suggest they should move to putting their position in a position paper. The issue would then be seen, in writing, from the two perspectives or three perspectives which were prevailing at the time. Thereafter, I would go back and issue, in writing, my opinion of what the project required to do in the circumstances. From my recollection no opinions were overturned after I had issued my opinion. In the event of continued disagreement, the parties could have referred the matter to the

Principals' Forum to say they weren't happy with what I had declared.

276A) Were there ever situations where you felt that the issue is outwith your expertise and, if so, what would you have done about it?

- I didn't set out to suggest that I had expertise in all matters, in particular with the detail of some of the highly technical issues and, to that end, I had full back-up from Turner and Townsend in their various disciplines. In addition, I could always reach for information from CEC and Transport Scotland to augment the experience that I had built up over the years in dealing with disputes or emerging disputes.

277)What matters did you express opinions on?

- There were about 5 or 6 opinions times over the period 2011 – 2014 when I would have expressed by opinions but I don't recall the detail

278)Were those always accepted and followed by the parties?

- Yes, there was no escalation to the Principal's forum

279)Can you supply copies of all of the opinions you issued, together with a summary? (The papers suggest you were to compile all of them into a single document: see, e.g., CEC01891170.)

- Yes that was my suggestion to have one readily available document.
- I can supply that as it has been compiled

Senior Responsible Officer

You were appointed as "Senior Responsible Officer" in or around January 2012 (see, e.g., CEC01914661 at 3.2.10).

280)What were your responsibilities in this role?

- Previously David Anderson was SRO. I would assist him in preparing reports. I was still helping in preparation of reports to Council and the all party oversight group.
- In practice when I assisted Dave Anderson to work on reports I was doing much the same as the SRO

281)How did you come to be appointed to it?

- I think because Dave was no longer with the Council. If he had still been there, I think I would have just carried on what I had been doing with Dave and assisting with writing reports.

282)In overview, what work did you do?

- I think the work was really all part of the Independent Certifier's wider

role.

283) How did it relate to your work as the independent certifier?

- I don't think it interfered or had any effect at all.

Operation of the project under the Settlement Agreement

284) In broad overview, how did the project progress after the Mar Hall mediation, with particular regard to:

- a) Design – its completion, and the obtaining of all relevant approvals and consents;
 - b) Change: the extent of it, the reasons for it, the contractual change procedure, and its impact on time and cost;
 - c) Utility conflicts: their existence, the parties' reaction to them, and their impact on time and cost;
 - d) Differences and disagreements between the parties: the extent to which these arose, how they were addressed and how they were resolved; and their impact on time and cost.
- A) It progressed well and swiftly. One of the early tasks was to get a full list of the work in progress, the work completed or to be identified to be completed and then having a strict approach to making sure that the project had disciplines delivered to what was then the programme of work.
 - B) The previous process as it had been explained to me post mediation was cumbersome and open to varying opinions. What I strove to do was to have a system whereby at the Monday afternoon control meetings, the reason for change, the cost of change and its implication for that new programme or any other circumstance were identified. Each point was then debated with the benefit of Turner & Townsend, CEC Finance, Alan Coyle, Bob McCafferty and Andy Conway and a number of others in attendance and we also had the mentoring benefit of Transport Scotland who attended as well. If something had merit and value for change that group came to a consensus and agreed the way forward. Therefore, rather than a protracted exchange of emails or meetings, matters were dealt with in the afternoon's forum and thereafter endorsed, whether it be on the Tuesday or the Thursday meetings.
 - C) I think the additional work in researching the utilities position started to pay dividends, as did the additional radar work. Everyone appreciated the magnitude of the task in hand. The contractors agreed to change their approach to allow multi working on the various site parcels. Prior to that

agreement utilities had to be cleared before the site parcel could then be handed over to BSC. I think it was a major concession from BSC when they agreed to that request to adjust the way they worked. There was no longer a linear approach, but everyone in there working around and working with each other. We had to be very mindful of health and safety aspects and we spent quite a bit of time setting up a regime with the help of Bilfinger and Siemens. CAF were also involved as well as the team from Turner & Townsend.

- We also at this time had an utilities contractor, McNicholas, working with us and they fitted in to the team very well.
- We also has a dedicated utilities project manager, Stephen Lewcock from Turner & Townsend, which was absolutely vital in giving instructions and acting as a type of "Clerk of Works".
- I think there was acceptance by all parties that the role of the Independent Certifier was as someone being permanently on site to deal with and resolve disagreements. The Independent Certifier's file shows the record of disagreements and differences that were resolved.

WED00000101 lists all of the changes under the Infraco contract after mediation.

287) Why were there so many changes even after the mediation and is that a significant number of changes, in your experience for a project?

- I think that is a reasonable level of change. Some are design development revisions and I would expect them to occur. This was a design and build project. The contractor's price is based on his offer. If he uncovers a requirement for change then he will come back and ask for a change. Every change that you have seen post mediation would have gone through the change control group meeting review on Mondays.

You sent an email on 26 June 2012 to various parties (CEC01933207), requesting a meeting

"to reset behaviours ... in order to take us back in line, by common agreement, to that which was envisaged when we came out of mediation".

288) What were you referring to? Were matters resolved?

- Given that we were all based on site on a daily basis, I could pick up if there was strain emerging and this was a case in point where the people that I've mentioned in that email. This was about saying to them "I don't like the way this is going, people are starting to go back into old habits. You need to exchange ideas and understand each other's point of view

and come to an agreement". That was the spirit coming out of mediation. It was the role of the Certifier to keep that going. In this particular instance of 26 June, it hadn't reached boiling point. This is really me putting a bit of a warning shot across to say to people: "Folks, let's get back into the spirit of where we were back at Mar Hall" The matter was resolved.

On 21 November 2011, you sent an email about the IDC certification process which you considered to be a "*project threat*" (BFB00095187). You noted that "*my early thoughts are that this issue may be as a result of previous arrangements not having caught up with the way that we have successfully worked together since Mar Hall.*"

289) Can you explain this issue and how it was resolved?

What I am referring to there is an issue of coordination and cooperation between CAF, who are now on separate contract, and Bilfinger and Siemens who, hopefully, would complete the remainder of the BSC contract. By contacting CAF I'm bringing Richard Garner into the situation. David Lowe is from CAF and David Steele was on site for CAF. It was about bringing people together to talk about the work, how the handover of the IDC certificates should be processed and I would say it was a case of people still looking at old mind sets. The IDC process was required at that time and I just needed to bring people back to a place that says, "This is the way we're doing business now with this new piece of work that has arrived at its point in the project programme".

On 8 October 2012, CEC, Bilfinger and Siemens signed a Memorandum of Understanding (CEC01933565). It sought to maintain the commitment the parties had made at Mar Hall to act reasonably and work together in a spirit of cooperation and innovation. It provided for "*regular and meaningful*" meetings amongst Martin Foerder, Alfred Brandenburger, Stephen Sharp and Colin Smith.

290) Why was this required?

- I felt that such a memorandum of understanding would be beneficial to re-affirm the commitment and behaviours from Mar Hall until the point of signing the Memorandum of Understanding in October 2012. I was keen to have a declaration such as this so that it would allow both Siemens and Bilfinger to exhibit to their offices in Germany that we were moving into yet another phase in the project, which was around the City of Edinburgh Council and myself getting meaningful access to the programme. I have previously said that I was surprised to find that it was

a contractor's programme and not a jointly owned programme of work. The proposal I had put to Bilfinger and Siemens was that I would like to create, what I called, a "Client Target" programme to gain a closer understanding of the programme's underlying mechanisms.

Post-Mar Hall programme change

On 15 April 2011, CAF submitted a claim for delay costs based on the movement revealed by revision 2 of the post-mediation programme (BFB00094784, BFB00094785, BFB00094786, BFB00094787). These totalled €1.113m on top of the €5.566m that had been agreed at Mar Hall.

291) Can you explain in brief terms this claim and the basis on which it was made?

At Mar Hall the CAF discussion was led by Antonio Campos and Richard Garner from CAF's side and Alastair Richards from TIE. He was the tram Director for TIE. When Bilfinger and Siemens came out of mediation they still held the ownership of their programme, which they revised. CAF did not revise their programme and so they referred back to a handwritten agreement between Alastair Richards and Antonio Campos and the subsequent settlement agreement that they had and the impact that they outlined in their submission is the impact of becoming now compliant with a revised programme.

292) How was it resolved?

It was resolved by taking position papers from the parties and issuing a Certifier's opinion. Whenever I arrived at a Certifier's opinion, I reported back to the CEC Tuesday/Thursday meeting and the Principals' forum. All the participants were aware of the detail of any Certifier's opinion.

In December 2011, you issued your independent certifier's opinion on the impact of the change between revision 3A and Revision 4 of the project programme (CEC02031937). Your decision was that the settlement agreement contract sum should be adjusted to take account of that (_2), and that it should be increased by £4,541,161 (_3). Turner & Townsend on behalf of CEC had proposed £2.86m (_5), and BBS £4.75m (_10).

293) Please explain how the change between these revisions of the programme had come about.

This change came about from the Council decision to go to Haymarket and then, of course, that being reversed after the intervention with Transport Scotland's letter of funding being withdrawn. This cost is the effect of the contractor not releasing sub-contractors and retaining their expertise in Edinburgh until such time as we could re-commence work

on site in October 2011.

294) Please explain, in broad terms, why you had valued the price increase as you did.

It was arrived at after analysis based on information from the contractor, by Turner and Townsend, looking at the sub-contractors' rates and costs and, eventually, arithmetically working up the impact from the detail, so it was my interpretation of the papers that were put in front of me.

Cost engineering

A report considered by the Joint Project Forum on 25 January 2012 (minutes, BFB00099215 at 5.1; report at CEC01890999_11; title "*Edinburgh Trams Contract, Baseline Project Instructions 2012*") summarised potential cost savings identified through cost engineering workshops. The anticipated net saving was £14.5m, following the deduction of £7.8m for the "*contract incentive share*". The largest saving was £12.9m, and 22 weeks on the completion date, achieved by removing embargoes and introducing revised traffic management at Shandwick Place, Princes Street and York Place.

295) Please explain the cost engineering initiative in overview, including the extent to which these savings were in fact made.

On or around January 2012, or it maybe would have been in December 2011, I had asked if the contractors, CAF, Bilfinger, Siemens, Transport Scotland, with Vic Emery to chair, would come together with CEC and Turner and Townsend. This was a minuted meeting, therefore any detail about work around this can be seen from the file. I had set a task that everyone would come to the meeting to talk about cost engineering and any benefits that the project could approve. I had asked everyone to come along with at least three suggestions of potential cost savings which could be derived through programme, change of detail, design detail that is, ways of working, i.e. that everyone in the room could bring forward benefits from their experience on other projects that could be brought into this project. Suggestions came, I think, from just about everyone in the room. I was acting as the agitator to encourage people to think about additional processes that the project could benefit from. It was helpful to have Vic there because he gave gravitas to that meeting. That cost engineering session was then taken, in detail, to the meeting of 25 January 2012 when I asked for permission to implement the initiatives that had come from the team. Not every suggestion was taken forward for instruction. I believe the project benefitted from all of those that were subsequently instructed by the client group.

296) Please explain the “*contract incentive*”.

My understanding is that this was an unused clause pre-Mar Hall from the original contract document that gave the BSC contractor an incentive if there were cost savings.

We understand that the 22 week programme saving was made, but was then used up in dealing with utilities; and that there was a disagreement with Infracore over whether it was entitled in those circumstances to its incentive payment.

297) Is our understanding correct? Please explain this issue, and how it was resolved, more fully.

See also:

- Joint Project Forum Minutes, 22 February 2012, CEC01942252 at 4 and 5.1
- Joint Project Forum Minutes, 20 August 2013, CEC02043793 at 3.0

The understanding is correct. The language that I used at that time, which has been referred to in the minutes, is that having been given access to the programme, with the benefit of a programmer on behalf of the Council, and with the benefit of the cost engineering workshop, we could see that if we changed ways of working again there was the potential for a 22 week saving assessment of time. I suggested that we consider those 22 weeks as a time bank so we had a “time float” that would protect the Council in the event of a delay that would push the completion date beyond the contractor’s contract programme. Additional extension of time costs would not apply if we were to spend some of our time from the time bank, i.e. the 22 weeks. From memory, the time bank was analysed on a weekly basis and reported on a fortnightly basis and, as events were occurring that would otherwise have impacted and extended the contract period, the time bank was being drawn down. The leaders of that debate were Steven Sharp for Bilfinger and Siemens and Graham Robertson for CEC. Martin Foerder and Alfred Brandenburger were the Bilfinger and Siemens senior representatives there. I also attended. The two planners would meet on various dates with myself beforehand, they would explain to me what had occurred in the previous week or the fortnight. The time bank was drawn down to the point where three days remained and the time bank account was then closed, which was what was reported on 20 August 2013.

We understand that CEC decided to appoint Turner & Townsend as project managers.

298) Can you explain the scope of their role?

The scope of their role changed over the period but, initially, it was to provide a full service on all levels of project management, not dissimilar to the level of resource previously provided by TIE. However, over the project, with the help of Alan Coyle and others within CEC, I would look to refresh the team to match resource to skill sets from the contractor's side and the Council's side. As the project evolved, within the project papers I discuss a blended team approach to ensure that there was no duplication from Turner and Townsend or a Council resource or, indeed, towards the end, a Lothian Bus resource that was providing a human resource for the testing of the tram running.

299) When, and why, did CEC decide to appoint T&T?

I think it would be around about autumn of 2011. From memory, I think it was being recognised that perhaps some members of the TIE team had been finding difficulty moving away from past behaviours to the behaviours that were required after Mar Hall. There was also a recognition of Turner and Townsend's light rail experience and that that expertise would have been beneficial to the project. Prior to that time TIE were the project managers.

Commercial issues between Infraco and CEC after Mar Hall

The Turner & Townsend monthly progress reports, in the run up to the conclusion of the project, note a number of commercial issues between CEC and Infraco which had to be resolved.

The material ones appear to be those listed below.

300) Can you please explain them in overview, and how they were resolved?

301) Were there any other issues which had a significant financial impact on the project? If so, what were they and what was their impact?

302) What, in broad terms, was CEC's attitude and approach to resolving disagreements with Infraco in the post-Mar Hall period? What was Infraco's attitude and approach?

NB – the documents referred to below are merely for your assistance. You need not refer to all of them if they are not material to your answer.

A. Delayed signing of settlement agreement (i.e., the change from revision 3A of the programme to revision 4) (For the BBS claim, see TRS00025478).

- (Gary Easton's email to Alan Coyle of CEC may be relevant

(CEC01960500, 1 February 2012))

- CEC01951549, August 2012, 5.3: notes the approval of the change, which was valued by Infraco at £4.541m (see change order at CEC01950945, 6 August 2012). [NB – the reference to ‘approval’ appears to be contradicted by the following entries in this list]
- CEC01932700, November 2012, 5.1.3: notes that the claim was unresolved. BBS had not justified the costs they claimed (£3.1m) and were refusing to supply more information.
- CEC02024340, March 2013, 5.1.3: CEC had instructed the issue of a change order for £4,515k; reference to your opinion that only costs incurred would be payable; £1,881k had been certified to date but T&T were advising that Infraco had not provided sufficient information to demonstrate that costs were incurred
- CEC02027146, April 2013, 5.1.3: £2,365k certified to date “as instructed by CEC, although T&T have advised that Infraco have not provided sufficient information to demonstrate costs were incurred. Infraco have advised that they will not provide any further information to support this amount.”
- CEC02033347, September 2013, 5.3: Infraco considered they were entitled to contract prelims plus the £4.5m for the change between revision 3A and revision 4 of the programme. CEC considered a saving of £3.14m could be made.
- CEC02036992_4, December 2013: CEC in discussions about the saving of £3.14m; “no evidence from Infraco that they accept this approach”.
- CEC02072604_8, January 2014: the base cost of £506m for Tramco, Infraco and post-mediation utility costs included payment in full (on CEC’s instruction) of £4.5m for the programme change from revision 3A to revision 4, **and** of the £6.45m for the 22-week cost engineering saving; however, CEC envisaged saving £3.14m in respect of these. CEC “having confidential discussions with Infraco on this matter”.

B. Time-saving from value engineering: valuation of draw-down

- CEC01951549, August 2012, at 5.4 suggests it had been agreed that the parties would share the savings generated by the 22-week time-saving from value engineering; and that the issue in dispute was how to apply those principles as the 22-week period was, over time, eroded by subsequent delays. Infraco were taking the view they were entitled to the full value if the erosion resulted from a client risk (e.g., utility diversion).
- CEC02015436, minutes of Client Instruction and Control Meeting, 27 August 2012, paragraph 8 explains some of the context.
- CEC02017359, September 2012: Infraco claimed £6.45m under this head; T&T saw no clear basis for that payment, but indicated CEC

might wish to consider a commercial settlement because of the potential consequences if Infraco withdrew co-operation and commenced a dispute (5.1.3 and appendix 10 (_116)).

- WED00000095, draft advice note by Turner & Townsend dated 5 October 2012 (see especially paragraphs 4.1, 4.2 and 4.5)
- CEC01891277, October 2012, 5.1.3: CEC reported as having come to an arrangement with Infraco, but T&T did not know what it was.
- CEC01933544, email from you to Alastair Maclean dated 16 October 2012 and attachments (CEC01933545 and CEC01933546). The draft letter (CEC01933546) notes that at the time of the cost engineering workshops, when the time bank saving of 22 weeks was established, “it was agreed that CEC would pay the sum of £6,459,810.44 to Infraco regardless of any erosion in the time bank as a result of matters for which CEC is responsible.” T&T appear not to have been aware that this was the arrangement: e.g., CEC01933455.
- WED00000097, note of meeting between CEC and Turner & Townsend on 29 October 2012, noting that authority to make the payment had come from the senior management team, including Sue Bruce
- WED00000099, letter from Turner & Townsend to Colin Smith dated 30 October 2012
- CEC01932700, November 2012, 5.1.3: CEC reported as having authorised payment of the £6.45m claimed by Infraco

5 October 2012
should be
4 October 2012

Delayed signing of settlement agreement (ie, the change from revision 3A of the programme to revision 4) (For the BBS claim, see TRS00025478).

That looks to me like the position paper from Bilfinger/Siemens for the revision impact of the settlement agreement. I will go to Gary Easton’s email.

- Gary Easton’s email to Alan Coyle of CEC may be relevant (CEC01960500, 1 February 2012).

I don’t think I have any comments here.

(CEC01951549), August 2012, 5.3: notes the approval of the change, which was valued by Infraco at £4.541m (see change order at (CEC01950945), 6 August 2012). The reports would have gone to Alan Coyle and myself and they would be in draft form and I see this is noted as final so I would have attended a meeting with the CEC, Transport Scotland team; the way the meeting operated is when they were presenting a report, T&T would

talk to the report with perhaps give a PowerPoint presentation as well. I would have a number of questions in order to highlight particular facts in the report, they weren't rehearsed so the T&T team would come along with maybe four or five members who would respond and the aim was to have as much open, clear dialogue in front of Vic Emery and Sue Bruce and whoever was there from Transport Scotland to give Turner and Townsend an appreciation that they had direct client communication. Document (CEC01950945), which is dated 6 August 2012, would be the final piece in the process post-client approval.

Document (CEC01932700), November 2012, 5.1.3: notes that the claim was unresolved. BBS had not justified the costs they claimed (£3.1m) and were refusing to supply more information. I would have seen this, along with Alan Coyle, in draft. As this is the final version of it I would have attended the meeting when that report would be tabled.

The next document is (CEC02024340), March 2013, 5.1.3: CEC had instructed the issue of a change order for £4,515k; reference to my opinion that only costs incurred would be payable; £1,881k had been certified to date but T&T were advising that Infraco had not provided sufficient information to demonstrate that costs were incurred. I would get a copy of that report so my answer would be the same as before. That would be the same for all of the following T&T reports.

- (CEC02027146), April 2013, 5.1.3: £2,365k certified to date *"as instructed by CEC, although T&T have advised that Infraco have not provided sufficient information to demonstrate costs were incurred. Infraco have advised that they will not provide any further information to support this amount."*
- (CEC02033347), September 2013, 5.3: Infraco considered they were entitled to contract prelims plus the £4.5m for the change between revision 3A and revision 4 of the programme. CEC considered a saving of £3.14m could be made.
- (CEC02036992_4), December 2013: CEC in discussions about the saving of £3.14m; *"no evidence from Infraco that they accept this approach"*.
- (CEC02072604_8), January 2014: the base cost of £506m for Tramco, Infraco and post-mediation utility costs included payment in full (on CEC's instruction) of £4.5m for the programme change from revision 3A to revision 4, **and** of the £6.45m for the 22-week cost engineering saving; however, CEC envisaged saving £3.14m in respect of these.

CEC *“having confidential discussions with Infracore on this matter”*.

Utilities conflicts

Expertise in managing utility diversions

Your report (*Edinburgh Tram Project, Review of Progress and Management of the Project, January 2011 to June 2012 (27 May 2012, TRS00023933)*) noted at 7.12 that

“It is also important to point out that due to the lack of skills in the previously to deal with utilities additional resource has been required to manage this area due to its complexity.”

303) Can you explain this comment?

I refer back to the introduction of a person who became the eyes and ears of the project on the ground on a daily basis, Stephen Lewcock from Turner & Townsend, and that approach wasn't apparent to me prior to mediation. Again, as far as I could see the request I made for that person was in addition to any team structure that had been in place pre-mediation. Although I am mentioning one person, Stephen also had a team of people working below him which was going up and down site on a daily basis and they had only one task and that was to be the eyes and ears of the project with regard to utilities and to report back through the T&T team and also directly when I made an approach on issues that they were uncovering. This additional resource and skill was beneficial.

Ongoing utility diversion works

It had originally been intended to divert utilities ahead of infrastructure work being carried out, to avoid delay and cost. In the event, utility conflicts had to be addressed after the Mar Hall settlement up until a late stage in the project (see, e.g. the reports summarised at the bottom of this box).

304) Why did these conflicts continue to arise, and take so long to resolve?

The conflicts weren't fully known about. In the case of Scottish Water, indeed any utility, but particularly Scottish Water, there is a technical query process to be gone through which you need to make application with the detail of design. Once approved, the work is carried out. It is thereafter inspected by the utility. This process takes time.

305) Are you able to explain why investigation of utility conflicts in the on-street section was being carried in 2011 (following the Mar Hall mediation), some 3 years after the infrastructure contract was awarded and some 5 years after the MUDFA contract was awarded?

I had reported to the Council Chamber in June when asked by one of the elected members what steps I would promote to ascertain utilities, that additional radar scanning and slot trenching should be undertaken before going back onto site. I did not know what steps TIE had taken pre-Mar Hall.

306) To what extent did the need to divert utilities delay the infrastructure works and increase costs during the post-Mar Hall period? (In answering this, please take account of the cost to CEC of the 22 week time-bank and the cost of its erosion.)

In my opinion, the 22-week time bank, while it had the benefit of making sure there was no prolongation costs, was the resource used up in order to deal within the main utilities. Otherwise the delay would have been an extra extension of time cost through prolongation, as opposed to being spent pre-contractor's contract completion date.

307) To what extent, during the post-Mar Hall period, was there co-operation between the infrastructure contractor and the contractors carrying out utility diversions?

(See, e.g., Turner & Townsend progress report no. 6 (February/March 2012), CEC01942255, executive summary: "*Infraco have been working cooperatively to enable discovery utilities works to be addressed alongside the main BBS works.*")

As a result of the processes employed after mediation, in my opinion there was very meaningful cooperation between the infrastructure contractor and the contractors carrying out utilities diversions. I think it is probably worth noting that cooperation was being given without any resorting to the contract or contract instructions. There was no imposing, or trying to impose, that level of cooperation. The team were asked by me to cooperate and they did.

308) How did that compare to your understanding of the position prior to the Mar Hall mediation?

I cannot answer that question because I didn't have, or don't have, the detail of how the mechanics were all working before mediation.

Examples of reports concerning utility conflicts and their impact include the following. ***Again, these references are supplied for your assistance and you need not refer to them in your answer if they are not material:***

- June 2011 Report to CEC (CEC01914650) at 3.43 noted that work was

underway to map potential utility and other sub-ground obstructions between Haymarket and York Place, with a view to increasing price certainty.

That report is connected to the Council meeting and the query from an elected member relating to cat scans and slot trenches.

- 25 August 2011 Report to CEC (CEC01914650) noted (3.8 onwards) that utilities investigations had been instructed on key sections of the on-street works to identify utility conflicts with the finalised design. Trial bore holes and radar scanning had identified c. 550 potential conflicts

There had to be a process to be followed to gain information to resolve matters thereafter.

- The Minutes of the Joint Project Forum for 18 October 2011 (CEC01890987_3, 6.2) noted that test trenches for utilities had identified an increase from 550 to 895 potential conflicts.

We were told by TIE at the outset that only a very small number of conflicts remained and I made the disparity in clash numbers quite clear to all in my reports the result following examination, "Unknown clashes are now sitting at 895".

- The November minutes (CEC01890994_3 at 4.1) noted that the current number of utility clashes was 1,127.

It is maybe worth noting that the client group gave me the instruction to reduce the road excavation depth and under 4.2 I am reporting that such a reduction could make a beneficial change to the number of clashes presently reported at 1,127.

- Progress Report No 3 (9 November to 8 December 2011) – CEC01891191
 - Para. 4.5
 - At 5.2: "*The utility clashes in Shandwick Place and St Andrews Square account for almost 50% of the clashes currently identified on the project.*" The magnitude of the problems could only be fully quantified once enabling works were carried out in the New Year. The discovery of BT cables in Haymarket was the key contributor to delays reported below.
- Progress Report number 4 (9 December 2011 to 27 January 2012) – CEC01889907:
 - Utilities (4.3)

- Joint Project Forum minutes, 25 January 2012 (BFB00095321), 4.1:
 - *“Colin Smith explained that utility conflicts were still a major threat to the Project. The procedure set by Turner and Townsend which managed utility conflicts was working well and ensured that the minimum amount of time was spent resolving utility conflicts.”*
- Progress Report No 5 (28 January to 24 February 2012) – CEC01889974:
 - Executive summary: The extent of utility diversions required in both Shandwick Place and St Andrew Street has been significantly greater than anticipated from record data.
 - Section 5 (on street enabling works): Significantly more utilities were encountered than anticipated: 316 conflicts were encountered rather than the 195 expected.
- Progress report no. 6, 25 February to 27 March 2012 – CEC01942255.
 - 4.7: potential time saving of 22 weeks would be impacted by advance utility diversions and delays resulting from unforeseen utilities
- Progress report no. 7, 24 March to 28 April 2012 – CEC01890161
 - Off street dashboard (_44) noted as a failure the continued utility strikes in the off-street section
- Progress report no. 8, 29 April to 26 May 2012 – CEC01890199
 - Section 3 noted delays attributable to utility clashes
- Progress report no. 9, 27 May to 23 June 2012 – CEC01890244
 - 6.1 (on street): Significant areas of on-street now in Infraco’s possession following resolution of utility conflicts. Some minor conflicts would continue to arise (legacy issues and “type 2” conflicts – i.e., proving areas for road signs, etc).
 - 8.2.1 (off street): utilities uncovered at Airport now causing delay to tram ducting works; airport not being proactive in resolving issues
- Progress report no. 10, 24 June to 21 July 2012 – CEC01932286;
 - Executive summary: 11 weeks of 22 week time bank eroded due to utilities works and on-street drainage issue (see also 3.2)

Cost of utility diversions after Mar Hall

We understand that the budget originally set after Mar Hall for utility diversions

was around £2.9m, but that the outturn cost was around £21m (see, e.g., the Turner & Townsend report dated 21 June 2014 (WED00000092 at page 1).

309) What was the basis for the original budget, and when, by whom, and on what basis, was it made?

The original budget would have come from TIE. Around the summer of 2011 I asked TIE to provide a close down or position statement on utilities. I had asked them for complete transparency in their reporting to the Council on what exactly was the position. They gave a report which detailed where they believed every aspect of the project was sitting at that time. My advice to the Council was not to wholly rely on that, but to make sure that there was a sufficient time contingency and financial contingency to deal with further utilities if we were to uncover them after further research and surveys.

310) Why were the resultant costs so far in excess of the estimate?

Because of the limited extent of the unknown clashes at the time of the £2.9m being reported.

Remedies for delayed utility works

311) To what extent (if any) did cost and delay in connection with utilities in the period after Mar Hall derive from poor quality work under the MUDFA contract?

It is difficult for me to quantify a delay and cost but I do know from what we uncovered post Mar Hall, there were a significant number of issues such as poor positioning of multi utilities and fire hydrants that weren't compliant with the fire and rescue service needs. with regard to the cost and the actual extent.

312) To the extent that it did, what was the nature of the poor quality work?

Those are just two types of examples under 311 that we had.

313) What investigations and/or remedies (if any) were pursued in respect of it?

See, e.g.,

- Progress Report number 4 (9 December 2011 to 27 January 2012) – CEC01889907, Executive summary:
 - *“extent of delay has been exacerbated by the discovery of incorrectly recorded and poorly executed utilities works under MUDFA” ...*
 - *“The resolution of these items is being hampered by poor historical record keeping under MUDFA.”*

- Email from Mark Turley to Sue Bruce dated 17 December 2013 (cc'd to you, CEC02037102):
 - *“Lesley feels strongly that the poor quality work done by tie/MUDFA contractors cannot go unpunished. ... I believe preparatory work has been done on the possibility of pursuing “someone”...”*

Again, in terms of the T&T report I would have processed this as per my previous answer, but I would add to that I presented a series of photographs to the client group giving examples of poor quality work and asked that I be given permission to contact some of the MUDFA contractors to hold them to account.

I took the photographs of the defective work to Carillion, one of the MUDFA contractors, and they afforded me, I think, maybe two meetings. They listened to what I had to say but, ultimately and finally, they presented that they had a full and final settlement account signed by TIE and themselves and at that point they had no further obligation, the work had been signed off in their view and there was no offer either to go back and rectify matters, or to reimburse for work incorrectly executed. Their stance was that they had carried out the work under the control of TIE, and that they had no further liability.

Tie's settlement with the MUDFA contractor

It appears you were involved in an investigation into tie's settlement with the MUDFA contractor. An email from Brandon Nolan of McGrigors (CEC01942045, 15 February 2012) suggests its scope was to consider defects in the utility diversion works, to ascertain the extent to which it might remain possible to seek remedies in respect of those defects, taking account of tie's settlement with Carillion (the original MUDFA contractor).

The minutes of the Project Delivery Group on 10 January 2013 (CEC01931577) noted that:

“Colin Smith advised that a meeting had been held with Carillion to discuss the quality of works in respect to the Mudfa contract. Carillion had agreed to review the information and Colin Smith would re-engage with Carillion to undertake the next step. ... It was noted that tie had previously agreed a final settlement with Carillion. For this reason it was unlikely that any settlement would involve a financial sum.”

314) What was the scope of this investigation?

It was the presentation of photographic evidence once the post-mediation team had opened up certain aspects of the site so it was factual, it was

there to be seen and that's what was presented to Carillion. Solicitors were not present at my meeting with Carillion.

315) What was your role?

It was to ascertain, with Carillion being used as the benchmark, whether there was any opportunity for re-engagement or the need for a wider negotiation or review of matters with the contractor, thereafter reporting my findings back to the Tuesday and Thursday morning client meetings.

316) Who else was involved, and what were their roles?

Sue Bruce was involved as she had been at the first or the second of the meetings. Vic Emery, Alastair Maclean, Alan Coyle and Brandon Nolan were involved and there would be other people acting as assistants to those members. Alastair was leading the debate if there was any contractual remedy beyond the actual response from Carillion at those meetings. Sue and Vic were the Principals within the project so it was them that we were reporting to.

317) What was the outcome of the investigation?

At the first meeting Carillion said they would investigate and look into it; by the second meeting I certainly had the feeling that they felt no need to take any further action at all and the situation remains more or less as it was left at the last meeting.

318) Was any action taken as a result?

Not that I am aware of.

Utility diversions between York Place and Newhaven

319) What is your understanding of the extent to which utility diversion works have been completed in this section, sufficient to allow the extension of the line over it?

I don't think I can answer that, as I have no knowledge.

320) To the extent that such works are required, what is your understanding of their likely, or estimated, cost?

See, e.g., CEC01930373 and CEC01930374 (email from Turner & Townsend dated 17 January 2013, attaching their *Estimate Report for Extension from York Place to Leith*, which estimated the utility diversion costs at £25m (_6).

As far as the Turner and Townsend report and the document finishing 374, my previous answer applies. With regard to the email from Alan Coyle, initially from Mike Mackenzie to myself and Alan, this would be a

piece of work that was starting to be brought forward, from one of my all party oversight group reports. I was trying to highlight to the elected members that I was aware of the Leith improvement programme works and, potentially, unless someone was to take a coordinated view, if there were to be a tram extension and if the Leith programme works did not recognise the possibility of a tram extension, the outcome would be that the road and infrastructure could be dug up three times over and so this was really starting to put some quantification, based on T&T's experience, on the prevailing tram project and what the impact may be in terms of the cost of diversion of utilities.

Scottish Water

Your report "*Edinburgh Tram Project, Review of Progress and Management of the Project, January 2011 to June 2012*" (27 May 2012, WED00000134) noted, at 7.11 (page 237), that in handing over the project management to Turner & Townsend, T&T produced a "Close Report" signed off by the Project Director as an accurate record of all the issues he was aware of (Appendix 12, from page 442)). It also noted that the close report did not take into account a number of historic utility issues, primarily in relation to Scottish Water assets.

321) Can you explain in overview the historic utility issues referred to here?

This related to the document known as the Close Down Report or position statement from TIE. I had asked the Project Director to really give an accurate record of all the issues that TIE was aware of. Moving forward some months, and through the control meetings, difficulties were being reported to me, as the chair of the utilities control meeting, between Scottish Water and Bilfinger, Bilfinger's designer and the representatives in that piece of work from Turner and Townsend. My action in response to that was to request a weekly meeting with Scottish Water and, if I recollect correctly, these meetings were held at 11am on Mondays and, again, the meetings were minuted. The lead designer was Simon Nesbitt from Bilfinger and we had good representation from the project team with Scottish Water's technical team. The issues that were being dealt with ranged from apparatus that had been incorrectly installed, consents remaining outstanding and the creation of an effective interface between Scottish Water and the project team. While I chaired that meeting I would say that the main dialogue, observed by the senior management team of Scottish Water and Bilfinger, was really being conducted between the technical designers. That helped make the possible solutions that emerged from these technical discussions clear.

The relationship with Scottish Water appears to have been difficult until a late stage in the project.

See, e.g., the following Joint Project Forum Minutes (references to which are supplied only for your assistance; you need not refer to them in your answer if they are not material):

- 21 March 2012, CEC01942260, 2.4 (manhole design)
- 30 May 2012, CEC01942270, 3.2.4 (manhole design)
- 30 June 2012, CEC01891032_3, 3.4: *“The relationship was still delicate with Scottish Water given the history with MUDFA.”*
- 25 July 2012, BFB00095505, 3.4: *“Colin Smith raised an amber warning on the relationship with Scottish Water. The starting point for the relationship with Scottish Water in July 2011 had been at a low point, this had been improved over the year and there had been good co-operation with Scottish Water over the 33 manholes. However, there had been recent instances of poor behaviour which threatened to delay parts of the Project. A meeting had been scheduled to resolve these issues and to ensure that the improved relationship was maintained.”*
- 22 August 2012, CEC01891049, 3.4: *“Colin Smith advised that discussion at control meetings over the previous two months had highlighted instances where Scottish Water had re-opened issues they had recently agreed. ... Sue Bruce stated that this issue would be escalated and a meeting would be held with Scottish Water’s senior management.”*
- 31 October 2012, CEC01891060, 3.4: *“Colin Smith stated there had been an emerging picture over 2011/12 over the extent of poor services work affecting Scottish Water. The project’s engagement post mediation had not started in a good place because of this impact.”*
- 30 January 2013, CEC01891081, 3.4: *“These issues had all now been worked through and the key item which was a £2m worth of work requested by Scottish Water had now been acknowledged as a set of work costing £450k. This work would commence on 18 February 2013 and had been a significant piece of work to agree.”*
- 27 February 2013, CEC01891088, 3.4.2: *“Colin Smith advised that there had been an acknowledgement from Scottish Water that they would not pursue £3m for works in Leith but the works would be for a sum of £450k. However, there had been a question over the betterment that Scottish Water had received. The Project was due money where betterment was received from Scottish Water on their infrastructure on a road. This was*

30 June 2012
should be
20 June 2012

estimated at £1.8m but Scottish Water was challenging this as they believed that the betterment had taken place on a railtrack rather than a road due to the tram track construction, therefore different valuation rules would apply.”

- 27 March 2013, CEC01891100, 3.5: “Colin Smith stated that there were no issues with Scottish Water that could impinge on the Project. Simon Nesbitt added that there were minor issues to complete but it was now a very positive situation with Scottish Water.”
- See also the Appendix to this note, which summarises entries in the Turner & Townsend monthly reports relating to Scottish Water

322) To what extent did issues with Scottish Water, such as these, increase the cost or timescale of the project?

These were issues that should have been dealt with and needed to be dealt with at the right time pre Mar Hall. They were not “nice to have” or bolt ons, they were matters which should have been addressed in the first place but they did have a cost and they did have a time implication and they should have been budgeted for and dealt with at the right time.

323) To the extent that they did, can you explain ***in overview***:

- a) What the issues were
- b) Why they had arisen
- c) How they were resolved
- d) Whether they could have been avoided and, if so, how

It is not necessary to address every point in detail. The documents supplied to you are intended to be illustrative. We are interested in major issues which had a significant cost or time impact on the project. Possibly also relevant as background here are:

- Gary Easton’s email dated 6 September 2012 to you and its attachment (CEC02015793 and CEC02015794)
- Gary Easton’s email dated 4 March 2013 to you and its attachments (the six documents from CEC01948111 to CEC01948116)
- the Scottish Water Closeout Report, 17 June 2013, and its appendices (the ten documents from CEC02029257 – CEC02029266 inclusive; the report is CEC02029266 and the financial appendix is CEC02029263). ***NB – this report is noted as a draft. If it is relevant, is a finalised version available?***
- CEC02032422 (note of meeting between Pinsent Masons, Scottish Water

and Dundas & Wilson, 2 September 2013, sent to you by email CEC02032421)

- CEC02037818 (draft heads of terms by Brandon Nolan of Pinsent Masons for an agreement between SW and CEC, providing for inter alia payment by CEC of £700k; sent to you by email CEC02037817, 24 January 2014)
- CEC02037966 (email from David Cunningham of Pinsent Masons dated 29 January 2014, attaching agreement tracker, CEC02037967)
- CEC02046256 (email from Brandon Nolan of Pinsent Masons dated 5 February 2014, which notes: "*Colin has an ongoing work stream with SW which ultimately will lead to an agreement being entered into which will deal with all the historic issues as well as regulating the position in relation to SW assets which are affected by the trams route (including an extension to Leith) going forward.*")

There was still a great deal of frustration in the May/June 2011 period. Although we had set up Monday morning meetings with Scottish Water and they were starting to bear fruit and people were starting to talk to each other, I did think it was still delicate and it wouldn't take too much for people to slip back into their old behaviour. It was really, for my part, about managing and producing what was required. An example being to discuss the practicality of a particular manhole on Princes Street and the likelihood of risk to Scottish Water or to the city if that manhole was left as it was. We came to an agreement that in the event that there was any further load imposed on that drain line, it would not be taken through that manhole. Therefore, Scottish Water was protected, the project reached a resolution and it was only by listening to the technical people that I was able to talk to my opposite number in Scottish Water to state, "Would you be prepared to accept that under a derogation?" which they did on a number of occasions, so that built up a momentum of, I thought, a very good working relationship between CEC and Scottish Water from the mid part through to the end of the project. The situation did not deteriorate further to the point that it would affect the project, notwithstanding my voiced concerns.

I was able to articulate on behalf of the Council that all that was required was for discussions to take place between the two technical sides. It didn't at any time go beyond what has been openly reported and, therefore, per my previous answer, it should have been an issue for discussion at an earlier time but I don't feel it had an additional impact; it was always something that should have been dealt with.

There was discussion about deferring utilities remedial works on Leith Walk (see email dated 18 June 2012 from Andy Conway, CEC01934415).

323A) Can you explain this issue?

We reached a point in the relationship with Scottish Water that if there had been a hardnosed approach to following the rules from the new works or utilities Act and matters were carried out in an absolute rigid manner, we would be guilty of, certainly in my view and I think shared by Scottish Water, wasting public money for no real gain. The principle of leaving utilities started to emerge and the protection I was prepared to recommend to the Council was, if in the event there was an incident and it could be clearly seen it was a result of incorrectly fitted infrastructure, the Council would incur that cost. In other words, rather than handing over a large cheque for Scottish Water to carry out work which, in my view, would have been carried out for the sake of it, if an incident occurred Scottish Water would be indemnified by the Council but only in the event that the infrastructure had been fitted incorrectly. Similarly, if in the event a tram extension was instructed by the Council and in opening up the road for that work, infrastructure was uncovered incorrectly fitted, then the Council would correct that poor workmanship.

324) To what extent has the utility diversion work needed to construct an extension of the line to Newhaven been completed?

I have no knowledge to answer that question.

Final account

A report by Sue Bruce, CEC Chief Executive, to CEC dated 25 September 2014 (CEC02083198_36) noted, at 3.10.5:

"...in August 2014 agreement was reached on the Infraco settlement in the sum of £427,238,356.15."

With reference to WED00000101 (the Infraco final account statement issued by Turner & Townsend) and WED00000092 (the final Turner & Townsend cost report dated 21 June 2014), ***in overview*** :

325) What were the main reasons for the changes arising under the Infraco contract since the Settlement Agreement of 2011 (shown on WED00000101 to be £9.8m under clause 80, and £4.295m under schedule 45)?

The extent of changes were recorded as part and parcel of the change register. From memory, the delay in starting on site taking us up to

October 2011 was at a cost of circa £4m. In addition, there was the cost of utilities moving from just under £3m up to circa £20m and the time cost to carry out the utilities work from the time bank.

326) How was the risk allowance used up (see WED00000092)?

I can't remember the individual risk allocations but it was a controlled meeting, with CEC and Turner and Townsend providing the risk register. The various risks were all on the risk register, a cash allocation assigned based on probability and impact. For the cost of each risk and when the particular risk occurred we actually had an identified financial allocation against each. As an overview that is how risk was dealt with.

327) Please explain in overview the 'Opportunities' shown at WED00000092_25, the 'Credits and Contributions' shown at WED00000092_27.

This was a variation on cost engineering with the contractor to encourage Turner and Townsend and CEC to consider what other opportunities existed. I think we'll also see in the papers Dr Keysberg considering this when he was asking about cost engineering and whether this would be part and parcel of an ongoing process. I said it would, but at each session it became more difficult to try and find the savings because you were actually managing to achieve and process them. This was more of an internal version of the same thing and it was to identify areas that could be seen as "nice to have", not essential to tram, and all the while endeavouring to achieve best value, for example items such as the road reconstruction depth or Turner and Townsend and CEC staff resources. What I did not want to promote was a monolithic resource running from one end to the other so every so often, with the help of CEC, I would look at the blended team and stand down people from Turner and Townsend, when I felt the project had gone beyond their input, or when I felt that CEC could take people back into Waverley Court. I promoted that to the client group to make sure that at every point in the project was running as lean as it could.

Around about 2012 I had instigated a tracker and a meeting that talked about third party involvement. I wanted to have in a single place the ability to overview all the obligations of the tram project to third parties but, as importantly, obligations of third parties to contribute or make some payment. .

328) Please explain their role in bringing the project in on the £776m budget.

They were key members of the client team.

In the Turner & Townsend Infraco cost report (WED00000092_3), the Infraco costs are split into the Off Street and On Street sections. Costs for the section between Newhaven Road and Haymarket appear in both (£82m in the off street section, and £29m in the on street section).

329) Can you explain why?

Not from memory.

In that cost report (again at page 3), the total for Infraco preliminaries is approximately £182m (£160m for the off street, and £22m for the on street).

The figure for Infraco construction preliminaries in schedule part 5 of the Infraco contract (milestones, USB00000073) appears to be £96.3m, including a £45.2m mobilisation payment (see, e.g., page 3).

330) Is our understanding correct?

I think that question would be best directed to Alan Coyle.

331) What accounts for the difference between the preliminaries figures (i.e., between those originally provided for in the Infraco contract, and those actually incurred)?

I think that question would be best answered by Gary Easton, Quantity Surveyor, from Turner & Townsend.

The costs per section appear to have changed as follows:

Section	Infraco schedule part 5 USB00000073 (page references in brackets)	T&T final cost report WED00000092_3
Newhaven Road to Haymarket	£38.3m (_7)	£112m (Off Street element: £82.8m; On Street element: £29.7m)
Haymarket corridor	£5.5m (_48)	£8.8m
Roseburn junction to Gogar	£50.1m (_51)	£84m
Depot	£12.9m (_79)	£20.4m

Gogar Edinburgh Airport	to	£11.1m (_83)	£15.4m
----------------------------	----	--------------	--------

332) Do you agree?

That information would be provided by Gary Easton and Alan Coyle

333) In overview, what accounts for the differences?

Again, those questions are best answered by Gary Easton and Alan Coyle.

The outturn cost of £776m (as reported to the Council on 25 September 2014 (CEC02083198, Appendix 1)) is precisely the budget which had been proposed to the Council in the August 2011 report (CEC01914650). Thus, the base budget of £742m and the quantified risk allowance of £34m had been spent in full.

334) Can you comment?

Page 39 of this report was the subject of exchange internally within CEC. I had built up the information on page 39 on the back of the Turner and Townsend declaration of final accounts and values and then went round the other aspects of the project to provide a total of £776m.

Within the £776m is a figure of £166,865, which had not been fully spent at the time of reporting, hence my comment "remaining within the budget of £776m".

Impact on the public

The revised governance structure proposed for the project (see appendix 2 to the report to CEC of 30 June 2011 (CEC02044271) and 3.91 of that report) included a stakeholder forum. It was intended to allow the Council, as project sponsor, together with the contractors, to manage key relationships with stakeholders directly impacted by the project, including BAA Edinburgh Airport, Henderson Global Investors (St James Centre), business groups such as Edinburgh Business Forum, the Federation of Small Businesses and the Edinburgh Chamber of Commerce, as well as representatives of local communities.

In overview:

335) How did that work in practice?

The intention of what was to be achieved was a good intention, but in my opinion looking back I didn't think, initially, it worked terribly well at all. I say that because it excluded the other stakeholders that really should be closer to projects such as tram and that was members of the public,

neighbours, as in domestic neighbours, to areas of work and small businesses and shopkeepers and the like. We did recognise, some months into the post-mediation project, that we really weren't meeting the mark and at the instigation of Sue Bruce in conjunction with a discussion with Ainslie McLaughlin, that whole stakeholder operation was enhanced. A communications officer from Transport Scotland started attending the Tuesday and Thursday 8am client meetings. We also had third party expertise from the Big Partnership. The interface with the public became far more regular, far more detailed and, at that point, I was asked to go along to those evening stakeholder meetings. I would inform people of the forthcoming programme.

336) Was it successful in addressing the concerns of those bodies?

I think it did address the points of concern. Whether the recipients would agree that it was successful is really for them but, certainly, it was a far more focussed endeavour to try and provide the most relevant and up to the minute information that would have an impact on those stakeholders and the public as it became a wider group.

Please note that in this question we are interested only in effects arising from the delay to the project, not in effects which would have been suffered anyway if the project had run on time.

337) What role (if any) did you have in dealing with the effects on the public and other stakeholders of the delays in the project?

I think my role was to constantly address and inform on the up to the minute position with regard to the revised programme and where I could see areas of trying to reduce impact, or indeed take ideas from the meeting. An improvement on programme, with the help of CAF and Infracore, brought a potential completion date of March 2015 to May 2014, avoiding a possible impact on winter trading 2014/15.

338) Can you describe ***in overview*** what those effects were?

I think it made the project team much more alert to the fact that the quality of information required to be clear and accurate in addition to strengthening the on-street team that would assist with deliveries, talking to the public, talking to the traders.

339) What steps (if any) were you involved in to address them?

The following references may assist. There is no need to deal with all of them in

your answer – you may confine yourself to dealing with those which are material to your answer to the questions above.

- Joint Project Forum minutes, 22 February 2012, CEC01942252 at 8.1 and 10.
- Compensation claim for business in York Place, and reply (rejecting the claim on the basis that compensation claims had to demonstrate an effect on the value of the land and that the loss was solely attributable to the tram works) (CEC02030419, CEC02030371)
- Construction noise and mess complaints on Grosvenor Street; no council tax rebate since property value not affected (CEC01909787)
- Early start by contractors on York Place disturbing hotel guests; trams project had caused £400,000 of lost turnover (CEC02028766; see also CEC02016102, CEC02015524)
- Charity training course disrupted by work noise on Shandwick Place (CEC02061872)
- Delayed completion of work disrupting business of the Rutland Hotel (CEC02028216)
- Disruption to Harvey Nichols, with none of their alleviation suggestions having been implemented (CEC02020132)
- *“the mood and frustration of the businesses in the West End is reaching boiling point. Most of us are near financial ruin ... and we are fed up with the meetings that give us an endless supply of bad news, no news, procrastination, false promises and total failure to engage the contractors in implementing anything that will allow us to trade adequately...”* (CEC02019787)
- Traffic being redirected through the New Town (e.g., CEC01920869) and West End (e.g., CEC01937889)
- Impact of project delay on independent Shandwick Place traders, and the inadequacy of business rates initiatives (CEC01918105). (See draft reply, CEC01918103)

I was involved in trying to create a working zone for the traders and neighbours that was compatible with the red line boundary public construction works. In that report I called it a blue line boundary. Balancing a desire for increased crossings through the works with that of working space required for the works to be able to be carried on without delay; putting out messages on behalf of the project to the contractors to exercise good site management and removal of debris and the like. I was

a participant, along with Alastair Maclean, in meeting with the rates assessor to discuss any, or if there was indeed, relief available to the traders. Paragraph 10. We strengthened the communications control meeting. The communications control meeting, apart from addressing the issues of forthcoming events that were positive, we had the contractor attend so that we could hear of potential negative impacts that the works programme would bring and so we could take that need and turn it into a statement that would inform.

Compensation claim for business in York Place, and reply (rejecting the claim on the basis that compensation claims had to demonstrate an effect on the value of the land and that the loss was solely attributable to the tram works) (**CEC02030419**, **CEC02030371**).

I was the author of Document (**CEC02030419**). That was written having had the benefit of a meeting with Alastair Maclean and the assessor to determine what the rules of the road or the process that may or may not be available. Document (**CEC02030371**) is a letter that is written on behalf of Robbie's Services and the first document was me issuing a reply on behalf of the Council to address the question that he's raised in the Sturrock Armstrong & Thomson letter.

Construction noise and mess complaints on Grosvenor Street; no council tax rebate since property value not affected (**CEC01909787**).

Not involved directly.

Early start by contractors on York Place disturbing hotel guests; trams project had caused £400,000 of lost turnover (**CEC02028766**; see also **CEC02016102**, **CEC02015524**).

In response to Lesley Hinds' email to Sue Bruce and myself, I met Mr Ellis of The Place, from recollection on at least two occasions. The site did have controlled hours and there were occasions when the contractors breached the start time. I think there were occasions where they breached the finish times. It was a matter of policing and also trying to reassure Mr Ellis that there was a protocol and procedures in place and if he was troubled again to make any incident known to me.

Two other documents referred to just for completeness were (**CEC02016102** and **CEC02015524**).

Jim Davidson had been brought in by the Council to be the lead element of the stakeholder team, and Alf Orriell would report to Jim, Jim would then report to the SMT but he would contact me on a regular basis as he has done in that email to me. Again, as part of the team he expected me to take the issue up with the contractor, which I would do in each and

every occasion.

With regard to document (CEC02015524) this is the project now going on to the street, so any lesson that we had learned when the civils work was on the street should still be with us at the time of testing and commissioning.

Charity training course disrupted by work noise on Shandwick Place (CEC02061872).

When I received that email I went to the site to find out what it was they were experiencing. It was concrete being broken up with breakers and also stihl saws. There was no other way around it. It was during working hours and it was noisy, but what I made sure of is that the compressors had suitable and appropriate sound insulation jackets on them and that was something that was checked out and done.

Delayed completion of work disrupting business of the Rutland Hotel (CEC02028216).

I went to meet both, from memory on two or three occasions. I found that when I explained to them what was being done and the programme, they were understanding, not necessarily happy, but they understood what was happening at their front door. I tried to explain to them what was needing to be done, the period of time involved and that the Council and the project team were doing their very best to get off the site and open up as quickly as possible.

Disruption to Harvey Nichols, with none of their alleviation suggestions having been implemented (CEC02020132).

My interface with Harvey Nichols was extensive. The Harvey Nichols' representative would be a regular attender at the revised stakeholders' meetings and usually the person who would ask particularly detailed questions, which I was happy to endeavour to answer. In particular, the issues raised related to traffic management and access to the front door of the shop. Again, what we did was to explain to him what we were trying to do. When there were issues such as contractors taking advantage of the fenced off areas for parking, I undertook to make sure that the misdemeanour that was happening would be stopped.

"The mood and frustration of the businesses in the West End is reaching boiling point. Most of us are near financial ruin ... and we are fed up with the meetings that give us an endless supply of bad news, no news, procrastination, false promises and total failure to engage the contractors in implementing anything that will allow us to trade adequately..." (CEC02019787).

I accompanied Councillor Hinds to a number of meetings with the personnel within Au Bar, given that the working space for the contract was very close to their front door. Sometimes it was just the public house personnel, but other times there were other neighbours there. If there was bad news it was my view that you would report to people exactly what was going to happen. It was a balancing act with being straightforward and trying to encourage them to realise that we were listening, trying to balance their needs with the project to get it over and done with and away from their premises as quickly as possible.

Traffic being redirected through the New Town (eg, **CEC01920869**) and West End (eg, **CEC01937889**).

This issue would find its way to me through the communications control meeting. The people in that area would, ordinarily, enjoy a relatively quiet environment. There was really no other way to deal with the construction work on site and still keep the traffic flowing. I think it's to the Council's credit that, where possible, the traffic model managed to keep traffic flowing throughout the various changes within the traffic management arrangements. What I did was to attend the Traffic Management Review Panel on a regular basis to make sure that if there was another solution it should be explored and, perhaps, adopted. I took into account stakeholder comments, utilities comments, Lothian Buses and an external consultant who had managed the traffic model for the city. Various scenarios were tested, however the adopted solution was the traffic management regime that was causing concern to this particular resident but there was really no viable alternative.

It's the same answer to the question in (**CEC01937889**).

Impact of project delay on independent Shandwick Place traders, and the inadequacy of business rates initiatives (**CEC01918105**). (See draft reply, **CEC01918103**).

In response to comments made, and I would be a party to those comments, at the West End construction group on 7 August there would have been a report back on meetings with the assessor and Chris Highcock is preparing the draft that captures what was said at the West End construction group. There was also an East End Group.

Rates relief

There is reference to rates relief being given to businesses disrupted by the tram project (see, e.g., Joint Project Forum, 22 February 2012, CEC01942252 at 8.1;

minutes of the Tram Briefing Meeting, 28 August 2012, CEC02015435, paragraph 5; CEC report dated 25 August 2011, CEC01914650, 3.70).

340) What arrangements were made for compensating businesses disrupted by the tram project?

This was the message that we were now transmitting to businesses. This was to inform the Joint Project Forum meeting.

The document (CEC02015435) is follow-up to meetings that Jim Davidson was having as the stakeholder manager with the assessor where he was reiterating what Alastair Maclean had previously said. He's taking it into a bit more detail so that's just a follow on.

Document (CEC01914650) I wasn't aware of any, other than the efforts to explore the rates relief that I have mentioned.

341) To what extent was this necessitated by the *delay* in the project, as opposed to disruption which would have happened even if the project had run on time?

The disruption would have occurred whether the project had been on time; the same work was required to be executed.

Third party agreements

Your draft delivery plan for 2014 (TRS00016328) noted (page 6) that a target for completion of agreements with third parties had not been met (see Appendix II for the list of agreements).

342) To what extent (if any) did this delay progress in the project?

In my opinion, it did not delay. This refers to a detailed tracker which covered all of the third party agreements, whether it be land transfer back to owners after tram works were complete. The entries on that tracker that could have caused delay would have been Scottish Water or Network Rail. I instigated a series of meetings with Network Rail with Alistair Sim in attendance. We established a good working relationship with people in Network Rail and we ensured between the respective teams that Network Rail did not impact nor, I would say, Scottish Water for reasons I've explained under an earlier answer. The tracker generally, though, was not being delivered by the date set of 31 March 2014. It did not delay the project.

343) How might any such delays have been avoided?

In my view, the third party arrangements did not cause a delay.

Surplus trams

We understand that, given the truncation of the line to York Place, a number of trams would be surplus to requirements.

344)What was your understanding of this issue?

The CAF element of the BSC contract had worked to the earlier programme 3, and, as such, given that they were manufacturing off site that work wasn't being impacted in any way by any on site issues. 27 trams was for the full line, and coming out of mediation it was apparent that the number of trams required to run the headway service that was in the business plan, would be much less than 27.

345)To what extent were you involved in the attempts to sell or lease the trams?

That initiative was led by Alistair Richards from TIE. Intermittent reports would come from Alistair Richards on his discussions with Croydon. I raised the prospect with CAF as to whether they would either buy back trams, or if they would act as an agent to sell on the trams to another service.

346) To the extent that you were involved, what attempts were made and what was the outcome?

See, e.g.:

- Paras 3.41 onwards of the CEC report dated 25 August 2011 (CEC01914650_73), which referred to an unsuccessful attempt to lease them to Transport for London for the Croydon Tramlink, the unlikelihood of there being demand for the trams from Rolling Stock Operating Companies, and assessed potential demand from other tram systems.
- **Minutes of the Joint Project Forum, 27 February 2013, CEC01891088, 9:** *“Colin Smith explained that the Project had received an offer from CAF regarding the disposal of the ten surplus trams. It was agreed that this would be passed CS to CEC’s Legal team. Any developments would be discussed with Transport Scotland.”*

This meeting was attended by CAF and in this report I’m explaining the offer received from CAF. It was agreed that it would be passed to CEC’s legal team. The next point I made is to make sure that the disposal of any trams would not be a contravention of the Scottish Government grant. Anything of that nature would have to be, on my reading of it, with the

approval of Transport Scotland.

General and conclusions

Your draft delivery plan for 2014 (TRS00016328) notes (at 11.0 and 12.0) that

- “as personnel leave confidentiality agreements should be enacted to protect the integrity of any future public inquiry”,
- “preparation of a lessons learned ledger ... should be initiated” and
- “confirmation should be given that a full library has been retained by way of a forensic file that may be used should a public inquiry be called.”

347)Can you explain the point about “protecting the integrity of any future public inquiry”?

By 2014 I had experienced the way that TIE had kept its files pre-mediation. I had experienced difficulty when asking for information that was pertinent to the work that was ongoing post-mediation. From January 2011 I had felt that very detailed records would be beneficial to the Council or to any other party who would want to examine the project. To that end, I was also keen to have the review report January 2011 to June 2012. Within the Certifiers Agreement there is an obligation to hand over a full hard copy file to the Council, I was keen that a full file library approach would run right the way through to the conclusion of the project. I had no knowledge or understanding that there would be a public inquiry, or whether it would be a public inquiry or lessons learned approach, however a full file, by way of an audit trail, would be there for anyone to scrutinise.

348)What was done in respect of that and the other issues raised in your note?

I believe I discharged the re-deployment of knowledge, with the help of others in the Council, in preparation of the project delivery plan for the suggested extension that’s being considered. To that end, up until and around the period January/February 2016, I gave input to that project based on experience of this tram project. I don’t believe confidentiality agreements were issued as people left the project, although I’m bound by a confidentiality agreement. In preparation of the lessons learned, I have prepared that report, it has been issued in draft form, it’s been discussed within the Council, where it has gone from there I cannot say.

349)What do you consider to have been the most significant factors leading the Edinburgh tram project having been over budget and over programme, and having a reduced scope?

I would say in answering that I now have the benefit of hindsight. The most significant factors appear to me to be:

1. the stage of design at the point of tender, coupled with the extent of exclusions that were noted in the tender document
2. if the design development had been further refined it would have reduced risk, it would have been able to provide a more accurate programme,
3. what we've already said about utilities knowledge which is part and parcel of that design stage.

I think if those factors had been fully appreciated, the scope, programme and cost would have been better understood.

350)Are there any other issues, not covered in this note, which you consider to have had a material bearing on the cost, scope and duration of the Edinburgh tram project?

No.


351)Are there any documents which you consider to be of importance to the inquiry which have not been supplied to you with this note?

No

352)Is there anything you wish to add?

If there was a single message for large infrastructure projects, it is that, in my opinion, at least at the initial stages, independent peer reviews by well experienced individuals outwith the client sponsor, relevant to the type and nature of project, would bring focussed thinking of previous lessons learned.

I confirm that the facts to which I attest in this witness statement, consisting of this and the preceding 104 pages, and the following appendix extending to 4 pages, are true to the best of my knowledge, information and belief.

Witness signature..... 

Date of signing..... 14th September 2017

APPENDIX – ISSUES WITH SCOTTISH WATER

Progress Report No 3 (9 November to 8 December 2011) – CEC01891191

- Executive summary: 1645 utility issues (largely associated with Scottish Water)
- 5.1: *“There are a number of legacy issues in relation to the utility diversions and abandonments carried out under the MUDFA contracts ... The vast majority of these relate to Scottish Water ...”*

Progress Report number 4 (9 December 2011 to 27 January 2012) – CEC01889907

- Executive summary: Resolution of a number of Scottish Water legacy utility works would, to be resolved, require derogations from standards by Scottish Water at short notice. *“The resolution of these items is being hampered by poor historical record keeping under MUDFA.”*
- 5.2: SOFT report 19.1.12 identified the Scottish Water legacy issues (of which there were over 750) as a threat to the project

Progress Report No 5 (28 January to 24 February 2012) – CEC01889974

- Executive summary: Infraco’s proposal to connect into existing drainage manholes rejected by Scottish Water – if unresolved this will significantly impact the on street programme. Urgent talks underway with Scottish Water. (See also 5.2 – T&T met at senior level with SW; workshop proposed; *“this issue has the potential to cause an overall delay to the overall programme”*.)
- 4.5: Top ten risks included: deterioration of relationship with Scottish Water, prolonging resolution of delay issues
- 5: Re “legacy issues”, *“there are seven key water issues that have the potential to cause significant difficulty for the project”*: further categorisable as: apparatus in DKE that cannot be diverted; apparatus without necessary separation distance from other utilities as a consequence of congested areas.

Progress report no. 6, 25 February to 27 March 2012 – CEC01942255

- Executive summary: *“A revised drainage design is required throughout the On Street section as a result of*

Infraco being unable to obtain Scottish Water's approval to their current proposals. This has resulted in a cessation of Infraco works at Haymarket and is likely to impact on the progression of both On and Off Street works. Re-design works are progressing well, however the programme and cost implications of the re-design are currently unclear."

- 6: A workshop with Scottish Water had been productive and yielded possible solutions to over 80% of the issues (but tram drainage had to be redesigned)
- T&T had prepared a briefing note setting out the history of the [SW] issue and a commentary on possible apportionment of responsibility; recognition, though, that maintaining relationships was important

Progress report no. 7, 24 March to 28 April 2012 – CEC01890161

- Executive summary: On-street drainage now redesigned to meet SW's approval. Although good progress had been made with SW legacy works, solutions were yet to be determined for some. *"The scope of legacy works is*

significantly greater than previously envisaged."

- See also 5.3.

Progress report no. 8, 29 April to 26 May 2012 – CEC01890199

- 5.3: progress with Scottish Water on legacy issues *"has not been as positive as hoped"* and the matter had been raised with CEC to discuss with SW at a senior level

Progress report no. 10, 24 June to 21 July 2012 – CEC01932286

- Offstreet dashboard (50) notes ("Key Issues") that there was a *"lack of willingness to help"* in the Scottish Water team. (Next report notes that too)

Progress report no. 11, 22 July to 18 August 2012 – CEC01951549

- Executive summary: Scottish Water legacy issues remain which cannot be addressed without significant intrusive reconstruction works. Reference to wider commercial discussions with SW

Progress report no. 12, 19 August to 15 September 2012 – CEC02017359

- Executive summary: *"Scottish Water behavioural issues continue to frustrate*

the resolution of matters on site.”

- 6.5: key water issues had potential to cause significant difficulty for the project, and agreement would only be reached when the wider commercial discussions with Scottish Water had concluded. Behaviours within SW appear to have changed and it was becoming increasingly difficult to reach agreement. Suggestion of lack of co-ordination between teams in SW. SW had also confirmed that the scope of legacy works was likely to increase significantly, with an impact on tram project cost and Infraco’s access to work areas

Progress report no. 13, 16 September to 13 October 2012 – CEC01891277

- Executive summary: T&T working with CEC to explore ways of capping and reducing the scope of SW legacy works

Progress report no. 14, 14 October to 10 November 2012 – CEC01932700

- 6.3: despite T&T and CEC efforts, *“behaviours within Scottish Water have not improved and indeed there have been instances where behaviours and attitudes*

have deteriorated”. Delays in agreeing scope (with Scottish Water) in relation to legacy works at Leith Walk and Constitution Street *“are now likely to impact on the January start date”*.

Progress report no. 18, 3 February to 2 March 2013 – CEC02024340

- Executive summary: Scottish Water interface continues to demand close attention, but criticality of issues from an Infraco delay perspective were becoming less significant. The majority of the remaining issues were legacy SW utility works. Remains a significant commercial gap between the parties
- 5.1.3: Scottish Water: SW had recently issued a forecast for their resources which was significantly higher than the reported forecast. T&T’s view included that there was a contribution due by them on costs incurred modifying their asset (under the New Roads and Street Works Act).

Progress report no. 20, 31 March to 27 April 2013 – CEC02027146

- Executive summary: Despite progress with Scottish Water senior management on closing out legacy issues,

there was a disconnect between SW's senior managers and advisers. That seriously threatened the June date for closing out issues and increases the risk of additional cost for all parties.

Progress report no. 21, 28 April to 25 May 2013 – CEC02042690

- 5.1.3: Scottish Water: inter alia, SW argued that the NRSWA should not apply due to the delay in completion

Progress report no. 27, 13 October to 9 November 2013 – CEC01983687

- Scottish Water (_6): SW had been looking for £3m to £6m in additional costs, CEC advised them there was a maximum of £700k to conclude matters. CEC expected SW to settle at that amount.
-

