

## EDINBURGH TRAM ENQUIRY

STATEMENT: Mr Vic Emery OBE

Responding to Edinburgh Tram Inquiry - Note to Witness. Issued 16<sup>th</sup> May 2017

### INTRODUCTION

1. What was your role on the Edinburgh Tram Project?

My role on the Edinburgh Tram Project was as Chair of TEL/TIE (TIE). I was appointed to support the stakeholder, the City of Edinburgh Council (CEC) in the transition of winding up TIE. Thereafter, I was a governance and performance consultant to CEC.

2. When did you first become involved?

I was appointed to the Tram Project on 3 February 2011.

3. How did you become involved?

I applied for the role of Chair TEL/TIE on 7 January 2011 through the recruitment consultants Munro.

4. What posts did you hold, and what committees/boards did you sit on? Between what dates?

I chaired the TEL/TIE Board Meetings between February 2011 and approximately July 2011. I was then appointed as a consultant to CEC up until April 2013.

5. What qualifications and experience of relevance to your work on the project did you have at the time you first became involved in it?

I am experienced company director and Non-Executive Chair/Director in the private, public and third sector with specific experience in complex capital projects, project management and governance.

6. What were your first impressions of the state of the tram project when you became involved?

The Tram Project was at a 'stalemate' with all work effectively stopped because of contractual and legal disputes.

7. What did you understand to be the main problems affecting the cost and duration of the project, and the reasons why they had arisen? What was your understanding based upon?

My understanding of the main problems with the Tram Project was the overall projected cost to the project and where liability for the cost growth lay. This manifested itself as a dispute over the interpretation of several contract clauses that would affect the outturn cost. My understanding of this came from reading various documents, the contract itself and consulting with variety of interested parties.

8. What expertise, and/or experience, did you bring to the resolution of these problems?

I have been involved in several contracts where cost growth was an issue and resultant legal actions have been instituted.

### Preparation for Mediation

Mediation took place at Mar Hall in early March 2011, at which progress was made in resolving the disputes which had affected the project.

1. To what extent, if any, were you involved in the decision to refer the dispute to mediation?

I was not involved in the decision process to refer the dispute to mediation.

2. What preparations did TIE and/or CEC undertake for the mediation?

The TIE and CEC teams produced a number of scenarios and cost projections and also reviewed the current progress of the project.

3. What part, if any, did you play in these preparations?

I attended various meetings with the CEC and TIE teams to prepare project status metrics, cost projections and contractual alternatives.

4. What individuals were influential or important in these preparations, and in what way?

The influential and important people included:

- |   |                    |                 |
|---|--------------------|-----------------|
| - | CEC CEO:           | Sue Bruce       |
| - | CEC Legal Counsel: | Alastair McLean |

- Lawyers from TEK/TIE: I cannot recall their names
- unfortunately
- Specialist Consultants: Anthony Rush and Colin Smith
- Transport Scotland Representative: Ainslie McLaughlin

5. What were the main objectives of TIE/CEC going into the mediation? (See e.g. the Project Phoenix Statement dated 24 February 2011 (**BFB00053293**)).

The main object of the mediation was a resumption of work and an agreement on the contract terms and outturn price.

6. What were your expectations, prior to the mediation, about what could be achieved?

I was sceptical that an agreement could be reached in all the areas that needed to be agreed.

7. To what extent were TIE involved? To the extent that they were not involved, or had a lesser role, why was that?

TIE were involved to the extent that they produced a significant volume of back-up data and analysis. They were also used extensively during the mediation process to analyse various discussions points and statements made by Infracore. TIE was not central to the medication process because the shareholder, CEC, had lost confidence in their credibility as a project team.

8. To what extent was there consensus in the TIE/CEC team prior to, and at, the mediation on:

- a) The reasons why the project was in difficulty;
- b) The forecast costs of the various options under consideration; and
- c) The strategy to take, and outcome to seek, at the mediation?

There was considerable consensus in the TIE/CEC team as to the reasons why the project was in difficulty and the costs of the various options under consideration.

9. What was your view on the strength or weakness of TIE's negotiating position going in to the mediation? Please explain your answer.

I believed that TIE had a very weak position going into mediation.

A report to the CEC chief executive's Internal Planning Group dated 21 January 2011 (**CEC01715625**) noted (page 8) that TIE

"were in a weak position legally and tactically ... That is likely to have a financial implication with the Infraco as the party in the stronger position faring rather better out of it that might otherwise have been the case."

10. Were you aware of these views at the time?

Whilst I have not previously seen document (**CEC01715625**), I was aware of the views of CEC.

11. Did you then, and do you now, agree with them? Please explain your answer.

CEC wanted the project to resume and therefore wanted an agreement from the mediation to continue the project albeit at a reduced scope (i.e. not all the way to Newhaven). I did agree with the decision although I felt it a great pity that the budget would not allow the project to go all the way to Newhaven.

12. What was your understanding of the reasons why the mediation took place when it did, rather than waiting until steps had been taken to improve TIE/CEC's negotiating position?

The mediation took place at this time because the project had stalled and Infraco was refusing to move forward until a settlement was reached.

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

13. What was your understanding of, and what were your views on, that proposal?

The Phoenix Proposal was tabled within days of my commencement as Chair and at the time when I was trying to catch up and understand where the whole project stood. I had no involvement in Phoenix Proposal other than a briefing when I started as Chair. However, on the face of it, the Phoenix Proposal looked more expensive.

14. What was your understanding of how it related to the earlier proposals which had been made to resolve the dispute (under the label 'Project Carlisle'):

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

- “Carlisle 2”: £405m plus €5.4m for a line between the Airport and Haymarket, with trams (11 September 2010, **TIE00667410**) (i.e., was Phoenix more expensive, but with the same scope?)

Carlisle 1 and Carlisle 2 were before my involvement in the project and Project Phoenix was, as far as I am aware, assessed on its own merits. My knowledge therefore of Carlisle 1 and 2 is limited and rudimentary.

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

Yes, Project Phoenix was more expensive than the Project Carlisle proposals.

16. If so, why had BSC’s offer become more expensive?

There is no plausible explanation in my opinion other than Infraco considered themselves to be in a more commanding position.

17. What was TIE/CEC’s attitude to that increase in cost?

The attitude was that BSC’s offer represented a negotiating position that reflected the BSC’s experiences to date with progressing the works and negotiating changes with TIE.

You had a short time previously emailed David Darcy of Bilfinger seeking clarification over whether the Project Phoenix proposal would only concern a line to Haymarket, noting TIE and CEC’s objective of an operational tram to St Andrew Square (**TIE00083983**, 23 February 2011).

18. Please explain the parties’ differing views on that issue?

Haymarket was the point at which the “off-street” work changed to “on-street” work, Infraco had found most of the difficulties in the “on-street” work therefore, my supposition is, that their proposal was attempting to avoid the costlier elements of the project which were the “on-street” elements i.e. from Haymarket to St Andrew Square.

We understand that TIE had, in the run up to the mediation, considered two main alternatives to continuing under the existing contract terms: a renegotiated deal with the BSC consortium (along the lines of the Project Phoenix proposal), and

terminating the contract with BSC and reprocurring the work with another contractor (under the label 'Project Separation').

19. Is our understanding correct?

That is a correct understanding.

20. What was your understanding of, and views on, the relative merits of these two options?

The preference expressed by the TIE representatives were for Separation however CEC and Transport Scotland were concerned with the legal and political implications of Separation and were therefore keen to pursue mediation to seek resolution.

21. What did you understand to be the likely cost of the two alternatives? What was your understanding based upon?

My understanding of the two alternatives was expressed in the calculations provided by CEC/TIE and commented upon by subject matter experts and quantity surveyor assessments.

A meeting of TIE, CEC and Transport Scotland representatives appears to have taken place on 28 February 2011, to discuss the BSC Project Phoenix proposal and the mediation (**TIE00084115**).

22. What was discussed and agreed at the meeting?

The discussions were based on the CEC/TIE negotiating strategy and approach to the mediation.

There appear to have been different views about the likely costs of the two competing options (revised BSC deal, and separation). For example, an email from Richard Jeffrey of 2 March 2011 noted that a report by GHP:

"gives figures for separation and phoenix which give a markedly different perspective to TIE's figures",

and attached a reconciliation of TIE's figures and GHP's: (**CEC02084602**, **TIE00109273**, **TIE00109274**). (**CEC02084612** is the draft report by GHP dated 25 February 2011.) GHP appear to have considered a deal based on Project Phoenix to be less expensive than separation; and TIE's view appeared to be the opposite.

23. What was your understanding of the differences between TIE's and GHP's estimates?

From memory, it was an assessment of risk and the value of the Infraco separation.

24. To what extent did you consider these estimates to be reliable? Which did you consider the more reliable? Please explain your answer.

The estimates were just that – estimates and informed the CEC/TIE team for entering into mediation. So they were reliable insofar as they covered all the elements of work but I cannot comment on the reliability of the value assigned to those elements as I did not do the calculations personally. However, you would generally assume that those who put the estimate together were experienced subject matter experts in the field of estimating.

25. In what way did these different figures influence TIE/CEC's approach to the mediation?

These figures provided a cost estimate spread against which Infraco's assertions could be reviewed and challenged.

26. Given the differing views, how did TIE/CEC decide (a) whether separation from BSC, or a revised deal with them, was the better option, and (b) what price to pay BSC under a revised deal?

CEC as the primary shareholder of TIE had an expressed desire to continue the work with the current contractors (Infraco) as it was regarded as the least risk option. The price was to be considered during the mediation and dependent upon how the discussions were progressing.

In an email dated 1 March 2011 (**TIE00685959**), Brandon Nolan of McGrigors raised concerns that TIE/CEC had been unable meaningfully to analyse Siemens' share of the Project Phoenix price proposal. He asserted that Siemens' share of the Project Phoenix proposal price was £136.5m, which he said was double their original price for the work between the airport and Haymarket (said to have been £68m). Siemens did not recognise the £68m figure.

27. What was your understanding of that matter?

My understanding was that there was no justification for the increase in Siemens' revised price.

28. To what extent did TIE/CEC gain a fuller understanding of the Siemens share of the Project Phoenix price proposal?

The fuller understanding of Siemen's share of Project Phoenix was better understood during the mediation process.

TIE appear to have had concerns about the risk allocation of the Project Phoenix proposal (see, e.g., email from Alastair Richards, 1 March 2011 (TIE00354986)).

29. What was your understanding of this matter?

Alastair Richards was highlighting that the current clauses concerning scope and changes that needed to be addressed in order for the "Fixed Price" to be meaningful.

30. How was it addressed at the mediation?

It was addressed at the mediation by seeking a 'complete' price for the work with risk taken by Infraco.

TIE appear to have considered the Project Phoenix price proposal to be unacceptably high (see, e.g., Richard Jeffrey's view (TIE00685894, 1 March 2011) that "we can see no justification for this level of price increase" (he quoted an increase from £13m/km to £35m/km, based on a price of £390m for a depot and 11km of track).

Tony Rush, in his reply (also TIE00685894), referred to "thresholds where individual proposals become acceptable to TIE". He surmised BBS would envisage "an available payment to them in excess of £400m, but only if TIE is eliminated and subsumed by CEC", and noted that "in my experience compromise has a habit of focusing on a totemic level and in this case it feels like £400m".

31. What was your understanding of these matters?

Infraco and particularly BBS, did not wish to continue with TIE and their prices were high to reflect their view of the difficulties they had experienced with TIE.

32. How did they influence the approach to the mediation?

The removal of TIE was a factor that CEC was willing to contemplate in any mediation result.

In an email dated 2 March 2011 (CEC02084603), Tony Rush made the following comments:

"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 Grigors 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. But ditching Phoenix is an irrevocable action with an uncertain end."

33. What was your understanding of, and view on, Mr Rush's comments, in particular in relation to:

a) The work being done by Cyril Sweett, and the fact Tony Rush had not seen it;

Tony Rush was a consultant to TIE and I have no idea why he was not given the Cyril Sweett outputs. Again, on 2 March, I had only been a few weeks into the role's Chair.

b) His comment that the TIE team had "no clear handle on the market cost of the Systems";

His reference was to the supposition that TIE had not benchmarked the Siemens element of the Phoenix proposal.

c) His comment that "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".

My interpretation is that he was suggesting that the cost of completing the project would be similar if BBS continued or if an alternative contractor was used. Therefore the critical factor in the overall costing would be the separation cost.

34. What information or advice did TIE/CEC have to help them assess whether or not the prices sought by Bilfinger and Siemens at the mediation were or were not good value?

TIE/CEC engaged quantity surveyors, subject matter experts and construction lawyers to assess the BBS costings.

35. How complete and robust was it?

I believe that the costings were complete and had been challenged for robustness.

BSC submitted a further extension of time claim (in addition to EoT2, i.e. INTC 536), for £16m plus €4.5m for CAF, shortly before the mediation on 4 March 2011 (e.g. TIE00357665).

36. What was your understanding of the total claims by BSC for extension of time, and related costs, which were outstanding at the start of the mediation?

My understanding was they were disproportionately high and unreasonable.

37. How were these matters dealt with at the mediation?

These matters were dealt with within the overall mediation negotiation.

38. What view was taken at the mediation of TIE's likely liability to BSC for the costs associated with project delay?

The view taken by CEC/TIE was that TIE had some liability but not as much as that expressed by BSC.

39. What was that view based upon?

That view was based on the contractual terms in the contract. The CEC/TIE view was that if a change had occurred then the work should continue until the change was resolved. The BSC view was that work should stop until an agreement had been reached on any changes, physical or contractual.

### **Mediation – Mar Hall, March 2011**

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

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

1. Were you present at the mediation? If so, what role did you play?

I was present at the mediation and I was a member of the senior negotiating team supporting the CEC who was lead negotiator.

2. What discussion, and negotiation, took place between the parties during the mediation? Was there, for example, a series of offers and counter-offers?

There was a continuous series of meetings on various sub-elements of the work. For example, civil construction (Bilfinger), trams (Siemens) and infrastructure (CAF) to understand the rationale behind the costings. There were a series of offers and counter offers made.

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

The main areas of consensus were about the overall schedule of work and priority works.

4. What issues were the subject of greatest contention at the mediation?

The issues of greater contention were the overall costs and the contract terms and conditions necessary to limit the risk of cost growth to CEC/TIE.

5. To what extent, if at all, did TIE/CEC's position change over the course of the mediation?

CEC/TIE position changed with respect to the overall price and a compromise on some of the terms and conditions hence the two documents entitled 'Mar Hall Agreed Key Points of Principle' and 'Heads of Terms'. The 'Heads of Terms' documents being where further negotiation was to take place.

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

The most obvious change to BSC's position was a reduction in their overall cost for completing the contract from the airport to St Andrew Square.

7. Were there any particularly significant developments or breakthroughs? If so, what were they?

The most significant breakthrough was an agreement on priority works being undertaken whilst the detailed contracts clauses were being re-negotiated and agreed.

8. Were there any particularly significant concessions made? If so, what were they?

Other than the overall contract price, I do not recall any other significant concessions.

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

The Heads of Terms were agreed in early April 2011, which were the weeks and months following the Mediation. I cannot recall the exact date.

10. Why was the agreement divided into two parts, the off-street works (in relation to which a price of £362.5m was agreed) and the on-street works (in relation to which a price remained to be agreed, but a target sum of £39m was proposed)?

The agreement was in two parts because BSC was more confident in their costings for the 'off-street works' than they were for the 'on-street works'. The 'on-street works' were a target sum because BSC still wanted to protect their position with regard to any problems that arose during this section of the work.

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

Project Phoenix was the base document against which the negotiations had taken place as Project Phoenix represented the BSC position. As I recall, the settlement was an improvement on the Project Phoenix offer.

12. What were your views (and those of other TIE officers) on the outcome of the mediation?

I cannot comment for the other TIE officers however my own view was and is that given the overriding desire to continue with the Tram Project, this was the best outcome that could have been achieved.

13. To what extent did the outcome reflect your expectations prior to the mediation?

The mediation took place within days of me being appointed as Chair and I therefore had no firm expectations resulting from the mediation other than a resumption of work.

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

The deal reached at mediation was the best deal that was achievable given the circumstances at the time. There were many areas where it was a less than satisfactory deal particularly in respect to Siemens costs and the amendments to the contractual terms and conditions but overall it was the best deal we could achieve under the circumstances.

15. 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?

There were external factors (i.e. political, reputational and public confidence etc) that had an overriding influence in the meditation. Such factors however could not have been avoided as they were out with the control of CEC/TIE.

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

The parties agreed that the priority works highlighted in the "Mar Hall Agreed Key Points of Principle" would commence, that CEC would secure the additional funding required to fund the revised contract and that completion of the revised contract terms and conditions would be negotiated and agreed. The timescale for the completion for the outstanding funding arrangements and contract re-negotiation was contained in the 'Heads of Terms' agreement and "Mar Hall Agreed Key Points of Principle".

A report by Colin Smith and Alan Coyle dated 27 May 2012, "Edinburgh Tram Project, Review of Progress and Management of the Project, January 2011 to June 2012" (**WED00000134**) includes (at chapter 7, from \_232) a "Financial Briefing Report", which includes a summary of the mediation (especially at 7.2 to 7.7; the appendices referred to are at \_243 onwards).

17. Do you accept that as an accurate summary of the matters it reports?

This document is not familiar to me, as I cannot recall seeing it previously. Having read it now, I can say that in large part, it appears to be an accurate summary.

18. In particular, can you comment on the following remarks:

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

There is no doubt that the utility diversions were a considerable influencing factor on the delay of the project and a large part of this work was the MUDFA utility diversions. However, the insistence by BBS to delay works in the areas of the diversions until the diversions had been entirely completed was also a hindrance.

b) that the analysis underlying TIE's preferred strategy of settling with Infracore and reprocurring the project was flawed (7.4);

I agree that TIE's assessment was a hard negotiation position and was at odds with other calculations.

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

TIE's preference was at odds with some but not all independent advisers.

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

19. What was your understanding of that price increase?

It was difficult to understand why BBS's price had increased by £38m.

20. To what was the increase attributable?

The increase was due to increased perceived risks from BBS's viewpoint to complete their work.

21. How, if at all, was that addressed at the mediation?

A number of intense discussions were held during mediation to try and understand the rationale used by BBS to justify their revised pricing.

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

22. What was your understanding of that price increase?

Siemens' price increase of 100% was implausible.

23. To what was the increase attributable?

It was claimed that by BBS that delays and increases in their risk had resulted in the increase to their costs.

24. How, if at all, was that addressed at the mediation?

There were specialist teams on both sides of the mediation to understand the rational and detail of BBS revised pricing.

**CEC02084577** is a note of Jochen Keysberg and Richard Walker's opening statements at the Mar Hall mediation.

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

25. What is your response to that?

It was not a surprise that Richard Walker made that statement. It was expected.

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

26. To what extent did you, and others on the TIE and CEC teams at the mediation, accept that view?

These views were not accepted by TIE or CEC.

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

It was the occurrence of engineering delays and utilities problems that had incurred cost increases and delays to the project.

At section 21, Mr Walker 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.

28. 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?

There is no doubt that the extensive utilities diversions were a major factor in the project.

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

The BBS interpretation of certain clauses in the contract would allow them (in their view) to claim extra time and cost which were to their advantage.

TIE's mediation statement, and its related exhibits (**CEC02084530** to **CEC02084561**), specified a number of legal arguments in support of its position.

30. To what extent were you familiar with these arguments?

To a limited extent given that I had only been appointed a few days previously.

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

The interpretation of certain contract clauses pertaining to delay, dislocation, and disruption.

32. How strong did you (and other members of the TIE/CEC team) consider the arguments to be?

Legal advice was that the arguments were weak.

33. 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?

CEC had engaged construction lawyers and specialists who provided guidance and analysis of the TIE/CEC position.

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

As far as I am aware, an investigation had been carried out.

35. TIE never tested any of its legal arguments in court. Why was that?

Because CEC had decided to go in to mediation rather than litigation. However, significant legal advice was obtained by CEC.

36. 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?

TIE was prepared to contemplate litigation but they had been unsuccessful in several legal judgments on additional work. CEC did not want litigation nor did Transport Scotland.

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

The legal disputes were all taken into consideration at the mediation to reach an overall settlement.

38. To what extent did those legal arguments serve to reduce the price which was agreed at and after the mediation?

Individually they had no effect. Mediation ended in an overall settlement taking all outstanding issues into consideration.

By the time of the mediation, the project had reached the limit of its approved funding (see, e.g., the minutes for the Tram Project Board on 13 April 2011, **TIE00897056\_9** at 3.9).

39. To what extent, if any, did this affect TIE/CEC's negotiating leverage at the mediation?

It weakened TIE/CEC's position and was a contributory reason for why BBS stopped work.

### **Adjudication Decisions**

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

40. To what extent was there discussion about the adjudication decisions at the mediation?

I cannot recall precisely however I believe that BBS used these decisions to justify their position.

41. 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?

TIE believed that these decisions would not reflect badly on litigation. CEC believed that litigation was to be avoided.

42. To what extent did that influence the outcome of the mediation?

It influenced the outcome of the mediation insofar that the specific clauses were debated during mediation and an interpretation was agreed.

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

43. What was your understanding of that matter?

I was not aware of this letter from Mr Walker.

### 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 (CEC02084511 at 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*".

44. Do you know why TIE had not in fact taken further steps towards terminating the Infraco contract?

I have no knowledge of why. This would have required the approval of CEC.

45. To what extent do you agree with the statement quoted above?

I do not agree with the statement.

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

TIE was prepared to terminate. CEC was **NOT** prepared to terminate. BSC believed that CEC would not allow TIE to terminate.

47. To what extent was there discussion of that option at the mediation?

The mediation concentrated on agreeing a resolution to enable a resumption of work.

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

The prospect of termination did not affect the price agreed at termination.

In an email to you dated 27 April 2011 (TIE00686805), Richard Jeffrey of TIE said that

“what was agreed at Mar Hall ... was a judgement made by Sue (with you and Ainslie) as to what was a reasonable price for ending the current impasse.”

49. Do you agree that it was Sue Bruce, you and Ainslie McLaughlin who were responsible for the agreement reached at Mar Hall (and in particular, the price to be paid)?

Sue Bruce, Ainslie McLaughlin, myself and the TIE/CEC negotiating team and Richard Jeffrey (who was not in the negotiating team) were responsible for the agreement reached.

50. If so, please explain as fully as you can the agreement on price, and the basis on which it was deemed to be acceptable to TIE/CEC.

BBS were asked to give a complete fixed price for completing the project from the airport to St Andrew Square and to assume responsibility for engineering and risk. This price was considered too high and using information provided by the CEC/TIE team, a counter offer was made and was subsequently accepted.

51. If not, please explain who (in your view) was responsible; and your understanding of the basis on which they decided upon the price.

N/A

### **The Off-Street Works Price**

The Heads of Terms (CEC02084685) included an agreed price of £362.5m for the Off-Street Works (broadly, the airport to Haymarket, certain enabling works and the Prioritised Works).

52. What was the basis for that figure?

The basis was an offer made by BBS and analysed by the TIE/CEC technical team.

53. How (if at all) was it broken down?

I cannot recall the break down except that there were 3 elements – BB/Siemens/CAF.

54. How was it agreed at the mediation?

It was agreed as part of an overall settlement and the least risky element of the settlement.

55. What steps did TIE/CEC take to be satisfied that it represented good value?

It was considered to be the best deal that could be achieved in the circumstances.

56. To what extent did the settlement agreed at Mar Hall (whether as part of the £362.5m price for the off-street works or otherwise) include payment to settle claims which had accrued under the Infraco contract?

I cannot recall, but I believe that settlement of claims was contained within the overall settlement price.

57. What was the approximate value at which the claims were settled?

I cannot remember that detail.

58. Is the settlement value of any such claims recorded anywhere, and if so, where?

My involvement in the Tram Project was over 4 years ago and I cannot recall where these claims are recorded.

See, e.g., two versions of a cost summary circulated in November 2012: **BFB00101644** (attached to **BFB00101642**, other attachment **BFB00101643**) and **CEC01952969** (attached to **CEC01952968** with **CEC01952970**). These suggest very high figures for settlement of claims.

59. Was any report given to CEC members giving details of the settlement value of claims under Infraco (such as those noted in the preceding paragraph)? If so, when and how? If not, why not?

I have no knowledge of this as far as I can recall.

### **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).

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

Because there were still utilities diversions that had not been completed. There were disagreements over the detailed engineering solutions and the 'turnaround' point at St Andrew Square was not yet agreed.

61. What was the basis for the £39m figure?

It was a figure put forward by BBS.

62. How was it agreed at the mediation?

It was part of an overall settlement.

63. How (if at all) was it broken down?

It was broken down after the overall settlement was agreed.

64. Did it include the cost of the Princes Street works?

As far as I can recall, yes it did.

### **Design and Trackwork for line beyond that which has been built**

65. To what extent did the price agreed at/after Mar Hall include payment for the design of, and materials to build, the section from York Place to Newhaven?

The price agreed included all of Siemens and CAF materials and the design from York Place to Newhaven.

66. Was that included in either the on or the off-street works prices?

It was included in the overall settlement.

67. If so, is that documented anywhere?

It must be, I remember seeing it but I do not recall where.

68. To what extent was the design completed for parts of the network beyond that which has been built?

As far as I am aware, the design was completed for the whole system from the airport to Newhaven.

69. How much of the material necessary to build a line beyond York Place does CEC now own?

I have no knowledge.

#### **Post-Mediation Meetings, etc.**

The minutes of the Tram Project Board on 16 March 2011 (TIE00897066\_5), at 2.1, record that you and Sue Bruce were to brief the Council Leaders about the mediation the following day.

70. What was the content of that briefing?

The CEC team prepared a briefing paper that was used to facilitate the meeting. The content was the high level aspects of the agreements reached at mediation including the priority works, which were to continue before a revised contract, and funding package was agreed upon.

(TRS00011438) is a note by Ainslie McLaughlin of Transport Scotland of a meeting on 8 April 2011 with you, Sue Bruce and Jochen Keysberg of Bilfinger. It noted that

CEC were proposing a new governance structure featuring more active involvement by TS; that TIE was to be scrapped in its present form; and that CEC would seek an early meeting with the new administration to try to secure extra funding.

71. Is that an accurate note of the meeting?

As I recall, yes it is.

72. What was your understanding of:

a) The proposed revision to the governance structure (including the increased involvement of TS) and the reasons for that;

This was to give CEC more direct control over the management of the project. The Scottish Government provided significant funds to the project through Transport Scotland, hence their concern and interest.

b) The reasons for 'scrapping' TIE; and

TIE was considered to be a problem and CEC agreed with BBS to terminate TIE and replace them with a new governance arrangement.

c) The attempt to seek extra funding from TS, and its outcome?

Extra funding was agreed from CEC however, I am not aware of any additional funding from Transport Scotland.

Immediately after the mediation, based on a suggestion by Tony Rush, you noted the need for a consultant to do a

"thorough, objective and independent assessment of the costs of termination and re-procurement", "as a fall-back position to our objective of seeking a solution to continue working with Infracore" (16 March 2011, **TIE00686267**).

Richard Jeffrey suggested this work be done by Cyril Sweett. The work appeared to be intended to feed in to a report by McGrigors (Brandon Nolan) to CEC and TIE (e.g., **TIE00690801**, **TIE00690802**, **TIE00690803** 18 May 2011).

73. What work was done, and by whom, in response to this?

As far as I am aware, this was not followed through.

74. What was its outcome and what was it used for?

N/A

75. Why was this work being done after and not prior to the Mar Hall mediation?

It was probably suggested by Tony Rush as a back-up position if the renegotiation with BBS stalled.

In an email to you dated 28 April 2011, Richard Jeffrey reported concerns about TIE's role following the mediation (**TIE00107104**). They included:

"There is a clear (and largely successful) drive to marginalise TIE ... The behaviour of BSC is entirely consistent with the demand at mediation for "the immediate removal of TIE and all its advisors". Having not achieved this by one route BSC are seeking to achieve it by another."

76. Can you comment on those observations?

I recognise these concerns from the TIE team and it was certainly the case that BBS wished to deal directly with CEC as a way forward.

#### **Other Matters relating to the Mediation**

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

Not that I can recall.

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

N/A

79. Do you consider that any documents material to your role in the mediation at Mar Hall, and the preparation for it, have not been made available to you with this note?

My involvement in this project was over four years ago, therefore I do not feel that I can confirm or deny this question.

80. If so, what are they and where are they likely to be found?

N/A

#### **Minute of Variation 4: Mobilisation Payment of £49m**

On 20 May 2011, TIE, Bilfinger, Siemens and CAF entered into Minute of Variation 4 in respect of the prioritised works (**CEC01731817**). It gave priority to certain works including the depot, the mini-test track, Haymarket Yards and the Princes Street remedial works. Clauses 6, 7 and 8 of Minute of Variation 4 provided for the payment by TIE to BBS, in instalments, of a sum totalling £49m. The report by Colin Smith entitled Report on Progress since Completion of Heads of Terms to 8 April 2011 (7 April 2011, **WED00000134** from \_6) noted, at 5.2.1 (\_19) that there had been discussion at Mar Hall on the cost of remobilising for the project and that at workshops on mobilisation costs a

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

The proposal was for payment of £49m (part of the off-street price of £362.5m) in instalments (£27m, £9m and three payments totalling £13m). In an email dated 7 April 2011 (**TIE00687649**), Richard Jeffrey had expressed concern about the £49m figure, and said the TIE team believed a

"more reasonable and supportable, but still generous number is £19m".

On 11 April 2011, Steven Bell also raised concerns about both the amount of the payments and the basis on which they were to be made (**TIE00687654**, under heading "**Payment & Certificates 1, 2 & 3**").

Richard Jeffrey expressed further concerns about the payment on 27 April 2011 (**TIE00686805**).

On 10 May 2011, Gregor Roberts (the TIE finance director) raised concerns with Richard Jeffrey about £27m having been paid under Minute of Variation 4 when he was on annual leave (**TIE00107170**).

At the Tram Project Board meeting on 11 May 2011 (**TIE00896987**), Kenneth Hogg (supported by Brian Cox and Peter Strachan) noted that the agreement to MoV4 and the payments associated with it should have been the subject of scrutiny by the TIE/TEL non executives and board members, but that that had not happened. It was acknowledged that until any changes to the existing governance arrangements were formally ratified, the TEL Board and TPB were to be afforded the opportunity to scrutinise the terms of any proposals emerging from the post-mediation engagement.

On 16 May (**TIE00687929**) Richard Jeffrey raised concerns about the second payment under MoV4 (£9m) and the lack of TPB scrutiny of MoV 4.

81. What was your understanding of these matters?

My understanding is that Colin Smith agreed these payments.

82. To what extent were you involved in decision-making about payment of this sum?

I was not involved in this decision-making.

83. What was the purpose of the £49m payment?

It was purported that this was a remobilisation payment.

84. Why were Mr Jeffrey's and Mr Roberts' concerns overridden?

CEC as the Shareholder had already changed the governance structure and was in the process of closing down TIE.

85. Why was the matter not put to the TEL, TIE or TPB boards?

Because CEC wanted to make progress and it was considered that TIE management was continuing to operate the contract in the style of pre-mediation.

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

CEC as the shareholder overruled TIE.

### **Negotiations on the Settlement Agreement**

In July 2011, there were emails about a proposed increase of £14m in Siemens' price for the on-street works (e.g., TIE00688914, TIE00688780, TIE00691220, TIE00688885 (point 6)).

87. What was your understanding of this issue?

My understanding of the issues were expressed in Document (TIE00688885).

88. How was it resolved?

It was resolved, I believe, by including the revised Siemens price in the commercial settlement agreement.

A report by Faithful & Gould dated 19 August 2011 (**CEC02083979**) 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).

89. Can you comment on this?

I believe this to be an honest assessment by Faithful & Gould.

90. Do you agree with these observations?

Yes, I do agree with the observations.

91. What, if anything, was done in response?

I am not aware that anything was done by CEC to address the issues raised.

A note circulated by Alastair Maclean on 20 August 2011 on the main points outstanding on the draft settlement agreement noted “two critical areas of risk”, which it described as “the same issues which [had] caused significant delay and cost increases to the project from the outset” – the incomplete state of the design and additional delays and work resulting from utilities conflicts in the on-street section (**TIE00689424**, **TIE00689425**, paragraph 1.1). The note referred to over 500 remaining utility conflicts.

92. Do you agree that these matters remained critical areas of risk at that stage, and that they had caused significant delay and cost increase from the outset of the project?

Yes, I do.

93. What comment do you have on the fact these matters remained the critical risks, more than 3 years after the infrastructure contract had been signed?

Two points in response: (1) The “ownership” of the decision was a disputed element and therefore liability was a risk and (2) Utilities diversions would be a risk until project completion.

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**).)

94. Why had it not been possible to conclude negotiations by then?

As I recall there were two primary reasons: (1) There were caveats included in the earlier draft, particularly relating to CAF and (2) CEC was not in a position to move forward.

The memorandum noted (Schedule 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).
95. What was the basis for the Target On-Street Works Price quoted in this agreement?

As I recall, this was based on the BBS estimate but was within the overall mediation settlement figure.

96. What was your view, and what were the views of others, about it?

Based on advice from TIE, CEC, subject matter experts, the view was that prices were excessive.

97. What was done in response?

These figures were used in the MOU dated 24 August 2011.

98. What was the purpose of the proposed termination payments?

The purpose of these termination payments were BBS's demands in the event that TIE/CEC were not able to secure funding/conditions to move forward with BBS.

99. On what basis had they been calculated?

I do not know how they were calculated.

100. What was your view, and what were the views of others, about them?

My views and that of others was that these numbers were excessive and designed to encourage CEC to proceed to complete the project.

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

As far as I am aware, they were taken forward into the MOU.

### **Revised Budget**

A new budget for the project was fixed at £776m (see reports to Council: 25 August 2011, **TRS00011725**; and 2 September 2011, **CEC01891495**; minutes, **CEC02083194** and **CEC02083154**).

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

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

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

From memory, I was not involved in the instruction and/or preparation of these reports.

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

N/A

104. Do you have any comment on the reports?

Within the parameters of the mandates given to the consultants/lawyers/contractors, they are sound reports.

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

I think they are a good set of reference documents to facilitate a CEC commercial judgment decision on the future course of action.

Paragraph 3.20 of the report to Council dated 25 August 2011 (**TRS00011725**) 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.

106. Can you explain this in more detail?

I have no recollection of this.

### **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\_1**) 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).

The Council agreed to pursue the option to build the line to St Andrew Square/York Place as set out in the report of 30 June 2011 and to the funding options set out in the report of 25 August 2011 (minutes, **CEC02083154\_3**).

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

- 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).

107. To what extent were you involved in, or aware of, these events?

I was not involved but I was aware that Sue Bruce was presenting to the Council.

108. What was discussed at the meeting of 29 August?

I have no record or recollection of that meeting.

109. What information did CEC have about the extent of the likely cost implications described in the report of 2 September?

The costing implications would have been well known to CEC from TIE information, earned value data from progress reports and from consultant and legal expert advice.

110. What information, if any, was given to Councillors about it?

I have no knowledge of this however I assume that they had a copy of the report and costed options.

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

I have no data to be able to address this question.

112. What was your understanding of the effect of the changes specified in clauses 3.2 and 3.3?

To the best of my knowledge, although I am not certain, is that the effect of these changes was a result of further negotiation with BBS and risk contingencies had been converted into costs thereby reducing the risk contingency and increasing the price.

In an email to you on 3 September 2011 (**TIE00691592**), Steven Bell referred to MoU 2 as an "interesting 'blank cheque' re extra time and costs".

113. What did you understand him to be referring to?

Steven Bell considered the settlement agreement to be generous and forgiving to BBS and did not support the agreement reached at mediation. Steven's email was retrospective.

114. What, if anything, was done to address his point?

Steven's position was well known to CEC, however it was contrary to CEC's commercial position and therefore, given that it was retrospective, was not acted upon.

### **Settlement Agreement, 15 September 2011**

Negotiations continued leading to the signing of a settlement agreement between CEC, TIE and BSC on 15 September 2011 (**BFB00005464**).

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

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

To a very limited extent.

116. 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?

Other than the documents referred to in this document pack, I am not aware of any further valuations.

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

I had no role at this point in relation to document (**BFB00005464**).

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

I am not aware of this detail.

119. Are those matters documented anywhere?

They would only be in the archived TIE and CEC documents. I have no documents on the Tram Project.

### **Negotiation of On-Street Price**

The Target Price for the on-street works was, in the end, £47.38m (see Settlement Agreement, Appendix A to Schedule 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.

120. 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 have no information to enable me to clarify or explain this target sum.

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

My view was guided by the references quoted on page 41 i.e. that BBS were in a strong position and the price was inflated.

122. What steps did TIE/CEC take to ensure that the price represented the best value available?

I am not confident that the price represented best value, however, the settlement was on a commercial basis and offered a way forward to complete the project.

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

- The target price of £39m stated in the post-Mar Hall Heads of Terms (**BFB00053262**).
- The figure of £22.5m stated in the Mar Hall Budget Appraisal which (appears to have) formed part of the confidential appendix to the June 2011 report to CEC (**CEC02085608**)
- The figure of £52.6m quoted in Schedule 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 on-street 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)**, a draft email by you, 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 approximately £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

## Governance

1. Please explain the project governance arrangements that were in place when you joined the project.

The governance arrangements were a Board of Directors, essentially made up of cross-party Councillors, CEC Executives, Non-Executive Directors and Executives from Lothian Buses. There were several Board Meetings, Project Progress Meetings and different subject matter meetings. From what I can recall when I first joined, there was generally the standard governance arrangements you would expect to see within a project but governance was not as strictly adhered to as, in my opinion, it should be.

2. What was your opinion of them? Were there aspects that required improvement, and, if so, why?

There were too many meetings and Board Members were, with the exception of the Non-Executive Directors, were inappropriate and political to the point where decisions were difficult to reach and too much detail was being discussed.

See, e.g., a draft paper prepared for you by Alan Coyle and others, dated 11 March 2011, entitled "Existing Governance Arrangements and Future Options" (TIE00787344, cover email TIE00787343; NB it is not clear whether this paper was given to you.)

I cannot recall seeing the paper prepared by Alan Coyle.

3. In your view, to what extent (if any) had the governance arrangements contributed to the problems affecting the tram project prior to mediation? Please explain your answer.

I believe governance arrangements did contribute to the problems affecting the tram project but it was not a root cause. During my very short tenure, the Board was frustrated by the cessation of work due to contractual and legal impasses with BBS.

4. Are there particular challenges to good project governance in a project such as the Edinburgh tram project?

There are no particular challenges to good governance in projects such as the Edinburgh Tram Project except that the tram project was implemented in a highly political environment.

5. If so, please explain them and how they might successfully be addressed.

The political environment and representation on the Board was an impediment to the governance of the project. The solution was to insulate the project from political influence.

Reports to CEC in the summer of 2011 noted proposals to improve the governance of the project – see, e.g.:

- June 2011 report, 3.81 to 3.99, **CEC01914650\_41**, and Appendix 2 (**CEC01914650\_51**);
    - Decision: to instruct the Director of City Development to report in the autumn on revised governance arrangements (minutes, **CEC02083232\_24**);
  - August 2011 report, 3.45 to 3.65, (**CEC01914650\_74**), and appendices 1 and 2 (\_85 to \_87);
    - Decision: to agree to the revised governance arrangements (minutes, **CEC02083194\_4**)
6. What was your understanding of the proposed changes to governance and the reasons they were being made?

The proposed governance arrangements were designed by CEC to replace TIE. This was to ensure involvement of the principals in the project, separation of political parts from the direct governance of the project and a more agile and speedy decision-making arrangements.

7. To what extent did you agree with the changes being proposed?

Given that TIE was about to be disbanded and closed down, these arrangements seemed a sensible arrangement.

8. Which parts of the changes did you consider to be particularly important? Please explain your answer.

Involvement of the senior principles of BBS, separation of politics from direct governance and a speedier decision making process.

A paper to CEC Audit Committee dated 26 January 2012 (TRS00019622) set out the new project governance arrangements in detail (see in particular paragraphs 3.2.3 to 3.2.9, and the governance structures set out at Appendix 1).

9. Please explain how these revised arrangements worked in practice.

Meetings were convened as shown in Clause 3.2.3 and the Independent Certifier was authorized by CEC to progress the contract by making commercial evaluations on the value of payments claimed by BBS and on any issues raised by BBS as a result of their interpretation of the revised contractual arrangements.

10. Please explain your role in them.

I was appointed as a consultant to CEC and advised CEC on project progress, project governance and resolution of any schedule issues. I was also Vice-Chair of the Joint Project Forum and Principals Forum and the Project Delivery Group. I also attended the Trams Briefing Meetings that were held twice weekly.

11. Please explain, in particular, the roles of:

a) Turner & Townsend?

Turner & Townsend assumed the role of Project Manager for the tram project in replacement of TIE.

b) The Tram Project Manager?

The Tram Project Manager (Turner & Townsend) managed all of the project aspects i.e. schedule adherence, costs and project quality etc.

c) The Senior Responsible Officer?

The SRO was a CEC person who had accountability within CEC for the delivery of the project and accountability for the project.

d) The Independent Certifier?

The Independent Certifier reported to the CEO of CEC, the Project Delivery Group and the Principals Forum on the status of the project and, in particular, the certification of payments and/or any changes in the project work scope.

e) The CEC Tram Briefing Meeting, the Project Delivery Group, the Joint Project Forum and the Principals Forum?

These were meetings to ensure transparency of progress and communication across all stakeholders on the status of the project and any issues that may have arisen.

f) The Audit Committee?

This was a CEO internal Audit Group to ensure value for money for CEC.

g) The All Party Oversight Group

The All Party Group consisted of all CEC political parties. CEC Executives gave regular briefings to this Group.

h) Transport Scotland?

Transport Scotland represented the Scottish Government who was a primary funder for the project.

12. What was the effect on the project of the revised arrangements?

The project resumed work and work continued successfully with problems being resolved progressively through the various meetings with advice from the Independent Certifier.

13. What was good, and what was bad, about the new governance arrangements?

The governance arrangements were successful in the speedy resolution of issues that may have caused cost/scheduled challenges. The negative

aspects were that the arrangements disempowered the project delivery teams.

14. To what extent would these arrangements be suitable for other projects?

To a large extent they could work for other projects however the heavy engagement of top management would disempower any project management teams of future projects.

### **Winding-down of TIE**

15. Why was TIE removed from its role in the project?

TIE was removed from its role because CEC wished to have more direct control and BBS considered TIE to be a continuing risk to the project.

16. What was the approximate cost of winding TIE down? (See, e.g., the TEL Board papers dealing with voluntary redundancy):

- TEL Board paper on voluntary redundancy, 25 July 2011, (**TIE00110161**).
- TEL Board meeting, 25 July 2011, (**CEC01939142**).
- TEL Board meeting, 27 September 2011, (**CEC01939144**).

I have no record of the costs of winding down TIE. These costings are contained in the TIE CEO archives.

### **● Operation of the Project under the Settlement Agreement**

1. 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?

The project progressed well after mediation. BBS were responsible for the design and ensured it was delivered to meet the Project Schedule. The approvals and consents were progressed through the Independent Certifier and raised to the Project Delivery Group in the audit of any issues.

b) Change: the extent of it, the reasons for it, the contractual change procedure, and its impact on time and cost?

There was a risk contingency held in the project budget and this was used to address changes.

c) Utility conflicts: their existence, the parties' reaction to them, and their impact on time and cost?

Utility conflicts continued throughout the post mediation period. CEC's reaction was to resolve them as quickly as possible. The reaction from BBS was to behave exactly as they had done pre-mediation. There was a cost associated with these, however to the best of my knowledge there was no schedule impact.

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?

Differences and disagreements were largely addressed immediately through the Independent Certifier.

2. To the extent that the project ran well after the mediation, to what do you attribute that?

The mediation settlement largely removed the sources of contention within the project and BBS assumed the responsibility within their revised cost, or risk, to the project. Also the project culture was more cooperative post-mediation and the Independent Certifier fostered this.

3. Where there any particular challenges in that period, or increases in time and cost, which ought to have been avoided? If so, please identify them, and how they might have been avoided?

Maintaining relationships was a challenge and maintaining the costs was also a challenge. My own view, as I recall, was that the project could have been completed earlier.

## General

1. What do you consider to have been the most significant factors leading to the Edinburgh tram project being over budget and over programme, and having a reduced scope?

The project was not set up properly from the beginning. The contract was biased towards Infracore, the engineering and design was incomplete and the project structure was flawed. The allocation of risk was inappropriate, probably due to a lack of pre-contract surveying and TIE/CEC were too hasty to conclude a contract without efficient competition. The physical delays were mainly caused by utilities diversions, disputes over changes/additions and delays caused by late engineering.

2. 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 project?

Not to my knowledge.

3. If so, please explain them as precisely as you can.

Not to my knowledge.

4. Are there any other matters which, in your view, would help future projects to avoid the difficulties encountered by the Edinburgh tram project?

Pre-contract evaluation and estimate of costs/schedule. More attention needs to be given to healthy competition, project definition, the project framework and construct, properly defined requirements, agreement on how changes are to be managed, robust and transparent risk management, correct project behaviours, robust performance management and earned value.

Is there anything you wish to add?

No.

I confirm that the facts to which I attest in these answers, consisting of this and the preceding 42 pages are within my direct knowledge and are true. Where they are based on information provided to me by others, I confirm that they are true to the best of my knowledge, information and belief.

Witness signature: 

Date of signing: June 30, 2017

