

**The Edinburgh Tram Inquiry
Interview with David Gough**

PREFACE

I was employed by Bilfinger Berger UK Limited on the Edinburgh Tram Project initially as Project Quantity Surveyor from October 2007 until July 2010 and thereafter as Commercial Manager until May 2012.

The Edinburgh Tram Inquiry team wrote to me on the 27 January 2016 asking to take a formal statement from me between the 1 March and the 15 April 2016.

I responded on the 15 February 2016 confirming my availability.

Having heard nothing in the meantime, on the 14 April 2016 the Inquiry Team then asked for my availability in either June or July 2016. An appointment on the 19 and 20 July 2016 was agreed for the purposes of a statement being taken from me by a member of the Inquiry Team.

The statement taker was subsequently advised as being [REDACTED]. The statement taker clearly had no understanding of either the Project or construction contracts.

In an email dated 7 June 2016 the Inquiry Team sent me a document which contained 'Areas for Discussion' and uploaded a number of files to their Document Management System for me to access

I attended the Inquiry Team on the 19 July 2016. I was not required on the 20 July 2016.

I subsequently received a draft Statement from the Inquiry Team on the 29 September 2016 together with some supplemental questions.

My concern with the draft statement issued by the Inquiry Team is that it does not accurately represent the position I stated at the meeting on the 19 July 2016 to the extent that the questions raised in the document sent on the 7 June 2016 have been presented to appear like statements I made on the 19 July 2016. This is wholly unacceptable and has involved me in a significant amount of time redrafting the interview statement.

I have also, in this document, provided my response to the supplemental questions issued on the 29 September 2016.

[REDACTED]

15/11/12

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1: INTRODUCTION

1.1 What were your duties and responsibilities as BBUKs Commercial Manager on the Edinburgh Tram Project?

A: I was responsible for the commercial and financial matters on the Project.

1.2 What were your duties and responsibilities as BBUKs Project Quantity Surveyor on the Edinburgh Tram Project?

A: There were about 7 Section Quantity Surveyors over whom I had a management role and they performed the same role as me within their respective sections with regards to commercial and financial matters.

1.3 With whom (companies, organisations and individuals) did you generally work on the project?

A: I worked with most of the bodies involved in the project to a certain degree.

1.4 To what extent, if at all, did you and other BBS employees working on the Edinburgh tram project, have experience of working on other tram construction projects?

A: I had no previous experience of tram projects prior to working on the Edinburgh Tram Project. I cannot comment on the experience of others.

2.0 We understand there were 'Section Quantity Surveyors' and you were the 'Project Quantity Surveyor'. Please can you explain the respective roles and responsibilities they and you had and whether you retained the management / supervision function over them.

A: See response to 1.2

3.0 What is your understanding of the relationship between BBUK and BB (Head Office Germany) in relation to the Edinburgh Tram project?

A: I do not have a view on the relationship between BBUK and BB. I reported to Martin Foerder and any meetings on site were generally attended by Richard Walker from the UK Head Office. I have never been to the Head Office in Germany and had no direct involvement with Head Office.

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2: THE PRICING PROVISIONS IN INFRACO

2.1 You started your involvement with this Project in February 2007. What role (if any) did you have in the negotiation and drafting of the Infrastructure Contract CEC00036952 (Infraco)?

A: My involvement started in October 2007. I had no involvement in negotiations or drafting of the Infraco contract.

2.2 In particular what role (if any) did you have with regard to Schedule 4 of the INFRACO USB00000032?

A: None

2.3 To what extent, and why, were you familiar with the terms of schedule 4 during your time on the tram project?

A: I was very familiar with it because it contained the pricing assumptions that the whole contract price was based on.

2.4 To the extent that you were called upon to apply the terms of schedule 4,

a) what did you understand by the statement in clause 3.1 that "The Construction Works Price [£238.6m] is a lump sum, fixed and firm price for all elements of work required as specified in the Employer's Requirements ... and the Infraco Proposals ... and is not subject to variation except in accordance with the provisions of this Agreement"?

A: I understood this statement to mean exactly what it states.

b) what did you (and BBS generally) take to be the purpose of the Pricing Assumptions and the Notified Departure mechanism (clause 3.2.1 and 3.4)?

A: To be exactly what they say.

c) Can you explain what you (and BBS generally) took Pricing Assumption 1 to mean, and to require, during the tram project?

A: I took Pricing Assumption 1 to mean exactly what it says. It says it will not change and it did. In other words, the Price is 'fixed and firm' assuming that a number of events will not occur. If they do occur, then this is a Notified Departure entitling Infraco to time and money. I will paraphrase the following, document reference (USB00000032), section 3.4 (1):

1.1 "The Design...will not...in terms of design principle, shape, form and/or specification be amended..."

1.2 "be amended from the scope shown on the Base Date Design Information..."

1.3 "be amended from the drawings forming the Base Date Design Information and Infraco Proposals..."

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d) In particular, can you explain what you (and BBS generally) took to be the meaning of the phrase “amendments arising from the normal development and completion of designs”, having regard to the explanation in the clause that “normal development and completion of designs means the evolution of design through the stages of preliminary to construction stage and excludes changes of design principle, shape and form and outline specification.”

A: I took the meaning of the phrase to be exactly what it says “amendments arising from the normal development and completion of designs”. This is clarified by the last paragraph in section 1.3 on page 6, “For the avoidance of doubt normal development and completion of designs means the evolution of design through the stages of preliminary to construction stage and excludes changes of design principle, shape and form and outline specification.”

e) The phrase “Base Date Design Information” is defined in Schedule 4 of Infraco as “the design information drawings issued to Infraco up to and including 25 November 2007 and listed in Appendix H...”. Appendix H, however, does not list any drawings and simply states “All of the Drawings available to Infraco up to and including 25 November 2007.” What did you (and BBS generally) understand to form part of the BDDI? Were these drawings readily identified and located when required? Was there any difficulty in identifying what was included?

A: There was an adjudication concerning what was considered to be the Base Date Design Information (BDDI). The outcome of the adjudication was in our favour. The drawings were readily identifiable and able to be located. We had no difficulty in identifying what was included.

f) Which (if any) of the other Pricing Assumptions listed in clause 3.4 were in your view ultimately had a significant impact on the overall cost, timescale and scope of the tram project?

A: Pricing Assumptions numbered 11, 12, 13, 17, 18, 19, 21 and 24.

2.5 To what extent, if at all, were you familiar with the “Notified Departure” mechanism under the Infraco contract (see especially clause 3.5)?

a) How did that mechanism function in practice?

A: I was very familiar with the Notified Departure mechanism under the Infraco contract. The Notified Departure mechanism in practice was a bit strained, due to the staggering volume of change and it was difficult to manage that volume. The Notified Departure mechanism worked but it was a difficult mechanism to operate in practice, because Tie refused to accept the correct interpretation of the contract and the sheer volume of change was staggering.

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b) Did it function well, or badly, and what were the reasons for that?

A: See response to a)

c) Clause 3.5 provides for Tie to bear any additional loss and expense incurred by Infraco as a consequence of delay between the notification of a notified departure, and the actual date tie issued a Tie change order. To what extent did such delays arise, and why? What was the extent of the loss and expense incurred by Infraco as a consequence of that? To what extent did Tie in fact pay Infraco for that?

A: There were so many delays on the project; although I would say that the critical delay was the fact that the utilities had not been moved prior to us commencing work. The volume of change and processing changes all took time but I don't think caused a critical delay. Tie did not understand that to price a change, the designer may have to design the change before pricing and that could lead to a delay. I have no idea of the extent of loss and expense incurred by Infraco as a consequence of clause 3.5. I do not know to what extent Tie paid Infraco for that.

2.6 To the extent that you were aware of the basis for the calculation of the Construction Works Price (appendix A to schedule 4 in Infraco), can you explain it (especially the deductions for value engineering and the additions for provisional sums)?

A: I was not involved in the calculation of the Construction Works Price I cannot explain the deductions for value engineering or the additions for provisional sums.

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3: THE REASON FOR COST INCREASE, DELAY AND CURTAILMENT OF SCOPE

3.1 In general what in your view, and in overview, were the reasons why the Project :

i) Was delayed;

A: In my view, the design was not complete, the services had not been moved.

ii) Was more expensive;

A: See response to i).

iii) Was curtailed in scope?

A: BSC did not curtail the scope of the project so I could not comment on that.

3.2 Of the reasons you set out, can you explain in more detail those of which you had direct experience?

A: The reasons are self-explanatory.

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4: THE OPERATION OF THE CHANGE MECHANISM (SCHED 4 CAUSE 80)

4.1 The Infraco Contract CEC00036952 and in particular Clause 80 at pg 182 sets out the procedure for handling Tie changes to the Infraco contract. Can you please explain:

a) In overview, how did these procedures operate in practice?

A: I understand the clause as I would read it. Tie changes would in practice operate as it states in the clause.

b) What was your role in their operation (e.g., you appear to have been involved in sending and agreeing estimates for changes see CEC00590421)?

A: The email clarifies the process for agreeing estimates, I had a management role to allow this to happen.

c) What proportion (in number and value) of Tie changes to the contract derived from Notified Departures under schedule 4? Which of the pricing assumptions in schedule 4 were most often departed from, giving rise to such notified departures (please identify all those which gave rise to significant impacts on the project, whether in terms of cost or delay)?

A: This question is impossible to answer. There were thousands of changes.

d) To what extent did difficulties arise in the operation of the change mechanism? What were those difficulties, and why did they arise?

A: There were no difficulties that arose in particular beyond what I said above - the sheer volume and the time it would take to submit Estimates if redesign was required etc. The biggest problem was that Tie were fundamentally at odds with us over the contract, this created difficulties. Even after adjudication Tie ignored the principles of the outcomes where we could have moved forward.

e) Were there any particular difficulties which arose in the particular context of Notified Departures? If so, what were they and why did they arise?

A: See response to d)

f) Clauses 80.2 and 80.3 make provision for time limits for processing changes. To what extent were these time limits met? To the extent that they were not, what were the reasons for that? Did BSC face difficulty in producing Estimates on time, and if so, why?

A: BSC at times faced difficulty in producing estimates on time for the same reasons that I have already set out discussing clause 80 earlier.

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g) Whilst the foregoing questions concern the generality of the change procedure, can you cite particular examples in support of your answers?

A: I am not able to cite any other particular examples in support of my answers other than ones I have already given.

h) What role did the change procedures under the Infraco contract have on any delays occasioned on the Project?

A: I do not think the change procedure was delaying the project. Moving the services was the critical delay in the project.

4.2 (No question)

4.3 Insofar as the operation of the change process itself had a significant impact on the duration/scope / cost of the Project, what was it and why did it happen?

A: I do not believe that the operation of the change process itself had a significant impact on either the duration/scope/cost of the Project.

(A) We understand that, in respect of certain disputed changes, BSC refused to start work until agreement was reached and that this itself was a cause of significant delay (see e.g., TIE00088884). We also understand that BSC relied upon clause 80.13 as prohibiting them from starting work in such circumstances.

a) Is our understanding correct?

A: With reference to clause 80.13, the reason why Infraco took this position is that this is exactly what the contract says: "Subject to Clause 80.15, for the avoidance of doubt, the Infraco shall not commence work in respect of a Tie Change until instructed through receipt of a Tie Change Order unless otherwise directed by Tie." This was an issue which arose mainly in relation to Notified Departures from the Pricing Assumptions in schedule 4. As I have already said, the process of operating the change mechanism was not a critical delay. The dispute about the meaning of Clause 80.13 went on for some time. Despite the express wording of Clause 80.13, we had been doing a lot of work on a goodwill basis, before a Tie change had been issued. The Murrayfield Underpass adjudication (before Lord Dervaird), found that we were correct on our interpretation of this clause and that Tie were wrong. However, Tie continued to refuse to accept the outcome of that adjudication. As a result of this, in late September 2010, Infraco took the decision to stop work which had previously been carried out on a goodwill basis.

b) Can you explain, by reference to the contract provisions, the basis on which BSC took the position it did?

A: See response to a)

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c) Was this an issue which arose solely in relation to Notified Departures from the Pricing Assumptions in schedule 4, or did it apply more generally to other types of change?

A: See response to a)

d) To what extent was this particular issue a cause of delay and/or cost increase?

A: See response to a)

4.4 We understand there were approximately 738 INTC's (Infraco Notices of Tie Change). CEC00590422 is a table of INTCs as at 12 March 2010, listing 618 changes and setting out certain information in relation to their status. TIE00656158 shows similar information in relation to INTCs concerning section 6, and subdivides them according to the nature of the dispute between the parties (e.g., separately listing those which Tie accepted were a change but were subject to a disagreement on value, and those which Tie disputed were changes on the basis that they were normal development and completion of the designs). Other examples of such information include BFB00055817 and BFB00055818.

1) Please explain, as fully as you can, what records BSC kept in relation to changes under the Infraco contract, and how they were organised.

A: Every month we submitted to Tie a change register as part of the monthly report. It was the most up to date register of the change process. The documents referred to earlier were part of Tie's internal change register and were not up to date. The document is headed INTC Register, document reference (BFB00055818), and is between Bilfinger and a subcontractor and not between Tie and Bilfinger, so it is not the change register.

2) Are there records available to BSC which identify and classify all of the changes under the Infraco contract, their impact on time and cost and the nature of any dispute in relation to them?

A: The monthly change register. We produced a couple of drawings near the time of the mediation time at Mar Hall, which shows certain types, or instances, of change which had a significant impact on the duration/cost/scope of the project.

3) Is it possible, in overview, to characterise certain types, or instances, of change which had a significant impact on the duration/cost/scope of the Project?

A: See response to 2)

4) If so, what were they? Which had the most significant impact?

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A: I do not know what they were or which had the most significant impact.

5) Do BSC retain records which group the changes according to their impact on time and cost (or would allow them to be so grouped)?

A: As noted previously by submitting a monthly change register BSC retained records which grouped the changes according to their impact on time and cost.

4.5 As distinct from the duration/scope/cost implications of the changes in and of themselves, to what extent was there any significant impact on duration/cost/scope of the Project as a result of:

- a) the number and/or complexity of the changes, or
- b) dispute about the operation of the change mechanism, or
- c) the parties' reactions to those matters?

A: There was a large volume though of changes and Tie refused to adopt the principles from adjudication, so we did not get anywhere. I have explained previously about the dispute about the operation of the change mechanism and how Tie did not implement the outcomes of the adjudications.

4.6 To what extent did changes arise for each of the following underlying reasons:

1) Issues with Utilities (see, e.g., Pricing Assumption 24);

A: There were hundreds of changes associated with Utilities.

2) Changes required in response to observations / comments by approval bodies (such as CEC, particularly in relation to prior approvals and technical approvals); (e.g., BFB00058349 is a letter from Tie to CEC dated 23/7/2008 relating to changes instructed at Shandwick Place to reduce visual impact to the listed Gladstone statue; and other changes to meet requirements of Lothian & Borders Police)

A: I was not involved in changes required in response to observations or comments by approval bodies such as CEC. This was the design stage and I imagine there were a lot of changes.

3) The requirements or demands of third parties whose interests were affected by the Project (e.g. Forth Ports, Statutory Utility companies, BAA (Edinburgh Airport), Scottish Rugby Union, Network Rail etc.)

A: I was not involved in discussions with the third parties as noted above.

4) Changes instructed by the promoters of the scheme for reasons of design preference, rather than technical necessity

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A: I was not involved in changes that were instructed by the promoters of the scheme.

5) Design development, in the sense of completing the design from that which appeared in the Base Date Design Information;

A: There were a lot of changes of this type.

6) Any other factors (it would be helpful if you could identify them)?

A: I can't think of any that haven't already been mentioned.

7) BFB00095663 Infraco briefing notes prepared for Mediation re Cessation of Works at Section 2A (Haymarket/Haymarket Yards) to Section 7 (Airport).

A: I have no comment to make on the briefing notes prepared for Mediation re Cessation of Works at Section 2A to Section 7, document reference (BFB00095663).

4.7 Compared to your experience on other projects, to what extent were the changes in the Edinburgh tram project out of the ordinary in respect of:

- a) number,
- b) nature and scope, and
- c) impact on the project overall?

A: Compared to my experience on other non-tram projects, the changes in the Edinburgh Tram Project were, in my opinion, out of the ordinary in respect of number, nature, scope and impact on the project overall. This was like going back 20 years in terms of Construction Contracts. However, I understand that other tram projects such as Croydon, Nottingham and Dublin had similar issues.

4.8 Can you give a view on the extent to which the extra cost and time associated with these Notified Departures and changes might have been avoided if the design had been complete, all consents / approvals obtained and utilities diversions complete prior to the commencement of the infrastructure contract?

A: That would have made a major difference. The other thing which would have made a major difference was that if Tie had acknowledged the adjudication outcomes, the job could have been finished much earlier.

4.9 What other issues (if any) had a significant impact on duration/cost/scope of the Project?

A: The contract document itself, which I believe is a procurement issue. The Infraco Contract protected Infraco from the main delaying issues that occurred, such as utilities.

Tie's refusal to accept the outcome of the adjudications delayed the contract.

Tie's management style – they would not properly engage with BSC.

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5: THE PRINCES STREET SUPPLEMENTAL AGREEMENT (PSSA) (MARCH – MAY 2009)

5.1 Can you explain your knowledge of the circumstances leading to the Princes St Supplemental agreement (PSSA)?

A: I cannot recall the exact circumstances leading to the Princes Street Supplemental Agreement, PSSA, signed on 29th May 2009, document reference (CEC00145837). However, I believe the desire by Tie was to get the work done post-festival and prior to Christmas/Hogmanay embargoes. I think Tie realised clause 80 would not work so someone must have come up with a demonstrable cost solution, which was the PSSA.

5.2 Why was it entered into?

A: The PSSA was entered into to get the works moving on Princes St and avoid clause 80.

5.3 What role, if any, did you have in relation to it?

A: I had no specific role in relation to the PSSA. I did do some work in the background on the schedule of rates.

5.4 Please can you explain the pricing provisions of the PSSA and, in particular, how they differed from those under the Infraco contract?

A: The pricing provisions of the PSSA differed from those under the Infraco contract, in that BSC would be paid on a demonstrable cost basis, unlike the contract; essentially it was cost plus pricing.

5.5 How did the PSSA work in practice? Did it achieve its objectives?

A: In practice the PSSA worked well, in part. The scope of works envisaged under the PSSA was only small. There is a sketch in this document that shows that the PSSA did not cover all of the work within the agreement. Tie had to relax the agreement so that we could work upwards and downwards in terms of identification and notification of the change required, carrying out the design and then estimating the costs. Otherwise the work on Princes St would have ground to a halt. The PSSA achieved its objectives because we extended the scope of the agreement as shown on page 1 of a letter to Tie from BSC dated 19th February 2010, document reference (CEC00654535), which states "The restriction on the scope recoverable in accordance with the PSSA has been removed. The OSSA includes for Works above the 'tendered formation' detailed in the PSSA. This change is as a consequence of recognition by both parties that the strict implementation of the PSSA would have had a detrimental effect on the progress on Princes Street by the key date of 29 November 2009. Infraco with the agreement of Tie therefore adopted a flexible approach by extending the recovery method under the PSSA to the scope above 'tendered formation'. This measure provided obvious benefits on Princes Street and was then reflected in the OSSA.

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5.6 So far as you are aware, were Tie content with the price they had to pay under the PSSA? If not, why was that?

A: Only Tie would be aware if they were content with the price.

5.7 There appears to have been disputes in regard to PSSA. You appear to have had an involvement in these. To the extent that you were aware of them, what disputes arose in relation to the PSSA? Why did they arise and how were they resolved?

A: I was aware that there was a dispute with Tie about payment, i.e what we were asking for and what Tie were paying . Just near to the completion of works on Princes Street, Tie, unprofessionally, stopped paying us. The gap in payment was in excess of £2 million and this dispute was eventually resolved at Mar Hall.

5.8 Princes St Mediation : CEC00796726 is an email dated 5th October 2009 between you and Michael Paterson (Tie) relating to the Princes St Mediation

1) Why was this mediation necessary?

A: Not all the work was covered under the PSSA.

2) What was the outcome of the mediation?

A: We got some agreement that allowed us to continue to proceed with the works on Princes Street.

5.9 There are series of exchanges between BSC and Tie regarding a dispute around the "Princes Street Credit". CEC00780807 is an email to you (10/11/2009) from MP making certain offers to essentially settle disputes, accepting and rejecting different aspects of the claim. CEC00781003 – is an email from MP to DG 13/11/2009 showing 250k credit; CEC00781032 & CEC00781033 – email 13/11/2009 Steve Bell (Tie) Kevin Russell BB attaching Amended Credit Summary sheet showing £3.77 M of credit.

Princes St Credit :

1) What was this and

A: With regards to the credit, it did not increase from £250,000 to £3.77 million credit. The £249,000 in the Amended Credit Summary sheet, document reference (CEC00781033), is part of the £3.77 million credit.

2) What was it designed to do

A: The Princes Street Credit is a credit that reflects the scope of works that were included in the original contract price. It was designed to give Tie back some money. This was because the Contract is normally 'fixed price' (subject to Schedule Part 4) and so part of that fixed price would have been for work on Princes Street. As we were to be paid on a demonstrable cost basis ('cost plus') for carrying out works on

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Princes Street, we needed to give Tie back a credit for that part of the fixed price where we were now going to be paid on a demonstrable cost basis instead.

3) Which parties were involved in drafting and agreeing the Credit Sheet?

A: Infraco and Tie.

4) Can you explain what your role was?

A: My role was to calculate the value of the Credit.

5.10 Did you consider the PSSA was a success or not? Why?

A: I considered the PSSA a success because it allowed the work on Princes Street to be completed – without such an agreement to pay for the work required, we would have been held up in the Clause 80 process. For example, we would have been entitled to sit back and wait until all of the utilities had been moved, and Tie had issued a Tie Change Order in respect of that delay to us. The PSSA instead allowed us to proceed, and to work around the work to remove utilities and other design changes

5.11 Email exchanges at late as dated 17-21/10/2010 between Steven Bell (Tie) and Kevin Russell (BBUK) indicate that BBUK wished to move to formal Adjudication; whilst Tie considered Mediation was appropriate - CEC00136606

A: This was a year later and not relevant. We had already been in mediation and we were not getting anywhere and the next step was formal adjudication. Kevin sets this out in his email and the reasons why

5.12 What was the ultimate outcome (resolution) of the dispute over the PSSA?

A: It was resolved at Mar Hall.

5.13 What implications did the PSSA have for the duration/cost/scope of the Project overall?

A: The PSSA probably saved time.

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6: THE ON STREET SUPPLEMENTAL AGREEMENT (OSSA) (FEBRUARY 2010)

We understand proposals were made to reach agreement on a contract to govern on-street works beyond Princes Street, in an attempt to overcome conflicts which had arisen under Infraco.

On 22 May 2009 you prepare a Note BFB00055665 having reviewed the areas of the contract which are still to be complete and estimate the value of Change which you believe may happen. You summarise : " In the city centre we estimate that there is about £13 million of change which does not currently feature in the change register, and about £15 million outside the city centre." And you conclude: "In our opinion an arrangement similar to the Supplemental agreement for Princes Street will most likely be required if we are to enter Leith Walk, Lothian Road and Shandwick Place."

The OSSA is set out at CEC00654535 sent from the consortium (Martin Foerder) to Tie on 19/02/10 with a covering letter.

CEC00368373 is Richard Jeffrey's Tie's response dated 26 February 2010 to the 19/02 letter/agreement.

You appear to have had some involvement (see, e.g., CEC00781096 & CEC00781097)

[CEC00780808] is copy of Appendix 2 to the on street works Supplemental Agreement

6.1 Can you explain your knowledge of the circumstances surrounding the proposed On St Supplemental agreement (OSSA)?

A: I am aware proposals were made to reach agreement on a contract to govern on-street works beyond Princes Street. This was an attempt to overcome conflicts which had arisen under Infraco Contract, similar to the PSSA.

6.2 Why was it not ultimately entered into?

A: Tie response, document reference (CEC00368373), tells why it was not entered into.

6.3 Was it because it would prove to be too expensive? CEC00587050 are email exchanges in 13/12/09 between Martin Foerder BB and Steven Bell / Dennis Murray Tie re PSSA indicating: "Based on your assessment (in particular your view on PA12, PA14 and the planning drawings) it would appear that agreement is very unlikely to be possible...."

A: I do not know. It was Tie who did not enter into it.

6.4 What was your role in relation to OSSA?

A: I prepared the OSSA together with Martin Foerder.

6.5 Was the ultimate cost to Tie of the work under PSSA a factor leading to the failure to enter into OSSA?

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A: Tie told us that it was a procurement problem (the EU procurement issue which I refer to above in Q6.2). This was after 6 months of talks and it was a similar document to the PSSA document. I do not understand where this procurement problem came from.

6.6 To what extent did difficulties with BSC sub-contractors affect the success of OSSA ? CEC00582565 & duplicate TIE00400623 email chain incl email 10/12/09 DG (BBS) to MP – “ I described the difficulty we are having in agreeing rates with our subcontractors for inclusion in the OSSA Agreement. I undertook to provide today a Schedule of the Rates which show where we are at the moment, and at least we can begin a dialogue between Tie and BSC and as required our Subcontractors to propose and agree rates.” Subsequent email reply MP to DG 15/12/09 enclosing Tie rates sourced for plant and base costs for PSSA.

A: There were no difficulties with subcontractors. This had no effect on the OSSA. All the subcontractors were in favour of the OSSA. I was trying to push everyone before the Christmas shut-down period to agree rates etc. However, as you can see, the OSSA was never entered into for reasons for which you should ask Tie (including the allegation that to enter into the OSSA would be contrary to EU procurement legislation). I am really not clear why you think this chain of emails is at all relevant - there is nothing unusual about trying to get rates from subcontractors which we could build into the OSSA. You can see however that we did a lot of work on the proposed OSSA all to no avail because of Tie.



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7: "PROJECT PITCHFORK" FEB/MAR 2010

In March 2010, Tie produced a report entitled "Project Pitchfork" (CEC00142766). In general, what are your views on the criticisms of BSC set out in the report at page 38 onwards?

A: I have never seen this document before but in many ways, it is an astounding document. It shows the level of distrust between BSC and Tie.

The report is a wish list of what Tie wanted to do and we had suspected this is what Tie wanted but had never seen it written down before. It felt as if they were waging a campaign against us in 2010 and this document confirms that this is exactly what was going on. This also sums up Tie's mentality when they call a project Pitchfork like stabbing you in the back.

I refer to page 8, second paragraph which states "The DRP strategy was intensive of management time and expensive in advisor costs. The effectiveness of the strategy was addressed in detail in December 2009. It was concluded that the strategy was not delivering the desired outcomes. Whilst Tie had achieved the objectives of getting work started at some locations put into dispute and significantly driving down the final value of Estimates being submitted by BSC, success had not been as visible on matters of legal interpretation and especially on the principles of the Pricing Assumptions contained in Schedule Part 4 of the Infraco Contract. Whilst the resolution of these DRP's has required investment of time and cost, the process has not unduly delayed the programme in itself because of the continuing impact of the late utility diversions (and subject to the debate about concurrency)."

They acknowledged themselves there was a delay in utility diversions and that this was the critical delay to the project. I would agree with that. However, I am astounded at some of the euphemisms being used here – 'success had not been as visible...' meaning that they had been losing the adjudications! Had Tie been prepared to accept that we were right on the interpretation of the contract and not continued to argue their position on this, we could have saved a lot of time and effort.



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8: PROJECTS CARLISLE 1 & 2 (SEPTEMBER 2010)

Attempts in 2010 to resolve the disputes between Tie and BSC (ultimately unsuccessfully) were given the name "Project Carlisle". Emails about this came to you (e.g., on 27/09/2010 you forwarded an email BFB00055874 to Jim Donaldson (BBUK) attaching Tie's Revised Proposal for discussion and finalisation (40pgs) BFB00055875 regarding Project Carlisle. In the email chain is a comment from your colleague Edward Kitzman that "it is not worth reading." Tie's proposal refers to Infraco's Project Carlisle Proposal dated 11/9/2010 and confirms Tie denies any explicit /implicit allegations of Tie's behaviour therein.

8.1 Can you explain your knowledge of, and involvement in, the Project Carlisle 1 & 2?

A: I was aware that there were attempts in 2010 to resolve the disputes between Tie and BSC, ultimately unsuccessfully, and that one such attempt was given the name "Project Carlisle".

8.2 To the extent that you were involved, can you summarise in overview the nature of the Project Carlisle negotiations and the parties' proposals?

A: I had no involvement in the negotiations. I was only aware that they were taking place. I was not present at any of the negotiations

8.3 Which other parties were involved?

A: I do not know which other parties were involved.

8.4 Did you have a role in the pricing of the proposals? If so, what was it? What was the Consortium price? How did BSC arrive at its proposed price?

A: I had a role in the pricing of the proposals, I cannot remember the prices that were given.

8.5 How would you describe the relationship between BBUK with Tie at this time?

A: The relationship between BBUK and Tie was strained at this time.

8.6 What was the outcome of the Carlisle negotiations?

A: We never entered into the agreement.



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9: PROJECT PHOENIX (EARLY 2011)

The proposals which ultimately led to the Mar Hall resolution, and thereafter to resolution of the project disputes, were known by the name "Project Phoenix". You were involved in correspondence about this, e.g. BFB00056548 –an email dated 25/2/2011 from you attaching BBUK's Project Phoenix proposal (204 pages long) (BFB00056549) to "allow [the recipients] to understand the final exclusions and clarifications which went in with our price" .It was issued shortly before the Mar Hall Mediation.

**BFB00056549
should be
CEC02084201**

9.1 What was your role, if any, in relation to Project Phoenix?

A: I priced Project Phoenix and identified the inclusions, exclusions and clarifications.

9.2 To the extent that you were involved, can you summarise in overview the nature of the Project Phoenix proposals?

A: In overview, the nature of the Project Phoenix proposals were essentially to deliver a new lump sum for the works to Haymarket and included a new change process.

9.3 Who, to your knowledge, was involved?

A: To my knowledge the parties involved in the negotiations with Tie were Infracore which consisted of Bilfinger, Siemens and CAF.

9.4 Were you involved and, if so, what was the nature of your involvement?

A: See response to 9.1

9.5 Did you have a role in the pricing of the proposals? If so, what was it? What was the Consortium price? How did BSC arrive at its proposed price?

A: I was heavily involved in pricing the Bilfinger element. Siemens and CAF did their own sections and I would have collated all of the information to put it into one proposal for submission to Tie as part of Project Phoenix. I have no memory of how the Bilfinger price was arrived at, and I would not have known how the Siemens and CAF elements were put together.

9.6 To what extent was that price the subject of negotiation and/or revisal at, or after, the Mar Hall mediation?

A: The price was revised both during and after the Mar Hall discussions, but that will all be recorded in the final agreement reached (Minute of Variation no. 5).



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10: POST – MAR HALL MEDIATION (MARCH 2011)

You were involved in implementation aspects of the Mar Hall Mediation and the Minute of Variation that resulted.

BFB00095990 You exchanged emails with Martin Foerder in late March 2011 about indicative costs for the Prioritised Works. Mr Foerder's comments included, in relation to preliminaries, "could be too obvious that you/we are front loading old Prelims (just in regards to the EOT element)?" Can you explain that comment?

A: I addressed Martin Foerder's comment in my response to the email which is also included in document BFB00095990. I indicated that the Prelims were in line with our actual costs.

You received an email on 18 March 2011 with various project works programmes, following the Mar Hall mediation (BFB00094672; attachments: BFB00094673 to BFB00094676).

10.7 Who, to your knowledge, was involved in the mediation at Mar Hall?

A: Tie, CEC, Infracore and a lot of other people who did not introduce themselves and whose faces I did not recognise.

10.8 Were you involved and, if so, what was the nature of your involvement?

A: I was there to give support in the negotiations of the price.

10.9 Did you have a role in the pricing of the proposals? If so, what was it? How did BSC arrive at its proposed price?

A: See response to 10.8

10.10 What works programmes were definitively agreed by the parties following the Mar Hall mediation?

A: I believe only a programme for the prioritised works was agreed.

10.11 To what extent were they met?

A: I do not know to what extent they were met I left the Project in May 2012.

10.12 If there were delays, what were they and why did they occur?

A: I do not know if there were delays as I had left the project in May 2012 before the works were completed.

10.13 What was the Consortium ultimately paid by CEC/Tie?



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A: I do not know what the Consortium was ultimately paid by CEC or Tie

10.14. What payments were received and when? Was there a Schedule of Payments narrating what payments were made / received?

A: I do not know what payments were received or if there was a schedule of payments, as I had left the project in May 2012 before the works were completed.

DG

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11: MOV 4 AND MOV5 (SEPTEMBER 2011)

11.1 MOV4 came about as the result of Mar Hall. MOV 4 is BFB00096810
There appears to have been disagreement over the treatment of preliminaries under Minute of Variation 4 (see, e.g., TIE00357030 and TIE00357031).

1) Can you explain this disagreement?

A: No it was Steven Bell, Tie, who had a disagreement over the preliminaries money.

2) How was it resolved?

A: I cannot recall how this was resolved.

3) Did the difference of view have any significant impact on the cost, scope or timescale of the project?

A: No.

11.2 MOV5 : September – December 2011 ; MOV5 (Minute of Variation) was a Settlement Agreement BFB00005464 .

BFB00095116 is an email from Martin Foerder dated 15 September 2011, headed "Settlement Agreement signed", to the Bilfinger team and cc'd to DG. He thanks everyone for their support and that he believed "we have achieved a good result for our company and a good basis to proceed and finish this project successfully".

At this point funding was in place for the remaining construction work to York Place. It is understood that MOV5 attempted to achieve a number of things , although was ultimately not signed. MOV5 dealt with "On Street" Works. In particular it introduced a new mechanism to reach agreement where changes arose and introduced the concept of the "On Street Works Trigger Date" to deal with changes that arose. It also Introduced a detailed Variation Mechanism and a Schedule of Rates & Prices for calculating what was due in respect of Pricing Assumption Variations.

1) What, if any, role did you have in implementing the contractual arrangements as modified by MOV5?

A: I had procedures put in place to allow us to operate the new mechanism.

2) Were there any difficulties or disagreements between the parties in doing so?

A: No.

DU

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3) Did any significant issues arise following MoV 5 which had any significant impact on the cost, timescale or scope of the tram project?

A: Not to my knowledge.

4) Were there any features of the parties' arrangements following MoV 5 which, if introduced earlier, might have prevented the delay, cost increase and scope reduction of the project?

A: In my opinion, had Schedule 45, document reference (BFB00005516), been introduced earlier, it might have prevented many of the disputes with Tie on the mechanism for change. It would probably have saved some time but it is impossible to say how much. The main reasons for the delay, cost increase and scope reduction of the project were that the Contract was entered into probably too early – before the design was complete, all of the utilities had been moved and all third party approvals obtained etc. Thereafter, Tie would not acknowledge what the contract said and refused to recognise the impact of the adjudication decisions etc. MOV5 was only possible after they had been told by the mediator at mediation that their position was not sustainable.

11.3 You were copied in to an email about attempts to shorten the works programme by considering revised traffic management arrangements and increased working time by ignoring the summer embargoes (BFB00057212). The email suggests that resource constraints might be an issue.

1) What attempts were made, after the Mar Hall mediation, to shorten the works programme?

A: I attended a meeting at the Council Headquarters, Waverley Court with the Roads Department to see if it was possible to lift embargoes/restrictions on road closures around the festival and Hogmanay periods. It was also a restriction that we could not work on York Place at the same time as Shandwick Place. We believed that if they lifted these restrictions and embargoes, we could save time on the programme.

2) To what extent were they successful?

A: I do not know if these attempts were successful as they were only discussed in January 2012 and I left the project in May 2012.

3) To the extent there were obstacles to shortening the programme, what were they? What were the resourcing issues referred to in the exchange above?

A: This is answered in the email referred to earlier, document reference (BFB00057212). For example, the email states "Although the On Street Works completion now improves to the 30 September 2013 there is no effect on Section Completion D. This is due to resource constraints .If the track resource constraint is lifted Section



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Completion D could improve to 29 March 2014." The email also states "If resource limitations are not considered Section Completion D becomes 4 February 2014. If the resource profiles of Programme Revision 4 are adopted the Section Completion D date returns to that of the Revision 4b analysis. I have attempted a re-profiling of resource which would mean we would have to provide, for periods, 3 off street and 2 on street track gangs and 4 OLE gangs. This would improve the Section Completion D date back to 04 February 2014. I have attached a programme and resource profiles for this option."

This was a Siemens issue.

You received an email from Martin Foerder dated 18 December 2011, which refers to a "TCO with an amount of 4,541,161 ... That sounds fully acceptable to me." (BFB00095252).

4) Can you explain what this email concerned?

A: I cannot recall what this email concerned.



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12: LATE DESIGNS

You were copied in to emails about slippage in the design programme, and about failings in the design programmes produced by SDS. The responses from SDS indicate that they considered their efforts in production of the design to be frustrated by a lack of information or instruction from Infraco and/or CEC. (E.g., BFB00097924 email 16/09/11 between Simon Nesbit (BB) to Graeme Lang (PB) cc'd to you – Analysis of slippage in Design Programme V75- from V74; BFB00098756 email 21/12/11 between Simon Nesbit (BB) to Graeme Lang (PB) cc'd to you):

12.1 Can you comment generally on the performance of the SDS Provider during the period they operated as a sub-contractor to Infraco?

A: I did not have a role with SDS. As I mentioned earlier I left the project in May 2012. Simon Nesbit wrote in the email that he was managing SDS within Bilfinger. I was not closely involved in the performance or commercial issues of SDS.

12.2 To the extent that there was slippage in the programme for production of the design, what (in overview) were the reasons for that?

A: I do not know if there were any problems in the design programmes produced by the SDS provider as I left soon after the agreement.

12.3 Was there any difference in these factors after the mediation at Mar Hall?

A: I was not aware of any significant issues post-mediation or by the time I left.

12.4 To the extent that you are aware, what (if any) problems were there in the design programmes produced by the SDS provider? What (if any) problems did they cause (e.g., in programming works)?

A: See my response to 12.2

12.5 Did these issues have any significant impact on the cost or duration of the project?

A: I do not know if these issues had any significant impact on the cost or duration of the project.



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13: ANY OTHER COMMENTS

I was then asked by the Statement Taker if I had any other comments to make about the focus of the Inquiry.

A: In my view the inquiry should be focusing pre-contract on why the Council entered into a contract like that. The overall problem was not administration of the contract as mediation resolved the issues with the contract. The problem was pre-2008, the fact that utilities had not been diverted, the design was not finished and third party approvals etc had not been obtained, all of which were exacerbated by Tie ignoring the outcome of the adjudications.



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14: SUPPLEMENTARY QUESTIONS ISSUED ON THE 29 SEPTEMBER 2016

1. For the avoidance of doubt, to what extent were you involved in preparing the INTCs and Estimates? Which individual or individuals in BSC were primarily responsible for these matters?

A: See my response at 4.1 b) and document CEC00590421

2. During the dispute TIE made a number of allegations against BSC. It would be helpful if you could provide your views on the following assertions:

(1) BSC failed to mobilise timeously (see e.g. DLA00001673, DLA0000167).

A: I am not aware that this was ever an issue.

(2) BSC unreasonably refused to commence works involving a variation until a price had been agreed for the works as varied.

A: The terminology is not Variations but Notified Departures.

As I mention in my witness statement, Infraco were on occasion complying with clause 80.13 of the Infraco Contract which prevented works which were a Notified Departure from proceeding prior to a tie Change Order having been issued.

We were found to be correct on this - see the decision of Lord Dervaird on Murrayfield Underpass.

(3) BSC carried out very little on-street works under the Infraco contract with very few exceptions (e.g. Princes Street, in respect of which a supplementary agreement, on a demonstrable cost basis, had been agreed).

A: The on-street part of the works were the most affected by the continued presence of utilities so until these had all been moved, it is correct that less work could be done in these sections.

(4) BSC stopped all work in a section if not all utility diversion works in that section had been completed (c.f. undertaking works in those parts of the section in which utility diversion works had been completed see e.g. (i) letter dated 6 October 2008 from Steven Bell to Colin Brady, CEC01205274 and (ii) adjudication decision dated 26 July 2010 by Robert Howie QC, CEC00407650).

A: These are two different issues. The On Street works is well documented in my earlier responses.

DLA0000167
should be
DLA00001672

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(5) BSC failed in its duty to take all reasonable steps to mitigate delay to the Infraco works. (we denied this – this was a permanent accusation by tie that we should be spending our own money to mitigate the delay caused by utilities. They were wrong on this as per Howie's adjudication decision on MUDFA).

A: This was a permanent accusation by tie that we should be spending our own money to mitigate the delay caused by utilities. They were wrong on this as per Howie's adjudication decision on MUDFA.

(6) BSC failed to properly manage and progress the design process after SDS novation (design being incomplete, and necessary approvals and consents being outstanding, a number of years after contract close).

A: I have no view on this it is not my area of expertise.

(7) BSC intimated an unreasonably high number of INTCs.

A: Only because there were a large number of changes due to the fact that the design was not completed and the utilities were not moved prior to Infraco commencing work

(8) BSC delayed in providing Estimates for each INTC (see e.g. (i) letter dated 19 February 2010 by Steven Bell, CEC00574090 and (ii) spread sheet, dated 12 March 2010, CEC00590422, in which a number of Estimates were noted to be outstanding).

A: My response at Section 4 of my original interview deals with this issue.

(9) When Estimates were provided, they were lacking in specification and/or failed to demonstrate how Infraco would minimise any increase in costs and ensure that the change would be implemented in the most cost effective manner etc (per clause 80.7 of the Infraco contract, CEC00036952).

A: We did what we could for a very large number of estimates.

(10) The amounts in the Estimates were excessive (see e.g. (i) BSC's Estimate for INTC 1, Design delivery programme, was just over £7m c.f. agreement appears to have been reached at around £3.5m – see CEC00590422) and (ii) the example of the Russell Road Retaining Wall given by Richard Walker in BSC's opening statement at the Mar Hall mediation (TIE00670846 at para 16.4) in which he noted that Infraco submitted an estimate of £4.5m, which was reduced by BSC by £2.5m, and then again by £180k, and that the adjudicator awarded £1.46m).

A: I don't recall this first issue. On the second one, you have got this completely wrong.

DN

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Tie kept saying that they needed to go to adjudication so that they could reduce the level of the Estimate but they told lies in the press on this (to justify why they kept losing) and Russell Road was one of these. The whole dispute was about £4.5m but a large part of that was to do with removal of contaminated material. The bit that was referred to adjudication was only £1.8m and we were awarded £1.45m - a degree of substantial success.

- (11) The new estimates produced by BSC during settlement discussions in 2010 and 2011 for building a line from the Airport to St Andrew Square were excessive (see e.g. (i) e-mail dated 1 March 2011 by Brandon Nolan (BFB00094574) which sought more detailed information in relation to Siemens' Project Phoenix Proposal (PPP) price, noting that Siemens' PPP price of over £136m was double Siemens' original price of c. £68 for the Airport to Haymarket (see also Mr Nolan's e-mail dated 2 March, BFB00094589, in which he explained how he had arrived at the sum of £68m) and (ii) report dated 19 August 2011 by Faithful and Gould (CEC01727000) which, in the Executive Summary, stated that current costs for the on-street works for Siemens were "extremely high and not value for money" and that the cost of the other on-street works was "grossly inflated").

2 March should
be 1 March

A: You will have to ask Siemens that question – as I mention in my witness statement, I didn't prepare their costs but just collated the costs for the purpose of Project Phoenix.

3. We understand that prior to the Mar Hall mediation in March 2011 there were approximately 738 INTCs and that, after the Mar Hall agreement, there were approximately 352 INTCs. On the face of it, there appear to have been a relatively large number of changes post Mar Hall given that, by that stage, the design and utility diversion works ought, presumably, to have been largely completed and given that a shorter section of line was to be built. Do you have views or comments on that suggestion?

A: I left the Project in May 2012 before it was completed and have no view on this issue.

Du.