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10 TRANSCRIPT OF PROCEEDINGS

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**THE HON MICHAEL F ADAMS KC, COMMISSIONER**

15 **THE ACT INTEGRITY COMMISSION – OPERATION KINGFISHER**

**PUBLIC HEARING**

**DAY 6**

20

**WEDNESDAY, 27 SEPTEMBER 2023 AT 12.03 PM**

**MR CALLEN O’NEILL, Counsel Assisting**  
**MR DOWLING SC, Counsel for Zachary Smith**  
**MS KATE MORGAN SC, Counsel for Katy Haire**  
25 **MR PHILLIP WALKER SC, Counsel for Mark Bauer**  
**MR MATTHEW McAULIFFE, Counsel for Jason O’Mara**  
**MR JOHN BIRD, Counsel for Duncan Edghill**  
**MR KIERAN GINGES, Counsel for Yvette Berry**  
**MR ATHOL OPAS, Counsel for John Green**  
30 **MR JAMES WALKER, Counsel for Joshua Ceramidas**  
**MS CLAIRE CARLTON, Counsel for Dylan Blom**  
**MR SARID MILNE, Counsel for Rebecca Cross**

COMMISSIONER: Yes, Mr O'Neill.

MR O'NEILL: May it please the Commission. The next witness is Mr Mark Bauer.

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COMMISSIONER: Mr Bauer, there are things which no doubt you are already aware of but which the Act requires me to bring to your attention. The first is that you must answer all questions that you are asked. The only relevant exception will be if you are asked for a matter that would disclose a communication between you and your lawyers. If it looks as though a question will invite that, would you please let me know, although I think those advising you will be alert to take the objection, and the Act provides for a way of dealing with that issue.

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The next matter is to bring to your attention the terms of the confidentiality notice to which you are subject. The exceptions to that are that you can be entirely candid with your lawyers, with any professional person you feel, because of the stress or anxiety arising out of the present hearings, the need to get assistance.

15

I'm also sympathetic to any witness who wishes to have a - some support person with them. It's just that I need to know the identity of such a person - I can't give carte blanche - and your lawyers need to contact Ms Vogel and let me know, and I should think it's very likely I would agree. It's only, frankly, I would impose a limit where there was someone who might have something to do potentially with the investigation. Otherwise, it's a matter of indifference to me and if it's a help to a witness, then I'm happy for that to happen.

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Should there be any matter of complaint about the way you've been treated by the Commission, you're entirely at liberty to make a complaint to the inspector. The method of doing that is on our website. Now, I think there's an application?

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MR WALKER: Commissioner, my name is Walker. I seek leave to appear for Mr Bauer, please.

COMMISSIONER: You are accompanied by?

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MR WALKER: Alisa Taylor, partner of MV Law, the instructing firm of solicitors.

COMMISSIONER: Very well, leave is granted.

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MR WALKER: If it pleases.

COMMISSIONER: Now, you need to be either affirmed or give evidence under oath. Which do you prefer?

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MR BAUER: Under oath.

COMMISSIONER: Very well.

**<MARK ERNEST ROBERT BAUER, SWORN**

COMMISSIONER: Thank you, Mr Bauer. Yes, Mr O'Neill.

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**<EXAMINATION BY MR O'NEILL**

MR O'NEILL: Thank you, Commissioner. Mr Bauer, could you please provide the Commission your full name?

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MR BAUER: Mark Ernest Robert Bauer.

MR O'NEILL: What is your position?

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MR BAUER: I'm the chief executive officer of Manteena.

MR O'NEILL: How long have you held that position for?

MR BAUER: Since August 2021.

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MR O'NEILL: Can you tell the Commission who Manteena is?

MR BAUER: Manteena are a Canberra-based construction firm, comprising of three operational entities delivering construction services: Manteena Commercial, which is the entity that tendered for Campbell school -

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COMMISSIONER: Would you mind just speaking up a little, Mr Bauer. I'm having difficulty hearing you.

30

MR BAUER: Sure. Would you like me to repeat that?

COMMISSIONER: No, I heard that.

MR BAUER: Manteena Commercial, which delivers construction services. We have a residential business, Manteena Residential, and we have a business in the security field delivering security construction services, Manteena Security.

35

MR O'NEILL: The - is that somehow then controlled by a group company?

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MR BAUER: Not by a group. They are all individually owned, but we have, I guess, a collective under the Manteena brand.

MR O'NEILL: And so when you say you're the CEO and general manager, are you the CEO and general manager of each of those companies separately but also then collectively?

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MR BAUER: I'm the CEO of Manteena and I'm also - I hold roles - directorship roles in all of those organisations, yes.

MR O'NEILL: Yes. And has that been the case since about 1994?

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MR BAUER: I first - I was employed by Manteena in 1994, and I became a director in 2000.

COMMISSIONER: How long has Manteena been doing work in the ACT?

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MR BAUER: We were established in 1980. So over 43 years.

MR O'NEILL: In over - in that 43-year period, have you ever done - that is, Manteena - has it ever done work for the ACT Government?

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MR BAUER: Yes, we have.

MR O'NEILL: Now, what is Manteena's - the Group's combined turnover?

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MR BAUER: Between 150 and 200 million per year.

MR O'NEILL: And how many employees does it have?

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MR BAUER: At the moment, 120 employees across the Group. Manteena Commercial has just over 70 employees.

MR O'NEILL: So it's a large operation?

30

MR BAUER: Yes.

MR O'NEILL: And it is across all sectors; is that fair? Across industrial, residential and government?

35

MR BAUER: Yes. And we also operate outside of the ACT. So we operate nationally and internationally, particularly in the secure space for the Australian Federal Government.

COMMISSIONER: In 2020, or thereabouts, what would have been your employed numbers for Manteena Commercial? Approximately.

40

MR BAUER: 50. 50 staff in Manteena Commercial.

COMMISSIONER: Right. And most of those would have been administrative? Or how many would have been -

45

MR BAUER: At the time in 2020, we had seven staff who were construction workers. The remainder were technical, supervisory staff and managerial and clerical staff.

COMMISSIONER: So you would take on subcontractors where - seven obviously doesn't build much.

MR BAUER: Yes.

5

COMMISSIONER: You would take on subcontractors which, say for job as it's - the one we are considering, take the Campbell School Modernisation Project, what were your projections about the labour level that you would need?

10 MR BAUER: Typically we would be engaging 25 to 30 subcontractors on to that project.

COMMISSIONER: That would have brought how many workers onto the site?

15 MR BAUER: It would have varied, but at the minimum, I would have thought 10 to 15 workers and maybe upwards of, at the peak, 75 workers on the site each day.

COMMISSIONER: Right. And going on for?

MR BAUER: 12 to 18 months.

20

COMMISSIONER: 12 to 18 months. Of course, COVID changed the whole picture in that respect, but let's not complicate matters by considering that problem. But, no doubt, it did create problems.

25 MR BAUER: Yes.

MR O'NEILL: Now, Manteena Commercial, did it have any - that is, as at 2019, so mid-2019, did it have any familiarity with government procurement processes?

30 MR BAUER: Yes, we regularly tendered government work for the Territory.

MR O'NEILL: And here we know that, initially, the tender was undertaken by a different Manteena entity but was switched to Manteena Commercial Pty Ltd. Or was that an administrative error at some level?

35

MR BAUER: So in this tender was only submitted as Manteena Commercial. I think that was a clerical error in the tender box at Tenders ACT that we had two profiles, one for Manteena Pty Ltd and one for Manteena Commercial.

40 MR O'NEILL: Is there a division within Manteena Commercial that looks at procurement and then assembles tenders for the purposes of winning bids in the ACT?

MR BAUER: Yes, we do. We have a pre-construction or a tendering team.

45 MR O'NEILL: And so the pre-construction and tendering team, are you a member of that?

MR BAUER: I oversee that, yes.

MR O'NEILL: So you have a working knowledge of what that team is looking at when it comes? What is its first step when it undertakes the start of a procurement? What does it first look to do?

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MR BAUER: The first thing we would do is determine whether or not it is an opportunity that we wish to pursue. So we would do, essentially, a bid-go, no-go assessment to determine if the bid is suitable, that we have sufficient resources to be able to deliver the project, necessary skills and expertise, financial prequalification requirements. We would make those assessments before we would even download the tender documents.

10

MR O'NEILL: This project had an overall tender of about \$18 million. That value, where does that sit in the Manteena Commercial spectrum of project size?

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MR BAUER: So we would - probably 20 per cent of our work is in the 10 to 20 million dollar category. A larger portion of our work is actually above \$20 million projects. So this still fits firmly within our wheelhouse, so to speak.

MR O'NEILL: But at the lower end -

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MR BAUER: The mid to lower end, yes.

MR O'NEILL: Okay. And once it's then decided that you have the ability to tender and that you - there are resources available and it's a go, I think were your words, what's the next stage?

25

MR BAUER: We would download the tender documents, and, in this case, it was a two-stage process. So there was an expression of interest, which we responded. So we downloaded, prepared our response to that. Whether there was - attend any pre-tender briefing, if there is a briefing provided by the Territory, prepare our response, lodge it electronically through Tenders ACT, and wait for the outcome.

30

COMMISSIONER: Now, as we know, ultimately, there were outside consultants that you used for design and other engineering, but for the expressions of interest, was that entirely internal? Or did you get outside consultants?

35

MR BAUER: We still needed, as part of our response to the expression of interest, to nominate design teams. So they were part of our expression of interest response.

40

COMMISSIONER: Right. It's not - sorry, then my question wasn't sufficiently clear. But did you actually get their - use their services as distinct from saying we would contract with these consultants?

MR BAUER: If I'm -

45

COMMISSIONER: For the purpose of the expression of interest.

MR BAUER: We sought proposals from them, so they didn't actually carry out any design services, but they provided a response.

5 COMMISSIONER: Because you needed to price that into your expression of interest?

MR BAUER: In the first instance, there was no pricing component for an expression of interest. It was purely about capability and capacity and ability to essentially be shortlisted for the project. So we needed to assemble a design team and -

10 COMMISSIONER: It would be available.

MR BAUER: It would be available and would be sufficiently experienced and qualified to be able to design and document the works for us, should we be shortlisted to tender and then subsequently be engaged to do the project.

15 COMMISSIONER: If this is a matter of commercial sensitivity, you don't need to answer. But just the first is a process question, which I think you can answer, is within the Manteena management and financial oversight structure, would you cost a expression - an expression of interest for your internal purposes?

20 MR BAUER: We track every opportunity that we would pursue. So we would allocate time to preparing that expression of interest.

25 COMMISSIONER: So you would either have or be able to ascertain that this cost us \$50,000, or whatever it was, to put in the expression of interest.

MR BAUER: Yes, we could.

30 COMMISSIONER: Have you done that in relation to the Campbell School?

MR BAUER: We've done it on the basis that we completed an expression of interest and the -

35 COMMISSIONER: So you've done an overall -

MR BAUER: So I think -

COMMISSIONER: Well, you don't get to one stage without the other, so -

40 MR BAUER: It might be possible to extract the two, but we -

COMMISSIONER: An overall is enough for my information. But if it's not commercially sensitive information - and I will leave that entirely to you. But if it's not I would like to know how much it cost you to put in this tender.

45 MR BAUER: Well in excess of \$200,000.

COMMISSIONER: Are you saying above 200,000 and less than 300,000?

MR BAUER: Yes.

5 COMMISSIONER: All right. And that just goes straight off your bottom line?

MR BAUER: It does. In this instance - and the question may be asked later - there was some recoverable fees that applied: A copyright assignment fee and a best and final offer response fee. So some of those costs were recovered.

10

COMMISSIONER: So my question should have been a bit more sophisticated. The number that you have given me excluded the possibility - excluded what was ultimately repaid or refunded to you?

15 MR BAUER: Yes.

COMMISSIONER: All right.

MR O'NEILL: So, that is, that we know the best and final offer fee was \$75,000; correct?

20

MR BAUER: Yes.

MR O'NEILL: So that then comes off the in excess of \$200,000?

25 MR BAUER: Yes.

MR O'NEILL: And we also know that the IP fee was the similar amount. So that comes off. And so doing that, netting those off, what's the net figure?

30 MR BAUER: Look, to be precise, it's somewhat difficult. And I think when I responded to your -

COMMISSIONER: We don't want the precise number.

35 MR BAUER: Commissioner, to your original question, I was referring to Manteena's costs. The design team had their own costs. Now, we chose in this instance to pass all of the copyright assignment fee and the best and final offer fee to the design team because they were actually producing physical design work during the tender process. So when I was referring to costs earlier -

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COMMISSIONER: That's what actually came out of Manteena's pocket.

MR BAUER: What came out of our pocket would be well in excess of, you know, 100 and 200 thousand dollars.

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COMMISSIONER: All right.



MR O'NEILL: Here the request for expressions of interest went out on 30 July 2019. They closed on 27 August 2019. The request for tender was then sent on 30 October 2019. That's a different process. And does that then trigger the procurement team into a different stage of its evaluation?

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MR BAUER: Yes, it does.

MR O'NEILL: And what do they do?

10 MR BAUER: We assemble a larger team to work on the bid because, essentially, we need to - in this procurement activity complete design work before we can commence putting pricing components around that. So one of the team members was leading the design management process and co-ordinating the design consultants. Another person was supporting them administratively, while the estimating team would start the process of  
15 pricing the project based on the information that they had available to them, and that was - in this instance, involved a senior estimator and an assistant estimator (indistinct) administration support.

20 COMMISSIONER: Would I be right in assuming that this process that you've described would be conventional? That's what, say, Lendlease would have done in its own way, but would have to cover the same ground?

MR BAUER: Without knowing exactly how they deliver it, but certainly it's typical for us to need that scale of team for a design and construct tender response.

25

COMMISSIONER: Okay.

MR O'NEILL: This isn't the only tender, I assume, that was being undertaken at that time. Is that fair?

30

MR BAUER: That's correct.

MR O'NEILL: Can you just give us a snapshot - obviously, this is commercial information, so we don't need to know the specifics of it, but just a detail of how many other  
35 procurements or prospective projects Manteena was looking at at the time?

MR BAUER: Typically, we would be working on three to four bids of that scale at any one time.

40 MR O'NEILL: Now, the identity of the other tenderer is known to you, then, when the requests were issued. So you knew it was Lendlease who was the other tenderer?

MR BAUER: We did.

45 MR O'NEILL: And you have a timeline by which you need to then be able to comply with putting in a submission?

MR BAUER: Yes.

MR O'NEILL: And then what happens after you have put your submission in, to the best of your knowledge?

5

MR BAUER: Typically, our experience is that the evaluation team - in this case, the Territory - would do an assessment and sometimes questions would be asked. In this case, we were asked quite a few questions, I think, about -

10 COMMISSIONER: Essentially clarifying your bid.

MR BAUER: Yes. We were asked about 75 questions and which we responded to.

15 MR O'NEILL: Who did you understand was the client that you were liaising with specifically within the government on the Campbell Modernisation bid?

MR BAUER: My understanding it was a project officer within Major Projects Canberra.

20 MR O'NEILL: And is that Ms Young?

MR BAUER: It was, yes.

25 MR O'NEILL: Now, pausing there with the procurement process, I just want to divert to a different topic slightly for the moment, and that is the topic of local jobs and certification. There had previously been a memorandum of understanding in the ACT about industrial matters that governed relevantly, amongst others, procurement. Fair? And there had been legislative reform that had introduced the program called the Secure Local Jobs Code.

30 MR BAUER: Yes.

MR O'NEILL: And under that code -

35 COMMISSIONER: Mr Bauer, you do need to actually answer because a nod is not recorded.

MR BAUER: I understand.

COMMISSIONER: Thank you.

40 MR O'NEILL: And under that code, entities such as Manteena, if it wanted to bid for government work, needed to have a Secure Local Jobs certificate?

MR BAUER: Yes.

45 MR O'NEILL: Which it needed to get by application to the Secure Local Jobs Code Registrar.

MR BAUER: Yes.

MR O'NEILL: Who was in charge of that within Manteena?

5 MR BAUER: Ultimately, it was my responsibility, but the task to actually complete that work would have resided with our integrated systems manager.

MR O'NEILL: And what did that require to be undertaken?

10 MR BAUER: From memory - it's a number of years ago since we first applied for it, and we were one of the first contractors - I think we were the eighth contractor to - or eighth recorded number to have the Secure Local Jobs Code registration, but what I would assume we were asked to provide at the time was details of our industrial instruments, so our employment arrangements for staff.

15

COMMISSIONER: So enterprise agreements?

MR BAUER: And also the agreements we would have in place for employing management-type staff as well, I'm assuming. Our practices around potentially safety, our other programs related to staff practices around health and wellness. I'm - I can't actually recall. I can't picture -

20

MR O'NEILL: That's okay.

25 MR BAUER: - what it looked like back in 2018, I think, was -

MR O'NEILL: 2019, I think.

MR BAUER: Two thousand - yes, it would have been.

30

MR O'NEILL: So then dealing with those in turn, there was an enterprise bargaining agreement in place?

MR BAUER: We had an agreement directly with our employees at that time, yes.

35

MR O'NEILL: And -

COMMISSIONER: You are making a point "directly with your employees". What is the point you are making? As distinct from?

40

MR BAUER: An enterprise agreement that had a third party as a member to that agreement.

COMMISSIONER: Such as?

45

MR BAUER: The CFMEU.

COMMISSIONER: Right. So, the system permitted that to occur?

MR BAUER: It did.

5 COMMISSIONER: And, as it happened, your enterprise agreement, however, did not involve the CFMEU as a party.

MR BAUER: That's correct.

10 COMMISSIONER: And was that - are those enterprise agreements registered with Fair Work Australia or -

MR BAUER: They are.

15 COMMISSIONER: And they had to be signed off on by a Registrar or a Commissioner or -

MR BAUER: Yes. Yes.

20 COMMISSIONER: Right. So yours had gone through that approval - that approval process?

MR BAUER: Yes, it had.

25 COMMISSIONER: Right.

MR O'NEILL: And I think the next matter you drew to the Commission's attention was safety record. What was Manteena Commercial's safety record like at that time?

30 MR BAUER: I think our safety record then and now is and was very good.

MR O'NEILL: Do you care to elaborate on what you mean by "very good"?

35 MR BAUER: We take safety extremely industry, and I think that's one thing all participants in the industry could agree on, that safety is the number one priority. We have got policies and procedures that inform how we go about managing safety on sites. Construction sites inherently have risk. So we, like all contractors, would develop those policies and procedures to manage the risks that exist to mitigate and reduce those as much as possible.

40 I think our safety performance record is best evidenced by the fact that we have Federal Safety Commissioner accreditation, which is the highest body providing independent accreditation and validation of safety records. And we currently hold that accreditation out to 2028, which is for a six-year period, which I understand is the maximum available  
45 period based on being considered low risk.

COMMISSIONER: What about in the period that was encompassed by this, say, 2018/2019?

5 MR BAUER: We held Federal Safety Commissioner accreditation at that time, and I would also say that on ACT Government projects specifically, they have a process called Active Certification which is an independent safety assessment of projects, and over the past four years, we have had - participated in over 14 Active Certification audits and there have been no issues of note, other than what you would expect to be some opportunities for improvement. I think there was one non-conformance report. So I would argue that's a very  
10 good performance.

That's not to say we are perfect. We don't profess to be. It is an industry that inherently has risks and, from our perspective, it's about identifying those risks and managing it. We have a policy and a culture within the organisation to report everything, and we do that because  
15 if - we find it becomes a slippery slide if people selectively report things. It doesn't mean everything, you know, that we could hold our hand on our heart and say that every little minor scrape and graze has been reported, but that's the culture we have within the business, to be transparent and take accountability for those things, address things if events occur.  
20

Remembering, you know, we are managing 20, 30, 40 subcontractors on the site at any one time. There could be 50 to 100 workers on the site at any one time. They are all going about their activities. And our job is to manage and provide the best opportunity for a safe workplace. But that's not to say it's - at times, you actually have to work through those  
25 issues and that's how - we find it's how you respond to any issues that arise.

MR O'NEILL: Another indicator of a happy workplace or a safe workplace is staff retention. Is there anything particular about staff retention at Manteena that the Commission needs to be aware of?  
30

MR BAUER: Manteena has a lot of long-term employees who have been with the organisation - particularly our construction workers who are based out on site - who have been with the company for 10 plus years. Our industry is very competitive. There is a real demand for labour. So if we didn't look after our people and care for them, both our  
35 workers wouldn't stay, and I suspect the same would apply for subcontractors and suppliers. They would choose to work for others because, you know, there are other opportunities out there.

COMMISSIONER: Can I just go back to the enterprise agreements. You, of course, have an enterprise agreement with those you employ.  
40

MR BAUER: Yes.

COMMISSIONER: But what about subcontractors who, of course, have their own employees? Do you have any involvement with their enterprise agreements, or they are entirely independent of you in relation to their employment arrangements?  
45

MR BAUER: They have - they would manage their own affairs. The extent to which we would want visibility on that would be to the extent of wanting to ensure that they are complying with their obligations. So we would be seeking, for instance, on a Territory project, to obtain copies of their Secure Local Jobs certificate to perhaps provide the basis. We might also ask for statutory declarations provided with each progress claim to confirm that they are paying their employees in accordance with the arrangements they have in place. But we wouldn't be involved in the negotiations that they would have with their workers. That would be something that their - that's their responsibility.

10 COMMISSIONER: Thank you.

MR O'NEILL: Thank you. Now, here, Manteena's certificate was issued by a Registrar by the pseudonym of Mr Green. You know who I'm talking about.

15 MR BAUER: I do.

MR O'NEILL: Do you know that person?

MR BAUER: I do.

20 MR O'NEILL: What is your relationship with him?

MR BAUER: I recall first meeting him when he was working for Major Projects Canberra. I think it might have been called at the time Infrastructure Capital Works, but I - it has changed names a number of times. That was when I first recall meeting Mr Green.

25 MR O'NEILL: And do you know when that was?

MR BAUER: I can't recall, sorry, with any definitive date, sorry.

30 MR O'NEILL: Had you undertaken - that is when I say "you", had you been involved in, on behalf of Manteena, any procurements where you had come across Mr Green prior to this?

35 MR BAUER: Yes, we had. Yes.

MR O'NEILL: And how many do you think you may have been involved in?

40 MR BAUER: I think, given his role - I can't be precise. I could assume that we would tender five to 10 projects for the Territory in one year. So I suspect that when Mr Green held roles in that organisation -

COMMISSIONER: He would have been involved in one way or another.

45 MR BAUER: He would have been involved in most of them in some capacity. Maybe not in a direct role but certainly in - had some visibility, perhaps, to that.

MR O'NEILL: Is that then similar to - do you know a person by the name of Mr Edghill?

MR BAUER: I do.

5 MR O'NEILL: Is it similar - a similar interaction with that person?

MR BAUER: Less so. My understanding of Mr Edghill's role was he was more senior in Major Projects Canberra and therefore wouldn't be involved in day-to-day procurement activities.

10

MR O'NEILL: Right. Did you have any involvement with Mr Green when he became the Secure Local Jobs Code Registrar?

15 MR BAUER: Very limited. It would have been, perhaps, engagement at industry-type briefings that might have been facilitated by the Master Builders on updates that the Registrar would have provided to industry. There wouldn't have been a direct need for us to be communicating, as such, on a regular basis.

20 MR O'NEILL: I'm now going to return back to the timeline, the procurement timeline. So the request for tender closed with submissions from you and - that is, from Manteena and Lendlease on 23 January 2020.

MR BAUER: Yes.

25 MR O'NEILL: At that stage, Canberra was experiencing - had experienced quite a difficult summer with bushfires.

MR BAUER: Yes.

30 MR O'NEILL: And there's not yet any impacts from COVID, but that's soon to come.

MR BAUER: Yes.

35 MR O'NEILL: The - in on or about 24 February 2020, you sent an email to Ms Young asking for an update as to what was going on. Firstly, is that a normal thing that you would do when you are waiting for a procurement? You would chase up -

40 MR BAUER: Yes, so it would be typical to inquire as to the status of the tender. Tenderers would typically be trying to preserve the teams that they have nominated on the project. So as any visibility we could get in terms of our success or otherwise would be helpful in planning works - workload, and we would have the same questions being asked of us by 15 to 20 consultant firms and 30 to 40 subcontracting firms who were obviously keen and continued, obviously, to be keen to understand, you know, whether they are going to have work coming up.

45

MR O'NEILL: And in particular in this case now - because as at late February, COVID is a very real risk to everyone - in that context, do you recall whether Ms Young said anything to you or gave you any indication as to what was to occur?

5 MR BAUER: I can't recall specifically. I may have some file notes that I can look to at that time. My -

COMMISSIONER: Have you got them with you?

10 MR BAUER: I've got, yes, notes that I've taken. So I'm - if I can I -

COMMISSIONER: Yes, by all means look at them. Do you want to press the matter, Mr O'Neill?

15 MR O'NEILL: Not at all. He is well entitled to look at the notes, Commissioner.

COMMISSIONER: No, what I mean is, is this information you would like him to access?

MR O'NEILL: Yes, please.

20

COMMISSIONER: Yes. All right. Would you please -

MR O'NEILL: Is anything assisting you?

25 MR BAUER: I can't find anything directly around February. I think I took down - I certainly have some correspondence here in. March.

MR O'NEILL: I will come to that. I - having reviewed your diary, I couldn't find a note either. But that's why I thought I would ask.

30

MR BAUER: No, I can't find anything.

MR O'NEILL: And so putting Ms Young's conversation with you or otherwise aside, did you have any awareness of what was going on and whether the Tender Evaluation Team within Major Projects and the Directorate had reached a decision yet?

35

MR BAUER: I think - if I recall at the time, we were anxious to find out as to how the tender was going. We would have inquired on a number of occasions, whether that be by phone or via email. I think my recollection is that the process was just taking a long time, or longer than we might expect for a tender assessment to take place. But I don't think we had - or I had any other understanding or advice or thought that there was anything but a normal tender evaluation process on foot.

40

MR O'NEILL: The Commission has received evidence that what had occurred was that the Tender Evaluation Team had actually arrived at a preliminary position that Manteena was to be preferred and preferred by some margin. Was that something that you were aware of

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at the time? I know you're aware of it probably now from the Auditor-General's report. But is it something you were aware of at the time?

5 MR BAUER: Not directly. I think we might have - and perhaps with the benefit of  
hindsight could see now some of the questions that we were asked as part of the  
post-tender evaluation or post-tender questions that it was a lot of rigour going into our  
design and tender response. Sometimes that might give you confidence as a tenderer that  
your bid is under serious consideration. So I don't think I could hold any more confidence  
than that. Certainly, we weren't given verbal or any other form of advice to say that we  
10 were preferred.

MR O'NEILL: Later on in the chronology, that is from about early March, within the  
Tender Evaluation Team and the Directorate of Major Projects, information, that is, legal  
advice was being sought about a process known as "best and final offer". Now, the first  
15 question, when I say best "and final offer", do you know what that means?

MR BAUER: Yes, I do.

MR O'NEILL: What is it, to the best of Manteena's - your understanding?  
20

MR BAUER: It's a process that might be adopted by a tendering party to encapsulate  
changes or opportunities to obtain the best offer possible and get it ready to be accepted.

MR O'NEILL: Did you have any understanding at the time as to the conditions that were  
25 required in order for a tendering party to be able to adopt that process?

MR BAUER: Sorry, I might get you to (indistinct) please.

MR O'NEILL: Certainly.  
30

COMMISSIONER: Yes. What - did you have any knowledge of what, in this case, the  
Education Department had to be satisfied as to before they decided to institute a BAFO  
process?

MR BAUER: No, I didn't.  
35

COMMISSIONER: Right. The BAFO process gave you an opportunity - if I use this word,  
I don't mean it offensively - to massage your tender -

MR BAUER: Yes.  
40

COMMISSIONER: - and, obviously, the other tenderer to do the same. So it provides that  
opportunity and, in a sense, you say to the client, "This is the best we can do."

MR BAUER: Yes.  
45

MR O'NEILL: You sent another email to Ms Young on 11 March 2020. Now, is that the one that you are about to take the Commission to in answer to my previous question about the February email?

5 MR BAUER: I'm not sure. Can I check with the March email because I -

MR O'NEILL: It's not a guessing competition. So feel free to do so.

10 MR BAUER: I think I must have every email here, but I'm not sure that I have one on 11 March. But unless it - is it possible to be shown to me? Is that possible? Or is it not -

MR O'NEILL: Just accept it from me that that's the date that it was sent.

MR BAUER: Sure.

15

MR O'NEILL: But I assume, then, given that you have had a review, there is nothing that triggers your memory as to whether you had a discussion with Ms Young on that date as to how things were progressing?

20 MR BAUER: I will check my notes, if I had a date - if I had a record on 11 March.

MR O'NEILL: On or about 11 March, not later, because I know we will come to that shortly.

25 MR BAUER: I don't think I've got anything on 11 March.

MR O'NEILL: All right. Now, despite this being a slightly different topic, I don't want to take you out of timeline, so I want to keep you in chronology. Sorry, I withdraw that. There was an email between you and Ms Young on 19 March 2020.

30

MR BAUER: Right.

35 MR O'NEILL: Is that - Ms Young said to you that she was expecting an imminent decision and response within a day or so and then can provide further advice. Do you recall that email?

MR BAUER: I don't recall it, but it sounds familiar because that most likely would have been in response to me asking the question as to the status of the tender.

40 MR O'NEILL: And there's nothing unusual about that kind of communication?

MR BAUER: No.

45 MR O'NEILL: Then on 23 March, there was a further email from Ms Young where she explained that she expected to receive a response last week. But she expects an update imminently so she can provide a response.

MR BAUER: Yes.

MR O'NEILL: The 23 March. Do you recall that email?

5 MR BAUER: I recall emails around that time and -

MR O'NEILL: Again, nothing unusual?

10 MR BAUER: Nothing unusual, no. Other than just that the decision was taking a long time.

MR O'NEILL: On the same day - and, again, this is the part where I was -

15 COMMISSIONER: It was more than it was taking a long time. Is - she was saying she was expecting something imminently and it just didn't happen as she had predicted. So she was also mistaken about the timeframe.

MR BAUER: Yes.

20 MR O'NEILL: On the same date, that is, 23 March 2020, on a slightly different topic but in that chronology, Manteena received a letter from the CFMEU dated 17 March 2020.

MR BAUER: Yes.

25 MR O'NEILL: I will bring you up a copy of the letter, 2.1553. Do you recall seeing that letter at or about the time?

MR BAUER: Yes, I do.

30 MR O'NEILL: And what was Manteena's response to this request about the commencement of bargaining?

35 MR BAUER: So, typically, we would - not being industrial relations expert, as a builder, we would take advice or seek some advice when we would receive correspondence like this. And, in this case, we sought advice from the Master Builders Association. I would also say that, at this time, we were very much in the start of the - trying to come to grips as a community with the pandemic, with COVID. So it was quite an uncertain time.

40 COMMISSIONER: Can we just look at that first paragraph. The CFMEU is asserting that there were employees of yours - of Manteena's, who the union represented.

MR BAUER: Yes.

45 COMMISSIONER: So far as you knew, was that correct? They did represent one or more workers?

MR BAUER: My understanding - again, I'm not an industrial relations expert - was - is that they could represent workers covered by those activity or those work practices. Whether or not any of our workers had sought to have them represent, that's a different matter. But as I - my understanding of reading this is that they could be eligible to  
5 cover - to represent workers - and it wouldn't matter whether it was Manteena or another others, but workers carrying out activities.

COMMISSIONER: No, quite. Indeed they say so. "We are eligible". "We are eligible to cover the employees". But they don't say, "CFMEU seeks that you commence bargaining  
10 for an enterprise agreement with your employees who are eligible to be covered by us." They make the flat statement that they are actually representing them. Now, industrial law is not my area of expertise, but it seems to me that you can't represent a worker unless a worker agrees to be represented. Or am I mistaken? So far as - well, you are not an expert, so we are probably sharing our ignorance, but -

15 MR BAUER: I'm not an expert, Commissioner.

COMMISSIONER: No, no. But all I'm asking is, you just sent this to your lawyers, did you?

20 MR BAUER: We sought advice. We sent it to the Master Builders Association to obtain their advice.

COMMISSIONER: Right, okay. But it just occurs to me that relevant information would  
25 be whether they actually represented workers employed by you or didn't.

MR BAUER: I think - I think I understand the question.

COMMISSIONER: That's the point of my question.

30 MR BAUER: But I - I don't have knowledge if they were actually representing - if - I think if I'm understanding the question.

COMMISSIONER: Or eligible to represent.

35 MR BAUER: Or eligible to represent or have even, to take your point, sought to have discussions with them to say, well, we are now representing you.

COMMISSIONER: Right, okay.

40 MR O'NEILL: The letter that was sent in response is at 2.1568. And there the letter really made two points. Firstly, we will consider what you are saying.

MR BAUER: Yes.

45 MR O'NEILL: And secondly, if bargaining is commenced and you are eligible, you will be notified.

MR BAUER: That's correct.

5 MR O'NEILL: Was there any communication at that time not in writing from the union to Manteena?

MR BAUER: Not that I'm aware of.

10 COMMISSIONER: Now, as I take it from previous answers, this was written on the advice that you got either from or through the Master Builders Association. Is that right or you are not sure?

15 MR BAUER: No, no, I'm - I quite clearly remember it and I can clearly recall two reasons: (1) we had an agreement that was on foot.

COMMISSIONER: So not - didn't need to be renegotiated.

MR BAUER: Didn't need - in our view, need to commence bargaining. Secondly -

20 COMMISSIONER: Right. Just tell me - although we can have a look at it, I suppose, but just if you can say offhand, I presume that an enterprise agreement is for a set period.

MR BAUER: It is.

25 COMMISSIONER: And it has provisions for timeframes before it expires for you to commence bargaining so that you've got something in place by the time it ends. Is that -

30 MR BAUER: I'm not an expert in the field but what my understanding is, that agreements actually continue on foot when they pass their nominal expiry date. So the actual agreement would continue.

COMMISSIONER: Right. Until the workers said, "We want to renegotiate" or the employer said, "We want to renegotiate."

35 MR BAUER: Correct.

COMMISSIONER: Okay. I understand that.

40 MR BAUER: Can I just add, because I think it is important in the context, that there were - you mentioned, Commissioner, that we relied solely on the advice of the Master Builders. We sought their advice. We had an agreement on foot. But we also felt, in light of the uncertainty in the economic and - well, the physical environment, being in the start of the pandemic, that that wasn't the appropriate time to be commencing a bargaining process with employees. And that's a view I still would hold now if the same  
45 circumstances was to present again.

COMMISSIONER: Because of the uncertainties of what your business was going to be facing in the next period; is that right?

5 MR BAUER: Actually more so for our workers because I would have felt that they may be feeling unsure or vulnerable about their work, so one might even argue that it might have been advantageous for someone to commence bargaining in that period to have people agree to something. Now, we didn't feel that was right. We had an agreement on foot, and it was appropriate to continue with that.

10 COMMISSIONER: Right. I might say, so that everyone in the room is aware, I do not propose to enter into the rights and wrongs of what obviously became a disagreement between Manteena and the CFMEU. The important matter, as I see it - and I will hear submissions if necessary. The important matter is that there was such a disagreement and to consider whether that gave a reason or motive for the CFMEU to make submissions or  
15 approaches to government about Manteena's tender and what was the significance of the way government did or did not deal with that.

20 So I'm not going to deal with the substance, the rightness or wrongness. I understand entirely there are different views and, obviously, different interests involved here. And I'm not going to act like an Industrial Relations Commission in an attempt to deal with that dispute. It's the fact of the dispute that is capable of explaining some of the evidence which we have heard. So if someone else wants to make a submission about that approach, I'm perfectly happy to hear it. But I just let you know that you needn't be concerned that I'm going to make any findings whatever about whose position was right or whose was wrong.

25 MR DOWLING: Commissioner, if I wonder if I can make one clarification.

COMMISSIONER: When counsel get up for the record, when we are reading a transcript, it is much easier - would you mind just -

30 MR DOWLING: Mr Dowling, representing Mr Smith.

COMMISSIONER: Thank you. Yes, Mr Dowling.

35 MR DOWLING: I wonder if I could seek one clarification in respect of your last comment.

COMMISSIONER: Certainly.

40 MR DOWLING: There has been some evidence this morning about what is now a difference in opinion about safety records or treatment of workers and, more recently, about the question of negotiation. Should we understand from your comments a moment ago, Commissioner, that you don't intend to enter into or resolve the differences in respect of all three of those things?

45 COMMISSIONER: That's correct. The - I'm going to note that there are differences, and if you recall there's - there is a tweak, to some degree, that it also either influenced or flavoured the communications between Mr Green and the union when he was Registrar so

that history may have had a continuing consequence. But I'm not going to state whether his view was right or wrong. I might - I might say in relation to his position that it was patently an open one, but I'm not sure I will even go that far. If I do go that far, though, that will be in a draft report that you will have the opportunity to make a submission about.

5

MR DOWLING: Yes.

COMMISSIONER: But I regard that as being very much a peripheral question and one which, frankly, this Commission is not qualified to determine.

10

MR DOWLING: Yes. Thank you. Can we just put on the record that it's certainly our view that you should not resolve, and you are not required to resolve those disputes.

COMMISSIONER: Yes.

15

MR DOWLING: And can we also put on the record a reservation of rights in respect of - if you are minded to go to those issues, we reserve our rights, not having heard before today some of the material that's been put and not having previously received or having received the private examination transcript of Mr Bauer.

20

COMMISSIONER: No. Although, if you may say so, I suspect that Mr Smith would be well aware that Manteena was not entirely agreeing with his point of view.

MR DOWLING: Yes. That, of course, is different to -

25

COMMISSIONER: I agree. Of course.

MR DOWLING: - hearing evidence about particular circumstances. So we just reserve our rights in that respect.

30

COMMISSIONER: Well, you will, at all events, if I come close to any finding, have an opportunity to respond before any finding is made.

MR DOWLING: Thank you, Commissioner.

35

MR O'NEILL: Now, moving away from that topic, that is, the topic about the matters between Manteena and the CFMEU.

COMMISSIONER: Sorry, but before you do, unless you're going to come to it, the - the connection between disagreements of this kind and the issues that arise when a compliance certificate under the Code is issued because that compliance certificate, for example, in substance, I think, amongst other things, says, "You're complying with your obligations under the enterprise agreement" or it adverts to that issue.

40

MR BAUER: Yes.

45

COMMISSIONER: And that can be, of course - as it was in this case, apparently - a matter of dispute between Manteena on the one hand and the union on other. So I think we will need to enter into at least your understanding of how the Code dealt with problems of that kind and, hence, what's the significant of the certificate when you get one? Does it  
5 preclude the argument at least from the procurement point of view? So the government says, as I understand it, we want compliance with industrial standards by people that we contract with as a government. That's our policy. They have to do the right thing industrially.

10 MR BAUER: Yes.

COMMISSIONER: The way we ensure that is we've set up a code. We've set up certification. Procurements have to okay obtain certifications. If they don't have a certification, they don't get a procurement. I'm being broad-brushed here but essentially,  
15 therefore, as I see it, the procurement interest of government - which is undoubtedly a legitimate one - that it's contracting with parties who are complying with their industrial obligations is satisfied by instituting the certificate system under the Code which is a prerequisite for a government procurement.

20 MR BAUER: Yes.

COMMISSIONER: So, it may be that these matters might be litigated in Fair Work Australia or an Industrial Commission of one kind or another, but the system, as I understand it, for the Territory, for the purpose of government contracting, was resolved by  
25 the certificate process under the Code.

MR BAUER: Yes.

COMMISSIONER: And this was a - I think it's fair to say, a negotiated outcome because  
30 of disputes that arose or were current and not resolved by the MOU.

MR BAUER: I'm not an expert on the MOU, so I know the Code has -

COMMISSIONER: Leave that alone. Leave the MOU out of it.  
35

MR BAUER: - replaced the MOU in some respects. And it -

COMMISSIONER: No, well, it is still alive in kicking in others. But let me rephrase the - let me rephrase my observation. And, that is, that the Code was designed in an  
40 attempt to formulate a protocol that governed the relationship between industrial relations compliance and government procurement and that it was a solution into which both unions and employers - construction employers in the field contributed in an attempt to resolve the problem. Is that fairly stated as a matter of history or not? If you want to qualify it?

45 MR BAUER: My layperson view would be the Code was established to do the things that you've expressed.



COMMISSIONER: Right.

5 MR BAUER: As a contractor wanting to work for the Territory, we needed to obtain and maintain compliance with the Code. I'm not sure - and not being an expert in the field - about its ability to administer disputes, as you've referred, between employers and unions.

10 COMMISSIONER: Well, no one has managed to do that in the entire history of Australia, so far as I know. Because, ultimately, it comes down to different interests and they having to negotiate their way into agreement one way or another. But I see your point. In fact, you're right. The Code does not provide for arbitration. It provides for information gathering. So you have audits.

15 MR BAUER: Yes.

COMMISSIONER: And it provides for complaints being made and registered or noted.

MR BAUER: Yes.

20 COMMISSIONER: But it doesn't provide, say, for an Inspectorate or a process of adjudication, except to the extent that the Registrar may, I think, attempt to manage disputes about important matters. Here, of course, there was a dispute with a Registrar, the CFMEU saying, "You should take a line on this issue" and Mr Green saying, "That's outside my jurisdiction." So, that set the framework, then, for - perhaps not surprisingly for  
25 attempts to settle the dispute outside the Code framework. But -

MR BAUER: Can I just say, there's been references made to a dispute. I'm not sure -

30 COMMISSIONER: Sorry. In this - I know, in this field, "dispute" has a special meaning. I think I should say disagreement. I don't mean an industrial dispute within the meaning of that area of law.

35 MR BAUER: Correct. Because Manteena didn't and doesn't have a dispute with the CFMEU.

COMMISSIONER: No, quite.

MR O'NEILL: Well -

40 COMMISSIONER: No, but it's clear you have a disagreement. We've just looked at one.

MR BAUER: No, I think we've just responded to what we are entitled to be able to do.

45 COMMISSIONER: No, no, I'm not being critical at all. What I'm saying is, the CFMEU wanted something, and you said, "we are not accepting what you say." That's the effect of this letter. I don't mean anything more than simply noting there was a difference which, of course, no doubt reflects the differing interests at stake here.

MR BAUER: Yes.

5 MR O'NEILL: Commissioner, I note the time, but this topic - I've just got something that's related to this topic I would like to - if I may.

COMMISSIONER: Yes.

10 MR O'NEILL: Can I just take you, Mr Bauer, to 2.1614. So this is a draft letter that we understand was never sent by the CFMEU dated 22 April. So that is about a week after the letter that Manteena had sent.

15 COMMISSIONER: I think we should add the information, although you might be aware of it, that I think both Mr Smith and Mr O'Mara, their evidence is - correct me if I'm wrong, Mr O'Neill, they had thought this letter had gone and the fact that it didn't was a mistake or administrative oversight.

MR O'NEILL: Yes. So they had intended to letter to be sent to the Education Directorate.

20 MR BAUER: Right.

MR O'NEILL: And the way in which it framed what you say is not even a disagreement, was that the CFMEU had written to Manteena on 11 September 2019 seeking to provide information appropriate to inductions, etcetera, no response. They again wrote to you on 25 17 March 2020 seeking to commence bargaining. Do you see that? The second or third last paragraph.

MR BAUER: I do.

30 MR O'NEILL: And then they framed the - what it views as a disagreement in that paragraph, if we can pull that out. Starting with:

35 *We believe that there was a consistent failure to adhere to the Secure Local Jobs Code which had the potential to render you ineligible to tender at some point during the process, and, as such, a risk to the Education's efficient management of the tendering process.*

Do you see that?

40 MR BAUER: I do.

MR O'NEILL:

45 *And to ensure that the Education Directorate maintains the choice of tenderers for this significant project -*

They are talking about Throsby here?

MR BAUER: Yes.

MR O'NEILL:

5 *We seek you raise the issues of compliance with Manteena directly.*

Do you see that?

MR BAUER: Yes.

10

MR O'NEILL: Now, were you aware that this was the union's view about Manteena at the time?

MR BAUER: No, I wasn't.

15

MR O'NEILL: It seems at odds with the way in which you're describing what you understood to be just an interaction with them about commencing bargaining. You agree with me?

20 MR BAUER: Correct. Can I - can we just, for my benefit, just zoom out to the first response?

MR O'NEILL: Yes.

25 MR BAUER: Where - the 11 September '19.

MR O'NEILL: Yes, so that's the CFMEU wrote to Manteena. That paragraph?

30 MR BAUER: Yes. So Manteena sought advice from the Master Builders at that time, and the advice we were given was that we were not obligated to provide information to the CFMEU. I have that advice and the advice, if I could paraphrase, as I recall, was that the only party who could compel a contractor to provide that information was the Registrar.

COMMISSIONER: That is, the Secure Local Jobs Registrar.

35

MR BAUER: Yes.

MR O'NEILL: Who is Mr Green?

40 MR BAUER: Yes.

MR O'NEILL: And he had not compelled Manteena to do so?

MR BAUER: Not to my knowledge, no.

45

MR O'NEILL: And so, to the best of your knowledge, as at 4 - sorry, I withdraw that - 2 April 2020, you were unaware that the CFMEU had an issue with Manteena?

MR BAUER: Yes, that's correct.

5 COMMISSIONER: Yes. All right. We will take the luncheon adjournment. I think we will return at 2, though.

**<THE HEARING ADJOURNED AT 1.10 PM**

**<THE HEARING RESUMED AT 2.04 PM**

10 COMMISSIONER: Yes, thank you, Mr O'Neill.

MR O'NEILL: Thank you, Commissioner. Now, Mr Bauer, just before we leave the topic that we were last on, which was about the way in which the CFMEU perceived Manteena and Manteena likewise, a related topic about that is, were there processes within Manteena  
15 that were designed to be able to audit things like performance of - safety record, how they were going on their Secure Local Jobs requirements; those kind of things?

MR BAUER: We would have - and we do have internal processes to carry out audits as part of our integrated management system. But in addition, there are external processes  
20 that I mentioned earlier around independent validation of those things, whether it be -

COMMISSIONER: I understood that in order to get a certificate or retain a certificate, that an audit report is required by the Registrar.

25 MR BAUER: That's correct.

COMMISSIONER: And is the - I don't recall now, is the choice of auditor of the company or does the registrar have a panel and you choose from one of the panels or how does it -

30 MR BAUER: My understanding is that there are a panel of accredited auditors. It is the choice of the organisation to choose one of those auditors.

COMMISSIONER: And, naturally, it's your obligation to pay the auditor?

35 MR BAUER: Yes, and I understand there is a maximum number of audits that that auditor can carry out on an organisation before you would need to appoint a second auditor after a number of audits.

COMMISSIONER: So this is to ensure independence and -

40 MR BAUER: That's what I would understand, yes.

COMMISSIONER: Right. So as at - and amongst the things being audited would be safety compliance, for example? Or what can you tell me about -

45

MR BAUER: Look, I have not sat with the Secure Local Jobs auditor, but I would assume there would be less focus they would have on safety and more so to do with industrial-related matters, whether that be confirming pay and conditions were being met, other entitlements were being made, that the company would have processes and procedures in place that they could validate those, that they could perhaps view induction procedures to determine that the necessary obligations under the Code form part of inductions and the like, more so than a specific safety assessment because that, as I understand, is being carried out by a separate part in Territory projects as part of the Active Certification process.

5

COMMISSIONER: Sorry?

10

MR BAUER: Active Certification process, and that's the safety inspection validation - independent validation process.

15

COMMISSIONER: What happens to the reports made as a result of Active Certification?

MR BAUER: My understanding is they are provided by the independent auditor - in the case of Active Certification audits, my understanding is that auditor is selected by the Safety Manager in Major Projects Canberra. I might have the title of that role not precise.

20

COMMISSIONER: Someone with that role.

MR BAUER: They make the selection of who that auditor is. That audit outcomes are provided back to the Major Projects Canberra. And I believe, generally, as a course of events, that the company who was being audited would also get a copy of the audit report.

25

COMMISSIONER: So an opportunity to respond.

MR BAUER: Yes, or close out issues if there were issues identified during the audit.

30

COMMISSIONER: And is - are those audits in the public domain or are they - do you know?

MR BAUER: I'm not sure if they are made publicly available.

35

COMMISSIONER: Right, okay.

MR O'NEILL: Thank you, Commissioner. Now, returning back to the topic of the procurement. You were liaising with Ms Young throughout the latter part of March, and you were being told by her that the ED was coming to a decision - COVID, etcetera. Had anything started to trigger in your mind as to this process is now starting to drag and I would like a response, or I would like an answer?

40

MR BAUER: Yes. Certainly that the process was dragging and, from my recollection at looking at my file notes, I felt there was a degree of less positivity about the conversations that I was having, so I suspected - you know, I guess the benefit of hindsight now, perhaps

45

things might have been happening in the background. But I think at the time it was just more, we are keen to get a decision. In fact, a decision either way, because we tender projects all the time. We don't win them all, and that's a commercial reality of the industry. We were just keen to find out what the outcome was.

5

COMMISSIONER: What when you say, "less positivity", did you actually get some indication to that extent?

MR BAUER: No. Can I just check my notes, because I had - I did make a file note at the time, I believe.

10

MR O'NEILL: Maybe - if we can do it this way. It might just be quicker if I help you. So on or about - sorry, on or about 3 April 2020, you have a diary entry. Can I just bring up the diary entry. 2.1616. Do you recognise that handwriting?

15

MR BAUER: Yes, that's mine.

MR O'NEILL: That's yours. This is a handwritten diary entry for 3 April 2020. It says there that you spoke with Mr Edghill. Do you see that?

20

MR BAUER: Yes.

MR O'NEILL: And then it refers to something called HubSpot. What's that?

MR BAUER: That's a customer or client resource management system that we use to just capture information on projects, on clients and the like. So just collates it all in one location.

25

MR O'NEILL: And then a separate conversation with Mr Green at 10.30 am.

30

MR BAUER: Yes.

MR O'NEILL: And you see under there it's got "GSO involvement". Do you see that?

35

MR BAUER: Yes.

MR O'NEILL: What does that mean?

MR BAUER: I'm assuming my reference there is to Government Solicitor Office involvement and, again, my assumption is that Mr Green provided that advice in the phone conversation.

40

MR O'NEILL: Yes. So he's told you that there's - the Government Solicitor's Office - the Government Solicitor is involved. And then underneath it says:

45

*Direct engagements with local education architects. Small stimulus package, 6 mil. 15 mil PM-style jobs.*

Do you know what that is?

5 MR BAUER: Yes, I do. So, at the time, this was - the industry was in a great degree of uncertainty with the pandemic and, as I understand, the Territory was looking at how they might actually bring some projects online to keep the industry going during this period. And that's what my recollection is, that the Education Directorate would be undertaking some packages of work. That would be coming out to the market shortly.

10 MR O'NEILL: Do you see next to that there's a cloud around a word with an asterisk:

*Two weeks BAFA.*

Do you see that?

15

MR BAUER: Yes.

MR O'NEILL: What does that mean?

20 MR BAUER: I think that's my initial recognition of what ended up becoming a BAFO, best and final offer, and Mr Green providing advice that - now, I can assume that the Campbell School Project tender was going to go to a advise BAFO process, best and final offer. And the reference to areas cost and relationship between areas might be some things that would form part of the best and final offer assessment or response. And the reference  
25 to 75K now and 75K to the loser was the reference to the additional funds that the Territory was going to make available for the best and final offer process, and the 75K to the loser refers to the original tender requirement for a copyright assignment fee of 75,000.

30 MR O'NEILL: Now, if I could just take to you 2.1642. What is this document?

MR BAUER: They are my notes that I actually entered into the system, HubSpot. So you will see on that previous slide, I actually had a reference to HubSpot with it ticked. When I tick it, that means I've actually entered it into the system.

35 MR O'NEILL: Right. And so here it says:

*Campbell School tender likely to go to BAFO process.*

40 So that confirms the previous answer that you understood you were giving answers about Campbell that you were - discussions about Campbell.

MR BAUER: Yes.

45 MR O'NEILL: And it goes on to deal with other projects - other opportunities, rather?

MR BAUER: Yes.

MR O'NEILL: And then if we scroll one further on, 2.1644. Sorry, 45. Do you see here, this seems to be a HubSpot -

MR BAUER: Yes.

5

MR O'NEILL: - entry in - for the discussion with Mr Edghill.

MR BAUER: Yes.

10 MR O'NEILL: And you will see there that he notes in respect of Campbell, there were budget issues. Do you see that?

MR BAUER: Yes, I do.

15 MR O'NEILL: Do you recall what those budget issues were?

MR BAUER: I recollect from the time that the tender responses were above the available budget.

20 MR O'NEILL: Mr Edghill had told you that, had he?

MR BAUER: I think I inferred that from the conversation that I had with him, that that was the reason for the delay.

25 MR O'NEILL: I see. Did any of that - now that you can recall it, did any of that strike you as unusual?

MR BAUER: No, because it was in the context of the Territory commencing a - or indicating that they were commencing a best and final offer process. So the two probably aligned.

30

MR O'NEILL: The process did go to best and final offer and Manteena was - well, Manteena did - it didn't have to, but Manteena did opt to provide a response.

35 MR BAUER: Yes.

MR O'NEILL: What was - in a very general sense, what did that entail?

MR BAUER: We were given a short brief over a couple of pages by the Territory. We needed to go back and meet with the design team to look at rationalising - if there was an opportunity to rationalise areas to make the building even more efficient to reduce cost. The Territory provided a maximum available budget and our objective - I guess, challenge, was to see if we could make that all work. So that meant we needed to effectively get some documentation from the design team, re-approach trades, get a revised pricing from them and essentially recompile the bid again, complete all the sections that were asked for as part of the evaluation and submit best and final offer.

45



MR O'NEILL: On 6 April 2020 - and this is at 2.1617 - your diary records that a bubble with:

5 *Throsby, Manteena, not -*

Underlined -

*the preferred tenderer.*

10 Do you see that?

MR BAUER: Yes, I do.

MR O'NEILL: What's that a reference to?

15

MR BAUER: I received a phone call from the project officer on the Throsby tender.

MR O'NEILL: That's the person named there?

20 MR BAUER: Yes, Erica Pilgrim-Day, advising that we were unsuccessful on that bid and that we would be given a debrief within the month of April.

MR O'NEILL: There was a consultation meeting, a section 50A consultation meeting with Mr O'Mara on 8 April 2020. Do you remember that?

25

MR BAUER: There wasn't actually a consultation meeting. So on 8 April, there was a phone conversation with Mr O'Mara.

30 MR O'NEILL: So where he says that that was a meeting on site, he's incorrect about that, you say?

MR BAUER: The meeting actually took place on 15 April.

MR O'NEILL: Okay. What happened on the 8th?

35

MR BAUER: On 8 April I received a phone call from Mr Edghill. It was in relation to the Surge Centre that was being constructed at - now it's known at the Garran School campus that - asking if I could make a call to Mr O'Mara regarding the workplace arrangements on that project. So I then called Mr O'Mara and had a conversation with him about that and arranged after that to hold the worker consultation or our organisation held the worker consultation on 15 April.

40

MR O'NEILL: So if I just take you to - well, I will just walk through your diary quickly. To the next page, 2.1618. You will see the 7th. And then to the next page, 2.1619, the 9th.

45

MR BAUER: Yes.

MR O'NEILL: Do you see at the top:

*Duncan Edghill follow-up Colm purchase order.*

5 MR BAUER: Yes. That actually relates to another project that we were doing for the Territory.

MR O'NEILL: And then in - underneath that, in a box that starts Jason O'Mara with the date 8th of the 4th '20, File Notes. And then you have set out there, you say that that means  
10 that that was the date you had discussed there would be a consultation. Fair?

MR BAUER: That's correct.

MR O'NEILL: He indicated to you he wished to talk with your workforce?

15

MR BAUER: That related to the section 50A consultation for that project, yes.

MR O'NEILL: Yes. And then it was to take place on the Wednesday at 8 am, to meet on site.

20

MR BAUER: Yes.

MR O'NEILL: Then he says - then there's this note:

25 *Jason intimated that had we engaged more, we might have got a different piece of paper on Throsby.*

Do you see that?

30 MR BAUER: Yes, I do.

MR O'NEILL: Do you remember him saying that to you?

MR BAUER: Yes, I do .

35

MR O'NEILL: What was your reaction to that?

COMMISSIONER: Well, that's only a note. Can you give us any conversational context or -

40

MR BAUER: Look, it's three and a half years ago, but for the best I can recall, the conversation started because I was asked by Mr Edghill to call Mr O'Mara. And can I say that the process of consulting with workers on that project was being arranged by Manteena. So we didn't need to be necessarily be reminded but we appreciate that was  
45 what Mr Edghill felt he needed to do. So I obliged and made that call. And I'm not sure - I can't recall specifically, you know, how the conversation arrived at that reference to Throsby. Clearly, it did in some way because I made the note and it was of - of notable for

me to make - to record that down or at least to have that memory jogger for myself, to say that reference. It was a bit surprising, probably, to say, because, you know, we had only just found out couple of Days earlier that we didn't - we weren't successful on Throsby. I don't think I reacted to that.

5

COMMISSIONER: So engaged more with whom? What did you understand that to mean?

MR BAUER: I understood that to mean the CFMEU.

10 COMMISSIONER: Had the CFMEU reached out to you in relation to Throsby?

MR BAUER: Not in relation - well, no, not in relation to Throsby.

15 COMMISSIONER: But more generally in relation to the matters that we have seen in the correspondence?

MR BAUER: Well, I can hypothesise that that might be the reference to engaging as in responding to those - the correspondence in. March. But that's a - that would be an assumption. I don't know. And I didn't, I guess, interrogate to say, "What does that actually mean?" I just took the information.

20

MR O'NEILL: The next note says:

*Jason believes I was taking them seriously -*

25

Probably means "I wasn't taking them seriously".

MR BAUER: Correct.

30 MR O'NEILL:

*...and put off commenting when they made recent approaches and they wouldn't have worried, but tendering \$100 million of ACT Government work puts us on the radar.*

35 MR BAUER: Yes, I think - I think the words "put off consulting", when they made recent approaches.

MR O'NEILL: I see. "Put off consulting". Then now, there was no - you don't recall responding to this assertion from Mr O'Mara?

40

MR BAUER: No, because it was not really a process for us to start. I mean, we are tendering work for the Territory, not for any other organisation. The Territory are the people we submit a bid to. The Territory provide a direction as to whether or not the bid is successful or not. Any other kind of process is not part of a procurement process.

45

COMMISSIONER: When did you make this note in relation to this conversation? Was it the same day, the same afternoon? The next day?

MR BAUER: At the time. At the time.

COMMISSIONER: At the time.

5

MR BAUER: Yes.

MR O'NEILL: You have just written it on the wrong date page? Is that the -

10

MR BAUER: I think - without having my diary in front of me, I think 8 April before was full.

MR O'NEILL: I see. And Mr O'Mara's evidence to the Commission is that it was a bit of a parting shot. Is that how you recall it?

15

MR BAUER: Look, I don't know. It was a comment that was made to us. I took it for what it was worth. I didn't really -

COMMISSIONER: Did you think he was joking?

20

MR BAUER: I don't suspect I thought he wasn't joking, or not joking. I don't think I - I'm not sure - if - I think if he said it, I suspect he wouldn't have been joking. So, I mean, I think that's all I can - I didn't write it down and, you know, I suspect if I felt someone was joking I probably wouldn't make the effort of making a note of it.

25

COMMISSIONER: It doesn't read like a joke.

MR O'NEILL: All right.

30

COMMISSIONER: Of course, a great deal of things are said in the course of negotiations which may or may not imply an ability to do things or not. That is, claims can be made for the purpose of the discussion but not necessarily for the purpose of truth.

MR BAUER: Yes.

35

MR O'NEILL: Can I take you to a different note you've made. 2.1779. On 6 May 2020, you've recorded that you had a phone call with Mr Green. Do you see that?

MR BAUER: Yes, I do.

40

MR O'NEILL: Do you see bullet point 1:

*Touching base re unions.*

45

MR BAUER: Yes.

MR O'NEILL: What was that about?

MR BAUER: They were my notes that I made before I had the phone conversation.

MR O'NEILL: So you were calling him?

5

MR BAUER: Yes.

MR O'NEILL: And these were your notes. These are your preparatory notes, are they, above the line?

10

MR BAUER: Yes, I prepared those and then the notes at the bottom half of the page where it spoke to Mr Green are the notes that I took after the conversation.

MR O'NEILL: So the number one there:

15

*Good that we have reached out to the CFMEU.*

That's him saying -

20

MR BAUER: That's - that's correct.

MR O'NEILL: And he said words to that effect. Is that how you recall it?

MR BAUER: That's how I recall it.

25

MR O'NEILL: How had you reached out to the CFMEU at that stage?

MR BAUER: We had had meetings, the consultation process that occurred on the COVID Surge Centre project.

30

MR O'NEILL: Yes. So the section 50A consultation.

MR BAUER: Yes.

35

MR O'NEILL: And the phone call.

MR BAUER: Yes.

MR O'NEILL: He says - well, you've made a note:

40

*Let us know if he has any feedback re unions and Manteena.*

Do you see that?

45

MR BAUER: Yes, I do.

MR O'NEILL: Was it your - that is, was it Manteena's concern that it had a problem with the unions at this stage?

5 MR BAUER: I think we had - we were starting to form that view by then, yes.

MR O'NEILL: When I say - whether you say, "the unions", one union in particular, the CFMEU?

10 MR BAUER: Yes.

MR O'NEILL: And do you recall what he said - sorry, did he provide you any feedback in relation to -

15 MR BAUER: No, he didn't.

MR O'NEILL: It says:

*Knows that the unions widely voice their opinions on things to lots of people.*

20 MR BAUER: Yes.

MR O'NEILL: What did you take that to mean?

25 MR BAUER: Just that they communicate to people out there and probably say lots of things.

MR O'NEILL: Sure. But - at a level of abstraction, that's obviously correct but people here means people that can - it has a different meaning, doesn't it? It means people that can actually make decisions or influence decisions being made. Fair?

30 MR BAUER: Yes, I think that's fair.

35 MR O'NEILL: So when he's saying unions - that he knows that the unions widely voice their opinion on things to lots of people, he's saying they are saying this to people who are in positions that mean something.

MR BAUER: I can understand that, yes.

40 MR O'NEILL: Is that how you understood it at the time?

MR BAUER: Yes, I - I think so. I think it has a lot more clarity now with the benefit of hindsight, but I think it's probably reasonable to assume that now.

45 COMMISSIONER: It strikes me as a careful way of giving you a hint. Do you think now, looking back?

MR BAUER: Yes.

MR O'NEILL:

*MB didn't mention Throsby.*

5

MR BAUER: Yes.

MR O'NEILL: So you didn't mention Throsby. Is that what you are saying there? Is that who MB is?

10

MR BAUER: That's correct. So my comment there or my note is I didn't mention the two tenders that were under assessment or, in the case of Throsby, that had just been awarded.

MR O'NEILL: And so this is not a note of what actually occurred but a note of what you did in the meeting -

15

MR BAUER: That's correct.

MR O'NEILL: - as a matter of - to ensure that there was no suggestion otherwise.

20

MR BAUER: That's correct.

MR O'NEILL: Having looked at that note - that is, both pre-agenda and the notes that follow - is there anything else about that conversation which struck you, now that you do know what was happening at the time, as odd in that conversation?

25

MR BAUER: Based on what I now or what I knew at the time?

MR O'NEILL: Well, at the time, but you now know what's going on. So it's really a matter of - is there something else about that conversation you now recall?

30

MR BAUER: I mean I think it was becoming more and more clear to us that there were factors that were influencing the outcome or outcomes, potentially.

MR O'NEILL: Did you get a sense of where in government those factors were at play?

35

MR BAUER: Not at that time, no.

MR O'NEILL: My learned junior has asked me for you to clarify who "Rod" is at point 2.

40

MR BAUER: So the reference to Rod is one of my fellow directors, Rod Mitton.

MR O'NEILL: It will no doubt be the source of correspondence shortly. All right. I then want to take you to the next document, which is back at 2.1762. This is your note on 5 June 2020. Now, there has still not been a decision. You've had your best and final offer bid in for some time.

45

MR BAUER: Yes.

MR O'NEILL: And so is this - does the Commission come to assume that you - you're calling Ms Young directly, saying what's going on?

5

MR BAUER: Yes.

MR O'NEILL:

10 *Still no word on tender.*

Is that a record of what she is informing you?

MR BAUER: Yes.

15

MR O'NEILL: And then:

*Didn't sound very positive.*

20 Is that a note of what Ms Young told you or is that your reflection upon what you heard?

MR BAUER: That was the point that I was making to the Commission before, that I felt that there was a change in the language. That was purely my assessment of the conversation, not any particular words that were said. It was just that I didn't think it was that positive anymore and I guess I was forming the view that it was unlikely that we were going to win the project.

25

MR O'NEILL: So your previous view had been formed on the fact of the way in which you had been asked all these - that Manteena had been asked all these questions which looked like you were on the road to winning the bid and now you are getting a sense, however that may be, that that's not - no longer the case?

30

MR BAUER: Correct.

35 MR O'NEILL:

*Confident the job will be going ahead.*

Again, is that what Ms Young was telling you or is that your reflection upon it?

40

MR BAUER: Yes. I think it's probably a combination of both but the reference there is the offer - offers are now within the available budget, and it's in a position where the Territory could accept something, so it - the - I guess positivity or lack of wasn't around that the job may not go ahead. It was - it's going to happen.

45

MR O'NEILL: And it's in the budget?



MR BAUER: Yes.

MR O'NEILL: Did Ms Young disclosed to you that she was no longer on the panel?

5 MR BAUER: She must have, because I've made that note there, yes.

MR O'NEILL: Do you remember reflecting upon that as to whether that was odd or not?

10 MR BAUER: I think at the time, I thought it was odd. But didn't probably give it a lot more attention that that.

COMMISSIONER: Did she explain?

MR BAUER: She didn't explain the context and I didn't inquire.

15 MR O'NEILL: And:

*Not sure if the tender Rec has gone to the Education Delegate yet.*

20 So -

MR BAUER: That was, I believe, my note of what Ms Young explained to me.

25 MR O'NEILL: Right. At 2.1763, your diary entry for 10 June 2020. And there's a note to the left of the cloud that says:

*Campbell School with Director for signature.*

30 Do you see that?

MR BAUER: Yes, I do.

MR O'NEILL: Do you know who was telling you that?

35 MR BAUER: That was a phone conversation I had with (indistinct).

MR O'NEILL: Right. And what did that signify to you?

40 MR BAUER: I can't recall unless I can actually look at the HubSpot record, which I can see whether I initiated that phone call or not.

MR O'NEILL: Certainly. Feel free to do so.

45 MR BAUER: He was working in, I believe, Major Projects Canberra working on not the Campbell School project, I believe, at that time, but would have been aware of procurement activities that were taking place. And so he's obviously shared with me that

that tender was with the Director-General for signature. Or I assume that's what I've referenced there, "with DG for signature".

5 MR O'NEILL: Did you know that the Director-General was the person who needed to -

MR BAUER: No, I didn't. And, typically, we wouldn't, as an entity for the Territory, wouldn't be privy to what might be actually signing which piece of paper.

10 MR O'NEILL: And then just go to the next page in your diary, 2.1764. This is 24 June 2020. And you see here you've noted a call to Ms Young. As at this stage, Manteena still hasn't been told the results of the tender - of the best and final offer process?

MR BAUER: Yes.

15 MR O'NEILL: You call her. She informed you that the delegate is the Director-General and it normally wouldn't go this high.

MR BAUER: Yes.

20 MR O'NEILL: Is that a note of what she told you?

MR BAUER: Yes.

25 MR O'NEILL: Did you have a reflection upon that when she told you that? This is not a \$200 million job. This is a - as you describe it, a mid, low-mid level job.

30 MR BAUER: Correct. With the benefit of hindsight, I can now see, and I think I probably would have assumed at the time that it sounded like there was some complexities for it to need to go to this level or to have this kind of delays and then, I guess, escalation within the directorate. But, in some respects, we're a contractor. We're just wanting to get an answer on the tender, to know whether we've got a job to work on or not. You know, that's fundamentally really all we wanted to know.

35 COMMISSIONER: When you say "complexities", the job itself was not particularly complex, was it? It was a conventional refurbishment.

MR BAUER: Correct.

40 COMMISSIONER: You can have agreements or disagreements about design but nothing particularly interesting or exciting. Is that fair?

MR BAUER: No. No. It was obviously an important project.

COMMISSIONER: Sure.

45

MR BAUER: But from a design and building perspective, it was not unusual.

COMMISSIONER: Fairly conventional.

MR BAUER: Correct.

5 MR O'NEILL: And you see there, Chair of the Tender Evaluation Team has had no response.

MR BAUER: Yes.

10 MR O'NEILL: It's a little cryptic.

MR BAUER: I think that was actually just Ms Young's words. She was, as I understand it, no longer the chair and presumably that was her passing on information to say the Major Projects team wasn't even aware of where it was up to. That's what I took out of it.

15

MR O'NEILL: That coheres somewhat, I guess, with the next line:

*Kelly is reporting the delay to Adrian Piani and Duncan Edghill.*

20 MR BAUER: Correct.

MR O'NEILL: And so they were people within Major Projects?

MR BAUER: Yes.

25

MR O'NEILL: And she called back and suggested you call Mr Green directly.

MR BAUER: Yes.

30 MR O'NEILL: As a suggestion from Mr Piaini. Do you see that?

MR BAUER: Yes.

MR O'NEILL: What did you make of that?

35

MR BAUER: I think there was probably some context to Ms Young wanting our organisation, and presumably the other tendering party, to get an answer on whether the job was going to go ahead or where things were up to. So it might have even been out of a degree of frustration that I was keeping on following her up and she wasn't able to provide any advice. So perhaps she might have formed the view, well, perhaps speak to someone who can tell you.

40

COMMISSIONER: She was redirecting you to another target. Is that what it amounted to.

45 MR BAUER: Sorry?

COMMISSIONER: She was redirecting you to another target.

MR BAUER: Perhaps.

5 MR O'NEILL: Well, in Mr Piaini's position, you would expect him to know what was happening, wouldn't you?

MR BAUER: I could assume, yes, but I - again without - I'm not a public servant so I don't profess to know any of the mechanics of how that communications might work.

10 COMMISSIONER: Certainly.

MR O'NEILL: Chasing him up.

MR BAUER: Yes.

15

MR O'NEILL: Sorry. Mr Green. You were text messaging Mr Green after that date chasing him up for an update. Is that fair?

MR BAUER: Yes.

20

MR O'NEILL: And do you recall whether you were successful in being able to obtain contact with him in this period of time?

MR BAUER: I recall there was a discussion on the - there was definitely a discussion on 25 26 June.

MR O'NEILL: Yes.

30 MR BAUER: And you might be leading me to the - maybe a slide that has a screenshot of that. I'm not sure. I can check my notes if I've got -

MR O'NEILL: If I can take you to 2.1892 to start.

MR BAUER: Yes.

35

MR O'NEILL: Where you have informed Ms Young that you tried to contact Mr Green, but you hadn't managed to speak to him.

MR BAUER: That's correct.

40

MR O'NEILL: And then there was a conversation that took place on the 26th. But we don't seem to have your note of that conversation.

MR BAUER: In the - in the afternoon?

45

MR O'NEILL: Do you have one?

MR BAUER: I've got a file note that I made.

MR O'NEILL: Yes.

5 MR BAUER: But I don't have a diary entry, no.

MR O'NEILL: Sorry, the file note on 26 June. You may potentially be confused with a conversation that occurs later with a significant file note, which we have.

10 MR BAUER: Yes, I think I am being confused by that, yes.

MR O'NEILL: Very well. Let's proceed. Do you recall anything of a conversation on the 26th, that is, the date that you found out?

15 MR BAUER: I recall that conversation in the afternoon. Yes.

MR O'NEILL: Yes. What happened?

20 MR BAUER: Mr Green called, and I think it was around 4 - it was in the mid to late afternoon - and advised that Manteena was unsuccessful. And I was obviously disappointed but perhaps in some way kind of expecting that response. And I asked, you know, could they - could he provide any information on why. You know, some initial feedback. And it was very limited other than to say it was contentious and - can I just check my notes because I did make some notes of that.

25 MR O'NEILL: When you say "notes" s that notes you have undertaken in preparation for today?

30 MR BAUER: No, notes that I took at the time or later that evening. I made some notes. So the things that I recall that I have documented down were apparently the decision was taken out of Mr Green's hands and made by someone above. And it was contentious. He indicated that the Education Directorate would be providing the debrief and not Major Projects, as is usually the case. And when asked if he would be able to tell us why the decision was contentious, he said:

35 *Possibly once he worked out how to pass the feedback on.*

40 MR O'NEILL: I'm just going to ask you to mark that page. Commissioner, leave to approach. Thank you. And I'm going to ask to get a copy of it after.

MR BAUER: Sure.

MR O'NEILL: So how long after that conversation do you think you made that note?

45 MR BAUER: I can't recall, but it would have been that evening.

MR O'NEILL: So soon thereafter?

MR BAUER: Yes.

MR O'NEILL: You received another phone call.

5

MR BAUER: That's correct.

MR O'NEILL: Who was that from?

10 MR BAUER: Ms Young.

MR O'NEILL: And what did she say?

15 MR BAUER: So that was quite late. So that was about 7 pm on Friday evening. And she wanted to check that we had heard from Mr Green earlier in the afternoon. And, which I confirmed that we had. I took from the conversation that she was uncomfortable, and my notes are that she intimated it was the wrong decision. She inferred. Again, my assumption from the conversation that Manteena had been put forward, but the tender evaluation panel's recommendation had been overturned.

20

MR O'NEILL: So as at the end of both of those conversations, you were now possessed with some information that, firstly, a decision had been made by the DG.

25 MR BAUER: Now that I can look at the, I guess, summary of, I guess, collection, I don't think I knew at that time that it was the DG. I can see that earlier you showed me some slides that I had a reference to the decision was with the DG. So I think by connection, you might assume that, but, yes, I can say correct there.

30

MR O'NEILL: And that something had gone on which had meant that there had been a -

MR BAUER: Yes.

MR O'NEILL: - internal decision to change what the recommendation had been.

35 MR BAUER: Yes.

MR O'NEILL: Did Ms Young recommend anything to you as to steps that should be taken?

40 MR BAUER: My recollection is that inferred that we might wish to consider an FOI process.

MR O'NEILL: And ultimately that was something that was done.

45 MR BAUER: That's correct.

MR O'NEILL: Some months later.

MR BAUER: That's correct. Yes.

MR O'NEILL: There was a phone call to Manteena on 29 June 2020.

5

MR BAUER: Yes.

MR O'NEILL: You didn't receive that call, but the joy of this forum is that the rules of evidence don't apply. So can you just tell us to the best of your understanding what that phone call was?

10

MR BAUER: Yes. So a call came in and it was directed to one of my fellow directors, Lou Agnello, and he didn't - the person who made the call didn't volunteer their name but made mention that Manteena had been recommended twice on the project and that the decision had been overturned by someone high up in the Department and made the comment that it was wrong and that heads should roll. And also mentioned that we should consider an FOI process.

15

MR O'NEILL: And that was 29 June 2020?

20

MR BAUER: That's correct. On a Monday morning.

MR O'NEILL: What did Manteena resolve it was going to do in respect of this decision as at about this time?

25

MR BUAER: I think in the first instance we needed to take stock of the information that we had been given and determine what might be appropriate. What we ultimately wanted to do was understand what occurred.

30

MR O'NEILL: On 28 July 2020 there was a Microsoft Teams meeting between you, Mr [redacted]. –

COMMISSIONER: Mr Green.

35

MR O'NEILL: I apologise, Mr Green. You, Mr Green, Mr Blom, Mr Patel and others over Microsoft Teams, there's a debrief on 28 July 2020.

MR BAUER: Yes.

40

MR O'NEILL: Do you recall that debrief?

MR BAUER: Yes, I do.

MR O'NEILL: What occurred?

45

MR BAUER: We were provided a, I guess, verbal feedback on our bid, and we were taken through the feedback that the Territory could provide on each of the assessable criteria as part of the tender evaluation process.

5 COMMISSIONER: So just so I understand it, so you were given the scoring?

MR BAUER: My notes, which I took at the time, which have been provided to the Commission, have made some references to scores where we were provided - and this was a verbal, or it was via Teams so I would have taken the notes at the time, and I can see that  
10 in some of these assessable criteria I have noted scores down but in others I haven't, and I've just made - I guess transcribed by what I understood.

COMMISSIONER: By the end of the meeting, did you understand that Manteena had outscored Lendlease? Or did that information not -  
15

MR BAUER: Can I just check my notes very quickly?

COMMISSIONER: Yes, check.

20 MR BAUER: I don't think I could definitively say that we had outscored the other tenderer, but what I can - what I did note is that - where we scored more strongly, but we were not provided information in terms of how our score compared to the other tenderer.

MR O'NEILL: Following that debrief, Manteena sent the letter which appears at 2.1936.  
25

MR BAUER: Yes.

MR O'NEILL: And you were seeking further information to better understand the decision.

30 MR BAUER: Yes.

MR O'NEILL: And there you say:

35 *Specifically we understand that while Manteena had the preferred design and construct solution, and may have in fact been recommended as the preferred contractor by the Tender Evaluation Team, the Director-General took into account company long-term factors as the core elements in the tender to select another preferred tenderer.*

40 Do you see that?

MR BAUER: Yes, I do.

MR O'NEILL: That was something that had been given to you in the debrief, is that fair?

45 MR BAUER: That's correct.



MR O'NEILL: And, essentially, the company was asking, well, we need to understand what that is, because at that level of abstraction, it's a bit hard to know.

MR BAUER: Absolutely.

5

MR O'NEILL: Also if the contract is still yet to be awarded, is there something else yet we can do to help?

MR BAUER: Yes.

10

MR O'NEILL: You sought a meeting with the Director-General.

MR BAUER: That's correct.

15

MR O'NEILL: Did you ever have a meeting with the Director-General?

MR BAUER: We did some time later, but not for well over 12 months.

20

MR O'NEILL: Right. And that was after, was it - no, I withdraw that. What do you recall was the next response that you received in respect of this matter?

25

MR BAUER: From my recollection, we followed up this letter with Mr Green seeking that meeting. And my recollection is that Mr Green then offered that he would meet with us, I suppose - my - I suppose to provide us some more information, I guess, to shed more light on to, you know, these long-term factors.

MR O'NEILL: Your diary records on the - this is at 2.1769, that on 28 August 2020, you called Ms Young.

30

MR BAUER: Yes.

MR O'NEILL: And it appears she provided that information to you. Is that fair?

35

MR BAUER: Yes.

MR O'NEILL: That doesn't mention any debrief.

MR BAUER: No, it doesn't.

40

MR O'NEILL: Is it fair to say that there still hadn't been any response, then, to the - formal response to the letter that you had sent on 6 August 2020?

MR BAUER: That's correct.

45

MR O'NEILL: At 2.1939, about two hours later after your diary entry, you send this email.

MR BAUER: Yes.

MR O'NEILL: Chasing your earlier email?

MR BAUER: Yes.

5

MR O'NEILL: And there you were still driving at a meeting with the Director-General; is that correct?

MR BAUER: Yes.

10

MR O'NEILL: Did you get a response to this email?

MR BAUER: My recollection is that the next event was a meeting with Mr Green.

15 MR O'NEILL: And that was on 14 September 2020?

MR BAUER: That's correct.

MR O'NEILL: Sorry, I will take you to your note of an entry, 2.1771. That was first a call -

20

MR BAUER: Yes.

MR O'NEILL: Or a message and then the meeting itself was on 18 September 2020.

25 MR BAUER: Yes.

MR O'NEILL: Now, you did take notes of this meeting?

MR BAUER: I did, yes.

30

MR O'NEILL: Just before I bring you to them, I want to understand the process by which this occur. The meeting was here at the Bittersweet Café here in Kingston.

MR BAUER: Yes.

35

MR O'NEILL: And you attended along with whom?

MR BAUER: Rod Mitton, and Mr Green and Mr Blom.

40 MR O'NEILL: Now, were you taking notes?

MR BAUER: Not at the meeting.

MR O'NEILL: Not at the meeting.

45

MR BAUER: I took the - took straight after the meeting.

MR O'NEILL: So - and how did you do that?

MR BAUER: I typed them on my iPad and then I sent them to Rod to get his confirmation that they were - you know, I captured I guess, all the topics that were discussed.

5

MR O'NEILL: So the notes are as close as contemporaneous as they could have been unless you were writing them at the time.

MR BAUER: Yes. And it was not really - I didn't feel it was appropriate, given we were sitting at quite a small table, to be able to try to type at the same time.

10

MR O'NEILL: All right. Notes appear at 2.1948. Now, I just note that, Commissioner, Mr Blom is currently in the hearing room. I'm just about to go - there's nothing wrong with that. But I am going to traverse an area of that he was at this meeting. I just want to note that. It's a matter for him what he wishes to do.

15

COMMISSIONER: Well, I think it's probably better if he removes himself. And then no suggestions could be made about influence. I don't mean any adverse criticism; it's just to avoid - yes, you can stay. I understand Mr Blom is to be the next witness. You can explain to him this is normal practice. It is not intended as any personal slight.

20

MR O'NEILL: All right. The first point there is that there was a strong view in government that Manteena had a problem with the CFMEU.

MR BAUER: Yes.

25

MR O'NEILL: Was that news to you?

MR BAUER: I think the - definitely the words "strong view" and "real problem" and "noise", yes. So that's why I took the effort to write it down.

30

MR O'NEILL: What about the words "in government"?

MR BAUER: Yes, I guess I've - if we bundle all that together, yes.

35

MR O'NEILL: Saying that there's a perception inside government about the relationship between the two entities?

MR BAUER: Yes.

40

MR O'NEILL: Is that something that was concerning at the time?

MR BAUER: It's still concerning now.

MR O'NEILL:

45

*Mr Green stated that he didn't know, and still doesn't know what the issue is. Just that the CFMEU has a problem with Manteena and that your name is regularly mentioned by it. And in recent times it had been guttural in terms to the Minister and others in Territory Government.*

5

Do you see that?

MR BAUER: Yes.

10 MR O'NEILL: What did you understand all that to mean?

COMMISSIONER: Well, I don't think - I think it's - if these are the words, unless Mr Bauer has something to add in terms of language, I think that's really a matter for me to interpret, is it not?

15

MR O'NEILL: Well, I just wanted to see - I just wanted to see whether he did.

COMMISSIONER: I think you need to ask a more direct question, then, Mr O'Neill.

20 MR O'NEILL: All right. I will do my best.

COMMISSIONER: In short, you understand, Mr Bauer, I have no doubt you have an opinion, but I need to confine myself to the evidence and, in the end, it's my opinion that counts. But if your opinion depends upon some matter which is not clear from the passage, then, of course, I want to know. Do you - do you see the point I'm making?

25

MR BAUER: Yes, I do.

COMMISSIONER: Right.

30

MR O'NEILL: Noting that exchange, my question is directed more to what is it that you were understanding he was telling you that was the issue with Manteena and how high it went?

35

MR BAUER: I think our question - sorry, if I'm understanding it correctly - the question I would have had at the time would have been what is the problem as opposed to I wasn't necessarily challenging that that wasn't being said. I was merely noting down what I recollected from the meeting, you know, an hour earlier. I think at the time we were trying to understand what is the problem. You know, essentially, so we can do something about it. If, in fact, it's genuine.

40

MR O'NEILL: You've used quotations for "guttural".

MR BAUER: Yes.

45

MR O'NEILL: That must be a direct word he used?

MR BAUER: Yes. That was a word he used.

MR O'NEILL: And:

5 *...to the Minister and others in the Territory Government.*

They are words that he used? He was talking about that level of government?

MR BAUER: I have noted them down. I'm - and I recorded that at the time. So to the best  
10 of my recollection, that's the words I -

COMMISSIONER: That's what he said.

MR BAUER: That's what he said.

15

MR O'NEILL: And do you see there that then in point 3 it appears that he's saying that  
"they" - that must be the Directorate or whoever was assessing it - that:

20 *...Manteena's IR standing with the CFMEU would have resulted in more work, more risk,  
more work and more management.*

MR BAUER: Yes.

MR O'NEILL: Did you challenge him about that?

25

MR BAUER: I think we just challenged on the basic principle of what is the problem? In  
fact, is it a problem? Not necessarily, I guess, moving to the point of if there is a problem,  
it's going to cause more work. I was more concerned about the primary issue was we're not  
aware of a problem, so that's the first issue to resolve.

30

MR O'NEILL: And so then from points 3, 4, 5, 6 and 7, is this really just Mr Green just  
providing you with a whole bunch of statements, you and Mr Mitton sitting quietly -

MR BAUER: Yes.

35

MR O'NEILL: - and then you come in at 8 -

MR BAUER: Yes.

40 MR O'NEILL: - and start asking the questions?

MR BAUER: Yes.

MR O'NEILL:

45

*Why even select us for the short list?*

MR BAUER: That's correct.

MR O'NEILL: What was the tone of the meeting?

5 MR BAUER: I think it was respectful. I think I would have probably expressed  
some - certainly very civil but undoubtedly I would have expressed some degree of, you  
know, disappointment and frustration that we were - had put all this work in - and not just  
Manteena, but we had 40 or 50 subcontractors and design consultants and the like who had  
10 all put effort in in what would, you know, on the surface of what we were hearing, appear  
that it was all for nothing.

MR O'NEILL: Yes. And then in 9 -

15 COMMISSIONER: Well, the scales, it appeared, were weighted against you from the very  
beginning. That was the point you were making.

MR BAUER: Yes.

20 MR O'NEILL: And in 9 you are noting the point that you don't even have a right of reply.  
There's no -

MR BAUER: That's correct.

25 MR O'NEILL: It's not in a procurement guideline, is it?

MR BAUER: No.

MR O'NEILL: And you don't have a chance to address it.

30 MR BAUER: That's correct.

MR O'NEILL: Do you see in 10, Mr Mitton says that - he's talking about how the  
Education Directorate would rely just on the CFMEU's view -

35 MR BAUER: Yes.

MR O'NEILL: - without questioning others - questioning this within other Directorates in  
the Territory had awarded Manteena high profile projects?

40 MR BAUER: Yes.

MR O'NEILL: Do recall if there was a response to that?

45 MR BAUER: The response that I recall was noted there that Mr Green stated that the  
Education Directorate had a different Minister and that Ministers each do things differently  
and are influenced by different things. Because the context of that was we had just  
been - not long prior to that debrief been awarded a \$10 million expansion at the Canberra

Hospital, which was obviously a very complex project delivering an expanded ICU during COVID, connected to the existing ICU. So the context there was, well, if we were suitable to deliver that project, we were struggling to understand why we weren't suitable to deliver a school project.

5

MR O'NEILL: At 12 - and this comes to the crux of it:

*Mr Mitton made the point that despite the prescriptive process that is designed to mitigate any bias by the Evaluation Team, ultimately a tender can be decided by the opinion of one person.*

10

And he says an officer of the CFMEU. I assume he was being somewhat tongue-in-cheek when he said that?

15

MR BAUER: Yes.

MR O'NEILL: And the response there:

*The process needs to be one that does not involve bias and they must be defensible.*

20

And Mr Green told you that the decision made to factor in your issues was defensible.

MR BAUER: Yes.

25

MR O'NEILL: What was your view in relation to that?

MR BAUER: Well, I didn't agree with it at all.

MR O'NEILL: No. Why?

30

MR BAUER: Because (1) we were not aware of the substance of the issue. (2) We were not afforded any opportunity to be able to respond to that, to test the veracity of that or address a concern if, in fact, it was a legitimate concern.

35

MR O'NEILL: Reflecting upon -

COMMISSIONER: Well, if that was the relevant criterion, it should have been in the criteria addressed for the purposes of the tender.

40

MR BAUER: Yes.

COMMISSIONER: It's a simple matter, isn't it?

MR BAUER: Yes.

45

COMMISSIONER: It's a question of transparency.

MR BAUER: Yes.

COMMISSIONER: Quite.

5 MR O'NEILL: And then, following that discussion, you say Mr Mitton also reviewed these  
-

MR BAUER: He did, yes.

10 MR O'NEILL: - and made any changes or updates to make sure these are accurate.

MR BAUER: Yes.

15 MR O'NEILL: Right. Excuse me for one moment. Now, in an earlier answer to one of my  
questions, you said you ultimately did get a meeting with the Director-General.

MR BAUER: Yes, that's correct.

20 MR O'NEILL: When did that occur?

MR BAUER: Can I check my notes to find out the date?

MR O'NEILL: Certainly.

25 MR BAUER: The meeting occurred 22 June 2022, but there was some correspondence  
entered into prior to that.

30 COMMISSIONER: Did the correspondence cover any matter of substance or was it just  
organising the meeting?

MR BAUER: It was organising the meeting. So we wrote to the Director-General on 26  
May 2022.

35 MR O'NEILL: And did you attend the meeting with the Director-General?

MR BAUER: I did, yes.

MR O'NEILL: And what occurred at that meeting?

40 COMMISSIONER: Or who else was there?

MR BAUER: I will just check my notes.

45 COMMISSIONER: By all means.

MR BAUER: So my notes are that Ms Haire, Mr Matthews and Ms Laurent for the  
Education Directorate and, Manteena, Rod Mitton and myself.



MR O'NEILL: And you've taken notes?

MR BAUER: I did, yes.

5

MR O'NEILL: How long after the meeting did you -

MR BAUER: I actually took those notes during the meeting, and I would have done some level of checking and getting Rod to check those afterwards. But these were actually taken - it was a face-to-face meeting.

10

COMMISSIONER: Contemporaneously.

MR BAUER: Yes.

15

MR O'NEILL: Do you have any objection to us taking a copy of those notes?

MR BAUER: No, the Commission has those notes already but, yes, I'm happy for to you take another copy.

20

MR O'NEILL: Thank you. And so what occurred at that meeting?

MR BAUER: Well, the context was we asked for the meeting because we had never been able to meet with the Director-General, even though we had sought to do that in August 2020. We - our letter to the Director-General in 26 May actually continued to follow up and made reference to the fact that there had been matters made public about this procurement process, and so we wanted to discuss with the Directorate what they intended to do in respect to the outcome and how it had affected Manteena.

25

MR O'NEILL: And did you get a resolution?

30

MR BAUER: We attended a meeting, and we were given - I guess there was a discussion. A resolution might infer that we were satisfied with the outcome. I guess the answer to that is no because we are still unsure as to substance of the issue at that meeting - or the explanation, I guess, we were given at the meeting. That's probably a better way to describe it.

35

MR O'NEILL: What was the explanation?

MR BAUER: Well, that there were no particular issues with Manteena that the Education Directorate held. That the - that we should, I guess, take comfort from the fact that we were recommended multiple times so that, you know, essentially we were a good bidder. That there were no black marks against our name in the department, nor had the department heard any concerns around ACT Government about Manteena. And that was in direct response to our question that that's not what we were told at the meeting that we've just -

40

45

COMMISSIONER: The debrief.

MR BAUER: The coffee shop debrief.

5 COMMISSIONER: Yes.

MR O'NEILL: How were things left at that -

10 COMMISSIONER: So, thus far, what we've got is, we've got nothing against you, you did a good - your bid was sound. That's - so were you told why you didn't get the bid?

15 MR BAUER: So we asked, and my notes state that we asked the Directorate to consider formalising an explanation of the reasons for the decision, what the delegate - and my, I guess, brackets note here is, "what the delegate was thinking at the time", because that was - Mr Matthews made a reference a number of times that he couldn't go back in time to understand what the delegate was thinking at the time. And we said, well, we would like to understand what are the issues.

20 COMMISSIONER: Sorry, what did Mr Matthews say?

MR BAUER: My notes are:

25 *Mr Matthews made several references to not knowing what was in Mr Green's head at the time.*

COMMISSIONER: But he wasn't the decision-maker.

MR BAUER: They were notes I took at the meeting on 22 June 2022.

30 COMMISSIONER: Very well. And more than that, there was a briefing note from him to the delegate - to the Director-General. Anyway, we will explore these matters with Mr Matthews. Yes. Go on.

35 MR O'NEILL: Is there anything else from that meeting that is of note the Commission needs to know?

MR BAUER: Can I just check?

40 MR O'NEILL: Sure.

MR BAUER: No.

COMMISSIONER: Can I ask you this, though. The Director-General is in the room.

45 MR BAUER: Yes.

COMMISSIONER: Am I right: You were then aware the Director-General had made the decision?

MR BAUER: Yes.

5

COMMISSIONER: So Mr Matthews said, "We can't go back. We don't know what was in the dell delegate's mind." As you understood it, a reference to Mr Green?

MR BAUER: Yes.

10

COMMISSIONER: Did not Ms Haire say, "Well, I was the decision-maker and I know what was in my mind" or something like that to inform you about the matter?

MR BAUER: My notes are that they - Ms Haire and Mr Matthews continually referred back to the delegate, and I have in brackets "Mr Green", and inferred that he made the decision. My notes are that I challenged this fact, given the statement in the Auditor-General's report where Mr Green stated that the Director-General made the decision and not him. And we were not given a clear answer in response to that.

15

20 COMMISSIONER: Yes. All right. Thank you.

MR O'NEILL: Thank you, Commissioner.

COMMISSIONER: All right. So, Mr Bauer -

25

MR O'NEILL: There may be applications. I don't know.

COMMISSIONER: Yes. That's perfectly true. First of all, Mr Coyle, are there any matters that you would like to ask to clarify?

30

MR O'NEILL: Walker. Mr Walker.

COMMISSIONER: I beg your pardon, Mr Walker, of course.

35 MR WALKER: Not at this stage, Commissioner. If there are questions in relation (indistinct) there may be something (indistinct).

COMMISSIONER: That's all right. You can - yes, you can wait. Are there any - is there any application to cross-examine?

40

MS MORGAN: Ms Morgan for Ms Haire. We have just heard the witness for the first time describe a meeting with Ms Haire. We are concerned that -

COMMISSIONER: Are you telling me you're not in a position to cross-examine and you need to get instructions? Is that your point?

45

MS MORGAN: I may - no, no, I would like the note that Mr Bauer - because it may be that -

COMMISSIONER: Yes, we will provide you with the note.

5

MS MORGAN: The note may solve - because I am concerned of what I understand occurred at that meeting may have got a bit mixed up between yourself and Mr Bauer.

COMMISSIONER: I was going to -

10

MS MORGAN: And especially because, Commissioner, you are concerned Ms Haire being in the room as the decision-maker, not acknowledging the fact that she was the decision-maker because of the use of the word "delegate", because Mr Green, you may recall, Commissioner, made the decision in relation to the BAFO, and Mr Green was also at the debrief. So there were circumstances in which it may be that Mr Matthews was quite accurately and properly saying he didn't know what Mr Green - was in Mr Green's mind, as opposed to any suggestion that Ms Haire did not acknowledge that she was the decision-maker and engaged - may not have answered Mr Bauer's questions for a whole lot of reasons, but didn't avoid the fact that she was the decision-maker. And that's how it's been left, Commissioner, between yourself and Mr Bauer. I would like to see the note and then I might seek to cross-examine Mr Bauer. But hopefully not.

15

20

COMMISSIONER: Yes, I think you are perfectly entitled to the note, and you are right about what I gathered from his evidence. I have not myself read the note. So the matter must be regarded as open. And I understand your submission. And it's best not to engage with it until we have the note, and we have the - as it were, we are looking at the same material. We can provide you with the note. But I think that brings me to the point that Mr Bauer may have to come back.

25

30

MS MORGAN: I hope not. I hope the note will speak for itself as the contemporaneous record and we don't need Mr Bauer dragged back to be tickled by me.

COMMISSIONER: I will just wait and see if there's a response from Mr Walker.

35

MR WALKER: (Indistinct) whether it can be done (indistinct).

COMMISSIONER: I don't think there is a problem with giving it now, but I think Ms Morgan would need to get instructions from Ms Haire about it.

40

MR WALKER: I appreciate it (indistinct).

COMMISSIONER: Ms Morgan, though, if you have the note, you have access to Ms Haire, you -

45

MS MORGAN: Very speedy.

COMMISSIONER: We could clarify this matter tomorrow.

MS MORGAN: Definitely, Commissioner.

5 COMMISSIONER: All right. Let's do that. Mr Bauer, I am afraid I must ask you to return tomorrow. I don't think it will be very long one way or another.

MS MORGAN: I don't - how about we do - I can do that overnight through Mr O'Neill, who can then -

10 COMMISSIONER: All right. And then we can let - if you can just hold yourself against the possibility that we might need you - the same, Mr Walker, I'm afraid - it is easier to come in and then be told to go home. And, Ms Morgan, if you can let Mr Callan know in enough time for us to arrange -

15 MS MORGAN: I will do that this evening.

COMMISSIONER: All right. And we will give you that note before you go this afternoon.

20 MS MORGAN: Perfect. Thank you.

COMMISSIONER: All right. Now -

25 MR OPAS: My name is Opas. I seek your - I beg your pardon. I will start again. Commissioner, may it please the Commission, my name is Opas, O-p-a-s. I seek leave to appear for Mr Green. Mr Hassall previously appeared for Mr Green, but he is not available this week.

COMMISSIONER: Yes.

30 MR OPAS: I do have a - I propose to ask probably just one question of Mr Bauer, if granted leave to do so. Would it be convenient to do that now or tomorrow?

COMMISSIONER: I think it is best to do it now because he may not be needed tomorrow.

35 MR OPAS: Exactly. With your leave, Commissioner.

COMMISSIONER: Certainly.

40 MR OPAS: I said one question. It might need to be two or three. It's all related.

COMMISSIONER: That's the Barrister's lament.

45 MR OPAS: Exactly. I think you have referred to umbrellas before, Commissioner. Mr Bauer, you have had some experience, by the sounds of it, in tendering to the ACT government, is that correct, on behalf of Manteena?

MR BAUER: Yes.

MR OPAS: And obviously by their nature, tenders for capital works are reasonably significant sums of money?

5 MR BAUER: Yes.

MR OPAS: In the course of this tender - in the course of this procurement process, you've had some insight into who the relevant personnel were, for example, who the members of the Tender Evaluation Team were, who the delegate was and also who the decision-maker was. Do you agree with that?  
10

MR BAUER: Is that - sorry, just to clarify the question, that we are now aware of or that I would have been aware of at the time?

15 MR OPAS: I'm simply asking the question that at the relevant time during the course of the tender process, you became aware at various times of the individuals who were involved and in different roles.

MR BAUER: I think we would have limited knowledge of members of - who are  
20 the - during the tender process who are on the Tender Evaluation Panel because that's not something that's - that would be made available to us as a tenderer.

COMMISSIONER: But you knew the chairperson of at least the first panel.

25 MR BAUER: Yes, on the basis that this was quite a long, drawn-out process, so, yes.

COMMISSIONER: We are not worried - but you knew that.

MR BAUER: Yes.

30 COMMISSIONER: You knew she changed, but did you know who became the next chair?

MR BAUER: I believe I did.

35 COMMISSIONER: Because I think you've got a note.

MR BAUER: Yes.

40 COMMISSIONER: But are you saying you were not aware of the other members of the panel? Or their identities?

MR BAUER: I think if I had to name them all, I wouldn't be able to do that. So I guess I'm trying to answer that question precisely.

45 COMMISSIONER: Right. And - so you knew who was the delegate at the time, Mr Green?

MR BAUER: Yes.

COMMISSIONER: And you discovered later that the Director-General was the decision-maker.

5

MR BAUER: Yes.

COMMISSIONER: That was long after the decision was made?

10 MR BAUER: Yes.

COMMISSIONER: Does that answer your -

15 MR OPAS: Yes. Thank you, Commissioner. Most helpful. Mr Bauer, to your knowledge, have you been aware of the decision-maker in a procurement in which Manteena has been involved where the decision-maker - call it decision-maker or delegate, but the person who decides the outcome of the procurement is the Director-General or otherwise the head of a Directorate of the ACT Government?

20 MR BAUER: I'm not aware of - like, I can't recall another procurement activity that we've done that would have been that position. But we probably wouldn't have had the visibility of what we've had on this procurement exercise to have even understood maybe that much.

25 COMMISSIONER: So are you saying it might have been so, but you wouldn't have known?

MR BAUER: That's correct.

30 MR OPAS: I think you did express some surprise at some point in - when Mr O'Neill was asking you questions, you expressed some surprise that the Director-General was involved. Is that correct?

35 MR BAUER: I think it was in the context was the - we were following up the status of the tender.

MR OPAS: Yes.

40 MR BAUER: And it was the surprise of its needing to be escalated and escalated for a decision, which was off the - in response to Manteena being anxious to actually get a decision.

45 MR OPAS: I think you were - correct me if I am wrong, but I think you expressed surprise, didn't you, that the Director-General was going to be the decision-maker. That there had been a change of some sort from Mr Green?

MR BAUER: If I showed surprise, I think I would have - yes, I guess it's different to what I would have expected. Whether surprised is the right word, I won't argue around -

5 COMMISSIONER: I think the context was that this - as I understand it - and correct me if I am wrong, Mr Bauer, and anyone in the room correct me. My understanding was that this was a conventional, not especially significant in terms of amount of money procurement and that it raised - I think there was a question of complications, or I can't now remember the precise adjective.

SPEAKER: Contentious?

10 COMMISSIONER: Yes, that it raised contentious issues that had to be determined by the Director-General and Mr Bauer couldn't see what it was about the procurement that either would be contentious or was other than conventional. Is that right?

MR BAUER: Yes.

15 MR OPAS: Thank you, Commissioner. That's my one question.

COMMISSIONER: All right. No other questions, I take it? All right. Well, we will let you know about tomorrow as soon as we can. Can we start with Mr Blom now?

20 MR O'NEILL: Yes.

COMMISSIONER: Yes. Thank you, Mr Bauer.

25 <THE WITNESS STANDS DOWN

COMMISSIONER: Thank you, Mr Walker. You can stay if you wish.

30 MR O'NEILL: Commissioner, can we just take a quick adjournment so we can rearrange the room.

COMMISSIONER: Yes, all right.

35 <THE HEARING ADJOURNED AT 3.32 PM

<THE HEARING RESUMED AT 3.51 PM

40 COMMISSIONER: Mr Blom, I think you were in the room when I explained to Mr Bauer about his obligation to answer all questions and also about the welfare and wellbeing issues that it's not infrequent that witnesses have, because I know it's a difficult and can be quite stressful experience. So I just remind you of it and if, as a result of your appearing here, you feel the need to get some help, you should go and get that help.

45 Also, I just remind you, if there is some other person who could be a confidante for the purpose of getting some support, as a support person, I'm quite willing to approve that but you need to make a request so the person can be identified. But I will look at that sympathetically, and unless there is some real problem, I can't imagine that I wouldn't



allow it. So if you feel that need, do tell those representing you and do something about it. I'm not making an assumption. I say this to all the witnesses. So don't feel I'm singling you out. Now, is there an application for leave?

5 MS CARTON: Commissioner, Claire carton, Griffin Legal, seeking an application to appear for Mr Blom.

COMMISSIONER: Certainly. And who is with you?

10 MS CARTON: Alexandra Smith.

COMMISSIONER: And she is?

MS CARTON: A solicitor at Griffin Legal as well.

15 COMMISSIONER: Yes, very well. That leave is granted.

MS CARTON: Thank you.

20 COMMISSIONER: Do you wish to give your evidence by affirmation or under oath?

MR BLOM: Affirmation, please.

25 <DYLAN MATTHEW BLOM, AFFIRMED

<EXAMINATION BY MR O'NEILL

MR O'NEILL: Mr Blom, you can please provide the Commission your full name.

30 MR BLOM: Dylan Matthew Blom.

MR O'NEILL: What is your occupation?

35 MR BLOM: I'm a public servant. A senior director - my substantive position is senior director with Education Directorate, and I'm currently in an acting position in Canberra Health Services.

MR O'NEILL: In, sorry?

40 MR BLOM: Canberra Health Services.

MR O'NEILL: How long have you been a public servant for?

MR BLOM: Since 2009.

45 MR O'NEILL: What were you before that?

MR BLOM: A student.

MR O'NEILL: Right. And always with the ACT Government?

5 MR BLOM: Yes.

MR O'NEILL: At various Directorates?

10 MR BLOM: Primarily, what is now Major Projects Canberra and Education and now recently Canberra Health Services.

MR O'NEILL: On an acting role for a period of time.

15 MR BLOM: Yes, for a period of time.

MR O'NEILL: All right. Now, do you know - when I refer to someone by the name of Mr Green, do you know who I'm talking about?

20 MR BLOM: Yes.

MR O'NEILL: How long have you known that person for?

25 MR BLOM: Known - that's a good question. I've known him since he started in Major Projects Canberra. Worked with him for less time than that.

MR O'NEILL: And so when you say, "when he worked in Major Projects Canberra", do you remember what year that was in? That was -

30 MR BLOM: I don't - I can't give you an exact year, but I think shortly after I started there. Sometimes around maybe 2010 or 2011, I would guess.

MR O'NEILL: All right. And what was his role when you first were introduced to him?

35 MR BLOM: He - he, I believe, started in - so at that time when I was starting in what was Procurement Solutions at the time, now Major Projects Canberra - it's gone through about five or six different title - he - I was working in the Education space as a junior project officer and Mr Green was, I believe, what was then a director now a branch manager in the Civil or the Roads team. So a different - different area of the Directorate.

40 MR O'NEILL: And then you moved across into Education?

MR BLOM: When?

MR O'NEILL: After Major Projects?

45 MR BLOM: Yes.

MR O'NEILL: Do you remember when this was?

MR BLOM: At the end of 2019, November 2019.

5 MR O'NEILL: And do you recall whether Mr Green moved into Education at or about that time?

MR BLOM: I believe he was there in an acting position as Group Manager some time around - because I recall coming in for a meeting and he was in the EGM position.

10

MR O'NEILL: Had you had any interaction with him whilst he was in his role as the Secure Local Jobs Code Registrar?

MR BLOM: No.

15

MR O'NEILL: When I say the Secure Local Jobs Code, do you have an understanding of what that is?

MR BLOM: Yes.

20

MR O'NEILL: To the best of your knowledge and very generally, what did you understand - what do you understand it to be?

MR BLOM: I understand it's part of the Procurement Act and it's essentially managing and overseeing some industrial aspects.

25

MR O'NEILL: Now, coming to your role, then, in Education, so you move into there in 2019 - late 2019 I think you said.

30 MR BLOM: Yes.

MR O'NEILL: What was your role specifically?

MR BLOM: So I was a senior director in the team that was called Major Projects. So my responsibility was basically delivery of projects. There's a rough number - projects bigger than \$5 million, capital works projects. So specifically capital works funded projects. And any of the bigger stuff, we also managed the transportable program each year. That's usually an annual program. And then we are also responsible for the development of the infrastructure specifications.

40

MR O'NEILL: To whom did you report?

MR BLOM: To the branch manager of ICW.

45 MR O'NEILL: Who was?

MR BLOM: At that time - when I started, I think Rodney Bray was the EBM, possibly for a day, and then I think John Nakkan was then acting when I started.

MR O'NEILL: Nakkan, N-a-k-k-a-n.

5

MR BLOM: Yes, correct.

MR O'NEILL: When did you first become aware of the Campbell Modernisation project?

10 MR BLOM: I believe some time in late February.

MR O'NEILL: 2020?

15 MR BLOM: 2020, yes. I mean, sorry, I would have been aware of the project when I started. I was given handover documentation of every single project, within my team, within the Major Project space. So I would have got - I think I got - there would have been an assembly brief or something like that, that was a briefing note that would have had every single project, every procurement underway and a short statement about every single project. So I was aware of what was in my branch and what was being managed by my  
20 branch when I started in November.

MR O'NEILL: So when you answered my question, then, you answered it at a different date, that is, mid-February or so. Why is it that you - you draw that date to the Commission's attention?

25

MR BLOM: That's when I started to be more intimately involved in that process.

MR O'NEILL: And what do you mean by "more intimately involved"?

30 MR BLOM: Being invited to meetings around the process and things like that.

MR O'NEILL: Do recall why it was that you were starting to become more intimately involved?

35 MR BLOM: Yes. The - the project tenders had closed. I believe the tender process had been ongoing since before I started, and both contracts - sorry, the tenderers had come back over budget.

40 MR O'NEILL: And so you weren't part of the Tender Evaluation Team at that stage, were you?

MR BLOM: No.

45 MR O'NEILL: And did you have any insight into what work they were doing at the time?

MR BLOM: No. Not beyond - not beyond them providing general updates. So I think each week or more than once a week we would provide general updates on status within the

branch. So a general dot point update that would do into a - I think it was called a Min's Weekly Brief. So we would provide, you know, "Tender assessment ongoing", full stop. That would have been the level of information I would have had at that time.

5 MR O'NEILL: Were you aware that the Tender Evaluation Team had started to form a view as to which of its tenderers it was likely to prefer?

MR BLOM: I don't recall that level of knowledge at that time.

10 MR O'NEILL: Not unusual, though. That wouldn't be something that would regularly come across your desk in any event?

MR BLOM: Not unusual, no.

15 MR O'NEILL: Had you been involved in any procurements prior to this point in time in your role at Major Projects?

MR BLOM: Yes.

20 MR O'NEILL: How many, do you think?

MR BLOM: Too many to count.

MR O'NEILL: Right. So well over 10, well over 20?

25 MR BLOM: Yes.

30 COMMISSIONER: Do you have any particular expertise in the area of procurement evaluation or tender evaluations? Or do you have more of an administrative and project management expertise?

35 MR BLOM: So when you work for - when I started it was Procurement Solutions and then Major Projects Canberra, you generally are running a significant number of procurements on behalf of government. So specifically I was involved in many major project procurements.

40 COMMISSIONER: Right. But could you give me an example of - assuming they are more or less typical, give me an example of what your role would be? I mean, obviously, you've got a company that's doing the building or whatever it -

MR BLOM: Yes.

45 COMMISSIONER: So they are primarily responsible. But you as project officer, is it called, or project director?

MR BLOM: Yes, depends. Depends what level you are at within that - within that area. So throughout my career, I would have been - I would have been, from a junior project

officer, you would be on the panel assessing tenders, through to - and that includes tenders for design consultant work, builders, consultants; anything that is needed for the delivery of a project, we would be involved in the procurement, essentially briefing that procurement, getting the delegate sign off, doing all of that on behalf of client Directorates.

5

And then as you move up through those, you potentially then are the chair or the chair of those evaluation processes. So I would have been a chair on a number of processes. And then once you become a project director, there is, on occasion, that you're no longer on those panels but you are there providing guidance, helping develop business cases, coming up with the procurement methodology more so, and then allowing others to deliver that methodology, if that makes sense.

10

COMMISSIONER: Right. So you are not actually on the site dealing with the building issues?

15

MR BLOM: There is that aspect as well. No, no, no. Yes, you very much are. So the procurement part is one aspect. We are then also - when you are working for Major Projects, you will run the procurement, you will deliver the project as a contract representative, and then you will hand that project back, usually with a handover, back to the client Directorate or whoever is operating it. At Health, you would hand back to - you know, whoever the client is.

20

COMMISSIONER: I would like to drill a little deeper into what you actually are doing.

25

MR BLOM: Sure.

COMMISSIONER: So leaving the procurement to one side for a moment - we will probably have to come back to it - but you have got a company that's been contracted to do the building.

30

MR BLOM: Yes.

COMMISSIONER: And you are the - you may be the contract officer.

35

MR BLOM: Yes.

COMMISSIONER: And so issues that arise whether something is within the contract or needs a variation, or something of that kind, you're the ultimate responsible person dealing with that.

40

MR BLOM: Potentially, yes.

COMMISSIONER: Potentially.

45

MR BLOM: There's a few different models and there's a few different ways that you divide up that work.

COMMISSIONER: It just occurs to me as a layperson that I take it you wouldn't be able to resolve an engineering problem or a - some - or a design problem or any conditioning problem. Those are very technical -

5 MR BLOM: Correct. That's why we engage - that's why we procure the services of experts.

COMMISSIONER: Right. So obviously you need to kind of communicate with these people. You need to understand what it is they are talking about. But your expertise is not  
10 to say whether their particular solution is the right one or the wrong one. You just manage to see whether they seem to have covered the bases and are considering what needs to be considered?

MR BLOM: There's - I guess what you are trying to - I think what you are trying to say is  
15 that that's why you need specifications and documentation to then support assessment of those things.

COMMISSIONER: Sure.

20 MR BLOM: I think - I think that's what you are saying. We are not necessarily HVAC or architectural experts, but we do have documentation that we are generally very familiar with and have delivered a number of projects with that we know how those experts need to apply to that documentation.

25 COMMISSIONER: And you bring that - and you bring that experience and expertise into the procurement space where you are assessing a tender where you have to look at design and so on. Is that -

MR BLOM: Correct. To a degree, yes. Not all tenders are you assessing a full design  
30 submission. Quite often, you are assessing a team versus team, capability versus capability. It's not necessarily - it's not every project where you are looking at literal designs with a solution. Sometimes you engage - or quite often you will engage consultants based off capacity and expertise and will work with those in a post-tender process.

35 COMMISSIONER: This particular one did require design -

MR BLOM: Correct. This was an interactive. This tender process was an interactive design process. So they were designing as part of the tender process.

40 COMMISSIONER: All right. Thank you.

MR O'NEILL: And so it's required, then, that the Tender Evaluation Team is required to utilise its expertise and bring that expertise to bear when making assessments?

45 MR BLOM: Yes, correct.

MR O'NEILL: Now, did you become aware at any stage as to whether - sorry, I withdraw that question. At the end of February, the Tender Evaluation Team appears to have come to a position that Manteena was to be the preferred tenderer?

5 MR BLOM: Yes.

MR O'NEILL: And yet that appears was not something that it appears Mr Green was keen on. Are you aware of that?

10 MR BLOM: I became aware of that around this time, yes.

MR O'NEILL: How?

15 MR BLOM: I'm pretty sure with a meeting. A meeting or - I can't recall exactly, but I believe it was either through the first Tender Evaluation Team members, two of which were in my group. So we all shared an office. Either there or with a meeting with Mr Green. I can't - I can't pinpoint exactly the first time.

20 MR O'NEILL: When do you recall was the substance of what was being - what you were told?

MR BLOM: So, I recall essentially being told that a delegate wasn't happy with a recommendation, and then later there was some background to why that was and that the delegate felt that he wanted that evaluation process to continue to a BAFO.

25 MR O'NEILL: And when you say "delegate", you understand that -

MR BLOM: Mr Green.

30 MR O'NEILL: Mr Green. And that he wanted it proceeded to BAFO.

MR BLOM: Yes.

35 MR O'NEILL: And, indeed, that's what ultimately would happen, but the first Tender Evaluation Team changed its - or changed its recommendation on what it had proposed in a draft recommendation. And it was to proceed -

COMMISSIONER: Are you aware of that?

40 MR BLOM: Yes, I am.

MR O'NEILL: And, indeed, it was to proceed to BAFO and yet that didn't happen, did it?

45 MR BLOM: No, because I think there was an expectation that the scores were too disparate.



MR O'NEILL: That is, the scoring that the first Tender Evaluation Team had arrived at were too far apart.

5 MR BLOM: I believe they were the views of Mr Green, yes.

COMMISSIONER: Sorry, I didn't hear you.

MR BLOM: I believe that was the view of the delegate, who was Mr Green.

10 COMMISSIONER: Who was Mr Green.

MR BLOM: Yes.

15 MR O'NEILL: So is it - and explain, then, how one gets from the scores being too far apart to then the BAFO process? Was that why it was that you understood that the second Tender Evaluation Team was being stood up?

20 MR BLOM: No. I believe there was - well, I believe Ms Young wanted to remove herself from the process. I think it was at around this time, and I can't, again, pinpoint when I first found out about it but there it was around this time that there was also talk within the office that the union, via the Minister's office, also had a view on this procurement. And on -

25 COMMISSIONER: What was that view? Was that said? Sorry, I will put it in another way and then move back a step.

MR BLOM: Sure.

30 COMMISSIONER: Did you have an understanding, or did you gather what that view was? And then I'm going to ask you, where did that information come from, okay?

MR BLOM: Again, really hard for me to pinpoint, because of the passage of time and lots of things going on. But I think it was clear - if not at that time, very soon afterwards - that the view was that they were unhappy with Manteena being the preferred tenderer.

35 MR O'NEILL: Who is they?

MR BLOM: The union and the Minister's office.

40 MR O'NEILL: And the Minister's office?

MR BLOM: That was essentially the - what the talk was in the office, yes.

MR O'NEILL: Now, the Commissioner - the second question.

45 COMMISSIONER: That leads me to the next question. You have partly answered it, but who would have - there may have been more than one person.

MR BLOM: So who told me the first time?

COMMISSIONER: Yes.

5 MR BLOM: I believe I first heard it through Mr Morton, who was one of the first TET members, and I think he had had conversations with Ms Young.

COMMISSIONER: Right.

10 MR BLOM: But I definitely heard it again, possibly around the time where that second TET was stood up, from Mr Green as well in a conversation in our office.

COMMISSIONER: Right.

15 MR O'NEILL: What was your reaction to hearing that rumour?

MR BLOM: I have never - I have never had to deal with something like that. I did not know how - I mean, again, I was - I was primarily - for my career prior to working with Education, I have worked for Major Projects Canberra which is an area that does not report directly, necessarily, to a Minister. We would do work on behalf of other Directorates. The Directorates would deal with that interface. So I didn't - I guess I didn't really know how to understand the implications of what was being said or the severity of it, to be honest. Like I said, I think it was very much presented to me early days as a - as a rumour. It wasn't a - there's serious things. I'm obviously aware of a lot more now that I wasn't aware of back at that time. So I think I just thought, that's well and good, lots of people have opinions. It doesn't necessarily mean anything at that stage to me, at least.

COMMISSIONER: The time when it might have meant something - I'm not saying it did or didn't.

30 MR BLOM: Sure.

COMMISSIONER: Was when you were asked to join the second TET because then you were in a position to do an evaluation and therefore, one way or another, effect an outcome.

MR BLOM: Yes.

40 COMMISSIONER: Now, I think you've told me, but correct me if I am wrong, that Mr - at this point, thereabouts, Mr Green told you about the attitude of the Minister's office?

MR BLOM: Yes. I do feel at some point very early days in the evaluation process that he would come into the office and talk about - because we were all very frustrated. The office was very frustrated around the delays to the procurement. We wanted the project - there was a lot going on in the world and everyone was - get these projects going, get these projects going. Yet this one, for whatever reason, was asked to be reviewed, relooked at. So there was frustration. And I think he came into the office and sat down with us all to

kind of say, this is going to happen, and we are just going to get it done and, you know, keep going.

5 COMMISSIONER: Well, I think, Mr O'Neill - I think perhaps we need to adjourn at this point. It's a key point, as you would appreciate. Because what I'm concerned with, naturally, is the information that you take when you go into the room with other members of the team.

10 MR BLOM: Sure.

COMMISSIONER: That's what I want to ask you about the process, how it worked out.

MR BLOM: Sure.

15 COMMISSIONER: So I think with that, we will start with that process tomorrow. So, Mr Blom, I'm afraid you are going to have to come back. Please remember what I said. Firstly, you do need to honour the confidentiality notice. And, secondly, if you need some help, make sure that you make arrangements to get it. I understand as a public service there is a wellbeing arrangement available and so if you feel the need, by all means, take  
20 advantage of it.

**<THE WITNESS STANDS DOWN**

25 Before we adjourn for the day, I - can I raise with people - I don't need an answer now, but I raise, because I would like to determine this tomorrow, if possible, and that is we are obviously not going to finish with these three days. So we will need another number of days. And, presently, I'm looking at early November. But would you please all look at your diaries and we will see what we can do. Now, I'm afraid no one gets a veto, but to the extent that there's compromise available, I'm willing to hear what suits people's  
30 convenience. So - but I'm giving you that time to discuss it, perhaps, or look at your diaries and then discuss, I think, with Mr O'Neill and see if dates can be agreed. Otherwise, I will just have to make a decision. All right, then. I will adjourn for the day.

35 **<THE HEARING ADJOURNED AT 4.12 PM TO THURSDAY, 27 SEPTEMBER 2023 AT 10 AM.**