



WORD FOR WORD AUSTRALIA

ABN 14 610 850 809
E: enquiries@wordforword.au
W: www.wordforword.au

TRANSCRIPT OF PROCEEDINGS

THE HON MICHAEL F ADAMS KC, COMMISSIONER

THE ACT INTEGRITY COMMISSION – OPERATION KINGFISHER

PUBLIC HEARING

DAY 10

TUESDAY, 5 DECEMBER 2023 AT 10.12 AM

**MR CALLAN O’NEILL, Counsel Assisting
MS KATE MORGAN SC with MS KEARNEY, Counsel for Katy Haire
MR ATHOL OPAS, Counsel for John Green**

COMMISSIONER: Yes, Mr O'Neill.

MR O'NEILL: May it please, Commissioner, there are some housekeeping matters to which I wish to attend. The first is that, yesterday in MFI-C there are some documents that had
5 been identified by my learned friend, Ms Morgan, while she was examining the witness. Those documents are numbered 25, 26, 28, 30, 31. I will tender those and they will be added to the hearing book and the public available book online - sorry, the book available to the parties, not the online book.

10 Secondly, there were some questions that I put yesterday in relation to some information that has come to the Commission very recently from notebooks that had been located. Can I disclose this now: that those documents have been processed, and that is that they belong to Ms Cross who has already been examined. Ms Cross has provided them pursuant to a summons and I intend to tender a select version of those from that bunch of notes that had
15 been provided and, in particular, those that were relevant to the questions that I asked Ms Haire yesterday.

The notes speak for themselves, and so, at this point in time it's not my intention to recall Ms Cross and I wanted to make that publicly known at the moment so that anyone who has
20 any objection to that course can raise it with me.

Finally, we had received a statement from Mr Ceramidas in relation to various issues. That was provided to the person to whom that statement was directed - it was directed to Mr Green - it was provided to him and he has had an opportunity to respond to it. That has
25 been done in writing. Those two documents will be provided to the parties during the course of today, potentially more likely after the Commission convenes this afternoon, but they will be provided.

COMMISSIONER: Can I make a point concerning Mr Ceramidas. He has given evidence
30 in private hearing. The additional material which is now provided is evidence which I'm entitled to receive given the width of the role of the Commission under the legislation in terms of receiving evidentiary material. At a later stage it will be necessary to consider the weight to be given to it if he is unable to be called to verify the statement on oath and be cross-examined upon it. I simply highlight that as an issue which will require attention in due
35 course.

Yes, sorry, there was something else you were going to -

MR O'NEILL: Then, all I was going to do was just signpost for those in the room, the
40 witness order at the moment is Mr Matthews. If he finishes before lunch, then the next witness I will call will be Ms Young and then, after that, at 2 pm regardless of where we are, Ms Berry will be called, and then I anticipate that the evidence of all three witnesses should be completed today. The next witness after that will be Mr Green.

45 COMMISSIONER: Thank you.

MR O'NEILL: Thank you, Commissioner. I note that Mr Matthews is in the witness box.

COMMISSIONER: Yes. Mr Matthews, I've already gone through the statutory requirements
50 that oblige me to give certain information to witnesses; they touch on your obligation to

answer all questions, and to maintain confidentiality, but of course that does not apply to anything that's in the public arena now, as almost but perhaps not everything is. And your ability to consult lawyers and to obtain any other professional assistance that you might wish to obtain relating to anxiety or stress and your ability to make a complaint to the

5 Commission - to the inspector, I should say, about any aspect of the way that you have been treated by the Commission. I'm sure, anyway, your lawyers have told you about this and I do not need to dilate upon it more. You recall that information?

MR MATTHEWS: Yes, Commissioner.

10

COMMISSIONER: I do not recall this, though, do you wish to give evidence on oath or affirmation?

MR MATTHEWS: Affirmation, Commissioner.

15

COMMISSIONER: Very well. Confirm the witness, please.

<DAVID ANDREW MATTHEWS, AFFIRMED

20 COMMISSIONER: I think I'm also obliged to state that the matters upon which Mr Matthews will be questioned concern the recommendations and decisions relating to the Education Directorate's procurement for the Campbell Primary School Modernisation Project. Yes, thank you. Yes, Mr O'Neill.

25 MR O'NEILL: Thank you, Commissioner. Mr Matthews has legal representatives here who may wish to seek leave.

COMMISSIONER: Yes.

30 MR SHARWOOD: May it please the Commission, my name is Sharwood. I appear for Mr Matthews and, to the extent that I need leave, I seek that leave.

COMMISSIONER: Yes, leave is granted. And you appear with? Instructed or -

35 MR SHARWOOD: Mr Miller from MinterEllison.

COMMISSIONER: Very well. Yes, I give that leave.

MR O'NEILL: Thank you, Commissioner.

40

<EXAMINATION BY MR O'NEILL:

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

45 MR MATTHEWS: I'm David Andrew Matthews.

MR O'NEILL: And what is your current occupation?

MR MATTHEWS: I'm the executive group manager of business services in the ACT Education Directorate.

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

5

MR MATTHEWS: About five and a half years.

MR O'NEILL: And before that role, what did you hold?

10 MR MATTHEWS: I worked at Transport Canberra in city services.

MR O'NEILL: How long have you worked in government?

15 MR MATTHEWS: I've worked in the ACT government since the year 2000 and been an executive for the last 17 years.

MR O'NEILL: You know that this Commission is interested in the Campbell Primary School modernisation project and you're familiar with that project, aren't you?

20 MR MATTHEWS: I am.

MR O'NEILL: You first became familiar with it, I understand, in the very early times and that's when the requests for expressions of interest had started to become - had started to be drafted; is that right?

25

MR MATTHEWS: Mr O'Neill, I actually approved the Tender Evaluation Plan that went to the government procurement board in 2019.

MR O'NEILL: So that happened in about June 19, is that fair?

30

MR MATTHEWS: That's correct.

COMMISSIONER: And that comprehended the expression of interest?

35 MR MATTHEWS: Commissioner, yes, it did. It foreshadowed a two-staged process, so a request for expression of interest and then a shortlist of tenderers that would then go through a full process.

COMMISSIONER: Now, just to be clear, in the ACT that's a conventional process?

40

MR MATTHEWS: Yes.

MR O'NEILL: Now, the Secure Local Jobs Code, it had come in in or around early 2019; is that fair?

45

MR MATTHEWS: That's my understanding.

MR O'NEILL: What role did it play, if any, in the tasks that you were undertaking to provide the procurement plan to the government?

MR MATTHEWS: Mr O'Neill, the Secure Local Jobs Code is actually a disallowable instrument of the Government Procurement Act, so its legislation and law that needs to be followed by territory (indistinct) entities, so in relation to this procurement it was considered at two points: there was a threshold criteria, so parties had to have a certificate in order to be eligible for the process, and then it was part of the weighted selection criteria.

MR O'NEILL: In relation -

COMMISSIONER: To just go back to that issue of weighting. Are you saying then that it's not binary? I must say, on the face of it you either have a certificate or you don't; you don't have 90% of a certificate or 80, do you see what I mean?

MR MATTHEWS: Yes, I understand.

COMMISSIONER: So what, so far as you're aware - so obviously you have to have a certificate, but then you say there's a weighting and what is involved in that weighting?

MR MATTHEWS: Commissioner, I've gone back and reviewed the evaluation plan so that I can give evidence on this. So essentially it was two points. As I said, there was a threshold assessment, so a yes/no binary, do you have a certificate or not and that -

COMMISSIONER: If you don't have a certificate, end of?

MR MATTHEWS: End of story, that's exactly right. Then in terms of the actual assessment of the proposals, both in the REOI stage, the expression of interest, and then in the full process had some criteria and one of those criteria related to the Secure Local Jobs, and the weighting of that criteria, from memory, was about 10 per cent in the final evaluation.

COMMISSIONER: No, no, I'm sorry, then we're at cross purposes. What I mean is, and we see it here, you could get a score in relation to that criterion of less than 10; you could get a 7 or 8 or 9 or 10. What would lead to - once you got the certificate what would lead to giving a party less than 10? Do you see what I mean?

MR MATTHEWS: I think I do, Commissioner. So, I think the second assessment, so once you've been through the threshold, yes/no, essentially it's about compliance with your code obligations but, as I said, that's one criteria of about six that were to be considered.

COMMISSIONER: No, quite, but this particular issue has assumed an importance, I suspect, that perhaps was not seen at the beginning. So that, what would lead - what were the considerations, let's deal with it in terms of principle, what are the considerations that might lead a Tender Evaluation Team to accord less than 10 to a company that had an unqualified certificate?

MR MATTHEWS: Commissioner, I can't speculate on the actuals of evaluation but (crosstalk) -

COMMISSIONER: No, no, that's why I've asked the question at the level of principle.

MR MATTHEWS: I can't answer that any more specifically other than, what happens is that the proponents have to respond to that criteria, provide evidence and then that is given a score out of 10 by the panel. So they make their own judgment around what score they give to the evidence provided by the proponent.

5

MR O'NEILL: The weighting criteria, was that something that you were involved in designing in terms of how each of the various categories were to be weighted in the evaluative part of the procurement process?

10 MR MATTHEWS: I wasn't involved in the design, to use that word, Mr O'Neill, but I did approve it as the delegate and sponsored it to the Government Procurement Board.

MR O'NEILL: Was there a way in which the reasoning was provided for why it was, say, that category 3, which is design, has a more significant weighting than category 6, which is Secure Local Jobs Code?

15

MR MATTHEWS: Sorry, can you ask that question again?

MR O'NEILL: Certainly. I'm really just wondering whether you were across why it was that the weighting was - the way in which the weightings were arrived at?

20

MR MATTHEWS: Arrived at. Well, going and looking at the plan, about 50 per cent of the weighting was to do with an understanding of the project and the ability to deliver a project, and in my experience in procurement over many years that's about right, that when you look at a procurement assessment you're looking at the ability to deliver that project as well as the track record, if you like, of the proponent and that's captured in the evaluation criteria.

25

MR O'NEILL: So does one understand that answer to mean that there was an intuitive way in which the weightings were arrived at based upon experience within procurement, within government, that was looking at this process at this time?

30

MR MATTHEWS: I think it was normal practice.

MR O'NEILL: Right. Well, (crosstalk) -

35

COMMISSIONER: So, are you saying that, in your experience, the scoring here was conventional scoring for construction projects; is that right?

MR MATTHEWS: Commissioner, just to make sure that I'm very clear on that. So, what I think is the way the evaluation criteria was designed was normal and the assessment methodology outlined in the plan was normal.

40

COMMISSIONER: Right. So, let's come then to the 10 points out of 100 ascribed to the Secure Local Jobs criterion. Who said, "We will make that 10 points"? That's, I think - or where did that come from or one possibility - well, there are a number of possibilities: you do it afresh for each project, or you simply do what is conventional if the project is a conventional project. In other words, you don't re-invent the wheel, these points against these - first of all, the criteria are fairly conventional and obvious when you think about them, and the relative significance of each one is then to be calculated, and the calculus here, as I

45

hear what you say but correct me if I'm wrong, was simply adopted as a conventional calculus. You didn't rethink, should it be 10 points, should it be 15 points or so on, am I right?

5 MR MATTHEWS: Yes, Commissioner. The only thing that I would add is that obviously, as pointed out by Mr O'Neill, the Secure Local Jobs had come into effect in early 2019, that particular element, so this would have been, I'm imagining, the first series of procurements where we'd had to consider that and that's how we had incorporated it within the evaluation criteria.

10 COMMISSIONER: Right. So, so far as Secure Local Jobs was concerned, strictly so-called, there wasn't a long history?

MR MATTHEWS: No, there wasn't.

15 COMMISSIONER: However, the considerations would have been relevant to earlier evaluations, wouldn't they, the kind of things that you look at - what is it, a safety record, industrial relations and those kinds of considerations would still have been part of the process but perhaps under a different descriptive rubric about in the evaluation process; am I right about that, does that make sense then?

20 MR MATTHEWS: Yes, Commissioner, that's correct. So, in addition to project brief and understanding of that these other general considerations around work, health and safety, local industry participation, you know, have been a feature of our procurement for a period of time.

25 COMMISSIONER: Right. In the result, as I understand you to say the Procurement ACT signed off on the scoring plan?

30 MR MATTHEWS: Formally, Commissioner, the delegate signs that, so that would have been me, so I was given advice from the team -

COMMISSIONER: Sorry, but ultimately did this go to the Procurement Board, because it would have had to because it was well over a million dollars?

35 MR MATTHEWS: Yes, Commissioner.

40 COMMISSIONER: What went to the Procurement Board would have been the EOI, the evaluation plan, the relevant proposed contracts, in short, the deal, as it were, that's been put out to the market for the purpose of seeking a response, all of those papers go to the Government Procurement Board; is that right?

MR MATTHEWS: That's correct.

45 COMMISSIONER: And the Government Procurement Board advises on the - it has a statutory obligation to advise, it's in a general sense, advise on the proposal; is that right?

MR MATTHEWS: Yes, particularly, Commissioner, in relation to whether the proposal meets the requirements of the Procurement Act and the procurement principles.

COMMISSIONER: Right. Now, at this time of course, I think ever since the inception of the Act, a fundamental requirement is value for money?

MR MATTHEWS: That's correct.

5

COMMISSIONER: There was also, when the code was instituted, a specific provision about the code that, if you didn't - in substance, if you didn't comply with the code, you were not to obtain a government procurement?

10 MR MATTHEWS: The disallowable instrument under the Act said that you needed a certificate granted by the register in order to get government work.

COMMISSIONER: Right. So this is part of a scheme which involves the code and involves ultimately, before it goes to market, advice by the Government Procurement Board, in
15 substance, approving the proposal but sometimes they advise this or that amendment or change to align the proposal, as the board sees it, more with government policy. That's not unknown?

MR MATTHEWS: Yeah, and speaking in a general sense as you are, Commissioner, often
20 the feedback from the board is around risk management, is generally the type of feedback that they give, where the risk has been considered appropriately. So that's the sort of - the tenor of the general advice that can come from the board.

COMMISSIONER: They focus on risk?

25

MR MATTHEWS: That is, in my experience, one of the areas that they do provide feedback on, but obviously they will review all the documents and are free to make comments on any of them.

COMMISSIONER: Right. This occurs to me, though: it would be generally accepted, for
30 example, take price. The price goes to the - is one of the factors, the budgeted amount goes to the board, but that's intended to inform the board, it's not intended - usually not intended, at least, that the price would be part of the tender process. You may well not disclose price to your competitive tenderers, for obvious reasons?

35

MR MATTHEWS: Commissioner, there is the option of fixed-price tenders under the Act, and in the past I know that they've been used, so those are options that are available.

COMMISSIONER: In this case it wasn't?

40

MR MATTHEWS: No, it wasn't, Commissioner.

COMMISSIONER: But the budget went to the board?

45 MR MATTHEWS: I think the financial envelope, yes, that went to the board, yes.

COMMISSIONER: Now, if in respect of any particular criterion in the plan that changed significantly - let me just give you an example, and I'm not suggesting this is real but by way of looking at the process. If when it came back from the board someone decided, well, we

really should give 20 points - a 20 per cent significance to the Secure Local Jobs criterion, shall we say, and that meant, of course, that some other criteria are lessened in their impact by mathematics. Do you see?

5 MR MATTHEWS: I do, Commissioner. So, yes, I mean, the board may provide advice about the weighting and it's the delegate's role to make that decision.

10 COMMISSIONER: I'm really looking at this point: when they sign off, they say, yes, we're happy with this going forward, in effect. They're doing so on the basis of information they're getting about the nature of the proposal. That would necessarily involve, though how close an examination is made of an otherwise conventional scoring system but it must involve, as it were, ticking the scoring system as being appropriate for this kind of project?

15 MR MATTHEWS: It's included in the Tender Evaluation Plan.

COMMISSIONER: And it's included in the material that they - it's part of, to use the language of the Procurement Act, it's part of the proposal; correct?

20 MR MATTHEWS: Yes, Commissioner.

COMMISSIONER: So if that significantly changes as, for example the example that I've given you, you've doubled the Secure Local Jobs weighting, then the effect of that is that the proposal is no longer the same proposal which the board has advised on; do you see the point?

25 MR MATTHEWS: Commissioner, I agree to the extent that, if the board made a recommendation that was then agreed to by the delegate, then that would change the weighting of that Tender Evaluation Plan.

30 COMMISSIONER: Right. But the effect of that would be that the statutory requirement to obtain advice from the board on the proposal is not satisfied because the proposal that they advised on, on the example that I've given you, is significantly different to the proposal that's going into the market, and it follows, therefore, that it has to go back to the board for advice because otherwise the Act is not being complied with; do you see the point I'm making?

35 MR MATTHEWS: I do, Commissioner. I think it's important to say that generally the Government Procurement Board only reviews proposals at the onset of a process so -

40 COMMISSIONER: No, quite. And those proposals do change, for example, there are always rise and fall clauses in contracts such as this for obvious reasons, so the price might ultimately differ even potentially significantly from that envelope that the board has coverage of or has given advice on, so in that sense you wouldn't go back simply because of an inbuilt potential variation, it's within a reasonable range, and of course it's no black and white - there's no black and white amount, it's always a question of judgment and assessment; do you agree?

45 MR MATTHEWS: Yes, Commissioner, except that on price there is some general understandings around what agreed variations do need to go back to the Government Procurement Board.

5 COMMISSIONER: Certainly. All I'm saying is that it's accepted that ultimately you may not get an exact copy going out to the market of what went to the board. There may be some adjustments, it's accepted there will be some adjustment, but it's accepted they're not - that they won't be so material as to require the matter to go back to the board?

MR MATTHEWS: That's correct.

10 COMMISSIONER: Now, if we can come back then - and if you can't answer this question, Mr Matthews, I accept it because I think this is a question which has almost never been asked, although the Auditor-General has said some things about it in different contexts, I might say. And that is, let's look at the scoring. Obviously, the scoring is a vital part of the whole tender process; do you agree?

15 MR MATTHEWS: Can I clarify though, Commissioner.

COMMISSIONER: By all means.

20 MR MATTHEWS: Yes, when you say the scoring, the nature of the discussion we've been having so far is the evaluation framework which is established -

25 COMMISSIONER: Sorry. I mean the scoring in the framework as proposed. So, you have the five or six particular subject matters, they are given weightings in relation to the - some have 30 points, some have 10 points and numbers in between, that's all in the framework and that's what goes out to the market so the tenderer knows what weight is going to be given, for example, to design, what weight is going to be given to their financials and so on.

30 MR MATTHEWS: Generally, Commissioner, just to make one addition, is that what happens is that each of those criteria is generally assessed against a score of zero to 10 and then a weighting is applied, so that's the way that the evaluation plan is designed. So each of the criteria essentially is assessed by the Tender Evaluation Team and the 10 per cent that I refer to is the weighting that's given to that score in this case.

35 COMMISSIONER: No, quite. However, the point is to - aside from, anyway, having a rational framework that tenderers are able to work against so that they know what they need to satisfy so it's necessary for the tenderers, it's also necessary for the public, for accountability and transparency, to understand what sorts of measures and issues are regarded by government as being important for the purposes of spending government money; do you agree? In other words, it's not merely matter of private conversations, as it were, with the
40 proposed contractors, it's a matter of public record that gives accountability and transparency and that's one of the purposes of the procurement process as provided in the Procurement Act; do you agree.

45 MR MATTHEWS: I agree, Commissioner. I would have to say, though, that I think the primary purpose of the Tender Evaluation Plan is to give a rule book to the people undertaking that assessment.

COMMISSIONER: No, quite. So everybody knows where they stand?

MR MATTHEWS: Yep.

5 COMMISSIONER: Indeed, you may be aware, but there is law developing that you may indeed, by inviting tender, be entering into a process contract which binds you to those - the framework exposed in the RFT; you're aware of that.

MR MATTHEWS: I'm not a lawyer, Commissioner, but like you I have access to lawyers.

10 COMMISSIONER: No, I don't expect you to know the detail, but it is becoming increasingly rule-controlled; that's right?

MR MATTHEWS: We operate within a legal framework and obviously as that evolves we have to make adjustments.

15 COMMISSIONER: Quite. So, if we can just come back to the question that I asked about a significant - of course, this is always a matter of fact and degree, you might make a change but it may be relatively immaterial; you might make a change and it may be very significant. So, I'm bearing in mind the range. What I want to think about is the matter in principle and to test that what I'm asking is, say the Secure Local Jobs criterion instead of being 10 points
20 of 100 became 20 of 100; do you see?

MR MATTHEWS: I understand the example.

25 COMMISSIONER: Right. I'm not suggesting that would happen but I'm simply testing the consequence. Now, if you cannot answer this - and I'm asking you, I know, without an opportunity of prior consideration of it, so don't feel embarrassed if you feel you can't answer the question in a sensible way - but assuming a change like that, I have assumed that would be a significant change because not only would it increase the importance of that criterion, it would necessarily reduce the significance of other criteria?
30

MR MATTHEWS: It would change the balance of the assessment.

COMMISSIONER: That's a better way of putting it, yes, I entirely agree.

35 MR MATTHEWS: Yes.

COMMISSIONER: And the question then would be whether the proposal signed off by the board is no longer the proposal which is actually going to market because of that significant change; do you see.
40

MR MATTHEWS: I do, Commissioner. Again, I just wanted to - just to clarify whether you are suggesting that occurred in this -

45 COMMISSIONER: No.

MR MATTHEWS: Okay.

COMMISSIONER: Well, I'm not suggesting it occurred at the evaluation team process at all.

MR MATTHEWS: Yes.

5 COMMISSIONER: There's a nice question about the weight ultimately given to that aspect, that's part of the controversy in this inquiry, but I'm trying to look at the question as a matter of principle really. Ultimately whether that's useful will depend upon what factual findings I make and it may not be useful, but I'm anxious to get the insight of someone who's been around this part of the world for some time, as it were.

10 MR MATTHEWS: So, Commissioner, just to try to answer that question in the general.

COMMISSIONER: Yes?

15 MR MATTHEWS: So, as I said, I would say a 50 per cent weighting generally around the actual specifics of program - of the project is a normal kind of rating. The extent to which how the other 50 per cent is sort of, if you like, determined is important but is less important than the 50 per cent criteria. If that had become, to use your example, 80 per cent of the criteria, then that clearly would be a very, very significant change to the process. Whereas, as I said, from my experience across a number of portfolio areas, that's generally the - a split of around 50 per cent being very much about the project and the delivery of that project and 20 50 per cent around organisational capability.

25 COMMISSIONER: Right. Now, part of the difficulty here is lack of precedent. I think I'm confident in saying, you have never seen a case where the criteria specified in the proposal that went to market has significantly changed in the course of evaluating the tenders made; is that right?

MR MATTHEWS: That's -

30 COMMISSIONER: Well, let me put it another way, perhaps to be clearer. What the Tender Evaluation Teams almost invariably consider complies with the framework which is in the Tender Evaluation Plan and exposed in the tender evaluation proposals that have gone to market.

35 MR MATTHEWS: The Tender Evaluation Plan should be used to undertake the assessment and any variations to that should be documented.

COMMISSIONER: Right. And notified to the parties so they can make some adjustment if they think it's necessary?

40 MR MATTHEWS: If that's relevant, yes, Commissioner.

45 COMMISSIONER: Because it does seem unfair that, as the parties provide information upon one understanding of how significant the particular matter is and then, as it were, the goalposts are moved halfway through the process and the parties are not given a chance to respond; do you agree?

MR MATTHEWS: I agree that it should be fair and transparent.

COMMISSIONER: Which, in the context that we're discussing, means consistent?

MR MATTHEWS: Indeed, and disclosed where required.

5 COMMISSIONER: Yes. And changes, of course, have to be disclosed to - in this case there were two parties, so we only have two - each of the parties, so each is treated equally; that's the intent of the process, equal treatment?

MR MATTHEWS: That's correct.

10 COMMISSIONER: Of course, at a later stage you might make some adjustment to the contract here or there but it has to be broadly within the envelope of equal treatment; do you agree?

MR MATTHEWS: You mentioned the contract there, Commissioner?

15 COMMISSIONER: Well, a contract - what happens is, as I understand it, the recommendation is made to enter into negotiations for a contract?

MR MATTHEWS: That's correct.

20 COMMISSIONER: But the course of those negotiations may change this or that term from the one which is specified in the RFT, but that's accepted as part of the legitimate process and you wouldn't, as it were, publicise those negotiations because they're obviously commercially sensitive, but nevertheless it is important to retain some coherence between the contract that
25 you're negotiating and the contract exposed to the market; do you agree?

MR MATTHEWS: Yes, Commissioner. In my experience the tender write-ups that I've got often raise things that are - would then be discussed in the contract negotiations that follow that and provide some parameters for that team that are undertaking that negotiation.

30 COMMISSIONER: Certainly. So, it might be some adjustment to timetable or some change to insurance arrangements and things of that kind which are conventional for contracts - building contracts?

35 MR MATTHEWS: Those are good examples, Commissioner.

COMMISSIONER: Thank you. Yes, thank you.

40 MR O'NEILL: Now, in relation to this project, the introduction of the Secure Local Jobs Code was relatively new at the time that your team and you were coming together to formulate this plan; fair?

MR MATTHEWS: It was, as has been discussed in this Commission, though, that there were previous arrangements with the MOUs.

45 MR O'NEILL: And so, is all that really happened was the way in which the MoU formally operated in relation to how it engaged with procurement was, from the point of view of how it is to be assessed, one just replaced the other?

MR MATTHEWS: I think the important difference was that one was codified in law as a disallowable instrument.

MR O'NEILL: Yes.

5

COMMISSIONER: And the effect was, as it were, a veto: if you didn't satisfy it with a certificate government wasn't going to procure from you?

MR MATTHEWS: It formalised the requirement to have a certificate to receive work and that provided a legal framework for public servants.

10

COMMISSIONER: Right. To understand what was acceptable and what wasn't?

MR MATTHEWS: Well, in terms of what the requirements were of the law, yes.

15

COMMISSIONER: Sorry, I meant what requirement had to be satisfied?

MR MATTHEWS: Yes, in order to contract with that party then, of course, that requirement under the Government Procurement Act then needs to be brought into the actual way that the tender assessments were undertaken and that's what did occur in this Tender Evaluation Plan.

20

COMMISSIONER: Right.

MR O'NEILL: So, as an evaluative mechanism criteria 6 which was the SLJC code evaluation element, that replaced what was formally the MoU evaluation element?

25

MR MATTHEWS: I didn't have a lot of experience with the MoU, but what it did under that criterion mentioned, Mr O'Neill, it actually also sat alongside local industry participation, so there were a couple of elements in it, and effectively it went to the reputation of the proponent.

30

MR O'NEILL: And do you recall any discussions around, when you were designing the procurement plan, how that component, that is, component No.6, was to be weighted?

35

MR MATTHEWS: Mr O'Neill, my recollection is, I wasn't involved in any of those discussions, so I simply received advice from my team with draft documentation, which of course I reviewed and approved and then took to the Government Procurement Board, so I don't have any recollection of being involved in discussions around how the code would be translated into our tender documents.

40

MR O'NEILL: Right.

COMMISSIONER: But so far as you could see there was nothing unusual or nothing that suggested a need for further interrogation, it seemed to you to be conventional and appropriate; is that fairly put?

45

MR MATTHEWS: That's correct, Commissioner.

MR O'NEILL: And no one from government more broadly came and spoke to you and said, "Well, can we make sure that this policy is attracting appropriate weighting in the evaluative component"?

5 MR MATTHEWS: Mr O'Neill, I'm not aware of any whole of government communications, there might have been, around the code. Like, generally when new laws are - you know, take effect, there is advice to public servants around all of that, but I can't remember any specific advice.

10 COMMISSIONER: Can you tell me: you would have known that this would have had to have gone through Procurement ACT and the board?

MR MATTHEWS: The project, Commissioner?

15 COMMISSIONER: Yes, by the time it got to you?

MR MATTHEWS: Yes.

20 COMMISSIONER: And I'm just wondering, did you take comfort from the fact that other experts had already looked at this and had approved what you were looking at? Did that give you some comfort or not? Did you feel you had to look at it independently of that process.

25 MR MATTHEWS: Commissioner, I think the advice that came to me said that it was going to the Government Procurement Board, so that would have been part of the advice that I'd received. But generally, to answer the other part of your question, I take advice from my team; of course, I do rely on their advice, I have a role in due diligence, I've got to review documents and ensure that I'm comfortable to sign off them as the delegate but I do rely on the advice I'm given, and I was also aware that they would be reviewed by the Government Procurement Board.

30 COMMISSIONER: So, this is an interactive process in which a number of specialist interlocutors, as it were, is involved to ultimately produce what goes out to the market. It's not just done within the Education Department or just done within the - sorry, the capital works. It's part of a process in which, for example, Procurement ACT, which is independent of the protagonists, also has a role. And I think I'm right in saying, and comment on it if you wish, that it can be quite interactive; that is, Procurement ACT might say, well, have you looked at this or have you looked at that, so that there's a dialectic - a dialogue that goes on in the hope of producing an appropriate outcome in the result. So it's consultative, it's cooperative, it involves certain government regulations and rules which are specific, and it involves the exercise of judgment by each of those parties contributing to an ultimate outcome. Does that fairly describe the process as a whole? If you want to make any changes to it.

45 MR MATTHEWS: Commissioner, the way you've described it is a level of detail and involvement I would not normally have. So, the Education Directorate works with Major Projects Canberra and then would work with agencies like Procurement ACT, as you've mentioned, to prepare tender documentations. School projects can be very complicated, we need things like planning consultants, cost advisors, a range of other technical advisors.

COMMISSIONER: Because of the specialised purpose of the building, is that?

MR MATTHEWS: That's correct, or it could be site-specific issues, Commissioner, around latent conditions in the actual sites. It can be traffic studies. They're very complicated projects, so the teams that are working on - there's normally - before a procurement phase there's a design phase that is almost always undertaken which is normally funded by government ahead of the actual procurement. During that design phase there is things like master planning that occurs, as I said, cost planning, use of some technical advisors, and all of that leads towards the development of the procurement documentation which -

COMMISSIONER: Is that work relevant to this which was a refurbishment as distinct from a new build? Would you also have to do that kind of examination?

MR MATTHEWS: Commissioner, those requirements do vary by project, so I was speaking in the general again.

COMMISSIONER: Right.

MR MATTHEWS: In relation to Campbell Primary School, obviously we were constructing if new learning communities to replace learning communities that had been previously demolished. So, there are complexities with working on what we would call a brownfields site. So, obviously Campbell Primary School continued to operate during the modernisation process.

COMMISSIONER: That's a distinct complication, of course, if you prefer to have, as it were, a naked field to work on than one where you have to interact with people using the site?

MR MATTHEWS: It adds complexity and, as I said, though, every project, Commissioner, has its own elements and dimensions but increasingly we're doing these brownfields projects because of the way the city is growing and with urban densification and ageing infrastructure in the inner areas, so these things are leading towards more brownfields work.

COMMISSIONER: Right. Yes, thank you.

MR O'NEILL: All right. I'm going to move to a slightly different topic now. So, the Secure Local Jobs Code registrar was a person we've identified in this Commission as John Green; you know who I'm talking about?

MR MATTHEWS: I do.

MR O'NEILL: When did you first come into contact with that person?

MR MATTHEWS: I would have first worked with Mr Green when he was in - I think it was called infrastructure, finance and capital works, which was the predecessor of Major Projects Canberra, so that would have been before he had taken on the role of the Secure Local Jobs coordinator.

MR O'NEILL: And then he becomes the registrar - he was the registrar throughout 2019 and then he moved back into the directorate in around early 2020. Do you have any understanding as to how that occurred?

5 MR MATTHEWS: Can I clarify, Mr O'Neill, which directorate? Are you talking the Education Directorate?

MR O'NEILL: The Education Directorate, yes?

10 MR MATTHEWS: You said "moved back into". My understanding is that that was the first time he'd worked with Education.

MR O'NEILL: You are correct, yes.

15 MR MATTHEWS: So, I was involved in that, yes.

MR O'NEILL: And, do you recall why it was that he was moved back to the directorate?

MR MATTHEWS: Again, he wasn't moved back, Mr O'Neill.

20

MR O'NEILL: Sorry. Why he was moved to the directorate?

MR MATTHEWS: My understanding was that the first occasion was during my acting period when I went to Europe in late 2019. I'm not exactly sure, but I think that -

25

COMMISSIONER: So you mean to fill in a vacancy, essentially?

MR MATTHEWS: Essentially to backfill myself, and I don't - I can't recall, but I understand that was an EOI process. I could be wrong.

30

MR O'NEILL: And then the second period after you had returned?

MR MATTHEWS: The second period after I returned was, I think, around sort of early 2020 he was moved - offered the opportunity to come over at level from his current role to be the executive branch manager of what was known as infrastructure capital works.

35

COMMISSIONER: So that was a permanent position?

MR MATTHEWS: My recollection was that it was a transfer at level, so that's a mobility arrangement within the ACT public service. If you sort of own a position -

40

COMMISSIONER: Sorry, he wasn't backfilling another position is what I meant?

MR MATTHEWS: Yes. He was replacing the incumbent in that role.

45

COMMISSIONER: Yes.

MR O'NEILL: And do you remember why?

MR MATTHEWS: Can you ask that question again?

MR O'NEILL: Do you remember why it was he was selected for that?

5 MR MATTHEWS: I think he had suitable experience. He was obviously working with Education on the other side, if you like, in terms of delivery and that he'd had experience with project delivery and that was the reason.

MR O'NEILL: Right. Do you know - you obviously know who Ms Haire is?

10

MR MATTHEWS: I do.

MR O'NEILL: When did you first come into contact with her in a working sense?

15 MR MATTHEWS: When she joined the directorate in late 2019.

MR O'NEILL: And what was your involvement with her at that period of time?

MR MATTHEWS: As a colleague, a member of the senior executive team in the Education Directorate we had an incoming Director-General who was new to the ACT, new to the organisation, so just generally to support her.

20

MR O'NEILL: And you reported to her?

25 MR MATTHEWS: I did.

MR O'NEILL: And the period where she first took over, that is, when she was new, were you involved in assisting her to have an understanding of how procurement worked in the ACT?

30

MR MATTHEWS: I can't remember that specifically, Mr O'Neill.

MR O'NEILL: Mr Ceramidas, do you know who he is?

35 MR MATTHEWS: I do.

MR O'NEILL: Who is he - who was he at this period of time, rather, that is, late 2019, early 2020?

40 MR MATTHEWS: Mr Ceramidas was the chief of staff with Minister Berry.

MR O'NEILL: And did you have interaction with him?

MR MATTHEWS: Yes.

45

MR O'NEILL: What was that interaction?

MR MATTHEWS: I'd worked with Mr Ceramidas over an extended period previously before he was Chief of Staff with Minister Berry. He was previously education advisor, so part of my role was to regularly engage with the office.

5 MR O'NEILL: And in relation to that do you ever recall having an interaction with him in respect of Campbell?

MR MATTHEWS: No.

10 MR O'NEILL: What about in respect of the implementation of the Secure Local Jobs Code policy in relation to procurement projects from within the EDU?

MR MATTHEWS: My recollection is that that period of early January - January and early in 2020, was that there was general enquiries coming from Mr Ceramidas around the
15 compliance with the government's policies and that's what I recall. I don't ever recall him mentioning individual projects or individual tenderers.

MR O'NEILL: Did you ever have an occasion to explain to Mr Ceramidas, "Well look, the way in which" - this is the evidence that we got earlier in your examination, that is, the way
20 in which this is taken care of is in two steps: (1) there's the gateway; and second, there's evaluative step and this is how it's done. Did you ever explain that to him?

MR MATTHEWS: I don't ever remember explaining that to him.

25 MR O'NEILL: Was there some piece of paper or a document that could have explained that type of - well, what we've just explained now, is there something that could have been handed over to him so that he could understand that?

MR MATTHEWS: Well, the Tender Evaluation Plan itself.

30

MR O'NEILL: And you don't recall whether you ever passed that on?

MR MATTHEWS: I don't recall whether they received that or not.

35 MR O'NEILL: Next, the union -

COMMISSIONER: Just apropos that, it strikes me it would have been quite unusual for the Minister's office to ask for particular documentations relating to particular procurements, or
40 am I mistaken about that? It just seems a level of detail, operational detail, that you wouldn't expect the Minister's office to be involved with?

MR MATTHEWS: Commissioner, generally we provided process updates to the Minister's office, so where things were up to, had we gone to market, had tenders closed, that was
45 generally the advice that we provided.

COMMISSIONER: But not the underlying documentation?

MR MATTHEWS: I can't think of other examples where that was provided.

MR O'NEILL: The union known as the CFMEU, are you familiar with that union?

MR MATTHEWS: I am, Mr O'Neill.

5 MR O'NEILL: Are you a member of it?

MR MATTHEWS: No, I'm not.

10 MR O'NEILL: Do you know a person by the name of Jason O'Mara?

MR MATTHEWS: I know of Jason O'Mara.

MR O'NEILL: Have you ever met him?

15 MR MATTHEWS: I've met him once.

MR O'NEILL: And, in meeting him, was that in relation to a specific procurement or just generally?

20 MR MATTHEWS: It was generally.

MR O'NEILL: What about a person by the name of Zach Smith?

25 MR MATTHEWS: Same answer, Mr O'Neill.

MR O'NEILL: You've only met him once?

MR MATTHEWS: I can only remember meeting him once.

30 MR O'NEILL: I think I will come to that in a moment. The Request for Expressions of Interest was issued on 30 July 2019, you were the delegate then. At that point in time can you just explain to the Commission what your authority level was as delegate in respect of this project?

35 MR MATTHEWS: I was the decision-maker.

40 MR O'NEILL: And if it were that that needed to change, what is the mechanism by which that is communicated to the relevant persons involved in the tender both internally and externally?

MR MATTHEWS: Well, speaking generally, so there should be a formalised amendment to the Tender Evaluation Plan and that should be provided to the Tender Evaluation Team and, as I said, if there's necessary communication with tenderers, that should occur as well.

45 COMMISSIONER: Although you're a decision-maker, I can understand that, did that comprehend fully your role - sorry, let's not talk about you, let's try and deal with it in principle. Did the delegate have other responsibilities in relation to the tender evaluation process in addition to being the decision-maker? Just to make it clear - you're aware of this, I think - the Auditor-General was quite critical about the lack of specification of roles of

people who got involved one way or another in the process. As it happened, you were not the individual and I'm not concerned with individuals for this question. What I'm asking you is your view about what the delegate's role was or should be in relation to the process of evaluation and ultimate recommendation?

5

MR MATTHEWS: Commissioner, so my view on that is, is that the role of the delegate or the decision-maker - I know that that terminology is important in this Commission, but if I can use it generally.

10 COMMISSIONER: Yes?

MR MATTHEWS: Is to make sure that the Tender Evaluation Plan is followed. So that, whenever I get an outcome from a TET, from a Tender Evaluation Team, my first consideration is, was the plan followed, and then I look at their assessment and make a
15 decision around whether I think their assessment is grounded, and then if I've got questions I would go back to the Tender Evaluation Team.

COMMISSIONER: Does it follow then that the delegate, as you see the role, is at arm's-length from the actual nuts and bolts of the team doing the assessment, aside from
20 saying, have you got the resources you need, or those general kind of administrative or managerial responsibilities. It's not the task for a delegate to get involved in the way in which criteria should be assessed or what experts they should be talking about, how they should evaluate an expert's report or not; am I right, the delegate needs to be a
25 decision-maker and not part of the process of the recommendation that's being made to him or her?

MR MATTHEWS: I agree with that, Commissioner, the delegate should not become involved in the tender assessment. They should, obviously, engage with the tender chair and engage at that level, but they should not - they should let the panel - let the Tender Evaluation
30 Team undertake their deliberations in accordance with the Tender Evaluation Plan.

COMMISSIONER: And, you might have discussions about timetabling and things of that kind, but not the substance of the evaluation itself?

MR MATTHEWS: There is the opportunity for the Tender Evaluation Team to consult with the delegate as required as well. So, if during their assessment they were stuck on a particular point or were unsure about how to resolve an issue within their deliberation, they could come and seek advice from the delegate around that. That's envisaged and appropriate, but that would, as I said, be it - or, as you said, Commissioner, be at arm's-length from the
40 actual assessment itself.

COMMISSIONER: Right. Yes.

MR O'NEILL: Thank you. Now, on 5 November 2019 you were still the delegate for the Campbell Modernisation Project?
45

MR MATTHEWS: Yes. I think I was back from Europe at that point.

MR O'NEILL: Can I just show you a document at 2.0209.

COMMISSIONER: Just to be clear to people listening to this process: your position as delegate was not a specific appointment, it arose by virtue of your position in the directorate?

5 MR MATTHEWS: That's correct, Commissioner.

COMMISSIONER: It's a sort of ex officio position?

MR MATTHEWS: It's one of the jobs of that position.

10 COMMISSIONER: Of that position?

MR MATTHEWS: That's correct.

15 COMMISSIONER: Right. Yes.

MR O'NEILL: You see here below the line, it says - it's an email from Mr Player to you dated 5 November 2019, copying various others, and it's talking about a steering committee meeting. What's the steering committee?

20 MR MATTHEWS: Education Directorate has a capital works steering committee to oversee its projects and that involves both Major Projects Canberra and Treasury.

MR O'NEILL: And you will see there that the top one is Campbell Primary School and it's talking about two tenderers: Manteena Commercial Pty Ltd and Lendlease Pty Ltd; do you see that?

25 MR MATTHEWS: I do.

MR O'NEILL: And who were they as at that point in time, to the best of your understanding, in respect of this project?

MR MATTHEWS: I'm not sure of the question, Mr O'Neill?

35 MR O'NEILL: All right, I will put it to you positively and you can deny it if it's wrong, but you understood them to be a shortlist of tenderers for the Campbell Primary School?

MR MATTHEWS: That's correct.

40 MR O'NEILL: So they were the two that, after responding to the requests for expressions of interest, had been selected as the two preferred tenderers?

MR MATTHEWS: That was my understanding. I think that REOI was resolved while I was in Europe, so.

45 MR O'NEILL: Right. Now, more interestingly though, at the top of the email there's another email on a Sunday on 12 January 2020 from Mr Green - sorry, from you to Mr Green; do you see that?

MR MATTHEWS: I do.

MR O'NEILL: And you say:

5 *Need a brief discussion on the below.*

Can you just explain to the Commission what you wanted to discuss and why?

10 MR MATTHEWS: I don't have a strong recollection of that, Mr O'Neill. I would - I was aware that Mr Green had recently started with the directorate and it would have been generally part of the background briefing of the various things that were under discussion or that were of relevance, so I can't be more specific than that.

MR O'NEILL: Do you recall having that debriefing with Mr Green?

15

MR MATTHEWS: I can't recall discussing it with him, no.

MR O'NEILL: Now, the timing of this email is significant, in that the ACT had been covered in smoke as a result of bushfires, and this is an email that's on a Sunday evening, so everyone was working very hard. Is that a fair characterisation of what was going on with the Territory at that time?

20

MR MATTHEWS: Yes. The Territory was in a state of alert. Ms Haire as DG had stood up an incident management team on 10 January which I was an incident controller for, so that was my primary focus.

25

MR O'NEILL: So does this then look more like you're handing off some of what you need to hand off because you're now taking in a different role and now Mr Green is going to come into this role, in effect, acting in your previous position?

30

MR MATTHEWS: Not necessarily handing off as you've put, Mr O'Neill, but certainly briefing him as the responsible executive.

MR O'NEILL: All right. Now, in that context you still can't recall what you said to him?

35

MR MATTHEWS: No, I can't.

MR O'NEILL: Would you have discussed with him the strengths and/or weaknesses of the various tenderers?

40

MR MATTHEWS: I think that's very unlikely because I wouldn't have known the details of the strengths and weaknesses of those different tenderers.

MR O'NEILL: Had you had any exposure to Manteena Commercial Pty Ltd?

45

MR MATTHEWS: No. Not that I'm aware of.

MR O'NEILL: Hadn't worked with them before?

MR MATTHEWS: Not that I'm aware of.

MR O'NEILL: Did you know at that time a person by the name of Mr Bauer?

5 MR MATTHEWS: No.

MR O'NEILL: And Lendlease, had you had any experience with that company?

10 MR MATTHEWS: Not that I'm aware of, but that's an international brand so I was aware of it.

COMMISSIONER: You're well aware of it, of course?

15 MR MATTHEWS: I'd heard of Lendlease, of course, yes.

MR O'NEILL: I will take you to a different document now, the document at 2.0352. I want to orientate you again in time. This is an email from Mr Green to Ms Cross and you on 26 February 2020. At this time Ms Cross was the acting Director-General because Ms Haire was on leave. At that period of time, that's 26 February, what role were you playing within 20 government? We now know, of course, that COVID's become much more a real risk to the Territory; does that assist you in understanding what you were doing at that time?

MR MATTHEWS: Yes. Mr O'Neill, I was the acting deputy director general from about the middle of February, and I'd had that continuous involvement in Black Summer and the 25 various natural disasters all through January and February and then, of course into March, so that was pretty much my entire focus for that period.

MR O'NEILL: To the best of your understanding, why is it that you're copied on this email, or why is it sent to you?

30 MR MATTHEWS: My understanding was that the Minister's office may have asked for a list of the short-listed tenderers. And, going back to the previous note, my recollection is that that issue was raised in the Education capital works steering committee earlier.

35 MR O'NEILL: Well, we will just return to that recollection. What do you recall was said in the steering committee about that point?

MR MATTHEWS: I believe that in the steering committee I sought clarification whether the information could be provided or not, whether it was about public information. I'm not sure 40 if it was that steering committee or another steering committee, but I have a very general recollection of that.

MR O'NEILL: What information are you talking about?

45 MR MATTHEWS: This is around any sort of information around short-listed tenderers, effectively. And I was told that that information is public, essentially it was notified to various different parties and not commercially sensitive, is my recollection.

MR O'NEILL: Were you aware at this period of time that within the directorate - sorry, I withdraw that - that from about this time Mr Ceramidas had spoken with Ms Cross to ensure that the policy, that is, the Secure Local Jobs Code policy, was being followed in respect of procurement?

5

MR MATTHEWS: I was not aware of that.

MR O'NEILL: So, Ms Cross never briefed you on such a position?

10

MR MATTHEWS: No, I had no recollection of that.

MR O'NEILL: And Mr Ceramidas never spoke to you about that?

15

MR MATTHEWS: No. I think, as I said previously in an answer, I had a general understanding that there was an interest in making sure that we followed the government policies, but specifically not in relation to any individual tender or tenderer.

COMMISSIONER: You were not directly involved in this procurement process at all events?

20

MR MATTHEWS: Not at this time.

COMMISSIONER: You might have had general managerial responsibility because Mr Green answered to you, I suppose, did he?

25

MR MATTHEWS: No, he didn't.

COMMISSIONER: Or he answered to the Director-General, so you were out of the loop in that sense. So, you didn't have responsibility, although perhaps you were informed about what was happening; do I understand your position correctly?

30

MR MATTHEWS: Yes. Commissioner, I wasn't involved, just to be clear about that. I believe that the reason why I would have been cc'd into this is because we had an Acting Director-General. So, I was, as the deputy, just I think the source of continuity and I believe that's why I would have received that information, but I'd otherwise not been involved in discussions.

35

COMMISSIONER: Right.

40

MR O'NEILL: Can I just draw your attention to the last paragraph of that, it'll be drawn up for you. Do you see there that there's a focus of this email is talking about:

The submitted labour relations, training and workplace equity plans.

45

Or LRTWE plans?

MR MATTHEWS: "LWRTE" as it's referred to, or the world's worst acronym.

MR O'NEILL: Certainly. Does that trigger any recollection you have as to why it was that this kind of email had been generated at the time?

MR MATTHEWS: No, it doesn't. As I said, this wasn't on my radar.

5

COMMISSIONER: When you say it's not on your radar, can I just be a bit more specific. This responds, obviously, to a query about the way in which this particular aspect had been dealt with and it's responding to that query by saying, in effect, it has been dealt with appropriately; correct, is that fair?

10

MR MATTHEWS: I think that would be the implication of that advice, yes.

COMMISSIONER: But are you saying that that as an issue or problem was not one which you were concerned with at the time and this rang no bells with you when it passed your desk, as it were?

15

MR MATTHEWS: Yes. I wasn't concerned with capital works delivery as a high focus, I was focused on the natural disasters and associated events. So, I get lots of emails and people cc me into lots of different emails just to give some sort of line of sight or general awareness, but there are areas like this where I just read the emails and just get on with my own work.

20

COMMISSIONER: I gather from that answer what you're saying is, this didn't signal to you any particular problem or issue?

25

MR MATTHEWS: No.

MR O'NEILL: Do you recall whether you attended an Education meeting with, or MINSET meeting on 24 February 2020?

30

MR MATTHEWS: I don't.

MR O'NEILL: Do you take notes at MINSET meetings and those kinds of things, or not really?

35

MR MATTHEWS: Generally not. They're generally minuted by the departmental liaison officer.

MR O'NEILL: I'm going to show you Ms Cross's notes, and so, just remember that when I show you someone else's documents you don't have to adopt it. We all understand how notes are taken and they're not an accurate representation of what occurred.

40

MR MATTHEWS: Yes.

MR O'NEILL: If the witness could be taken to 3.0143. The notes indicate that there was a discussion about - and you will see at the top there's "Min B" on the left, "school packs", "international students", et cetera. Does that trigger any particular recollection about this particular one, that is, school packs and things that were to be handed out?

45

MR MATTHEWS: No, they're generic issues in Education.

MR O'NEILL: All right. And if I could take you to the next page, you will see the words "Min B", which is Minister Berry, "(Josh)", that's Mr Ceramidas. And then at the bottom:

5 *A long discussion on EOI/tender and the Secure Local Jobs Code.*

And:

10 *How to avoid having providers that don't meet appropriate standards.*

And:

More important than just working to envelope.

15 Do you see that?

MR MATTHEWS: I see that.

MR O'NEILL: Does that trigger any memory of yours in relation to any discussion about
20 how Secure Local Jobs is to be best handled in procurement?

MR MATTHEWS: Doesn't trigger for me anything about being in that discussion, but I
think, as I said, it accords with my general statement earlier that there was general awareness
or commentary around compliance with policies.

25 MR O'NEILL: And then, after that, the words:

And check being properly monitored post contract. Had success with cleaners (Joss).

30 We understand that's a contractor. Again, does that trigger any memory in you about this
meeting?

MR MATTHEWS: No.

35 MR O'NEILL: Then if I could take you to 2.0378. You will see here, this is 27 February
2020, so at or about the same time period. You will see here that Ms Cross responds to
Mr Green, and again, copies you in relation to things that Ms Cross had identified that needed
to be reviewed and further evidence required; do you see that? Was this an issue on which
you had any involvement in any real sense other than as being a recipient to that email?

40 MR MATTHEWS: No. But I do recollect this email, yes.

MR O'NEILL: What about it do you recollect?

45 MR MATTHEWS: What I recollected was that Ms Cross was being particularly diligent
going through procurement documentation and pointing out where she felt that things had not
been resolved, so that's the way I took it.

MR O'NEILL: And do you see that what's actually being identified in respect of, say, if you just take the first one, that's "Built", you will see it's zeroing in on this issue of the LRTWE plan. It's really focused on the way in which, which was a component of how the Security Local Jobs Code policy was to be implemented; do you see that?

5

MR MATTHEWS: I can see those references.

MR O'NEILL: So is that something which you understood at the time was then to be a focus of what government wanted in respect of procurement, or is that putting that too high?

10

MR MATTHEWS: I think that's putting that too high because, Mr O'Neill, just very briefly, I understood the context of the whole Tender Evaluation Plan, so this was one factor but only one factor, you know, that ought to have been properly considered during these procurement activities. So, the LWRTE is, I believe, another threshold question in relation to the tender, so it's a requirement. But LWRTEs, local industry participation, work health and safety, Secure Local Jobs, were all elements that were reflected in the evaluation criteria.

15

MR O'NEILL: So does one take that answer to mean, and focusing in on something like that too intently, has the prospective danger of meaning that there may not be compliance with the Procurement Plan Minute?

20

MR MATTHEWS: No, that answer shouldn't be taken in that way, Mr O'Neill. I guess I was commenting that, in relation to your question that, you know, you focussed that these notes are around the LWRTE, which obviously is evident here; that didn't necessarily indicate to me that that would have a higher area of importance than other things that were in the Tender Evaluation Plan.

25

MR O'NEILL: On or about the 26th or the 27th the Commission understands that there was generally an agreement that you and Mr Green would meet with the CFMEU, that is, Mr O'Mara at or about that time; do you recall that?

30

MR MATTHEWS: I don't, I have a different recollection to that. So, I understand that I was asked to do a general meet and greet with the CFMEU and that part of my responsibilities in business services includes industrial relations. So, for example, I engage extensively with the Australian Education Union, with the CPSU, with the United Workers Union, so this is part of my normal role. So my recollection was that the request was that I go and do a meet and greet.

35

MR O'NEILL: And do you recall going to that meet and greet?

40

MR MATTHEWS: I do.

MR O'NEILL: And Mr Green attended with you?

45

MR MATTHEWS: That's not my recollection.

MR O'NEILL: You went by yourself, as you understand it?

MR MATTHEWS: Yes.

MR O'NEILL: And do you recall what was said?

MR MATTHEWS: I have a general recollection of what was said.

5

MR O'NEILL: Enlighten us?

MR MATTHEWS: Okay. So, I, as I said, went into the - I went to Dixon where the CFMEU were based. I remember arriving. I remember being escorted to their conference room where Mr O'Mara and Mr Smith were, and I think they were the only people in the room, is my recollection.

10

COMMISSIONER: Did you go alone?

MR MATTHEWS: I did go alone, yes. And I remember general, you know, introductory type comments and then I remember the CFMEU expressing a whole range of views around, you know, around government industrial relations policies, and I remember having that meeting, responding to questions that I thought were appropriate and then leaving the meeting.

20

MR O'NEILL: Well, industrial relations is a big topic.

MR MATTHEWS: Yes.

MR O'NEILL: Can you narrow it down into subtopics? Was the subject of a Secure Local Jobs Code discussed?

25

MR MATTHEWS: I think it was raised, yes.

MR O'NEILL: And what about compliance with it?

30

MR MATTHEWS: My recollection was that the CFMEU's view was that the compliance regime wasn't tough enough.

MR O'NEILL: And did you respond to that?

35

MR MATTHEWS: No.

COMMISSIONER: It was scarcely a matter for you.

40

MR MATTHEWS: Exactly.

COMMISSIONER: I'm sorry. Yes, go on.

MR O'NEILL: All right. What about procurement projects in the Territory generally; was that raised with you?

45

MR MATTHEWS: No. I think - well, generally, if I lean on that word "generally", Mr O'Neill, I think there was an awareness that Education was going to be increasing its

capital works and I think that was of interest to the CFMEU, but there was no specific discussion.

MR O'NEILL: Was there any specific discussion then of Manteena?

5

MR MATTHEWS: Not to my recollection.

MR O'NEILL: Lendlease?

10 MR MATTHEWS: Not to my recollection.

MR O'NEILL: Any other tenderer that had tendered for work in the Territory?

15 MR MATTHEWS: I have a recollection that the CFMEU may have raised their views generally on various construction companies, but not in the context of a tender as you've just described it, Mr O'Neill.

COMMISSIONER: Can you give a little more detail about that?

20 MR MATTHEWS: Yes, Commissioner. So, generally they have a view on who they work with and who they don't work with, and obviously they've got an interest as a stakeholder in construction companies working with them, so that from my point of view was their perspective as a stakeholder.

25 COMMISSIONER: What did they say about that subject to the extent you recall it?

MR MATTHEWS: Just generally that they - that they would want the government to contract with ethical suppliers, but no more specific than that.

30 COMMISSIONER: In substance then - if I'm overstating this, please let me know - in substance then, they were telling you that this was - that compliance with the labour relations regime, if I can just try and use a general term, was very important to them, it was important in procurement and they wanted to make sure that compliance was properly undertaken, but that was - it got no more detailed than that kind of general statement of their attitude; is that -

35

MR MATTHEWS: I think that's a fair summary, Commissioner.

40 MR O'NEILL: Thank you, Commissioner. Now, continuing on, was there any discussion about procurement - the procurement methodology, that is, in respect of Secure Local Jobs Code: well, there's firstly a gateway and then secondly there's an evaluative assessment. Was that kind of information discussed?

45 MR MATTHEWS: I'm not sure definitively, Mr O'Neill, but I believe that I'd read the evaluation plans before going to that meeting, and I may well have said, "This is the way that the evaluation occurs".

MR O'NEILL: And then, what about the LRTWE's assessment and the role unions played in any of that; was that discussed?

MR MATTHEWS: No, I don't think so.

MR O'NEILL: Was there any discussion about the engagement or consultation requirements of bargaining with workers in relation to the work that the union did; was that discussed?

5

MR MATTHEWS: I can't recall that, and that wouldn't have been relevant to my purpose for being there.

MR O'NEILL: Thank you. Commissioner, I'm about to move to a different topic and I note the time.

10

COMMISSIONER: Just before you finish this topic. On leaving was there any plan to meet again? Was it proposed that this would be a regular get-together every few months or so, or was that matter just left at large?

15

MR MATTHEWS: Specifically, Commissioner, there were no further plans made at that meeting. From my point of view regular union engagement was part of my role, so certainly didn't -

20

COMMISSIONER: That was not a subject of specific discussion?

MR MATTHEWS: No.

COMMISSIONER: Except, "I will see you again in due course" or something of that kind of general description?

25

MR MATTHEWS: Yes. There were no plans made or no process that was instigated.

COMMISSIONER: Yes, thank you. Yes, very well, we will take a brief adjournment.

30

<THE HEARING ADJOURNED AT 11.32 AM

<THE HEARING RESUMED AT 12.02 PM

35

MR O'NEILL: So, in the timeline we were - you've had a meeting with the CFMEU. Did you at any time have a draft of the tender evaluation report?

MR MATTHEWS: No.

40

MR O'NEILL: You had no involvement with the project, any specific involvement with the project at all, even right up until after the second Tender Evaluation Team made its recommendation and/or - and that recommendation was not accepted; that's fair, isn't it?

MR MATTHEWS: Yes. I was unaware until early 2021.

45

MR O'NEILL: Were you aware of any rumours within the directorate that there was union involvement in the way in which decision-making was being made?

MR MATTHEWS: No.

5 COMMISSIONER: Mr Matthews, you're aware here - I will ask you in due course whether you were aware at the time, but I think I know the answer to that - but you were aware that the Tender Evaluation Team, the first Tender Evaluation Team, made a draft report which included a recommendation, one might say a conventional recommendation about moving on with the project.

10 MR MATTHEWS: Can I confirm, Commissioner: I read all of the relevant documents in early 2021. Is that the period that you're talking about?

COMMISSIONER: Yes.

MR MATTHEWS: Thank you.

15 COMMISSIONER: And that Mr Green - leaving aside the way that it happened - Mr Green intervened and the recommendation was changed; you're aware of that?

MR MATTHEWS: (Indistinct).

20 COMMISSIONER: The recommendation was changed to, instead of proceeding in the normal way to negotiate with the recommended tenderer for the contract, to proceed by way of best and fairest offer which is, as I understand it, a very significant change to the recommendation. One is, we've completed the evaluation; and the other is, we want to give the tenderers another opportunity to amend anything they want to amend for the purposes of
25 assessing a best and final offer. Now, you tell me if you think I'm mistaken, but that seems to me to be a fundamentally different recommendation?

MR MATTHEWS: Commissioner, the use of the word "recommendation" is one I just want to sort of clarify with you.

30 COMMISSIONER: All right.

MR MATTHEWS: Because my reading of the documents at that time was that there was the process of the assessment by the TET as you've described, but then there is a brief from
35 Mr Green to Ms Haire -

COMMISSIONER: No, no. Sorry, you're talking at the end of the - I'm talking right at the beginning. The first Tender Evaluation Team process -

40 MR MATTHEWS: Yes.

COMMISSIONER: - which ended with a recommendation of a conventional kind to proceed with negotiating a contract with a recommended tenderer which in this case happened to be Manteena, which had significantly out-scored Lendlease, right, that's the recommendation.

45 MR O'NEILL: So this is in 2020 -

COMMISSIONER: Sorry?

MR O'NEILL: This is in February, 2020, just to be clear. There was a draft tender evaluation report, you've just said that you had no awareness of this. That draft tender evaluation report originally recommended entering into a contract negotiation with Manteena for the purposes of reducing the price; that recommendation was changed through the involvement of Mr Green to be that the process go to a best and final offer. That's what the Commissioner is asking you about, that process, not the later one which we will come to.

COMMISSIONER: I can understand a process, whether right or wrong, I can understand a process where a recommendation is made and for various reasons it's not followed. That's different. That's not getting the Tender Evaluation Team to change its recommendation which we are all agreed on, I think. No one has suggested that that was an unorthodox process. Everyone's agreed on that. The point that I'm asking you about though is that the delegate had the authority either to accept the recommendation or not depending upon appropriate and relevant considerations which plainly had to be clearly articulated and explained, but in terms of authority he did have the power to say I don't accept this recommendation for these or that reason, and then to do something about next steps; are we agreed?

MR MATTHEWS: Yes, Commissioner.

COMMISSIONER: Here, however, what was clearly the recommendation of the team was changed because of the intervention of the delegate. I grapple with understanding how, in any circumstances, that could be appropriate.

MR MATTHEWS: I would agree with that, Commissioner.

COMMISSIONER: I can understand if you said you made a mistake about your scoring for design, or you overlooked this aspect and you overlooked this aspect; I send it back to you so you can reconsider these matters and see whether your recommendation stays the same or not. I can understand that kind of intervention, and maybe if not done quite so brutally, maybe on occasions that has been done in the past; or it may be, of course, the delegate in the meantime has obtained additional relevant information about the viability of a company who's a tenderer or so on. So I can understand them saying, look - a delegate saying, well, I've got this additional information, could you factor this into your work and see whether it affects your recommendation or not. Those things seem to me to be available - they're obviously going to be rare, but one accepts that they might happen and it's not unreasonable for a delegate to bring those matters to the team's attention; do you agree?

MR MATTHEWS: Commissioner, as I understand it in this phase of your - that Mr O'Neill's referred to, this was the first TET and the first evaluation.

COMMISSIONER: Exactly.

MR MATTHEWS: My understanding, and it's just from memory, is that that evaluation was never completed, it was only in draft form. So, just to answer your question, I think that that should have been completed and provided to the delegate before any further action took place.

COMMISSIONER: The question -

MR O'NEILL: Sorry, Commissioner, if I may. Does that mean that, if that was to follow the process, the draft should have been provided in a finalised form and then the delegate go back to the TET and say, "I don't accept this recommendation and therefore could you consider
5 whether it's appropriate to go to BAFO" and so that that would then be done - that same Tender Evaluation Team could then reconsider that; is that the proper process as you understand it if that was to be the -

MR MATTHEWS: In a general sense, Mr O'Neill, that's right. So that, a Tender Evaluation
10 Team should be allowed to complete its work and then at the point at which they've got advice to the delegate, that should be the conversation and the types of interactions that the Commissioner was talking about would be appropriate in that context.

MR O'NEILL: And that's of course a transparent way of doing that; is that fair? Then rather
15 than having interference with the actual report it's a transparent way to go back and say to them, look, you have given me this, these are the issues I have with it?

MR MATTHEWS: I think the word I would use is "involvement." If the delegate has
20 involvement with the process it can confuse the probity issues and I think that's what the Auditor-General later concluded.

COMMISSIONER: So, just to explore the matter. Let's suppose the recommendation - first
25 of all, the process assumes that the people who have been appointed to the team and write the report are the people responsible for their recommendation?

MR MATTHEWS: That's correct.

COMMISSIONER: It's not the delegate's recommendation, it's their recommendation?

MR MATTHEWS: That's correct, Commissioner.

COMMISSIONER: To my mind that necessarily implies that - subject to something that I
35 will come to in a moment - they make their recommendation, they sign off on that recommendation, that's what they think of the evaluation, and then the delegate deals with it as the delegate thinks appropriate?

MR MATTHEWS: That would be my understanding too.

COMMISSIONER: I can understand perhaps that if the matter was susceptible of some
40 uncertainty that a team might say to the delegate, "This is our draft report, this is what we are thinking of doing. Are there additional factors or do you have any additional information that perhaps we need to factor in to reconsider our draft recommendation?" I find it difficult to think of that situation because, after all, the delegate always can say to them when he or she has got the recommendation, "Listen, I'm thinking of this, would you please consider that and
45 see whether that varies your recommendation." But at least we have a line of what happened: this was their initial view, the delegate had this extra factor, this is what - the ultimate recommendation. But ultimately, it's either the recommendation of the team or it's not; do you see what I mean?

MR MATTHEWS: No, I would I agree with that. The team makes a recommendation to the delegate. The delegate doesn't have to accept the recommendation, and the team may come with queries, so, for example, the team might come to say that the tenderers have exceeded the available budget, for example; that might be a query -

5

COMMISSIONER: What's best? Sometimes, I know, one process is to enter into a negotiation to see if you can, by adjustment, come to an acceptable price. Other ways is to go to perhaps a best and final offer, give them an opportunity to adjust price by adjusting one or more aspects of their design, for example. So that all -

10

MR MATTHEWS: Or to seek additional funding, Commissioner, just to -

COMMISSIONER: Or seek additional funding.

15

MR MATTHEWS: Yes.

COMMISSIONER: But those things, in order to maintain the integrity of the process, surely have to be recorded so that everyone knows what happened and why this document has this statement in it which changed from the original statement, for example; do you agree?

20

MR MATTHEWS: I agree that the assessment should be recorded and the engagement with the delegate should also be recorded.

COMMISSIONER: Right. At the end of the day, though, the whole plan, Tender Evaluation Plan, assumes that the tender evaluation team will make its recommendation, a recommendation for which they, and not the delegate, is responsible. The delegate deals with that recommendation but it comes from the team and has to be the team's recommendation; that's part of the legitimacy of the entire process?

25

30 MR MATTHEWS: I agree with that, Commissioner.

COMMISSIONER: Thank you. Yes.

MR O'NEILL: In any event, at the time you did not know or have any transparency in relation to this being - the way in which this project was being reviewed?

35

MR MATTHEWS: No. Yes.

MR O'NEILL: And I think you agreed with me that you had no understanding about the rumours that were circulating within the EDU?

40

MR MATTHEWS: Yes (crosstalk) -

COMMISSIONER: I don't think "understanding". I think he said he was unaware of any (crosstalk).

45

MR O'NEILL: Unaware of that. Thank you, Commissioner. You did become aware of it after the Freedom of Information request was made; do you agree?

MR MATTHEWS: When the Freedom of Information request was made I read all of the documents from both the EDU and MPC release, and obviously, I'd identified Ms Young's file note in that, and that was the way I became aware of that rumour.

5 MR O'NEILL: We will come back to that, but I just wanted to make sure that that was so. Then, were you aware that both tenderers had come in over budget?

MR MATTHEWS: I was aware of no details, Mr O'Neill, until I read the documents in February 2021.

10 MR O'NEILL: What about in relation -

COMMISSIONER: When you say "read the documents", in the context of the Freedom of Information or some other context?

15 MR MATTHEWS: Maybe, Mr O'Neill and yourself, Commissioner, may come to this, but essentially at the beginning of 2021 there was the FOI release and there was the Sparke Helmore probity audits, and that's when I became aware of the details.

20 COMMISSIONER: That's what I'm asking. So that was the process by which you became aware of the documents. You didn't have some independent enquiry or it didn't come to you for any other reason? I just want to clarify the source of your information. It was the collection of documents made pursuant to the FOI?

25 MR MATTHEWS: Yeah, and my recollection is, it was from my reading of those documents where I identified that.

MR O'NEILL: It certainly wasn't where someone, a staff member who you had some responsibility for came to you and said, "Look, I've got to disclose this to you" and said "what do I do?" There wasn't any of that kind of communication, was there?

30

MR MATTHEWS: No.

MR O'NEILL: Then, in relation to the executive brief that went to the EDU Director-General, you weren't aware of that at the time either, were you?

35

MR MATTHEWS: That's correct.

MR O'NEILL: But you came to review that at or about the same time that you came to review the handover note, is that fair - sorry, the file note?

40

MR MATTHEWS: Was part of that package of material, yes.

COMMISSIONER: So it was contained in the FOI material?

45

MR MATTHEWS: It was either contained in the FOI material or the matter that was - or the material that was provided to the probity order, but it was in that body of material, yes.

COMMISSIONER: Right. Thank you.

MR O'NEILL: Now, why was it that you were reviewing material that was to be provided pursuant to the FOI?

5 MR MATTHEWS: I was reading it for my own benefit in terms of establishing what had occurred. I was not a part of the FOI decision-making process.

MR O'NEILL: Why was it important that you understood what had occurred given you had very little involvement in it?

10

MR MATTHEWS: Well, in early 2021, in very early February, it was brought to my attention that there was this FOI release. It was - I was aware that there'd been discussions between Ms Haire and the head of service and that the probity audits were to be instigated, so it was a significant issue that I wanted to understand myself.

15

MR O'NEILL: But that doesn't explain why it was that you were given copies of that. It explains that you were interested in the issue and that that was understandable, but why was it that you then descended into reviewing the very information that was part of the request?

20 MR MATTHEWS: Well, the only way I could - is to give the same answer, Mr O'Neill: I'm a very thorough person and I read the documents to have a firsthand understanding of what was being put into the public domain in terms of the FOI documents and then any other relevant material for the probity audit.

25 COMMISSIONER: Mr Matthews, I've gathered from what you've just said but I just want to be explicit about it: did you only become aware of the meeting with the head of service after it occurred?

MR MATTHEWS: That's correct, Commissioner.

30

COMMISSIONER: And were you only aware of the request for a probity audit, the process for a probity audit, after the probity audit report had been obtained, or were you aware of it more or less when it was made and then you later got a report? I'm just wondering, at what point were you aware of the probity audit proposal?

35

MR MATTHEWS: Commissioner, my best recollection was that the probity audits had been initiated from that meeting with the head of service -

COMMISSIONER: Which you were unaware of?

40

MR MATTHEWS: - which I was unaware of and not in attendance of. Then I understand that it had already been actioned through the Government Solicitor's Office at the time and which I was, if you like, backgrounded around what was occurring.

45 COMMISSIONER: Right, but before the report was actually provided?

MR MATTHEWS: Yes, but it was in very rapid succession. The timeframes between the initiation of the probity audit and its initial findings were really only a matter of about a week.

COMMISSIONER: Let's go back a step, please, just so I get the sequence right. You were informed of the initiation of the process shortly before the report was in fact produced?

5 MR MATTHEWS: That's correct.

COMMISSIONER: And then, who informed you of the initiation of that probity report process?

10 MR MATTHEWS: I've gone back and reviewed the records to try to assist the Commission, and I received an email - the first email I received about this matter was from Ms Haire on 1 February, and then there was a series of follow-up emails from her giving me some background about this matter and it was primarily about the FOI release that was in, at that stage, being processed and then obviously the information around the fact that the probity
15 audit had been initiated.

COMMISSIONER: So, you were not - so when was the first you heard of a proposal to get a probity report?

20 MR MATTHEWS: It would have been in that first week or so of February when I was starting to get background material.

COMMISSIONER: Were you informed after the probity audit had been identified and instructions given or before that stage?

25 MR MATTHEWS: I don't -

COMMISSIONER: Are you able to say now?

30 MR MATTHEWS: I think it was after, but I'm not sure because I wasn't involved in the process, so I'm happy to explain what I think -

COMMISSIONER: I will just leave that. I'm not sure that I've seen those emails, but I've seen an awful lot of emails, Mr -

35 MR O'NEILL: Well, we will come to that.

COMMISSIONER: Okay.

40 MR O'NEILL: Now, did you and Ms Haire, though, have a discussion about the process that was to be undertaken in relation to probity?

MR MATTHEWS: We would have had a general discussion, but I've got no recollection of it.

45 MR O'NEILL: Did she seek your advice at all in respect of what had gone on and what your reflections upon it were?

MR MATTHEWS: No.

MR O'NEILL: Has she ever sought your reflections on what had occurred, even now?

5 MR MATTHEWS: I've not - I can't remember occasions where she's asked for my opinion. You know, I'm not shy at giving my opinion at times, so I may well have, having read the FOI reports, expressed a view on what I saw, but I can't remember Ms Haire asking for my advice.

10 MR O'NEILL: All right. Let's then come to some of the documents that you had reviewed. The first one's at 2.1887 that I want to take you to. This is the executive brief minute and it'll come up on the screen.

MR MATTHEWS: Yes.

15 MR O'NEILL: So, this was the document that drove, in effect, what was used to support the decision not to accept the recommendation of the Tender Evaluation Team. You've reviewed this document, haven't you?

20 MR MATTHEWS: I have.

MR O'NEILL: On your review of the document what was your reflection about, firstly, the reasoning that was provided in support of the decision?

25 MR MATTHEWS: When I first read the brief in February 2021, I thought the brief was inadequate in terms of the justification for the recommendation that was provided in the brief.

MR O'NEILL: And why did you form that view? Do you want to go to the various paragraphs? Or I can take you through?

30 MR MATTHEWS: I can say - speak generally, Mr O'Neill, and then if you've got any specific questions. From a principle point of view, that I think a decision to set aside a recommendation from a Tender Evaluation Team is a significant one and a serious one and should be appropriately and fully documented. I didn't see evidence of that in this brief. And also, I recall reading about the way the BAFO was undertaken in this brief, and particularly
35 advice in this brief that certain criteria were not considered or assessed as part of the BAFO but they were introduced into this brief in terms of the advice that was being provided. And I remember reading Ms Haire's annotations as well and going to those paragraphs.

40 MR O'NEILL: So what's the concern about reintroducing matters that haven't been re-evaluated? What is it that concerns you about that?

45 MR MATTHEWS: From my perspective generally it was unclear advice, and so that the whole - if I was the decision-maker in receipt of that brief I wouldn't have been able to form a full view around what had occurred and why it had occurred. But essentially, it represented, from my reading of the document at that time, Mr Green's assessment around what the preferred outcome should have been.

MR O'NEILL: Did you know at the time, that is when you came to read this in February, that Ms Haire had made herself the relevant decision-maker (delegate), whatever the correct term is, by about mid-May 2020?

5 MR MATTHEWS: I wasn't aware of those specifics.

MR O'NEILL: If we can then turn to - I think, just before we go to the next page, you drew some attention to the feedback that Ms Haire had provided. I think you will find that in the bottom box of the page, we will just draw that out for you. And that's what you were talking
10 about. You noted those matters in particular; is that fair?

MR MATTHEWS: One of the things that I reviewed in the brief was getting a sense of Ms Haire's consideration of it and that was her record of that.

15 MR O'NEILL: And is it fair then to say that - well, you tell us, I will ask it in an open way: what is it that concerns you about that feedback, if anything?

MR MATTHEWS: In terms of they're just very brief words there, obviously, it refers to the brief itself. But what that feedback illuminates is that there were three or so paragraphs that
20 were used to justify the decision-making, and it mentions long-term factors, and then Ms Haire obviously provides some instructions in signing the brief. So that, in of itself, gave me an insight into her consideration of it. But obviously I had to read the rest of the brief to identify those paragraphs and -

25 MR O'NEILL: Let's go through that task now, if I can just take you to the next page. There was some background that was being provided here, and some of this background would have been things that you had no awareness of, as we've just received evidence from you. You obviously were involved in the Request for Expressions of Interest that's referred to in paragraph 2, but your involvement pretty much ends by about paragraph 4; fair?
30

MR MATTHEWS: I think so, and just to be clear, I think in paragraph 2 I initiated the request for expression of interest but didn't make that decision, so my role was in initiating the Tender Evaluation Plan and then initiating the REOI and that's where it ended.

35 MR O'NEILL: Paragraph 4 talks about the fact that both tenderers were over budget, you can see that there. And then paragraph 5 talks about the advice that was received from the Government Solicitor's Office and the recommendation to go to best and final. In those paragraphs is there anything that jumps out to you as being unusual in this process?

40 MR MATTHEWS: Well, generally the use of a BAFO was not something that was a common occurrence. Obviously, it was an option that was available, but not envisaged necessarily in the Tender Evaluation Plan that had been approved. It talked about a two-staged assessment process, not a best-and-final offer. So, obviously tenders can - you know, the processes can adjust to circumstances, but the use of a BAFO generally was
45 something that was novel.

MR O'NEILL: And, to your mind, when you were reading this at the time, that is, in February 2021, was there sufficient information in this document for why BAFO was selected?

MR MATTHEWS: Not in this document, no.

5 MR O'NEILL: Then to the next page. The background finishes at 7. There doesn't seem to be any reference to the Procurement Plan Minute. Is that a concern to you?

MR MATTHEWS: It's noteworthy but it's not necessarily a failing of the brief.

10 MR O'NEILL: And then, in Issues, paragraph 8:

Evaluation had been completed by the TET and there was a full summary of the evaluation as Attachment 1 in the tender evaluation report.

15 Did you go and read the tender evaluation report?

MR MATTHEWS: In the course of reading all the documents I read all the tender evaluations that occurred and the advice provided around the BAFO.

20 MR O'NEILL: Paragraph No.9 correctly summarises that:

TET recommended that Manteena be awarded the contract.

25 It doesn't go on to explain in any detail about the actual scoring and the differences between the two tenderers; do you see that?

MR MATTHEWS: I do see that.

30 MR O'NEILL: Is that something that concerned you at the time, in terms of the granularity about how this note is dissecting what had occurred prior to its recommendation?

MR MATTHEWS: It goes back to my earlier comment that it was very general, non-specific advice. Obviously, I read all of the documents together and then had the benefit of the Sparke Helmore assessment a few days later, so all of that in totality showed that there were three assessments, two tenderer evaluation panels. On each occasion Manteena was the preferred tenderer, and then some commentary particularly about the BAFO. So, I had all of that information in my mind when I was reading this and other documents.

40 MR O'NEILL: The evaluation plan is mentioned in paragraph 10. So, here it is that there's an engagement with the actual plan, but that really what this paragraph is directed to is the way in which the Procurement Act requires best value for money?

MR MATTHEWS: Yes.

45 MR O'NEILL: Then a discursive paragraph - and I don't mean that in any pejorative way - but a discursive paragraph in 11 about a recommendation and why it is that the other tenderer offers best value for money, so echoing what had preceded in the preceding paragraph; you see that?

MR MATTHEWS: I do.

MR O'NEILL: And then the first substantive paragraph about reasoning for why it is that recommendation was being made in 12?

5 MR MATTHEWS: Mr O'Neill, I would say 11 is related to that too because I think the significance of paragraph 11 is a personal statement, "I consider the other tenderer" and then the subsequent paragraphs go on to describe that advice from Mr Green.

10 MR O'NEILL: Yes. Is there a problem with using the first person in a note like this or not really?

15 MR MATTHEWS: It's not a problem as such but I think, reading the document, I understood it to be his opinion. That's what I understood by reading the document and I think that's a reasonable, you know, characterisation of what you would understand. So, it's notable that it shifted to the first person from my point of view and that the advice followed that.

20 MR O'NEILL: And now what is effectively being handed to the Director-General is two recommendations: one is a personal recommendation being made by Mr Green, and the other is the recommendation being made by the Tender Evaluation Team?

MR MATTHEWS: I would have to go up to the actual recommendation block, but I actually - I think a single recommendation was being made from Mr Green to set aside the recommendation of the Tender Evaluation Team.

25 MR O'NEILL: Certainly. But what's happening is that now the Director-General has to undertake a weighing-up process in her decision-making?

MR MATTHEWS: There's a broad reflection of those issues in this brief, yes.

30 MR O'NEILL: The recommendations, just so you know, I won't take you back to them but the first one was:

Note the information contained in the brief.

35 And then:

Agree to enter into a contract.

40 They were the two main ones. There was also an intellectual property payment?

MR MATTHEWS: So from a public service point of view the wording of those recommendations is always very carefully designed because they represent the decision of the brief, so clearly the recommendation of that brief was to enter into the contract with Mr Green's preferred recommendation.

45 MR O'NEILL: Now, coming to the first one, that is, in paragraph 12, the first substantive paragraph in support of the opinion, as you put it. Reading that paragraph, and draw it out for you, what is it that causes you any concern in respect of that paragraph, if anything?

MR MATTHEWS: Obviously, the first part of that sentence essentially calls out that considerations other than the BAFO are being considered.

MR O'NEILL: And why does that concern you?

5

MR MATTHEWS: It shows a deviation from the agreed processes. That would be my concern reading it, but I would have to say that, as I said, I took this brief in totality rather than necessarily looked at every individual word.

10 MR O'NEILL: Is there a problem also - and feel free to reject this contention if you wish - and that is that, it's showing that structurally something had been re-assessed but then that reassessment is actually not the basis upon which someone is going to actually be awarded the tender?

15 MR MATTHEWS: That's correct. And also the second part of it introduces long-term indicators which suggests that things are out - that are being considered outside of the actual tender process itself.

MR O'NEILL: And then in the next paragraph - it goes over the page, so I will draw it out for you in both parts. Do you see here it introduces this concept of, firstly, that - well, there is the design element which we've received evidence from you now is usually about 50 per cent, effectively, because that's what you actually want?

MR MATTHEWS: And delivery, so it's design and delivery, project delivery.

25

MR O'NEILL: So, the design element of that Manteena is clearly ahead, but we're going to use this intellectual property, assigned intellectual property technique, or device, to be able to rectify the differences between them; do you see that?

MR MATTHEWS: I do see that.

MR O'NEILL: Does that cause you any concerns?

MR MATTHEWS: I think that that's poor advice in terms of the transferability of one design solution from one tenderer to another. Obviously, there are factually correct things in that paragraph, that the directorate owns the design, for example, but in terms of the risk of importing somebody else's design into a project, that is not without some risk and that should be properly considered and assessed.

MR O'NEILL: And why is that? Sorry.

COMMISSIONER: Especially when one of the factors here is not simply the pencil on paper sense of design, it was that there was a distinct difference between the team's assessment of the understanding of each of the protagonists or each of the tenders of the nature of the project. In other words, Manteena had a far better understanding of what was required than Lendlease. Well, that's not going to be shown on a pencil on paper, that's a much more fundamental notion that is being evaluated. Whereas all that would happen with getting the design, that is, getting the blueprints as it were, is transferring that information but not

45

transferring the understanding of the project, which is probably just as important to evaluating who's more likely to successfully complete the job; is that a fair observation?

5 MR MATTHEWS: My view would be - I'm not a design expert, the panel's role is to do that, undertake that, and they undertook their assessment, they came up - in the context of this brief it appears to be a justification to say, even though one design is inferior to another, we can remediate that in some way. I think that's the purpose of this point in this brief. That's what I understood it to be.

10 COMMISSIONER: Indeed. Right.

MR O'NEILL: The Commission has received some evidence from a person known as "Mr Blom" who said that, in fact, this kind of substitution could lead to a higher risk because you're actually trying to get one tenderer to adopt ideas that are not theirs, and they haven't priced them, and they don't really understand conceptually how they have been put together; is that fair?

MR MATTHEWS: Well, I think I made that point a minute ago, there is certainly a risk in importing somebody else's design, but I'm not a design expert.

20 MR O'NEILL: Paragraph 14 goes on to interpose a concept about "stronger proven track record" - it'll be drawn up for you now - and that that outweighs this design consideration. You read that paragraph, what was your reflection upon that?

25 MR MATTHEWS: My reflection on that was that this was a troubling paragraph because essentially the whole notion of a tender evaluation process is that, things are put into the process, assessed, and then an outcome is formed. So this suggested that there were other factors that were outside of that Tender Evaluation Plan that were being considered.

30 COMMISSIONER: Did you notice - I'm not sure whether you would or not - did you notice that in that tender evaluation report there is no evidence whatever that compares the track record on the one hand of Lendlease and the track record on the other of Manteena? So, this could not have been extracted from the report. As you point out, this seems to have come from other personal knowledge of Mr Green, a matter to which the - not surprisingly - the Tender Evaluation Plan did not advert?

MR MATTHEWS: So, Commissioner, obviously in the context of this brief I understood it to be Mr Green bringing in his prior experience -

40 COMMISSIONER: Yes.

MR MATTHEWS: - and forming a judgment. Now, he's a very experienced executive and works in this space, so he has a view and expressed his judgment, but from my point of view it was in addition to what would have been the requirements of the Tender Evaluation Plan.

45 COMMISSIONER: But also, he doesn't state the evidence for it, he doesn't state a basis; there's no reasoning, it's an ipse dixit?

MR MATTHEWS: It's incomplete advice and that's why I said, one of my general comments about this brief is that it's too brief, that there isn't sufficient detail or rationale, and these quite important points were only subject to a few sentences.

5 COMMISSIONER: Yes.

MR O'NEILL: You will see then, in 15, there's a return to - I'll just draw it up for you - there's a return to the concept about design and cost even though there's resourcing and risk. That doesn't seem to be a new point, it seems to be a reiteration of a point that had
10 previously been traversed.

MR MATTHEWS: Are you talking about paragraph 15, sorry, Mr O'Neill?

MR O'NEILL: Yes.
15

MR MATTHEWS: I can't make any extra comment on this except to say that there is a reference to both submissions being low risk.

MR O'NEILL: And then you see, in paragraph 16 - I will draw it this up to you - there's a
20 reference here going back to the concept of best value for money and then:

Requirements of the Government Procurement Act including Secure Local Jobs and the contracting methodology for the project.

25 Secure Local Jobs isn't mentioned in any of the paragraphs before and isn't relevantly engaged in any of the paragraphs before. Did you reflect upon that paragraph at all?

MR MATTHEWS: I've noted the reference but, as I said, my understanding of the Secure Local Jobs elements were that they were included in the tender evaluation process, they'd
30 been considered at the outset and brought into the tender evaluation plan, so from my point -

MR O'NEILL: They weren't considered as part of the best and final offer of valuation, though, because they weren't one of the criteria that had been re-assessed?

35 MR MATTHEWS: Well, obviously, that wasn't something that I didn't have an awareness of, but what I understood was that Secure Local Jobs had been built into the evaluation criteria. But that's, I think I take that as a general rationale for the advice that's provided rather than technical advice. It's not lengthy enough to be technical advice.

40 MR O'NEILL: The note then goes on, in 17, to note that the Lendlease bid is over budget but can be managed. Would that be something that concerned you?

MR MATTHEWS: It's not uncommon that one or more bids exceed the tender price, and the Commissioner and I had an exchange before about the options that are available: value
45 management, you know, ceasing the tender process, seeking additional funds, there are a range of things that can be done in that situation.

MR O'NEILL: Was your view ever sought about, the very matters that you've just addressed with us, was it ever sought by anybody else in the process of any review that was undertaken within the directorate?

5 MR MATTHEWS: No.

MR O'NEILL: That is, it wasn't part of any review - it wasn't part of the probity process that was undertaken to the best of your knowledge?

10 MR MATTHEWS: No.

MR O'NEILL: And, until you've given evidence to this Commission and also the Auditor-General, it hasn't really been traversed anywhere else; is that fair?

15 MR MATTHEWS: My views on this brief?

MR O'NEILL: Yes?

20 MR MATTHEWS: No.

MR O'NEILL: You were required, some time later - I think it's June 2022 - to meet with - or, you weren't required, but you did meet with the unsuccessful tenderer, Manteena, and issues about how this came about were discussed; do you recall that meeting?

25 MR MATTHEWS: I do.

MR O'NEILL: Did you feel that at that meeting you were in a position to provide open and frank assessments to that tenderer about what had gone on in your view?

30 MR MATTHEWS: I didn't feel constrained about what I could say. I would, though, point out that that meeting occurred under legal advice, so we were given advice about that meeting, and the legal advice just went to the extent of, that there was a possibility of ongoing civil litigation, for example, from Manteena and certainly from my point of view, even at that stage, a likelihood of further scrutiny of this work, so we were being cautious and
35 I was very concerned to only talk about things that I - you know, that were relevant to my role.

40 MR O'NEILL: Now, at that point all that was really relevant to your role, though, was the establishment of the Request for Expressions of Interest very early on. You had no actual role being played until you'd come to review these documents; that's fair?

45 MR MATTHEWS: Mr O'Neill, so what happened, of course, is that I was - you know, I was - Ms Haire referred the probity audits to me, so that's why I became involved in February 2021. Then I engaged with the Auditor-General and the office around all of this. So, under my responsibilities I have a responsibility around governance and legal and compliance. The audit committee sits under my responsibilities, so it's within my responsibilities to engage with oversight bodies, with auditing functions, et cetera, so I did have that role through 2021 and through to 2022.

MR O'NEILL: But why is it that that means that you are a person that should be or ought be attending a meeting with an unsuccessful tenderer?

5 MR MATTHEWS: I believe the Commission's been provided with our verbatim notes around that. What we wanted to do in that meeting - it was initiated at Manteena's request, they were seeking information about the decision making and the process. Obviously, that wasn't something that I could talk firsthand about. What I was able to talk firsthand about was to acknowledge the probity issues that had been raised by the Auditor-General, so to recognise the disadvantage that Manteena had experienced. And then also the reforms or the
10 changes that we had made, you know, as a result of the learnings from this exercise.

MR O'NEILL: The other document that you were provided on your review was the file note from Ms Young. Now, Ms Young didn't sit within the education directorate, she sat within major projects; that was fair?

15 MR MATTHEWS: That's correct.

MR O'NEILL: But you nevertheless reviewed it. What was your reaction -

20 COMMISSIONER: Perhaps you should bring it up.

MR O'NEILL: I am. I'm just trying to find it.

25 COMMISSIONER: Sorry.

MR O'NEILL: I already should have it off by heart, I've brought it up so many times, but 2.1338, I think. 2.1448, there we go, I was only out by 10. So, you see here, this was the file note. When you saw that what was your concern, if any?

30 MR MATTHEWS: When I read it for the first time, in February 2021, my impression was that it was a potentially significant email, but that there was very general level of details provided. And I looked at the language as well and I think that there's a few noteworthy elements to it that I'm happy to discuss.

35 MR O'NEILL: Please do.

MR MATTHEWS: Well, I think the first thing is that it's a four-lined file note, so it's a very brief file note to begin with, so it wasn't a stronger level of documentation to review. The other thing that I looked at was, there are two "mays" that are used which I think is important
40 in public service context. So, the first line has:

The Minister for Education "may" have been approached by the unions.

45 And then, later on in that it was:

This "may" be why John Green is pushing for a BAFO.

So I think it's fair to say that that was qualified in that way. The other thing that really did jump out to me was that the term:

Manteena is getting all [of] the jobs.

5 Because that was not my understanding at the time or later. So, the last four major education construction projects had been delivered by Joss Constructions, J-o-s-s, and whilst Manteena may have done other work for the directorate, I wasn't aware of it. But I certainly - it was a surprising characterisation to me that "Manteena is getting all the jobs". So, when I looked at the wording of this I thought it was significant and noteworthy, I thought they would be investigated, but they were my observations on reading it

10

COMMISSIONER: Well, at the end, it's plainly not something that should have been ignored, it needed some level of enquiry, but as it stood it was not convincing evidence of interference?

15

MR MATTHEWS: Well, that's exactly right, Commissioner. So, it was important that it be further looked at, but it didn't - there was no other corroborating or correlating information in the material that I had available to me at that time.

20

COMMISSIONER: This may not be altogether surprising, though, would it -

MR MATTHEWS: No.

COMMISSIONER: - that when you think about it -

25

MR MATTHEWS: Yes.

COMMISSIONER: - very unlikely there'd be some other documentations - it's possible, of course, but this looks as though it's, if true, you're not going to find a directive from the Minister of Education, "Manteena's getting too much work"?

30

MR MATTHEWS: Sure, I understand what you're saying, Commissioner. I just wanted to make sure that there wasn't anything else in the package that I -

COMMISSIONER: No, no. You didn't have anything else to go on.

35

MR MATTHEWS: Yes.

40

COMMISSIONER: On the other hand, it came from a responsible officer attempting to deal with something that had come to attention, it was shared with another responsible officer, so in that sense people were taking it seriously as far as they were able to take it seriously. So, this is not a joke, or it's not a -

MR MATTHEWS: It's a serious and important issue.

45

COMMISSIONER: Yes, quite.

MR MATTHEWS: And obviously the thing that I was aware of as well was that it had been provided to Sparke Helmore as part of their probity audit, so I was aware that the material that was available had been given to the probity auditors.

COMMISSIONER: And the context for this was not that it was an idle "by the way" comment, but that it may have driven a particular decision that occurred in the process of the procurement?

5

MR MATTHEWS: And indeed in the Sparke Helmore report, which you may come to, they make that comment themselves, is that, the mere understanding that there might be interest or influence in a process -

10 COMMISSIONER: Might have had an effect?

MR MATTHEWS: - might have had an effect; that's what the probity audit itself found.

15 COMMISSIONER: We'll need to come back to that matter again, but I take on board what you say.

MR O'NEILL: Can I just show you another document and ask whether you've ever seen it in your review. It's at 2.1591. Do you recall ever seeing a document that looked like this; a handwritten note?

20

MR MATTHEWS: I don't, no.

MR O'NEILL: I will just draw out the middle. At the bottom two-thirds there there's a paragraph "26/3." You've not seen that before?

25

MR MATTHEWS: That does not strike my memory for me.

MR O'NEILL: Thank you. If that could be taken down.

30 COMMISSIONER: The other factor which is important is that both these persons, Morton and Young, were participants in the process. It's not that they were spectators or distant observers, as it were?

MR MATTHEWS: Yes.

35

COMMISSIONER: So, those things would have added to the potential seriousness of this matter; do you agree?

40 MR MATTHEWS: I just want to acknowledge and just to be clear, Commissioner, for your benefit that I definitely understood its significance when you have a file note where somebody says that there's been potentially political interference in a process.

COMMISSIONER: No, I understand. I quite understand what you're saying.

45 MR MATTHEWS: Yes, great. Thank you.

MR O'NEILL: Were you involved at all with assisting Mr Green in providing a timeline, a document that could be used to orientate people in a chronology for the purposes of everyone understanding what went on and when?

MR MATTHEWS: I requested Mr Green to consider whether he would want to write down additional justifications or reasons for his decision in that period of early February 2021.

5 MR O'NEILL: Did you ever review that document, if any was provided to you?

MR MATTHEWS: I recall being at Nature Conservation House in Belconnen with Mr Green and having - and standing up while he showed me a draft document, which I read and I gave it back to him, and pointed out that it had - that the document that I read had minimal
10 reference to the best and final offer process. And then, I think it was the next day or shortly after, he emailed me a final version.

COMMISSIONER: And did it contain further information?

15 MR MATTHEWS: Not much. I was, obviously having already reviewed the documents, I essentially regarded it as a repeat of the advice that he'd given to Ms Haire, and I would say my reaction was disappointed because I was hoping that additional particulars would be able to be made available to support any future scrutiny of this work.

20 COMMISSIONER: Right.

MR O'NEILL: Did you and Mr Green have a discussion at that point as to why it was that further detail could not be provided?

25 MR MATTHEWS: No.

MR O'NEILL: Did you discuss that topic with anybody else?

MR MATTHEWS: I can't recall that, no.
30

MR O'NEILL: Commissioner, I note the time. There's two matters that I will briefly touch on with Mr Matthews, I won't be very long. But knowing that we have the Minister at 2, could I respectfully suggest that we reconvene at 10 to 2 and then I will finish Mr Matthews -

35 COMMISSIONER: I don't think you will.

MR O'NEILL: I see. I see. Well then, it's not -

COMMISSIONER: I think we should adjourn now.
40

MR O'NEILL: Thank you, Commissioner.

COMMISSIONER: And then we will resume at 2 with the Minister and then we will resume with Mr Matthews. Aside from anything else, there may be an application.
45

MR O'NEILL: Yes.

COMMISSIONER: But we will deal with it then.

MR O'NEILL: Thank you.

COMMISSIONER: Yes, very well.

5 <THE HEARING ADJOURNED AT 12.56 PM

<THE HEARING RESUMED AT 2.02 PM

10 MR O'NEILL: So, in the timeline we were - you've had a meeting with the CFMEU. Did you at any time have a draft of the tender evaluation report?

MR MATTHEWS: No.

15 MR O'NEILL: You had no involvement with the project, any specific involvement with the project at all, even right up until after the second Tender Evaluation Team made its recommendation and/or - and that recommendation was not accepted; that's fair, isn't it?

MR MATTHEWS: Yes. I was unaware until early 2021.

20 MR O'NEILL: Were you aware of any rumours within the directorate that there was union involvement in the way in which decision-making was being made?

MR MATTHEWS: No.

25 COMMISSIONER: Mr Matthews, you're aware here - I will ask you in due course whether you were aware at the time, but I think I know the answer to that - but you were aware that the Tender Evaluation Team, the first Tender Evaluation Team, made a draft report which included a recommendation, one might say a conventional recommendation about moving on with the project.

30 MR MATTHEWS: Can I confirm, Commissioner: I read all of the relevant documents in early 2021. Is that the period that you're talking about?

COMMISSIONER: Yes.

35 MR MATTHEWS: Thank you.

COMMISSIONER: And that Mr Green - leaving aside the way that it happened - Mr Green intervened and the recommendation was changed; you're aware of that?

40 MR MATTHEWS: (Indistinct).

45 COMMISSIONER: The recommendation was changed to, instead of proceeding in the normal way to negotiate with the recommended tenderer for the contract, to proceed by way of best and fairest offer which is, as I understand it, a very significant change to the recommendation. One is, we've completed the evaluation; and the other is, we want to give the tenderers another opportunity to amend anything they want to amend for the purposes of assessing a best and final offer. Now, you tell me if you think I'm mistaken, but that seems to me to be a fundamentally different recommendation?

MR MATTHEWS: Commissioner, the use of the word "recommendation" is one I just want to sort of clarify with you.

5 COMMISSIONER: All right.

MR MATTHEWS: Because my reading of the documents at that time was that there was the process of the assessment by the TET as you've described, but then there is a brief from Mr Green to Ms Haire -

10

COMMISSIONER: No, no. Sorry, you're talking at the end of the - I'm talking right at the beginning. The first Tender Evaluation Team process -

MR MATTHEWS: Yes.

15

COMMISSIONER: - which ended with a recommendation of a conventional kind to proceed with negotiating a contract with a recommended tenderer which in this case happened to be Manteena, which had significantly out-scored Lendlease, right, that's the recommendation.

20

MR O'NEILL: So this is in 2020 -

COMMISSIONER: Sorry?

25

MR O'NEILL: This is in February, 2020, just to be clear. There was a draft tender evaluation report, you've just said that you had no awareness of this. That draft tender evaluation report originally recommended entering into a contract negotiation with Manteena for the purposes of reducing the price; that recommendation was changed through the involvement of Mr Green to be that the process go to a best and final offer. That's what the Commissioner is asking you about, that process, not the later one which we will come to.

30

COMMISSIONER: I can understand a process, whether right or wrong, I can understand a process where a recommendation is made and for various reasons it's not followed. That's different. That's not getting the Tender Evaluation Team to change its recommendation which we are all agreed on, I think. No one has suggested that that was an unorthodox process. Everyone's agreed on that. The point that I'm asking you about though is that the delegate had the authority either to accept the recommendation or not depending upon appropriate and relevant considerations which plainly had to be clearly articulated and explained, but in terms of authority he did have the power to say I don't accept this recommendation for these or that reason, and then to do something about next steps; are we agreed?

35

40

MR MATTHEWS: Yes, Commissioner.

45

COMMISSIONER: Here, however, what was clearly the recommendation of the team was changed because of the intervention of the delegate. I grapple with understanding how, in any circumstances, that could be appropriate.

MR MATTHEWS: I would agree with that, Commissioner.

COMMISSIONER: I can understand if you said you made a mistake about your scoring for design, or you overlooked this aspect and you overlooked this aspect; I send it back to you so you can reconsider these matters and see whether your recommendation stays the same or not. I can understand that kind of intervention, and maybe if not done quite so brutally, maybe on occasions that has been done in the past; or it may be, of course, the delegate in the meantime has obtained additional relevant information about the viability of a company who's a tenderer or so on. So I can understand them saying, look - a delegate saying, well, I've got this additional information, could you factor this into your work and see whether it affects your recommendation or not. Those things seem to me to be available - they're obviously going to be rare, but one accepts that they might happen and it's not unreasonable for a delegate to bring those matters to the team's attention; do you agree?

MR MATTHEWS: Commissioner, as I understand it in this phase of your - that Mr O'Neill's referred to, this was the first TET and the first evaluation.

COMMISSIONER: Exactly.

MR MATTHEWS: My understanding, and it's just from memory, is that that evaluation was never completed, it was only in draft form. So, just to answer your question, I think that that should have been completed and provided to the delegate before any further action took place.

COMMISSIONER: The question -

MR O'NEILL: Sorry, Commissioner, if I may. Does that mean that, if that was to follow the process, the draft should have been provided in a finalised form and then the delegate go back to the TET and say, "I don't accept this recommendation and therefore could you consider whether it's appropriate to go to BAFO" and so that that would then be done - that same Tender Evaluation Team could then reconsider that; is that the proper process as you understand it if that was to be the -

MR MATTHEWS: In a general sense, Mr O'Neill, that's right. So that, a Tender Evaluation Team should be allowed to complete its work and then at the point at which they've got advice to the delegate, that should be the conversation and the types of interactions that the Commissioner was talking about would be appropriate in that context.

MR O'NEILL: And that's of course a transparent way of doing that; is that fair? Then rather than having interference with the actual report it's a transparent way to go back and say to them, look, you have given me this, these are the issues I have with it?

MR MATTHEWS: I think the word I would use is "involvement." If the delegate has involvement with the process it can confuse the probity issues and I think that's what the Auditor-General later concluded.

COMMISSIONER: So, just to explore the matter. Let's suppose the recommendation - first of all, the process assumes that the people who have been appointed to the team and write the report are the people responsible for their recommendation?



MR MATTHEWS: That's correct.

COMMISSIONER: It's not the delegate's recommendation, it's their recommendation?

5 MR MATTHEWS: That's correct, Commissioner.

COMMISSIONER: To my mind that necessarily implies that - subject to something that I will come to in a moment - they make their recommendation, they sign off on that recommendation, that's what they think of the evaluation, and then the delegate deals with it
10 as the delegate thinks appropriate?

MR MATTHEWS: That would be my understanding too.

COMMISSIONER: I can understand perhaps that if the matter was susceptible of some
15 uncertainty that a team might say to the delegate, "This is our draft report, this is what we are thinking of doing. Are there additional factors or do you have any additional information that perhaps we need to factor in to reconsider our draft recommendation?" I find it difficult to think of that situation because, after all, the delegate always can say to them when he or she has got the recommendation, "Listen, I'm thinking of this, would you please consider that and
20 see whether that varies your recommendation." But at least we have a line of what happened: this was their initial view, the delegate had this extra factor, this is what - the ultimate recommendation. But ultimately, it's either the recommendation of the team or it's not; do you see what I mean?

25 MR MATTHEWS: No, I would I agree with that. The team makes a recommendation to the delegate. The delegate doesn't have to accept the recommendation, and the team may come with queries, so, for example, the team might come to say that the tenderers have exceeded the available budget, for example; that might be a query -

30 COMMISSIONER: What's best? Sometimes, I know, one process is to enter into a negotiation to see if you can, by adjustment, come to an acceptable price. Other ways is to go to perhaps a best and final offer, give them an opportunity to adjust price by adjusting one or more aspects of their design, for example. So that all -

35 MR MATTHEWS: Or to seek additional funding, Commissioner, just to -

COMMISSIONER: Or seek additional funding.

40 MR MATTHEWS: Yes.

COMMISSIONER: But those things, in order to maintain the integrity of the process, surely have to be recorded so that everyone knows what happened and why this document has this statement in it which changed from the original statement, for example; do you agree?

45 MR MATTHEWS: I agree that the assessment should be recorded and the engagement with the delegate should also be recorded.

COMMISSIONER: Right. At the end of the day, though, the whole plan, Tender Evaluation Plan, assumes that the tender evaluation team will make its recommendation, a

recommendation for which they, and not the delegate, is responsible. The delegate deals with that recommendation but it comes from the team and has to be the team's recommendation; that's part of the legitimacy of the entire process?

5 MR MATTHEWS: I agree with that, Commissioner.

COMMISSIONER: Thank you. Yes.

10 MR O'NEILL: In any event, at the time you did not know or have any transparency in relation to this being - the way in which this project was being reviewed?

MR MATTHEWS: No. Yes.

15 MR O'NEILL: And I think you agreed with me that you had no understanding about the rumours that were circulating within the EDU?

MR MATTHEWS: Yes (crosstalk) -

20 COMMISSIONER: I don't think "understanding". I think he said he was unaware of any (crosstalk).

MR O'NEILL: Unaware of that. Thank you, Commissioner. You did become aware of it after the Freedom of Information request was made; do you agree?

25 MR MATTHEWS: When the Freedom of Information request was made I read all of the documents from both the EDU and MPC release, and obviously, I'd identified Ms Young's file note in that, and that was the way I became aware of that rumour.

30 MR O'NEILL: We will come back to that, but I just wanted to make sure that that was so. Then, were you aware that both tenderers had come in over budget?

MR MATTHEWS: I was aware of no details, Mr O'Neill, until I read the documents in February 2021.

35 MR O'NEILL: What about in relation -

COMMISSIONER: When you say "read the documents", in the context of the Freedom of Information or some other context?

40 MR MATTHEWS: Maybe, Mr O'Neill and yourself, Commissioner, may come to this, but essentially at the beginning of 2021 there was the FOI release and there was the Sparke Helmore probity audits, and that's when I became aware of the details.

45 COMMISSIONER: That's what I'm asking. So that was the process by which you became aware of the documents. You didn't have some independent enquiry or it didn't come to you for any other reason? I just want to clarify the source of your information. It was the collection of documents made pursuant to the FOI?

MR MATTHEWS: Yeah, and my recollection is, it was from my reading of those documents where I identified that.

5 MR O'NEILL: It certainly wasn't where someone, a staff member who you had some responsibility for came to you and said, "Look, I've got to disclose this to you" and said "what do I do?" There wasn't any of that kind of communication, was there?

MR MATTHEWS: No.

10 MR O'NEILL: Then, in relation to the executive brief that went to the EDU Director-General, you weren't aware of that at the time either, were you?

MR MATTHEWS: That's correct.

15 MR O'NEILL: But you came to review that at or about the same time that you came to review the handover note, is that fair - sorry, the file note?

MR MATTHEWS: Was part of that package of material, yes.

20 COMMISSIONER: So it was contained in the FOI material?

MR MATTHEWS: It was either contained in the FOI material or the matter that was - or the material that was provided to the probity order, but it was in that body of material, yes.

25 COMMISSIONER: Right. Thank you.

MR O'NEILL: Now, why was it that you were reviewing material that was to be provided pursuant to the FOI?

30 MR MATTHEWS: I was reading it for my own benefit in terms of establishing what had occurred. I was not a part of the FOI decision-making process.

MR O'NEILL: Why was it important that you understood what had occurred given you had very little involvement in it?

35 MR MATTHEWS: Well, in early 2021, in very early February, it was brought to my attention that there was this FOI release. It was - I was aware that there'd been discussions between Ms Haire and the head of service and that the probity audits were to be instigated, so it was a significant issue that I wanted to understand myself.

40 MR O'NEILL: But that doesn't explain why it was that you were given copies of that. It explains that you were interested in the issue and that that was understandable, but why was it that you then descended into reviewing the very information that was part of the request?

45 MR MATTHEWS: Well, the only way I could - is to give the same answer, Mr O'Neill: I'm a very thorough person and I read the documents to have a firsthand understanding of what was being put into the public domain in terms of the FOI documents and then any other relevant material for the probity audit.

COMMISSIONER: Mr Matthews, I've gathered from what you've just said but I just want to be explicit about it: did you only become aware of the meeting with the head of service after it occurred?

5 MR MATTHEWS: That's correct, Commissioner.

COMMISSIONER: And were you only aware of the request for a probity audit, the process for a probity audit, after the probity audit report had been obtained, or were you aware of it more or less when it was made and then you later got a report? I'm just wondering, at what
10 point were you aware of the probity audit proposal?

MR MATTHEWS: Commissioner, my best recollection was that the probity audits had been initiated from that meeting with the head of service -

15 COMMISSIONER: Which you were unaware of?

MR MATTHEWS: - which I was unaware of and not in attendance of. Then I understand that it had already been actioned through the Government Solicitor's Office at the time and which I was, if you like, backgrounded around what was occurring.

20 COMMISSIONER: Right, but before the report was actually provided?

MR MATTHEWS: Yes, but it was in very rapid succession. The timeframes between the initiation of the probity audit and its initial findings were really only a matter of about a
25 week.

COMMISSIONER: Let's go back a step, please, just so I get the sequence right. You were informed of the initiation of the process shortly before the report was in fact produced?

30 MR MATTHEWS: That's correct.

COMMISSIONER: And then, who informed you of the initiation of that probity report process?

35 MR MATTHEWS: I've gone back and reviewed the records to try to assist the Commission, and I received an email - the first email I received about this matter was from Ms Haire on 1 February, and then there was a series of follow-up emails from her giving me some background about this matter and it was primarily about the FOI release that was in, at that stage, being processed and then obviously the information around the fact that the probity
40 audit had been initiated.

COMMISSIONER: So, you were not - so when was the first you heard of a proposal to get a probity report?

45 MR MATTHEWS: It would have been in that first week or so of February when I was starting to get background material.

COMMISSIONER: Were you informed after the probity audit had been identified and instructions given or before that stage?

MR MATTHEWS: I don't -

COMMISSIONER: Are you able to say now?

5

MR MATTHEWS: I think it was after, but I'm not sure because I wasn't involved in the process, so I'm happy to explain what I think -

10 COMMISSIONER: I will just leave that. I'm not sure that I've seen those emails, but I've seen an awful lot of emails, Mr -

MR O'NEILL: Well, we will come to that.

COMMISSIONER: Okay.

15

MR O'NEILL: Now, did you and Ms Haire, though, have a discussion about the process that was to be undertaken in relation to probity?

20 MR MATTHEWS: We would have had a general discussion, but I've got no recollection of it.

MR O'NEILL: Did she seek your advice at all in respect of what had gone on and what your reflections upon it were?

25 MR MATTHEWS: No.

MR O'NEILL: Has she ever sought your reflections on what had occurred, even now?

30 MR MATTHEWS: I've not - I can't remember occasions where she's asked for my opinion. You know, I'm not shy at giving my opinion at times, so I may well have, having read the FOI reports, expressed a view on what I saw, but I can't remember Ms Haire asking for my advice.

35 MR O'NEILL: All right. Let's then come to some of the documents that you had reviewed. The first one's at 2.1887 that I want to take you to. This is the executive brief minute and it'll come up on the screen.

MR MATTHEWS: Yes.

40 MR O'NEILL: So, this was the document that drove, in effect, what was used to support the decision not to accept the recommendation of the Tender Evaluation Team. You've reviewed this document, haven't you?

MR MATTHEWS: I have.

45

MR O'NEILL: On your review of the document what was your reflection about, firstly, the reasoning that was provided in support of the decision?

MR MATTHEWS: When I first read the brief in February 2021, I thought the brief was inadequate in terms of the justification for the recommendation that was provided in the brief.

5 MR O'NEILL: And why did you form that view? Do you want to go to the various paragraphs? Or I can take you through?

MR MATTHEWS: I can say - speak generally, Mr O'Neill, and then if you've got any specific questions. From a principle point of view, that I think a decision to set aside a recommendation from a Tender Evaluation Team is a significant one and a serious one and should be appropriately and fully documented. I didn't see evidence of that in this brief. And also, I recall reading about the way the BAFO was undertaken in this brief, and particularly advice in this brief that certain criteria were not considered or assessed as part of the BAFO but they were introduced into this brief in terms of the advice that was being provided. And I remember reading Ms Haire's annotations as well and going to those paragraphs.

15 MR O'NEILL: So what's the concern about reintroducing matters that haven't been re-evaluated? What is it that concerns you about that?

MR MATTHEWS: From my perspective generally it was unclear advice, and so that the whole - if I was the decision-maker in receipt of that brief I wouldn't have been able to form a full view around what had occurred and why it had occurred. But essentially, it represented, from my reading of the document at that time, Mr Green's assessment around what the preferred outcome should have been.

25 MR O'NEILL: Did you know at the time, that is when you came to read this in February, that Ms Haire had made herself the relevant decision-maker (delegate), whatever the correct term is, by about mid-May 2020?

MR MATTHEWS: I wasn't aware of those specifics.

30 MR O'NEILL: If we can then turn to - I think, just before we go to the next page, you drew some attention to the feedback that Ms Haire had provided. I think you will find that in the bottom box of the page, we will just draw that out for you. And that's what you were talking about. You noted those matters in particular; is that fair?

35 MR MATTHEWS: One of the things that I reviewed in the brief was getting a sense of Ms Haire's consideration of it and that was her record of that.

40 MR O'NEILL: And is it fair then to say that - well, you tell us, I will ask it in an open way: what is it that concerns you about that feedback, if anything?

MR MATTHEWS: In terms of they're just very brief words there, obviously, it refers to the brief itself. But what that feedback illuminates is that there were three or so paragraphs that were used to justify the decision-making, and it mentions long-term factors, and then Ms Haire obviously provides some instructions in signing the brief. So that, in of itself, gave me an insight into her consideration of it. But obviously I had to read the rest of the brief to identify those paragraphs and -

MR O'NEILL: Let's go through that task now, if I can just take you to the next page. There was some background that was being provided here, and some of this background would have been things that you had no awareness of, as we've just received evidence from you. You obviously were involved in the Request for Expressions of Interest that's referred to in paragraph 2, but your involvement pretty much ends by about paragraph 4; fair?

MR MATTHEWS: I think so, and just to be clear, I think in paragraph 2 I initiated the request for expression of interest but didn't make that decision, so my role was in initiating the Tender Evaluation Plan and then initiating the REOI and that's where it ended.

MR O'NEILL: Paragraph 4 talks about the fact that both tenderers were over budget, you can see that there. And then paragraph 5 talks about the advice that was received from the Government Solicitor's Office and the recommendation to go to best and final. In those paragraphs is there anything that jumps out to you as being unusual in this process?

MR MATTHEWS: Well, generally the use of a BAFO was not something that was a common occurrence. Obviously, it was an option that was available, but not envisaged necessarily in the Tender Evaluation Plan that had been approved. It talked about a two-staged assessment process, not a best-and-final offer. So, obviously tenders can - you know, the processes can adjust to circumstances, but the use of a BAFO generally was something that was novel.

MR O'NEILL: And, to your mind, when you were reading this at the time, that is, in February 2021, was there sufficient information in this document for why BAFO was selected?

MR MATTHEWS: Not in this document, no.

MR O'NEILL: Then to the next page. The background finishes at 7. There doesn't seem to be any reference to the Procurement Plan Minute. Is that a concern to you?

MR MATTHEWS: It's noteworthy but it's not necessarily a failing of the brief.

MR O'NEILL: And then, in Issues, paragraph 8:

Evaluation had been completed by the TET and there was a full summary of the evaluation as Attachment 1 in the tender evaluation report.

Did you go and read the tender evaluation report?

MR MATTHEWS: In the course of reading all the documents I read all the tender evaluations that occurred and the advice provided around the BAFO.

MR O'NEILL: Paragraph No.9 correctly summarises that:

TET recommended that Manteena be awarded the contract.

It doesn't go on to explain in any detail about the actual scoring and the differences between the two tenderers; do you see that?

MR MATTHEWS: I do see that.

5 MR O'NEILL: Is that something that concerned you at the time, in terms of the granularity about how this note is dissecting what had occurred prior to its recommendation?

10 MR MATTHEWS: It goes back to my earlier comment that it was very general, non-specific advice. Obviously, I read all of the documents together and then had the benefit of the Sparke Helmore assessment a few days later, so all of that in totality showed that there were three assessments, two tenderer evaluation panels. On each occasion Manteena was the preferred tenderer, and then some commentary particularly about the BAFO. So, I had all of that information in my mind when I was reading this and other documents.

15 MR O'NEILL: The evaluation plan is mentioned in paragraph 10. So, here it is that there's an engagement with the actual plan, but that really what this paragraph is directed to is the way in which the Procurement Act requires best value for money?

MR MATTHEWS: Yes.

20 MR O'NEILL: Then a discursive paragraph - and I don't mean that in any pejorative way - but a discursive paragraph in 11 about a recommendation and why it is that the other tenderer offers best value for money, so echoing what had preceded in the preceding paragraph; you see that?

25 MR MATTHEWS: I do.

MR O'NEILL: And then the first substantive paragraph about reasoning for why it is that recommendation was being made in 12?

30 MR MATTHEWS: Mr O'Neill, I would say 11 is related to that too because I think the significance of paragraph 11 is a personal statement, "I consider the other tenderer" and then the subsequent paragraphs go on to describe that advice from Mr Green.

35 MR O'NEILL: Yes. Is there a problem with using the first person in a note like this or not really?

40 MR MATTHEWS: It's not a problem as such but I think, reading the document, I understood it to be his opinion. That's what I understood by reading the document and I think that's a reasonable, you know, characterisation of what you would understand. So, it's notable that it shifted to the first person from my point of view and that the advice followed that.

45 MR O'NEILL: And now what is effectively being handed to the Director-General is two recommendations: one is a personal recommendation being made by Mr Green, and the other is the recommendation being made by the Tender Evaluation Team?

MR MATTHEWS: I would have to go up to the actual recommendation block, but I actually - I think a single recommendation was being made from Mr Green to set aside the recommendation of the Tender Evaluation Team.

MR O'NEILL: Certainly. But what's happening is that now the Director-General has to undertake a weighing-up process in her decision-making?

MR MATTHEWS: There's a broad reflection of those issues in this brief, yes.

5

MR O'NEILL: The recommendations, just so you know, I won't take you back to them but the first one was:

Note the information contained in the brief.

10

And then:

Agree to enter into a contract.

15 They were the two main ones. There was also an intellectual property payment?

MR MATTHEWS: So from a public service point of view the wording of those recommendations is always very carefully designed because they represent the decision of the brief, so clearly the recommendation of that brief was to enter into the contract with

20 Mr Green's preferred recommendation.

MR O'NEILL: Now, coming to the first one, that is, in paragraph 12, the first substantive paragraph in support of the opinion, as you put it. Reading that paragraph, and draw it out for you, what is it that causes you any concern in respect of that paragraph, if anything?

25

MR MATTHEWS: Obviously, the first part of that sentence essentially calls out that considerations other than the BAFO are being considered.

MR O'NEILL: And why does that concern you?

30

MR MATTHEWS: It shows a deviation from the agreed processes. That would be my concern reading it, but I would have to say that, as I said, I took this brief in totality rather than necessarily looked at every individual word.

35 MR O'NEILL: Is there a problem also - and feel free to reject this contention if you wish - and that is that, it's showing that structurally something had been re-assessed but then that reassessment is actually not the basis upon which someone is going to actually be awarded the tender?

40 MR MATTHEWS: That's correct. And also the second part of it introduces long-term indicators which suggests that things are out - that are being considered outside of the actual tender process itself.

45 MR O'NEILL: And then in the next paragraph - it goes over the page, so I will draw it out for you in both parts. Do you see here it introduces this concept of, firstly, that - well, there is the design element which we've received evidence from you now is usually about 50 per cent, effectively, because that's what you actually want?

MR MATTHEWS: And delivery, so it's design and delivery, project delivery.

MR O'NEILL: So, the design element of that Manteena is clearly ahead, but we're going to use this intellectual property, assigned intellectual property technique, or device, to be able to rectify the differences between them; do you see that?

5

MR MATTHEWS: I do see that.

MR O'NEILL: Does that cause you any concerns?

10 MR MATTHEWS: I think that that's poor advice in terms of the transferability of one design solution from one tenderer to another. Obviously, there are factually correct things in that paragraph, that the directorate owns the design, for example, but in terms of the risk of importing somebody else's design into a project, that is not without some risk and that should be properly considered and assessed.

15

MR O'NEILL: And why is that? Sorry.

COMMISSIONER: Especially when one of the factors here is not simply the pencil on paper sense of design, it was that there was a distinct difference between the team's assessment of the understanding of each of the protagonists or each of the tenders of the nature of the project. In other words, Manteena had a far better understanding of what was required than Lendlease. Well, that's not going to be shown on a pencil on paper, that's a much more fundamental notion that is being evaluated. Whereas all that would happen with getting the design, that is, getting the blueprints as it were, is transferring that information but not transferring the understanding of the project, which is probably just as important to evaluating who's more likely to successfully complete the job; is that a fair observation?

20

25

MR MATTHEWS: My view would be - I'm not a design expert, the panel's role is to do that, undertake that, and they undertook their assessment, they came up - in the context of this brief it appears to be a justification to say, even though one design is inferior to another, we can remediate that in some way. I think that's the purpose of this point in this brief. That's what I understood it to be.

30

COMMISSIONER: Indeed. Right.

35

MR O'NEILL: The Commission has received some evidence from a person known as "Mr Blom" who said that, in fact, this kind of substitution could lead to a higher risk because you're actually trying to get one tenderer to adopt ideas that are not theirs, and they haven't priced them, and they don't really understand conceptually how they have been put together; is that fair?

40

MR MATTHEWS: Well, I think I made that point a minute ago, there is certainly a risk in importing somebody else's design, but I'm not a design expert.

45 MR O'NEILL: Paragraph 14 goes on to interpose a concept about "stronger proven track record" - it'll be drawn up for you now - and that that outweighs this design consideration. You read that paragraph, what was your reflection upon that?

MR MATTHEWS: My reflection on that was that this was a troubling paragraph because essentially the whole notion of a tender evaluation process is that, things are put into the process, assessed, and then an outcome is formed. So this suggested that there were other factors that were outside of that Tender Evaluation Plan that were being considered.

5

COMMISSIONER: Did you notice - I'm not sure whether you would or not - did you notice that in that tender evaluation report there is no evidence whatever that compares the track record on the one hand of Lendlease and the track record on the other of Manteena? So, this could not have been extracted from the report. As you point out, this seems to have come from other personal knowledge of Mr Green, a matter to which the - not surprisingly - the Tender Evaluation Plan did not advert?

10

MR MATTHEWS: So, Commissioner, obviously in the context of this brief I understood it to be Mr Green bringing in his prior experience -

15

COMMISSIONER: Yes.

MR MATTHEWS: - and forming a judgment. Now, he's a very experienced executive and works in this space, so he has a view and expressed his judgment, but from my point of view it was in addition to what would have been the requirements of the Tender Evaluation Plan.

20

COMMISSIONER: But also, he doesn't state the evidence for it, he doesn't state a basis; there's no reasoning, it's an ipse dixit?

25

MR MATTHEWS: It's incomplete advice and that's why I said, one of my general comments about this brief is that it's too brief, that there isn't sufficient detail or rationale, and these quite important points were only subject to a few sentences.

COMMISSIONER: Yes.

30

MR O'NEILL: You will see then, in 15, there's a return to - I'll just draw it up for you - there's a return to the concept about design and cost even though there's resourcing and risk. That doesn't seem to be a new point, it seems to be a reiteration of a point that had previously been traversed.

35

MR MATTHEWS: Are you talking about paragraph 15, sorry, Mr O'Neill?

MR O'NEILL: Yes.

40

MR MATTHEWS: I can't make any extra comment on this except to say that there is a reference to both submissions being low risk.

MR O'NEILL: And then you see, in paragraph 16 - I will draw it this up to you - there's a reference here going back to the concept of best value for money and then:

45

Requirements of the Government Procurement Act including Secure Local Jobs and the contracting methodology for the project.

Secure Local Jobs isn't mentioned in any of the paragraphs before and isn't relevantly engaged in any of the paragraphs before. Did you reflect upon that paragraph at all?

5 MR MATTHEWS: I've noted the reference but, as I said, my understanding of the Secure Local Jobs elements were that they were included in the tender evaluation process, they'd been considered at the outset and brought into the tender evaluation plan, so from my point -

10 MR O'NEILL: They weren't considered as part of the best and final offer of valuation, though, because they weren't one of the criteria that had been re-assessed?

15 MR MATTHEWS: Well, obviously, that wasn't something that I didn't have an awareness of, but what I understood was that Secure Local Jobs had been built into the evaluation criteria. But that's, I think I take that as a general rationale for the advice that's provided rather than technical advice. It's not lengthy enough to be technical advice.

MR O'NEILL: The note then goes on, in 17, to note that the Lendlease bid is over budget but can be managed. Would that be something that concerned you?

20 MR MATTHEWS: It's not uncommon that one or more bids exceed the tender price, and the Commissioner and I had an exchange before about the options that are available: value management, you know, ceasing the tender process, seeking additional funds, there are a range of things that can be done in that situation.

25 MR O'NEILL: Was your view ever sought about, the very matters that you've just addressed with us, was it ever sought by anybody else in the process of any review that was undertaken within the directorate?

MR MATTHEWS: No.

30 MR O'NEILL: That is, it wasn't part of any review - it wasn't part of the probity process that was undertaken to the best of your knowledge?

MR MATTHEWS: No.

35 MR O'NEILL: And, until you've given evidence to this Commission and also the Auditor-General, it hasn't really been traversed anywhere else; is that fair?

MR MATTHEWS: My views on this brief?

40 MR O'NEILL: Yes?

MR MATTHEWS: No.

45 MR O'NEILL: You were required, some time later - I think it's June 2022 - to meet with - or, you weren't required, but you did meet with the unsuccessful tenderer, Manteena, and issues about how this came about were discussed; do you recall that meeting?

MR MATTHEWS: I do.

MR O'NEILL: Did you feel that at that meeting you were in a position to provide open and frank assessments to that tenderer about what had gone on in your view?

5 MR MATTHEWS: I didn't feel constrained about what I could say. I would, though, point out that that meeting occurred under legal advice, so we were given advice about that meeting, and the legal advice just went to the extent of, that there was a possibility of ongoing civil litigation, for example, from Manteena and certainly from my point of view, even at that stage, a likelihood of further scrutiny of this work, so we were being cautious and I was very concerned to only talk about things that I - you know, that were relevant to my
10 role.

MR O'NEILL: Now, at that point all that was really relevant to your role, though, was the establishment of the Request for Expressions of Interest very early on. You had no actual role being played until you'd come to review these documents; that's fair?
15

MR MATTHEWS: Mr O'Neill, so what happened, of course, is that I was - you know, I was - Ms Haire referred the probity audits to me, so that's why I became involved in February 2021. Then I engaged with the Auditor-General and the office around all of this. So, under my responsibilities I have a responsibility around governance and legal and compliance. The audit committee sits under my responsibilities, so it's within my responsibilities to engage with oversight bodies, with auditing functions, et cetera, so I did have that role through 2021 and through to 2022.
20

MR O'NEILL: But why is it that that means that you are a person that should be or ought be attending a meeting with an unsuccessful tenderer?
25

MR MATTHEWS: I believe the Commission's been provided with our verbatim notes around that. What we wanted to do in that meeting - it was initiated at Manteena's request, they were seeking information about the decision-making and the process. Obviously, that wasn't something that I could talk firsthand about. What I was able to talk firsthand about was to acknowledge the probity issues that had been raised by the Auditor-General, so to recognise the disadvantage that Manteena had experienced. And then also the reforms or the changes that we had made, you know, as a result of the learnings from this exercise.
30

MR O'NEILL: The other document that you were provided on your review was the file note from Ms Young. Now, Ms Young didn't sit within the education directorate, she sat within major projects; that was fair?
35

MR MATTHEWS: That's correct.
40

MR O'NEILL: But you nevertheless reviewed it. What was your reaction -

COMMISSIONER: Perhaps you should bring it up.

MR O'NEILL: I am. I'm just trying to find it.
45

COMMISSIONER: Sorry.

MR O'NEILL: I already should have it off by heart, I've brought it up so many times, but 2.1338, I think. 2.1448, there we go, I was only out by 10. So, you see here, this was the file note. When you saw that what was your concern, if any?

5 MR MATTHEWS: When I read it for the first time, in February 2021, my impression was that it was a potentially significant email, but that there was very general level of details provided. And I looked at the language as well and I think that there's a few noteworthy elements to it that I'm happy to discuss.

10 MR O'NEILL: Please do.

MR MATTHEWS: Well, I think the first thing is that it's a four-lined file note, so it's a very brief file note to begin with, so it wasn't a stronger level of documentation to review. The other thing that I looked at was, there are two "mays" that are used which I think is important in public service context. So, the first line has:

The Minister for Education "may" have been approached by the unions.

And then, later on in that it was:

20 *This "may" be why John Green is pushing for a BAFO.*

So I think it's fair to say that that was qualified in that way. The other thing that really did jump out to me was that the term:

25 *Manteena is getting all [of] the jobs.*

Because that was not my understanding at the time or later. So, the last four major education construction projects had been delivered by Joss Constructions, J-o-s-s, and whilst Manteena may have done other work for the directorate, I wasn't aware of it. But I certainly - it was a surprising characterisation to me that "Manteena is getting all the jobs". So, when I looked at the wording of this I thought it was significant and noteworthy, I thought they would be investigated, but they were my observations on reading it

35 COMMISSIONER: Well, at the end, it's plainly not something that should have been ignored, it needed some level of enquiry, but as it stood it was not convincing evidence of interference?

40 MR MATTHEWS: Well, that's exactly right, Commissioner. So, it was important that it be further looked at, but it didn't - there was no other corroborating or correlating information in the material that I had available to me at that time.

COMMISSIONER: This may not be altogether surprising, though, would it -

45 MR MATTHEWS: No.

COMMISSIONER: - that when you think about it -

MR MATTHEWS: Yes.

COMMISSIONER: - very unlikely there'd be some other documentations - it's possible, of course, but this looks as though it's, if true, you're not going to find a directive from the Minister of Education, "Manteena's getting too much work"?

5

MR MATTHEWS: Sure, I understand what you're saying, Commissioner. I just wanted to make sure that there wasn't anything else in the package that I -

COMMISSIONER: No, no. You didn't have anything else to go on.

10

MR MATTHEWS: Yes.

COMMISSIONER: On the other hand, it came from a responsible officer attempting to deal with something that had come to attention, it was shared with another responsible officer, so in that sense people were taking it seriously as far as they were able to take it seriously. So, this is not a joke, or it's not a -

15

MR MATTHEWS: It's a serious and important issue.

20

COMMISSIONER: Yes, quite.

MR MATTHEWS: And obviously the thing that I was aware of as well was that it had been provided to Sparke Helmore as part of their probity audit, so I was aware that the material that was available had been given to the probity auditors.

25

COMMISSIONER: And the context for this was not that it was an idle "by the way" comment, but that it may have driven a particular decision that occurred in the process of the procurement?

30

MR MATTHEWS: And indeed in the Sparke Helmore report, which you may come to, they make that comment themselves, is that, the mere understanding that there might be interest or influence in a process -

COMMISSIONER: Might have had an effect?

35

MR MATTHEWS: - might have had an effect; that's what the probity audit itself found.

COMMISSIONER: We'll need to come back to that matter again, but I take on board what you say.

40

MR O'NEILL: Can I just show you another document and ask whether you've ever seen it in your review. It's at 2.1591. Do you recall ever seeing a document that looked like this; a handwritten note?

45

MR MATTHEWS: I don't, no.

MR O'NEILL: I will just draw out the middle. At the bottom two-thirds there there's a paragraph "26/3." You've not seen that before?

MR MATTHEWS: That does not strike my memory for me.

MR O'NEILL: Thank you. If that could be taken down.

5 COMMISSIONER: The other factor which is important is that both these persons, Morton and Young, were participants in the process. It's not that they were spectators or distant observers, as it were?

MR MATTHEWS: Yes.

10

COMMISSIONER: So, those things would have added to the potential seriousness of this matter; do you agree.

MR MATTHEWS: I just want to acknowledge and just to be clear, Commissioner, for your benefit that I definitely understood its significance when you have a file note where somebody says that there's been potentially political interference in a process.

15

COMMISSIONER: No, I understand. I quite understand what you're saying.

20 MR MATTHEWS: Yes, great. Thank you.

MR O'NEILL: Were you involved at all with assisting Mr Green in providing a timeline, a document that could be used to orientate people in a chronology for the purposes of everyone understanding what went on and when?

25

MR MATTHEWS: I requested Mr Green to consider whether he would want to write down additional justifications or reasons for his decision in that period of early February 2021.

MR O'NEILL: Did you ever review that document, if any was provided to you?

30

MR MATTHEWS: I recall being at Nature Conservation House in Belconnen with Mr Green and having - and standing up while he showed me a draft document, which I read and I gave it back to him, and pointed out that it had - that the document that I read had minimal reference to the best and final offer process. And then, I think it was the next day or shortly after, he emailed me a final version.

35

COMMISSIONER: And did it contain further information?

MR MATTHEWS: Not much. I was, obviously having already reviewed the documents, I essentially regarded it as a repeat of the advice that he'd given to Ms Haire, and I would say my reaction was disappointed because I was hoping that additional particulars would be able to be made available to support any future scrutiny of this work.

40

COMMISSIONER: Right.

45

MR O'NEILL: Did you and Mr Green have a discussion at that point as to why it was that further detail could not be provided?

MR MATTHEWS: No.

MR O'NEILL: Did you discuss that topic with anybody else?

MR MATTHEWS: I can't recall that, no.

5

MR O'NEILL: Commissioner, I note the time. There's two matters that I will briefly touch on with Mr Matthews, I won't be very long. But knowing that we have the Minister at 2, could I respectfully suggest that we reconvene at 10 to 2 and then I will finish Mr Matthews -

10 COMMISSIONER: I don't think you will.

MR O'NEILL: I see. I see. Well then, it's not -

COMMISSIONER: I think we should adjourn now.

15

MR O'NEILL: Thank you, Commissioner.

COMMISSIONER: And then we will resume at 2 with the Minister and then we will resume with Mr Matthews. Aside from anything else, there may be an application.

20

MR O'NEILL: Yes.

COMMISSIONER: But we will deal with it then.

25 MR O'NEILL: Thank you.

COMMISSIONER: Yes, very well.

<THE HEARING ADJOURNED AT 12.56 PM

30

<THE HEARING RESUMED AT 2.13 PM

COMMISSIONER: I'm sorry to be late. There were some mixed signals. Very well. Just one moment. Yes, Mr O'Neill.

35

MR O'NEILL: The next witness interposed is Ms Berry. Can I also indicate to those in the room that Mr Matthews will be stood down until tomorrow subject to the productions of further material from him.

40 COMMISSIONER: Right.

MR O'NEILL: I call Ms Berry.

COMMISSIONER: Yes. Just one moment. Yes.

45

MR GINGES: Commissioner, my name is Ginges. I'm instructed by Adrian McKenna and I appear for Minister Berry.

COMMISSIONER: You seek leave to appear?

MR GINGES: I seek leave to appear.

5 COMMISSIONER: Yes, that leave is granted. Ms Berry, as you're aware, this is a public inquiry into allegations concerning the procurement for Campbell Primary School Modernisation Project. On the last occasion that you were here I explained some things which the legislation requires me to explain. I don't think I need to repeat them, you recall what I said?

10 MS BERRY: Yes. Thank you, Commissioner.

COMMISSIONER: Can I just make the point so far as your confidentiality notice is concerned that of course you can discuss anything that's in the public domain. Things that are not in the public domain, however, you must keep confidential.

15 MS BERRY: I understand.

COMMISSIONER: Now, I do not recall, did you give evidence by oath or affirmation?

20 MS BERRY: Affirmation.

COMMISSIONER: Right. Will you reaffirm the witness, please.

25 <YVETTE SIMONE BERRY, AFFIRMED.

COMMISSIONER: Yes, Mr O'Neill.

MR O'NEILL: Thank you.

30 <EXAMINATION BY MR O'NEILL:

MR O'NEILL: Ms Berry, just for the transcript, could you please restate your full name?

35 MS BERRY: Yvette Simone berry.

MR O'NEILL: And your current occupation?

MS BERRY: I'm a Minister within the ACT Government.

40 MR O'NEILL: You've given evidence here previously and I don't intend to traverse any of that evidence in any significant detail, it's just that we've now heard evidence from the Director-General of the EDU and we've also had a little bit of further evidence provided, documentary evidence, and so, in fairness to you and in circumstances where your former chief of staff is not available, we and want to put a few propositions to you in order to know
45 your position in respect of them.

The first is a factual one and that is that on or about 24 February 2020 - now, is I appreciate that was a very busy time - there appears to have been a meeting that was attended by a Ms Cross, and you and we understand you potentially - and potentially your then chief of

5 staff, Mr Ceramidas. We understand it might have been a MINSET meeting. I'm about to show you some notes from that this Ms Cross took. They are not your notes. The notes that we have from you don't go into this level of detail, understandably, but you don't need to accept them just because I'm putting a piece of paper in front of you. You understand what I'm saying?

MS BERRY: Sure, yes.

10 MR O'NEILL: So, the document is at 3.0143. So, the note starts here. You will see that the handwriting says:

Min B.

15 That's a reference to you, as Minister Berry. There's a discussion about school packs, international students, and of course this was all becoming pretty relevant at the time because of the COVID complications and this is just after the black summer in the ACT. Do you have any independent recollection of this meeting? Again, based on notes that aren't yours so I appreciate there may be some difficulty and feel free to -

20 MS BERRY: If it was an Education Minister's meeting with myself and the directorate, these items all look familiar.

COMMISSIONER: But you don't remember this particular meeting, I take it?

25 MS BERRY: No.

MR O'NEILL: Can I just take you to the next page, 3.0144. And I will just zoom it in for you. Again, at the top "Min B" that's you, and open brackets "(Josh)", that's Mr Ceramidas. That indicates that either you or he may have been speaking at any time when the person was taking the notes. And in particular I want to draw your attention to what's at the bottom, and that is:

Long discussion on expression of interest/tender.

35 Do you see that?

MS BERRY: Yes.

40 MR O'NEILL: Do you recall having a discussion -

COMMISSIONER: Well, I'd just read that section, because it all seems to be related, and then (indistinct) your question (indistinct).

45 MR O'NEILL: Do you need a hand with the handwriting, because I can assist you with it?

MS BERRY: It's okay, just give me a moment.

MR O'NEILL: Not a problem.

MS BERRY: Yes. Yes.

MR O'NEILL: Now, the notes are obviously someone's reflection upon - that is, Ms Cross's reflection upon how long this topic was dealt with. Do you recall at or about that time having
5 a long - a longer than ordinary discussion about these matters?

MS BERRY: No. I don't recall having a long discussion about this at all.

MR O'NEILL: You see the note there says:
10

Secure Local Jobs Code. How to avoid having providers that don't meet appropriate standards. More important than just working to envelope.

MS BERRY: Yes.
15

MR O'NEILL: I will just get it brought up.

COMMISSIONER: Can I just ask you this, though, before Mr O'Neill proceeds, and that is, are you able to say whether - I think we can safely say this was the subject of discussion,
20 otherwise there wouldn't have been a note.

MS BERRY: Yes.

COMMISSIONER: But it seems both you and Mr Ceramidas was present. It may be that
25 you each made a contribution to this part of the discussion or it may be - I'm wondering whether you think it would have come from you rather than Ceramidas. If it's just a guess, you don't know, that's fine. I wouldn't expect you to recollect necessarily at this stage.

MS BERRY: No. I - sorry, now I'm confused about what you asked. I'm not going to guess.
30 Can you -

COMMISSIONER: What I'm asking you is, do you recall whether you were the source of this information or Mr Ceramidas was, that's all?

MS BERRY: No. I know more about the Secure Local Jobs process now than I did back
35 then.

COMMISSIONER: Then. All right.

MR O'NEILL: Conceptually, that is, as at February 2020, were you aware of there being any
40 providers that didn't meet appropriate standards?

MS BERRY: No.

MR O'NEILL: Was that a concern that you held?
45

MS BERRY: No.

MR O'NEILL: Was it a concern that any other members of government had passed on to you?

MS BERRY: No.

5

MR O'NEILL: Were you concerned about the implementation of the Secure Local Jobs Code?

MS BERRY: No, no.

10

MR O'NEILL: You paused at my question -

MS BERRY: I paused because I was thinking back to the cleaners, when we sourced the cleaners and that was before Secure Local Jobs, and there was a specific reason for that, which was ensuring that those workers got paid their wages and that the government or taxpayers' money went to pay the wages of workers, so in that respect my only thought on the Secure Local Jobs Code was that it would - it might avoid those kinds of issues for future contracts.

15

MR O'NEILL: Yes, but -

20

MS BERRY: We talked about this before with, like, service kind of contracts.

MR O'NEILL: Yes. What about this concept of being properly maintained post-contract? If I could just draw out the next part of the note for you, one moment. There you are. You see:

25

Checking properly maintained.

Or "monitored", rather, "post-contract". Was that something that was a concern of yours at the time? I appreciate this is someone else's notes, so again, just use your recollection rather than the note?

30

MS BERRY: No, I don't believe that was something that I was particularly concerned about at the time, although post that we've heard from - I think I recall hearing from the CFMEU that they were concerned about that.

35

MR O'NEILL: Yes. It echoes, in fact, a little bit of what the CFMEU were concerned about and is it your understanding that the CFMEU had communicated that to you?

40

MS BERRY: No. I don't - not specifically, no.

MR O'NEILL: Clearly at that time. All right, thank you. If that can be taken down. The next period of time that I want to take you to, if I may, and again it's factual, is shortly after that the author of these notes - hang on, I don't want to get the numbering wrong. So, 3.0149, has got a recording of a chat that she had with you. Do you see that's there now. Again, it's not your note. Just by me putting it in front of you that is meaningless to you. Do you recall having a chat with Ms Cross around about the 26th or the 25th to the 26th of February in relation to two school contracts that were in expression of interest?

45

MS BERRY: I don't recall those conversations.

MR O'NEILL: Do you know, the author of this note has provided evidence to the Commission that this was a note made prospectively, that is, she hadn't yet had a discussion
5 with you about these matters, so these were things to discuss with you.

MS BERRY: Right.

MR O'NEILL: And, in particular here, the question of whether there was a pause to be made
10 on the expressions of interest. Do you ever remember anyone from the directorate addressing that to you?

MS BERRY: No.

MR O'NEILL: What about the concern about not fully meeting:

Not fully meeting policy on unions.

You see that there. Did anyone from the directorate address that concern with you?
20

MS BERRY: No, although I will say, and I think I've given evidence on this previously, that implementing the Secure Local Jobs Code was important to the government and government policy.

MR O'NEILL: Yes. But my question is -

MS BERRY: On this specifically, no.

MR O'NEILL: And that would have been, as we understand it, a discussion that would have
30 occurred at or about the time of these notes being made, that's sort of late February 2020; you don't recall those issues being raised with you?

MS BERRY: No.

MR O'NEILL: Did your chief of staff raise with you that these matters had been raised with
35 him? Do you want me to take them one at a time?

MS BERRY: Look, I can't recall - I can't recall these - the specific - these specific things
40 being raised with me at any particular time.

COMMISSIONER: Just go back to this period and let's just look at the subject matters.

MS BERRY: The contracts would have been raised with me because, as I said, we were
45 building more schools or redeveloping more schools than we ever had been. Campbell was particularly challenging because of the issues that were there, we've talked about this previously, so in that respect it would have been, yes, we need to get these schools done, we need to get the jobs out, but - and that they need to meet the Secure Local Jobs requirements. My knowledge of the detail of the Secure Local Jobs Code was broad but not detailed. It was just not an area that I was involved in.

COMMISSIONER: I understand, but I just want to come back to the issues identified here as intended to be discussed; they may not have been as a result, of course, but -

5 MS BERRY: I don't recall the conversation being held with me about not fully meeting policy on unions.

COMMISSIONER: Let's just deal with the first, the delay. I think it would be fair to say that you would have been concerned if you were told that there was a delay or pause in the
10 process going forward?

MS BERRY: Yes.

COMMISSIONER: And I'm wondering whether it follows, and one has to be careful with
15 line of reasoning -

MS BERRY: Yes.

COMMISSIONER: - that if you had been told that, that's something that would probably
20 stick in your mind?

MS BERRY: Yes.

COMMISSIONER: But suggests, therefore, that this may have been an intended
25 conversation but more likely than not it didn't actually happen; does that fairly put the matter?

MS BERRY: Yeah, I think I'd agree with you there, Commissioner.

COMMISSIONER: Now let me then come to the - does the same reasoning apply? I can
30 understand someone saying, yes, of course we have to apply the government policy, that makes sense and that's an expected answer and it's unlikely you would necessarily remember that because that's exactly a conventional answer you would expect from a directorate about government policy; that's their job, is to apply policy. This, however, is suggesting there may
35 be a problem with the policy.

MS BERRY: Yes.

COMMISSIONER: Again, is that something you think you'd be likely to recall if it was
40 suggested to you or maybe not? Look, plainly it is speculative to a degree, I'm just - doing the best you can, what do you feel about that?

MS BERRY: Look, if we're talking specifically about the CFMEU, they generally don't think we do enough.

45 COMMISSIONER: Nobody does enough.

MS BERRY: Okay. So, it's not something that I would have thought about, I would have - like, if it was raised with me I would have just went, "Well, okay. Thanks, Captain Obvious", you know, but I can't specifically recall that being an issue with these contracts.

COMMISSIONER: Right. And -

MS BERRY: But you are right that I would remember if they were delayed, yeah.

5

COMMISSIONER: Or particularly if your Education Directorate had said, we are not fully meeting policy on unions, that's something that might stick in your mind; that's not the CFMEU?

10 MS BERRY: I would hope that they would if there was some - with any stakeholder, but including unions, yeah.

COMMISSIONER: So the difficulty here is knowing whether this is reporting - this is an intended report of what was happening or a mere - a report of what a CFMEU complaint was; that's the difficulty. In the context, because it's a brief note, we don't know. But at all events you do not recall a complaint being made by - to you through the Education Directorate that they were not fully meeting policy on unions?

MS BERRY: That the Education Directorate weren't?

20

COMMISSIONER: Yes.

MS BERRY: No.

25 COMMISSIONER: All right.

MR O'NEILL: And we've been over this topic slightly before but I just in fairness want to put it to you. Were you told at any time that the company, Lendlease, was liked or loved?

30 MS BERRY: I was not.

MR O'NEILL: And were you told at any time that the company, Manteena, was not liked or not loved?

35 MS BERRY: Only that the CFMEU had some issue with Manteena.

MR O'NEILL: And that's the issue that you've given evidence about before?

MS BERRY: Yes.

40

MR O'NEILL: The next topic is about the delegation of decision-making and when it is appropriate for the Director-General to take over. Now, the Director-General, Ms Haire, provided evidence to the effect - to the Commission to the effect of, that there was a general policy or a general bit of advice within the directorate that for more important projects the Director-General should take over the decision-making. Is that something that you are aware of?

45

COMMISSIONER: Yes, I don't think that, if I may say so, with respect, Mr O'Neill, quite states the evidence.

MR O'NEILL: Got that wrong?

5 COMMISSIONER: The evidence was that - and I can be corrected on this, Ms Morgan, if
you wish to - my recollection is that Ms Haire said that Mr Ceramidas had expressed an
opinion - or she was aware that Mr Ceramidas had expressed an opinion, in relation to
procurements at this time, that it would be appropriate for or better for the Director-General
herself to make the decision on the procurement. And, do you agree with that summation,
Ms Morgan?

10 MS MORGAN: Yes, thank you. Thank you, Commissioner.

COMMISSIONER: I mean, it has been stated in various ways but that's the substance of it.
My question is, would you suggest to a Director-General about such a matter who should
15 make a decision of that kind?

MS BERRY: No.

COMMISSIONER: And it's implicit in that, you would certainly not give a direction about
20 it?

MS BERRY: No. I have - I mean, there will be occasions where I would give direction on
something, so I'm not saying it never happened, but it's not usually a - like, "I direct you to do
these things or else", yeah.

25 COMMISSIONER: Right. Well, let's just unpack that a little bit.

MS BERRY: Can I give you an example?

30 COMMISSIONER: Yes.

MS BERRY: So last week or the week before, there's a new school called Shirley Smith in
Kenny, and the school hours were changed or announced by the school without - that weren't
consistent with the rest of our public school system and so I had an email sent to the
35 Director-General to say, "I direct you to ensure that this school's hours are consistent with
public schools." So that kind of thing, although that's a - you know, that would be a kind of
direction that I would give.

COMMISSIONER: I could understand, if it I may say so, a Minister saying to a
40 Director-General, in this case Education, look, this is really important and I'd really like it if
you kept your eye on it, or some kind of indication that it was important and -

MS BERRY: Yes.

45 COMMISSIONER: - should be closely supervised or managed as something that you would
prefer to be done, but that's not the line of "you should make the decision." The distinction
is, though somewhat grey, really quite important; do you agree with me?

MS BERRY: Yes, I would. Look, if there was an issue within the Education Directorate within maybe some of the public servants, that we would - you know, I'd contact the Director-General directly, that doesn't happen very often. It's very rare.

5 COMMISSIONER: And in this context where there was a decision about a procurement following a procurement process, I take it you are saying you would not have yourself requested or required that the ultimate decision-maker should have been the Director-General as distinct from whoever is appropriately making that suggestion and you wouldn't offer a suggestion about it?

10 MS BERRY: No.

COMMISSIONER: Accepting for this point that Mr Ceramidas did take - there are some differences as to whether he made it as a direction or he made it as a suggestion, but either
15 way, would such a suggestion or direction be made at your request or pursuant to something that you conveyed to Mr Ceramidas should occur?

MS BERRY: No, I didn't on this occasion, not at all - well, actually on any occasion.

20 COMMISSIONER: So, if he did that, would you characterise that as exceeding his authority?

MS BERRY: Well, I guess it depends on the experiences of the people having the conversation, whether it was an opinion or a suggestion rather than an actual direction. If it
25 was a direction, I would expect that it would have been in writing.

COMMISSIONER: Right.

MS BERRY: Because I could just, you know, I could just say, "Well, I give you a direction",
30 and somebody else could say, "Oh, I thought you were just saying that's a good idea."

COMMISSIONER: So, something like that, "It's a good idea if you make the decision", that would not be offensive. It might be unwise because it implicitly comes from you, because of his position as chief of staff, but perhaps not offensive or - what's your view of it?
35

MS BERRY: Of whether he -

COMMISSIONER: Say you became aware of it as a suggestion. "Well, Josh suggested that I should make the decision", what would your response be to that?
40

MS BERRY: I'd probably ask why that suggestion was made and what did they feel - what did the person feel about that suggestion, was that an appropriate cause of action, yeah. It's a bit hard to know, thinking -

45 COMMISSIONER: No, no, and I can't put it to you any more specifically because the evidence doesn't go any further than that, and we're not in a position to interrogate Mr Ceramidas about it at this point. Yes.

MR O'NEILL: And just rounding that topic off, was there any view expressed that in these particular procurements at this time, because of the Secure Local Jobs Code policy and that being implemented was some reason why there should be decisions being made at a Director-General level?

5

MS BERRY: I'm not sure I understand what you're getting to.

MR O'NEILL: It's probably too compounded as a question and I can split it up and that'll be easier.

10

MS BERRY: Thank you.

MR O'NEILL: You've provided evidence that, certainly at least, that the implementation of the Secure Local Jobs Code policy was a government priority in relation to procurement; fair?

15

MS BERRY: Yes.

MR O'NEILL: And my question is, noting that, was there ever to the best of your knowledge a direction - sorry, I will withdraw the word "direction" - but some indication that because of that it was important that decisions were being made at a Director-General level?

20

MS BERRY: I don't know whether it was - that was the way that I would phrase it, that it's - any decisions to do with the Secure Local Jobs Code should be made by Director-Generals. That's not the case.

25

MR O'NEILL: No. But is there any concession though in relation to, well, these two procurements, for example, being significant projects? Does that cast that answer in a different light?

30

MS BERRY: Yeah, it could be the case that that would be a decision that would be taken. It's not - it doesn't happen often, as I've said, those kinds of Director-General kind of taking over the decision-making, but it wouldn't be out of this world.

35

MR O'NEILL: So that's an answer about the appropriateness of it, to your mind it wouldn't be inappropriate for that to occur?

MS BERRY: No.

40

MR O'NEILL: But I think your evidence earlier is, you never made such an indication or provided such advice about that occurring?

MS BERRY: No.

45

MR O'NEILL: You don't know whether your chief of staff did so?

MS BERRY: No.

MR O'NEILL: And you don't know whether - sorry, I withdraw that. I think that's all the questions I have for this witness.

5 COMMISSIONER: Is there any application to cross-examine? No. Well, I think I can say, unless something comes up, and it's not impossible yet to surprise me, that your evidence is completed.

MS BERRY: I won't hold my breath.

10 COMMISSIONER: Well, don't hold your breath, no, because we still are making certain enquiries. But I think it is most unlikely that we would call you again. So, I can't release you, I'm afraid. However, subject to that, you're free to go, thank you.

MS BERRY: Thank you.

15 COMMISSIONER: I'm sorry, I assumed that you had no re-examination, but am I mistaken?

MR GINGES: Your assumption is correct, Commissioner.

20 COMMISSIONER: Thank you, Mr Ginges. Yes, very well.

MR O'NEILL: I propose that we have a brief adjournment and then I will call Ms Young.

25 COMMISSIONER: Very well.

<THE WITNESS STANDS DOWN

<THE HEARING ADJOURNED AT 2.42 PM

30 <THE HEARING RESUMED AT 2.49 PM

COMMISSIONER: Yes, Mr O'Neill.

35 MR O'NEILL: Commissioner, I think we're down one representative. Ms Berry's representatives said they were coming back and they haven't re-appeared. I'm in your hands if you -

40 COMMISSIONER: Sorry, what's the issue?

MR O'NEILL: Ms Berry's legal representatives wanted to come back and told me that they were coming back and they don't appear to have re-attended. I'm in your hands if you - I think we should just continue and they can -

45 COMMISSIONER: Did they tell you what the matter was?

MR O'NEILL: They were just saying goodbye to their client. I think we should continue with the formalities of it and if it gets into any -

COMMISSIONER: Very well. This is a public examination of Ms Kelly Young concerning allegations that recommendations and decisions relating to the Education Directorate's procurement of the Campbell Primary School Modernisation Project were made improperly.

5 Now, there are some informal matters which I need to tell you about which I've already explained to you, but we will do it again, I'm afraid. The first is that you have to answer all the questions that you're asked. You're still bound by your confidentiality notice but in relation to any matter that's in the public arena as a result of this hearing.

10 Any complaint you wish to make about the way you have been treated by the Commission you can make to the inspector and the details of that are on the website. If you wish to consult some professional person arising out of anxiety or stress because of this experience, and I understand it can be stressful, you are free to do so and be entirely candid with that person. If you'd like to share with a support person, that will also be permitted but you need
15 to let us know who it is before doing that. I can't give you carte blanche because in Canberra everybody knows everybody else, so there has to be some caution about that, but you only have to call the Commission office and I will look at it straight away and if you feel that would be helpful, I'm happy to agree to it.

20 Now, you have a lawyer present.

MS SULLIVAN: She does, Commissioner. My name is Sullivan and I seek leave to appear for Ms Young.

25 COMMISSIONER: Certainly, Ms Sullivan. That leave is granted. You are bound, of course, by the same confidentiality but only, as I say, in respect of matters which are not in the public domain already. And most of them are, but I don't - I'm unable to say that that is complete. Yes, thank you, Mr O'Neill. I don't recall, do you give evidence on affirmation or
30 oath?

MS YOUNG: Affirmation.

COMMISSIONER: Yes. Would you affirm the witness, please.

35 **<KELLY KATHLEEN YOUNG, AFFIRMED.**

COMMISSIONER: I should just point out, I'm wearing a mask because of the number of people in this room, which is an enclosed room. Would you feel more comfortable with a mask? We can provide one if you would prefer it. That's a matter for you?
40

MS YOUNG: I'm okay, thank you.

COMMISSIONER: Are you all right, Ms Sullivan, without a mask?

45 MS SULLIVAN: I'm okay, thank you, Commissioner.

COMMISSIONER: Very well.

MR O'NEILL: Thank you, Commissioner.

<EXAMINATION BY MR O'NEILL:

MR O'NEILL: Ms Young, can you please provide your full name?

5

MS YOUNG: Kelly Kathleen Young.

MR O'NEILL: And what is your occupation?

10 MS YOUNG: I'm a project manager with Major Projects Canberra.

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

MS YOUNG: Since 2016.

15

MR O'NEILL: And prior to 2016, what were you employed as?

MS YOUNG: I was an architect in various architectural - private architectural firms up and down the eastern seaboard of Australia.

20

MR O'NEILL: And you hold tertiary education?

MS YOUNG: Yes.

25 MR O'NEILL: What is that?

MS YOUNG: I have a Bachelor of Architecture and I'm also a registered - I was a registered architect in New South Wales and Victoria.

30 MR O'NEILL: The Commission is interested in a procurement process that was undertaken in respect of the Campbell Primary School Modernisation Project, and you held a role in respect of that procurement from pretty much its inception; is that fair?

35 MS YOUNG: Yes. As soon as we - as Major Projects Canberra got the request for infrastructure procurement, I was involved.

MR O'NEILL: What was your level of involvement at that point?

40 MS YOUNG: I was the project manager on that procurement and I - I guess, one of my first jobs is to write a Procurement Plan Minute.

MR O'NEILL: And so, you're the author of the Procurement Plan Minute for this that ultimately was approved and sent out under the Request for Expressions of Interest; is that fair?

45

MS YOUNG: Yes, and the attachments, yes.

COMMISSIONER: Can you just tell me this: it's not in every case but in some cases, consultations take place with the agency and the entity and Procurement ACT before the documentation is finalised. Do you know whether that process occurred in this case?

5 MS YOUNG: So, we have standard forms in Major Projects Canberra.

COMMISSIONER: Right.

10 MS YOUNG: And these forms, these templates are used for construction projects, and Procurement ACT had more to do with the goods and services, but where there was a - some of the standard templates go across either - both goods and services and construction.

COMMISSIONER: Right.

15 MS YOUNG: That was the extent of our, kind of, any contact with (crosstalk).

COMMISSIONER: It was essentially to get the right format?

20 MS YOUNG: Well, we already knew it. It was a standard process.

COMMISSIONER: And the proposal had to go to the board?

MS YOUNG: The government procurement -

25 COMMISSIONER: - the Government Procurement Board?

MS YOUNG: Procurement board, yes.

30 COMMISSIONER: And were you responsible for that or someone else?

MS YOUNG: So, after I drafted the Procurement Plan Minute, the PPM, that had to get signed off by various people in my directorate in NPC and then it was sent over to the Education Directorate and various people signed off that, and ending in David Matthews.

35 COMMISSIONER: And thence to the procurement board?

MS YOUNG: And then we went to the procurement board. David and I were at the procurement board.

40 COMMISSIONER: The obligation is to obtain the advice of the procurement board on procurements of this kind. Did they give you any particular advice, do you recall, or did it just pass through as acceptable without any comment?

45 MS YOUNG: I don't actually recall them doing anything, in saying anything in particular.

COMMISSIONER: Right. But that advice was given in due course and then you proceeded with the EOI process?

MS YOUNG: Yes. As soon as you get the Government Procurement Board approval, then you can go to market.

COMMISSIONER: And that's what you did?

5

MS YOUNG: Yes.

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

10 MR O'NEILL: Thank you. Your name and email, I'll just show you the front page of it so that it's open, if I could just go to hearing book 1.086. You see your name is the contact officer and then an email address, et cetera. That indicates that you're the relevant contact for this procurement project; is that fair?

15 MS YOUNG: Correct.

MR O'NEILL: And so, in that role at the request for expression of interest stage, what is it that you're required to do once the tenders have gone out?

20 MS YOUNG: So, answer any tender queries that happen, but also with the REOI there was - from tender queries, from RFIs, requests for information, there was a series of addenda that went out after the actual REOI went out, which is a typical process if there's something missing.

25 MR O'NEILL: And, in effect, you're the conduit for all of that information between -

MS YOUNG: Correct.

MR O'NEILL: - the relevant or prospective tenderers at that stage and major projects?

30

MS YOUNG: Yes.

MR O'NEILL: The REOI evaluation report was prepared on 4 October 2019. What was your role in respect of that report?

35

MS YOUNG: Of the REOI?

MR O'NEILL: Yes.

40 MS YOUNG: My job was to assess the tenders that had come in with the other two people on the Tender Evaluation Team, and the evaluation criteria were as set out in the REOI and we assessed against those criteria and scored it and provided a tender evaluation report to short - and with the recommendation of shortlisting to two particular tenderers.

45 COMMISSIONER: At that stage, I take it, there's no preference one for the other; it was simply those two to be considered further as distinct from other proposed contractors who were then excluded from the process, is it?

MS YOUNG: Yes. So, we were about to go into an ECI process, early contractor involvement process, which would be a lot more work for the contractors - the tenderers, so the idea is that you shortlist to two who are possible.

5 COMMISSIONER: Who are real contenders?

MS YOUNG: Yes.

10 MR O'NEILL: And at 1.132, your signature appears as the chairperson. It'll come up shortly, but is there an is distinction between the roles that are played by the various members of the evaluation team, that is, from the chair and the other two members?

15 MS YOUNG: So, the chairperson is usually somebody from Major Projects Canberra. The person - the chairperson is usually the person who is the project manager for that particular project and they are obligated to - well, usually the chair would write the report based on the discussions that it had with the other tender evaluation team members, and to let the - to tell the other team members what their obligations were as being part of the TET and to follow the recommendation through to get it signed off.

20 MR O'NEILL: Now, in terms of this specific procurement, you are the person who was undertaking all of those roles and as at this point in time there was nothing different to the process you've just outlined?

25 MS YOUNG: Correct.

MR O'NEILL: A Request for Tender was sent out on 30 October 2019, and one finds that at 1.163 of the bundle.

30 COMMISSIONER: Can you just tell me this just so I'm clear about it. In considering, in giving its advice on the proposal all the documentation goes to the board, doesn't it, so the draft RFT, for example, would have gone to the board. Do you know what document - can you - if you can't recall we can find out, but if you can recall just let us know.

35 MS YOUNG: There's a typical process. There's the Procurement Plan Minute, there's the evaluation criteria, there's a risk -

COMMISSIONER: Management plan?

40 MS YOUNG: Yes. I think that's about it. The -

COMMISSIONER: Draft contract?

45 MS YOUNG: Often the RFT, the Request for Tender, or the REOI, might not necessarily be drafted exactly by then. But, yeah, that's -

COMMISSIONER: But, if it has been, it would go?

MS YOUNG: Yeah, it could -

COMMISSIONER: But you don't know - as you sit here now you can't recall whether -

MS YOUNG: Well, I'm pretty sure the RFT was not ready by then.

5 COMMISSIONER: Right, okay. But the EOI would have had the criteria and the evaluation plan?

MS YOUNG: What happens is, the evaluation criteria that are in the evaluation plan that went to the board, it gets copied and pasted out of the evaluation plan and pasted into the REOI that went out and then the RFT that went out.

COMMISSIONER: Right. So that remains consistent throughout?

MS YOUNG: Yes.

15 MR O'NEILL: And if I could just take you to the next page across, so 1.164. This is the index. This is all standard - is this all pretty standard form, that it contains this information?

MS YOUNG: Yes. There is a template for the RFT.

20 MR O'NEILL: And then on the next page, 1.165, you see there's various attachments?

MS YOUNG: Yes.

25 MR O'NEILL: They're all standard attachments to this kind of document; is that correct?

MS YOUNG: They are.

MR O'NEILL: So as at this point in time, again, this tender, there was nothing in particular that was being - it was in any way different to how this would normally be conducted?

MS YOUNG: No.

MR O'NEILL: The tenders closed on 23 January 2020 with two submissions received: they were from a company named Lendlease. Had you had experience with that company before?

MS YOUNG: No.

MR O'NEILL: And another company called Manteena; had you had experience with that company before?

MS YOUNG: I don't think so, no.

MR O'NEILL: And then, what's the next step after the -

45 COMMISSIONER: Can I just ask you this: how many evaluations - construction evaluations had you sat on by this time, do you think? Approximately, obviously you don't have the exact number, but can you give us an idea?

MS YOUNG: So, evaluations related to construction, and they might not have been just construction, they might have been consultants for construction -

COMMISSIONER: Yes?

5

MS YOUNG: - I would have sat on about six or seven, yeah, and at least - and maybe been involved with others.

COMMISSIONER: Others as well. And, of those how many do you think would have concerned schools, are you able to say?

10

MS YOUNG: They were all -

COMMISSIONER: Is this the first - they're all schools?

15

MS YOUNG: Yes.

COMMISSIONER: Thank you.

MR O'NEILL: So what's the next step after the tenders have closed, what needs to be undertaken?

20

MS YOUNG: So, there's a number of things that have to happen. There's a few things within the RFT itself that need to be circulated to other areas, like Secure Local Jobs asking if the Secure Local Jobs register - what are they called - a team or something - if the two tenderers are compliant.

25

MR O'NEILL: Yes.

MS YOUNG: There's - it also gets sent to a WHS, kind of like a superintendent to ask for their opinion on the WHS sections of the procurement. And we check that it's compliant in the first place, like, was it a - well, I check it's compliant in the first place, that it's arrived in the tender's ACT box by the allotted time. Things like that. Then there was a - then we had a - the Tender Evaluation Team themselves convene and start assessing the tender after you've read it before the tender evaluation team kind of meet.

35

MR O'NEILL: And the process of assessment, is that undertaken in accordance with Tender Evaluation Plan?

MS YOUNG: Yes.

40

MR O'NEILL: Can I just show you this document, it's at 3.0184. Is this what is known as the Tender Evaluation Plan?

MS YOUNG: Yes. This was the attachment with the PPM.

45

MR O'NEILL: Yes. And so, this document sets out how it is that matters are to be evaluated when the team sits together?

MS YOUNG: Correct.

MR O'NEILL: It's a fairly lengthy document, it's 17 pages. Is it your job as the chairperson to be - in particular, you're the person that ensures the rules are being implemented?

5

MS YOUNG: Yes. We make sure that we're assessing in alignment with this evaluation plan.

MR O'NEILL: Can I take you to a document at 2.0219. You see here, this is an email from you to Mr Jacobi and Mr Morton, they were members of the team, that is the Tender Evaluation Team?

10

MS YOUNG: Yes.

MR O'NEILL: And Mr Patel was an observer or someone in there, in the Education Directorate?

15

MS YOUNG: Yes.

MR O'NEILL: And you're providing some information here relevant to the evaluation task that you're undertaking; is that correct?

20

MS YOUNG: Yes.

MR O'NEILL: And here you've noted a couple of things, in particular, though, that the project cost is over budget?

25

MS YOUNG: Yes.

MR O'NEILL: And that you will have to set up a meeting to discuss the Lendlease tender. This is only in respect of that tender; is that right?

30

MS YOUNG: Of the tender of the Campbell Primary School, are you saying?

MR O'NEILL: Yes?

35

MS YOUNG: Yes. There's no other tender.

MR O'NEILL: And so, you will see there that you've indicated in the penultimate sentence:

40

Please have a go at providing your own score on each of the valuation criteria before the meeting and then we will discuss.

What's relevantly important about that, from your perspective?

45

MS YOUNG: Because I want them to have a go independently to evaluate the criteria, evaluate each of the tenderers on the criteria as is set out in the RFT. Before we get together and consult about them - talk about it.

COMMISSIONER: Well, that has the advantage, amongst other things, of ensuring they read the material before the meeting?

MS YOUNG: That too.

5

MR O'NEILL: 2.0219. Just excuse me one moment. Attached to that email was this document at 2.0220. Do you recall this document?

MS YOUNG: Yes, vaguely, that one and another one that was similar.

10

MR O'NEILL: And what was the purpose of that document?

MS YOUNG: Obviously, we were over the budget amount for this project, so we - so I went about identifying what items we could value manage out to get within budget, so a VM'ing exercise, potentially a VM'ing exercise.

15

COMMISSIONER: So, just, "QS" means?

MS YOUNG: Quantity surveyor.

20

COMMISSIONER: Right.

MR O'NEILL: Can I take you to 2.0294. At the bottom - sorry, in the middle of this page you will see there's an email from you dated 20 February to Mr Morton and Mr Jacobi again, and this time Ms Wright was copied. Do you recall why you copied Ms Wright to this email?

25

MS YOUNG: I don't recall exactly. I had been on leave just prior to this and she had done some - like, she'd stepped into my role prior to the - well, just after the RFT closed and before I got back from leave.

30

MR O'NEILL: I see. You see there that you express a view that you should still recommend that - I think underneath the redaction, from memory, is the word.

35

(Livestream paused)

Lendlease is offered the unsuccessful tender fee as they have collectively put a lot of work into the submission.

40

And I will try and see if I can have the redaction removed, it's obviously been placed there in error, but accepting from me what's underneath it -

MS YOUNG: That makes sense.

45

MR O'NEILL: You say there that:

The submission was good all round but didn't hit the mark and missed some critical items.

MS YOUNG: Yes.

MR O'NEILL:

5 *The debrief will be important. I may have been a little harsh in my scoring but let's see what you guys come up with.*

Do you see that?

10 MS YOUNG: Yes.

MR O'NEILL: Do you recall what had missed the mark in respect of the Lendlease tender?

15 MS YOUNG: There was - I recall there was a number of things with regard to the design. Some items had been missed, they didn't quite understand the brief. The specifications. There was there - also, that I think their personnel weren't as strong.

MR O'NEILL: And then if I can just take you to the preceding page, so 2.0293, you see at the bottom on the Friday, Mr Jacobi responded to you and provided you with his and Mr Morton's scores?

20 MS YOUNG: Yes.

MR O'NEILL: Then they've added some comments, and then you've responded:

25 *Nice that we are within cooe of each other.*

At 12.39. And then you've got a discussion about:

30 *Yes - foreperson was not very experienced. I assume their site [manager] is assisting her but this wasn't explained.*

Do you recall what that issue was about?

35 MS YOUNG: The key personnel that they put forward mustn't have been - or they mustn't have demonstrated their sufficient experience, or as much as experience as what had been put forward in Manteena's submission.

40 MR O'NEILL: And then a request about the copyright amount, that that's the IP payment of \$75,000?

MS YOUNG: Yes.

45 MR O'NEILL: You are asking for some confirmation about that, and that you are recommending in effect that it should be paid given the amount of work that had been placed into the tender by that company?

MS YOUNG: Yes.

MR O'NEILL: And here, Mr Jacobi above thanking you:

They'll seek permission from the delegate when we put our covering brief over the TET report.

5 That must be, as you understand it, a reference to the tenderer fee being paid?

MS YOUNG: Yes. What I was trying to get at was that he agreed that, as the Tender Evaluation Team member, and Phil Morton, Mr Morton, that they both agreed that the tender - that the unsuccessful tender fee or the - of the 75 grand should be paid to Lendlease.

10

MR O'NEILL: Right, and we see that at 2.0292 at the bottom of the page. Sorry, just scroll down to the bottom. You say, so you're recommending they get paid, and Mr Jacobi responds:

15 *Yes, we will be recommending them to get paid, however it is the delegate's decision.*

And you say:

Understood, thanks.

20

MS YOUNG: Yeah, that was because he didn't quite understand my first question, which was, as a Tender Evaluation Team member you agree that we are putting forward the recommendation that they get paid, not for the decision for them to get paid. Obviously, it is the delegate's decision.

25

MR O'NEILL: Certainly, and that's what the procurement plan - sorry, I withdraw that - the Tender Evaluation Plan requires you to form these views; correct?

MS YOUNG: Yes.

30

MR O'NEILL: As at this time, that is 21 February 2020, was there anything that gave you concern in relation to how this tender evaluation had been conducted?

MS YOUNG: No.

35

MR O'NEILL: Had there been involvement from anybody outside of the Tender Evaluation Team in this process at this point in time?

MS YOUNG: I'm not too sure if it had already happened by this stage - maybe not. There is a usual process that we have, that our draft tender evaluation report, once we finish it - and I don't know if we'd actually finished it by then - but that our draft tender evaluation report gets sent within Major Projects Canberra up to my manager or director to get them to look at, from a QA perspective, to make sure that it's okay.

40

45 MR O'NEILL: And who was that at the time?

MS YOUNG: John Hawkins was on the way out, he was my manager. But I - it was a bit not clear to me when he was actually starting his other job within Major Projects Canberra on

other project. But I did send it to him and got some comments, and I think I also sent it to Rebecca Power, who is the executive group manager.

MR O'NEILL: And as you say, the purpose of that was from -

5

MS YOUNG: QA, make sure I've put in all I needed to -

MR O'NEILL: You're not seeking their input in relation to the evaluation task though, are you?

10

MS YOUNG: No.

MR O'NEILL: Now, at 1.528 is a tender evaluation report draft. It's not marked up with "draft" but it's unsigned, just take it from me. And at 1.530, you see, it expresses its purpose as being:

15

To seek approval for Manteena ... to be approved as the preferred tenderer.

MS YOUNG: Yes.

20

MR O'NEILL: Now, as of about the emails that we just saw, that was the 21 February emails, that was a view held by you; correct?

MS YOUNG: Yes, that's right.

25

MR O'NEILL: And as best you understand it by the team?

MS YOUNG: Yes.

30

MR O'NEILL: You say that this was sent to people within Major Projects for QA. To the best of your knowledge was it sent to anybody else?

MS YOUNG: Usually what I do to try and expedite in finalising the TER is to not only send it to my managers as part of the QA process, but send this draft over to the two Tender Evaluation Team members in the Education Directorate, and I did that on 24/2.

35

MR O'NEILL: So we can understand, that is the Commission can understand, that the date of this document is probably around 24 February 2020?

40

MS YOUNG: Yes.

COMMISSIONER: So let me just understand the process. The report comes with a worksheet that goes through the criteria and makes comments in relation to the tenderer's responses?

45

MS YOUNG: That's what we - we use the worksheets in the first instance, particularly when we're in meetings. Each of us fills out a worksheet which goes into a lot of detail about what we've picked up in each tender.

COMMISSIONER: Exactly.

5 MS YOUNG: And then independently we're giving scores against each of the - for each tenderer against each of the evaluation criteria, and then it sums it - well, it sums it and puts the summary at the front. It's a standard template.

COMMISSIONER: Right. So, obviously, it's potentially at least possible that each member of the team might score a particular criterion differently?

10 MS YOUNG: Yes.

COMMISSIONER: And then you attempt to achieve consensus?

15 MS YOUNG: Yes. So, we will discuss each point and why we scored it in a particular way, and then some people - and then we either agree on a score for each wagger criteria or, if we can't agree, then we add them all up and divide by three.

COMMISSIONER: Right, so you get an average score?

20 MS YOUNG: Yes.

COMMISSIONER: Does the report or the commentary sheet say when this averaging has occurred, or you just get an outcome?

25 MS YOUNG: When the averaging occurs? The sheet is an attachment to the final TER.

COMMISSIONER: Indeed.

30 MS YOUNG: And not each individual's worksheet is provided with the TER, it is the moderated - the single moderated version of it.

COMMISSIONER: I understand, it's that final one?

35 MS YOUNG: Yes.

COMMISSIONER: The outcome, as it were?

MS YOUNG: Yes.

40 COMMISSIONER: That might contain averaged scores or it might contain agreed scores?

MS YOUNG: Correct.

45 COMMISSIONER: All I'm asking is, can you tell from looking at that or are they just scores, in terms of the information contained -

MS YOUNG: Of who scored what on which criteria?

COMMISSIONER: Yes?

MS YOUNG: No, it's not identifiable. I've got archives, but that -

COMMISSIONER: And this process of averaging is part of a protocol, is it?

5

MS YOUNG: It's common.

COMMISSIONER: And then you've got the tender evaluation report itself which is really just a narrative that contains the ultimate conclusions?

10

MS YOUNG: Yes.

COMMISSIONER: And is it normal that - I gather from what you say that the chairperson would usually draft the moderated commentary?

15

MS YOUNG: Of the tender evaluation report? Yes.

COMMISSIONER: Yes?

20

MS YOUNG: Yes.

COMMISSIONER: And you send it to the others to see if they are happy with that summary?

25

MS YOUNG: Correct.

COMMISSIONER: If they want to make a change, usually you will make a change if -

MS YOUNG: They will track changes and then discuss it.

30

COMMISSIONER: But the result is, what you get, one way or another, is a consensus report?

MS YOUNG: Correct.

35

COMMISSIONER: Yes. Thank you.

MR O'NEILL: Thank you. Can I just take you quickly to another document, 2.0296. At the bottom of this you will see an email from you to the team dated 19 February 2020 where you're basically, from what I observe, and feel free to reject it, is that it's a summary of what you're discussing and the outstanding items that need to be undertaken for the purposes of the assessment?

40

MS YOUNG: What I was doing simultaneously to this, because obviously we were over budget, was I was seeing - I was discussing with the TET team, in particular Phil Morton because he was my counterpart at the Education Directorate on this project, was agreeing with them that within the budget what we were going to - what was to be allocated to each of these items, an agreement of what was going to be allocated against each of these items so that we knew how much we had for the actual design and construction.

45

MR O'NEILL: Certainly, and if I just take you to the next page, 2.0297, you make a direction at the bottom of that email:

5 *You are also directed to VM.*

That's value manage; yes?

MS YOUNG: Yes, VM is value manage.

10

MR O'NEILL:

Items to be removed from scope including -

15 Those seven items. And what you're saying there is, look, these are things we might be able to make some savings on?

MS YOUNG: Yes, these were my suggestions and I wanted confirmation from the Education Directorate that they were happy that these things were also - that they were also
20 happy for these things to be VM'd.

MR O'NEILL: Returning to page 2.0296, you see that Mr Morton attaches a revised budget at 2.0295. There's a little bit further commentary at the bottom from you about some things that need to be added and subtracted. Then at the top of that page you will see there, you've
25 said:

See attached and below assumptions and status of the budget ... we require what we require for value management is 1.3.

30 You've collated a potential list and attached it, and then you're letting them know that you should have the tender evaluation report to you before too long?

MS YOUNG: Correct.

35 COMMISSIONER: And I think you expressed the opinion that the cost savings were readily achievable?

MS YOUNG: At that stage, yes, there was - yes, that's right. Correct, yes.

40 MR O'NEILL: There's a document that begins at 2.0319, but relevantly I want to take you to some changes that appear at 2.0322. Do you just see here that, for example, in the bottom Manteena part of the report there's some deletions and editing and things of that nature; nothing that appears to us to change any conclusion, but it appears there's been some process of editing. Do you recall what that was about?
45

MS YOUNG: Yes. So, when I had sent the tender evaluation - the draft tender evaluation report over to Phil Morton and Chris, this was the comments - the tracked changes that I got back from Phil Morton, his comments about what should be in and out of the actual tender evaluation report.

MR O'NEILL: Can I take you to a separate document, 2.0380. Excuse me one moment. You see there at the top, firstly, do you recognise this handwriting?

5 MS YOUNG: Yes.

MR O'NEILL: Whose is it?

MS YOUNG: It's mine.

10 MR O'NEILL: And this is a note that you took about the Campbell Primary School; is that fair?

MS YOUNG: Yes, that's right.

15 MR O'NEILL: It bears a strange date at the top; is that 28 or 20 from the best -

MS YOUNG: 28th.

20 MR O'NEILL: Thank you. There's some initials on the right-hand side underneath the date:
JG, JH, RP, KY.

25 That indicates who was in attendance at the meeting; is that right?

MS YOUNG: Yes, but that's not the only people.

MR O'NEILL: So why is that only those people who are noted?

30 MS YOUNG: I think I wrote down later who actually was at that meeting, but I have a - the actual meeting invite and -

MR O'NEILL: Others were invited?

35 MS YOUNG: Others were invited.

MR O'NEILL: You see that there's a note about:

NZ all brands shoes.

40 That's nothing that we need to be concerned about?

MS YOUNG: No.

45 MR O'NEILL: Okay, dealing then with the first bullet point:

Mr Green ...

I assume that's a reference to him?

MS YOUNG: Yes.

MR O'NEILL:

5

... wants dual negotiation with both tenderers with a list of items that each will be negotiated upon.

MS YOUNG: Yes.

10

MR O'NEILL: Is this the first occasion that - sorry, is this an accurate - sorry, I withdraw that as well. Can you explain to the Commission how it is that you came to write that down?

MS YOUNG: So, I had - obviously we were over budget. I had that John Hawkins and Rebecca Power know that I - that we were over and I suggested to Rebecca Power that we needed to talk to the delegate about - obviously we were over budget so we needed to discuss where we were going to get extra funding from. Typically it's VM'ing or seeing if the Education Directorate have additional or can get additional budget. So, this was - so this meeting was set up, we were in Level 1 tower meeting room in the Education Directorate office. I went in there with the - pretty much a final copy of the TER and a list of value management items with the expectation - I went into this meeting with the expectation that we were going to have a discussion about how to - what items they were okay to VM or, if it was partial VM and partial finding some money from somewhere else, or finding some money somewhere else. As it turned out, the - so, I had these documents in my hand in this meeting ready to give to the delegate. We could have just signed it then and there and given it to him, this final tender - what I thought was the final tender evaluation report. But instead the delegate said that he wanted to go to a dual negotiation.

15

20

25

MR O'NEILL: Right. Is that what you recall Mr Green said?

30

MS YOUNG: Yes.

COMMISSIONER: So that's his phrase?

35

MS YOUNG: Yes, that's his phrase "dual negotiation." I'd never heard of it before.

MR O'NEILL: So you'd never heard of this process before?

MS YOUNG: No.

40

MR O'NEILL: Had you heard of the best and final offer process?

MS YOUNG: No.

45

COMMISSIONER: Can I just go back then to this. He wanted a list of "items for each that would be negotiated on" and a list of "items to be negotiated with dual negotiations." Can you explain those entries?

5 MS YOUNG: Yes. So, in going to a dual negotiation you have to - what I understand now, of course - is that you go back to both tenderers with the list of items that you're going to negotiate upon. Now, my understanding now, and since we had had GSO advice directly after this, is that those items had to be the same and you weren't allowed to favour one tenderer or the other in the questions that you sought clarification on or negotiation on.

10 COMMISSIONER: So let me just reflect back to you how I understand it and you tell me if that's your view as well. One of the issues with evaluating tenders is the need to be even-handed, treat each one equally?

MS YOUNG: Yes.

15 COMMISSIONER: One of the problems that I see as a lay person - and it may be that this is just conventionally done and it's accepted for what it is - if you are value managing some material or reducing a classroom size, changing the outlook of a parking lot or anything like that, so you're essentially changing the specifications -

MS YOUNG: The scope, yes.

20 COMMISSIONER: And so, you're doing that with one of the tenderers -

MS YOUNG: You're doing it with both.

25 COMMISSIONER: Sorry, with a value managing, do you -

MS YOUNG: Sorry, value managing is just with one tenderer, yes.

30 COMMISSIONER: Quite. So with value managing you're saying, well, maybe we can reduce the scope by changing the shape of the roof or changing the size of this room or whatever it is that you're varying to see whether they can reduce their tender price?

MS YOUNG: Yes. You're looking at the particular design.

35 COMMISSIONER: Indeed. So that may be the key. So, are you saying then that you are looking at their design but you're not varying the specifications? I take it that implicit in what you say, and I understand it makes sense, there are certain specifications which they tender against but they have a design solution for that specification. What you're looking at is adjusting their design solution but you're not changing the basic specifications. Is what I say making sense or is it -

40 MS YOUNG: Yes, I think so. So, I guess the basis of the specification stays the same with a value management, but you can work with the - okay, let me give an example for instance. If one tenderer had in their design a brick that was very expensive we would say, "How about we look at a different type of brick that's not so expensive" so that, you're still complying with the specification, like it's clad, the building's clad, but it's a -

COMMISSIONER: Different way of answering that issue?

MS YOUNG: Yes.

COMMISSIONER: All right, I understand now. All right, thank you. That's just what I wanted. What John Green was saying is, he was talking about something quite different to that?

5

MS YOUNG: Correct.

COMMISSIONER: Yes, Mr O'Neill.

10 MR O'NEILL: You've already written a note:

Probity advice.

Do you see that?

15

MS YOUNG: Yes. So, once he - once Mr Green had said that we were - that he wanted to seek this dual negotiation, I think Rebecca Power said, "We will have to seek probity advice" and he confirmed, "Yes, you will have to seek probity advice."

20 MR O'NEILL: There's a line across the page; is that significant?

MS YOUNG: Only that the information above the line is at the time and the information below was afterwards.

25 MR O'NEILL: Do you know how long afterwards you wrote -

MS YOUNG: Like, within a couple of hours.

MR O'NEILL: I see. And so, what were you doing below the line?

30

MS YOUNG: So, I think that this was a discussion with my manager, John Hawkins, because he, I guess, was - he had a lot more experience than me, obviously. I was discussing with him - he said that this dual negotiation would be a best and final offer. What else did I say there?

35

COMMISSIONER: Would you like to translate your (crosstalk) -

MS YOUNG: My own text:

40 *Potentially affected by your design. Review the floor areas. Meet the brief.*

COMMISSIONER: Resource, something?

MS YOUNG:

45

Resource. Look at the experience of support.

But I think it was just a - yes, a discussion about what best and final offer was and what potentially we could be looking at in a best and final offer.

MR O'NEILL:

Meet brief. Resource. Look at experience. Support.

5

MS YOUNG: Support, yes.

MR O'NEILL: And the reference to LC3?

10 MS YOUNG: It's unrelated, I think. Although, LC3 is the learning community 3, and that looks like an area of the learning community.

MR O'NEILL: So, what was your view about this position that had been expressed to the meeting about dual negotiation?

15

MS YOUNG: I didn't quite understand why we were going down this track.

COMMISSIONER: Did Mr Green explain why?

20 MS YOUNG: No, he just said that he wanted a different - it done a different way. When we had put to him in that meeting on the 28th of doing a value management and/or finding additional funding he said, "I want this third offer - this third option", which was the dual negotiation.

25 MR O'NEILL: Did you discuss this with the other members of the TET?

MS YOUNG: I am pretty sure that Phil Morton was there. I don't think Chris Jacobi was. I think he was away, but certainly they were aware that I was seeking GSO advice.

30 MR O'NEILL: Was there any informal discussions between you as to the approach that was now being taken and its appropriateness or otherwise?

MS YOUNG: First of all, I had to go and get the GSO advice to see whether we would be able to do that at all. There is - on receiving the probity advice from the GSO, obviously it took quite some time -

35

MR O'NEILL: All right. Let me just - we will go through it in sequence, I apologise if I probably forced you forward in the chronology. So, can I then take you to this document, 2.0382. You see here, this is an email from you to Ms Power and Mr Hawkins, 2 March. You say:

40

Following our meeting with Mr Green on Friday and his request to perform a dual negotiation, please see attached: summary of a probity advice request and the list of items to be included in the TET and sent to tenderers for negotiation of a best and final.

45

And you were seeking their input. What were you attempting -

COMMISSIONER: Sorry, can I just go back a step, please. Do you remember you said that you took a draft report to that meeting expecting to sign off on it?

MS YOUNG: We could have signed off on it then.

COMMISSIONER: Did you actually give it to Mr Green?

5

MS YOUNG: No, I didn't give it to him. It was evident that he didn't want it.

COMMISSIONER: Beg your pardon?

10

MS YOUNG: It was evident that he didn't want it.

COMMISSIONER: So, had he read it?

15

MS YOUNG: I don't know. It was in the Education - it was with the - it was sent over to the two people in the Tender Evaluation Team in the Education Directorate.

COMMISSIONER: So, you hadn't sent it to him?

20

MS YOUNG: No.

COMMISSIONER: But you gathered that somehow or other he had read it and was aware of its content?

25

MS YOUNG: I don't know if it was sent to him or not, but he - I mean, I had said to Rebecca already, and obviously to the two tender evaluation team members that we were over budget, and so that was why I was thinking that we would need to have this meeting to discuss the budget.

COMMISSIONER: What, how to deal with that issue?

30

MS YOUNG: Yes.

COMMISSIONER: I understand that, that's not quite my question. Did you gather from Mr Green that he had read the report or perhaps was what he said inconsistent merely with him knowing that it was over budget and some value management was going to be proposed? Or, if you - if it's merely speculative, don't - just let me know you don't know?

35

MS YOUNG: I don't know. I don't know whether it's in the report before or not.

40

COMMISSIONER: You don't know. All right. That's all I wanted to know. Thank you.

MR O'NEILL: So this document, is this putting in train the probity advice request and (crosstalk)?

45

MS YOUNG: Yes. I had to get it signed off by Rebecca.

MR O'NEILL: And a broad outline as to what you thought could be -

MS YOUNG: What we were seeking the probity advice about.

MR O'NEILL: And so, if I just take you to 2.0383, this is what was attached and that's your note about these matters?

5 MS YOUNG: Yes.

MR O'NEILL: You see how in the note at the bottom you've used the word:

Questions to GSO; can we negotiate with both tenderers to get a best and final offer?

10 You see that?

MS YOUNG: Yes. I was wondering if it was possible.

15 MR O'NEILL: So to your mind there's no distinction between dual negotiation and best and final offer?

MS YOUNG: Yes.

20 MR O'NEILL: At 2.0386, there's an email to Ms Power which has the attached request, and you ask her to forward it on to a person known as Ms Stewart. Is this the final request for probity advice, to the best of your recollection?

25 MS YOUNG: Yes. There was - there was a bit of toing and froing between myself and Rebecca Stewart to make sure she had all the documents.

MR O'NEILL: And for the purposes of the record that document extends to - it's fairly lengthy - 2.0796. On the same day, that's 3 March 2020, you sent this email, 2.0797. What was happening at or about this time?

30 MS YOUNG: So, I think Phil was asking to get cc'd into all the correspondence we were sending to the GSO. I know he had a request about that. But I was generally putting -

35 MR O'NEILL: Trying to keep them apprised of what was going on and where the things were at?

MS YOUNG: Yes, where it was at.

40 MR O'NEILL: 2.0800. Yes, sorry. One of the matters that was not provided to the GSO was the draft report, the draft TER report; was that a deliberate decision?

MS YOUNG: No.

45 MR O'NEILL: Why wasn't it?

MS YOUNG: Why wasn't it a deliberate decision?

MR O'NEILL: No. Why wasn't it provided, thank you. My confusion, not yours.

MS YOUNG: She didn't ask for it.

MR O'NEILL: Right. Do you think - was it something that - did you turn your mind to whether it should be provided?

5

MS YOUNG: Not that I recall.

MR O'NEILL: And you don't recall any discussion about whether it should be provided or not?

10

MS YOUNG: Well, I remember at the - well, in one of my emails I've said - like, I provided her with a lot of information. At the end of the email I've said, "Is there anything else?"

MR O'NEILL: Certainly. That is to Rebecca - that is to Ms Power?

15

MS YOUNG: No, to Ms Stewart, Rebecca Stewart, does she need anything else.

MR O'NEILL: Would she have known that there was a draft tender evaluation report, to your understanding?

20

MS YOUNG: Well, she he knew the stage that we were at with the procurement.

MR O'NEILL: At 2.0800, you see here you're asking Ms Power and Mr Hawkins a question about, "Can you send the revised TER over."

25

What revised TER are you talking about there?

MS YOUNG: It's - so, the initial TER that I had drafted that I thought we could sign-off on -

30

MR O'NEILL: Which is the one I took you to earlier?

MS YOUNG: Yes. I was asked to re-submit it with the recommendation changed that we go to a best and final offer.

35

MR O'NEILL: Right, so that had already occurred, that is, you had already changed that by the time - prior to receiving the probity advice from the Government Solicitor's Office to the best of your recollection?

40

MS YOUNG: Well, I had started drafting the - well, I had started redrafting it because that was to say that it was open to the delegate to go to a best and final offer, but I wasn't going to send anything until I got the GSO advice.

MR O'NEILL: I will just take you to -

45

COMMISSIONER: Can I just go back to that stage. I think you yourself found it troubling. The recommendation should be a recommendation of the team, it's not the delegate's recommendation?

MS YOUNG: Yes.

COMMISSIONER: Here you had, as I understand it, what amounted at this meeting that will be spoken about, a direction that there should be another recommendation, a different recommendation?

5

MS YOUNG: This is what I was told to do.

COMMISSIONER: By?

10 MS YOUNG: Well, that's what had come out of the meeting, is that the - that they didn't - that the delegate didn't want the recommendation I was going to give him.

COMMISSIONER: I understand that, but I just - I'd just like to unpack that a little. The team was made up of two representatives from major projects and one from the Education Directorate?

15

MS YOUNG: No, it was myself from Major Projects Canberra and two from the Education Directorate.

20 COMMISSIONER: Sorry, two from the Education Directorate. The delegate was from the Education Directorate?

MS YOUNG: Yes.

25 COMMISSIONER: He had no authority over you and the - am I right? We will take it step-by-step. He had no management or other responsibility over you; he couldn't give you directions?

MS YOUNG: Well, I was also getting advice from my own director, Rebecca -

30

COMMISSIONER: I'm going to come to that but I just want to take this in stages. So he had no authority over you to direct you to do anything?

MS YOUNG: It was clear to me - or it was made clear to me - I know you're going to get to this in a second, but it was clear to me that - well, Rebecca had made it clear to me that the delegate wasn't going to accept anything that didn't say it's going to a BAFO, so I had to re -

35

COMMISSIONER: Did you understand then, from Ms Power, that you should comply with the delegate's intention?

40

MS YOUNG: Yes, but I did complain about this.

COMMISSIONER: I know that you were not happy about it, but I just want to go through the process as it actually happened. So, did you understand from Ms Power, either implicitly or explicitly, that she wanted you to do with the delegate asked you to do?

45

MS YOUNG: Yes.

COMMISSIONER: Right. So you raised this issue, I think we've seen other correspondence about it?

MS YOUNG: I did -

5

COMMISSIONER: Are we coming to that or?

MR O'NEILL: Yes.

10 COMMISSIONER: Yes. Well, we will deal with that in due course. Did you raise with Mr Green the point that it was the job - and this was in relation - and this followed the Tender Evaluation Plan - that it was the task of the team to make recommendations and the delegate could accept or reject them as the delegate thought fit. So he was entitled to say, "I'm not going to accept your recommendation, I want to go to a BAFO", but that's not the same as saying, "I don't accept your recommendation, I want you to change it." The two are very different processes, aren't they?

15

MS YOUNG: Yes, but you've got to understand that I'm a project officer with - talking - I wouldn't be - it's not - I don't think it's my place to tell a delegate who's -

20

COMMISSIONER: I'm not being critical of you, please understand that, at all. I entirely understand you were placed in a very difficult position.

MS YOUNG: Yes.

25

COMMISSIONER: So, you need not concern yourself with that. I'm just trying to unpack what happened.

MS YOUNG: Yes.

30

COMMISSIONER: And I don't for a moment think that you acted wrongly. One of the matters that concerns me, and I just want you to confirm this - of course, we've asked for all the emails and communications. We have not found anything that in which Mr Green, or indeed anyone else, actually directs you or directs the TET to change the recommendation. We have your recommendation, then we have the change recommendation, but we don't have a document, say, from delegate, to you saying "change the recommendation".

35

MS YOUNG: Correct.

40

COMMISSIONER: You're not aware of any such document?

MS YOUNG: No, there's nothing, but he's notorious for not writing things down.

45

COMMISSIONER: No, no, quite. But I'm just making sure that, so far as there are records, you're not aware of any record that contains that direction?

MS YOUNG: No, there's no - not that I'm aware of, no.

COMMISSIONER: No. All right. Yes, thank you, Mr O'Neill.

MR O'NEILL: And then, just to take you through the highlighted changes to the relevant document, 2.0805. You see there that you've changed the wording to the purpose section to:

5 *Reduce the scope of work required.*

And then:

10 *To bring the project within target design and construction costs but to negotiate with both tenderers.*

You see that?

15 MS YOUNG: Yes.

MR O'NEILL: And then the other part that you had started to amend is at 2.0809 in the Conclusion section. Now just dealing - and it follows from what the Commissioner was just asking you some questions about - here, in this part in the conclusion section, these weren't conclusions that you actually held but they were questions that you felt - conclusions you felt were what the delegate had asked or had required in order to give it approval; is that fair?

MS YOUNG: Correct.

25 MR O'NEILL: And that was as at the date of your email to Ms Power and Mr Hawkins at 3 March 2020; that's what you understood?

MS YOUNG: Yes.

30 COMMISSIONER: Did you tell Mr Morton or Mr Jacobi that you were unhappy about this?

MS YOUNG: I'm not too sure if I said at that stage that I was unhappy about that, but certainly shortly afterwards.

35 COMMISSIONER: Right.

MS YOUNG: At that stage I was still waiting for the GSO advice.

40 COMMISSIONER: Of course, which gave you the possibility that you mightn't have to take that step if it was - the advice went one way rather than another?

MS YOUNG: Yes, I'm (crosstalk).

45 COMMISSIONER: Does that fairly put it? It might have given you a way out, in other words, if it said you shouldn't do it?

MS YOUNG: Correct.

MR O'NEILL: At 2.0815 is an email from you to a Mr Eldridge; do you see that?

MS YOUNG: Yes.

MR O'NEILL: This, again, was just trying to get the request form signed off so that you could send the relevant information for -

5

MS YOUNG: Correct. He's in the contracts section.

MR O'NEILL: Thank you. And for the purposes of the record that document continues until 2.1414. You forwarded on the request and accompanying documents - the request of the Government Solicitor's Office to Mr Morton on 6 March 2020. This is at document number 10 2.1415. You recall that you did that?

MS YOUNG: Yes.

MR O'NEILL: Did you have a discussion with Mr Morton at or about this time in relation to this matter; that's 6 March?

MS YOUNG: This was only because he was asking what had been sent to the GSO, so I must have probably spoken to Rebecca about - Rebecca Power - if it was okay to send this request, our GSO request, over to the EDU. 20

MR O'NEILL: Did he explain to you why he wanted to see it or he -

MS YOUNG: He just wanted to be informed, I'd say. 25

MR O'NEILL: There was nothing to your mind that was unusual in relation to that?

MS YOUNG: No, not particularly.

MR O'NEILL: Advice was received by you on 12 March 2020 at 1.58. One finds that at 2.1240. And then you provided your reflections upon the advice to Ms Power and Mr Hawkins at 2.1428. Now, this document contains your views as at that time about the process that had been proposed by the delegate; is that fair, that is, the BAFO process?

MS YOUNG: This is my response to the GSO advice about, if we could or couldn't go to a BAFO. She would - the GSO advice was saying, like, set out certain points about why we - if we could - if these things applied then we could - it would justify going to a BAFO. 35

MR O'NEILL: But you're providing, for example, bullet point 1, and then at the concluding bullet point - sub-bullet point: 40

Concluding going to a BAFO is only based on; (1) all tenders are unacceptably high, which is not the tenderer's fault.

Do you see that? 45

MS YOUNG: Yes.

MR O'NEILL: These are comments that you have in relation to the way in which the GSO has formed its opinions; is that fair?

5 MS YOUNG: Yes. So, the GSO had advised that you could go to a BAFO if the tenders are unacceptably high, and I agreed they're unacceptably high because they're above the budget, but that's not the tenderer's fault.

10 MR O'NEILL: I see. And so, just to elucidate on that reflection a little bit more for us, in that, your opinion was that, well, they were unacceptably high because you'd set this large scope and they'd done what they could to get the price as close to what they could.

15 MS YOUNG: It was - it was, like, both companies had tendered on the scope. They've come back, they were over budget. And so, yes, the scope was too big for the amount of budget that we had.

20 MR O'NEILL: Then in relation to the second bullet point, can I just take you to your reflection in the sub-bullet point. Here you appear to be advocating an opinion based upon your assessment?

MS YOUNG: Yes.

25 MR O'NEILL: And that view is that, well, what - in relation to at least this bullet point is, is that, you don't think that that's actually the case here. This is that Lendlease are capable, strictly, but relevantly not for the purposes of a BAFO process; fair?

MS YOUNG: Obviously Lendlease are a tier 1 company, so they're quite capable. It's just that in the submission, which is what we were assessing in front of us, they - their price, and a number of other items, were not as good as the other tenderers.

30 MR O'NEILL: In relation to the third bullet point, do you see the last sentence? So there's a statement about how BAFO is to proceed and that's come from the GSO - your understanding of the GSO advice?

35 MS YOUNG: Sorry, which one?

MR O'NEILL: The third bullet point:

If a BAFO is to proceed.

40 I will pull it out for you, if you like.

MS YOUNG: Yes.

45 MR O'NEILL: You see at the end:

This is not the case.

MS YOUNG: Okay.

The scope of the deficiencies is largely similar in scope and magnitude.

5 The deficiencies in the design, in our - well, in my opinion - and certainly by the scoring of the other two people in the Tender Evaluation Team as well, the deficiencies in Lendlease is, design were a lot larger than the deficiencies in Manteena's design.

MR O'NEILL: In the next bullet point you see that the GSO advice is talking about care that needs to be taken about -

10 COMMISSIONER: So, I'm not sure that we need to go through each of these, Mr O'Neill. The point is this: you are looking at the scope of the advice, then you're looking at the examination which you've undertaken, or the TET's undertaken and saying essentially, look, if we follow this advice there's no case for a BAFO?

15 MS YOUNG: Correct.

COMMISSIONER: That's really what this is about.

20 MS YOUNG: Absolutely.

MR O'NEILL: And, in fact, you first make that position clear on the second-last bullet point on the page where you say you would still recommend Manteena as the preferred tenderer. You make a fairly poignant observation about the copyright assessment fee in the last bullet point. And then, on the next page at 2.1429, in the penultimate paragraph:

25 *In short, and given the GSO advice, I am still not convinced that we should be offering a BAFO to both tenderers.*

30 That was your view, wasn't it?

MS YOUNG: Yes.

MR O'NEILL: So this was you expressing to Ms Power that you thought this was not the correct way in which this tender evaluation should proceed?

35 MS YOUNG: Yes.

40 COMMISSIONER: And indeed I think you were calling in aid of the qualifications in the GSO's opinion which demonstrated that, when applied to the actual circumstances here, there was no case for a BAFO?

MS YOUNG: That was definitely my opinion.

45 COMMISSIONER: Well, just to tie that up. Far from supporting a BAFO, in the result, properly analysed, the GSO advice, if you applied it appropriately to the facts was, you shouldn't have a BAFO, in effect?

MS YOUNG: Correct.

MR O'NEILL: You also provided a similar - your opinion, similarly, to Mr Morton and Mr Jacobi and that's at 2.1437. Almost identical - in identical form, except for the changing of names and relevant other small changes?

5 MS YOUNG: Yes. It would have been a copy and paste.

MR O'NEILL: There's a slight difference in relation to the conclusion which one sees - of the penultimate paragraph at 2.1438, but relevantly, you are now letting the team members know your view?

10 MS YOUNG: Yes.

MR O'NEILL: There was then a meeting on the following morning between you, Mr -

15 COMMISSIONER: I notice the time, Mr O'Neill. It's clear we're not going to finish this afternoon.

MR O'NEILL: No.

20 COMMISSIONER: I rather think - depending on what arrangements are made with Mr Matthews, I rather think we should try and finish this witness's evidence -

MR O'NEILL: Yes.

25 COMMISSIONER: - rather than interrupt it again and then resume Mr Matthews when she's completed. Do you have an idea of how long?

MR O'NEILL: I actually don't have much further for the witness, but I won't be finished today by 4.30, so it will be probably half an hour.

30 COMMISSIONER: I think what we will do is, unless it's inconvenient to you, we will start again at 10 o'clock tomorrow morning, but hopefully we will be finished within half an hour or so.

35 MR O'NEILL: Well, I understand there may be an application in respect of this witness.

COMMISSIONER: Right. All right, perhaps I might hear you now on your application, Ms Morgan. But let's let the witness go. Yes, you can go for now.

40 <THE WITNESS STANDS DOWN

COMMISSIONER: Thank you.

(Livestream paused)

45 <THE HEARING ADJOURNED AT 4.11 PM TO WEDNESDAY, 6 DECEMBER 2023
AT 10 AM