OTTAWA LIGHT RAIL TRANSIT COMMISSION

COMMISSION D'ENQUÊTE SUR LE RÉSEAU DE TRAIN LÉGER SUR RAIL D'OTTAWA

Public Hearing | Audience publique

Commissioner / Commissaire

The Honourable / L'honorable
C. William Hourigan

VOLUME 2

Held at :

Ian Scott Building
100 Thomas More Private
Second Floor Courtroom
Ottawa, Ontario
K1N 1E3

Tuesday, June 14, 2022

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100, Thomas More Private
Salle de cours au 2e étage
Ottawa, Ontario
K1N 1E3

Mardi, le 14 juin 2022

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Heather MacKay Jeffrey Claydon Adam Mortimer	The Province of Ontario
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Jennifer McAleer Peter Mantas Maria Braker	Thales Canada Inc.
David Jeanes	Transport Action Canada
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Ottawa, Ontario

--- Upon commencing on Tuesday, June 14, 2022 at 9:00 a.m.

COMMISSIONER HOURIGAN: Good morning. Justice Hourigan here. Our first witness is Mr. Rob Pattison from Infrastructure Ontario. They will be examined by Commission counsel, Chris Grisdale.

Mr. Pattison, are you there?

MR. ROB PATTISON: Hi, can you hear me?

COMMISSIONER HOURIGAN: You can hear us?

MR. ROB PATTISON: Yes. Good morning, Commissioner.

COMMISSIONER HOURIGAN: Okay. We can't see you right now, so.

MR. ROB PATTISON: Apparently, the host just stopped my video. No. There you are.

MS SARIT BATNER: No, that's ---

COMMISSIONER HOURIGAN: Oh, that's your counsel.

MS SARIT BATNER: That's our counsel, right. Rob Pattison has his own login.

COMMISSIONER HOURIGAN: All right.

MS SARIT BATNER: Sorry about that. I apologize for the voice. What's Rob's room called?

(SHORT PAUSE)

COMMISSIONER HOURIGAN: Good morning.

MR. ROB PATTISON: Good morning.

COMMISSIONER HOURIGAN: All right. Mr. Pattison, the Court Registrar is going to swear you in or have you affirm. So, go ahead.

MR. ROB PATTISON: I will affirm, please.

--- MR. ROBERT PATTISON, Affirmed

--- EXAMINATION IN-CHIEF BY MR. CHRIS GRISDALE:

COMMISSIONER HOURIGAN: Go ahead, Mr. Grisdale.

MR. CHRIS GRISDALE: Good morning, Mr. Pattison.

MR. ROB PATTISON: Good morning.

MR. CHRIS GRISDALE: My name is Chris Grisdale, and I am Commission counsel. I will have some questions about yours and Infrastructure Ontario's role in the Ottawa Light Rail Transit Project today. In particular, I intend to ask you some questions about yourself and IO, the theory behind the procurement and delivery model selected for this project, IO's mandate, and then I will turn to some specific questions about the commercial relationship between the City and its private partner, RTG.

To make sure we are all on the same page, I may refer to Ottawa Light Rail Transit Project or the Confederation Line simply as "the project", and I will frequently refer to Infrastructure Ontario as "IO". And if at any point you have any difficulty hearing or understanding any of my questions, please let me know.

MR. ROB PATTISON: I will.

MR. CHRIS GRISDALE: I will begin with your professional background. How long have you been with IO, Mr. Pattison?

MR. ROB PATTISON: I joined IO in the spring of 2006.

MR. CHRIS GRISDALE: And what is your current role with IO?

MR. ROB PATTISON: My current role is Senior Vice President of Commercial Relations. I am a member of the legal department and I lead the claim and disputes function within IO.

MR. CHRIS GRISDALE: What role did you hold with IO while you were involved in the Ottawa Light Rail Project?

MR. ROB PATTISON: I was in the project delivery group in the civil infrastructure group at that time, so I was not acting in the capacity as a lawyer. I led Infrastructure Ontario's LRT team, and I led the work that we did on the Confederation Line project.

MR. CHRIS GRISDALE: And when was IO's LRT team created? Sorry, I've lost...

COMMMISSIONER HOURIGAN: We are having trouble hearing you, Mr. Pattison. It doesn't look like you've hit your mute button, but maybe just check that.

MR. ROB PATTISON: Yes, can you hear me now, sir?

COMMMISSIONER HOURIGAN: Yes, it's fine now.

MR. ROB PATTISON: Fine now? Okay, good. Great. Sorry.

MR. CHRIS GRISDALE: So, Mr. Pattison, my question was, when was IO's light rail transit team created?

MR. ROB PATTISON: I joined it in mid-2009. There were a small number of members in place who reported to me at that time. I believe they were formed in 2009, early 2009, thereabouts.

MR. CHRIS GRISDALE: And to your knowledge, was IO's light rail transit team created to assist with the Ottawa Light Rail Project?

MR. ROB PATTISON: No, not specifically, and I am not sure we were aware it was a project at the time, or I wasn't aware it was a project at the time.

MR. CHRIS GRISDALE: So, was it your understanding that IO's light rail transit team was working on other light rail projects?

MR. ROB PATTISON: Yes. Yes. Yes.

MR. CHRIS GRISDALE: What were those projects?

MR. ROB PATTISON: The bulk of our time was involved in what were then called the Transit City Projects, which were the Eglinton Scarborough LRT, the Sheppard East LRT, the Finch West LRT. I think those were the projects at the time and, you know, I think the hope and intent would be that there would be other projects to come.

MR. CHRIS GRISDALE: Okay. Prior to working at IO, where did you work?

MR. ROB PATTISON: Immediately before I was at SNC-Lavalin for eight (8) years as a member of their legal team. And before that, I was with Bordon & Elliot as they then were. Prior to that, I was with a firm called Graham, Wilson & Green in Barrie, Ontario. And prior to that, I articled at Keyser, Mason, Ball & Lewis in Mississauga.

MR. CHRIS GRISDALE: Now, before we discuss yours and IO's involvement with the Ottawa LRT, I wanted to discuss IO's background with you. Can you please explain what Infrastructure Ontario is?

MR. ROB PATTISON: Infrastructure Ontario is an entity formed by the province under statute. There is a specific statute that we are created under. I am sorry I don't have the details of precisely what our corporate nature is, but that is in the statute. We were created I believe in 2005, 2005 or 2006. IO, over the years, has evolved a little bit. We merged with an agency called OSIFA, which I believe was the Ontario Strategic Infrastructure Funding or Financing Authority, and we subsequently, I believe in 2011 or around that time, merged with what was Ontario Realty Corporation.

MR. CHRIS GRISDALE: Mr. Pattison, what is your understanding as to why Infrastructure Ontario was established?

MR. ROB PATTISON: Infrastructure Ontario initially was established, my understanding is, for the purpose of addressing Ontario's infrastructure gap which, as I understand, was identified at the time as tens of billions of dollars. And there was recognition by the government of the day that good project management and risk management practices would lead to better project outcomes, and so we were created to do that. And the projects that we were assigned were what we then called AFPs, alternative financing and procurement, to deliver the projects.

MR. CHRIS GRISDALE: Was cost overruns associated with traditional procurements a meaningful factor in IO's establishment?

MR. ROB PATTISON: Yes, absolutely.

MR. CHRIS GRISDALE: So, sir, is it your understanding that IO was set up to respond to financial issues?

MR. ROB PATTISON: I believe that that is one of the issues that we were set up to respond to.

MR. CHRIS GRISDALE: And your referred to AFPs, and I believe that the acronym stands for alternative financing -- and sorry, could you help me with the P?

MR. ROB PATTISON: And procurement.

MR. CHRIS GRISDALE: And procurement. And is that a public/private partnership?

MR. ROB PATTISON: Yes, I would say so.

MR. CHRIS GRISDALE: Now, sir, can you please explain to me your understanding of IO's mandate?

MR. ROB PATTISON: Typically, Infrastructure Ontario is appointed by the province to work on a project. And from the time that we get involved, we are involved in technical and financial due diligence, we lead the procurement working with the asset owner, and typically, we are involved in the delivery phase of the project, design, construction, commissioning and opening. And on DBFMs, depending on the project, we will have a role supporting the owner in the administration of the contract.

MR. CHRIS GRISDALE: So, it is fair to say that IO is responsible for designing the commercial structure of the relationship between the procurer and the supplier, is that right?

MR. ROB PATTISON: On the projects where we are appointed by the province, yes, that is correct.

MR. CHRIS GRISDALE: Okay, Mr. Pattison, I want to turn to the sectors of the economy that you understand IO to be primary providing advisory services in. Could you tell me which sectors IO typically is involved in?

MR. ROB PATTISON: We are involved in healthcare, justice, education, transit, highway, athletic facilities, offices. Those are the ones -- forensics facilities, Coroners' courts -- or the Coroner's court, I should say. Those are the ones that come to mind. I can't say that's an exhaustive list.

MR. CHRIS GRISDALE: And would you say, sir, that IO is primarily involved in the procurement and delivery of what's been referred to as vertical structures as opposed to horizontal structures like rail?

MR. ROB PATTISON: No, I wouldn't say that at all. Right now, I think the vast majority by dollar value of the projects that we're involved in are rail projects on the P-3 side.

MR. CHRIS GRISDALE: At the time, back in 2011 ---

MR. ROB PATTISON: I should say on the major project side.

MR. CHRIS GRISDALE: Mr. Pattison, at the time in 2011, had IO -- would you describe IO's activity as primarily involved in what I've described in as these vertical structures, again, going back to 2011, not today?

MR. ROB PATTISON: Sure. By number of projects, certainly.

MR. CHRIS GRISDALE: Now, when it comes to procuring public infrastructure, there's a range of procurement models that can be used, right?

MR. ROB PATTISON: That's right.

MR. CHRIS GRISDALE: One of those models is a public private partnership commonly known as a P-3 model, right?

MR. ROB PATTISON: Yeah. P-3 is an umbrella term that describes a variety of contract models.

MR. CHRIS GRISDALE: And in practical terms, sir, how does a P-3 model work?

MR. ROB PATTISON: So in -- I'll talk about the projects that IO is involved in, which has been BF -- build, finance; design, build, finance; and design, build, finance, maintain.

The key principle in all of those models is that the private sector builder or design builder puts their capital at risk through the construction period and gets paid out either substantially in arrears, so they've always got a lot of their own money in the ground before they begin getting paid; or in fact, on many of our projects, particularly the earlier projects, they would have to reach substantial completion of the project to be paid anything.

And then under a DBFM project, on substantial completion, when the facility is built, there's a payment of part of that private capital and the balance is paid out over the 30-year maintenance term as a -- and it's paid down through that period.

MR. CHRIS GRISDALE: Mr. Pattison, I understand the finance component, I think, and I want to circle back to that with you later. But isn't it fair to say that a BDM model is a public private partnership, even absent the finance component, the design? A procurement and delivery model that’s just design, build, maintain, without finance, would you consider that a P-3 procurement model?

MR. ROB PATTISON: I would not.

MR. CHRIS GRISDALE: Okay.

MR. ROB PATTISON: Forgive me, you said design, build, maintain?

MR. CHRIS GRISDALE: That’s correct.

MR. ROB PATTISON: Yeah. No, I wouldn't.

MR. CHRIS GRISDALE: So Mr. Pattison, to be a P-3 model, you have to include some component of financing?

MR. ROB PATTISON: Yeah, and I would say that that component of financing is in excess of the working capital that a contractor or maintainer would normally have.

MR. CHRIS GRISDALE: So there's two components. There's the bundling of services, having, you know, design, build, maintain, and potentially operation, although that’s not at issue here. There is that bundling of services, and then there's also this financing component. And it's your evidence that you need both to be a P-3? You have to bundle the services and have the financing component, and I take your point that there's also this aspect of the builder or the -- what I'll call the private partner would sort of go underwater, so to speak, as they're building, right?

MR. ROB PATTISON: Yeah. In fact, I would say the one factor that’s consistent across all of those models is the financing, because so for instance, a BF doesn’t have the bundling. The design is done by the owner. It actually resembles in terms sort of the functionality, it resembles a traditional design bid build, and you know, there's purists out there who would say that a BF or a DBF isn't a P-3 at all, but you know, I would say that they are.

But it's the financing that makes it a P-3.

MR. CHRIS GRISDALE: And since IO's creation, IO has advanced public private partnerships, or P-3 models for the procurement of public infrastructure; is that right?

MR. ROB PATTISON: When you say advanced, do you mean promoted them, recommended them?

MR. CHRIS GRISDALE: That’s right.

MR. ROB PATTISON: Yes, certainly.

MR. CHRIS GRISDALE: Has IO been mandated to implement P-3 procurement models for the construction of public infrastructure across sectors, including transit?

MR. ROB PATTISON: Well, we receive a direction typically from the government, and I believe that those directions mandate the model, and -- but those directions are also based on advice from IO in many or most cases.

MR. CHRIS GRISDALE: Does IO ever recommend models other than P-3s to its partners for the competitive procurement of public infrastructure?

MR. ROB PATTISON: I wouldn't be able to give a comprehensive answer to that. I can say we do operate in other models, and more and more over the years, we've gotten involved in other delivery models. And outside of major projects, of course, we do all sorts of stuff under the traditional model.

MR. CHRIS GRISDALE: Back in 2011, was IO primarily recommending P-3s to its partners for competitive procurement of public infrastructure?

MR. ROB PATTISON: I ---

MR. CHRIS GRISDALE: To your understanding?

MR. ROB PATTISON: Yeah. To my understanding -- and the only reason I'm hesitating is because I'm -- I -- quite frankly, I work on projects that get assigned to me, and so what was IO recommending generally? I honestly wouldn't know.

MR. CHRIS GRISDALE: And in your experience in the projects that you were involved with?

MR. ROB PATTISON: In the projects that I were involved in, as I recall, we typically recommended a P-3.

MR. CHRIS GRISDALE: And if I said to you, sir, that the P-3 procurement and delivery models are in IO's DNA, would you agree with that statement? Do you think that’s a fair statement?

MR. ROB PATTISON: I think thinking about risk is in our DNA, thinking about the taxpayers in our DNA.

MR. CHRIS GRISDALE: Is it fair to say, sir, if you want a P-3 model, if you're a public body and you want a P-3 model, then you call IO to get access to IO's expertise with respect to P-3 procurement and delivery models?

MR. ROB PATTISON: Sure.

MR. CHRIS GRISDALE: And to your knowledge, is IO currently exploring other procurement and delivery models?

MR. ROB PATTISON: Oh, yeah.

MR. CHRIS GRISDALE: And what are those?

MR. ROB PATTISON: And I only hesitate because I'm not in the project side of the business any more. I'm embarrassed to say I don’t pay that much attention to the details of projects as they're going out the door, but I know we've been involved in what are called partnering projects. I know we're looking at things called progressive design builds. I know that the -- my understanding is that our Major Projects Group now includes traditional DBB delivery and things like that.

MR. CHRIS GRISDALE: And to your knowledge, sir, what has prompted IO's interest in these other models?

MR. ROB PATTISON: Well, we're constantly looking at what the market conditions are, what the particular aspects of a -- of any particular project are, and asking what are the -- what's the right contract model for that project.

MR. CHRIS GRISDALE: Have any particular concerns arisen within IO with respect to the P-3 model in certain context that has motivated this exploration into other potential models?

MR. ROB PATTISON: I would say there’s a variety of factors that contributed -- that contribute to it. You know, we -- like, again, at the time of this project, the Major Projects Group had only AFPs, as we called them at the time, and there’s terrific reason, as a rule, to think DBFM is a good model for many projects, but there were certainly projects prior to that time that we’d recommended not be DBFM. So again, to use the label “P3” maybe obscures a little bit more than it eliminates. We try to tailor the model to the project rather than the project to the model.

MR. CHRIS GRISDALE: Sir, we just talked about, you know, the bundling of different aspects of the project, and I take it that, for you, sir, financing is a necessary component to be a P3. I wanted to discuss with you some of the theoretical benefits associated with a P3 model.

In theory, sir, what are the benefits, at a very high level, of the P3 model, as you understand them?

MR. ROB PATTISON: Right. And so start with the financing. And, to be really clear, the financing is a risk-transfer tool. It is not a funding tool. In our model, the funding for the project always comes from the public sector. The public sector always pays. The purpose of having financing in the project is to give the owner a lever to enforce the contract. Under traditional design-bid-build contracts, for instance, where the owner goes and hires an engineer or architect and they go and they hire a contractor, if the contractor underbids the job, if the contractor poorly executes, if their price goes up, as the project's proceeding, you're paying on progress.

You've got -- on opening day, you've got stakeholders, you've got taxpayers, you've got voters who are -- you know, who want that service on the day that's been announced, and, typically, promises are made. And the contractor is in a position, if they so choose, where they're cashflow neutral -- they're not out of pocket -- and, you know, they get 40, 50, 60, 60, 80, 90 percent of the way into the project and they can down tools and pick a fight that they see they have the greatest leverage. They're not out of pocket.

MR. CHRIS GRISDALE: And so ---

MR. ROB PATTISON: Right, sorry. Go ahead.

MR. CHRIS GRISDALE: So, sir, so what I think you're describing is performance security, right?

MR. ROB PATTISON: I'm describing the -- a behaviour which performance security is intended to address.

MR. CHRIS GRISDALE: And so financing as an enforcement mechanism for the transfer of risk because we have that performance security, right?

MR. ROB PATTISON: That's right.

MR. CHRIS GRISDALE: But that's not the only benefit to financing -- private financing. Is that true?

MR. ROB PATTISON: No, it's not at all.

MR. CHRIS GRISDALE: And so what are the other -- the other benefits associated with financing?

MR. ROB PATTISON: So when the contractor -- we call them

Project Co. in the model. When Project Co. is putting together their bid to pursue the project, they'll assemble a team. So let's talk about a design, build, finance, maintain. They'll put together a team that involves an engineer or architectural firm, or a consortium or joint venture of engineering and architectural firms, a builder or a group of builders, and a maintainer or a group of maintainers.

Because the design builders are going to have to finance the project using Project Co. as a vehicle, the designer and the builder will be in creative tension to make sure that they get a good product at the cheapest price. The design builder and the maintainer will be in tension to make sure that what the design builder delivers will be maintainable for the price that the maintainer is bidding for 30 years and will be a safe, durable, high-quality, reliable product. And the design-build-maintain team is in tension both with their internal equity providers, who are often related companies, and from the independent third-party lenders, both short-term constructions lenders and the long-term lenders who get paid out over the per-year maintenance terms.

And so the -- all of the enforcement tools in the model, because they are clearly set out through design and construction and maintenance, you'd be crazy to bid one of these without doing extensive due diligence about the risk that you were taking on. And if one or the other members of team gets -- you know, gets deal fever, all of the others are there to say, "Whoa, wait a minute. Have you thought about this?" Say, you know, "Have you thought about how they wash the windows?"

MR. CHRIS GRISDALE: So, Mr. Pattison, I think -- like, in my mind, I see, really, two components here. There's the bundling of the services. So you have the -- say the DBM, and when you bundle those services together, you get integration and coordination benefits, right?

MR. ROB PATTISON: Right. That's right.

MR. CHRIS GRISDALE: Okay. And you also get, in the DBFM model, the -- like, an innovation benefit, right?

MR. ROB PATTISON: Yes, absolutely.

MR. CHRIS GRISDALE: And could you describe what that innovation benefit is?

MR. ROB PATTISON: So -- and again, this would apply only for design, build, finance, and DBFM, and DBFOM. We always recommend to the asset owners that the output spec have as little engineering in it as possible, and as few constraints in it as possible. Project Co. have their own engineers who are properly qualified. They've got the financial incentive over the long term to do the right thing.

And, you know, one of the -- one of the -- one of things about traditional design, bid, build, delivery is you hire an engineer. That team has very little at stake in the model. You know, their fees are going to be eight, 10. 12 percent of the capital costs to the project. Their profit is on the order of one percent of the capital costs to the project.

And they will start with a concept and typically -- and there's challenge functions and so on in any of these, and value engineering, and things like that, but typically, you know, they're going to start down a road and, as their design advances, you know, in the ordinary course, you just expect refinement of a design. In ---

MR. CHRIS GRISDALE: Is it fair to say, Mr. Pattison, that if -- that innovation occurs where there is, say, less requirements from the City in the preliminary design? So the less design requirement, the more room for the private partner to innovatively design that if the City, in this case, had more requirements narrowing the scope of ---

MR. ROB PATTISON: Yeah, I'm going to split a hair. The City has -- or, you know, any asset owner has lots and lots and lots of requirements. What I'm going to focus on is prescriptiveness. So when I say "prescriptiveness", I mean, in a traditional project when you're building an office in a maintenance and storage facility, you're going to have a design that shows metal studs on 12-inch centres, or 2x4 studs on 18-inch centres, and who cares about any of that stuff? Project Co. can deal with details. And again, they've got properly qualified engineers, architects do that work.

What you want to specify, as the owner, is, "I want to move this many people from here to here safely during rush hour. I want to add these architectural amenities," and so on and so forth. And the more prescriptive you get on engineering things that might not benefit you at all, the more you constrain Project Co., and sometimes you might actually prevent them from doing things that will enhance your safety quality outcome or save you money.

MR. CHRIS GRISDALE: Okay, I'm going to take you back to this prescriptiveness issue later, but I just want to touch on the other benefits associated with the P3 model. One of the other benefits, sir, I take, is that there's one point of contact, is that right, between the public -- the public entity and the private partner?

MR. ROB PATTISON: Yeah.

MR. CHRIS GRISDALE: And that's opposed to a traditional model where the public entity has multiple contracts, right, a contract the builder, a contract with the designer, a contract with the maintainer.

MR. ROB PATTISON: That's right. And again, just to be very clear, all three of those functions, you know, are commonly, not universally, but -- well, design and construction are, in my experience, universally contracted out per project. Maintenance depends on -- the owner depends our side.

MR. CHRIS GRISDALE: And we talked about shifting risk as a benefit, and how the F enforces that benefit, but -- and I think that you might have touched on this earlier in your answer to me, that there are really two other benefits to financing, right? There's a sort of due diligence component that the lender has, because it has capital at risk, it wants to monitor the project?

MR. ROB PATTISON: Exactly.

MR. CHRIS GRISDALE: And is the lender monitoring only the private partner, or is the lender also monitoring the City?

MR. ROB PATTISON: My understanding is that the lenders, through their consultant, who we refer to as an LTA or a lender's technical advisor, would opine on the entire technical contractual structure, and the due diligence and so on. My understanding is that that's the role that they would play during a pursuit of the project, by each project. My understanding is that during the implementation of the project, they're reviewing progress. I don't know. When you say "monitoring the owner", I'm not sure what that would mean in that context.

MR. CHRIS GRISDALE: So, I believe your colleague, John Traianopoulos, and apologies if I mispronounced his last name ---

MR. ROB PATTISON: No, you got it.

MR. CHRIS GRISDALE: --- has given evidence that the third-party lender sort of makes sure that the City is sort of a moderating influence over both the private partner and the public entity, ensuring that both are behaving in the best interest of the project. Is that your understanding?

MR. ROB PATTISON: He -- I haven't heard it expressed that way, but he's a lot closer to the financing world than I am.

MR. CHRIS GRISDALE: And the last -- the last point I want to make in terms of the theoretical benefits, particularly with the financing component, is that it adds incentives for the private partner to meet schedule, right?

MR. ROB PATTISON: It -- sorry. And if I could just go back on one thing on the lender's point that I think I forgot to say; we do talk about a project being bankable, the lenders go into it, and so the LTA plays a part of that role. But, sorry, I -- maybe I need a second cup of coffee, I think I've already said that. So, forgive me, can you repeat your question?

MR. CHRIS GRISDALE: So, my question, Mr. Pattison, was -- and this is the last benefit that I want -- or theoretical benefit that I want to canvass with you, that private financing adds incentives for the private partner to meet schedule, right?

MR. ROB PATTISON: Yeah, private financing incentivizes the contractor to comply with their contractual obligations.

MR. CHRIS GRISDALE: And that's because the private partner would be paying additional interest that it didn't build into its bid price when it got the contract, right? So, if it's taking longer for the private partner to complete the project, it's servicing that debt, and that service of that debt was not built into its contract price?

MR. ROB PATTISON: Right. And I think the only thing I would add to that is whether there's a contractual deadline or an incentive for a contractual performance, any contractor, when they bid, will build a schedule, and build a financial model, and finance the project around that schedule. And so, whether or not there's a date that the owner requires, the contractor always has that challenge. And that's why -- you know, there's -- we have a lengthy in-market period. That's why we do a tremendous amount of due diligence in the ordinary course, to give the contractors much certainty as they can about what they're getting into when they sign the contract.

MR. CHRIS GRISDALE: Okay. So, we've canvassed the theoretical benefits to a public/private partnership, particularly with private financing. Now, I want to talk to you about the potential drawbacks of private financing. Can you tell me what the potential drawbacks associated with financing, the design construction and maintenance of the project?

MR. ROB PATTISON: Sitting here today, I -- the only potential drawback I can think of is that for some variations, a lender's consent is required. And you know, sort of all things being equal, if you don't want to have to bother going to a third party for permission to do something that you're happy to do, I -- you know, some might think of that as a drawback.

I would say, though, that, in fact, that can be an advantage. Again, the same thing, when you're -- if you're doing a variation or if you're changing the scope of the project, you could argue it either way. One, it's added eyes for due diligence, or the other is it's getting in the way of doing something sensible that the owner and the contractor want to do. So, it's...

MR. CHRIS GRISDALE: But in any particular circumstance, you might have a scenario where there's a disadvantage, right? It want to expand the project, and now, all of a sudden, you need lender consent to expand the project, in that circumstance it could be seen as a disadvantage?

MR. ROB PATTISON: Sure.

MR. CHRIS GRISDALE: Okay. And also, I think you'd agree with me, sir, that increased cost is a disadvantage, right? If you're ---

MR. ROB PATTISON: Sorry. I say "sure", subject to the -- subject to what I said a few moments ago.

MR. CHRIS GRISDALE: And you'd agree with me, sir, that increased costs is another disadvantage?

MR. ROB PATTISON: What increased costs are you talking about?

MR. CHRIS GRISDALE: To the public party who is procuring the infrastructure. It's going to cost them more with financing than it would otherwise.

MR. ROB PATTISON: No, I don't agree with that. The -- one of the things, and this is why in a model in -- you know, and again, to talk about DBFM in particular, this is why the design innovation piece is so important, the ability Project Co. to optimize what they're building for long-term maintenance, because, in fact, we've seen many, many projects where the winning bidder came in well under budget, under the other bidders, and read the output spec, read every word of the output spec, designed in accordance with that and saved way more money.

MR. CHRIS GRISDALE: Sorry, sir. So, that's true because there's -- they're value engineering, but all things -- all else being equal, if you have the private financing component, it's going to cost more because they're -- you're servicing a debt, right?

MR. ROB PATTISON: Well, no, I don't agree with that at all. The whole -- again, the whole point is, under each flavour of P-3, there's an offsetting benefit to what might be a nominal increase in financing costs.

MR. CHRIS GRISDALE: Okay.

MR. ROB PATTISON: So, you wouldn't -- you wouldn't pay that money without getting the benefit.

MR. CHRIS GRISDALE: Could you get the benefit without the private financing component, by just bundling together the services?

MR. ROB PATTISON: These are -- these are all matters of degree and it's going to vary by -- from project to project to project where, you know, Infrastructure Ontario lives in a world where we're delivering billions and billions of dollars of public infrastructure. I think we're over 100 billion dollars from a standing start in 2006. And so, we want to do everything we can to tend to reduce costs and get a better outcome on the project.

And so, by -- in a DBFM, encouraging the costs savings of design innovation while protecting for safe, durable, high-quality reliable through a maintenance obligation backstopped by private capital, you -- if we do our homework upfront, and if we diligence the project right, and if we think about how to design it or how to write the output spec properly, and how to align as commercial interest, you will get a safe, durable, high-quality asset at the best 30-year price, and that more than makes up for -- and John will know this better than I do, but you know, 100 BIPS or 200 BIPS or whatever it is ---

MR. CHRIS GRISDALE: Okay.

MR. ROB PATTISON: --- or less ---

MR. CHRIS GRISDALE: Okay.

MR. ROB PATTISON: --- by the financing.

MR. CHRIS GRISDALE: Okay, so we -- and just moving on. We agreed that one benefit is that private financing puts pressure on the private partner to hit schedule. We agreed to that earlier. That pressure results from the interest accruing on the loan. We also agreed to that earlier that the private partner took out to finance the project. All else being equal, sir, would you agree with me that the time pressure created by private financing might be at odds -- might be at odds with quality, reliability and performance?

MR. ROB PATTISON: I would generalize it to say any time somebody has signed a contract where they're going to get a limited amount of money to do something or a specified amount of money to do something, under any contractual model that will always be in tension.

MR. CHRIS GRISDALE: That's all I need form you, sir,. But you agree with me that there is that tension.

MR. ROB PATTISON: Yeah, in any contractual model, yes.

COMMISSIONER WILLIAM HOURIGAN: Well, that wasn't the question. The question was a P3 model. So in the last couple of questions you've given us a lot of detail. Again, I need witnesses to focus on the questions that are being asked of them. All right?

So it was a specific question. I'm not interested in any other model. The question was related to P3 models.

MR. ROB PATTISON: Okay. And forgive me, could you repeat the question?

MR. CHRIS GRISDALE: Yes sir. So we agreed earlier that private financing puts pressure on the private partner to hit schedule. And we also agreed that that pressure results from the interest accruing on the loan. All else being equal, sir, would you agree with me that the time pressure created by private financing is at odds with, or could be at odds with quality, reliability, and performance in the DBFM model?

MR. ROB PATTISON: Ahh.

MR. CHRIS GRISDALE: Again, speaking just about that tension,

MR. ROB PATTISON: Yeah. It's at odds with? I have a real problem with that characterization. I -- it is a challenge the contractor -- it's a challenge

Project Co. has to manage and part of the management of that is the due diligence and all of that. Now, you know, again, if they find themselves ---

MR. CHRIS GRISDALE: Sir, sorry to interrupt but is it your evidence that the time pressure created by private financing could not possibly be at odds with quality, reliability, and performance?

MR. ROB PATTISON: Can I ask you to define what you mean by "at odds"?

MR. CHRIS GRISDALE: That there is a tension, sir, between the time pressure associated with private financing and quality, reliability and performance..

MR. ROB PATTISON: Sure.

MR. CHRIS GRISDALE: That's a yes?

MR. ROB PATTISON: Yes.

MR. CHRIS GRISDALE: Did I.O. discuss with the City that it might want to balance the financial pressure it puts on the private partner to hit schedule with the needs for quality and performance?

MR. ROB PATTISON: We had -- sorry, repeat the question?

MR. CHRIS GRISDALE: Sure. Did I.O. discuss with the City that it might want to balance the financial pressure that's caused by private financing with the need for quality and performance? Basically, sir, did I.O. let the City know of this tension that you just agreed with me exists between the need to hit schedule and the pressure to hit schedule that's caused by private financing, and reliability and performance?

MR. ROB PATTISON: I don't think we discussed it in those terms but we had many discussions about how to ensure good performance from the contractor and how to ensure that the Project Agreement results in the outcome that we're looking for.

MR. CHRIS GRISDALE: And sir, is it possible that the private partner might make a bad decision about the project turnover because of that time pressure?

MR. ROB PATTISON: Sorry, when you say "project turnover" what do you mean?

MR. CHRIS GRISDALE: From the City -- sorry, from the private partner to the City. So we have operation. So the private partner says, "Take that." It's handing over the infrastructure to the City. Do you think that the private partner might make a bad decision about that, given the time pressure?

MR. ROB PATTISON: Our -- I'm going to sound like a lawyer when I say this because -- when I'm involved in a transaction -- forgive me. It's a long answer to the question.

When I'm involved in a transaction -- and quite frankly, I.O.'s job in a transaction is to contemplate exactly that. The reality is contractors underperform all the time, right? And a contract is intended to make the contractor perform. And so we're always asking ourselves, what can we do to make sure that you get that good outcome? And so if the contractor is trying to get one by as you hand over or whether they just haven't done a good job, or whatever, we're always looking to how are we going to be able to enforce those obligations.

MR. CHRIS GRISDALE: But you would agree with me that the more time pressure that's put on the private partner, the more likely a bad decision is going to be made at handover.

MR. ROB PATTISON: I don't think I can agree.

MR. CHRIS GRISDALE: Okay. Okay, I'm going to move on, Mr. Pattison.

Did I.O. discuss how the financial pressure created by private financing might be amplified by the contractual financial penalties in the project contract for falling behind schedule, such as the $1 million penalty for not hitting revenue service in 2018?

MR. ROB PATTISON: Yeah. We had lots of debate about that $1 million and I wouldn't characterize it as a penalty. I think I'd characterize it as a liquidated damage. The -- we had lots of discussion about that because traditionally we hadn't used LDs in our own model. And we often get pressure from asset owners who want to turn Project Co into an insurer. And they want Project Co. to pay for all of their losses. And you know, that's a battle we've had many many times.

In this case, this was an unusual LD and that was actually very finely calibrated. And keep in mind, it's a million dollars which is, you know, it's a lot of money but it's in the context of a two billion and some odd dollar project.

This was not $1 million a day. LDs typically go on a daily rate. This was $1 million for one day, selected by Project Co., I believe six months out, so not committed on bid day. But there's a time under the P.A. where Project Co. says, "We are going to go into operation on X date." And I remember very clearly John Jensen, who came from the Operations side and talked about this a lot. And I believe he had been involved in a switchover. And there's literally this emphasis of an army of people go out over night ---

MR. CHRIS GRISDALE: Sir, sir, I appreciate the answer. I'm only interested in knowing whether or not this idea that the time pressure associated with the private financing has now been amplified by this liquated ----- as you've described, this liquidated damages piece in the contract.

Would you agree with me that the tension then, sir, between the time pressure and quality, reliability, and performance ---- that tension that we agreed to earlier, there's now a stronger tension because there is those ---- that potential for liquidated damages if they don't hit RSA.

MR. ROB PATTISON: I honestly don't think that $1 million damage in a $2 billion project is material. I'd be amazed if Project Co. considered $1 million to be a driving ---

MR. CHRIS GRISDALE: Okay. And is there a potential risk that the added financial pressure associated with private financing could create friction between the City or the procurer and the private partner, in terms of the relationship between the parties?

MR. ROB PATTISON: No. I mean, an again, we're in ---- if I recall correctly, the members of the consortium were frequent flyers in the program or all or most of them were. They had been pursuing P3s, you know, for years since I became in -- since I got involved in the program, and they were well aware of the use of finance as a lever and were very keen to pursue the project.

MR. CHRIS GRISDALE: But I just simply mean if the private partner begins to experience the financial pressure during construction as sort of overly punitive -- and I'm not saying that that's the case here -- I'm just saying if -- if the private partner experiences it that way, do you think that that could cause friction between the public procurer and the private entity?

MR. ROB PATTISON: You're saying if Project Co. regrets their deal?

MR. CHRIS GRISDALE: I'm saying if they're in the middle of construction and things are taking longer, the risks have materialized and things are taking longer than they should, and they're experiencing the financial pressure as overly punitive, do you think that that could cause friction between the procurer and the private partner?

MR. ROB PATTISON: Sure, it can.

MR. CHRIS GRISDALE: Thank you. I want to discuss one final potential drawback that private financing could have in certain contexts.

Does the financing component of the P-3 limit the scope for the public entity to work in partnership, in a partnership-like manner with the private partner?

And if you -- I'm happy to elaborate. So for example, if a risk were to materialize that would make hitting a schedule especially challenging, the interest on the debt continues to accrue regardless of the City's willingness to work with the private partner and potentially provide relief under the contract; is that right?

MR. ROB PATTISON: Sorry, repeat the question?

MR. CHRIS GRISDALE: So for example, if a risk were to materialize that would make hitting a schedule especially challenging, the interest on the debt continues to accrue regardless of the City's willingness to work with the private partner and potentially provide relief under the contract; is that right?

MR. ROB PATTISON: So interest continues to accrue, yeah. So interest is accruing throughout the project.

MR. CHRIS GRISDALE: And so would -- is it fair to say that the financing component of the P-3 model limits the scope for partnership-like behaviour because that financial penalty will be experienced regardless of the -- what the City decides to do?

MR. ROB PATTISON: So I wouldn't say that. Remember that there's a variety of -- we call them supervening events -- in the project agreement, delay events, compensation events, relief events, events of *force majeure*, where under a delay and comp event, under a relief event, Project Co. gets paid for those financing costs, right? So there's a list of things that, if those delays happen, they accrue to the owner.

Now, you know, if you're ---

MR. CHRIS GRISDALE: I'm not talking about those events, sir. I'm just saying, if a risk materializes that would make hitting schedule especially challenging -- and regardless of whether or not there's relief under the contract -- the interest accrues, right? That doesn’t change?

MR. ROB PATTISON: Right.

MR. CHRIS GRISDALE: And so if -- in -- that happens regardless of the City's behaviour, right, but the City can't change that fact? The contract is -- the finance -- the debt is there?

MR. ROB PATTISON: Right.

MR. CHRIS GRISDALE: And so do you think that that limits the scope for partnership-like behaviour in this context because it takes away a lever that the City -- like, the private partner is going to continue to experience that time pressure regardless of what the City does, unless it's one of these events that you've discussed under a contract?

MR. ROB PATTISON: Well, no. I would -- I don't think it limits anything. Like, when you sign a contract for 30 years, you know, we often say that's a lot longer than a lot of marriages.

And so an enlightened owner is going to, you know, joyfully comply with their own obligations, and they will expect Project Co. to joyfully comply with their obligations.

And you know, very often, there are ways to mitigate some of the effects, and maybe we -- you know, maybe it's important, you know, maybe you can't mitigate the delay and the financing costs that are attached to it, but there are other things that you can do.

And so in fact, you know, I've seen more cases than I can count over 30 years where something came up, it was a problem, the one party whose side of the ledger it laid on -- it sat on -- you know, accepted the responsibility, but the other party was able to find ways to minimize the other burdens or work with them on other solutions.

MR. CHRIS GRISDALE: Okay. I take your point.

Now, Mr. Pattison, if I put to you, sir, that the public private partnership model prioritizes cost certainty and schedule, would you agree with me?

MR. ROB PATTISON: Cost certainty and -- or cost?

MR. CHRIS GRISDALE: Cost certainty and schedule.

MR. ROB PATTISON: Cost certainty, full stop, and schedule? I think it prioritizes cost. I think it -- excuse me -- I think it prioritizes cost certainty over schedule.

MR. CHRIS GRISDALE: Okay. But it also prioritizes schedule, right? We've discussed one of the benefits of private financing, as it adds pressure to the private partner to hit schedule?

MR. ROB PATTISON: Yeah, I -- sure. I think it increases the likelihood that the private partner will hit whatever schedule they've selected.

MR. CHRIS GRISDALE: So the model is designed so that the City has the most cost certainty it can, and have -- and has incentives for the private partner to hit schedule?

MR. ROB PATTISON: Yes, yes.

MR. CHRIS GRISDALE: Okay. And sir, if the P-3 model was a response to significant cost overruns resulting from traditional procurement, it makes sense that the P-3 model focuses on cost and it focuses on schedule, right?

MR. ROB PATTISON: Yeah. There's a bunch of things that go into cost and schedule. There's technical due diligence, there's things like that, but yes, certainly. You know, any owner, including a public owner, wants predictable outcomes.

MR. CHRIS GRISDALE: And Mr. Pattison, would you agree that the P-3 model doesn't have baked into it the same way that it does with cost and schedule all of the interests of the citizens of Ottawa? It considers the cost to the taxpayers and it considers the time of the delivery of the infrastructure, but does it consider reliable performance in a meaningful way?

MR. ROB PATTISON: Of course it does.

MR. CHRIS GRISDALE: Can you tell me how it does that?

MR. ROB PATTISON: Yeah. There's a -- well, one, there's all of the other things that we've talked about that incentivize safe, durable, high-quality design, construction, maintenance. And during the maintenance period, there's a contractual mechanism called the PayMet where, if the facility does not perform, if the LRT service in this case doesn't perform, then the owner can make deductions.

And so you know, again, the whole purpose of the model is to make sure that for 30 years, you've got an asset that supports the service being delivered by the public sector.

MR. CHRIS GRISDALE: Okay. Now, I want to turn to IO's role and involvement in the project. I understand that you became involved in the Ottawa Light Rail Transit Project in your capacity as Vice-President of Project Delivery at IO in the spring of 2011; is that right?

MR. ROB PATTISON: Yeah, that's right.

MR. CHRIS GRISDALE: I also understand that IO was involved in this project as early as 2009. Do you have any knowledge of how IO became involved in the project in 2009?

MR. ROB PATTISON: Just from documents I've seen in the course of preparing for this hearing. Apparently, there was some analysis work that was done in 2009, but I was unaware of it, or I don't recall being aware of it.

MR. CHRIS GRISDALE: So I'd like to take you to a letter from IO to the City, dated April 20th, 2009.

Mitchell, could you please call up Doc ID IFO 1175?

--- EXHIBIT No. 017:

IFO0001175 – Letter from Infrastructure Ontario to City of Ottawa 20 April 2009

And Mr. Commissioner, this document is subject to a claim either by IO or the City, presumably for -- on a basis of confidentiality. I believe it's subject to your prior ruling.

COMMISSIONER HOURIGAN: Yeah, a broad category of documents was claimed to be confidential by IO and the City of Ottawa. I reviewed those documents and the application and determined that there was no legal basis for those claims. So, for the purpose of this proceeding, we can proceed and make reference to this document and others covered by the ruling.

MR. CHRIS GRISDALE: Thank you. Mr. Pattison, could I take you to the first paragraph of this letter? And I will give you a moment to read that paragraph. Could you let me know when you are finished?

MR. ROB PATTISON: Yes, thank you. Just a moment, please. The first paragraph? Okay, I'm done. Thank you.

MR. CHRIS GRISDALE: So, it appears from this document that IO had a mandate in 2009 from the City to consider alternative financing and procurement methods, and you have already agreed with me that that's the P3 model; is that right?

MR. ROB PATTISON: Yes. Yes.

MR. CHRIS GRISDALE: Okay. Now, could I take you to ---

MR. ROB PATTISON: Or, sorry, mandate from the City?

MR. CHRIS GRISDALE: Well, it says Infrastructure Ontario's mandate centres on the use of alternative financing and procurement. I take that that mandate is not a mandate from the City; I take that that mandate is from the provincial government?

MR. ROB PATTISON: That was certainly my understanding of our mandate at the time, yes.

MR. CHRIS GRISDALE: Okay. Now I want to take you to page 2 of this document, and it says, "The scope of Infrastructure Ontario's services" and I want to take you to a couple of items under 2(b). I will give you a moment to review.

MR. ROB PATTISON: Which romanette would you like me to look at?

MR. CHRIS GRISDALE: I would like you to look at 2(b)(ii).

MR. ROB PATTISON: Okay, got it.

MR. CHRIS GRISDALE: So, maybe I will just stop there. Can you tell me whether IO -- so, I understand that from this engagement letter that IO was engaged to review the project's projected construction operating and life cycle costs provided by Ottawa.

MR. ROB PATTISON: That's what it says there.

MR. CHRIS GRISDALE: Do you have any knowledge of IO reviewing the project's projected construction operating and life cycle costs provided by Ottawa?

MR. ROB PATTISON: No, I don't.

MR. CHRIS GRISDALE: Now, I'd like you to review 2(b)(iv).

MR. ROB PATTISON: Yes.

MR. CHRIS GRISDALE: And it would appear from this that IO had a mandate to prepare an analytical model of various AFP approaches versus traditional public sector procurement approaches and, again, AFP meaning P3 approaches. Do you know whether IO did that?

MR. ROB PATTISON: I don't know. And, again, I don't think I was aware of this letter at the time.

MR. CHRIS GRISDALE: And, finally, I just want to take you to 2(b)(vii). If you could scroll down? Thank you. And here I understand that IO and the City were to participate in approximately five meetings. And I assume the answer is no, but I want to put the question to you. Do you know whether or not the City and IO participated in five meetings with respect to this project?

MR. ROB PATTISON: In 2009?

MR. CHRIS GRISDALE: Or thereabouts.

MR. ROB PATTISON: I have no ---

MR. CHRIS GRISDALE: As it relates to this engagement. Okay. Do you have any other knowledge, sir, whatsoever, of IO's involvement with this project in 2009?

MR. ROB PATTISON: No.

MR. CHRIS GRISDALE: Okay. Now, sir, I would like to turn to the ---

MR. ROB PATTISON: Or I ---

MR. CHRIS GRISDALE: Sorry.

MR. ROB PATTISON: I should say, other than documents I've glanced at in preparation -- in the course of preparation for this, but again, there is nothing I was involved in, in 2009, to my recollection, that had to do with the Ottawa project.

MR. CHRIS GRISDALE: And you have no knowledge of any other activities that IO had with the City in 2009 that you weren't involved with?

MR. ROB PATTISON: Other than what is shown in the documents, no.

MR. CHRIS GRISDALE: Okay.

MR. ROB PATTISON: And only what is shown in the documents.

MR. CHRIS GRISDALE: And, Mr. Pattison, I now want to turn to sort of the immediate circumstances surrounding the City's selection of the design, build, finance, maintained procurement model. When IO reengaged the City in 2011 and you became involved, what procurement model did you understand the City to be pursuing?

MR. ROB PATTISON: I actually don't recall what their plan was.

MR. CHRIS GRISDALE: I can put it to you, if it would help you, but I understand that the City was pursuing a DBM model and, in fact, counsel had directed staff to pursue a DBM model.

MR. ROB PATTISON: That could be.

MR. CHRIS GRISDALE: In about May 25th -- May 25, 2011, I believe, is the date of the council minutes.

MR. ROB PATTISON: Yeah, I have no reason to question that. I didn't understand it was a traditional DBP. So, I have no reason to question it.

MR. CHRIS GRISDALE: And, as we've discussed, we understand that the DBM model brings together the designer, the builder, and the maintainer, but in this context, there is no private financing?

MR. ROB PATTISON: I wouldn't know. It depends what the City said they were considering.

MR. CHRIS GRISDALE: Well, I am telling you, sir, that they were considering the DBM model.

MR. ROB PATTISON: Okay. So, any contractor is going to have some working capital, but if there is no financing beyond that, then there is no financing on it.

MR. CHRIS GRISDALE: And, since you didn't understand the City to be pursuing a DBM model, you wouldn't know why it was the case that they ultimately pursued a DBFM model?

MR. ROB PATTISON: I recall, or I believe that we recommended a DBFM model.

MR. CHRIS GRISDALE: On that point, could I -- Mitchell, could you call up document ID IFO 0043843? Have you seen this document before, Mr. Pattison?

--- EXHIBIT No. 018:

IFO0043843 – Draft Memorandum Infrastructure Ontario

MR. ROB PATTISON: I've seen it in the -- I've seen it in the context of preparing for this hearing. I don't independently remember seeing it at the time, but I'd be stunned if I didn't, if this was made out at that time.

MR. CHRIS GRISDALE: Okay. And so, this is an undated and draft memo from IO, and I believe that it was attached to an email from John Traianopoulos to you.

MR. ROB PATTISON: Okay.

MR. CHRIS GRISDALE: Are you aware of that?

MR. ROB PATTISON: As I say, I'm not, but it wouldn't surprise me. Starting sometime in the spring of 201,1 I was very involved in IO's efforts to become engaged in the project.

MR. CHRIS GRISDALE: And I would just like to bring your attention to paragraph 4.

MR. ROB PATTISON: Could you roll that down?

MR. CHRIS GRISDALE: Paragraph 4. No, no, no -- yes, that's correct.

MR. ROB PATTISON: You mean the fourth paragraph ---

MR. CHRIS GRISDALE: That's right. The one that's bolded.

MR. ROB PATTISON: Yes.

MR. CHRIS GRISDALE: So, here we have,

> "Through discussions with the City of Ottawa, it has become clear that many of the deal parameters that will inform the RFP in the project agreement will not be settled until July 2011. Therefore, our comparison of the DBM and the DBFM model is somewhat theoretical and not as deal specific as we would have liked."

Why is IO comparing the DBM to the DBFM model if, in fact, you didn't even know that the City was pursuing the DBM model when you became engaged in 2011?

MR. ROB PATTISON: Sorry, what I said was, sitting here today, I don't recall. This seems to suggest that that was what was going on at the time.

MR. CHRIS GRISDALE: And do you understand, sir, what prompted this memo?

MR. ROB PATTISON: I don't.

MR. CHRIS GRISDALE: And to your knowledge, did the City ask IO to prepare this memo?

MR. ROB PATTISON: I don't recall whether this was something the City requested or we generated on our own motion.

MR. CHRIS GRISDALE: Okay. I'd like to direct your attention to the fifth paragraph, so just below. We have here, "IO does not recommend the use of a design, build, maintain procurement model for the Ottawa Light Rail Project. The reasoning and rationale is laid out below, but the primary concern is that the lack of private financing of the project, in our view, reduces the enforceability of the envisioned risk transfer under the project agreement."

Do you see that?

MR. ROB PATTISON: Yes.

MR. CHRIS GRISDALE: And we discussed performance security as one of the advantages that comes along with private financing, right?

MR. ROB PATTISON: Yeah. Yes. You mean the private -- the private financing as performance security?

MR. CHRIS GRISDALE: That's right.

MR. ROB PATTISON: Right, yes, yes.

MR. CHRIS GRISDALE: Now, I want to take -- or bring your attention to page 4 of the document. And I believe it sets out a list of -- a list of advantages that come with private financing. So here we have "security package", and then have, below that, "the lender value-add".

And do you mind scrolling down, Mitchell.

And we have a series of enumerated advantages. Many of these advantages we touched -- touched on earlier today.

MR. ROB PATTISON: Right.

MR. CHRIS GRISDALE: Have you reviewed this document in preparation for -- for this examination?

MR. ROB PATTISON: I have reviewed it, but I -- if you want to ask me specific questions about specific paragraphs, I'd have to look at them.

MR. CHRIS GRISDALE: I'd like to just ask you the general question. Does the memo canvas any potential drawbacks associated with private financing that we discussed earlier? And I believe, sir, you did agree with me that there is a tension between the time pressure associated with private financing and performance and reliability. Did -- was that set out here in this memo, that tension?

MR. ROB PATTISON: In this draft memo?

MR. CHRIS GRISDALE: In this draft memo.

MR. ROB PATTISON: I'd have to read the memo from end to end.

MR. CHRIS GRISDALE: Okay. I can tell you, sir, that it does not. To you knowledge, sir, did IO ever, at any time, identify for the City that there is this potential tension between the time pressure associated with private financing and performance in any correspondence, in a any meetings, in any discussions?

MR. ROB PATTISON: Sorry, repeat the question.

MR. CHRIS GRISDALE: To your knowledge, sir, did IO ever identify in any document, in any meeting, in any discussion with the City the potential tension that we identified between the time pressure associated with private financing and performance?

MR. ROB PATTISON: We had many discussions throughout the development of the project about the risks of the project. And I don't specifically recall discussing in precisely the terms that you've described, but ---

MR. CHRIS GRISDALE: Thank you.

MR. ROB PATTISON: --- we had -- yeah.

MR. CHRIS GRISDALE: Okay. Okay, thank you. I want to now turn to a new topic, Mr. Pattison. And I recognize that I'm moving somewhat out of order because the City determined its budget before it selected the procurement model. But I wanted to ask you a few brief questions about the City's projected project budget. Is it fair to say that the City was inflexible when it came to budget, in your experience ---

MR. ROB PATTISON: I don't ---

MR. CHRIS GRISDALE: --- with the City on this project?

MR. ROB PATTISON: What was expressed to me was that the budget was not up for debate. I don't know whether that's -- I don't know whether the City actually felt that way, but those were the instructions I had.

MR. CHRIS GRISDALE: And who expressed that to you?

MR. ROB PATTISON: Certainly -- certainly John Jensen, and I -- I think -- I -- it was just -- it was just in the air. It was just understood, and I -- like, again, I -- I -- I heard it several times that that was the goal. That was it. That's the amount the City had to spend, and, you know, to the extent that I know that I, you know, raised the flag of, "You might have a failed procurement."

MR. CHRIS GRISDALE: Sorry, you raised the flag that, "You might not have a successful ---

MR. ROB PATTISON: That's right.

MR. CHRIS GRISDALE: --- procurement because the budget -- because of the budget number"?

MR. ROB PATTISON: Yeah.

MR. CHRIS GRISDALE: And who did you raise that with?

MR. ROB PATTISON: It would have been John. I don't know if I would have raised it with others.

MR. CHRIS GRISDALE: And was it your understanding that the City was resisting a DBFM model on the basis of budget? Were they concerned that it might actually increase the cost of procurement because of the private financing component?

MR. ROB PATTISON: I wouldn't -- I don't recall the City as resisting DBFM. I remember the financing cost being one of the issues that we had to address and that we in fact did address in terms of the -- in terms of how payments were made during construction.

MR. CHRIS GRISDALE: And I'll turn to the way the payments were structured during construction, but one of the other ways that the City addressed that problem was through value engineering. Is that right?

MR. ROB PATTISON: I believe that there was value engineering and I know that we had many, many discussions about making out the output spec less prescriptive. We sought bidder feedback about that. We got feedback from all of the bidders. So, certainly, there were those technical sort of things.

MR. CHRIS GRISDALE: And were you aware that, when the City set its budget of $2.1B, it was set in 2009 and 2009 dollars?

MR. ROB PATTISON: I don't believe that I was.

MR. CHRIS GRISDALE: And were aware that Mayor Watson and some City councillors ran on an election campaign in 2010 that the Ottawa light rail transit system would be constructed and delivered to the City for no more than $2.1B?

MR. ROB PATTISON: I don't recall if I was aware of that specifically.

MR. CHRIS GRISDALE: And, sir, were you aware that the project's budget was set without any meaningful constructability analysis?

MR. ROB PATTISON: I don't recall whether I was aware of that or not.

MR. CHRIS GRISDALE: Is that something that IO takes into account when they're advising the City on procurement?

MR. ROB PATTISON: This was our first municipal engagement. In a project where we're assigned by the province, one of our roles is to ensure that technical and financial due diligence has been completed before the project -- before the RFP is released.

MR. CHRIS GRISDALE: And so you were satisfied that there was sufficient diligence around budget before the RFP was released?

MR. ROB PATTISON: Sorry, you're asking about on a provincial project or on this project?

MR. CHRIS GRISDALE: On this project.

MR. ROB PATTISON: And repeat the question.

MR. CHRIS GRISDALE: Was IO satisfied that sufficient diligence had been done around the project's budget before the RFP released?

MR. ROB PATTISON: I did not have an opinion about that.

MR. CHRIS GRISDALE: But you did say to me earlier that you expressed concern with the City that the budget number might result in a failed RFP?

MR. ROB PATTISON: Oh, sorry. Any budget number can lead to a failed RFP if the project ---

MR. CHRIS GRISDALE: Okay.

MR. ROB PATTISON: --- 8 above the budget.

MR. CHRIS GRISDALE: So you didn't ---

MR. ROB PATTISON: --- is above the budget.

MR. CHRIS GRISDALE: Understood, sir. So you didn't have any specific concerns around the diligence done on the project's budget before the RFP?

MR. ROB PATTISON: We did not diligence the project budget. The project budget was taken as read.

MR. CHRIS GRISDALE: I see.

MR. ROB PATTISON: And again, this is different mandate than what we normally do for the province.

MR. CHRIS GRISDALE: And, sir, what was the City's response when you said, "You might have a failed RFP given the budget"?

MR. ROB PATTISON: I don't recall a specific -- excuse me. I don't recall a specific discussion, but one of things that we did, at my suggestion, was include a mechanism whereby if -- whereby the -- the budget target that was set in the PA were exceeded, the City would have the ability to waive that exceedance, and so they could award to sell it to a bidder who was over. And that's backed in the RFP. And I don't recall if that was by way of addendum or that was when we went out the door. I believe it was by way of addendum.

MR. CHRIS GRISDALE: Okay, sir, and ---

MR. ROB PATTISON: Yeah, sorry. And I should say, you know, there are general powers to waive non-conformances in the RFP, but we put in a very specific bit of code.

MR. CHRIS GRISDALE: Okay, thank you.

I think it makes sense to the morning break for 15 minutes.

COMMISSIONER HOURIGAN: That's fine. We'll do that.

MR. CHRIS GRISDALE: Thank you.

THE REGISTRAR: Order. All rise. The Commission will recess for 15 minutes.

--- Upon recessing at 10:23 a.m.

--- Upon resuming at 10:44 a.m.

THE REGISTRAR: The Commission has resumed.

--- ROB PATTISON, Resumed:

--- EXAMINATION IN-CHIEF BY MR. CHRIS GRISDALE (cont'd):

MR. CHRIS GRISDALE: Hi, Mr. Pattison. I just have a couple of questions for you that circle back to some of the things that we discussed earlier before I move on to IO's mandate and the Memorandum of Understanding. I asked you earlier if responding to cost overruns was a meaningful part of the reason for IO's creation, and you agreed. And I asked you if IO was created in part to respond to financial issues, and you said it was. I think we are on the same page, but I want to make sure we are clear on what those answers mean.

I take it IO was created in part to respond to a specific financial problem with infrastructure projects and that specific problem is cost overruns with a more traditional design, bid, build model; is that right?

MR. ROB PATTISON: It was a broader problem. That's my understanding. That is part of the problem.

MR. CHRIS GRISDALE: But that contributed. That was a meaningful ---

MR. ROB PATTISON: Yeah, it was definitely a symptom.

MR. CHRIS GRISDALE: Okay. And I asked if P3 and financing are in IO's DNA, and you said, "thinking about risk is in our DNA, thinking about taxpayers is in our DNA". When you talk about risk and risk transfer as being a core issue for IO or part of IO's DNA, you are talking specifically about the financial risks that exist in the project; is that right?

MR. ROB PATTISON: No, I am thinking about every risk that leads -- or that you have to address to get to a successful outcome. Every owner wants their project to be on budget. Every owner wants a predictable opening day, and sometimes there are genuine deadlines that you are trying to meet if another facility is going to be about or whatever. And the problem that we were -- as I understood it, the problem that we were invented to address is wishful thinking in the early days of a project to get it launched and kick the ball down the road, and have the budget and the schedule, or the budget or the schedule go through the roof. And so ---

MR. CHRIS GRISDALE: So, it's financial risk and schedule risk that you are talking about?

MR. ROB PATTISON: Financial, schedule, technical, commercial, all of that stuff. When I set a budget, when I set a schedule -- or excuse me, when I set any of the project parameters, can I achieve those project parameters.

MR. CHRIS GRISDALE: Okay. Now, I understand that IO entered into a Memorandum of Understanding with the City of Ottawa that formalized IO's involvement with Ottawa -- sorry, with the Ottawa Light Rail Transit Project on October 6, 2011; is that correct?

MR. ROB PATTISON: That sounds right.

MR. CHRIS GRISDALE: Mitchell, could you call up the Memorandum of Understanding, Document ID COMM 0000234, please? And, Mr. Pattison, I presume you have seen this document before?

--- EXHIBIT No. 019:

COM0000234 – Memorandum of Understanding Ontario Infrastructure and City of Ottawa for the LRT Project 26 October 2011

MR. ROB PATTISON: Yes, this looks like the MOU, yes.

MR. CHRIS GRISDALE: Could you tell me how you understood IO's mandate after the memorandum was executed?

MR. ROB PATTISON: Yeah, we were the commercial procurement lead, I believe was the term that we used, and there is a variety of responsibilities for IO described in the document.

MR. CHRIS GRISDALE: Okay. So, we agree that IO was involved in the commercial structuring of the procurement and delivery package. I want to bring your attention to item 3.1(i) -- sorry, 3.1(i)(d) -- my apologies, 3.1(i)(3).

Sorry, do you mind scrolling for a moment? Could you continue scrolling, please, a little bit further? Sorry. I meant (ii). Sorry, my mistake. Could you scroll up, Mitchell? Thank you.

Okay. So, we are looking at item (c) here,

> "Provide advisory support to the contract management activities of the City during execution of the project following financial close, as further detailed in the Project Charter and the Project Implementation Plan."

Sir, coming back to IO's mandate, it was your understanding that IO's involvement would continue beyond the procurement process, right? When I say the procurement process, I mean the financial close and signing of the execution of the PA.

MR. ROB PATTISON: That was actually a matter of some debate, and I think there are other provisions of this MOU that speak to that. We were keen to be involved and, you know, I think the City's perspective as it was expressed to me, was that, you know, they wanted us as commercial procurement lead for the transaction.

We sort of managed to get a -- I think this was a -- this and the other provision or provisions in the MOU were a bit of a placeholder for the scope to be determined later.

MR. CHRIS GRISDALE: I see. So, IO was keen to be involved in the project after the project agreement was executed, but the City was uncertain whether or not they were going to use you in that capacity?

MR. ROB PATTISON: Yes.

MR. CHRIS GRISDALE: Okay. And was it your experience that IO was consulted with respect to contract management after the project agreement was executed?

MR. ROB PATTISON: Yes, there were specific things that we were consulted about, and I attended several ESC meetings from time-to-time.

MR. CHRIS GRISDALE: Is it your understanding, sir, that the City was actually relying on other consultants to assist it with contract management during construction?

MR. ROB PATTISON: Oh, absolutely, and just like during the transaction phase when there were a variety of advisors.

MR. CHRIS GRISDALE: And was it your understanding that the City was relying on Mr. Brian Guest to assist the City with contract management?

MR. ROB PATTISON: Contract management, I don't know specifically, but Brian did -- he was certainly involved in the project.

MR. CHRIS GRISDALE: And, sir, does Mr. Guest have any particular expertise on large scale infrastructure projects, to your knowledge?

MR. ROB PATTISON: You are saying today or in 2011?

MR. CHRIS GRISDALE: In 2011.

MR. ROB PATTISON: I don't know.

MR. CHRIS GRISDALE: And the Memorandum of Understanding also contemplated that the City would consult IO with respect to any disputes that arose between the City and its private partner? I can take you to that provision, but do you understand that to be the case?

MR. ROB PATTISON: You would have to take me to the provision, please.

MR. CHRIS GRISDALE: I believe it is 3.1(ii)(g). And so, "The City is to consult with Infrastructure Ontario with respect to any disputes that arise between the City and its counterparties under the project agreement."

MR. ROB PATTISON: Okay, yes.

MR. CHRIS GRISDALE: Do you recall if IO was ever consulted with respect to any disputes that the city had with RTG?

MR. ROB PATTISON: I don't recall being consulted about disputes, no.

MR. CHRIS GRISDALE: And sir, you did mention earlier that you participated in the executive steering committee, and Schedule C of this agreement contemplates that you'd be a member of that committee; is that right?

MR. ROB PATTISON: Yeah, that's right.

MR. CHRIS GRISDALE: And did you attend every one of those meetings?

MR. ROB PATTISON: I know that there are some that I was invited to and missed. I don't know if there are any that I was not invited to.

MR. CHRIS GRISDALE: And why was it the case that IO was a member of the executive steering committee? Was it to fulfill those obligations that we discussed earlier with respect to consultation of contract management and disputes?

MR. ROB PATTISON: So I believe that this MOU is based on a fairly standard template that we use with asset owners, and as I say, at the time we negotiated the MOU, the focus was on what we were going to be doing during the transaction phase. Like I say, I don't recall whether the stuff about implementation phase was boiler plate. I suspect it was, and as I say, my understanding was, we were going to address that.

MR. CHRIS GRISDALE: Thank you. Could you tell me then, sir, did you participate in any executive steering committee meetings after the financial close of the project?

MR. ROB PATTISON: Yes, I did. Sorry, yes, I did.

MR. CHRIS GRISDALE: Sorry, we're getting whoever's ---

COMMISSIONER HOURIGAN: So we have a technical issue. Just hang on a second.

Okay. Go ahead, Mr. Pattison.

MR. ROB PATTISON: Thank you.

MR. CHRIS GRISDALE: And so I assume that you were participating in those meetings because you were advising the City on contract management or disputes, because financial close had already happened, the commercial agreement had already been executed?

MR. ROB PATTISON: Yeah. I mean, there's only one I actually remember, but yeah.

MR. CHRIS GRISDALE: And sir, is it your experience when you attended those meetings or the one that you remember, the committee wasn’t -- the issues at the committee, they weren’t determined via a vote, right?

MR. ROB PATTISON: Yeah. I don’t -- no, I don’t believe it was by vote.

MR. CHRIS GRISDALE: And it was also the case that no member at the steering committee had a veto with respect to any issue that was discussed at the meeting?

MR. ROB PATTISON: Oh, I have no idea whether any -- I don’t believe I ever saw -- and it's all -- as I recall, it was all senior city staff around the table. I don’t recall that ever happening. This was fairly typical of other committees that I've been involved in in the course of my career where there is debate, sometimes spirited debate, or just good discussion or reports on things, and you know, the Chair says, "Okay. So here's what we're doing."

Often, it has the feel of, okay. Here's where we've all landed.

I don't recall ---

MR. CHRIS GRISDALE: Yeah.

MR. ROB PATTISON: Yeah, I don't recall a situation where---

MR. CHRIS GRISDALE: So is it your evidence that the City manager at the time of your involvement, a Mr. Kent Kirkpatrick, who chaired the executive committee, was sort of the ultimate decision maker of the issues that were at play in those meetings?

MR. ROB PATTISON: No. As I say, I never saw that proposition tested. He chaired the meetings and you know, as I say, it would often be him saying, "Okay. So this is what we've decided," but I don't recall ever having the sense that Kent said, "Well, I'm deciding this despite the fact that, you know, somebody else wants to veto it," or whatever.

MR. CHRIS GRISDALE: Okay. And given the time, Mr. Pattison, I want to turn to two specific aspects of the project agreement and ask you about those.

As we've discussed, I understand that the City wanted a form of advance payment to keep the project in budget. I want to ask you about the advance payment mechanism used on this project.

Does IO have experience with interim payment structures in the context of P-3 procurement and delivery that includes private financing?

MR. ROB PATTISON: Yes.

MR. CHRIS GRISDALE: In what context has IO used interim payment structures?

MR. ROB PATTISON: So prior to 2011 or prior to the period of this procurement, we'd had a variety of projects where we're building a facility such as a hospital and one, you know, the main building will be finished or a wing will be finished, and the main building remains to be completed, or you know, vice-versa.

And our principle until that time was that to get an interim payment, you had to deliver a usable asset. So the main body of the hospital, fully operational, ready to move in, fantastic, and the wing is -- the wing's not yet built.

And in that context, those payments would not be for the full value of the interim facility that was being handed over, the piece of the facility. It would always underpay so that -- by a margin that was determined by the owner that was incorporated in the bid that was quoted in the RFP to ensure the project that was always underwater post that payment.

MR. CHRIS GRISDALE: So IO understood that the procurement and delivery of a hospital might not be the most apt analogy here, so we -- you just described how the events process -- the events payment process works for a hospital. Do you think that that makes sense in the context of delivering this kind of infrastructure project?

MR. ROB PATTISON: Well, I can only speak from my own experience. The -- we felt at the time that given the City's stated desire to have interim payments to reduce the financing cost, we felt that it was appropriate to use milestone payments as ---

MR. CHRIS GRISDALE: Okay, sir. So I'm just going to -- my -- I'm just going to check my understanding of the milestone payment structure.

I believe it was the case that the private party -- or sorry, the private partner got to select -- I think it was 12 milestones in which it would receive payment, right? And those milestones were typically the construction of certain elements of the infrastructure; is that right?

MR. ROB PATTISON: I'd prefer it if you could put the list up on the table. These weren't -- as I recall, these weren't typical milestones that you'd think of.

MR. CHRIS GRISDALE: Okay. I'm not going to do that, given the time. I just want to understand just the high-level -- a high-level sort of understanding of what the milestone structure is. So would you ---

MR. ROB PATTISON: Sorry, go ahead.

MR. CHRIS GRISDALE: So would you agree with me, sir, that the private partner would receive a payment on certain events that were articulated in the PA in which the private partner had some feedback in determining what those events would be?

MR. ROB PATTISON: Yes, I would agree with that.

MR. CHRIS GRISDALE: Okay. And do you recall whether IO, Deloitte, or the City suggested milestone payments?

MR. ROB PATTISON: I believe that we did, I believe that Deloitte did, and I believe that CTP did, but I know we did. I believe the others did.

MR. CHRIS GRISDALE: Mitchell, could I ask you to pull up Doc ID IFO 0043831? Thank you.

Have you seen this document before, Mr. Pattison?

--- EXHIBIT No. 020:

IFO0043831 – Speakers Notes – Ottawa LRT 6 June 2011

MR. ROB PATTISON: This looks like a document I have reviewed over the last few days in preparation for the hearing.

MR. CHRIS GRISDALE: So I can tell you that this document was attached to an email that John Traianopoulos, your colleague at IO, sent to a Mr. Jim Chahill (phonetic), ccing you, and in the email, it referred to this document as speaking notes.

I want to draw your attention to the third row in this chart that says "Payment structure". And we have the Deloitte model saying monthly progress payments; and we have IO model, milestone based.

When -- is your understanding that Deloitte was proposing milestone-based progress payments?

MR. ROB PATTISON: Sorry, I was reading. Can you repeat that?

MR. CHRIS GRISDALE: Was it your understanding that at the time, Deloitte was proposing milestone-based progress payments?

MR. ROB PATTISON: Well, this doesn't say that and I don't recall whether that advice changed, and as I say, this is -- this is a decade ago -- plus or minus, so I could very well be wrong about Deloitte recommending a milestone.

MR. CHRIS GRISDALE: So, it appears to me, sir, that the document compares the milestone payment approach that IO is proposing with monthly progress payments that Deloitte was proposing.

MR. ROB PATTISON: That's what this seems to do. As I say, we didn't really end up with what I would call a traditionally milestone scheme, so...

MR. CHRIS GRISDALE: Do you recall why IO was proposing milestone payments as opposed to another form of advanced payment like, you know, a percentage complete type model where a certain percentage of the infrastructure is done, somebody certifies that, and a progress payment is made on the basis of ---

MR. ROB PATTISON: Yes.

MR. CHRIS GRISDALE: --- of that percentage?

MR. ROB PATTISON: Yeah, I certainty do. And again, we were going on our -- we were going on our experience, we were going on the knowledge that the Project Co's are going to be going and financing the project. And so, just to pick up on what you said a moment ago about hospital versus LRT, an LRT is a very complex mechanism for moving passengers, right? A hospital -- you know, a lot of the hospitals we work at, if you took away the architectural aspects of them, they look like petrochemical plants, right? Extraordinarily complex, system integration, medical gases, fluids, mechanical, electrical, you name it.

And you know, in the -- in our recent experience prior to Ottawa where we had used actual milestones, what you want is -- when you're going to -- and again, this was a risk management technique, typically, in the hospital realm, the reason you open part of it early is because you need that part to move part of your old operation on an interim basis and then move to the other. So, it wasn't -- you know, it was in no sense an artificial deadline, but you wanted to make sure that that machine worked. And so, you wanted to make sure that Project Co. and their lenders and their equity people were laser-focused on a plan so that the interim machine would work.

In fact, in Ottawa, as I recall, some of the -- well, to begin with, you're never, until completion, you're never going to have a transit system that runs end to end. We focus -- as I recall, when we initially started, we focused on things like, show that you got a complete station box built, and structure in place, and you know, ready to go. You always ask yourself, what would happen if Project Co were to default?

MR. CHRIS GRISDALE: Sir, my question was just why was IO proposing milestone payments?

MR. ROB PATTISON: To get something certain for what we received, or for what we paid, but as I say, we ended up being something that wasn't quite milestones for most of ---

MR. CHRIS GRISDALE: Okay. And did IO have experience milestone payments in the light rail transit context?

MR. ROB PATTISON: I would say no.

MR. CHRIS GRISDALE: And have you heard of phenomenon called "milestone chasing"?

MR. ROB PATTISON: I have not. Sorry. I mean, I heard discussion of it yesterday in the hearing, but it's not a term I've ever heard in 30 some odd years.

MR. CHRIS GRISDALE: So, milestone payments can incentivize a private partner to deploy resources to hit a milestone rather than deploy those resources in the most efficient way elsewhere, does that make sense to you, would you agree with that, that it could create that incentive?

MR. ROB PATTISON: Um...

MR. CHRIS GRISDALE: You have the private partner who is chasing the payment, and they have a finite amount of resources, they might allocate those resources in a way to access the payment rather than the most efficient use on the project?

MR. ROB PATTISON: Sure. So, we count on them to plan that they won't have to do that. And that's why -- you know, that's why we have the engagement with them during the in-market period.

MR. CHRIS GRISDALE: Now, sir, if RTG were, hypothetically, inefficiently deploying resources to access milestone payments, would you agree with me that that could negatively impact the schedule?

MR. ROB PATTISON: Hypothetically? So, if a contractor were doing this, could if hypothetically affect the schedule? Hypothetically, yes.

MR. CHRIS GRISDALE: And, sir, we already discussed the financial pressure baked into the delivery model associated with private financing and the contractual penalties. So, Mr. Pattison, I'll put it to you, could the time pressures baked into the commercial relationship here between the parties come at a cost to reliability and performance?

MR. ROB PATTISON: Sorry, repeat the -- I have a very hard time answering it the way you framed it, I think. So, please repeat it and I'll try.

MR. CHRIS GRISDALE: So, sir, we've already discussed how the financial pressure baked into the delivery model is associated with private financing, and we discussed the contractual penalties associated with not hitting schedule. So, Mr. Pattison, I'll ask you, could the time pressures baked into the commercial relationship between the parties come at a cost to reliability and performance, given those things, and also given this phenomenon that I've described to you as "milestone chasing"?

MR. ROB PATTISON: Well, let me start with "milestone chasing" first, the term you've used. I could see that hypothetically, as I've said, affecting schedule. I wouldn't see how that would affect quality. And to ---

MR. CHRIS GRISDALE: Sorry, sir. I'm just going to stop you there. Did you not agree with me earlier in this examination that there is a potential tension between time pressure and quality and performance?

MR. ROB PATTISON: So, I'm going to -- and mindful of the Commissioner's admonition, so I'm going to just qualify everything I say by saying everything I say applies to any contract model, and if you want ask me about distinctions between the DBFM model we used here and another model, we'll get to that, but what I say, if it includes DBFM as part of a broader class, happy to answer the question. So, could you answer [sic] the question again, please?

MR. CHRIS GRISDALE: Mr. Pattison, I'm just asking you whether or not the time pressures that are associated with -- and I'm putting them together here because I think that they're compounding -- associated with private financing, milestone chasing, contractual liquidated damages, and a topic that I will not be able to canvass with you now, but the materialization of the geotechnical risk, that those time pressures compounding are at tension with the liability, quality and performance?

MR. ROB PATTISON: All of those things put cost pressure on Project Co.

MR. CHRIS GRISDALE: And does that cost pressure -- is that at tension with reliability, quality and performance?

MR. ROB PATTISON: This is where I have to distinguish them all, because ---

COMMISSIONER HOURIGAN: Mr. Pattison, can you please answer the question? It's very specific. Counsel has asked you three different times to do it. He's talking about in the context of this model. So, please answer it in that context.

MR. ROB PATTISON: Yes, but Mr. Commissioner, a yes or no will be misleading.

COMMISSIONER HOURIGAN: I did not say a yes or no. I said to answer the question.

MR. ROB PATTISON: Okay.

COMMISSIONER HOURIGAN: You can go on as long as you want, but you need to answer the question that's asked of you.

MR. ROB PATTISON: Thank you, Mr. Commissioner.

Sorry, could you ask the question again?

MR. ROB PATTISON: Mr. Pattison, I've canvassed a number of incentives in this model that result in time pressure: One being private financing; two being the liquidated damages component of the PA; three being inefficient allocation of resources because of milestone chasing; four, the materialization of the geotechnical risk. All of these items put time pressure on the private partner. Is that at tension with reliability, quality and performance?

MR. ROB PATTISON: I would say no, and the ---

MR. CHRIS GRISDALE: Okay. Thank you.

MR. ROB PATTISON: Sorry. I said it's not a yes or no answer.

COMMISSIONER HOURIGAN: Go ahead. Explain why it's no.

MR. ROB PATTISON: All right. Thank you very much.

The Project Co. will be under cost pressure, there's no question. Under this model, by design, the contractor has a 30-year obligation. They don't get their loan paid back, they don't get their equity, they get deductions made against them, and so on, and so on, and so forth for 30 years, and there's no escape from that. And so, a contractor that's thinking in an extraordinary -- or a Project Co., I should say, that is thinking in an extraordinarily short-sighted way, or thinking on just about getting the substantial, might be tempted to think about it that way, like a traditional contractor would be. But they are going to have the maintainer within their own family and the LTA breathing down their throats on behalf of the lenders. And their ---

MR. CHRIS GRISDALE: So ---

MR. ROB PATTISON: Forgive me. And their equity people, to make sure that they don't hand over a piece of junk. And, on top of all that, there are the provisions of the contract that they have to comply to in terms of, you know, whatever provisions are in there for commissioning, testing, and operationalizing the system, and the long-term payment.

MR. CHRIS GRISDALE: So, Mr. Pattison, what you just identified, those items address the tension, but the tension still exist. Those items might address it, but as I framed the question to you, there is a tension there. And I think, if I understand you correctly, you are saying that that tension is addressed by these other items, the inclusion of the maintainer ---

MR. ROB PATTISON: As you framed that, I think I can agree with that, yes.

MR. CHRIS GRISDALE: Okay. Thank you. I think that we are out of time.

COMMISSIONER HOURIGAN: Thank you, counsel. City of Ottawa is next.

--- CROSS-EXAMINATION BY MR. PETER WARDLE:

MR. PETER WARDLE: Good morning, Mr. Pattison. It is Peter Wardle for the City of Ottawa.

MR. ROB PATTISON: Good morning.

MR. PETER WARDLE: I want to just touch briefly on a couple of points my friend made towards the end of his examination. You were involved in this project, Mr. Pattison, from 2011 right through to most of the way through the design and construction phase of the project; is that correct?

MR. ROB PATTISON: I was involved until ’17, ’18, ’19, somewhere in there. I honestly don’t remember when it opened.

MR. PETER WARDLE: It opened in August of 2019, so would that be fair that you were involved if the project award was at the end of 2012 and is it correct that you were involved until very late in the design and construction phase?

MR. ROB PATTISON: The records would show exactly when it was. Honestly, honestly, with COVID, I am very unreliable about dates.

MR. PETER WARDLE: That's fine. And you had regular interactions with City representatives and senior city staff from 2011 forwards, correct?

MR. ROB PATTISON: I'd say periodic. Not regular but yes, periodic. And we had staff visiting the site on a monthly basis.

MR. PETER WARDLE: Okay. And you sat on the Executive Steering Committee for, again, must of the design and construction phase, although you may not have attended all the meetings?

MR. ROB PATTISON: That's right.

MR. PETER WARDLE: And my information is that the MOU between Information Ontario -- sorry, Infrastructure Ontario and the City was only ended in or about June of 2019, just before substantial completion of the project; is that consistent with your recollection?

MR. ROB PATTISON: I have no reason to doubt that. The records will show.

MR. PETER WARDLE: And when you were interviewed, you indicated that your attendance at executive steering meetings by that time were becoming kind of superfluous; is that right?

MR. ROB PATTISON: Yeah, I think -- I mean, with all due respect to me, the City had things well in hand it seemed.

MR. PETER WARDLE: And you also stated in your interview that the City had an excellent owner's team, correct?

MR. ROB PATTISON: Yes. That is certainly my impression.

MR. PETER WARDLE: "Very sophisticated owner's team which could handle a project of this magnitude."

MR. ROB PATTISON: Yeah, that was certainly my impression. At the ESC meetings I attended, their understanding of the project or understanding of where they were going, all of that seemed very, very sophisticated and they seemed really in control of the project.

MR. PETER WARDLE: And during your involvement, did you ever have any concerns about the technical abilities of the team, including what would have been referred to as the owner's engineer and capital transit partners?

MR. ROB PATTISON: What sort of concerns are you referring to?

MR. PETER WARDLE: Did you have any concerns about their technical abilities?

MR. ROB PATTISON: No. I had no questions about that.

MR. PETER WARDLE: And you were aware from, I think, some questions my friend asked you, that the City was receiving financial advice throughout from Deloitte and strategic advice from Boxfish; is that correct?

MR. ROB PATTISON: As far as I know, yes. I couldn't give you details.

MR. PETER WARDLE: And did you have any concerns at any stage about the abilities of the individuals that you interacted with from these organizations?

MR. ROB PATTISON: No. I mean, Brian Guest, who is the only person I think I dealt with from Boxfish on the file is a frighteningly brilliant guy with what I consider to be very good knowledge across a lot of domains. And Remo Bucci from Deloitte, same thing, lots of experience, knowledgeable guy, good perspective.

MR. PETER WARDLE: And we've heard from you this morning that Infrastructure Ontario recommended a DBFM model to the City?

MR. ROB PATTISON: Yeah, I believe so.

MR. PETER WARDLE: And I think you have already stated that DBFM was a model that had been successfully used by Infrastructure Ontario in connection with a number of infrastructure projects by that point in time, correct?

MR. ROB PATTISON: That's right.

MR. PETER WARDLE: And this was one of the first transit infrastructure projects in the province using that model?

MR. ROB PATTISON: It was the first LRT project to go to procurement. It was the second rail project to go to procurement. The first being the UP Express spur, which was also my project, which reached financial close, I believe, in the fall of 2011. And we had been actively involved in the due diligence and commercial and technical analysis of the Transit City projects in Toronto since my involvement started in, I want to say, July or August of 2009. And my team had been working on it since before I got there and we had been neck-deep in those projects. In fact, forgive me, we had launched the Sheppard East LRT maintenance and storage facility prior to 2010. So, again, an LRT project, although not a linear project but, you know, I think several kilometres of track on it and a maintenance shed for LRTs.

MR. PETER WARDLE: And the Sheppard project was also a DBFM; is that correct?

MR. ROB PATTISON: That was DBFM. That's right.

MR. PETER WARDLE: And the model that was used in Ottawa, in the form of project agreement, is it correct that it has since been used in a number of other transit projects in Ontario that IO has been involved in?

MR. ROB PATTISON: Yeah, we've used DBFM project agreements on a variety of projects. I don't know if we took the Ottawa PA and adapted it. I think what you would see is that in the -- you know, the PA is several thousand pages, 40 some odd schedules, which is where a lot of the technical stuff is. There is a bunch of project-specific tweaks that we did in the body of the PA but, you know, as you will know, Mr. Wardle, in the T's and C's of a construction contract, a lot of that doesn't depend on the asset class that you are in. You know, reps and warranties and indemnities, and notice provisions, and stuff like that.

MR. PETER WARDLE: And let's just maybe come to the punchline, Mr. Pattison. In retrospect, do you have any concerns about IO's recommendation or the fact that the city procured this as a DBFM? Sorry, now I am not hearing you.

COMMISSIONER HOURIGAN: Yes, Mr. Pattison, we are not hearing you right now, so just hang on.

MR. ROB PATTISON: Yes.

COMMISSIONER HOURIGAN: Okay. We hear you now. Just start from your answer to counsel's questions, all right? So, start from the beginning of your answer.

MR. ROB PATTISON: I have no concerns at all. I am very proud of the work that we did with the City on this project.

MR. PETER WARDLE: I want to talk to you a little bit about risk allocation under the DBFM model. And I think you have already stated that the theory is that the risk should be allocated to the party that can best control the risk.

MR. ROB PATTISON: That's right.

MR. PETER WARDLE: And in your ---

MR. ROB PATTISON: Sorry ---

MR. PETER WARDLE: Okay. And in your statement, when you did your formal interview, you indicated that when writing the contract, the idea is to find that balance point where every risk that is best controlled by Project Co. in terms of their ability to influence it is also owned by Project Co. under the contractor." Do you recall saying that?

MR. ROB PATTISON: Yeah, that sounds like me.

MR. PETER WARDLE: Okay. And you also said in your testimony that, "I was in favour of maximum risk transfer." Correct?

MR. ROB PATTISON: Yes.

MR. PETER WARDLE: Now, Project Co. is a special purpose vehicle and you stated in your interview that you don't want to be in a situation where they take on a risk that they could never absorb or pay for under their own -- out of their own pocket, correct?

MR. ROB PATTISON: Yes, keeping in mind that, you know, from a construction perspective it's not actually non recourse, of course, right? Because typically there's DBJVs, operating entities. There's parent company guarantees and so on and so forth. So the non recourse nature of it is a bit of a fiction, just to ensure that this Project Co. only does one thing. But then of course Project Co. drops down all of the obligations to design or build or maintain it.

MR. PETER WARDLE: And this is the point I'm trying to get to, Mr. Pattison. You said in your interview:

> "We have to assume that these very sophisticated entities that are on the other side of these deals understand their risk, can price it, and will not take a risk that they cannot honour." (As read)

Correct?

MR. ROB PATTISON: That's right. And in fact -- oh, sorry. Go ahead.

MR. PETER WARDLE: And you said at one point this morning that the members of the consortium were frequent flyers. What did you mean by that?

MR. ROB PATTISON: I meant that we had seen and so remind who are the members – ACS, Dragados I think we'd very recently seen them in what I believe was our first highway project, forgive me. I don't know if we'd seen them in other projects by that time,

Ellis Don who were in the process of delivering several of our projects -- remind me.

MR. PETER WARDLE: Sorry, Ellis Don, ACS, and ----

MR. ROB PATTISON: SNC Lavalin.

COMMISSIONER WILLIAM HOURIGAN: SNC Lavalin.

MR. ROB PATTISON: Yeah, and again, frequent flyer involved in many of our projects, whether bidding or executing, I don't recall.

MR. PETER WARDLE: Okay. And so would you agree with me that these are extremely sophisticated, experienced, and financially astute organizations?

MR. ROB PATTISON: Yes. That's been my experience and that's my perception of all of them.

MR. PETER WARDLE: And the owner and in this case I.O. as procurement lead you count on the proponents to price it, to price the bid, to price it properly so they can execute the job, correct?

MR. ROB PATTISON: That's correct. That's right.

MR. PETER WARDLE: And you were asked a lot of questions during your examination about the tension between the time pressures associated with private financing, and performance obligations. Do you recall that?

MR. ROB PATTISON: Yes, I do.

MR. PETER WARDLE: And is it not the case, Mr. Pattison, that when the proponent put in their -- the proponents put in their bids on this project they would have understood that they were taking on a 30-year financial risk with respect to the long-term lenders?

MR. ROB PATTISON: There would have been no doubt in their minds that they were doing that.

MR. PETER WARDLE: Okay. And so you have to assume as procurement lead, and doesn't the City have to assume as well, that the proponents understand that risk and build it into their schedule analysis first, correct?

MR. ROB PATTISON: Yes.

MR. PETER WARDLE: And their pricing of the bid, correct?

MR. ROB PATTISON: Yes.

MR. PETER WARDLE: And the obligations that they're going to be taking on under the drop down feature with respect to maintenance, right?

MR. ROB PATTISON: Yes.

MR. PETER WARDLE: So all of those things have to be taken into account by the private sector at the time of procurement, correct?

MR. ROB PATTISON: Exactly.

MR. PETER WARDLE: And if those things are properly accounted for, then that takes care, does it not, of the tension that my friend suggested to you between the time pressures associated with private financing and performance? That issue gets assumed by the proponents when they finalize their bid.

MR. ROB PATTISON: Precisely.

MR. PETER WARDLE: And that, of course, is in the interest of the citizens of Ottawa, correct?

MR. ROB PATTISON: To transfer that list to Project Co.? Absolutely.

MR. PETER WARDLE: And Project Co. has the ability to insure for some of its risks, correct?

MR. ROB PATTISON: Yes. In fact, I believe that the insurance requirements for Project Co. -- the minimum insurance requirements that they were required to carry were in fact imposed in the Project Agreement. They were always free to get more than that but typically these PAs include very robust insurance requirements.

MR. PETER WARDLE: So, and I'm not going to take you to it. There is a schedule and I'm sure you're very familiar with the schedule, but we don't really have the time. The Project Co. pays an insurance premium up front, takes that into account in its bid, but also has the ability to make a claim if the terms of the insurance contract are met, correct?

MR. ROB PATTISON: Well, yeah. That's exactly like -- like with any -- like with any contract, you're going to have insurance to protect against things like destruction or damage to the facility while it's in course, and you know, typically Project Co. has an obligation to deliver the facility, period, full stop, whatever happens. And part of their analysis is going to be, in my experience, to take into account the insurance in doing that.

You could never -- you know, neither party could ever budget for a catastrophe. That's why you require an insurance program.

MR. PETER WARDLE: All right. And there are certain risks under a DBFM model to remain with the owner, correct?

MR. ROB PATTISON: That's right.

MR. PETER WARDLE: And is it correct to say then that information -- sorry, Infrastructure Ontario and the City of Ottawa would have relied on the proponents during the procurement phase to price the work properly?

MR. ROB PATTISON: Yes. And that reliance is enforced by the terms of the Project Agreement that Project Co. ultimately signed.

MR. PETER WARDLE: Right. And so for example, the liquidated damages provision is a provision in the project agreement that the proponents knew about at the time they submitted their bid.

MR. ROB PATTISON: Precisely, exactly.

MR. PETER WARDLE: And it's not an unusual feature of a construction contract, correct?

MR. ROB PATTISON: Well, in fact, this was a very limited LB. I've seen all these in lots of contracts and typically LBs run for some period of time and can really add up to a significant portion of the -- I've seen LBs that were 10 percent problematic and I think I've seen more than that. I've certainly seen LBs that were 10 percent of the contract price. This was 1 million on 2 billion.

MR. PETER WARDLE: And we'll just spend a few minutes on the geotechnical risk here. This was n innovation -- the geotechnical risk ladder was an innovation proposed by the City, correct?

MR. ROB PATTISON: The ladder was, yes.

MR. PETER WARDLE: And you described the idea in your interview as super-sensible, right?

MR. ROB PATTISON: Yes. Yeah.

MR. PETER WARDLE: And that's because geotechnical risks are best controlled by the Project Co. and in this case the Project Co. included a member of the consortium that had significant experience in tunnels, correct?

MR. ROB PATTISON: Yeah. And I don't remember that last piece specifically, but yes. And again, I should say the allocation of risk for geotechnical conditions I think was very similar to what we we've traditionally done. The innovation from the -- that the City proposed was the ladder which minimized the likelihood of a failed procurement and I think it's super-sensible. And a key part of that was the quality of the geotechnical due diligence that was done by the City. And in fact the proponents were given the opportunity while we were in market to chime in on the adequacy of that. And in fact more geotech due diligence was done while we were in market, based on the feedback from the bidders.

MR. PETER WARDLE: And the geotechnical risk ladder, just to put it very simply, gave the proponents choices to make with respect to how much geotechnical risk they wanted to take on.

MR. ROB PATTISON: That's right.

MR. PETER WARDLE: And ultimately, Infrastructure Ontario was comfortable acting as procurement lead on this project with the geotechnical risk ladder being one of the components of the procurement.

MR. ROB PATTISON: Yes. And again, to split the hair, the risk ladder was, do you take the risk you'd normally take, notwithstanding the special asset class, which is a tunnel, or do you take something less than what would normally be allocated on a P-3? That's how I recall.

MR. PETER WARDLE: And once that risk -- once the proponent's accepted that degree of risk -- and as you recall here that all of the proponents chose the highest level of risk on the due technical risk ladder?

MR. ROB PATTISON: That's what I recall, yes.

MR. PETER WARDLE: Okay. And doesn't that give us, in retrospect, some comfort that one proponent was not being blinkered for -- improperly influenced in some way, the fact that all three of them chose the highest level of risk?

MR. ROB PATTISON: I would certainly agree with that, and I would add that it is my conviction and belief that the risk allocation is only a part of the concern that a project would have, and that the engineers for the project would have, entering into a tunnel -- or excuse me, entering into a tunnel contract.

MR. PETER WARDLE: And is it also not fair that after an event takes place where one of the risks is actualized during the design structural period, in this case, the sinkhole, it wouldn't make sense under the DBFM model for the City to take back that risk?

MR. ROB PATTISON: To rewrite the contract after it's happened? Without any more details to suggest something, I can't imagine why you would. And again, that's the sort of risk I would anticipate, would be an insurable risk, which, you know, would address as the financial.

MR. PETER WARDLE: So let's just turn to the question of the City's budget, because you were put a number of questions about the budget.

So first of all, it's not unusual, is it, in your experience, Mr. Pattison, for the owner to have a budget?

MR. ROB PATTISON: No, it's not unusual at all.

MR. PETER WARDLE: In fact, it would be normal, wouldn't it?

MR. ROB PATTISON: In fact, yes.

MR. PETER WARDLE: And wouldn't it be normal, in fact, Mr. Pattison, for that budget to change over time as there's changes made to the scope of the project, experts looked at it, it gets poked and prodded, expanded, contracted over time? Isn't that part of the normal process of developing a budget from the owner's perspective?

MR. ROB PATTISON: I think that is something that happens often, and other times, there's a number and you can't exceed it, and you're prepared to either de-scope or kill the project if you can't fit within that number.

MR. PETER WARDLE: All right. And here, the City had a budget, and that budget ultimately makes its way into the affordability cap in the RFP, correct?

MR. ROB PATTISON: Yeah, the affordability cap was a subset of the budget. I believe that between the affordability cap and the budget were City expenses and things like that. But yes, the affordability cap was part of the budget.

MR. PETER WARDLE: But from the owner's perspective, in this case, the City, the City had its own engineers, it had consultants. There was a process that was gone through to develop an enhanced budget. But at the end of the day, the proof of whether that budget is sufficient comes at the end of the procurement processes, does it not?

MR. ROB PATTISON: Precisely. And you know, again, this is why we talk about bankable and biddable, because bidders are either going to show up or they're not, and we've had projects where bidders don’t show up.

MR. PETER WARDLE: And just to stop you there, Mr. Pattison, if they don’t show up, that might suggest to the owner that the budget is unrealistic?

MR. ROB PATTISON: Exactly.

MR. PETER WARDLE: And then the owner in that situation has to go back to the drawing board, right?

MR. ROB PATTISON: Yeah.

MR. PETER WARDLE: But that didn’t happen in this case, correct?

MR. ROB PATTISON: That’s right.

MR. PETER WARDLE: Two of the proponents, as I understand it, came in below -- underneath the affordability cap, correct?

MR. ROB PATTISON: I'd have to check, but that’s my understanding.

MR. PETER WARDLE: Okay. And so doesn't that suggest that two of the proponents, including RTG, thought that at the end of the day, after this lengthy and complex procurement process, that the City had priced this project accurately?

MR. ROB PATTISON: It certainly suggests that to me, and you know, look, there's a lot of gamesmanship during the in-market period. You hear a lot of stuff from bidders, but at the end of the day, exactly, they either show up or they don't. And the fact that two out of three did, if that's the case, as you say, that's a really strong signal.

We often -- as we're getting feedback from the bidders about what they can and can't take across projects, we often sort of go, when you hear it from two -- when you hear it from one, eh; when you hear it from two or three, you start to pay attention. So two bidding within tells me that we have it right -- or excuse me ---

MR. PETER WARDLE: And then -- and you also said -- you also said in your evidence earlier today that the Infrastructure Ontario develops the mechanisms to assist the City in the case -- in the event that the bidders, I guess, exceeded the affordability cap, right?

MR. ROB PATTISON: Yeah.

MR. PETER WARDLE: And the technical term for that is off ramps, right?

MR. ROB PATTISON: Yeah, I've heard that term used, and I think we use that term on this, but yes, this would be an off ramp.

MR. PETER WARDLE: And all that -- again, trying to keep this really simple, because we don't much time -- all this meant was that if all of the bidders came above the affordability cap, the City would have to think about it's options, and one of the options would have been to accept the highest bidder, even though it was outside the affordability cap -- or sorry, the lowest bidder, correct?

MR. ROB PATTISON: Yeah. Yes.

MR. PETER WARDLE: And another option would have been to go back to the drawing board?

MR. ROB PATTISON: Yeah, exactly.

MR. PETER WARDLE: And Infrastructure Ontario proposed these off ramps to the City, and they were incorporated into the RFP, were they not?

MR. ROB PATTISON: Yes.

MR. PETER WARDLE: I just want to spend a couple of minutes on what's called the PSOS and whether the technical specifications or performance specifications were too prescriptive.

And so first of all, I understand for this particular project, Infrastructure Ontario implemented what was called a white paper process where bidders were invited to advise where the technical specifications were too prescriptive. Do you recall that process?

MR. ROB PATTISON: I recall it well.

MR. PETER WARDLE: Okay. And bidders could make comments on the output specifications, correct?

MR. ROB PATTISON: That’s right.

MR. PETER WARDLE: And if there was something where the City and its advisors had got those specifications wrong and they were too prescriptive, then there was an opportunity for the bidders to provide feedback and say, "No, we don’t want it done this way," correct?

MR. ROB PATTISON: For sure.

MR. PETER WARDLE: Okay. And there were -- I don't know what the white papers looked like -- they must have been white -- but I understand that there were white papers received and there were several intensive discussions about which recommendations to accept ---

MR. ROB PATTISON: Yes.

MR. PETER WARDLE: --- correct?

MR. ROB PATTISON: Yes.

MR. PETER WARDLE: And parts of the specification that were too prescriptive were removed, correct?

MR. ROB PATTISON: Yes, that's my recollection.

MR. PETER WARDLE: And at the end of the procurement process, first of all, would you agree that the goal of the procurement process was to ensure that all of the bidders' concerns about technical issues, design, and specifications were considered, and if possible, addressed?

MR. ROB PATTISON: Yes.

MR. PETER WARDLE: And were you confident at the time when the procurement was finished that that process had worked properly?

MR. ROB PATTISON: Yes, I was.

MR. PETER WARDLE: And do you remain so today? Do you have any doubts about it today?

MR. ROB PATTISON: I don't -- I haven't heard anything that would suggest the otherwise or the opposite. I ---

MR. PETER WARDLE: I want to ask you very briefly about revenue service availability under the project agreement. That is the last step before the system is handed over to the owner, correct?

MR. ROB PATTISON: Now, you're testing me.

MR. PETER WARDLE: Well, let's assume for a moment that it is the last step. Once that takes place, do you agree that the concept is that the owner would have a completed system that's ready for launch?

MR. ROB PATTISON: And sorry, just before we get to that, the answer to my last question, I should say, other than stuff I've heard in testimony over the last couple of days, but sorry, could you repeat that question?

MR. PETER WARDLE: Okay. Once revenue service availability takes place -- and that's a step that has to be completed by the contract, right -- once that step takes place, do you agree that the concept under the project agreement is that the owner has a completed system that's ready for launch?

MR. ROB PATTISON: That's my understanding of what revenue service availability was in this case.

MR. PETER WARDLE: A couple of questions about the City's decision to make arrangements in 2017 with the long-term lenders.

MR. ROB PATTISON: Right.

MR. PETER WARDLE: And first of all, can we agree, Mr. Pattison, that there were both long-term and short-term lenders?

MR. ROB PATTISON: That's my understanding.

MR. PETER WARDLE: And the arrangements the City made in 2017 were with respect to the long-term lenders, not the…

MR. ROB PATTISON: I couldn't tell you.

MR. PETER WARDLE: Okay. And do you recall that this was about the expansion of the system and the need to include RTM, the maintainer, as the maintainer as the system was expanded?

MR. ROB PATTISON: I believe that that's the case. I believe that was my understanding around that time.

MR. PETER WARDLE: And do you recall that the City was required then to go to the long-term lenders and obtain certain consents from them because they would be taking on additional risk if RTM was going to maintain a larger and longer system?

MR. ROB PATTISON: I recall hearing that. I don't recall when I heard that. So, I believe that to be the case, but I don't know when I heard that.

MR. PETER WARDLE: All right. And do you recall that there were a number of discussions about this issue within the City? You were apprised of some of those discussions, although I understand you weren't directly involved?

MR. ROB PATTISON: I don't know if I was apprised of the discussions. I was aware that it was being recommended. I don't know if I -- I don't recall what I -- I don't recall anything about City deliberations, but I was certainly having discussions with Brian Guest for a period of time where I know he talked about that concept.

MR. PETER WARDLE: Okay. And, ultimately, there was a decision by the City, and I won't take you to the details because we are almost out of time, but the decision was made by the City to step into the shoes of the long-term lenders and issue new debt instruments to those lenders?

MR. ROB PATTISON: Sure.

MR. PETER WARDLE: And, in your evidence today, you said that the F in the DBFM gave the owner a lever to enforce the contract, correct?

MR. ROB PATTISON: Yes, that's right.

MR. PETER WARDLE: And, at the end of the day, in 2017, it was the City of Ottawa's commercial determination, was it not, to determine whether it had to weigh up the continued benefits of having third-party lenders involved in Stage 1 in connection with all of the risks and benefits it was considering in relation to Stage 2 of the project?

MR. ROB PATTISON: It was their decision, yes. No, I agree with that, and I know that they -- or I understand that they were weighing up exactly those sorts of tensions.

MR. PETER WARDLE: The approach to milestone payments in this contract, do you have any information to suggest that the contractor in this case was chasing milestones?

MR. ROB PATTISON: I don't. I don't. And, as I said, my understanding is that some or most of these weren't traditional milestones. Some of them were 50 percent of something done as opposed to an asset, or a piece of an asset, that you can actually use, which is what a more typical milestone would be.

MR. PETER WARDLE: And do you recall, and you may not, from your involvement with the Executive Steering Committee, whether the City actually made some changes to the milestones as a result of some requests from the consortium?

MR. ROB PATTISON: Yeah, I was actually -- IO was consulted and I was part of that in 2014, and we were asked by the City, they were actually -- they had been asked by Project Co. They were open to it, and they wanted to see if IO had any concerns and if we would make a recommendation one way or the other. And, based on our analysis, information provided by the independent certifier, information provided by the technical advisor, and discussions with the City, we felt confident that the changes they made -- and I don't recall if it was defining terms or redefining milestone or what it was, but we all agreed it was doable and wouldn't hurt the City at all, and it was an accommodation that could be made for Project Co. And my recollection is that's not the last time it happened, but I don't -- you know, I don't know how deeply involved I was in any later ones where that happened.

MR. PETER WARDLE: And would you agree, Mr. Pattison, that that is an interest of collaboration between the consortium and the City?

MR. ROB PATTISON: Absolutely. And that is certainly the spirit -- when the City approached me, it was on the foot of, well, Project Co. wants this and, you know, we are inclined to agree. Now let's think about could something go wrong if we did it. So, they moved with, you know, deliberation, as did I, in doing the analysis.

MR. PETER WARDLE: All right. Thank you very much, Mr. Pattison, those are my questions for you.

MR. ROB PATTISON: Thank you.

COMMISSIONER HOURIGAN: All right. RTG is next.

--- CROSS-EXAMINATION BY MR. MICHAEL FENRICK:

MR. MICHAEL FENRICK: Good morning, Mr. Pattison. Michael Fenrick here for the RTG parties.

MR. ROB PATTISON: Good morning.

MR. MICHAEL FENRICK: So, I just want to start with a few questions concerning IO's role. IO has expertise in understanding and advising on what makes for good project management on a P3 project; is that fair?

MR. ROB PATTISON: Well, we certainly say we do, yes. I am blushing, but yes. Yes, we do.

MR. MICHAEL FENRICK: And this project was a $2.1 billion project?

MR. ROB PATTISON: That's right.

MR. MICHAEL FENRICK: And IO has experience working on and advising on project management on a project of that magnitude?

MR. ROB PATTISON: Yes.

MR. MICHAEL FENRICK: And the Ottawa LRT was the largest ---

MR. ROB PATTISON: Forgive me. We've got experience with deal structuring on a project of that magnitude. I think the thing we've got closest to it, yeah, Herb Gray, I think was 1.6 or something. So, yes, on that magnitude, yes.

MR. MICHAEL FENRICK: And the Ottawa LRT, though, was the first and was the largest public infrastructure project the City of Ottawa had ever undertaken?

MR. ROB PATTISON: I remember that being said, yes.

MR. MICHAEL FENRICK: And just unpacking a little bit about, you know, what good project management is, one element of an effective P3 project is having a clean contract -- or, clear contract, excuse me. You would agree with me?

MR. ROB PATTISON: I agree with that.

MR. MICHAEL FENRICK: But claims can and do arise, even where there is a clear contract; is that correct?

MR. ROB PATTISON: Yes.

MR. MICHAEL FENRICK: And you would agree with me that reasonable people can disagree over the interpretation of a contract and contractual language?

MR. ROB PATTISON: It depends on the provision, but yes. There are lots of things that reasonable people can disagree about in a particular contract or a particular provision.

MR. MICHAEL FENRICK: And you would also agree with me, sir, that no contract can be clear enough to address all factual circumstances that may arise when it is drafted on a complex P3 project? Things can happen?

MR. ROB PATTISON: I think that things can happen that folks might not have specifically contemplated. You know, one tries to plan for the unexpected with things like insurance provisions and stuff like that. But yes, of course things happen that people don't plan on.

MR. MICHAEL FENRICK: And you would agree with me, then, in the circumstance where something arises that was unexpected at the time that a contract was entered into, that where there is a dispute between and a contractor, that needs to be taken into account and not just the language of the contract?

MR. ROB PATTISON: I think that the -- no, I would disagree with that, as you have framed it. One of the things that we endeavour to do on these P3 projects, and one of the reasons that we take so long in the in-market period, and one of the reasons that we start with a template with a well-understood risk allocation and adapt it for that asset class is because, in my view and in my experience, and I think this reflects the IO view, the best way to ensure that people properly plan and provision for the unexpected is with a clear allocation of responsibility. And so, you know, I know that if this happens, I am going to have some budget over here. You know that if that happens, you are going to have to have some insurance over there. You know, I don't mean you and me, I mean A and B.

And the problem is, if you are to say, look, let's redecide -- let's have a rethink about our deal, if you assume at any time something that wasn't in the bid price happens you are going to renegotiate, then the only thing a responsible bidder would do is bid a dollar and win the project on price and then when anything goes wrong say, oops, I need more money. And so, what we endeavour to do is provision for the sorts of things that can go wrong in the ordinary course.

MR. MICHAEL FENRICK: But we are talking here about something that is unforeseen and I believe, sir, that you gave evidence since this morning that in circumstances where perhaps something unforeseen arises that – and “light”, I believe that was your word, the owner, would try to mitigate that in other ways on the project; is that fair?

MR. ROB PATTISON: Well, sure. And so things like, you know, helping with – you know, helping regulators or putting extra resources on to review documents more quickly, there’s all sorts of things that aren’t re-write in the contract.

MR. MICHAEL FENRICK: Yeah, but those aren’t necessarily things that are included in the contract and so where something unforeseen arises an enlightened owner would assist in those circumstances?

MR. ROB PATTISON: Well, do you want to give me an example? Because it depends on what the unforeseen thing is.

MR. MICHAEL FENRICK: I think I’m just asking you in general. I mean you said that an enlightened owner would assist in mitigating and I’m just simply asking you, is that fair?

MR. ROB PATTISON: Well, sure, there’s lots of things you can do to mitigate without re-writing the contract and taking back the rest. And in fact, you know, very often and more times than I can count, I’ve written letters or I’ve seen letters written where something has gone wrong on a project and you say, “Look, we’re happy to help you; we’re just reserving our rights; we’re not re-writing the PA but whatever we can do to help you without re-writing it, I’m happy to do, and I think that’s the active and enlightened owner, like myself.

MR. MICHAEL FENRICK: That’s fair, sir, and in addition to the contractual language the owner and the contractor should both take into account the public's interest in receiving quality infrastructure; is that fair?

MR. ROB PATTISON: Right. I mean that's what we endeavour to do when we are writing the contract.

MR. MICHAEL FENRICK: And quality service after the design and build has been completed?

MR. ROB PATTISON: Yes. And, again, we write the contract in an endeavour to get that quality service.

MR. MICHAEL FENRICK: And just getting back to what you were saying a moment ago about an enlightened owner, I believe in your transcript, sir, you said that when a claim arises that the parties shouldn't be a jerk about it; does that sound like something you'd say?

MR. ROB PATTISON: I think that's a good rule in all of this.

MR. MICHAEL FENRICK: And you should really never be a jerk about these types of things but try to be focussed on solving problems.

MR. ROB PATTISON: Yeah, that's right. I mean, you know, often you're in a position of acting more in sorrow than in anger. You know, the contract says what it says; I can't help you with this, but maybe I can help you with this other thing.

MR. MICHAEL FENRICK: And so would you agree with me that good contract administration by an owner means not taking an overly aggressive and adversarial approach to disputes?

MR. ROB PATTISON: I would say that that applies to any party to a contract.

MR. MICHAEL FENRICK: If they're going to be a good partner?

MR. ROB PATTISON: Sure.

MR. MICHAEL FENRICK: And partnership between the private and public sector is important for the success of a P3 project; is that fair?

MR. ROB PATTISON: So, again, I'm going to be a little bit bedantic. It's not "partnership" as per the Partnership Act, but I think – and I come from a "Claims & Dispute & Trouble projects" background and I think, you know, what that experience teaches is, look, in any contractual dispute there is going to be factual questions unresolved, there's going to be, you know, often you look at the contract and maybe it's not as clear as you thought. There's a million reasons why one should not be too proud of their own position and always try to put themselves in the other's shoes, and that applies to contractors, it applies to owners, it applies to architects, it applies to everybody. You should always be trying to focus on a solution but, you know, that doesn't mean throwing out the contract, but it certainly means, you know, recognizing things like litigation risk and reputation risk and all those things that we all have to be concerned about.

MR. MICHAEL FENRICK: Because these are generally very lengthy relationships; that's fair. A DBFM at least is generally – has a long design phase, a long build phase, a 30-year maintenance term?

MR. ROB PATTISON: Absolutely.

MR. MICHAEL FENRICK: And so if people are going to work together, then both the owner and the contractor should approach these things practically and reasonably; is that fair?

MR. ROB PATTISON: I certainly think so. And, again, you know in many cases in a typical project agreement we use terms like "reasonably". We refer to good industry practice. And so I think inherently in some of these things there's room for judgment and judgment and compromise or uncertainty about where the risks lie and in that uncertainty, is sometimes an opportunity for that.

MR. MICHAEL FENRICK: And I just want to move to talk a little bit about the DBFM model, the "Design Build Finance Maintain" model that was used on this project.

There's no requirement from the Province that you're aware of that the confederation line proceed with that model?

MR. ROB PATTISON: That's my understanding.

MR. MICHAEL FENRICK: With a condition of funding?

MR. ROB PATTISON: I don't know if it was a condition of funding but the distinction I'm drawing is up until that point we had always been appointed by the Province to work on a project; we weren't appointed. What the conditions of Ottawa's funding are, I don't know.

MR. MICHAEL FENRICK: And I.O. was involved though in advising the City on which P-3 model they'll choose for the project?

MR. ROB PATTISON: Yes, as I recall we were.

MR. MICHAEL FENRICK: And I.O, recommended the design build finance model for this project; correct?

MR. ROB PATTISON: Design Build Finance Maintain?

MR. MICHAEL FENRICK: Yes, excuse me; I apologize. There's so many words in there that I sometimes miss them.

And this is in contrast to other models that are available, right, like a Design Build Maintain model?

MR. ROB PATTISON: That's correct.

MR. MICHAEL FENRICK: And can you help me understand why I.O. recommended that the City proceed with the Design Build Finance model?

MR. ROB PATTISON: Design Build Finance Maintain?

MR. MICHAEL FENRICK: Maintain, excuse me.

MR. ROB PATTISON: So – and as I said earlier today, the model sets up intention between designer and builder and between design builder and maintainer to get the lowest price. And keep in mind it's a net present value or valuation and some of the most expenses dollars in that calculation are the construction dollars because they're being spent effectively today in the next small number of years, balanced against 30 years of maintenance costs. And the – you know, in a traditional project you've got a construction budget, you've got a maintenance budget. This, by putting them together, ensures that you're going to get the best – or tens and the incentives are aligned to make sure that you've got the best product for the long terms because of the payment deductions and so on that could be directed.

MR. MICHAEL FENRICK: So those are some of the reasons, but I would put to you that one of the reasons that a DBFM model may be preferred, at least in part, is because, as you say, I believe in your evidence to the Commission, that it focuses the attention of Project Co on making sure that they've got a reliable plan to succeed on the project; is that fair?

MR. ROB PATTISON: Yes, that's exactly. You know, when we're planning the projects we tell our asset owners, our "co-sponsors" we call them, that, you know, you can't ever be afraid to use your Paymac. In fact it's better to use the Paymac than to waive it, but – the perfect paymac is one that Project Co never comes close to breaching because they have planned out all of those problems and you don't have to make deductions because great design, great construction, great maintenance, everything goes good and they can plan for all of that upfront.

MR. MICHAEL FENRICK: And just to focus a moment on the role that lenders play; lenders are – perform an "arm's length" function from the design builder maintainer; is that right?

MR. ROB PATTISON: That's right.

MR. MICHAEL FENRICK: And from the owner as well; there's also independent of the owner?

MR. ROB PATTISON: Excuse me, that's right, yes.

MR. MICHAEL FENRICK: And there's value to the role that third party lenders play in this arm's length function?

MR. ROB PATTISON: Yeah, I think, you know, again – it's a layer – I've been thinking about this a lot; it's a lawyer – the equity which is independent money, you know, with a separate PNL within Project Co, is adverse interest from design builder but inside the family. The lenders are adverse interests in the family and they're outside the family. So, yes, they bring an independent view and their own interest in getting paid.

MR. MICHAEL FENRICK: And they sometimes can perform a challenge function for both the owner and the contractor because the owner may require their consent in order to make a variation?

MR. ROB PATTISON: Yes. And during the bid period, of course the LTA's reviewing everything to make sure that the lenders – that Project Co is going to be able to complete the project and maintain it for 30 years.

MR. MICHAEL FENRICK: And I'm also interested; so I know you're – you've said, and I think this is true, that Project Co is project companies who are generally single purpose vehicles; is that right?

MR. ROB PATTISON: Yes. Yes, Project Co itself is.

MR. MICHAEL FENRICK: And generally the revenues that they receive come solely from the asset owner through the payments under the contract?

MR. ROB PATTISON: Yes.

MR. MICHAEL FENRICK: And from those revenues where you are in a DBFM model, Project Co. needs to pay the third-party lenders from those revenues; is that correct?

MR. ROB PATTISON: That's correct.

MR. MICHAEL FENRICK: And if they don't, then the project company will be in default with the lenders and the project could fail; is that fair?

MR. ROB PATTISON: Yeah, I think that is a fair statement.

MR. MICHAEL FENRICK: And we spoke a little bit about an owner not taking an overly aggressive and adversarial approach to disputes. Do you recall me asking you some questions about that?

MR. ROB PATTISON: I do.

MR. MICHAEL FENRICK: And I will put this proposition to you, that that too, the risk that an owner may take an overly aggressive and adversarial approach is mitigated by the risk of default where there is a third-party lender involved. That the owner may not as aggressively pursue disputes in order to -- because it may risk a default under the credit agreement; is that fair?

MR. ROB PATTISON: Sorry, could you restate that question?

MR. MICHAEL FENRICK: So, I am just -- in the situation where Project Co. is only receiving revenues from the owner, and it has to pay the lenders out of those sums, they owner may not take an overly aggressive attitude towards disputes because it knows there is a risk that Project Co. could default on its loans?

MR. ROB PATTISON: Well, you are asking me to speculate about a general owner. What I will say is that when I've got a -- when an owner is dealing with any counterparty, I just think taking aggressive positions unwarranted by the language of the PA, and I would say the same thing about a Project Co., is -- it is not smart. You know, when I say enlightened, I am talking about enlightened self interest, right? In a 30-year relationship, if you are a jerk today, your partner is going to have the opportunity and the incentive to be a jerk tomorrow, and whether or not there is a lender -- you know, if you're -- whether or not there's a lender, whoever the third parties are, a party that is too aggressive in a contract I don't think serves their own interests and I don't think it is in the spirit of PA. Now, enforcing a contract is not what I would call being aggressive.

MR. MICHAEL FENRICK: Those are my questions, sir. Thank you for your time.

MR. ROB PATTISON: Thank you.

COMMISSIONER HOURIGAN: All right. Next, the Province.

MS. HEATHER MACKAY: Thank you, Commissioner. The province has no questions for this witness.

COMMISSIONER HOURIGAN: All right. Thank you, Ms. Mackay. Witness counsel?

MR. MICHAEL O'BRIEN: I believe that STV had a little bit of time with this witness.

COMMISSIONER HOURIGAN: I apologize, yes. STV.

MR. MICHAEL O'BRIEN: Thank you, Mr. Commissioner.

--- CROSS-EXAMINATION BY MICHAEL O'BRIEN:

MR. MICHAEL O'BRIEN: Mr. Pattison, good afternoon. My name is Michael O'Brien.

MR. ROB PATTISON: Good afternoon.

MR. MICHAEL O'BRIEN: Last name O, apostrophe, B-R-I-E-N. I'm counsel for STV. I'm sorry, Mr. Pattison, we are talking over each other. Go ahead.

MR. ROB PATTISON: Sorry. I said, "Afternoon already? Yikes."

MR. MICHAEL O'BRIEN: I am counsel for STV Incorporated, one of them members of the Capital Transit Partners, which I believe Mr. Wardle referred to as the owner's engineers in your discussion with him this morning.

MR. ROB PATTISON: Yes.

MR. MICHAEL O'BRIEN: I won't retread ground that has already been covered but have a few questions in particular about the white papering process that you just discussed with Mr. Wardle. And I believe you described that process as a process that all of the bidders had an opportunity to participate in or participated in?

MR. ROB PATTISON: Yes, that's right.

MR. MICHAEL O'BRIEN: So, when we talk about all of the bidders, am I correct there were ultimately three bidders on this project?

MR. ROB PATTISON: That's right.

MR. MICHAEL O'BRIEN: And prior to bidders being qualified, or proponents being qualified, the City undertook an RFQ process, a Request for Qualification process; is that correct?

MR. ROB PATTISON: That's right.

MR. MICHAEL O'BRIEN: And I know there are a number of benefits or purposes to that process, but one of them is to ensure that the owner will only receive high quality -- or receive bids from high-quality bidders; do you agree with that?

MR. ROB PATTISON: Yes.

MR. MICHAEL O'BRIEN: You've already testified that the successful bidder on this project, the Rideau Transit Group, was a sophisticated entity and you went to some lengths to explain what you mean by that earlier today. Is it fair to say that the other bidders brought a comparable level of sophistication to the table?

MR. ROB PATTISON: Oh, forgive me. Sorry, finish your question.

MR. MICHAEL O'BRIEN: That's the question.

MR. ROB PATTISON: Yes, that's certainly my recollection. I had every confidence in the bidders. We call them proponents.

MR. MICHAEL O'BRIEN: So, it was -- proponents. So, it was all three of these bidders or proponents, these sophisticated bidders or proponents, that partook in this white papering process?

MR. ROB PATTISON: Yes, that's right.

MR. MICHAEL O'BRIEN: Those are all the questions that I have for you, Mr. Pattison. Thank you.

COMMISSIONER HOURIGAN: Thank you, counsel. Now we will go to witness counsel.

--- CROSS-EXAMINATION BY MS. SARIT BATNER:

MS. SARIT BATNER: I'm told my host has stopped my video. The host has asked you -- you cannot start your video ---

COMMISSIONER HOURIGAN: Yes, we're here now. We've got you.

MS. SARIT BATNER: First let me apologize for my voice. I'm recovering from laryngitis. Just a few questions, Mr. Pattison. You said earlier today something to the effect of you tailor the model to the project, not the project to the model. What did you mean by that?

MR. ROB PATTISON: The idea is that you want to select a model that is going to tend to give you the best outcome for the particular project in the particular circumstances. And so, by way of contrast for that, I point to the UP Express Spur, which I referred to earlier, which was a Metrolinx project, which I was also responsible for. And the UP Express Spur is a 3.2-kilometre-long mainly elevated guideway that connects a rail line that comes out of Union Station into Toronto. It actually goes out to, I think, Kitchener and beyond, and trains were going to run along that guideway down to Union Station and back all day long. And in that case, it would be crazy to have a maintenance function in a 3-kilometre-long line that is part of a 20 or 30 or 40-kilometre long, or 100-kilometre-long facility. So, in that case, you would never go DBFM. You know, we recommended a DBF there.

MS. SARIT BATNER: And in terms of the model that was used here for the Ottawa LRT, as reflected in the project agreement, was it tailored to adapt to the LRT project?

MR. ROB PATTISON: Yeah, it absolutely was. So, for instance, one of the things that we included in -- this was my suggestion, although it was implemented by the City -- was what ended up being called the Mobility Matters Schedule in the PA. And the notion was Project Co. is going to be tearing up the streets of downtown Ottawa for some number of years. Is there a way that we can incentivize them to do that less and to get in and out and open up lanes as quickly as possible? And as I recall, and I don’t take credit for the scheme, it was -- I believe it was work that was done by CTP, but they came up, as I recall, with different pricing for rush hour and at night and weekends, and this and that. So, I think it was quite an elegant scheme that was specifically created for a linear project at my suggestion.

MS. SARIT BATNER: What about Energy Matters? Was there tailoring of Energy Matters project agreement?

MR. ROB PATTISON: Yes. And I think John Traianopoulos would know the details of that better than I would, but Energy Matters is something that was on other IO projects before this one, but it is tailored for the fact that, you know, again this is a different type of asset. This isn't a hospital, it's not a courthouse, it's not a jail.

MS. SARIT BATNER: What about the pay mechanism, was that tailored for the Ottawa LRT project?

MR. ROB PATTISON: Yes, it was. And, again, John will have the details of that, but I believe a tremendous amount of work went into tailoring that to this agreement and believe he worked with the City, the City and the ops people and Deloitte.

MS. SARIT BATNER: What about the geo tech that you talked about earlier in the letter?

MR. ROB PATTISON: Yeah, that was -- that was something that I don't believe we had ever done before, the latter, I should say. The risk transfer, as I said earlier, was very similar to what we do; the application was very different. So, our -- IO's practice has always been, and traditionally, our experience before IO existed was that a lot of owners don't do sufficient geotechnical investigations. And so, what you end up doing, traditionally, under DBB contracts, geotechnical was actually thought of as a classic owner's risk. In our projects, we turn the site, you know, whether it's a hospital or a jail, we turn the site into a pin-cushion or a Swiss cheese, and we're able to very effectively transfer that.

On this project, again, we -- the site was, I think, very, very well understood, and in fact, we did additional sampling and testing at the request of the bidders during in-market, so they had all the information that they needed. And as I say, their number one obligation, and the thing that their engineers would be concerned under their, you know, iron ring professional responsibility would be the life safety aspect of tunneling, and then you look at things like commercial issues.

MS. SARIT BATNER: Okay. And so, if we were just to hold up this project agreement as against the base template agreement that IO has, is it fair to say there will be many, many ways that many, many schedules that were directed specifically to the Ottawa LRT?

MR. ROB PATTISON: Yeah, I think that -- I think that's absolutely fair.

MS. SARIT BATNER: And, I just want to talk specifically, you were talking about the tunneling risk a moment ago, and you were asked questions earlier about "unforeseen risks", and can you just talk about unforeseen risks in the context of the tunneling issues that happened in this case? Were those the kinds of risks that were intended to be captured by the geotechnical risk transfer?

MR. ROB PATTISON: Right. So, I'm going -- and the -- and I'm not sure if I used the term "unforeseen" earlier. We talk -- you know, in -- we talk about the -- and I may have.

MS. SARIT BATNER: It might not have been you. It might have ---

MR. ROB PATTISON: Yeah. We talk about unforeseen and unforeseeable risks, right? The reality is some sort of geotechnical event was absolutely foreseeable, that's why -- that's why it had so much attention during in-market. This particular geotechnical event was unforeseen. So, that's -- you know, that's the distinction I would draw. So, there was a huge amount of attention paid to this issue long before the contract was ever signed.

MS. SARIT BATNER: Right. So, you didn't know this particular thing would ---

MR. ROB PATTISON: Right.

MS. SARIT BATNER: --- go along with tunneling, but you turned your mind to, if something goes wrong in tunneling, who should bear the risk, and who should insure it?

MR. ROB PATTISON: Exactly. And who should insure it, and -- exactly.

MS. SARIT BATNER: And I just wanted to shift for a minute to talk about milestone payments; you were asked some questions about these, and in particular, you were about the input that the bidders had. So, can you just talk for a moment about the role that the bidders had in terms of the milestones?

MR. ROB PATTISON: Yeah. And so, my recollection is that, one, we knew that we wanted interim payments; two, we had recommended and decided on -- you know, we were calling them milestones, but again, I think for many of most of these, that's a misnomer. But the IO -- and I wasn't deeply involved in this piece, but I believe John Traianopoulos was. IO worked with CTP and others to develop a list of potential, I'll say, milestones, milestones that could be used, and then the bidders were given a menu to select from. I think it was 18 or 19, and they had to choose a minimum number, and they were entitled to choose maximum number, and I don't know, but the documents would show whether we market-sounded that. So, it went out to the bidders and got feedback on the list before they then selected on bid day.

MS. SARIT BATNER: Okay. And can we just have document IFO 0000070, which is financial submission requirements in the RFP, up?

--- EXHIBIT No. 021:

IFO0000070 – OLRT RFP Schedule 3 Part 2 Financial Submission Requirements

COMMISSIONER HOURIGAN: Just standby.

(SHORT PAUSE)

MS. SARIT BATNER: Thank you. And if you turn to page 16 of that document, bottom right-hand corner, you'll see schedule 2.17. Correct. And so, is this -- this is what you were talking about then, Mr. Pattison, that the -- it talks about the City making certain interim payments, and a proponent may select up to 12 eligible milestone events?

MR. ROB PATTISON: That's right.

MS. SARIT BATNER: And do I understand it correctly that these events were created with input from the bidders?

MR. ROB PATTISON: I don't recall that specifically, but I'd be stunned if they were. John would know better than I would.

MS. SARIT BATNER: Okay. And can you turn forward to page 31 of the document? And so, these were the lists from which they could choose those 19 options from which they could choose?

MR. ROB PATTISON: That's right.

MR. ROB PATTISON: And so, to the extent that different bidders had different schedules or different orders that they wanted to do things, they could pick and choose up to 12 of these -- for up to 12 interim payments to structure their financing and their schedule?

MR. ROB PATTISON: That's right.

MS. SARIT BATNER: And if you turn to document IFO 0034739, which is Schedule 19 to the Project Agreement.

(SHORT PAUSE)

COMMISSIONER HOURIGAN: Sorry. We're having some difficulty locating it. It's an appendix to the Project Agreement?

MS. SARIT BATNER: Yes, it's Schedule 19, milestone payments, to the Project Agreement. I have it as IFO 0034739, but you might have it somewhere else as well.

COMMISSIONER HOURIGAN: All right. Just standby for a second. Can you share it on your screen?

MS. SARIT BATNER: Good question. Just give us a minute.

COMMISSIONER HOURIGAN: Hang on a one sec. We're trying to get it as well.

MS. SARIT BATNER: Sorry, I didn't plan for that.

COMMISSIONER HOURIGAN: Just stand by. I think we've almost got it.

(SHORT PAUSE)

MS. SARIT BATNER: You might have it under COM 0001143.

--- EXHIBIT No. 022:

COM0001143 – OLRT Schedule 19 Project Agreement Milestone Payments

COMMISSIONER HOURIGAN: All right. We've located a copy of it, but it appears to have been redacted.

MS. SARIT BATNER: Do you have schedule ---

COMMISSIONER HOURIGAN: Just hang on.

MS SARIT BATNER: Our redacted might be fine. It's just the number is whited out. I'm not going to go with the numbers.

COMMISSIONER HOURIGAN: Okay. We're just going to take five minutes, get this figured out. Just standby.

THE REGISTRAR: Order. All rise. The Commission is recessed for five minutes.

--- Upon recessing at 12:23 p.m.

--- Upon resuming at 12:32 p.m.

--- ROB PATTISON, RESUMED

COMMISSIONER HOURIGAN: Please proceed.

MS SARIT BATNER: Thank you. So these are the actual milestones selected by RTG, which made them made it into project agreement

MR. ROB PATTISON: Right. That's what they appear to be.

MS SARIT BATNER: And so, you spoke earlier, can we scroll down a little bit about them not being sort of typical milestones because they were 50% of our costs are things so just with regard to this -- just take a look at that page, and then, can you flip to the next page please. You see it talks about major equipment supplies having been ordered -- and a little further down, down to the bottom of page -- completion of 50% a permanent structure or later -- down submitted 80% of the total of over the page -- first three final designs et cetera -- so can you just talk a little bit about those in terms of benchmarks for interim payments?

MR. ROB PATTISON: Yeah, so I you know, I wouldn't -- these look a lot more like progress payments than milestones. They're referred to as milestones, which is one of the things that suggests to me that this would have had better feedback. Again, this is very unlike a situation where we're opening a wing of a hospital, and you know, that thing that behaves like a chemical plant, I described is up and running and pressurized, and, you know, everything turns on and goes on. It's supposed to this, you know, these are very, very different this is making progress towards something.

MS SARIT BATNER: If we could have document IFO0011272, This is the notice to proponents for the financial CCN.

COMMISSIONER HOURIGAN: Just repeat the number for us?

MS SARIT BATNER: IFO0011272.

COMMISSIONER HOURIGAN: Thank you.

--- EXHIBIT NO. 023:

IFO0011272 – Financing Issues – Background Note 29 November 2011

--- CROSS-EXAMINATION BY MS. SARIT BATNER, (cont'd):

MS SARIT BATNER: And so to go back in time, before the document we just looked at while we were still in the process, we were talking about input from the bidders. And so can you just help us understand what this document is and how it fits into the piece we were just talking about?

You see it talks about major equipment supplies having been ordered and a little further down, down to the bottom of page -- completion of 50% a permanent structure or later down submitted 80%

MR. ROB PATTISON: Yeah. So forgive me. I'd just like to take a moment to read this, the whole document. This -- this is -- I mean the piece that's on the screen says what we just talked about. The City wishes to be non-prescriptive in relation to milestones and recognize that construction schedules approaches will differ between proponents, and therefore you may select eligible ones. They're only defined at a high level. And, you know, it states the intent that the proponents will be able to pinpoint where in their schedule the milestone will occur and develop their financial model accordingly.

And again, with or without this, that's what Project Co. is going to do. They're going to have an execution plan and they're going to build a financial model around that execution plan, whatever we say about it.

MS SARIT BATNER: So this is Project Co.'s way of telling the contracting authority -- in this case, the City -- "This is our critical path. This is when we want you to give us money. These are the stages"?

MR. ROB PATTISON: Exactly.

MS SARIT BATNER: And then, you spoke earlier in your evidence in response to some questioning. I think you were asked, "Was there any evidence in this case of chasing milestones?" You said none that you had seen and, in fact, gave an example of the contrary behavior. And I just want to take you to some paper around that.

Can you turn up document IFO0071744?

--- EXHIBIT No. 024:

IFO0071744 – Letter from Infrastructure Ontario to City of Ottawa 7 May 2014

MS SARIT BATNER: And this is a letter -- you can't see the bottom but it's from you to Nancy Schepers dated May 7. 2014. And just if you could scroll up a bit, and just under 1.0, is the letter that -- is the situation that you were talking about earlier when the City came to you and said, "Project Co. would sort of like to redefine the language around them having met the milestone," and that made good sense to you?

MR. ROB PATTISON: Yes.

MS SARIT BATNER: And just over the page where it says, "We have reviewed the RTG financial documents," can you just talk about what you were looking and -- and -- I just want to put this in the context of the actual paper at the time.

MR. ROB PATTISON: Right.

MS SARIT BATNER: If you could just scroll down to the second page of the letter, "We have reviewed" ---

MR. ROB PATTISON: And, actually, if I could just point out one thing under 1.0 ---

MS SARIT BATNER: Yeah, could you go back?

MR. ROB PATTISON: --- on the first page? In fact, one of the considerations -- and as I recall, the -- neither I nor -- I don't recall if the City had an opinion about this, but Project Co. was saying one of the reasons for it is potential knock-on effects.

MS SARIT BATNER: Correct.

MR. ROB PATTISON: Right.

MS SARIT BATNER: So they were saying, "We don't want to chase ---

MR. ROB PATTISON: Yeah.

MS SARIT BATNER: --- the milestone, so we'd like you to work with us."

MR. ROB PATTISON: Exactly.

MS SARIT BATNER: And they went to the City, and the City came to you, and ---

MR. ROB PATTISON: Exactly.

MS SARIT BATNER: --- you worked with them.

MR. ROB PATTISON: And we worked with them.

MS SARIT BATNER: And, in fact, this milestone definition was changed?

MR. ROB PATTISON: That's my understanding, yes.

MS SARIT BATNER: And let's just look at the paper. So, first of all, can you turn up IFO0038293 -- IFO0038293? This is actually a letter from the day before your letter, which is part of the information you reviewed. So is a letter to the City of Ottawa to Nancy Schepers from the IC -- from the independent certifier.

--- EXHIBIT No. 025:

IFO0038293 – Letter from Altus Group Limited to City of Ottawa 6 May 2014

MR. ROB PATTISON: Yes.

MS SARIT BATNER: And so do you recall that this was part of the information that you looked at in writing your letter, or what -- or does that make ---

MR. ROB PATTISON: Yeah, given the timing of this -- and this is the day before my letter addressed to Nancy Schepers the next day -- I believe this is what I was referring, or at least, at the very least, this was part of what I was referring to when I referred to the IC's opinion, or input from the IC, or however it's phrased.

MS SARIT BATNER: And if you scroll down to the second page towards the bottom where it says:

"We understand that Project Co.'s rationale for proposing the amendments to the description and acceptance criteria for Milestone 2 are to allow continuation with their construction strategy and continue to achieve the critical path objectives of the construction schedule. Project Co. has confirmed that they can achieve Milestone 2 as currently defined, however, this would require them to depart from their current construction schedule and redeploy the road header currently working east at Parliament Station cavern and turn the road header back to the intermediate shaft to complete mainline tunnelling activities west towards Lyon's Station. In brief, Project Co. has confirmed this would redeploy resources from a critical path to a non-critical path solely to achieve the milestone." (As read).

So they were saying, "We don't want to chase, so work with us to make sure we don't do that," and that's exactly what happened ---

MR. ROB PATTISON: Yeah, exactly.

MS SARIT BATNER: Now you understand me?

MR. ROB PATTISON: Precisely.

MS SARIT BATNER: And just to confirm on paper where we can see that, if you turn up IFO0042110, which is a variation chart, we see -- or at least people who can read the small print and see -- if you turn to page 3 -- sorry, one, two, three -- 4, line item 23 -- right -- that that is Milestone No. 2. That is the variation at zero cost to Milestone 2. Do you see that?

MR. ROB PATTISON: Yes.

MS SARIT BATNER: And I'm not going to take you through it, but if the Commissioner wanted to have a look at what other milestones were shifted, there are other milestones -- for instance, the next entry -- which we see were shifted as well on this chart.

MR. ROB PATTISON: That's right.

MS SARIT BATNER: I want to just talk very briefly, take a tangent on this $1M liquidated damages payment we've heard some talk about. Do you recall, or do you know, for what purpose the $1M was? Like, why did that come about?

MR. ROB PATTISON: Yeah, it was specifically related to a very practical concern unique to a transit system running across a city. Ottawa has a very heavily subscribed bus system and, in fact, the LRT was being built within an existing bus right-of-way. And there was a period of detouring those buses during construction, and then there would be a moment when you would flip over from that very robust bus services to the LRT. And that is literally done overnight, is -- was the way it was described to me by John Jensen.

And, you know, the example that sticks with me is, you know, there's bus-stop posts, and they go out and they put a hood over them, or they take it off, or they do whatever. They put signage. And there's things that an army of people literally have to do overnight. And that LD was structured in such a way that the date that would trigger it wasn't set in the project -- or, excuse me, on financial close. It was set once Project Co. gave a notice some number of months before they're expected completion of the project, and when they had confidence that they were going to get there. And it was one-time thing.

I believe if Project Co. missed the date, they could re-up and you'd pay if you sent the army out a second time, but this was not like most LDs which are schedule-based where they start on a date and then accrue everyday, sometimes up to a limit, until the milestone is reached. This was very targeted for a very specific cost that would -- that the city was concerned. And, you know, I think it was -- you know, philiosophoically, we don't like LDs. We don't like -- at IO, you know, we think the economic incentives of the model take care of most of this, but this was a -- this was laser beam. A lot of our resistance to it was philosophical. But the practical reality of this one was a really smart application of an LV.

MS. SARIT BATNER: So to cut to the chase, that -- it was to compensate the City for their out-of-pocket expenses?

MR. ROB PATTISON: Yes, yes. And I believe it was actually supported by an estimate that was a genuine estimate of the cost that the City would incur.

MS. SARIT BATNER: Okay. New topic. Earlier today, you were asked some questions in response to which you were talking about delay events, relief events, compensation events, and *force majeure* events. What are those things, briefly, in a project agreement?

MR. ROB PATTISON: Right.

MS. SARIT BATNER: How do they work in a project agreement?

MR. ROB PATTISON: So -- and again, without looking at this particular project agreement -- delay events are a list of events typically, which are generally out of the control of Project Co., and for which, if they occur, and if they cause an impact to Project Co.'s critical path, so that -- and again, putting aside the terms in this PA -- so that completion is delayed beyond the scheduled date for completion -- and I'm using inexact terms -- then they get an extension of the scheduled date of completion to the extent of that delay.

A compensation event, typically, is the same list of items, but whether or not it causes substantial completion to be extended, you -- Project Co. is entitled to compensation, and I think the test is, they're being put in the same position as if -- no more, no less -- in the same position as if it had never happened.

So an example of that is if we were supposed to hand over a piece of property and Project Co. has mobilized a crane out on that day, and we hand over the property late, and they have to rent the crane for an extra month, those costs would -- and those costs would be a compensation event.

A relief event is a list of things typically well outside the control of either party, and for which Project Co. gets an extension if it's a delay event and some of their -- I think their senior debt paid -- the PA will say exactly -- financing cost.

And then *force majeure,* there's an extension, and *force majeure* is war and whatever -- and they get an extension but no money.

MS. SARIT BATNER: And in respect to the number of these things, for instance, the lenders might have to pay liquidated damages to Project Co., or the lenders might have to pick up the services amounts or things, or Project Co. may get relief from those things?

MR. ROB PATTISON: Yeah. Sorry, ask that again? I think you got it the other way around.

MS. SARIT BATNER: You go ahead, Mr. ---

MR. ROB PATTISON: Yeah, yeah.

So in those cases, so the way the structure works is, Project Co. agrees -- or excuse me -- the design builder agrees to pay Project Co. liquidated damages in their construction contact, which are informed by the financing cost that Project Co. expects to pay to its lenders.

So that is included in compensation event, which is a delay event, or it's included in a compensation event, which is a delay event, and it's included in a relief event, which is a delay event.

MS. SARIT BATNER: And so suffice it to say, these are long contracts and we're not sitting here taking the time to go through them and familiarize ourselves with them all, but I'm sure the Commissioner will.

But when he does so, he will see in them all sorts of ways in which the contract itself speaks to how things get shifted and who picks up what costs in the event that foreseen or unforeseen things happen is that ---

MR. ROB PATTISON: Yeah, precisely. And you know, our job was to adapt the PA to the particular needs of this project. You know, there was a reference, I think, in the evidence yesterday to injurious affection, and again, we laser cut that to distinguish between injurious affection caused by the very existence of the project versus injurious affection, and I'm paraphrasing -- I don't have the PA in front of me -- injurious affection caused by Project Co.'s breach of the PA or failure to comply with good industry practices, or whatever it says.

So we actually -- we got into a lot of those dark corners in adjusting this PA to this asset class in this city.

MS. SARIT BATNER: Just have a couple of minutes left. I want to cover one more topic. You talked earlier when you were being asked questions about the budget about failed percent.

MR. ROB PATTISON: Yeah.

MS. SARIT BATNER: What did you mean by that?

MR. ROB PATTISON: We say failed percent when we mean it's not biddable, bankable, you know, nobody can perform at that price, so either, you know -- so bidders don't show up.

MS. SARIT BATNER: So it's ---

MR. ROB PATTISON: Bidders don't bid, I should say.

MS. SARIT BATNER: So that's another way of saying, I take it, that bidders are not compelled to bid to the project?

MR. ROB PATTISON: Exactly.

MS. SARIT BATNER: And they give their input and they collect their subcontractors and their lenders, and they have to decide whether they want the job, correct?

MR. ROB PATTISON: That's exactly right.

MS. SARIT BATNER: Including whether they think it's profitable and whether they think they can reasonably do it to make money?

MR. ROB PATTISON: That's precisely right. And bidders have always prioritized their own ideal projects, the ones that they want to pursue. And quite frankly, you know, I think we had a more ardent market at this time. You know, the reality is -- but I will say, prior to that time, we'd seen bidders drop out after being qualified and going certainly down the road and deciding not to bid, and you know, more and more in recent years, bidders are being very selective about what they show up for. On the Edmonton LRT, for instance, we had two proponents. That's not at all unusual across the portfolio.

MS. SARIT BATNER: Thank you. Those are my questions.

MR. ROB PATTISON: Thank you so much.

COMMISSIONER HOURIGAN: Re-examination?

MR. CHRIS GRISDALE: Counsel has no questions.

COMMISSIONER HOURIGAN: All right, sir. You're excused. We're down now for the lunch break, coming back at two o'clock.

Thank you.

THE REGISTRAR: Order. All rise. The Commission is adjourned until 2:00 p.m.

--- Upon recessing at 12:48 p.m.

--- Upon resuming at 2:01 p.m.

THE REGISTRAR: The Commission has been resumed.

COMMISSIONER HOURIGAN: Ms. Simulik, are you there?

MS. MARIAN SIMULIK: Yes, I am.

COMMISSIONER HOURIGAN: Okay. Terrific. You will be given an option now to swear an oath or affirm that you will tell the truth. Which would you prefer?

MS. MARIAN SIMULIK: I'll affirm that I will tell the truth.

COMMISSIONER HOURIGAN: All right. Hold on. Go ahead.

--- MARIAN SIMULIK, Affirmed

THE REGISTRAR: The witness has been sworn in.

COMMISSIONER HOURIGAN: All right. Ms. Simulik, you will have some questions first from Ms. McGrann, Commission counsel.

--- EXAMINATION IN-CHIEF BY MR. KATE McGRANN:

MS. KATE McGRANN: Good afternoon, Ms. Simulik. My name is Kate McGrann. I'm one of the counsel for the Commission. To get started, I will just ask you a couple of questions about your background and your role at the City. It is my understanding that you were the City Treasurer from 2007 until December of 2019; is that right?

MS. MARIAN SIMULIK: That's correct.

MS. KATE McGRANN: And, in terms of your role in Stage 1 of Ottawa's Light Rail Transit Project, you were a member of the Executive Steering Committee?

MS. MARIAN SIMULIK: That's correct.

MS. KATE McGRANN: And you remained a member of that committee until your retirement in December of 2019?

MS. MARIAN SIMULIK: That's correct.

MS. KATE McGRANN: And other witnesses have discussed this, but just to help us situate ourselves, the Executive Steering Committee was made up of certain key staff members, including the City Manager?

MS. MARIAN SIMULIK: That's correct.

MS. KATE McGRANN: And the Executive Steering Committee had an oversight role of the Stage 1 Light Rail Transit Project?

MS. MARIAN SIMULIK: That's correct.

MS. KATE McGRANN: In terms of how the Executive Steering Committee approached making decisions in its oversight role in the project, how did the committee make decisions? Was it by way of consensus or by voting?

MS. MARIAN SIMULIK: It was by consensus.

MS. KATE McGRANN: And when Mr. Kirkpatrick was the City Manager, if the committee was unable to reach a consensus, was it the case that he would exercise ultimate decision-making power for the committee?

MS. MARIAN SIMULIK: I don't remember a time when the committee couldn't reach consensus, but I believe he had the authority to make a decision should there be such a case.

MS. KATE McGRANN: And in terms of how the committee approached its decision making, were there any changes in its consensus-based approach when Mr. Kanellakos took over as City Manager?

MS. MARIAN SIMULIK: I don't believe so.

MS. KATE McGRANN: In addition to your role on the Executive Steering Committee, I believe that you were also delegated the authority to approve the funding for Stage 1?

MS. MARIAN SIMULIK: To action funding. The approval of the funding was done by Council.

MS. KATE McGRANN: Thank you, yes, to action the funding. And that includes spends from the contingency fund; is that right?

MS. MARIAN SIMULIK: The Contingency Committee had the oversight and approved spending from the contingency fund, and there were three signatures required in order for that to happen. One was myself, one was the City Manager, and the other was the General Manager of Transit.

MS. KATE McGRANN: I'd like to turn now to some questions about how the estimates and ultimately the budget for this project were set, and it is my understanding that in or about 2008, the City prepared a cost estimate for the first stage of the LRT, and that cost estimate was approximately $1.8 billion; is that right?

MS. MARIAN SIMULIK: I believe the initial environmental assessment actually had it at 1.4. There is a memo that Ms. Schepers and myself released to Council in late 2009, and it starts at the 1.4 billion and then adds on the scope changes, et cetera, that ultimately brought it to I believe it was 1.8, then you added on a few other items to bring it to 2.1.

MS. KATE McGRANN: Okay. So, I am going to show you a document. It's at COW 27. So, this is a Downtown Ottawa Transit Tunnel Plan. If you scroll down a little bit, you can see in the bottom right-hand corner, just barely, that it is dated December 2009. Do you recognize this document?

MS. MARIAN SIMULIK: December 2009. I don't recognize the document, but I may have seen it.

MS. KATE McGRANN: If we could go to page 55 of this document? And I want to look at the -- there are three columns. I would like to look at the first one first under the heading "Cost Estimate", part of the way through the paragraph. You will see it says the capital cost estimate for this project is $2.1 billion (2009 dollars). Is this the $2.1 billion estimate that you were referring to?

MS. MARIAN SIMULIK: Yes, this is -- these are the same numbers that were used in the memo that Ms. Schepers and I sent in October of 2009 to show the transition from the original 1.4 billion to 2.1 billion.

MS. KATE McGRANN: Okay. And in looking for the $1.8 billion estimate, I have concluded that if you add up the transit tunnel and underground stations at 735 million, the transitway to LRT conversion at 540 million, and the maintenance and storage facility and vehicles at 515 million. That comes in at about 1.79 million [sic] or so.

Is that the source of the 1.8 billion, I should say, that you were referring to?

MS. MARIAN SIMULIK: I believe it is.

MS. KATE McGRANN: Am I right that 1.8 billion formed the basis for the contributions that the federal and provincial government ultimately agreed to make to this project?

MS. MARIAN SIMULIK: I believe it was. I was not part of the negotiations with the province or the federal government so I'm not aware of the conversations that took place. But that seems reasonable.

MS. KATE McGRANN: Okay. it's my understanding that the commitment was made on a third, a third, a third basis and by that I mean the provincial government would contribute a third; the federal government would contribute a third to this just about $1.8 billion estimate. Is that right?

MS. MARIAN SIMULIK: That's correct.

MS. KATE McGRANN: So each of them are committing to provide up to 600 million of eligible costs and not every cost of the project will qualify as an eligible cost; is that right?

MS. MARIAN SIMULIK: That's correct. For example, property acquisition was not an eligible cost.

MS. KATE McGRANN: So any costs over that 1.2 billion in funding coming from the provincial and federal government would go to the City's account; is that right?

MS. MARIAN SIMULIK: It would be the City's responsibility to fund, yes. Anything above the 1.2 billion.

MS. KATE McGRANN: Okay. So sticking with this document for a little bit longer, I just want to spend some time with you understanding what exactly this 2.1 billion estimate is made up of, and what isn't included.

So we've heard from others. This 2.1 billion in 2009 dollars does not include inflation, the cost of the project as it moves through time. Is that right?

MS. MARIAN SIMULIK: My understanding, it's -- and it says right there that this is in 2009 dollars so it would not include future inflation.

MS. KATE McGRANN: Okay. It would be your expectation that future inflation would increase the ultimate cost of the project?

MS. MARIAN SIMULIK: Yes, it would.

MS. KATE McGRANN: And if you look at the second column under the heading "Cost estimating project" -- process. This section describes the approach that was taken to prepare the$ 2.1 billion cost estimate. And if you look at the second paragraph in this column it says:

> "At the level of design completed to support this functional design report, the accuracy of the cost estimates can be considered Class D. That is, the estimate will be accurate to plus or minus 25 percent." (As read)

Do you see that?

MS. MARIAN SIMULIK: Yes, I do.

MS. KATE McGRANN: And so practically this means that the cost estimate could increase by over $500 million; is that right?

MS. MARIAN SIMULIK: Twenty-five (25) percent? Yes, that's the math.

MS. KATE McGRANN: Jumping back to the lefthand side for a second, I see that the second last bullet point lists a project director's contingency of $100 million. And the purpose of that contingency as it's planned at this point in time, I take it, was to account for additional unforeseen items or additional scope in the project. Is that fair?

MS. MARIAN SIMULIK: That's fair.

MS. KATE McGRANN: And in fact, a $100 million contingency was carried through the life of this project for just those purposes; is that right?

MS. MARIAN SIMULIK: I don't know if this was the original. What we ended up with, 100 million -- if this was the sort of the rationale, but yes, it was 100 million at the beginning and when it was approved in 2012 there was another 100 million.

MS. KATE McGRANN: I think we can take that document off the screen for now.

Now you said in your Commission interview, and we've heard from others that the City had never had a project as big as Stage 1 of the LRT; is that right?

MS. MARIAN SIMULIK: That's correct.

MS. KATE McGRANN: And at certain points in time as the estimate for this project progressed, you were asked to assess whether the City could afford the current estimate for the project.

MS. MARIAN SIMULIK: Yes, I was. There was concern about whether the City could afford this and all of the other plans that they had for transit in both the medium and the long term.

MS. KATE McGRANN: And at the times that you assessed the costs, the answer continually came back that yes, the City could afford the project?

MS. MARIAN SIMULIK: The City had the financial capacity to fund this project, yes.

MS. KATE McGRANN: At any point in time was staff asked to assess what the total cost or the highest cost that the City could afford to pa for this project was?

MS. MARIAN SIMULIK: I believe in the long range financial plan for transit that we provided Council in 2011, we did sensitivity analysis and we looked at what would happen if the costs went up by various amounts. And I believe the conclusion was is that there was an ability to absorb more costs if required.

MS. KATE McGRANN: So you looked at whether there was the ability to absorb more costs if required. But was staff ever asked, what is the total amount we can spend so that we can understand what our capabilities are and what we're able to do?

MS. MARIAN SIMULIK: No. We were never asked what the total was that we can spend because if this project had cost more, the Transit Commission and Council always had the ability to defer future projects. We were looking over a very large timeframe and so you can always move projects around to accommodate the higher costs up front. Or you can take on more debt. There's always a way to fund more and just through manipulation of the project timing, and sources of funds.

So we were never asked for an ultimate -- this is only how much you can spend. This number came from the clients.

MS. KATE McGRANN: It came from who? Sorry?

MS. MARIAN SIMULIK: The clients. So this would have come from the Rail Implementation Office or from the Transportation Planning, whoever was responsible for coming up with the estimates. They never asked us what the maximum was that they could spend.

MS. KATE McGRANN: Okay. And it's my understanding that that 2009 number that we looked at -- when that number was presented to Council, that number effectively became the target that everybody worked towards from that point onwards; is that fair?

MS. MARIAN SIMULIK: That is fair. We had subsequent -- I believe it was in early 2010 a report went forward and that was set as the budget target at that time.

MS. KATE McGRANN: Okay. And in fact, Mr. Jensen who appeared before the Commissioner yesterday, gave evidence that the preliminary engineering teams were directed to design to that budget. Is that consistent with your memory of what happened?

MS. MARIAN SIMULIK: Yes, that's a typical way we both budget and do capital works at the City. You come up with a very high level estimate, in this case Class D. And then the architects, engineers go away and try to accommodate that capital work within that envelope.

MS. KATE McGRANN: Okay. And that's your experience for every project?

MS. MARIAN SIMULIK: Yes. That's basically how we budget capital works at the City.

MS. KATE McGRANN: Okay. I will want to discuss with you what the City had to do in order to bring this project in within the $2.1 billion envelope. But before I do that, I want to talk with you about exactly what costs were ultimately accounted for.

So for starters, if we could pull up Document COW000040, please.

So this is December 4th, 2012 report to Council. And it discusses the Light Rail Project, if you could scroll down a little bit you can just see.

MS. MARIAN SIMULIK: M'hm.

MS. KATE McGRANN: The subject is "The Design Build Finance and Maintain of Ottawa's Light Rail Transit Project."

And if we go over to page 6 of this document and scroll down so we can see the third paragraph. Yeah, that's perfect.

So in the paragraph that starts, "In July 2012…" if you move through this paragraph you will see towards the end it says:

> “Finally, Council directed staff to design the $2.1 billion budget approved in January 2010 and also to absorb inflation costs within that amount that were not budgeted for at that time.” (As read)

And we already talked about that, and we will turn back to that in a second.

And this report also says:

> “Also not included and so absorbed in the original project budget were the higher borrowing costs associated with private financing entailed in the AFP approach." (As read)

Now, it's my understanding that the cost of private financing was not an eligible cost to be paid by either the provincial or federal government; is that right?

MS. MARIAN SIMULIK: That’s correct.

MS. KATE McGRANN: So any private financing costs would have to be taken on by the City?

MS. MARIAN SIMULIK: That’s correct.

MS. KATE McGRANN: And just to understand what the magnitude of these costs were, if we could go page 10 in this document, and scroll down to the second paragraph under the heading, "Background Project"?

MS. MARIAN SIMULIK: M'hm.

MS. KATE McGRANN: This is -- so it explains that the cost estimate was established in 2009 dollars. We've talked about that. And then it goes on to say that the initial estimate for the project did not include approximately $440 million in inflation.

And to your recollection, was that -- did that $440 million estimate for inflation turn out to be about accurate?

MS. MARIAN SIMULIK: I don't know if it turned out to be accurate, but this document, whoever prepared this, at that time, would have calculated what the original project would have cost in 2012 dollars, so 440 million seems reasonable.

MS. KATE McGRANN: Okay. And it goes on to say that the original budget did not need to -- did not include a provision for the expected 177 million in construction period financing and transaction costs.

MS. MARIAN SIMULIK: That's right.

MS. KATE McGRANN: So ultimately, when staff is working to keep the estimated cost of this project within that 2009, $2.1 billion project, they have to find a way to absorb over $600 million in costs for inflation and project financing; is that right?

MS. MARIAN SIMULIK: That's correct.

MS. KATE McGRANN: So in terms of what staff did in order to keep the project estimate within that, it's my understanding that the City and its consultants engaged in extensive value engineering to keep the estimated costs within the $2.1 billion envelope; is that fair?

MS. MARIAN SIMULIK: That is fair.

MS. KATE McGRANN: And one step that was taken in that value engineering exercise was changing the alignment in the depth of the tunnel?

MS. MARIAN SIMULIK: That's correct.

MS. KATE McGRANN: Keith Mackenzie, who is with Capital Transit Partners, the City's engineering consultants, gave evidence that other value engineering steps taken included shortening the station platforms and reducing the number of escalators in certain stations. Do those steps ring a bell to you?

MS. MARIAN SIMULIK: The shortening the platforms. I don't remember the escalators. I remember Campus was supposed to be -- they shortened the tunnel. Campus was supposed to be in the tunnel and it became above ground.

MS. KATE McGRANN: Okay. And any that -- it's fair to say that the City and its consultants took a number of steps to -- value engineering steps to contain the anticipate costs to that $2.1 billion envelope?

MS. MARIAN SIMULIK: To contain the costs and also to make it a better system.

MS. KATE McGRANN: And in terms of other steps that were taken to keep the costs to the $2.1 billion estimate, I'd like to turn back to COW0000040 again, and that's the December 4th report to council. In fact, I think we're on it right now.

If we could turn to the first page and scroll down to paragraph 2(a), this summarizes, I think, how the budgets were put together for this project.

And so we see that the budget ultimately ends up being 2.13 billion. Do you see that?

MS. MARIAN SIMULIK: Yes, I do.

MS. KATE McGRANN: So despite all the steps that staff took, this is at the end of the procurement, I think. You don't quite manage to get to the $2.1 billion, but you get within $30 million of it?

MS. MARIAN SIMULIK: Don't forget there's also $100 million contingency set as a separate budget. That was always included in the 2.1 billion before.

MS. KATE McGRANN: That was exactly where I was going to go next. So in addition to the value engineering, in order to get close to the 2.1, you got to take $100 million out of the budget and set it aside, so the project contingency lives outside of the project budget at this point in time; is that right?

MS. MARIAN SIMULIK: It wasn't taken out of the budget. What happened was is that the transition costs became less, and as opposed to just saying, "We don't need this money any more," it was decided, take -- set this up as the contingency.

MS. KATE McGRANN: So I think what we're looking at here is, we've got the 2(a), we've got the $2.13 billion budget, and then if you look under 2(b)(2), there is the OLRT transition at 63 million.

MS. MARIAN SIMULIK: M'hm.

MS. KATE McGRANN: In 2009, that transition cost was included within the 2.1 billion, wasn’t it?

MS. MARIAN SIMULIK: Yes, it was.

MS. KATE McGRANN: And it now sits outside of that $2.13 billion budget?

MS. MARIAN SIMULIK: Yes, it does.

MS. KATE McGRANN: And in the same way, the project contingency of 100 million was originally in the 2009 2.1 billion?

MS. MARIAN SIMULIK: Yes, and now it sits outside.

MS. KATE McGRANN: So staff and its consultants do a whole bunch of value engineering, and they also pull almost $200 million out of the budget, and they still can't quite get to the 2.1, but they get to 2.13 billion; is that fair?

MS. MARIAN SIMULIK: I'm -- could you rephrase that? That didn’t make sense to me.

MS. KATE McGRANN: Sure. So in order to try to get to 2.1, staff did a bunch of value engineering. We talked about that.

MS. MARIAN SIMULIK: Yes.

MS. KATE McGRANN: And then the two costs that we just described, the 63 million in transition fees and the -- or costs -- and the $100 million contingency are taken outside of the budget?

MS. MARIAN SIMULIK: Yes.

MS. KATE McGRANN: Now, I understand that you were involved in determining how much private financing should be included in this project; is that right?

MS. MARIAN SIMULIK: Yes, I had involvement in that.

MS. KATE McGRANN: And others have described this, so I won't spend much time on this with you, but the City ultimately decided to use a design, build, finance, maintain delivery model for this project?

MS. MARIAN SIMULIK: That's correct.

MS. KATE McGRANN: And in your Commission interview, you said that there was a requirement from the provincial government to use an alternative service delivery, which meant the City had to use private sector financing; is that right?

MS. MARIAN SIMULIK: That's correct. It was one of the terms of the contribution.

MS. KATE McGRANN: And do you remember how that requirement was communicated by the province to the City?

MS. MARIAN SIMULIK: Well, it's in the contribution agreement, but I do recall there was at one point where we were considering the financing component, and we wanted to gauge what their reaction would be if we actually didn't have a financing component. And basically, we heard that they would not be happy if there was any value for money left on the table, I think are the exact words.

So it was communicated that way.

MS. KATE McGRANN: And I understand that Infrastructure Ontario was working with the City to help assess the appropriate procurement model; is that right?

MS. MARIAN SIMULIK: Yes. Yes, they were.

MS. KATE McGRANN: Do you know if Infrastructure Ontario was also providing information or advice to the provincial government about its assessment of the City's options and decisions?

MS. MARIAN SIMULIK: No, I don't know what Infrastructure Ontario was providing to their -- to the province.

MS. KATE McGRANN: And just to situate our discussion about private sector financing, that effectively means that a project company would fund some of the construction costs and the City would ultimately pay those costs down over time; is that right?

MS. MARIAN SIMULIK: That's the long-term financing, but there's also the short-term financing within the construction period, but yes.

MS. KATE McGRANN: Okay. And the project company would fund the construction costs through a combination of short-term loans, as you've just identified, and long-term loans, and equity, yes?

MS. MARIAN SIMULIK: That's correct.

MS. KATE McGRANN: Okay. And those loans, short-term, long-term, and the equity are the private financing referred to in design, build, finance, maintain?

MS. MARIAN SIMULIK: That's correct.

MS. KATE McGRANN: And just to better understand how the private financing is ultimately paid off by the City, I'm going to ask you to walk me through how payments were to be made on this project.

So during the construction phase, it's my understanding that RTG was only paid by the City upon its successful completion of a milestone; is that right?

MS. MARIAN SIMULIK: Yes, milestones that they selected as part of the RFP process.

MS. KATE McGRANN: Okay. And upon completing a milestone, RTG would send an invoice to the City?

MS. MARIAN SIMUIK: That's correct.

MS. KATE McGRANN: And the independent certifier would take a look at the invoice and if it felt that the milestone had been achieved, it would certify?

MS. MARIAN SIMUIK: Yes, that's correct.

MS. KATE McGRANN: And upon the independent certifier's certification?

MS. MARIAN SIMULIK: That's correct.

MS. KATE MCGRANN: Okay. And then RTG would go on and pay subcontractors short-term lenders, et cetera?

MS. MARIAN SIMULIK: There was a whole regime on payments built within their contract, but I was not privy to what they did with the funds, so I can only assume you're correct.

MS. KATE MCGRANN: Okay. And then -- so, the City is now out of pocket for that milestone payment, and it then turns to its funding partners, the provincial and federal governments, and can you just explain to me how the provincial and federal contributions were then accessed by the City?

MS. MARIAN SIMULIK: So, we would then -- once we had paid it, we would have to send it to the provincial representatives, and the federal representatives, and then they would go through their own process of reviewing the invoice, making certain -- having somebody else certify the certifier and, ultimately, they would reimburse us for whatever the percentage was on that particular milestone. So, we could be waiting for the funding from them for, you know, weeks, months.

MS. KATE MCGRANN: Okay. And in terms of the contributions from each of the provincial and federal government, on this project, it was intended that the provincial and federal government would have paid their total contributions by the end of the construction of the project, is that right?

MS. MARIAN SIMULIK: Yes, they did not want to be involved in providing payments over the 30-year concession period, to repay that last 300 million in private sector financing. That's -- so, they wanted to be out by the time we got to revenue service availability.

MS. KATE MCGRANN: Okay. And that is in fact what happened, correct?

MS. MARIAN SIMULIK: That is what happened.

MS. KATE MCGRANN: And the short-term lenders on the project were also paid out by the end of the construction period, is that right?

MS. MARIAN SIMULIK: That's correct. They have a required amount that they had to keep in play from the short-term lenders, that was part of the contractual agreement, and the revenue service availability payment was actually designed in a way that it would be sufficient to repay the short-term lenders.

MS. KATE MCGRANN: Okay. So then, once the project heads into revenue service, it's open to the public , and we're in the operations and maintenance phase, only as far as private financing goes, the long-term lenders and the equity are still in play at that point in time, correct?

MS. MARIAN SIMULIK: That's correct.

MS. KATE MCGRANN: And then, throughout the operation phase and the 30-year maintenance term, the City is making monthly payments to RTG?

MS. MARIAN SIMULIK: That's correct.

MS. KATE MCGRANN: And then RTG is presumably making payments to its subcontractors, and the long-term lenders, and things like that?

MS. MARIAN SIMULIK: Well, I don't think during the maintenance period they -- unless, you're considering RTM to be a subcontractor, they shouldn't actually have any, but, yes, they would be paying the maintenance, and then they would be paying -- again, there's a whole cascade of how those payments work and, ultimately, the last person to get paid were the equity contributors.

MS. KATE MCGRANN: Okay. And so, the reason that we got into all of this was to provide some background to our discussion about how much private financing was included in the project agreement, and you were involved in determining that. So, just to understand the implications of how much private financing and what this decision looks like for the City, generally speaking, the City could borrow money for cheaper than Project Co. could, than its private partner could, right?

MS. MARIAN SIMULIK: Oh, definitely.

MS. KATE MCGRANN: So, it costs the City more money to include private financing on this project?

MS. MARIAN SIMULIK: Yes, approximately 177 million.

MS. KATE MCGRANN: Right, we looked at that number earlier. And we've talked a little bit about all of the work that staff and its consultants did to keep the anticipated costs of the project within the budget that council set. So, I take it that the City believed that the extra cost of private financing was worth it, because private financing brought some additional value to the project, is that fair?

MS. MARIAN SIMULIK: Yes, the private financing was supposed to provide additional oversight, more skin in the game from the private sector, as they would be repaid over the -- the long-term lenders would be repaid over the maintenance periods, so the maintenance had to be up to snuff or they wouldn't get -- well, they always actually get repaid, but there was the value of -- was that they would bring additional oversight.

MS. KATE MCGRANN: Okay. And you also used a phrase "skin in the game" and my understanding of what that phrase means is that there is some risk transfer from the City to the long-term lenders that remains in place throughout the maintenance period, is that fair?

MS. MARIAN SIMULIK: That's correct. The City -- the payments from the City included the debt, and if the maintenance wasn't up to snuff, ultimately, we wouldn't be paying -- we wouldn't be making a maintenance payment, and included in that would be the repayment portion of the long-term debt. So, that -- that debt was at risk from the long-term lender's perspective, from the City, but they had parental guarantees. So, ultimately, despite not receiving money from the City, RTG was obligated to pay back the long-term lenders even if they receive no money from us.

MS. KATE MCGRANN: Okay. And is it fair to say that there was also an element of protection for the City by virtue of the long-term financing because at the beginning of the operations phase, there's still a significant sum of money that the City owes for construction of the project that it has not yet paid? So, it's got that cash in hand, is that fair?

MS. MARIAN SIMULIK: Yes, that's fair to say, but that's actually only available as a cushion if you put them in default. If they're just not performing, it's really not there to help you.

MS. KATE MCGRANN: You and I ---

MS. MARIAN SIMULIK: That cushion is -- that cushion is there to -- if they go into default and you have to bring somebody back -- somebody else in, and it's there to absorb the extra cost of that.

MS. KATE MCGRANN: That's exactly where I was going to go. So, the idea is that the City has got this cash in hand so that if at any point during the maintenance phase there's a default, the City has to bring somebody else in, that's likely going to be more expensive, I think, is that fair?

MS. MARIAN SIMULIK: That's fair.

MS. KATE MCGRANN: The City has this cushion to rely on to help pay for those costs?

MS. MARIAN SIMULIK: That's correct.

MS. KATE MCGRANN: And the reason that the City has that cushion is because the long-term lenders have made this loan, and RTG is responsible for paying that loan out regardless of what happens?

MS. MARIAN SIMULIK: That's correct.

MS. KATE MCGRANN: So, turning back, once again -- we are going to get here eventually to how you and others at the City decided how much private financing should go into this project, I understand that the City's receiving advice from Infrastructure Ontario and Deloitte about how much private financing should be used?

MS. MARIAN SIMULIK: That's correct.

MS. KATE MCGRANN: And during your commission interview, you said that Infrastructure Ontario and Deloitte were originally modelling a billion dollars in private financing, do you remember saying that?

MS. MARIAN SIMULIK: Yes.

MS. KATE MCGRANN: Okay. And that was in fact the case?

MS. MARIAN SIMULIK: Yes, it was. It was ---

MS. KATE MCGRANN: And fair to say that including a billion dollars in private financing would have resulted in significant interest charges on that long-term loan?

MS. MARIAN SIMULIK: Yes, and further analysis from Deloitte looked at how much actual risk the City was able to transfer over with various levels of private sector financing, and that was sort of beyond -- it was more than the risk we were transferring.

MS. KATE MCGRANN: Okay. And the interest charges on that billion would have materially increased the cost of the project to the City, is that right?

MS. MARIAN SIMULIK: Well, if would have been -- if we had 177 million for 300 million, you can imagine it would at least three times ---

MS. KATE MCGRANN: So, the City ---

MS. MARIAN SIMULIK: --- the financial impact.

MS. KATE MCGRANN: The City just could not afford to include that much debt in the project?

MS. MARIAN SIMULIK: Well, it didn't make any sense. We probably could have afforded it, but why would you pay that much more if you're actually not transferring that amount of risk over?

MS. KATE MCGRANN: So, just to be sure that I understand what you're saying, you say that the City probably could have afforded to include that in the project?

MS. MARIAN SIMULIK: Yes, we had significant debt capacity back then -- I think we still do, but the City, if that had been the case, most likely would have been able to absorb that as well.

MS. KATE MCGRANN: Okay. And so, the City is looking at it with its advisors at the amount of financing that could be included, and part of the exercise here, I take it, is trying to figure out how much financing can be included while still coming in withing the 2.1 billion budget, is that fair?

MS. MARIAN SIMULIK: No, it was more around how much risk are you able to offload based on how much private sector financing is in there? And so, the sweet spot we hit where you were basically -- the amount extra you were paying was covering the costs of that extra risk was around 400 million.

MS. KATE McGRANN: Yes, I remember in your interview you described 400 million as the sweet spot. So, that is where the City landed?

MS. MARIAN SIMULIK: That is where we landed, yes, in consultation with Infrastructure Ontario and Deloitte.

MS. KATE McGRANN: And in your interview, you described the sweet spot as representing a trade-off between the amount of risk that was transferred and the cost of that transfer to the City; is that fair?

MS. MARIAN SIMULIK: That's fair.

MS. KATE McGRANN: And so, the amount of financing, you are looking at the cost as you are determining how much financing to include, fair?

MS. MARIAN SIMULIK: Yes.

MS. KATE McGRANN: I think you have answered this question, but at the time the 400 million was chosen, the City chose the highest amount of financing that the $2.1 billion budget would allow and try to stay within that envelope that Council had directed you remain within?

MS. MARIAN SIMULIK: I don't remember it being -- the decision being that this has to fit into the 2.1. It was more a decision of what is the appropriate level for risk transfer.

MS. KATE McGRANN: Okay. Well, let's talk about what ultimately ends up happening with the amount of financing that is included, but before we get there, I am going to need your help understanding another aspect of this project so that the conversation makes sense, and that is the affordability cap that is used through the RFP process. So, I am going to pull up a document that I think will help us take a shortcut through this, and that is COMM 1555.

So, this is a document prepared by Deloitte and Boxfish. At the bottom of the page, it is dated December 2015, and this document is titled "Ottawa Light Rail Transit System, Lessons Learned from Confederation Line and Stage 2 Implementation Implications." Are you familiar with this document?

MS. MARIAN SIMULIK: Yes, I am.

MS. KATE McGRANN: Okay. If we could go to PDF page 9, which is numbered page 7 of the document, and scroll down under the heading "Affordability Cap"? That's perfect.

Now, I am going to take you to the second paragraph, and I will let you know which aspect of this I would like to speak about, but if you want to take a moment to read the entire section, you just let me know. Okay?

MS. MARIAN SIMULIK: Okay.

MS. KATE McGRANN: So, if you look at the third paragraph under the heading "Affordability Cap", it says,

> "The affordability cap informed the bidding proponents that as long as one technically compliant bid came below the affordability cap, then any bids above the affordability cap could [sic] not be considered in the evaluation process."

MS. MARIAN SIMULIK: "Would not be considered in the evaluation process."

MS. KATE McGRANN: "Would not be considered in the evaluation process." Thank you very much. And is that your understanding of how the affordability cap worked?

MS. MARIAN SIMULIK: Yes. It was set as a normal project where you have a budget and you ask your bidders to come within that, and if they don't, in this case, they would be taken out if there was a bid that actually came in at or below the affordability cap.

MS. KATE McGRANN: Okay. And I think you just said this, but just to be clear, if you look at the last sentence, it explains that this process establishes a mandatory test where any bid successfully meeting that test would automatically be chosen before any bids failing to meet the test. That's your understanding of how this worked?

MS. MARIAN SIMULIK: Yes.

MS. KATE McGRANN: So, just to try this out, if the City received three bids that complied with the technical requirements, and only one of them meet the affordability cap, that's the bid that gets chosen?

MS. MARIAN SIMULIK: That's correct.

MS. KATE McGRANN: Okay. Was the use of the affordability cap discussed by the members of the Executive Steering Committee before it was implemented?

MS. MARIAN SIMULIK: I don't recall, but it likely was.

MS. KATE McGRANN: Do you recall anybody expressing any concerns about the affordability cap limiting the City's options as far as picking its private partner? And I will give you an example of what I mean. For example, a technically superior bid coming in just slightly over the affordability cap being unavailable to the City as an option because of the mandatory nature of the gating approach that was taken here.

MS. MARIAN SIMULIK: I don't remember anyone talking about having a technically superior bid, but being above the affordability cap, what the implications would be for that. I think the consensus around was that because we had gone through so many commercially confidential meetings and made so many adjustments with the three bidders that, in fact, we were fairly confident, and they were fairly confident, that they would be able to come within the affordability cap. So, I don't think we were seeing that as an issue.

MS. KATE McGRANN: Okay. And, once again, you and I are headed in exactly the same direction -- we can take this document off the screen -- talking about the affordability cap to understand how different components of the project may have affected the City's ability to evaluate bids based on the approach that it took and the application of the affordability cap that we've just looked at here. So, now we are coming back to the question of private financing, which we discussed before, and you had just told me that the City had determined that the sweet spot was $400 million in private financing; is that right?

MS. MARIAN SIMULIK: That's correct.

MS. KATE McGRANN: Okay. And we can take COMM 1555 off the screen now. Four hundred million is the sweet spot and I think you just said that throughout the in-market period the City is working with the bidders to try to help them achieve the affordability cap; is that right?

MS. MARIAN SIMULIK: That's correct.

MS. KATE McGRANN: And so, the City, I take it, makes a number of changes to the RFP requirements in order to help the bidders meet that cap?

MS. MARIAN SIMULIK: That's correct.

MS. KATE McGRANN: Okay. And in making those changes, I take it, the City is making some concessions on what it originally asked for in the RFP in order to help the bidders try to come beneath the affordability cap?

MS. MARIAN SIMULIK: I don't know if I would describe it as concessions, but a lot of times the proponents would raise a concern about, say, a particular design element and why was it like this, could they not in fact do something different? And after discussion it would be, you weren't compromising what we were going to get at the end so, yes, that would be something we would consider.

MS. KATE McGRANN: Okay. So, just to give you an example of the kind of concession that I am discussing, we had talked about the 400 million in financing being the sweet spot. It is my understanding that the bidders indicated that they would like that amount of private financing reduced in order to help them meet the affordability cap; is that fair?

MS. MARIAN SIMULIK: Yes, they were concerned about the cost of the 400 million. The risk profile had changed, or the time as well, with the realignment and a shallower tunnel and a shorter tunnel, and all kinds of changes like that. It was considered that, in fact, 400 million might be too much at that point in time. So, yes, we agreed that you could have a minimum of 300 million, but you could have gone with 400 million if you could afford it within your project bid. But, yes, ultimately it was changed to 300 million.

MS. KATE McGRANN: Okay. And just so that I understand your evidence, is it your evidence that the order of decisions is this: First, the City selects the 400 million sweet spot for private financing, then the tunnel alignment is changed?

MS. MARIAN SIMULIK: If I remember correctly, they might have been done almost at the same time, but if I am -- I think the tunnel alignment might have been in 2010 and I think we were deciding on the 400 million around -- in 2011. So, it might have happened before. I am foggy on those dates.

MS. KATE McGRANN: I am going to suggest to you that the documents indicate that the 400 million in private financing is selected in 2012, just prior to the release of the RFQ or the RFP, in and around that timeframe.

MS. MARIAN SIMULIK: Oh. Okay.

MS. KATE McGRANN: And if that is the case, does that change your evidence at all about whether the change in the tunnel alignment had any impact on the selection of the 400 million sweet spot for private financing?

MS. MARIAN SIMULIK: Yes, it would because you would think that would have already been incorporated into the risk analysis when the 400 million was selected. So, it was obviously something else that allowed the City to say we can take it down to 300 million and not feel that we didn't have sufficient skin in the game.

MS. KATE McGRANN: Okay. So, it is -- to your recollection, there was an assessment of whether the $100M reduction in private financing would have an impact on the risk transferred by way of the private financing aspect of the PS model used?

MS. MARIAN SIMULIK: There may have been. I'm -- off the top of my head, I can't recall, but it makes sense that if they were coming forward and saying -- because all of these changes had to go to the executive steering committee, if they came forward and said, "We're making these changes as a result of our discussions with the proponents," that they would give their rationale as to why they felt that that was acceptable.

MS. KATE McGRANN: Possible that the City just determined that it could accept a lesser transfer risk in order to meet the budget requirements and allow bidders to meet the affordability cap?

MS. MARIAN SIMULIK: I think -- would suspect not. I would -- there have to have been some justification as to why we would have gone down by $100M.

MS. KATE McGRANN: Okay. And this is -- you may have already answered this question, but I'll just ask it to be sure. Do you recall any discussions at the City with its consultants or otherwise about whether the budget requirements, the $2.1B, was inconsistent with the risk that the City was trying to transfer to the private partner through the DBFM model?

MS. MARIAN SIMULIK: Whether the quantum of the budget was inconsistent with the risk ---

MS. KATE McGRANN: That's right.

MS. MARIAN SIMULIK: --- the $2.1B?

MS. KATE McGRANN: Like, the quantum of the budget, the $2.1B and its -- the constraints that it placed on the private financing, whether that was inconsistent with the risk that the City was trying to transfer.

MS. MARIAN SIMULIK: No, I don't remember any discussions like that.

MS. KATE McGRANN: And stepping back from the private financing for a moment, we've talked about some steps that were taken to meet that $2.1B budget. We've talked about the instruction given to design to the budget, right?

MS. MARIAN SIMULIK: That's correct.

MS. KATE McGRANN: And we've talked about the value engineering that was performed?

MS. MARIAN SIMULIK: That's correct.

MS. KATE McGRANN: And we've talked about the contingency being moved outside of the budget and that other cost being moved outside of the budget?

MS. MARIAN SIMULIK: That's correct, m'hm.

MS. KATE McGRANN: And we've talked about the changes made during the RFP to the requirements to assist bidders in meeting the affordability cap?

MS. MARIAN SIMULIK: That's correct.

MS. KATE McGRANN: At any point prior to the close of the project agreement, so any point along the way of the project, were there any discussions at the City with the executive steering committee or otherwise about whether the budget might be insufficient for what the City was trying to accomplish with the LRT?

MS. MARIAN SIMULIK: No, I don't recall any discussions about it being insufficient.

MS. KATE McGRANN: And at any point prior to the close of the project agreement, were there any discussions at the City with the executive steering committee or otherwise about whether the budget or the affordability cap used in the procurement process might lead bidders to overpromise on what they could deliver to the City?

MS. MARIAN SIMULIK: So were we concerned that the private sector wouldn't actually put in a realistic bid? Is that you question?

MS. KATE McGRANN: Yeah, were there discussions about that rick being introduced by virtue of the -- of the budget, first of all, or the affordability cap, second of all?

MS. MARIAN SIMULIK: So we had confidence in the three bidders that we had selected that they were professional and that they would, in fact, produce a bid that reflected what their costs were, or they expected them to be, to do this project. We had initially -- we'd worked hard with them to find ways for them to come within the affordability cap, but we were prepared to deal with if, in fact, none of the fact came in within the affordability cap. So was there a concern? There was concern that they wouldn't get there. Otherwise, we would never have talked about, "What do we do if nobody comes within it?" But we basically trust the private sector to act reasonably and produce a document or a bid that reflected what they thought the costs were going to be.

MS. KATE McGRANN: Okay. My question was slightly different. Were there any discussions about whether the budget or the cap introduced a risk or increased a risk that the private sector might overpromise in its bids in order to make it under the cap or meet the budget?

MS. MARIAN SIMULIK: No.

MS. KATE McGRANN: So turning away from the procurement process for a second, I'd like to ask you some questions about the debt swap that the City executes. But before I get there, the -- at your Commission interview, you were asked some questions about the City's approach to the project agreement, which you had some experience with by virtue of your role in the executive steering committee. Is that fair?

MS. MARIAN SIMULIK: That's correct.

MS. KATE McGRANN: And your evidence was that if there was a delay or an issue that you ran into with RTG, the City's practice was to go first to the project agreement. Is that right?

MS. MARIAN SIMULIK: That's correct. That was the basis of our contractual relationship with them and so it was reasonable for us to look at that as to how we would resolve whatever was the issue of the day.

MS. KATE McGRANN: And your evidence was that the City was trying to follow the project agreement as closely as possible?

MS. MARIAN SIMULIK: That's correct because, ultimately, if you're in a Court of Law, it's your contract that is -- decides how you should have acted.

MS. KATE McGRANN: Okay. And you said that that was a reasonable approach for the City to take, and I take it that's your view because the project agreement is the results of negotiations between the parties?

MS. MARIAN SIMULIK: Yes, everybody entered into that project agreement willingly ---

MS. KATE McGRANN: Okay.

MS. MARIAN SIMULIK: --- knowing all consequences. They were all outlined in it, so yes.

MS. KATE McGRANN: And it's fair to say that each of the parties made compromises in order to get to the final agreement that they all agreed to?

MS. MARIAN SIMULIK: I don't know if they made compromises. They -- we took their bid at its face value, and it came with a set of conditions. So we basically -- that formed part of the contract, was their bid.

MS. KATE McGRANN: And the agreement and related agreements defined how the P3 relationship was going to work between the parties, right?

MS. MARIAN SIMULIK: To a degree, yes, it certainly did. It outlined how you would deal with a dispute. It outlined, you know, all the events, theoretically, that could happen, but it didn't deal with sort of the interpersonal. But I know that prior to the -- to the project even starting, there was -- I think it was a two-day meeting between the RTG group and the City group to talk about how they were going to work together because we were very conscious that this was -- this was going to be a 30-some year relationship with them and we wanted it to work.

MS. KATE McGRANN: Okay. And so, based on the fact that parties negotiate this agreement, they sign it, you've said that it's reasonable for the City to go to that agreement. It's -- that's all behind the City's view that if an issue arises, you go straight to the project agreement. You go there first, and you follow what it says, right?

MS. MARIAN SIMULIK: Yes.

MS. KATE McGRANN: Okay. And just as the City can read the project agreement and related agreements, so can RTG, right?

MS. MARIAN SIMULIK: That's correct.

MS. KATE McGRANN: And so it's reasonable for them to rely on the City following along in the relationship and everything that's described in those agreements?

MS. MARIAN SIMULIK: Yes, it is.

MS. KATE McGRANN: At any time during the City's procurement process, did the City consider how to account for future expansion of the LRT system in the context of the Stage 1 agreements that were being entered into?

MS. MARIAN SIMULIK: My only knowledge of that was when we came to the issue that I'm certain you're going to now, which is the debt swap, which was how to get one maintenance provider for the entire system as opposed to having, you know -- and one train -- one type of train for the entire system as opposed to having multiple maintenance providers and multiple types of trains. So that became an issue on Stage 2, but I don't remember that actually being discussed prior to that event.

MS. KATE McGRANN: Okay, so as the RFP is being put together, as the project agreement is being negotiated, you don't remember the City or its advisor turning your collective minds to, “What are we going to do when we need to expand the system, and how is this project agreement and related agreements going to impact our ability to do that?”

MS. MARIAN SIMULIK: No, I don’t remember that.

MS. KATE McGRANN: Okay. I’m going to ask for a document to be called up to help us with this next set of our discussion here, and it’s COW525727. So this is PowerPoint deck, and it’s half the size of the page so I wonder if we can make it a little bit bigger just to ease with reading. That’s perfect.

It’s titled, “Stage 2 Light Rail Transit RTG long-term debt release overview and approach, briefing to general manager and staff” and it’s dated July 26th, 2017.

I realize I'm only showing you the first page of this so far but are you familiar with this document?

MS. MARIAN SIMULIK: Yes, I am.

MS. KATE McGRANN: Okay. If we could go to Slide 4 which is on page 4, just to help situate the next couple of questions I’m going to ask you here.

The first bullet point on this slide describes that the city is determined that it’s going to have RTG assume the maintenance responsibilities for State 2 through a fixed price memorandum of understanding. It says MOU but we’re talking about a memorandum of understanding there, right?

MS. MARIAN SIMULIK: That’s correct.

MS. KATE McGRANN: Okay. And do you remember why the City decided that this would be the way that it should go?

MS. MARIAN SIMULIK: Basically it was felt it would be more efficient if you had one provider because if you had two providers then, you know, it would be a lot of finger pointing as to, you know, who was ultimately responsible if there was something happened. It just got to be too difficult. You're better off to have, you know, one maintenance provider for a system the size that we were going to.

MS. KATE McGRANN: And was there also an interest in taking RTG out of the running as far as procurement for Stage 2 to better enable a competitive environment?

MS. MARIAN SIMULIK: Yes, there was. The initial commercial or -- I can't remember the term that they use when they go out and they test the market. It basically showed that there was not going to be a lot of interest from other companies to bid on the next phase of light rail if the RTG was in there because they were sort of the -- at it right now so they had an advantage. So in order to take them out of the bidding process and also to meet our objective of only having one maintenance provider, it was decided that perhaps RTG would take over the maintenance responsibilities in lieu of being able to bid and in fact they were agreeable to it.

MS. KATE McGRANN: Okay. So to reach the City's objective of a single maintenance provider and in order to achieve the best possible price for the City on Stage 2, it's in the City's best interest to keep RTG on as the maintenance provider for Stage 1 and Stage 2, right?

MS. MARIAN SIMULIK: That's right. They also were to have other responsibilities in Stage 2. I think they had some oversight on certain of the capital build, for example, the signalling system, et cetera, et cetera. So it was -- they had a little bit more to do than just maintenance.

MS. KATE McGRANN: Okay. And in order to achieve this, RTG's involvement in Stage 2, there's amendments required to the Stage 1 agreements; is that right?

MS. MARIAN SIMULIK: That's correct.

MS. KATE McGRANN: And in order to achieve those amendments, the City needed to obtain the consent of RTG's long-term lenders, correct?

MS. MARIAN SIMULIK: That's correct.

MS. KATE McGRANN: Okay. And what ultimately ends up happening, instead of obtaining the lender's consent is that the City does what has been referred to as a debt swap, right?

MS. MARIAN SIMULIK: That's correct. The lenders were insisting in order to amend the agreement they wanted another $50 to $100 million put in in equity which would have made the Stage 2 project quite expensive or increase the costs. So yeah, we went with -- instead with what you have referred to as the debt swap.

MS. KATE McGRANN: Okay. And I will come back to the City's rationale for why it did the debt swap in a minute.

But right now I want to explore with you what this did to the risk transfer on the project when the City executed the debt swap. So the long-term lenders, by virtue of this, the City has effectively promised the payments that RTG was supposed to make you over the 30-year maintenance period, we the City will now make, right?

MS. MARIAN SIMULIK: That's correct. We stepped into their shoes. So RTG was now paying us and we were paying the long-term lenders.

MS. KATE McGRANN: And from the lenders' perspective, is the City a surer bet for repayment than RTG is?

MS. MARIAN SIMULIK: Oh, definitely.

MS. KATE McGRANN: So this is ---

MS. MARIAN SIMULIK: And plus we have a higher credit rating so we are -- our risk is considered much less in financial markets.

MS. KATE McGRANN: So it's a great day for the lenders. Their risk on the project has gone way down but they're still being paid the same amount, just by the City now, right?

MS. MARIAN SIMULIK: Yes. We tried to tell them that they had a better deal with us being the lender and not RTG, but -- and so therefore they should take a reduction in the interest rate but they were not amenable to that.

MS. KATE McGRANN: Okay. So they get to keep the same interest rate but they don't hold the risk of RTG non-payment any more, right?

MS. MARIAN SIMULIK: Well, you know, there's really not a lot of risk of RTG not paying them anyway. There are so many securities built in there for the long-term lender. They get paid almost regardless of anything.

MS. KATE McGRANN: Well, to the extent that there was risk for them ---

MS. MARIAN SIMULIK: Yes.

MS. KATE McGRANN: --- they don't have that risk anymore, right?

MS. MARIAN SIMULIK: That's correct.

MS. KATE McGRANN: And at this point the City now has that risk; is that correct?

MS. MARIAN SIMULIK: Yes. We have the same risk that they had which was almost nil.

MS. KATE McGRANN: And if we could go to page 8 of this PowerPoint presentation, I just want to look at the third sub bullet point., So we're talking about the benefits of the long-term lender debt released to the City. And the third sub bullet point says:

> "Maintains the presence of the Stage 1 long-term debt in the Project Agreement which could enhance and form an attractive package for infrastructure investors in the secondary markets once the Stage 2 project moves into operation." (As read)

Do you see that?

MS. MARIAN SIMULIK: Yes, I do.

MS. KATE McGRANN: So is the idea there that this debt would be packaged up and sold on to investors?

MS. MARIAN SIMULIK: That was one of the things we were considering at that time. Unfortunately, the maintenance period has not proven to be as smooth as we thought so I somehow doubt that this would even sell in today's market.

MS. KATE McGRANN: I was going to ask you if this appeared to be a viable option when you left the project in December of 2019.

MS. MARIAN SIMULIK: Well, it could have if they'd pulled up their socks and done something in 2020. But that didn't happen.

MS. KATE McGRANN: I take it that based on the way that this project has unfolded, this option is not really on the table any more?

MS. MARIAN SIMULIK: No, it isn't.

MS. KATE McGRANN: But would this option have been a way for the City to sort of hand off any risk it accepted from the long-term lenders to investors instead?

MS. MARIAN SIMULIK: It would have.

MS. KATE McGRANN: Okay. So this risk transfer plan didn't ultimately come to fruition?

MS. MARIAN SIMULIK: That's correct.

MS. KATE McGRANN: Sort of shifting focus but still talking about the debt swap, we talked before about Infrastructure Ontario acting as a procurement lead on this project providing advice to the City and I take it you'll agree with me that Infrastructure Ontario are experts in P3 procurement?

MS. MARIAN SIMULIK: For hospitals, yes. I think this was a learning ground for them with respect to light rail but yes, they certainly know a lot about P3.

MS. KATE McGRANN: Okay. And the distinction that you're drawing there -- I asked you if Infrastructure Ontario were experts in P3 and you said "Yes, for hospitals." Was it your view at the time that Infrastructure Ontario were not experts in P3 as it pertained to the project that the City was doing?

MS. MARIAN SIMULIK: To light rail? I think we were their first light rail project, the first or they might have dabbled their toe in one other. But yeah.

MS. KATE McGRANN: And in your view, did the fact that this was Infrastructure Ontario's first light rail project undermine their expertise in P3?

MS. MARIAN SIMULIK: No, I don't think -- I wouldn't say it undermined them but I think they were learning as well as we were on this. So they had all the templates that we used so they bought a lot of that and we just had to modify them to make them applicable to -- for a light rail system as opposed to a hospital. So they learned along the way. But they certainly had more knowledge than the City did.

MS. KATE McGRANN: Okay. So as far as LRT the City is a little bit of an experimental guinea pig for Infrastructure Ontario, their first time on a project like this?

MS. MARIAN SIMULIK: Yeah, I think we were.

MS. KATE McGRANN: Okay. But you said that they learned along the way?

MS. MARIAN SIMULIK: Yes.

MS. MARIAN SIMULIK: And they brought some expertise to the project?

MS. MARIAN SIMULIK: Yes, they did.

MS. KATE McGRANN: Okay. And they in fact had two seats on the executive steering committee throughout the construction phase?

MS. MARIAN SIMULIK: That, yes they did.

MS. KATE McGRANN: And one of the benefits that the City saw them bringing to the project was their experience in managing a project like this, a very big complex infrastructure project.

MS. MARIAN SIMULIK: I don't know about their involvement in actually managing the project. I know they brought the financial market, the P3 expertise, because they had done that before.

MS. KATE McGRANN: And they were instrumental in the structuring of the financial and commercial relationship between those involved in this project?

MS. MARIAN SIMULIK: Definitely.

MS. KATE McGRANN: And the model was theirs, they brought it to the City?

MS. MARIAN SIMULIK: That's correct.

MS. KATE McGRANN: When the City is looking at doing the debt swap here, did the City seek Infrastructure Ontario's advice about the potential upsides and risks of proceeding in this fashion?

MS. MARIAN SIMULIK: I do not know.

MS. KATE McGRANN: To your knowledge they did not?

MS. MARIAN SIMULIK: I don't know one way or the other. This was actually orchestrated by the Stage 2 office. They were the ones who were working on this. I was only brought into this sort of after -- not after the fact, but they did all the -- like, the meeting with the long-term lenders and coming up with the different strategies. And if they consulted Infrastructure Ontario, I wouldn't know about it. I was brought in as part of the Executive Steering Committee when they had to come to Finance to say, you know, could we actually do this? You know, what is the mechanism we have to put in place to orchestrate this?

MS. KATE McGRANN: Okay. And explaining the work that was done in order to identify options and a recommendation to present to the Executive Steering Committee, was any reference made to the fact that IO had had any involvement in assessing or making the recommendation at all?

MS. MARIAN SIMULIK: I don't remember any reference to IO on this recommendation.

MS. KATE McGRANN: Okay. And I will come back to the City's rationale for doing the debt swap in a little bit. We can take this document off the screen for now. Before we get to the question of why the City chose this option out of the options that were available to it, I just want to talk a little bit about the City in its role as lender. So, if we could take that one off the screen, that's great. Were you involved in the City exercising its role as lender?

MS. MARIAN SIMULIK: Are you talking about actually administering the new credit facility we had between RTG and the City?

MS. KATE McGRANN: Well, and also receiving information by virtue of being the lender, decisions coming to the City in its role as lender; were you involved in any of that work?

MS. MARIAN SIMULIK: So, we had a credit committee and that credit committee reported to me, but I didn't sit on the committee. I know they had access to information and if requested, I guess, by members of the Executive Steering Committee or myself, they would provide some of that information. But we tended to try to keep our role as lender and our role as the authority, the client, separate because they are sort of two different aspects to the project.

MS. KATE McGRANN: Okay. So, the Credit Committee reports to you?

MS. MARIAN SIMULIK: That's correct.

MS. KATE McGRANN: And you have a seat on the Executive Steering Committee which oversees the construction of the project and things like that?

MS. MARIAN SIMULIK: That's correct.

MS. KATE McGRANN: And so, if you are sitting with both hats, how did the City keep the roles separate?

MS. MARIAN SIMULIK: They basically -- I was the one who was sort of tasked with keeping the roles separate. Issues that arose from the Credit Committee, and we only had a few from what I understand, decisions that needed to be made, were made by Credit Committee and I was cc'd on those. But I didn't raise those at Executive Steering Committee.

So, for example, when we were asked, back when they missed the first revenue service availability date, to have to reduce the liquidated damages that they had to pay each other, that was never raised at Executive Steering Committee, and I only saw the result of what they decided. I was cc'd on the response.

MS. KATE McGRANN: And did you have the ability to intervene and change the direction that the Credit Committee was taking?

MS. MARIAN SIMULIK: I don't think I did. The committee was -- we had external legal counsel on there. We had -- Deloitte was on there. A number of my finance people were on there. It would have to have been a pretty drastic situation for me to even consider doing that. And I would never. I would have gone to them and tried to understand their rationale for a decision that they had made.

MS. KATE McGRANN: Okay. I understand that it would have been a drastic situation that would cause you to potentially intervene and that you would have tried to understand first, but did you have the authority to ultimately make the final decision with respect to any issues that came before the Credit Committee?

MS. MARIAN SIMULIK: I don't think I did.

MS. KATE McGRANN: In terms of the City as P3 partner and its approach to the project agreement, we have already talked about that, and we've talked about the fact that the City would look to the project agreement first if any issues arose with RTG. What approach did the City take to RTG in its role as long-term lender?

MS. MARIAN SIMULIK: Our approach was there was credit agreement, and we were following the terms of the credit agreement. So, I don't think it was any different in that the project agreement sort of set how we dealt with them on the construction and on the long-term debt. It was as per the credit agreement.

MS. KATE McGRANN: During your Commission interview, you were asked about whether the City was approached as lender to agree to make some changes or waive defaults, and at that time, you didn't have a recollection. Since then, I understand you have reviewed some documents and that is to refresh your memory. I am going to pull those documents up, including the letter that your counsel sent over to the Commission, and I just want to ask you a little bit about what you now remember.

So, it is COM H1. So, we are looking at a letter from June 1 of this year from Peter Wardle, Counsel to the City, to the Commission. And if we could just scroll down to page 2, we will get to the part that I want to ask you about that I should have asked you first. Are you familiar with this letter?

MS. MARIAN SIMULIK: Yes, I am.

MS. KATE McGRANN: Okay. And so, if you could just scroll down so that we can see number 2 and everything that kind of comes after it, that's great. This talks about or describes some documents that the City located which deal with a request by RTG in January of 2019 to the administrative agent for the senior lenders to consent to certain waivers of default as a result of RTG's anticipated failure to meet the senior creditors' long stop date under the credit agreement. And if you scroll down a little bit more there is a paragraph here that says, at the very bottom of the page, "We", that being the City's counsel, "have reviewed these emails with Ms. Simulik, who recalls attending a lunch at the MSF", and that is the maintenance and storage facility?

MS. MARIAN SIMULIK: That's correct.

MS. KATE McGRANN: "…in January 2019 with representatives of the short-term lenders and RTG." And it says that your recollection is that the short-term lenders had already decided not to agree to waive the default. You recall advising RTG at the meeting that the City had been prepared to support their request, but that the other lenders did not agree. And since the arrangements among the lenders required a majority to consent, the waivers were never provided.

So, a couple of questions for you about what you remember there. How did you learn that the short-term lenders would not consent to the waiver of default?

MS. MARIAN SIMULIK: The administrative agent had informed us that there was not -- there wasn't a majority to allow the request to proceed.

MS. KATE McGRANN: Who at RTG did you communicate the City's willingness to consent and the fact that the short-term lenders were refusing? Who did you tell that to at RTG?

MS. MARIAN SIMULIK: I actually stated that at that meeting. So, it was to everyone who was there. They were talking about their difficulty in accessing funds because this allowed them to basically continue to access funds from the short-term lenders once they were past the long stop date and we -- I told them at that time, you know, we understood their pain and we actually had been willing to allow them to continue, to grant them this waiver, but that the short-term lenders hadn't. The only reason I remember this is because after the meeting the administrative agent came up and basically chastised me for saying this out loud at the meeting because the discussions among the lenders, unknownst to me, unbeknownst to me, were to be kept confidential, and any decision was a decision of the whole as opposed to well, he voted against you and he voted for you.

So the administrative agent basically told me I had acted improperly by telling RTG that the City -- and I think we were the only ones who were willing to support their request.

MS. KATE McGRANN: And do you remember who from RTG was at that meeting?

MS. MARIAN SIMULIK: Oh, no. There was tons of them, so no, I don't remember who was at that meeting.

MS. KATE McGRANN: And do you remember if the decision of all of the lenders was ever communicated to RTG in writing?

MS. MARIAN SIMULIK: I don't -- I do not know if that was communicated in -- I would assume it was because they put in an official request letter, so the administrative agent would have had to respond to them.

But the administrative agent always deals with lenders on what he calls a bilateral basis. So you basically don't know who said what.

But in this case, he had told us that the short-term -- there wasn't enough on the short-term lenders who were willing to support this, that it would go through.

MS. KATE McGRANN: Okay. And the request that came through from RTG, a copy of that was provided to the City; is that right?

MS. MARIAN SIMULIK: That's correct.

MS. KATE McGRANN: And did you ---

MS. MARIAN SIMULIK: And moved on to the credit committee like the previous request when they didn't make revenue service availability and they were looking for some relief. So it goes to the credit committee and they make a determination on it, and relay that to the administrative agent.

MS. KATE McGRANN: Okay. And would you have expected the City to receive a copy of the -- of their agent's response to this request?

MS. MARIAN SIMULIK: Yes, I would have. I'm surprised that it didn't come up as one of the documents that were given to the Commission.

MS. KATE McGRANN: Okay. And we can take this document off the screen now.

Sticking with the debt swap for a little bit longer, we have talked about what happened to the risk that was transferred to the long-term lenders and your understanding of how that played out. When considering whether to do the debt swap, did the City consider whether it would introduce any other risks to the project?

MS. MARIAN SIMULIK: No. I think we felt that because it avoided significant costs to the City by doing the debt swap, and knowing how secure the long-term lenders were, having parental guarantees, having the letters of credit, that stepping into their shoes was of minimal, minimal risk to the City, that we did not consider there to be other risks.

MS. KATE McGRANN: Okay. Do you know whether the City considered whether removing the long-term lenders might result in the removal of an influence that could ultimately contribute to the successful completion of the project?

MS. MARIAN SIMULIK: The long-term lender had as much oversight as the short-term lenders, and my experience in dealing with the short-term lenders is that they were only interested in one thing, and that was getting their money and their interest. And they weren't particularly interested in the quality of the project. They were more interested in that they met the timelines and got the milestone payments, and so the maintenance aspect, which was the long-term lender -- and the long-term lender has so many guarantees that they're actually never really affected by poor performance.

That's -- I don't think it made any difference that it was the City or it was a long-term lender in terms of acting differently. I suspect the long-term lender might have even been more in line with how the short-term lenders acted, and that was to basically, in my opinion, try to handcuff RTG in not giving them any default on the waivers, not allowing them access to funds after the long-stop date.

Now, things that we as the City, we wanted this project to progress, so we perhaps took a little -- we were easier on RTG than a long-term lender would have been. And I don't think being hard on them as a -- as the short-terms lenders were helped ---

MS. KATE McGRANN: Okay. So ---

MS. MARIAN SIMULIK: --- the situation. It actually probably made it worse.

MS. KATE McGRANN: You shared your view, but my question for you is, did the City consider whether removing the long-term lenders may have removed an influence that might contribute to the successful completion of the project? Was that something that the City turned its mind to and considered at the time it decided to execute the debt swap?

MS. MARIAN SIMULIK: No.

MS. KATE McGRANN: Okay. And I have promised you several times that we will talk about the reasons that the City executed the debt swap, and we are finally going to do that now.

So if we could pull up COW0525272 again, and this is the same July 26, 2017 PowerPoint that we were looking at before, 2017, my mistake.

MS. MARIAN SIMULIK: M'hm.

MS. KATE McGRANN: And we'll go back to Slide 4. We've looked at this a little bit already, but I want to look at it again now that we're talking about the rationale for doing the debt swap.

So the City wants to make some changes to the Stage 1 project aqreement for reasons that you've already explained, best interest of the City to take RTG out of the mix for the procurement for Stage 2, and the City also wanted the same maintainer all the way through, right?

MS. MARIAN SIMULIK: That’s correct.

MS. KATE McGRANN: Okay. And we've talked about this already, but under the project agreement related agreements for Stage 1, the lenders must consent in order to make the change to the project agreement, right?

MS. MARIAN SIMULIK: That’s correct.

MS. KATE McGRANN: Okay. And you mentioned this already, but let's look at it more clearly now. Point 3 on the slide says:

> "In order to take on the incremental maintenance, a life cycle cost associated with Stage 2, in accordance with the current lenders' arrangement, the long-term lenders would have required RTG to invest additional equity in the range of $50 million to $100 million with an internal rate of return as large as 13 percent in order to meet debt service resiliency requirements." (As read)

That’s your understanding of the state of play at the time?

MS. MARIAN SIMULIK: Yes.

MS. KATE McGRANN: And so this is what the agreements would have required as far as lender consent went, 50 to 100 million in equity?

MS. MARIAN SIMULIK: That's right.

MS. KATE McGRANN: Okay. And if we go over to the next slide, this explains in the first bullet point that going along with the requirements of the agreements, this injection of 50 to 100 million would have created affordability challenges for the City, right?

MS. MARIAN SIMULIK: Yes.

MS. KATE McGRANN: Okay. And it also says that upon further analysis, it was deemed to have minimal benefit to the City from a risk transfer perspective?

MS. MARIAN SIMULIK: That's correct.

MS. KATE McGRANN: So going along with the agreement requirements is not good for the City? It's expensive and the City doesn't get much out of it?

MS. MARIAN SIMULIK: That's correct.

MS. KATE McGRANN: And the City also looks at another way to potentially obtain the lender consent required by the agreements, and that's described in bullet point 2 here. It's described as ring fencing the long-term lenders from risks associated with Stage 2?

MS. MARIAN SIMULIK: M'hm. Yes.

MS. KATE McGRANN: And I'm not going to ask you to explain to me what that would have done, but my understanding at a high level is, it means that the City would effectively protect the lenders from the increase in risk that came with the introduction of the Stage 2 components; is that right?

MS. MARIAN SIMULIK: That's correct.

MS. KATE McGRANN: Okay. And it's ultimately determined that it's going to be -- it's going to have significant complications to implement this. Do you see that?

MS. MARIAN SIMULIK: Yes.

MS. KATE McGRANN: And it would erode the risk transfer. Do you see that?

MS. MARIAN SIMULIK: Yes.

MS. KATE McGRANN: And that's not great for the City, right?

MS. MARIAN SIMULIK: No, that's not.

MS. KATE McGRANN: And it would require time that extended beyond the MOU target completion date of February 2017, and I take it that was a problem for the City as well, right?

MS. MARIAN SIMULIK: Well, they had a timeline for Stage 2, and they were trying to adhere to it, so yes, they needed that MOU to be done by February 2017.

MS. KATE McGRANN: Okay. So it's not good for the City that this ring fence option would take longer?

MS. MARIAN SIMULIK: No.

MS. KATE McGRANN: So these are the two options that are available to get the lender consent required by the agreements?

MS. MARIAN SIMULIK: There's actually a third option, and I don't know why it wasn't presented. It was actually basically prepaying the debt back to the long-term lender, basically getting rid of the long-term lender debt by just paying them out. It's part of the credit facility; it has that ability in there. And we looked at that as well but that, again, was very expensive.

MS. KATE McGRANN: Is that referred to as a make-whole payment?

MS. MARIAN SIMULIK: Yes, it is.

MS. KATE McGRANN: I think we've heard – that's exactly what it is?

MS. MARIAN SIMULIK: M'hm.

MS. KATE McGRANN: And that's an option that's explicitly provided for in the agreements; right?

MS. MARIAN SIMULIK: That's correct. But, like I said, we analyzed that. I remember discussing it with the Manager of Treasury and just the way it's worded, how you basically discount it, the stream of payments that are left to buy them out always meant that we were paying for way more than we originally bargained for.

MS. KATE McGRANN: Okay. So just to summarize the options that we've discussed here, there's the increase in equity or the ring-fencing?

MS. MARIAN SIMULIK: That's correct.

MS. KATE McGRANN: Both of those two options were potentially obtained under consent?

MS. MARIAN SIMULIK: Now, ring-fencing was one that was – needed a lot more discussion with the long-term lender from what I understood, so there was no guarantee that the ring-fencing actually – that they ultimately would have agreed to it. We knew they would have – the very first one was their requirement, the 50 to 100 million in additional equities, so they would have agreed to that. Ring-fencing –

MS. KATE McGRANN: Okay, fair enough.

MS. MARIAN SIMULIK: - was iffy and the third one, the make whole option was allowed as per the project – or the credit facility I should say.

MS. KATE McGRANN: And once again we are headed in the same direction. So the first two options, they're – let's call them "paths to lender consent". I understand it wasn't guaranteed but those are two ways to get to the lender consent that's contemplated by the agreements; right?

MS. MARIAN SIMULIK: That's correct.

MS. KATE McGRANN: And then the make whole option is explicitly set out in the agreements but that's very expensive to the City, so that's not a great option for the City?

MS. MARIAN SIMULIK: That's correct.

MS. KATE McGRANN: Okay. So instead of taking on any of those paths that are envisioned by the agreements of the City entered into with RTG and others on this project, the City takes this different approach of the death swap. It's not contemplated on any of the agreements; right? That's not offered as an option or anything like that?

MS. MARIAN SIMULIK: Well, the other two, the first two – the only one that's actually offered as an option is that make whole option.

MS. KATE McGRANN: Okay. Well, let's think about that for a second though. The reason you're in this position in the first place is because when there's consent to a change in the project agreement is required; right?

MS. MARIAN SIMULIK: That's correct.

MS. KATE McGRANN: So the first two options, the paths to lender consent we've discussed, those – they follow from explicit provisions in the agreements; right?

MS. MARIAN SIMULIK: No, these were – there was no agreement that says you can do either of these. So these are innovative ways that the City came up with – well, the first one isn't even ours; the 50 to 100 million is what when we went to the lenders, that's what they said they wanted. That's – the second one is an innovative way that the City was contemplating is there – are there any other ways to do that? And then the make whole is actually described in the credit facility.

MS. KATE McGRANN: Okay. And I think we're talking about the same thing here. So the make whole is explicitly provided for in the credit facility and otherwise the City is having a conversation with the lenders because lender consent is required by the agreements in order to change the project agreement; right?

MS. MARIAN SIMULIK: That's correct.

MS. KATE McGRANN: I think you'll agree with me that what isn't contemplated is the City stepping into the shoes of the lender; that's an "out of the box" idea that the City came up through its Advisory; right?

MS. MARIAN SIMULIK: Well, the ring-fencing is also an out-of-the-box idea but, yes, it's a different way of approaching it, trying to get to the same objective, just a different route of getting there.

MS. KATE McGRANN: Okay. And we've talked about what this involves; the City takes on responsibility for making payments to the long term lenders; RTG now has to repay the City and as a result of the City stepping into the shoes of lenders, its now obtained a new suite of rights and powers that it didn't have before; right?

MS. MARIAN SIMULIK: That's correct. The long-term lender has rights and abilities that the City as a client didn't have.

MS. KATE McGRANN: Okay. And that includes the rights to more information about RTGs work on the project?

MS. MARIAN SIMULIK: Different information. Some of the stuff we received as the City they weren't receiving; they had a different technical advisor and so they had different reports that they were receiving, reports that bankers would be more interested in than typically the engineers.

MS. KATE McGRANN: So information about RTGs financial position, for example?

MS. MARIAN SIMULIK: That was in there, yes.

MS. KATE McGRANN: And that information is a benefit to the City; right?

MS. MARIAN SIMULIK: Well, it allows us to know how they're doing, like how bad they're suffering, because we knew they were suffering when they didn't make the first – the revenue service availability and then it just progressively got worse.

MS. KATE McGRANN: And that information in fact provides the City with some leverage over RTG, doesn't it?

MS. MARIAN SIMULIK: I don't know if it provides leverage, but it's information. I mean how would you use it against them?

MS. KATE McGRANN: Was it information that the City did not have before?

MS. MARIAN SIMULIK: It does mention the City didn't have it before but it's not necessarily something you can use against a person or a company, it's just information.

MS. KATE McGRANN: And it's information that RTG was not voluntarily sharing with the City?

MS. MARIAN SIMULIK: They were under no obligation to share that with us as – as "us" as the client. They were obligated to share it with us as the long term one.

MS. KATE McGRANN: Why don't we take a look at 512 of this slide deck here.

All right, we've arrived at side 12. If you look at this slide it's titled "Appendix "A" – Impacts to Stage One Construction" and you'll see that there's a shaded-in box at the bottom of the page here. It's got four bullet points in it.

MS. MARIAN SIMULIK: M'hm.

MS. KATE McGRANN: And if you look at the second bullet point this describes: "… having taken the long term lender's position the City will gain access to all lenders, technical advisor reports which will help the City understand the nature and extent of the delay", and I think you mentioned that. And it would be valuable in any negotiations to RTG. So that's an example of some information that the City gets by virtue of executing the death swap; that's valuable to it in negotiations with RTG; right?

MS. MARIAN SIMULIK: Yes, that's what it says; I don't know how it would be used in negotiations but that is what the document says.

MS. KATE McGRANN: Okay. So presumably who ever put this slide deck together believed that this was valuable information to the City in an negotiation context; right?

MS. MARIAN SIMULIK: That's correct.

MS. KATE McGRANN: And in addition to the information the City also obtains additional rights that the lenders had in the event of default, for example?

MS. MARIAN SIMULIK: That's correct.

MS. KATE McGRANN: And I think you'll agree with me that this additional information and these additional rights provide the City the leverage over RTG that it did not have before the death swap?

MS. MARIAN SIMULIK: I don't know how it provides additional leverage. That's – it definitely provides us with more information. I would question whether it actually provides us with additional leverage.

MS. KATE McGRANN: Okay. The City has got – it's got access to different rights including access to default options that occurred before the City's default options kick in; right?

MS. MARIAN SIMULIK: That's correct.

MS. KATE McGRANN: And those are rights that the City could choose to exercise?

MS. MARIAN SIMULIK: That's right. The City could but they never did.

MS. KATE McGRANN: And in your interview with the Commission you described, I think, that option or the nuclear option; do you remember that?

MS. MARIAN SIMULIK: Yes, it is a nuclear option if you basically step in and take over from them. It's not something RTG would want to see happening; it would basically ruin their credibility and the financial impact would be significant on all the other projects that they do.

MS. KATE McGRANN: Would it be fair to say it would be quite disastrous for them if the City exercised that option?

MS. MARIAN SIMULIK: Yes, it would. As the long term lender, if we had exercised it, yes.

MS. KATE McGRANN: And so whether or not you exercise it, the City now has the power to exercise that right; correct?

MS. MARIAN SIMULIK: The City does have the ability to exercise that right.

MS. KATE McGRANN: And I'm going to suggest to you that by virtue of obtaining that right, the City has obtained some leverage over RTG that it did not have before?

MS. MARIAN SIMULIK: Oh, okay, yes. If that is – if that's how you're defining that we have leverage, yes, we have the right to step in. Again, we never exercised that right.

MS. KATE McGRANN: Okay. And we've talked about this a little bit already but I just want to come back to it. The death swap, unlike the make whole payment, for example, is not an option that's set out in the project agreement or contemplated by any of the agreements; right?

MS. MARIAN SIMULIK: That's correct.

MS. KATE McGRANN: I'm going to suggest to you that the decision to execute the death swap is inconsistent with the approach that the City took to the agreements when it was in the City's interest to take a stricter approach to the agreements; do you agree with that?

MS. MARIAN SIMULIK: Could you state that again?

MS. KATE MCGRANN: Sure. Then maybe -- maybe I'll try to explain to you what I mean. So, your evidence is that whenever there was an issue that arose with RTG, the City stuck to the project agreement, went straight to the project agreement and followed it strictly, right?

MS. MARIAN SIMULIK: Tried to, yes.

MS. KATE MCGRANN: Here, the project agreement required the City to pay a make hold payment if it wanted to eliminate the lenders, correct?

MS. MARIAN SIMULIK: That was the -- in the credit agreement, that was an option that was available.

MS. KATE MCGRANN: Okay, and otherwise, the City is looking at obtaining the lender's consent, and we walked through the options, and you explained to me why those options were not palatable to the City?

MS. MARIAN SIMULIK: That's correct.

MS. KATE MCGRANN: Okay. So instead, the City goes outside what's contemplated by the agreements and just takes the lenders out of the picture completely?

MS. MARIAN SIMULIK: The City took action that was in the interest of the taxpayer, and ultimately, would make no difference to RTG, because the long-term credit facility was still in place. It's just the City was the long-term lender and not the band that had been there before. So, it was neutral to RTG, from our perspective. Nothing had changed for them. And the only thing ---

MS. KATE MCGRANN: Well, I'm going to ---

MS. MARIAN SIMULIK: --- that had happened was we were making certain that the taxpayer was not paying for something that was of no value.

MS. KATE MCGRANN: I'm going to suggest to you that it was not neutral to RTG from their perspective, and I think that you have already explained why, when you agreed with me, that the City obtained additional leverage over RTG when it stepped into the shoes of the lender, is that fair?

MS. MARIAN SIMULIK: That is fair.

MS. KATE MCGRANN: So, by doing the debt swap, obtaining this additional leverage, the City has changed the relationship that was originally contemplated when the parties entered into the project agreement, will you agree with that?

MS. MARIAN SIMULIK: The relationship has changed, yes.

MS. KATE MCGRANN: By virtue of the debt swap?

MS. MARIAN SIMULIK: Well, the debt swap, I think was after -- we did this in 2017. The relationship changed, ultimately, with the sink hole, and this I think they saw as not a positive thing. And so, it was just one more thing that RTG was not happy with.

MS. KATE MCGRANN: Those are my questions.

COMMISSIONER HOURIGAN: All right. Next up is RTG.

Okay. Go ahead, we can proceed.

--- CROSS-EXAMINATION BY MR. JEAN-CLAUDE KILLEY:

MR. JEAN-CLAUDE KILLEY: Good afternoon, Mr. Commissioner. Good afternoon, Ms. Simulik. I'm Jean-Claude Killey. I'm counsel for the RTG parties.

Ms. Simulik, did the City see itself as RTG's partner on this project?

MS. MARIAN SIMULIK: Yes, we did see ourselves as a partner. This we had entered into was, ultimately, a 30-some-year relationship with them, so yes.

MR. JEAN-CLAUDE KILLEY: And you had a common goal as well under this project agreement I take it, you would -- you would agree with that?

MS. MARIAN SIMULIK: Yes.

MR. JEAN-CLAUDE KILLEY: The goal being delivering a light rail transit to the residents of Ottawa?

MS. MARIAN SIMULIK: Yes, a reliable system that the residents could be proud of.

MR. JEAN-CLAUDE KILLEY: And as quickly as possible as well, that would have been one of the goals?

MS. MARIAN SIMULIK: Well, the timeframe was -- are you talking about the construction?

MR. JEAN-CLAUDE KILLEY: I just mean really high-level goals of a partnership between the two. Time was one of the elements of the high-level goals?

MS. MARIAN SIMULIK: Time is definitely one. RTG would have agreed with that as they had built into their model the interest charges on the short-term financing. So, the longer it took, the more interest that they had to pay. So, they were interested as well in making certain that it was a timely product.

MR. JEAN-CLAUDE KILLEY: Right. So, you said a few times in your interview with Commission counsel, and I think once or twice in your evidence this morning as well, and -- sorry, not this morning, but earlier this afternoon, that the City's approach to dealing with RTG was to stick as closely as possible to the project agreement ---

MS. MARIAN SIMULIK: That's correct.

MR. JEAN-CLAUDE KILLEY: --- is that fair?

MS. MARIAN SIMULIK: That is very fair, in substance, yes.

MR. JEAN-CLAUDE KILLEY: Contracts, of course, is a basic matter or an exchange of promises. Under this contract, the City's main promise was to pay money, is that fair? That was the main obligation of the City under the project agreement?

MS. MARIAN SIMULIK: Yes, they were designing it, they were building it, they were going to maintain it. Our job was to -- was just generally oversight, but then it was -- yes, to -- as per the contract, and the milestone payments, to pay them when, in fact, they reached a milestone.

MR. JEAN-CLAUDE KILLEY: Okay. And I think we're also agreed that whether the money came from the City or the federal government or the provincial government, this was all public money that the City was paying? All of the payments came out of public money?

MS. MARIAN SIMULIK: Oh, definitely. Yes.

MR. JEAN-CLAUDE KILLEY: All right. So, as a prudent custodian of public money, the City wanted to make sure it was paying no more than necessary?

MS. MARIAN SIMULIK: I wouldn't use the term "necessary". I would say we were paying as per the contract. So, the contract was all defined and that is how the payments were made.

MR. JEAN-CLAUDE KILLEY: Was your experience under the contract one where you did not encounter any ambiguity in any of the application of the contract terms to the situations you were faced with?

MS. MARIAN SIMULIK: Some of the milestone payments, the way they worded, were somewhat ambiguous and, in fact, we actually had, if I recall, a milestone payment where we actually went in and changed the wording of it, because what RTG had done and wanted to get paid for made more sense than the way the actual milestone had been defined in the project agreement.

MR. JEAN-CLAUDE KILLEY: Right. And that situation, if I'm correct, did not involve changing the amount of the payment?

MS. MARIAN SIMULIK: No, it didn't change the amount of the payment. It just changed the definition of what they had done to achieve it.

MR. JEAN-CLAUDE KILLEY: Right. And would it be fair to say that the City was interested in finding all of the penalties and deductions that it could arguably impose?

MS. MARIAN SIMULIK: The penalties and deductions -- are you referring to the -- after they didn't make revenue service availability?

MR. JEAN-CLAUDE KILLEY: Well, yes, but others as well, in advance of achieving revenue service availability. The City was interested in making sure that if there was a circumstance that triggered a penalty or a deduction, it would apply the penalty or the deduction?

MS. MARIAN SIMULIK: I don't know that there were any prior to revenue service availability, but as part of the contract, I know they had agreed to, for example, the Mobility Matters. So, they had said, you know, we're going to have this road closed for this many days and, if, in fact, they had it closed longer, then they had to pay a price for that.

MR. JEAN-CLAUDE KILLEY: Right.

MS. MARIAN SIMULIK: So, we kept track of those. So, yes, that those could have -- those could be applied should they in fact not be able to fulfill the timelines of the contract.

MR. JEAN-CLAUDE KILLEY: Yes. I -- are we not calling those penalties or deductions? Do they have another name?

MS. MARIAN SIMULIK: I'm -- I just call it the Mobility Matters. I'm sorry, I'm -- the only deductions are -- there were no deductions. They -- when they met the milestone, they got paid in full. So, there were no deductions. So, I guess maybe the term "penalties" might be more appropriate. So, if, in fact, they didn't achieve the Mobility Matters timelines, there were -- there were penalties that we would charge them. And then there was the liquidated damages, which came after revenue service availability, but prior to that, I do not believe there were any deductions.

MR. JEAN-CLAUDE KILLEY: Well, there were also penalties for missing revenue service availability dates?

MS. MARIAN SIMULIK: That's a liquidated damage. Are you referring to the $1 million?

MR. JEAN-CLAUDE KILLEY: Yes.

MS. MARIAN SIMULIK: Okay. My understanding is that is actually a liquidated damage, and every time they tell you they are going to get to revenue service availability and they don't, they are obligated to pay $1 million to the City.

MR. JEAN-CLAUDE KILLEY: So, the City wanted to make sure that it didn't miss any liquidated damages, any penalties, whatever we want to call them, before revenue service and after?

MS. MARIAN SIMULIK: Yes. We were experiencing significant costs as a result of not getting to revenue service availability. So we were looking for a way to make certain we could recover those costs from the way the contract had been written.

MR. JEAN-CLAUDE KILLEY: Well, whether you were or weren't incurring costs, if it was provided for in the project agreement, you wanted it, right?

MS. MARIAN SIMULIK: As I said before, we followed the contract that both parties had signed, and RTG knew what those penalties were. So, yes, we were looking to the contract to be our source of what we would recover from RTG in the event that they didn't meet the timelines.

MR. JEAN-CLAUDE KILLEY: Well, in fact, didn't the City want to pay the minimum amount possible under the contract?

MS. MARIAN SIMULIK: The minimum amount? Are you talking about the construction?

MR. JEAN-CLAUDE KILLEY: I am talking about, at the end of the day, when all is said and done, if the City can make sure it paid a smaller amount than a larger amount, that is the objective it wanted. I didn't think it was a controversial proposition. It is public money. It is a prudent thing to do; isn't that right?

MS. MARIAN SIMULIK: As stewards of the public purse, you are always trying to get the best value for the dollar that you spend. We had entered into a fixed price contract with RTG and for that fixed price, we were to get a transit system, a light rail system. So, yes, we were looking to get the best value for the dollar spent.

MR. JEAN-CLAUDE KILLEY: And can I take you to a portion of the transcript of your prior formal interview with Commission counsel?

MS. MARIAN SIMULIK: Certainly.

MR. JEAN-CLAUDE KILLEY: I believe the document number for that is TRN 42 and the portion I am going to take you to is page 85 and line 16. And, if it is the participant database version, it is 169 of the document. It is page 85 of the transcript, but 169 of the version in -- there we go.

So, the place I wanted to start was right here at line 7. And you are asked, “And what were the circumstances around that decision making?” And, actually, in fairness, if we just want to contextualize that, we will go to line 4. This is a decision about holding back money. We don’t need to go further up. You were being asked about the Mobility Matters issue that you just brought up here and the hold back for that. The subject of that is not really where I am going, but you were being asked about the decision-making process around holding back the money and you explain that you were enforcing the project agreement,

A. That was ultimately what we were doing. We had a mechanism within the project agreement to recover some of the costs because we had additional costs as a result of all the delays and so, the project had mechanisms …

And if we could keep scrolling down. It’s actually a lengthy excerpt in the hopes of not having to come back.

Q. And so, if there was a delay or an issue with RTG’s performance, was the City’s practice to go to the project agreement to determine, like, if there was a remedy?

A. Yes, first and foremost, that was what we were trying to follow or following the project agreement as closely as possible.

Q. Do you remember or recall the amount that was held back as a result of the delay in invoking the Mobility Matters schedule?

A. No, I’m sorry, I don’t. I think it was taken off the final payment.

Q. Do you remember who was involved in that decision?

A. It was the Executive Steering Committee. We discussed this is what the payment is, and this is as per the project agreement. And so, there was even, I think it was, a million bucks every time that they didn't meet revenue service availability. That was taken off. Anything else that was in the project agreement, as per, as defined in there.

Q. And would you report to FEDCO on those reductions based on delays or whatever remedies were available in the project agreement?

A. I believe those reported, yes, when at that point in time Council and FEDCO were very interested in what was being paid out to RTG. And so, they would have been informed as to the deductions that were made from the payment to them. And so, obviously, the mayor, who was sitting on FEDCO, would have been aware of those deductions as well. I believe so.

And then we're almost done. One more question, one more answer,

Q. Do you recall any of the feedback from the members of FEDCO on the City's decision to invoke different schedules of the project agreement to make those deductions?

A. There was a desire from Council to actually hold back, or FEDCO, to hold back more, but we were privy. We were telling them that the project agreement had to be adhered to, and so these were the mechanisms in the project agreement, and so that was the limit we could do, and they would put themselves at risk if they, in fact, veered from it and decided to do something punitive.

MS. MARIAN SIMULIK: Mm-hmm.

MR. JEAN-CLAUDE KILLEY: So, FEDCO, could you explain, for those of us who may not know, what is FEDCO?

MS. MARIAN SIMULIK: FEDCO stands for Finance and Economic Development Committee. They are a subcommittee of Council and they deal with a number of areas of the city. One of them was this light rail project was their responsibility. So, they approve they approve it, they deal with the reports, and then everything they decide flows up to Council for full approval by Council.

MR. JEAN-CLAUDE KILLEY: And so, as a Council committee, the committee members are councillors?

MS. MARIAN SIMULIK: They all are councillors. That's correct.

MR. JEAN-CLAUDE KILLEY: I imagine as a Treasurer, you would attend FEDCO meetings?

MS. MARIAN SIMULIK: Yes, I attended every FEDCO meeting.

MR. JEAN-CLAUDE KILLEY: From the evidence you gave at your formal interview, are we right in concluding that the Executive Steering Committee that you sat on for this project was under pressure from City government, in particular, FEDCO and Council that it was a subcommittee of, to pay as little as possible to RTG?

MS. MARIAN SIMULIK: No.

MR. JEAN-CLAUDE KILLEY: Your evidence at your formal interview was that they wanted to withhold more and you were telling them that they were not able to.

MS. MARIAN SIMULIK: And they ---

MR. JEAN-CLAUDE KILLEY: That is not pressure to pay as little as possible?

MS. MARIAN SIMULIK: No. And we told them, this is your project agreement and you can't withhold more than you are allowed to in the project agreement. So, we were under no pressure to find ways to hold back more. We had already made the decision as the Executive Steering Committee that we were following the project agreement, and that is the line we came in with to FEDCO to help them understand.

They were mad. They were really mad that RTG had not met the deadlines and was basically giving almost a cold shoulder to the City in terms of actually saying when they would be able to get this done. And so, they were looking for ways to try to add more onto the deductions, but we held the line. And so, no, we weren't under pressure from them. And we know, they let off a lot of steam at committee, but ultimately, it is the majority that decides. So, even if there were one or two who wanted to do more, the majority would side with the position that the administration was taking. And, in fact, they did. It was there for them for information, not really for decision making, but they agreed with our approach to it.

MR. JEAN-CLAUDE KILLEY: So, you weren't getting pressure from them because they were satisfied that you were doing all that you could financially?

MS. MARIAN SIMULIK: They were not happy, but they were -- they knew, ultimately -- they're reasonable people. They understood, you know, you can't ask for more than what's in your contract.

(SHORT PAUSE)

MR. JEAN-CLAUDE KILLEY: Do you recall any occasion when the City decided not to enforce a financial consequence to it under the contract?

MS. MARIAN SIMULIK: I don't -- I don't recall any.

MR. JEAN-CLAUDE KILLEY: And not belabour the point, just to sort of frame the question, you -- when an issue arose, I think you've told us, you would turn to the project agreement and see what consequence flowed under the project agreement?

MS. MARIAN SIMULIK: Not so much consequence, but process. The whole process was defined. If there was a dispute, there was a whole process for escalation and how to deal with a dispute. But, to your point, there was also a number of penalties put in there should they not in fact meet the dates that they had agreed to.

MR. JEAN-CLAUDE KILLEY: Sure. And that's fine. I didn't mean you would -- you -- that's perfectly what I meant. What I meant, really, was that you would turn to the project agreement to see what the project agreement about the situation and do whatever it said. That's the idea ---

MS. MARIAN SIMULIK: Yes.

MR. JEAN-CLAUDE KILLEY: --- and that was the City's approach?

MS. MARIAN SIMULIK: The City's approach was to try to follow the project agreement as closely as possible.

MR. JEAN-CLAUDE KILLEY: And in those answers, and in the answers you gave in your formal interview, I didn't perceive in all the decision-making process an opportunity for consideration of the larger goals of the project other than how they were reduced into the project agreement. Is that fair?

MS. MARIAN SIMULIK: Well, when a project agreement encapsulates how we are to achieve our goal, it provides protection, though, for the City in certain -- if, in fact, the contractor doesn't achieve its goal. But I guess I'm really not certain what you're asking.

MR. JEAN-CLAUDE KILLEY: Fair enough. You were not, when you were making decisions about RTG, ever thinking, "How is this going to impact the delivery of the light rail train?" other than by looking at the project agreement and seeing how it had been agreed to ahead of time? Is that fair?

MS. MARIAN SIMULIK: For the disputes, no. A lot of times -- and I'll give you an example. We were looking at this in terms of how this would achieve the overall objective. When a sinkhole happened, we entered into a standstill agreement with them which basically said, "We're not going to come after you. You're not going to come after us. We're just going to basically get this dealt with and we will wait until, you know, the dust is settled, literally, and go back to then see who actually is responsible. We'll do our reports on -- you know, our root cause reports and stuff like that, and going to the insurance, et cetera, et cetera."

So when things like that came up, we were looking at, "What's the impact of this on the overall project?" But there were -- and I would -- maybe 100 is too many, but there were dozens and dozens of disputes from variations, and all kinds of things like that, which the City would -- would follow the process that was outlined in the document.

Going to -- for example, going to a standstill agreement with them when the sinkhole happened, that's not outlined in the project agreement, but that's something that the City did because we wanted this thing to proceed with as little a disruption as possible.

MR. JEAN-CLAUDE KILLEY: Fair enough, and that's a good example. Is that the only example of the City and RTG parking a dispute for the good of the project that you can think of?

MS. MARIAN SIMULIK: That's the only one I'm familiar with, but these aren't necessarily things that I would be -- I mean they would have probably gone to executive steering committee but, over the course of a decade, I don't remember any others.

MR. JEAN-CLAUDE KILLEY: Okay. I would like to turn you to a document that Commission counsel showed you in your examination. It's COMH1.

MS. MARIAN SIMULIK: Ah, yes.

MR. JEAN-CLAUDE KILLEY: I'm sure you recognize this at this point?

MS. MARIAN SIMULIK: Yes, I do.

MR. JEAN-CLAUDE KILLEY: So this letter addresses two issues, and I'll deal with them in sequence. So the first one is sort of headlined in Mr. Wardle's letter as allegation that the City refused to consent to a reduction in liquidated damages as between OLRTC and RTG.

MS. MARIAN SIMULIK: Correct.

MR. JEAN-CLAUDE KILLEY: And so I just want to ask a few things about that. First, so we understand the issue, and make sure I understand the issue, the -- RTG was entitled to levy liquidated damages against its subcontractor OLRTC?

MS. MARIAN SIMULIK: That's correct. You're referring to the very first one that -- I wonder if they could actually move this ---

MR. JEAN-CLAUDE KILLEY: Yeah.

MS. MARIAN SIMULIK: --- up a bit so we could actually see the very first -- oh, there you go, okay.

MR. JEAN-CLAUDE KILLEY: Yes, yes, that's helpful. Thank you.

MS. MARIAN SIMULIK: Yes.

MR. JEAN-CLAUDE KILLEY: And so -- again, so we're on the same page about the issue, so RTG is entitled to level liquidated damages against OLRTC because of its contract with OLRTC?

MS. MARIAN SIMULIK: M'hm, correct.

MR. JEAN-CLAUDE KILLEY: Under the project agreement, the City has no say in that ---

MS. MARIAN SIMULIK: No.

MR. JEAN-CLAUDE KILLEY: --- correct?

MS. MARIAN SIMULIK: And as credit facility, we do.

MR. JEAN-CLAUDE KILLEY: Right. The City has to be asked to consent to this because it's the lender as well, correct?

MS. MARIAN SIMULIK: That's correct.

MR. JEAN-CLAUDE KILLEY: Okay. And you mentioned, I think, in your examination with Commission counsel that the City tried to keep its roles as lender and owner separate.

MS. MARIAN SIMULIK: Yeah, we tried as much as possible, yes.

MR. JEAN-CLAUDE KILLEY: And I think you also said you were the person at the City primarily in charge of keeping those roles separate?

MS. MARIAN SIMULIK: Yes, because the credit committee, which were the ones who would have dealt -- actually, they dealt with both of these issues -- reported to me. So when they made a decision, they cc'd me on this and ---

MR. JEAN-CLAUDE KILLEY: So in terms of the -- when you were asked by Commission counsel about additional information -- you said, "different information, et cetera" -- you couldn't really keep that separate?

MS. MARIAN SIMULIK: I'm sorry, could you rephrase that?

MR. JEAN-CLAUDE KILLEY: The information you got as lender versus the information you got as owner, you couldn't keep that separate? You knew it?

MS. MARIAN SIMULIK: To a large extent, we could because the only ones who had access to that information were members of the credit committee. I would have -- I actually didn't have access to it. I would have had to go to one of them to get access to it.

MR. JEAN-CLAUDE KILLEY: Okay. I -- if we could scroll down to the second page, the final paragraph here, Mr. Wardle says he's reviewed the email chain with Ms. Simulik and she advises it refreshes her memory that, in 2018, RTG did seek consent from senior lenders to reduce liquidated damages paid by OLRTC to RTG and the City advised the Administrative leverage approved the request.

MS. MARIAN SIMULIK: That's correct.

MR. JEAN-CLAUDE KILLEY: Antonio Estrada was CEO of RTG at this period of time. He will say that first of all, before RTG would send a letter like this, it would often have an informal conversation with the administrative agent and sometimes with the lenders directly to let them know the letter is coming, to find out what they think about it.

Do you agree that that sometimes took place, or do you not recall any such informal conversations taking place?

MS. MARIAN SIMULIK: I don't recall any such informal conversations taking place.

MR. JEAN-CLAUDE KILLEY: Mr. Estrada will say that he remembers speaking to you, specifically, about this specific issue in an informal conversation before sending the letter and that you said the City would not consent to RTG reducing the liquidated damages it imposed on OLRTC.

Do you have any recollection of that?

MS. MARIAN SIMULIK: No, I don't, and in fact, we did actually agree to reducing the liquidated damages, so it's contrary ---

MR. JEAN-CLAUDE KILLEY: Mr. Estrada left the project shortly after and doesn't actually -- I believe he doesn't know what the end result was. He remembers that conversation, however.

MS. MARIAN SIMULIK: Okay.

MR. JEAN-CLAUDE KILLEY: So I wanted to make sure to put it to you before he testifies.

MS. MARIAN SIMULIK: I do not remember that. I do not remember that conversation, and I would be surprised if he would have a discussion with me, because I actually wasn't on the credit committee.

MR. JEAN-CLAUDE KILLEY: Okay. Just one last small set of questions about the second item in the letter. So if we can see the headline there, the allegation that the City refused to provide consent to waivers of default in connection with the draws. And Mr. Cosentino was asked a bit about that yesterday. You were asked a bit about it by Commission counsel.

So I'm going to skip some of the preliminaries, but to frame my questions, there was a meeting at the MSF. You remember being there. That meeting, we know from this correspondence was on January 17, 2019, and the letter, that request from RTG that requests the waiver is on January 4th, 2019.

So if we could scroll to the 18th page of the PDF, and if -- maybe if we could straddle 17 and 18, just so we can see the header of the email?

MS. MARIAN SIMULIK: M'hm.

MR. JEAN-CLAUDE KILLEY: So the meeting's been set for January 17th. Geoff Gilbert emails a number of people, including you and Mr. Manconi and a bunch of others to say the meeting's -- they sent an invite for January 17:

> "The visit will be in three parts, the site visit, a lunch, formal meeting between the lenders and RTG. I do not have the detailed agenda, but I'll send it along as soon as I do. I suspect the meeting portion will be scheduled for about an hour." (As read)

So just before I forget, this email was sent by Mr. Geoffrey on January 14th. Do you remember when the City decided that it would consent to the waiver that RTG was requesting?

MS. MARIAN SIMULIK: Sometime in between the receipt of the letter and this meeting.

MR. JEAN-CLAUDE KILLEY: Just let me ask you this, do you recall the City changing its mind, originally refusing and the agreeing, or ---

MS. MARIAN SIMULIK: This ---

MR. JEAN-CLAUDE KILLEY: --- as far as you remember ---

MS. MARIAN SIMULIK: To this request?

MR. JEAN-CLAUDE KILLEY: Yes, to this request?

MS. MARIAN SIMULIK: No. No. No, this request was -- quite frankly, was in the City's best interest to approve. We would never have said, "No, they can't have access to more credit." They needed the money. So it's counter-intuitive for the City to even think about denying this request.

MR. JEAN-CLAUDE KILLEY: Well, yeah, I think RTG would agree with you.

So let me just finish the email then, and I'll be able to conclude my questions there.

So the next paragraph as well:

> "I suspect none of us actually want to attend the site visit. Brian, Marian, and I were wondering if strategically, it might make good sense to send someone along as -- from the City as a Debbie Downer to point out the things that aren't working or that we are worried about, look over there as all of the plywood that may need to be replaced. My thought was that Steve Cripps and/or Michael Morgan. Please let me know your thoughts." (As read)

Brian in that sentence, is Brian Guest?

MS. MARIAN SIMULIK: That’s correct.

MR. JEAN-CLAUDE KILLEY: Marian is you?

MS. MARIAN SIMULIK: That’s correct.

MR. JEAN-CLAUDE KILLEY: And the strategy that you were pursuing here was to point out that a lot still needed to be done before revenue service?

MS. MARIAN SIMULIK: Yes. This was a dog and pony show that RTG were putting on for the lenders, trying to put on the -- excuse the expression -- lipstick on a pig -- to make it look like things were progressing and they had no need to worry. It obviously worked because they denied them access to more credit.

But this was to sort of counteract what we thought RTG would do with the lenders, which was to say, you know, "Everything's wonderful," and we want to say, "No, everything's not as wonderful," you know, "you should be concerned."

But they obviously were concerned.

MR. JEAN-CLAUDE KILLEY: And the City wanted to correct that impression with the lenders in its capacity as lender or in its capacity as owner?

MS. MARIAN SIMULIK: As capacity as of owner. We were looking for the lenders to understand the situation and to the extent possible, put pressure on RTG. So ---

MR. JEAN-CLAUDE KILLEY: But you were at the meeting because you were a lender?

MS. MARIAN SIMULIK: Yeah, but we were -- this was -- Transit people were invited to this as well. It wasn't just lenders that where there. There was RTG, there was also Transit people at the meeting.

MR. JEAN-CLAUDE KILLEY: And it was in the City's interest that RGT get access to credit?

MS. MARIAN SIMULIK: Yes, it was.

MR. JEAN-CLAUDE KILLEY: But you wanted to make sure the lenders knew that there were problems with the project?

MS. MARIAN SIMULIK: Yes.

MR. JEAN-CLAUDE KILLEY: Okay. Those are all my questions for you, Ms. Simulik. Thank you.

COMMISSIONER HOURIGAN: All right. Thank you. We'll take the afternoon break, 15 minutes.

THE REGISTRAR: Order. All rise. The Commission will recess for 15 minutes.

--- Upon recessing at 4:15 p.m.

--- Upon resuming at 4:42 p.m.

THE REGISTRAR: Order. All rise.

The Commission has resumed. Please be seated.

--- MARIAN SIMULIK, RESUMED:

COMMISSIONER HOURIGAN: Okay. The next party to examine is Infrastructure Ontario.

MR. DEVON JOHNSON: Good afternoon. Devon Johnson for Infrastructure Ontario. We have no questions for this witness. Thank you.

COMMISSIONER HOURIGAN: All right. Thank you.

The next party is STV.

MR. MICHAEL O'BRIEN: Good afternoon. Michael O'Brien for STV. We also have no questions for this witness.

COMMISSIONER HOURIGAN: Next is the Province of Ontario.

MR. ADAM MORTIMER: Good afternoon. Adam Mortimer with the Province of Ontario. We have no questions for the witness.

COMMISSIONER HOURIGAN: Next is Amalgamated Transit, Union Local 279.

--- CROSS-EXAMINATION BY MS. JAIME LEFEBVRE:

MS. JAIME LEFEBVRE: Good afternoon, Ms. Simulik. My name is Jaime Lefebvre. I just want to make sure that I am being heard okay. Can you hear me okay?

MS. MARIAN SIMULIK: Yes.

COMMISSIONER HOURIGAN: We can hear you fine.

MS. JAIME LEFEBVRE: Great, thanks.

You testified today that it cost the City more to utilize private financing. Would you say that's accurate?

MS. MARIAN SIMULIK: That is correct.

MS. JAIME LEFEBVRE: And you testified that was because the risk balanced out the cost the City would incur to privately finance the project?

MS. MARIAN SIMULIK: Are you asking why we used private financing?

MS. JAIME LEFEBVRE: Yes.

MS. MARIAN SIMULIK: Or what it achieved?

MS. JAIME LEFEBVRE: Yes.

MS. MARIAN SIMULIK: Okay. We used private financing. Number one, it was a requirement of our contractual or the contribution agreement with the province that we look at an alternative financed project, and they were keen on making certain that there was no value for money left on the table. And so we then proceeded to analyze the options. And yes, you balance it between how much extra it costs you between what's the risk that's being transferred.

MS. JAIME LEFEBVRE: Okay. And so as a part of that agreement or requirement by the Province that you look at an alternative project, was there any requirement that you decide on a P3 oriented project?

MS. MARIAN SIMULIK: It didn't specifically state that we had to end up with that. We had to go through an alternative finance project screen and when asked -- because we were at one point considering not using private sector financing. When we asked both province and the federal government, the Province said they would question whether there was any value for money left on the table as the result of looking at that private sector financing screen.

MS. JAIME LEFEBVRE: Okay. That is a great segue into what I wanted to understand a little bit more.

What did you take to understand when the Province said that they would question if you didn't go with a P3 model if there was any, as you say, value for money added?

MS. MARIAN SIMULIK: Okay. Any value left on the table.

MS. JAIME LEFEBVRE: Any value left on the table.

MS. MARIAN SIMULIK: And that we hadn't been able to ---

MS. JAIME LEFEBVRE: Yes.

MS. MARIAN SIMULIK: I took it to understand that they basically -- that's what they wanted to see and our contribution might be at risk if in fact we didn't go with the model or the alternative financing that they were so interested in.

MS. JAIME LEFEBVRE: Okay. Can we just back up for a second as well because you mentioned that you were at one point looking at not using a P3 model?

MS. MARIAN SIMULIK: No, not -- we were still going to do a P3 but there would have been no financing component.

MS. JAIME LEFEBVRE: Oh, I see. Okay.

MS. MARIAN SIMULIK: Yeah.

MS. JAIME LEFEBVRE: Okay. And so would that be one of the options, for example, that Deloitte had provided an analysis on?

MS. MARIAN SIMULIK: Yes, they did.

MS. JAIME LEFEBVRE: Okay. Okay. All right.

And so you said that the contribution, the province's contribution might be at risk. Can you help me understand a little more specifically what you mean by that?

MS. MARIAN SIMULIK: Ultimately, I guess they could have said -- they could have pulled back their contribution and said they wouldn't finance it. So yeah, that 600 million was dependent upon them being in agreement or with the contribution agreement that we had entered into. So yeah, I think it was at risk,

MS. JAIME LEFEBVRE: Okay. And was there any direct discussions about whether that was at risk or was this something you inferred in the process of negotiation and/or interpretation of the agreement?

MS. MARIAN SIMULIK: So we had already had one project cancelled because of government interference. So we were keen to make certain that both the federal and the provincial governments were willing to go forward with this project as envisioned. So we were trying to make certain we were meeting their requirements. So when we were discussing whether we would in fact have a financing component, we did approach them and they said they would look askance if there in fact there was value for money left on the table. And that would have included any financing component.

MS. JAIME LEFEBVRE: Okay.

MS. MARIAN SIMULIK: So was there a specific “Will you cancel our 600 million if we don’t have a financing component in this?”

The answer is “No,” but I think in an abundance of caution and based on our previous experience we were looking to make certain both contributing parties were satisfied with the project.

MS. JAIME LEFEBVRE: And as you just said in your testimony though, all of the projects that you looked at or project approaches were P3 projects? Is that fair to say?

MS. MARIAN SIMULIK: No. Actually I believe the Deloitte analysis started out with the City going it alone, you know, the City being the designer. I don’t think we could have been the builder but definitely maintain it and operate it. So a traditional City project where we basically -- we come up with the design and then we go out to market and we contract with somebody to build it. And then we own it and we run it. And we finance it. So that model was actually looked at, by the way.

MS. JAIME LEFEBVRE: Okay. But ultimately it was the City’s decision to go with the DBFM project approach?

MS. MARIAN SIMULIK: Yeah. The DBFM, based on basically our lack of experience in building a train system. I mean, we had the pilot project but that was a track that was already existing and trains that were already purchased and there. So we had a limited experience in this area and we needed the support of experts.

MS. JAIME LEFEBVRE: All right. Well, thank you very much, Ms. Simulik. I think that’s the end of my time.

COMMISSIONER HOURIGAN: Thank you, counsel. Transportation Action Canada.

<u>--- CROSS-EXAMINATION BY MR. DAVID JEANES:</u>

MR. DAVID JEANES: Yes, thank you. Ms. Simulik, I have five minutes, so I just have a few questions. The first is the original estimate which came from the Rail Implementation Office, $2.1 billion in 2009 dollars, which was the estimate after the completion of the environmental assessment, which of course had a lot of public involvement, that's correct?

MS. MARIAN SIMULIK: I believe the original from the environmental assessment was $1.4 billion.

MR. DAVID JEANES: Yes, but it had increased to $2.1 billion by the time -- that was a number that was in the document that was presented during Mr. Jensen's testimony yesterday.

MS. MARIAN SIMULIK: Yes.

MR. DAVID JEANES: But my question is, if that was the amount that RIO thought the project would cost, wouldn't keeping it at a cap of $2.1 billion actual dollars really be a significant cut in the budget? Because if you look at that amount in 2009 dollars, say the payments had all been made 10 years later in 2019, it would have been equivalent to about $2.5 billion. You know, there is an increase in that amount that is implied as you delay payment. So, unless the money was all spent in 2009, spending the money in later years, but staying within $2.1 billion, would in fact have been a reduction.

MS. MARIAN SIMULIK: So, the original $2.1 didn't actually have any private sector financing in it, so those interest payments on what they would cost, it was all going to be City funded, so…

MR. DAVID JEANES: Yes. I understand that, yes. But ---

MS. MARIAN SIMULIK: So, when we do -- on a City project, when we go out to Council and say it's going to cost you $100 million, if we borrow that $100 million, we don't add in the interest costs that we pay over the life of it into the capital costs that Council approves.

MR. DAVID JEANES: Okay.

MS. MARIAN SIMULIK: They approve $100 million in its debt, and that's what this was, the $2.1.

MR. DAVID JEANES: Okay. That's fine. Now, you did talk about quite a number of things which were done to reduce the costs, and some of these were done before getting into the bid process, such as changing the alignment to be under Queen Street, which you said was a significant cost saving, for reasons which have been discussed.

It was also mentioned reducing the number of escalators from the original plan, shortening the tunnel by not putting the University of Ottawa station underground, which was a significant shortening from about 3.2 kilometres down to 2.5. Moving the Rideau Station out from under the Rideau Canal in order to reduce the costs there. And there was also a mention of shortening platforms, though the evidence yesterday suggested that that proposal may in fact have come from RTG as part of their value engineering, perhaps.

Now, you said those changes actually made it a better system. I wonder, though, if some of them also may have reduced future system capacity. For example, the reduction of platform length down to 90 metres when RIO had originally been proposing 120-metre platforms for 2021 needs and 150-metre platforms for 2031 needs. Was there a consideration that, in fact, these cost savings might have a negative effect on the future system capacity?

MS. MARIAN SIMULIK: You would have to speak to the engineers about that. I was never privy to any discussions about that.

MR. DAVID JEANES: Okay. Well, I will go to the affordability cap. There's been some discussion of this already, whether it might have limited innovation by, for example, preventing suppliers from bidding technically superior solutions that were above the affordability cap. And I wonder whether that may, in fact, although you said you had a lot of discussions with the suppliers, whether that affordability cap may, in fact, have limited their willingness to really speak out if they saw problems?

MS. MARIAN SIMULIK: I can't speak to what the proponents would have felt or not. They bid, and they bid under the affordability cap, so hopefully they were confident and knew what they were doing when they put their bids together. So, I can't speak to whether they felt they couldn't speak out.

MR. DAVID JEANES: Okay. Well, we are also seeing a lot of suggestions that the City was perhaps over specifying the project and may have selected the wrong type of vehicle by choosing low floor light rail for what was really more like at least a medium capacity fully segregated metro system, and I'm just wondering whether the affordability cap may have been a factor there.

I don't know if I have time for one more question perhaps?

COMMISSIONER HOURIGAN: Go ahead.

MR. DAVID JEANES: Yes. You mentioned that the Executive Steering Committee for Stage 2 decided against having a different maintenance contractor and against having a different vehicle type. Do you recall, was that a recommendation from technical experts that there not be more than one vehicle type? I've seen, for example, the Houston light rail system, and the Calgary system, which now have both Siemens and CAF vehicles in mixed operation, and I am just wondering why the City of Ottawa made that decision that it couldn't have -- in future, that it couldn't perhaps a better vehicle at a more competitive price?

MS. MARIAN SIMULIK: I don't think it was a question of that they couldn't have it, but I think their preference, I think the preference was to have one maintenance provider, one type of vehicle. And was there a technical recommendation? I don't recall there being one, but honestly, I do not recall that discussion at all at the Executive Steering Committee.

MR. DAVID JEANES: Okay. That's fine. Is my time up now?

COMMISSIONER HOURIGAN: It is. Thank you very much.

MR. DAVID JEANES: Thank you.

COMMISSIONER HOURIGAN: All right. The last -- or next is counsel for the City.

--- CROSS-EXAMINATION BY MR. PETER WARDLE:

MR. PETER WARDLE: Thank you very much, Mr. Commissioner. Ms. Simulik, I am going to start by just asking you to step backwards for a minute. Perhaps you could just tell the Commissioner your formal training?

MS. MARIAN SIMULIK: My formal training?

MR. PETER WARDLE: Yes.

MS. MARIAN SIMULIK: I have a Masters in Business Administration, Bachelors in Education, and I am a Certified Management Accountant.

MR. PETER WARDLE: Thank you. And during your period of time as Treasurer for the City of Ottawa, who did you report to on a regular basis?

MS. MARIAN SIMULIK: The City Manager.

MR. PETER WARDLE: And what was your interaction with the political layer, the mayor and Council? How would you describe the level of your interaction, and when did you interact with the political layer?

MS. MARIAN SIMULIK: Most of the interaction with the political layer was at FEDCO. That's the committee that I reported to. But I also had to attend other committee meetings. So, you would occasionally have meetings with the Chair to discuss an agenda item. The mayor was the Chair of FEDCO, so there would occasionally be a briefing required with the mayor's office. But typically, the point of interaction at the political and the administrative level is really at the City Manager's office. He would have the most to do with the mayor's office.

MR. PETER WARDLE: And for a transit project of this size, what were the sources of funds that the City had to pay for the projects?

MS. MARIAN SIMULIK: Well, we had, as discussed *ad nauseum* on this, was the provincial and federal funding for it. In addition to that we would have had City funding, which would have been raised from a combination of taxes. Transit is its own separate tax, so the funds we received from transit taxes can only be used for transit purposes. Then there would have been a portion of the fare gate that goes towards supporting transit. There actually is no -- the fare gate money ends up actually totally subsidizing the operations. It doesn't -- there is no expert to flow with the capital, but potentially there could be in the future.

Development charges, transit has its own development charge. So, again, those are monies that we raise from new construction and those can only be used for transit purposes. And then the last one would be debt, and we would issue debt and it would be either repaid back from transit taxes or transit development charges, or -- oh, I'm sorry, I missed one. Then we actually had gas tax. We have provincial and federal gas tax, and those are, by Council direction or authority are used strictly on transit works.

MR. PETER WARDLE: We heard some evidence when you were questioned by Ms. McGrann this afternoon that there was a budget set for this project in late-2009 of $2.1B. Do you recall that?

MS. MARIAN SIMULIK: Yes, I do.

MR. PETER WARDLE: And do you recall your evidence that that did not take into account inflation, correct?

MS. MARIAN SIMULIK: That's correct.

MR. PETER WARDLE: And Ms. McGrann took you to changes that were made in that budget over the next couple of years, and she took you to a document which indicated that there was -- between inflation and construction financing, there was $600M that needed to be added on or accounted for from the original budget set in late-2009. Do you recall that?

MS. MARIAN SIMULIK: I do.

MR. PETER WARDLE: And was one of the ways that money was found, the shallowing of the tunnel?

MS. MARIAN SIMULIK: Yes, it was.

MR. PETER WARDLE: Okay. And I just want to take you to this quickly, COW000068. All right, and if we -- this is a report to Fed Co. in March of 2012, and I'd like to take you to pages 153 and 154 of the printed text. All right, and if we go down to -- you'll see there's a description here starting at the top of the page. If we go to -- if we just up this page, you'll see there's a description of some of the history and the 2009 budget in 2009 dollars of $2.1B. And then you'll see there's a reference to the contributions from the two levels of government ---

MS. MARIAN SIMULIK: M'hm.

MR. PETER WARDLE: --- and then a reference to two reports in May and July of 2011. Do you see that?

MS. MARIAN SIMULIK: Yes.

MR. PETER WARDLE: And if we keep going -- and there is a reference in the next paragraph to the $400M of long-term financing. And that, Ms. McGrann asked you some questions about, and I'll come back to that. I just want to go over the next page of the document. So you'll at the top of the page -- and perhaps we could just start at the bottom of the previous page, just so you have the context, Ms. Simulik. So it says:

> "In addition to the procurement element to the July 2011 report, Council also approved a modified project design that eliminated the previously approved cross-country alignment replacing it with a tunnel and station configuration along Queen Street. This modification allowed the project to remain within the $2.1B project budget including inflation. In real terms, this in an overall budget reduction of more than $450M from the original estimate." (As read).

Do you see that?

MS. MARIAN SIMULIK: Yes, I do.

MR. PETER WARDLE: So is it the case, first of all, that the $600M that Ms. McGrann referred you to was largely accounted for by the changes to the alignment and the tunnel configuration and station configuration.?

MS. MARIAN SIMULIK: Yes, it is.

MR. PETER WARDLE: And is -- do you have view on whether those modifications, and particularly the shallowing of the tunnel, we of benefit to transit riders in the City of Ottawa?

MS. MARIAN SIMULIK: Yes, I believe that the shallowing and, actually, even the route alignment made the system better for the actual users as opposed to taking, I think it was, four of five escalators down to the platform level, and the most they would be taking was two. So lots of people don't like to go down that deep. It gets kind of creepy. So it actually was of benefit to the users. It put alignment along streets that people use as opposed to sort of popping up all over the place. It definitely made the system better.

MR. PETER WARDLE: And you were asked some questions, going back -- we'll take this down now, please. You were asked some questions in connection with the 2009 documents, and this was COW0000027, about the fact that the construction budget was a high-level Schedule D budget. Do you recall that?

MS. MARIAN SIMULIK: Yes, I do.

MR. PETER WARDLE: And in your experience as Treasurer of the City of Ottawa, is it common or uncommon to have that level of budget -- Schedule D budget at early stage of a project's life, at the very beginning of preliminary design?

MS. MARIAN SIMULIK: It's not uncommon at all. The engineers typically -- that's -- will start with a D, an environmental assessment level D, and have -- and continue to go from the side. And then, as they progress the details of the design, they will -- that's -- some of the contingency moves over and, hopefully at the end, there's contingency left. But it may not be. It could be all brought over into the design portion.

MR. PETER WARDLE: And are you comfortable, from your involvement as City Treasurer, that in the two-year period between 2009 and 2011 when the project was approved by Council, that appropriate steps were taken by the Rail office and its technical advisors to ensure that the budget was enhanced to the extent necessary?

MS. MARIAN SIMULIK: That was enhanced?

MR. PETER WARDLE: That the budget was taken from a high-level Schedule D budget to something with more certainty and precision.

MS. MARIAN SIMULIK: Yes, I am confident in that only because I know that during the in-bid period, they had commercially confidential meetings with the three proponents and they had design review presentations, and so they were seeing the continual evolution of the design bringing it from, basically, a D to an A in terms of level, and they were able to respond to all kinds of questions that would come about, you know, "Could we have flexibility to do this? Could we substitute this for this?" to basically try to help them stay within the affordability envelope.

So there was enough time spent with proponents that, when they bid, they should have actually had a very credible number that they were bidding. It wasn't like they were just pulling it out from Class D. They'd had almost a year, I think, from the time the RFQ or the RFP went out to when the bid submission to work with the City and to understand the costs and what the design was.

MR. PETER WARDLE: And there was a term that was put to another witness earlier this week, "design to budget", and Ms. McGrann, I think, referred briefly to it but didn't ask any questions about it. What does the concept "design to budget" mean to you?

MS. MARIAN SIMULIK: Because you're basically starting at a Class D estimate, and that's what Council will approve -- and under our bylaws, you -- when you're allocated a certain amount for a capital project, that's all you get. So unless it comes in -- so design to budget means, basically, that you're going to take that amount and you're going to move it from across D to, basically, whatever level you want to go out for construction for procurement. You're going to take it there and you're going to make certain that it gets within that envelope.

We have had cases where it doesn't fit, but then we always have the option to come in and descope it. We don't award if it comes in above what they -- what the budget is. They have no authority to do that. So we either -- the engineers either go in and they descope or, or they change something about it. Or, if it really is -- there's no ways that we can get within the budget, we bring it back to Council and they have to approve additional funds.

MR. PETER WARDLE: So the concept of design to budget, how common is that concept in municipal procurement?

MS. MARIAN SIMULIK: I think it's the concept that they use in – because we are restricted we don't have the ability, like I said, to award a contract that comes in above the budget.

MR. PETER WARDLE: And maybe I could put it this way, is it an accepted budgetary technique at the municipal level?

MS. MARIAN SIMULIK: Yes, it is.

MR. PETER WARDLE: And would you describe it as best practice in fact?

MS. MARIAN SIMULIK: I don't know any other municipality that does anything different, so by virtue of the fact that we're all doing it, it's best practice.

MR. PETER WARDLE: Okay. And let me just put this to you squarely, Ms. Simulik, you were there in 2010 when the new administration came in; did you recall any pressure from the Mayor's office, in particular, with respect to the budget for this project?

MS. MARIAN SIMULIK: No, I do not; we had just gone forward in, I think, October of 2009. Actually January of 2010, with the 2.1 number and counsel had given us direction to accept that as our budget target. So I do not recall any pressure from the Mayor's office to do anything other than follow Council's direction.

MR. PETER WARDLE: Thank you.

And at the end of the day, Ms. Simulik, and bearing in mind what you've said about the affordability cap, do you have any concerns about whether the budget established by the City for this project was sufficient at the end of the day?

MS. MARIAN SIMULIK: No, I don't. I don't have any problems with it because I would not have expected to receive two bids that were under the affordability cap if it was a problem. I would have expected the private sector to come back to us and say, you know, despite the fact we've worked together for a year, and it's still not high enough, but they never did. They came in and they said it's high enough.

MR. PETER WARDLE: And had the private sector come in above the affordability cap, what were the options that were available to the City given past experience?

MS. MARIAN SIMULIK: So we had built-in off ramps, a system of off-ramps. And to deal with – if everybody, if all three bids came in and they were above the affordability cap. And that was – there were a number of basically de-scoping that we could look at if we're asked to bid on. We could add those or subtract those from the cost and see if we could bring it back within the affordability cap. If, as a result of – if you took their bid price and then you took in the value of what the de-scoping was that we had asked them to provide us numbers with, if it still came in over the affordability cap, the lowest number, even though it was above the affordability cap, would have been the preferred proponent and we would have gone back to Council to ask them to increase the budget. So we were not – it wasn't a case of it's the affordability cap or nothing, it was we knew there might be a problem still, so we were prepared for it, and ultimately we would have gone to Council if one or any of the proponents, if all three of the proponents I should say, had come in above the affordability cap.

MR. PETER WARDLE: Thank you.

I just want to ask you a couple of questions about the amount of the

"F", if I can put it that way, in the DBFM, and I think your evidence was that it was initially set at 400 million and then during the in-market period it was changed to 300 million dollars. And my friend, Ms. McGrann, suggested to you – I believe you said that you couldn't recall whether that change was done before or after the changes to the scoping of the project with respect to the tunnel. Do you recall that?

MS. MARIAN SIMULIK: Yes, I do.

MR. PETER WARDLE: And I'm just going to suggest to you; my friend suggested to you that the $400 million was set sometime in 2012, and I'm just going to suggest to you, and I won't turn it up, that in Ms. Sheppard's July 2014/2011 report it appears that the 400 million dollars at that point is already the number that has been set for the long term finance component of the project?

MS. MARIAN SIMULIK: Yes, it was. The 400 million was set, if I remember correctly, when they approved the AFP package, the whole concept of it, and I think that was in like March and then in July they approved the 400 million. So that was set – I thought Ms. McGrann's questions related to changing it to the 300 million.

MR. PETER WARDLE: Well, that's right, and I think the question was – that we eventually got to, is whether the changes to the shallowing of the tunnel had taken place before or after that change from 400 to 300 million dollars was made. Do you recall those questions?

MS. MARIAN SIMULIK: Yes, I do.

MR. PETER WARDLE: And if in fact the 400 million dollars was set in 2011, that would be at the same time that the changes were made to the shallowing of the tunnels; is that right?

MS. MARIAN SIMULIK: That's correct.

MR. PETER WARDLE: Thank you. With respect to your answers about mobility matters, so – I just want to unpack that very quickly. Mobility matters had to do with lane closures; is that right?

MS. MARIAN SIMULIK: That's correct.

MR. PETER WARDLE: And there were incentives to the consortium with respect to lane closures in the project; correct?

MS. MARIAN SIMULIK: There were. If they could actually – if they said they had to close it for a month and they only closed it for two weeks, yes, there was an incentive; they would get actually paid a little bit more for that two weeks that it wasn't – that it was open when they had said it would be closed. So, yes, there was an incentive.

MR. PETER WARDLE: All right. And do you recall that those payments would be taken into account at the time of revenue service availability? That would be the time at which the accounting for those payments would take place?

MS. MARIAN SIMULIK: My understanding was that, yes, those were to be dealt with at the conclusion of the project so that all your puts intakes would be dealt with at the same time and you wouldn't be dealing with this on a monthly basis?

MR. PETER WARDLE: All right. So I think you may have described it at some point in your evidence as a penalty, but in fact it was an incentive payment to the contractor; is that correct?

MS. MARIAN SIMULIK: It was an incentive payment but it was also – my understanding was, it was also a penalty. So if they got done early, there was an incentive for them, but if they went over, there was a penalty for them. So it was a double-edged sword; they could win or we could in fact recover some of our costs.

MR. PETER WARDLE: And all of that got sorted out in connection with the last payment that was made at revenue service availability; is that right?

MS. MARIAN SIMULIK: The very final payment, I don't think revenue service availability was actually the final payment; I think there was one right after that and I think it got taken off that one.

MR. PETER WARDLE: Okay. It was suggested to you that the City wanted to collect on every penalty; do you recall that suggestion being made to you?

MS. MARIAN SIMULIK: Yes, I do.

MR. PETER WARDLE: Is it – would you agree with me that what the City wanted was an on-time project for which it had agreed to pay a fixed price?

MS. MARIAN SIMULIK: Yes, I would.

MR. PETER WARDLE: And would you agree that when RTG failed to deliver, the City availed itself in a responsible way of bargain for remedies under the project?

MS. MARIAN SIMULIK: Yes, I would.

MR. PETER WARDLE: Thank you. Those are all my questions for you.

COMMISIONER HOURIGAN: All right. Thank you. Any re-examination?

MS. KATE McGRANN: No.

COMMISSIONER HOURIGAN: All right, very good; you're excused. Thank you. Tomorrow we start again at 9:00 o'clock. Mr. John Traianopoulos from Infrastructure Ontario will be the first witness, so we'll be back on tomorrow at 9:00; all right? Thank you.

THE REGISTRAR: The court will all rise; the hearing is now closed for the day and we will resume tomorrow at nine.

--- Upon adjourning at 5:09 p.m.

C E R T I F I C A T I O N

I, Wendy Clements, a certified court reporter, hereby certify the foregoing pages to be an accurate transcription of my notes/records to the best of my skill and ability, and I so swear.

Je, Wendy Clements, une sténographe officiel, certifie que les pages ci-hautes sont une transcription conforme de mes notes/enregistrements au meilleur de mes capacités, et je le jure.

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Wendy Clements