

NICK SMITH

This note identifies the broad subject areas which we would like to discuss with you during the interview. We have tried to include all documents that may assist you in answering the inquiry's questions.

Can you please send me an up-to-date CV.

The Note covers the following matters:

- Duties and Responsibilities
- The Procurement Strategy
- The Design Contract
 - Design Works Delay
- The Utilities Contract
 - Utilities Works Delay
- The Infrastructure Contract, broken down into the following periods,
 - Up to December 2007
 - Between January 2008 and May 2008 (the signing of the Infraco contract)
 - from May 2008 onwards
 - Between June 2008 and December 2008
- 2009
- 2010
- 2011
- Project Management, Governance and Contractors
 - General
 - TIE
 - City of Edinburgh Council
 - Tram Project Board
 - TEL
 - Transport Scotland
 - Contractors
- Consequences
- Final Comments

Notes to the Inquiry

In this witness statement I have sought to provide answers to the questions posed as best I can recall having read the documentation provided by the Inquiry. Inevitably, given that up to 10 years have elapsed since many of the events occurred, my memory remains unfortunately vague on a number of issues.

I have also been conscious that my views now are very different to those which I had at the relevant time, as my current views have inevitably been influenced by knowledge gleaned over the intervening years. I have therefore sought to provide as clear a picture of my views at the time as possible based on my recollections.

As the Inquiry may be aware, there are thousands of documents in my email and other archives in relation to the tram project. In order to compile my responses I have therefore concentrated on the extensive documentation supplied to me by the Inquiry. I have not attempted to comprehensively cross-match this with other contemporaneous information as no doubt the Inquiry will be doing so.

Whilst I have tried to be as thorough as possible and comment to the best of my recollection, there is a possibility that my responses based on my current recollection do not match other evidence available to the Inquiry. If this does occur, I can assure the Inquiry that it is simply a function of poor memory given the lapse of time and, if there are any obvious discrepancies, I will be happy to check my own records on any particular issue and provide the Inquiry with an updated position should that be of assistance.

A few other key issues are perhaps worth highlighting in general terms in advance of responding to the specific questions:

Council governance

It is worth explaining how advice is given within the Council and how decisions are generally taken. The Council was, and is, a largely hierarchical body. Decisions are taken in accordance with the relevant Scheme of Delegation, but in broad terms officers recommend policy, elected members approve and set policy, officers then implement that policy and then elected members scrutinise the effectiveness of that implementation.

Advice is generally provided through the relevant chain of command via a direct line manager for triage/consideration and onward transmission through the reporting and approvals hierarchy as appropriate. Briefings of elected members will usually always be decided on and given by Directors or Heads of Service. In my experience it would be very unusual for a more junior staff member to brief an elected member or indeed a Director without the content first being approved by the relevant Head of Service or at least them being made aware of the advice to be given.

With regard to formal Council and committee reports, whilst the drafting is often done by more junior officers in the first instance (with comments also often collated by them), ultimately it is the author/owner of the relevant Council report who decides on the final content as they are best placed to assess what should or should not be included. This decision is sometimes taken in consultation with relevant elected members. Committee reports are generally available in the public domain in the interests of transparency. Where appropriate and allowed by the relevant legislation, reports can be placed on a "B agenda" which means that they are considered in private.

DLA Duty of Care and the Infraco contract review

Many of the queries posed by the Inquiry appear to me to relate to, or are significantly informed by, the terms of the Infraco contract, related documentation and associated risks. It is worth me clarifying my position in relation to these matters.

During Summer/Autumn 2007, particularly in light of the request for the Council to provide a guarantee of tie's obligations, I advised my various superiors that an independent legal review of the Infraco contract and associated documentation should be undertaken on the Council's behalf (see for example [CEC01564795], [CEC01564705] and [CEC01564769]). This was because in my view CEC Legal, including myself, did not have the experience or capacity to provide the necessary advice on such a bespoke specialist transport construction contract. I therefore felt strongly that it would not have been professionally appropriate for me to advise on the terms of the contract and related documentation and to have done so may have given others a false impression that it had been appropriately legally reviewed (no matter what caveat was attached to any such review).

Against the advice of myself and Colin Mackenzie (and after others in the Council, including a Director, had sanctioned the proposed independent legal review), a decision was taken to instead rely upon a duty of care from tie's solicitors, DLA, to be given to the Council. I fundamentally disagreed with this decision.

I was very clear throughout the period of the project that I would not be reviewing the contractual terms or associated documents (including the risk registers, close reports etc) which tie had prepared, negotiated and agreed. This was well understood and accepted at the time. For example, see my email on 28 August 2007 to Colin Mackenzie [CEC01564795] in response to his email dated 27 August 2007 [CEC01567527]. I had discussed my concerns with Colin Mackenzie prior to sending this response [CEC01564795] to him and he both understood and agreed with my concerns at the time. Therefore, given the large quantity of information being sent in relation to the project, where I was sent documents or emails which related to these aspects of the project, I would have been unlikely to have reviewed them in any detail or possibly even at all.

Design risk

As I was not advising on the detail of the contractual terms, I necessarily only had a very high level understanding of design and consent matters and associated risks and allowances. It may assist the Inquiry if I set out what my understanding was at the time in this regard. Whilst I was not reviewing the contractual terms as set out above, it was apparent to me during Winter 2007/8 that there must necessarily be some risk to the Council and tie as the overall design was incomplete. At the time I recall my concerns related to the fact that additional costs may be incurred by the simple fact that if design was not complete then the system could not be approved or built.

At the time my high level understanding from tie was that overall design risk had been passed to the contractor in that the price BSC had provided was for delivery of the entire tram system. My understanding was therefore that tie and the Council would only be responsible for any changes which they specifically requested, or through any betterment required through the consents processes. I further understood that tie had assessed the potential for these further changes and created a risk allowance to allow for this. However, I was not involved in assessing or advising on how these risks were actually being assessed or addressed.

It was not until much later after signing that it appeared that tie had in fact not secured this risk transfer and, as I understand it, effectively any changes since the design freeze in November 2007 were for tie's account. This was not to my knowledge known by the Council and was certainly not known to me as being an issue until long after the contract was signed.

Other

The Inquiry has provided me with access to a number of documents which are not specifically referenced in the questions from the Inquiry set out below. These document references are attached in Appendix 1 to this Witness Statement.

DUTIES AND RESPONSIBILITIES

1. a) By way of introduction, it would be helpful if you could set out the dates you served as a member of CEC legal, and the various positions you held (e.g. senior solicitor, principal solicitor, Deputy Head of Legal, Risk & Compliance, Commercial & Procurement Manager and Head of Legal & Risk and Monitoring Officer etc.)?
- I first joined CEC Legal in October 2004 as a Senior Solicitor in the Commercial, Procurement and Finance team. I became the Principal Solicitor of the Commercial, Procurement and Finance team in February 2010. I was the Deputy Head of Legal & Administrative Services from September 2011 to July 2012. I was the Council's Chief Procurement Officer from August 2012 to February 2016. In February 2016 I assumed my current position of Head of Legal and Risk and Monitoring Officer.
- b) What were your duties and responsibilities, in respect of the tram project? Did these duties and responsibilities change over time (and if so when, and in what way)?
- I first joined the tram project team in approximately February 2007. I reported to Colin Mackenzie and worked with both him and Alan Squair (both Principal Solicitors) on the tram project. Colin Mackenzie and Alan Squair reported to Gill Lindsay and John McMurdo, the Council's Head of Legal and her Deputy.
- As the most junior legal team member working on the tram project between February 2007 and February 2010, my role was to work on task specific legal activities as required and under the direction of Colin Mackenzie or Alan Squair. This included working on numerous discrete matters, including Freedom of Information requests, property matters, governance issues, operating agreements and traffic management orders etc. In addition to the tram project, I was also engaged in many other non-tram legal advice matters. Between 2007 and 2009, the vast majority of my input into the tram project related to the drafting and negotiation of the tie and TEL operating agreements and related governance matters.
- From Spring 2010 until September 2011 I reported directly to Alastair Maclean, the Head of Legal & Administrative Services. As Principal Solicitor I had a significant workload in addition to tram matters, including working on the Council's Alternative Business Models outsourcing project and managing a team of up to 20 lawyers working on other legal business. The Council recruited Carol Campbell in mid-2010 to assist with tram specific matters and both Carol Campbell and Alastair Maclean were heavily involved in tram issues between Summer 2010 and Autumn 2011. The

three of us worked together on the project during this period. From Spring 2011 I recall that my input into the project reduced as I was engaged in other matters (see for example [WED00000169]).

c) Had you any prior experience in relation to the delivery of major Infrastructure projects? What experience, generally, did CEC have in that regard?

Whilst I had general corporate and public law experience, I had no experience in dealing with large infrastructure or construction projects prior to 2007.

I cannot comment more widely, but from a legal perspective my perception was, and remains, that the Council did not have anyone in the internal legal team at the time with appropriate legal experience to be able to properly advise on the construction/infrastructure aspects of the Tram Project.

d) What committees and sub-committees did you attend? For example, CEC's Internal Planning Group, CEC's Property & Legal Group, the CEC/TIE Legal Affairs Group etc? What was the role of these of these groups and what was your role in each group?

I was not a regular attendee at the IPG until mid-2010 as I was not of sufficient seniority to do so. I did attend some of the PLGs and LAGs as well as some of the IPGs from 2010 onwards.

My understanding was that the IPG was the most senior body within the Council's officer core (ie not including Councillors) which advised on and took decisions in relation to the tram project.

I cannot fully recall, but I believe that the PLG was the Council-only group of staff dealing with property and legal related matters and the LAG was a group set up with the intention of bringing together tie and Council officers on relevant property and legal matters.

e) Throughout the duration of the project, to whom did you report?

From 2007 to early 2010 I reported to Colin Mackenzie. From February 2010 I reported to Alastair Maclean.

f) We understand that you were a member of the "B Team"? Please comment on the role of the B Team and the interaction between the B team and the Directors?

The B Team was not a formal team and nor was it a formal title. The B Team was the name used during 2007-2010 by a small core of Council officers who were working on the project at a more junior and/or operational level. The B team did not have a full strategic view of the project but would provide advice on matters which we became aware of and considered should be highlighted to relevant decision makers. I cannot recall where the name came from but it was, in my view, likely a play on the fact that we were not senior or influential enough to be considered the "A team" and our perception was that we were generally operating on the sidelines and had only a partial picture of what was going on with the project at any given point.

The views of the B Team members would likely have been passed to Directors through the normal Council reporting processes (ie usually through the hierarchical chain of command). Concerns would be passed either up through the Principal Solicitors to the Head of Legal or directly to officers in other Divisions who would also pass the advice up to their Heads of Service or Directors as appropriate.

The B team consisted mainly of myself, Alan Coyle, Rebecca Andrew and Andy Conway, who were, at least between 2007 and 2010, the most junior members of our respective specialties of legal, financial and technical. I think that Collin Mackenzie and Alan Squair would also rightly have considered themselves as B Team members.

There was no formal advice provided by the B team as a collective group or comments formally fed back to the B team as it was not in any way a formal team.

THE PROCUREMENT STRATEGY

2. We understand that the procurement strategy for the tram project included carrying out design and utilities diversion works in advance of the infrastructure works, and obtaining a fixed price for the infrastructure contract.

a) What was your understanding of the main features of the procurement strategy for the tram project? How important was it that a fixed price was obtained for the infrastructure contract?

The procurement strategy for the Tram project was devised by me and predated my involvement in the project.

As a concept, it was my view that tie obtaining a fixed price contract was a key goal for the Council as it would have provided financial certainty for the project.

THE DESIGN CONTRACT

3. The SDS (Systems Design Services) Contract was entered into between TIE Ltd and Parsons Brinckerhoff Ltd (PB) in September 2005.

By way of overview:

a) It would be helpful if you could explain the different roles and responsibilities of CEC in relation to design i.e. when acting as client and when acting as statutory approvals authority? How did that work in practice?

I can only comment generally that the Council can often act as both client (whether through a third party such as tie or directly itself) and as statutory approvals authority, at the same time. This relates to statutory functions such as Planning and Licensing. In my experience this delineation is managed effectively and there is recognition within the Council that these two functions must be kept entirely independent and unfettered in terms of decision making. The fact that elected members are the ultimate decision makers helps assist with independence and process integrity.

By way of example, in my experience on the tram project it was accepted as a concept that if the planners refused a particular design aspect in relation to the tram, the fact that the Council was the promoter of the tram made no difference to how the matter was treated or decided. This would be the case regardless of whether there was a cost implication for the Council as a result of the decision.

b) What were the different types of statutory approvals and consents that were required for the tram project? What processes and procedures, in general, required to be followed to obtain such approvals and consents?

Numerous approvals would have been required for the tram. I am unable to confirm what all of these were or the process required for these. It was a matter for tie and/or the contractors to assess the need for and obtain such approvals as required through whatever process was necessary.

c) In producing the design, the wishes and requirements of a number of different stakeholders required to be addressed (e.g. TIE, CEC, the statutory utility companies (SUCs), Network Rail, Forth Ports and BAA etc) (see, for example, e-

mail dated 6 July 2007 by Scott Ney of Parsons Brinckerhoff in relation to the roads design, TIE00044022). Which body or organisation do you consider was primarily responsible for managing and obtaining the views and agreement of the different stakeholders?

I was not involved in advising on this aspect of the project. However, I consider that tie would have been responsible for this matter.

d) Who did you understand to be responsible for ensuring that the design works proceeded on a timetable that would not disrupt the main Infrastructure programme?

I am unable to provide any clarification on this matter as I was not involved in advising on this aspect of the project.

Design Works Delay

4. We understand that there were difficulties and delays in progressing and completing the design:

a) What was your knowledge in 2007 of the difficulties and delay in undertaking the design works?

I am unable to provide any clarification on this matter as I do not recall being aware of any detail in this regard, only that design was late in being delivered by SDS. The Inquiry will note that the issues relating to SDS and other possible concerns are highlighted in the final paragraph of the email from Colin Mackenzie to Gill Lindsay on 15 August 2007 [CEC00013273]. I also recall that there was a possible vires issue with regard to tie settling claims with SDS in Autumn 2007 (see [CEC01567732]).

b) What was your understanding of the cause(s) of that delay?

I am unable to provide any clarification on this matter as I do not recall being aware of any detail in this regard. As I note in my email dated 28 November 2007 [CEC01400081], "for whatever reason, tie and SDS have failed to obtain approvals" (my emphasis added).

However, one thing I can recall was that the designer SDS may not have been placed under a timebound obligation to produce the design. I cannot confirm whether this is accurate but, if true, this could have caused delays.

c) To what extent, if at all, do you consider that the actions, or inaction, of the different parties and stakeholders, including CEC, resulted in delay in progressing and completing the design for the tram project? (see e.g. [CEC02084810] [CEC00307573])

I am unable to provide any clarification on this matter as I was not involved in advising on this aspect of the project.

d) What in your view was the reason for delay in obtaining statutory approvals and consents?

I am unable to provide any clarification on this matter as I was not involved in advising on this aspect of the project.

e) What steps were taken to address delays in progressing design and in obtaining statutory approvals and consents?

I am unable to provide any clarification on this matter as I was not involved in advising on this aspect of the project.

f) Were these steps successful (and, if not, why not)?

I am unable to provide any clarification on this matter as I was not involved in advising on this aspect of the project.

THE UTILITIES CONTRACT

5. The MUDFA (Multi-Utilities Diversion Framework Agreement) was entered into between TIE and Alfred McAlpine Infrastructure Services Ltd in October 2006.

a) What was the role of the Council in respect of utilities diversion works?

I am unable to provide any clarification on this matter as I was not involved in advising on this aspect of the project.

b) Who was responsible for designing the utility diversion works?

	<p>I am unable to provide any clarification on this matter as I was not involved in advising on this aspect of the project.</p> <p>c) Who did you understand to have responsibility for obtaining information and approval from the utilities companies and for co-ordinating that information to inform MUDFA and other design?</p> <p>I am unable to provide any clarification on this matter as I was not involved in advising on this aspect of the project.</p> <p>d) Which organisation did you understand was primarily responsible for ensuring that accurate and sufficient utilities investigations were carried out?</p> <p>I am unable to provide any clarification on this matter as I was not involved in advising on this aspect of the project.</p> <p>e) Prior to the utilities works being undertaken, what investigations took place (including by whom and when) to identify the utilities that would require to be diverted? What investigations, for example, were made with the statutory utilities companies (SUCs) and with CEC?</p> <p>I am unable to provide any clarification on this matter as I was not involved in advising on this aspect of the project.</p> <p>f) What agreements were entered into with the SUCs to facilitate obtaining their agreement to the utilities works and by whom?</p> <p>I am unable to recall all of the arrangements, but I recall the requesting that the Council sign agreements with Scottish Power, Network Rail and various other third parties including Edinburgh Airport.</p> <p>g) Who, in your view, was ultimately responsible for ensuring that the utility works proceeded on a timetable that would not disrupt the main infrastructure programme?</p> <p>At a conceptual level, in my view this was the Limited.</p>
Utility Works Delay	
6.	There were difficulties and delays in undertaking the MUDFA works:

a) What was your understanding of the cause(s) of these difficulties and delays?

I am unable to provide any clarification on this matter as I was not involved in advising on this aspect of the project.

b) What steps were taken to address these matters?

I am unable to provide any clarification on this matter as I was not involved in advising on this aspect of the project.

c) Were these steps successful (and if not, why)?

I am unable to provide any clarification on this matter as I was not involved in advising on this aspect of the project.

d) In an e-mail dated 7 April 2008 [CEC01541528], Andrew Fitchie noted that TIE's project management had wished to proceed with MUDFA *with as little CEC involvement as possible*. Did lack of engagement with CEC on the utilities works cause delay, and if so how? For example, did the fact that CEC were reluctant to sign up to agreements they had not been involved in, cause delay? (see e.g. [CEC01567363][CEC01641228])

I am unable to comment on this matter in any detail. However, I recall being of the view that where tie had negotiated a contract with another third party (such as a utility or similar), the Council would require to fully understand the implications and negotiations which had led to the final terms being acceptable to tie. This would therefore have taken time and also possibly required formal approvals from the Council to allow signature. The Council may also have required changes to the proposed terms. This almost certainly took further time to enable agreement in some cases.

Although not a utility, my email to Andy Conway, Duncan Fraser and Marshall Poulton dated 14 October 2008 [CEC01062205] demonstrates the types of issues which we faced in relation to third party agreements. Similar issues also occurred later on in the project (see [CEC00256797]). Colin Mackenzie also highlights similar issues in his email to Trudi Craggs on 5 April 2007 [CEC01565799] and the issue of risks under third party agreements is also set out in Alan Squair's emails in June 2007 [CEC01567362]. Trudi Craggs also comments on some of these issues in July 2007 [CEC01641244].

e) A note following the meeting of 30 May 2007 between CEC and DLA and TIE on "CEC liability under utility agreements" noted that the process of negotiating with the utilities (especially on indemnities) had been a laborious

one, with each utility taking different positions, in some cases disproportionate to the scope and volume of the actual diversion works. To what extent do you consider that this contributed towards delay in undertaking the utilities diversion works [CEC01567363]?

I am unable to provide any clarification on this matter as I not recall being involved in advising in any detail on this aspect of the project.

THE INFRASTRUCTURE CONTRACT

Up to December 2007

7. An e-mail dated 22 March 2007 by Rebecca Andrew [CEC01558752] noted that TIE had budgeted for the back-filling of various CEC staff, including two solicitors, which would result in Legal Services gaining extra resources at no additional cost, but that Gill Lindsay and John McMurdo had decided not to appoint that additional cover.

a) What was the proposed arrangement whereby CEC Legal Services would gain two solicitors to assist on the tram project?

I do not recall being aware of this and I am therefore unable to provide any clarification.

b) What were your views on that proposal? Do you think that gaining extra resources would have enabled CEC legal to exercise more scrutiny over the project in the run up to contract closure?

I was not aware of this proposal at the time. My view is that additional resource within Legal may have assisted with the quantity of work required as the team was overstretched. From memory Colin Mackenzie was still managing the Litigation and/or the Commercial team at the time and Alan Squair was managing the Planning Legal team. Both roles would have been challenging given that they were managing Tram project matters at the same time. However, whilst extra internal legal resource may have assisted from a capacity perspective, it would in my view have been significantly more helpful and appropriate to have had expert external legal advisers acting for the Council independent of tie's legal advisers. This would have ensured that specialist and independent legal advice was available to the Council to ensure its position was protected.

	<p>c) Are you aware why Gill Lindsay decided not to appoint that additional cover?</p> <p>No.</p>
8.	<p>By e-mail dated 18 April 2007 [TRS00004225] Rebecca Andrew sent Transport Scotland CEC's response [TRS00004226] to TS's comments on the draft FBC. CEC's response noted:</p> <ul style="list-style-type: none"> • Risk, "Further analysis of costing assumptions is required to give confidence on 12% risk assumption" (para 10). • Programme, "TS concerns are shared by CEC. We will require TIE to revisit the programme and justify its assumptions, particularly in view of the SDS and Mudfa timetables slipping. We will also require the potential costs associated with delay to be balanced against the cost/quality impact of meeting an overly ambitious programme" (para 11). <p>a) Were you or other colleagues in CEC legal involved in the preparation of CEC's response to TS's comments on the draft FBC?</p> <p>I cannot recall commenting on this. From my email records, it appears that Collin Mackenzie noted on 17 April 2007 in an email to Rebecca Andrew that he would revert with comments [see CEC01559870].</p> <p>b) What were your views on the matters noted above?</p> <p>I have no further comments as I cannot recall this matter.</p>
9.	<p>Following the formation of a minority SNP administration in May 2007, and a debate and vote in the Scottish Parliament in June 2007, the grant for the trams project from Transport Scotland was capped at £500 million. A subsequent Highlight Report to the Internal Planning Group (IPG) on 30 August 2007 noted the changed the risk profile for the Council and sought guidance on the procurement of resources necessary to provide a risk assessment and analysis of the Infraco contract for the Council within the available timescales [CEC01566861] (para 4.1).</p> <p>a) To what extent were CEC legal involved in the preparation of Highlight Reports to the IPG?</p> <p>Legal would sometimes be asked to provide relevant detail or comments for the IPG reports.</p>

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	<p>b) What steps were taken by CEC following the changed risk profile to protect its interests? Did you have any concerns, at any time, as to whether these steps were sufficient?</p> <p>Other than being firmly of the view that an independent legal review was required, I am unable to provide any further comment as I was not involved in advising on this aspect of the project.</p> <p>c) Which official or officials in CEC were ultimately responsible for ensuring the affordability of the tram project to the Council?</p> <p>In my view this would have been the Chief Executive, advised by the Directors of Finance and City Development.</p> <p>d) Which official or officials in CEC were ultimately responsible for ensuring that the tram project was delivered within time and within budget?</p> <p>In my view this would have been the Director of City Development, with scrutiny from the Director of Finance and the Chief Executive.</p> <p>e) Which official or officials in CEC were ultimately responsible for ensuring that the Council understood the risks and liabilities arising from the Infraco contract?</p> <p>In my view this would have been the Chief Executive and the Directors of Finance, City Development and Corporate Services, as well as the Head of Legal.</p>
10.	<p>By email dated 31 July 2007 [CEC01564909], you were copied into an email that Susan Clark sent Gill Lindsay. Susan Clark stated that it was thought that DLA had provided a letter to CEC addressing the issue of duty of care to CEC in 2003 (shortly after the consultancy appointments by tie) but in actual fact they had not. DLA had never been given or asked by tie to sign such a letter for CEC. They only sent a letter dated 23 June 2005 [CEC01660254] in which DLA confirmed that they owed the same contractual duty of care to CEC as they owed to TIE, subject to certain conditions.</p> <p>a) Were you concerned that DLA had not, until that point, been considering the Council's best interests? Why in your view, had a duty of care letter not been provided by DLA at the outset of the project?</p>

I am unable to confirm why DLA had not provided a duty of care letter at the outset of the project.

I was concerned throughout my involvement in the project that the Council and tie's interests may not always fully align and that there had been no qualitative independent legal review of the contract and any associated risks on behalf of the Council. Separate legal representation was in my view the only proper way to protect the Council's interests from a legal perspective. See also the information set out in the preamble above. My concerns were also highlighted:

- in my email dated 1 August 2007 [CEC01564769] to Colin Mackenzie and Alan Squair when I advised "*To the extent that the Council is unable to consider/accept that tie has fully considered and acted in CEC's interests throughout the negotiations to date, a full external review would in my opinion be required to protect CEC's interests fully, especially as the contraction [sic- should read "contractual"] arrangements now appear to involve CEC as signatory/guarantor as opposed to tie being the contracting entity. Otherwise, the risk is that CEC is accepting risks which have been agreed by a third party on its behalf.*"
- in the draft "Options" paper I sent on 2 August 2007 to Duncan Fraser - see [CEC01564770] and [CEC01564771].
- in my email to Colin Mackenzie and Alan Squair dated 22 August 2007 [CEC01564793].

b) Did this letter in your view, provide CEC with adequate comfort? As the duty of care letter provided was not retrospective, were you still concerned that the Council's best interests would not have been taken into account to date?

No, at the time I considered that the letter did not provide adequate comfort. DLA had only been taking instructions from tie and the advice and associated duty of care could therefore only have been based on instructions from tie. Accordingly, in my view at the time, the duty of care letters were insufficient to protect the Council's interests from a legal and risk perspective.

c) We note that DLA referred to work over the preceding two years as having been carried out under the "TIE mandate". DLA appear to have regarded instructions from TIE as tantamount to instructions from the council. Did that cause you any concerns?

	<p>Yes, I had significant concerns that the Council's interests and tie's interests may not always align and accordingly it was not appropriate to assume that instructions from Tie would have been identical to instructions from the Council on any given issue.</p> <p>In the email to Gill Lindsay that was copied to me by Colin Mackenzie on 7 December 2007 entitled "CEC Mandate" [CEC01400194 & CEC01400195], Andrew Fitchie advised:</p> <p><i>"I do not envisage any conflict of interest here; to the contrary - in closing the required supply contracts as part of the procurement process, there needs to be complete commonality of interests and objectives among the Council, tie and TEL. That is not to say that there will be and will have been detailed discussions (in which we would have our role as advisers for the Project) on key issues in order to reach that commonality."</i></p> <p>On the basis that there appeared to me to have been few, if any, such detailed discussions, it was difficult to see how any such commonality could ever have been reached. This left significant potential for a divergence of views and interests. I highlighted this in my emails to Colin Mackenzie on 1 August 2007 [CEC01564769] and 22 August 2007 [CEC01564793]. This was a constant concern for me throughout the project and the reason I considered that an independent review was required. This issue was never resolved to my satisfaction.</p> <p>d) In your view, was the duty of care owed by DLA to CEC ever clearly defined, even at the later stages of the project?</p> <p>I cannot comment on whether the duty of care was ever sufficiently clear as Gill Lindsay was dealing with this matter.</p>
11.	<p>By e-mail dated 2 August 2007 [CEC01564770] you sent a draft options paper [CEC01564771] which included the option of CEC obtaining independent legal advice on the Infraco contract. Duncan Fraser forwarded that options paper to Andrew Holmes by e-mail dated 2 August 2007 [CEC01566648].</p> <p>On 23 August 2007 Colin Mackenzie forwarded Gill Lindsay an e-mail from Duncan Fraser [CEC01567522] noting that he was <i>"clearly very concerned that the contractual risks should be reviewed externally on behalf of the Council, and has his Director's support in that regard"</i>.</p>

By e-mail dated 2 September 2007 [CEC01566895] Duncan Fraser set out the scope of a proposed instruction to external consultants to review the risks arising from the Infraco contract, and the adequacy of the headroom available to CEC.

The minutes of a Property & Legal Meeting on 4 September 2007 [CEC01561179] noted (page 2), "Council Solicitor declined that opportunity to appoint independent solicitors, instead choosing to rely upon DLA letter of comfort to act in the Council's interest subject to agreeing the appointment of DLA ... It is the belief of the group that it is still prudent to seek legal advice before enabling the contractual approval".

On 18 September 2007 CEC published an invitation to Tender Notice for provision of consultancy services "to review the contract risk allocation matrix for the infrastructure and tram vehicle contracts and identify those risks that remain within the public sector [etc]" [TIE00678245].

By e-mail dated 24 September 2007 [CEC01652668] Duncan Fraser stated that the Directors of Finance and City Development were in agreement with the appointment of Turner and Townsend to carry out an external review of the matters set out the brief [CEC01652669].

By e-mail dated 27 September 2007 [TIE00663266] Susan Clark, TIE, asked Malcolm Hutchison whether the OGC team would be able to include a review of risk as part of the forthcoming OGC review. It appears that that was duly done (see below), with the result that Turner and Townsend were stood down.

a) What were your views on whether the Council should have taken independent external advice (whether legal or otherwise) on the risks arising from the Infraco contract?

I can only comment on the legal aspects as this was my area of expertise. It was very clear throughout the project that my view was that the contract should have been independently reviewed on behalf of the Council by external lawyers with appropriate experience of such projects. This would have more fully informed, and likely better protected, the Council's position as guarantor. My concerns were also highlighted in my emails to Alan Squair and Colin Mackenzie on 1 August 2007 [CEC01564769] and 22 August 2007 [CEC01564793].

b) Did you agree with the decision that appears to have been taken in relation to CEC not instructing an external independent legal opinion (and, instead, relying on the advice of DLA)?

No, I strongly disagreed with that decision. Indeed, in addition to my email to Colin Mackenzie on 1 August 2007 [CEC01564769] in this regard, I also sent a document [CEC01564783 & CEC01564784] containing a draft email to Colin Mackenzie on 15 August 2007 which he amended and sent to Gill Lindsay that same day [see [CEC00013273]]. This clearly set out my significant reservations in this regard. My view remains that independent legal advisers should have been appointed by the Council.

c) Did you agree with the decision that appears to have been taken that a review of risk would be carried out by the OGC, as part of their review, rather than by external consultants such as Turner and Townsend?

I can only comment on the legal aspects and my view was that, regardless of any other review findings, only an appropriately experienced lawyer could provide the legal comfort that the identified and agreed risks were appropriately reflected in the agreed contractual terms and that the contract was fit for purpose from the Council's perspective.

d) For the avoidance of doubt, who decided that it would be sufficient for the CEC to obtain advice from DLA and the OGC on these matters?

I am unable to comment on the OGC decision. I have no reason to contradict the minutes of 7 September 2007 noted above with regard to the decision taken not to engage an independent legal review. In addition, the notes under "Action" on page 2 in the Property and Legal Group minutes of 11 September 2007 [see CEC01567635 & CEC01567636] also provide some further commentary in this regard.

12.	<p>An Office of Government Commerce (OGC) Review was carried out in September/October 2007 [CEC01562064] and resulted in a "Green" rating (i.e. "The project is on target to succeed provided that the recommendations are acted upon").</p> <p>The report noted the following possible matters of concern:</p> <ul style="list-style-type: none"> • While preliminary designs had been completed, only 65% of detailed designs were completed (p2). • The entire costs of the project could not be finalised until the due diligence process with the preferred bidder, value engineering and alignment of contract terms had been completed (p4). • The timeliness of project delivery was of concern. Both bidders had raised the concerns that the planned preferred bidder period, which included due diligence on the designs and the novated contracts, was tight (p5). • While the tools being used by TIE to identify, monitor and manage the risks were "impressive", "If there is any weakness, we would note that discussions of these risks have not always been reflected in specific actions in the tram project board minutes" (p7) <p>a) Did you see the OGC review? What were your views on the above matters?</p> <p>I do not recall seeing this document and am therefore unable to provide any clarification on this matter. However, even if I had been aware of findings of the OGC review, my position with regard to an independent legal review being required would not have changed.</p>
13.	<p>On 15 October 2007 the OGC review team produced a further report, "Project Risk Review" (CEC01496784). The report noted that a number of risks remained with the public sector, including: the outturn price and delivery programme of MUDFA works; that the design and approvals processes delay the programme; that Financial Close was delayed and had knock on effects on approvals and programme; that the SDS novation process was not fully effective; changes of scope; third party delays; delayed and/or qualified acceptance; and project management skills and costs.</p> <p>The report further noted, "We endorse the assessment that the level of public sector risk on the capital expenditure programme is currently £49 million at a 90% confidence level. Further our best estimate of the schedule risk is currently 21 days also at a 90% confidence level. This equates to a capital expenditure risk of a sum of £2.2 million in the context of the proposed contracts". The report concluded, "We believe that the overall headroom of £49m in the capital expenditure is a prudent provision at this stage of the project's development".</p> <p>a) What were your views on these matters?</p>

I do not recall seeing this document and can therefore not provide any comment.

b) What were your views around that time on the adequacy of the risk allowance? Did your views in that regard change at any time (and, of so, when and why)?

I was not involved in setting or reviewing the risk allowance as this was a financial and technical matter and I am therefore unable to comment.

14. On 25 October 2007 the Council's approval was sought for the Final Business Case, version 1, in respect of phase 1a (Airport to Leith Waterfront). A joint report was provided by Andrew Holmes and Donald McGougan [CEC02083538].

The report to Council noted that:

- The SDS had prepared preliminary designs and were currently finalising the detailed designs. (para 3.22)
- *"It is anticipated that the SDS and Tramco contracts will be novated to the provider of the infrastructure works. This means that significant elements of the responsibility for the design and vehicle provision and the risks associated are transferred to the private sector"* (para 3.27);
- The estimated capital cost of phase 1a was £498m; *"There is detailed information behind [the] estimates, which take due allowance for risk contingency and further scope for savings, but a fuller breakdown cannot be provided at this stage for reasons of commercial confidentiality"* (para 4.2).
- *"The infrastructure costs are also based on the fixed prices and rates received from the recommended infrastructure bidder. However, there is scope for this cost to move slightly, prior to contract close as further design work is required to define more fully the scope of the works to allow a firm price to be negotiated. There is a risk allowance to take account of these variations. The price also assumes that savings can be made on the proposals through certain Value Engineering Innovations proposed by ... TIE and the infrastructure bidder"* (para 4.3).
- The estimates included a risk allowance of £49m, which had been calculated based on the perceived cost and likelihood of over 400 risks in the project risk register. A statistical analysis known as Quantified Risk Assessment was carried out at a 90% probability level and had concluded that there was a 90% chance that final costs would be within that risk allowance, which *"demonstrates a higher than normal confidence factor for a project of this scale and complexity"* (para 4.10).
- It was noted that *"The risk contingency is designed to cover additional unforeseen costs, but it is recognised that there is an element of residual risk of costs exceeding current estimates. It should also be notified that the risk contingency*

does not cover major changes to scope. The scope of such changes will be reviewed after completion of the Tram works and commencement of Tram operations" (para 4.32).

- "Fixed price" and contract details would be reported to the Council in December 2007 before contract close in January 2008. (para 5.3).

The Final Business Case, version 1 (CEC01649235) noted:

- "The level of risk allowance so calculated and included in the updated estimate represents 12% of the underlying base cost estimates. This was considered to be a prudent allowance to allow for cost uncertainty at that stage of the project. It reflected the evolution of design and the increasing level of certainty and confidence in the costs of Phase 1 as procurement had progressed through 2006. TIE continued to comply with the HM Treasury recommendations for the estimation of potential OB and had determined, in consultation with TS, that no allowances for OB were required in addition to the 12% risk allowance above" (paragraphs 10.13 and 10.14) (these provisions were essentially the same as the provisions on risk and optimism bias included in the draft FBC dated November 2006, CEC01821403, paras 9.11 and 9.12).
- "By the time of the DFBC, OB was effectively eradicated, as per the findings explained in the Mott MacDonald Review of Large Public Procurement in the UK. This was in view of greater scheme certainty and the mitigation of factors built into the procurement process, as well as project specific risks and environmental and external risks. Instead of using OB, TS and CEC adopted a very high confidence figure of 90% (P90) in the estimate of risk allowances to cover for specified risk, unspecified risk and OB" (para 11.43).

- a) It would be helpful if you could explain the process by which that report was drafted (including which individuals, from which organisations, had an input into drafting the report)? What was your role or input in drafting the report?

I am unable to provide much by way of clarification in this regard. I was provided with a copy of the report on 9 October by Andy Conway and sent a number of comments to Alan Squair on 10 October 2007 [CEC01564880].

- b) To the extent that information in the report was provided by individuals outwith CEC, what steps, if any, were taken to confirm the accuracy of that information?

I am unable to confirm.

- c) Did you consider that the report to Council fully and accurately reported on the delays in relation to design, approvals and consents and utility works and the risks arising from these delays?

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	<p>I highlighted a number of issues in relation to risks in my email to Alan Squair of 10 October 2007 [CEC01564880] including that "To my mind the whole report is light on risks but that's not my call" and that "3.30 obviously gives a clear signal that the Council believes it is reasonable to rely on tie's work to date. I'm not sure this is consistent with views expressed previously".</p> <p>d) What was your understanding of how the Infraco contractor could provide a fixed price, and how design risk could be transferred to the private sector, given the delay in design, approvals and consents (and given the design and TRO milestones noted at page 191 of the FBC whereby, for example, detailed design for phase 1a was not expected to be completed until September 2008)?</p> <p>tie was responsible for recommending a contracting strategy to the Council. That would have included appropriately managing design risk and any associated financial and risk impacts.</p> <p>I am unable to provide any further clarification on this matter as I was not involved in advising on this aspect of the project. To hopefully assist the inquiry my high level comments re design and associated risks are noted above in the preamble to my responses.</p>
15.	<p>The Highlight Report to the IPG on 15 November 2007 [CEC01398241] noted, under Detailed Design Review Process, "Reviews of the individual disciplines of the detailed design continue. The packages have yet to be coordinated by the designers therefore the value of these reviews is limited and all packages will require resubmission when complete and fully coordinated by the designers and TIE. Further delays to the design programme are becoming apparent with all technical reviews programmed to complete after financial close" (para 3.3).</p> <p>a) What was your understanding of, and views on, these matters? What was done to address these matters?</p> <p>I was not involved in advising on the detail of design and related matters and can therefore provide no further clarification.</p>
16.	<p>By e-mail dated 20 November 2007 [CEC01383667] Duncan Fraser advised Andrew Holmes that TIE had agreed to a fixed price contract for Infraco on the original basis, namely, that the detailed design would be completed by SDS, that all the designs were technically approved by the road authority and that all design had prior approvals granted by planning.</p>

	<p>He further advised that only some of the designs had been completed in detail, none of the designs were technically approved and only 4 out of the 61 packages for prior approvals had been agreed. He considered, in the absence of information from TIE, that an allowance of £25 million should be made to enable changes to be made post financial close with BSC. He further noted that he raised that at the last IPG but there was a concern about such a statement being minuted and suggested that that <i>"demonstrated a lack of understanding of how technical issues can translate into increase on costs through changes to time as well as money, especially for a fixed price contract"</i>.</p> <p>a) What was your awareness of, and views on, these matters?</p> <p>I do not recall being aware of these specific concerns at the time and cannot therefore comment.</p> <p>However, my high-level concerns re consents were later highlighted (for example in emails on 28 November 2007 [Document CEC01400081] and 23/24 January 2008 [CEC01395113]). This noted some of my general high-level concerns re design and what could in practice be priced.</p>
<p>17.</p>	<p>You were copied into an e-mail dated 28 November 2007 [CEC01544715] in which Colin Mackenzie advised Sharon Fitzgerald of DLA Piper, that the recent meeting of the Legal Affairs Committee [CEC01500853] had noted that "DLA would report to the Council independently of Andrew Fitchie, who would be acting in his TIE Contracts Directors role".</p> <p>a) What was your understanding of whether Mr Fitchie was employed by, or seconded to, TIE at that time?</p> <p>I cannot fully recall this issue. I believe he was seconded to tie as Commercial Director. However, I am unable to provide further information on the scope or detail of his role.</p> <p>b) While Mr Fitchie was employed by, or seconded, to TIE, to what extent did you consider it appropriate for Mr Fitchie to continue to give advice, on behalf of DLA, to CEC and to what extent did you consider that any advice from DLA to CEC should be provided by another solicitor?</p> <p>With regard to his providing advice to the Council, I had made my view clear that an independent legal review was required. In those circumstances Colin Mackenzie and I understood that Gill Lindsay was dealing directly with DLA with regard to seeking legal advice on the acceptability of the contracts and other matters relating to these aspects of the project.</p>

	<p>c) Did DLA report directly to the council on the issues outlined in Colin Mackenzie's email?</p> <p>I am unable to comment as I cannot recall. However, it appears from my email archive that various emails were sent back and forth among Colin Mackenzie, Alan Squair and Gill Lindsay during late November/early December 2007 in relation to the DLA letters. See for example the email from Colin Mackenzie to Gill Lindsay on 7 December 2007 [see CEC01400190 & CEC01400191] and email from Colin Mackenzie to Alan Coyle and others dated 4 December 2007 [see CEC01397560], email from Colin Mackenzie to Sharon Fitzgerald 5 December 2007 [see CEC01400161] and email from Alan Squair to Gill Lindsay dated 29 November 2007 [CEC01397608].</p>
18.	<p>By e-mail dated 28 November 2008 [CEC01400081] you set out your views on certain key issues that the Directors should be aware of to inform their decision making process.</p> <p>You noted that BBS were unhappy with accepting the novation of the SDS contract as SDS were not bound to process the designs within specific timescales, whereas BBS were time bound in terms of project delivery. They had therefore asked if there were any approvals etc which TIE/the Council would be willing to take back the risk on.</p> <p>a) Your view was that the Council should not do this, but this appears to be ultimately what happened. Was this option put to Directors and was there a conscious decision by Directors to take back the risk arising from outstanding design and approval of that design?</p> <p>The relevant risks were incorporated into the briefing note sent to the Directors on 3 December 2007 by Alan Coyle. I am unable to provide further clarification as to the decisions the Directors reached with regard to how to deal with these risks.</p> <p>b) What was done in response to your concern that CEC would effectively have no recourse to TIE, even if tie were entirely negligent?</p> <p>I am unable to confirm. Given that it was well known that tie effectively had no assets, I can only assume that the relevant senior officers considered this and decided to accept this risk.</p> <p>c) What was done in response to your concerns that the outturn cost of £498m, was not realistic given a number of commercial goalposts had moved since October (eg further lack of approved drawings etc)?</p>

28 November 2008 should be 28 November 2007

Again, I am unable to comment further. These were my concerns at the time at a headline level but this was simply a "common sense" commentary. I would not have been able to advise on the detail of whether this was a realistic number from a technical perspective. This issue was followed up by Colln Mackenzie in his emails to Gill Lindsay on 12 February 2008 [CEC01400837] and 28/29 February 2008 [CEC01400987].

d) Did Directors give any consideration to your suggestion that BBS be given an additional fixed sum to accept the approvals risk?

I am unable to provide further information in this regard.

e) Do you think the report to the Council dated 20 December 2007 adequately highlighted that there was little protection to the Council in the event of TIE's failure to deliver?

It would have been up to the author/owner of the report at the time to decide which risks required to be included within that report.

19. By e-mail dated 29 November 2007 [CEC01397521] Alan Coyle circulated a draft Directors Briefing Note. The Briefing Note was discussed at a meeting of the Chief Executive's Internal Planning Group on 11 December 2007.

a) What were your views on the matters set out in the Briefing Note? Did it adequately cover the concerns raised in your email above [CEC01400081]?

I sent a further email at 16.58 on 29 November 2007 to Alan Coyle [CEC01394873] seeking to clarify a further few points.

b) Are you aware what was done in response to the matters in the Briefing Note?

No.

c) What were your views on the extent to which, if at all, Council members should be advised of the concerns in the Briefing Note and whether it was appropriate to include its contents in the report to Council on 20 December 2007?

	<p>Clearly I was of the view that these issues should be highlighted to the Directors to inform their drafting of the report to elected members. However, ultimately it is the author/owner of the relevant Council report who decides on the content as they are best placed to assess what should or should not be included. There is reference to these decisions being considered in the final paragraph under "Council Report" in [CEC01500867]. In addition, Colin Mackenzie highlighted the issues with regard to reporting to members to Jim Inch in an email on 4 December 2007 [CEC01400143].</p> <p>As an aside, I do recall having a conversation with Colin Mackenzie sometime in Autumn 2007 about whether we should inform the Council's Monitoring Officer of our views on the project. I recall that this was particularly around the decision not to obtain an independent legal review and the risks associated with this. I further recall that the conclusion we reached at the time was that there did not appear to us to be anything illegal or maladministrative to report. They appeared to us to be essentially risk based decisions with which we may not have necessarily agreed but were left to assume that those who presumably had the full picture were taking these risk based decisions having fully considered all relevant issues. These type of issues were persistent concerns for us and are, for example, referenced in Colin Mackenzie's comment in his email on 1 May 2008 (with which I confirmed my agreement) - "<i>Are members being properly served by officers? Are there implications for us as professional legal advisers?</i>" [CEC01241689]; and (ii) in Colin Mackenzie's email dated 15 August 2007 [CEC00013273] (much of which I drafted and also discussed with him) [see CEC01564783 & CEC01564784] - "<i>when it comes to fundamental issues of risk on contracts worth in excess of £350 million, I would be failing in my professional obligation not to draw such concerns to your attention, or indeed to members before a crucial decision is taken</i>".</p> <p>d) Were the main concerns set out in the Briefing Note ever resolved to your satisfaction?</p> <p>No.</p>
20.	<p>The minutes of the meeting of the Legal Affairs Group on 5 December 2007 noted that there would be further negotiations between TIE and BBS between the Council meeting on 20 December 2007 and Financial Close on 28 January 2008 [CEC01500867].</p> <p>a) What was your understanding of the further negotiations that would take place after the Council meeting on 20 December 2007?</p>

	<p>I do not recall being given any information on these negotiations. I was not involved in, or advising on, this matter. However, I note in [CEC01501051] that the minutes of the LAG meeting on 17 December 2007 record that Willie Gallagher "reported that the Infraco Contract is now at 97% fixed price with BBS taking on design risk. Further negotiations to be undertaken between now and financial close".</p> <p>b) To what extent were CEC kept updated on these further negotiations?</p> <p>I do not recall being given any information on these negotiations. I was not involved in, or advising on, this matter. However, I note from the minutes of the LAG meeting on 7 January 2008 that Willie Gallagher "reported that the contract negotiations with BBS are proceeding satisfactorily and following the trip to Germany fixity on price, scope and programme as reported to Council on 20 December 2007" [CEC01475121].</p>
21.	<p>On 13 December 2007, Colin Mackenzie forwarded you an email for information. In this email Gill Lindsay asked Colin Mackenzie to "constant interface with Tie and their teams and officers here to provide all support between now and Monday mid-morning to de risk as agreed and secure completion of all actions as agreed yesterday" [CEC01400311].</p> <p>a) What did you understand Gill Lindsay to be asking Colin Mackenzie to do?</p> <p>I am unable to provide clarification on this matter.</p> <p>b) Did you think that this was reasonable in the circumstances? If not, why not?</p> <p>I am unable to provide clarification on this matter as I was not clear what was being requested of Colin Mackenzie at the time.</p>
22.	<p>A meeting of the Legal Affairs Group took place on Monday 17 December 2007 [CEC01501051]. The minutes noted that "WG [Willie Gallagher] reported that the Infraco Contract is now at 97% fixed price with BBS taking on design risk. Further negotiations to be undertaken between now and financial close. AF [Andrew Fitchie] noted that CEC/TIE will need to be clear on what elements of SDS ongoing design novation will be included (or excluded) from novation agreement between BBS and SDS. Approval of design remains an item of concern for BBS as SDS are not tied to a timeframe for obtaining the required approvals whereas BBS are" (para 2).</p>

	<p>a) What was your understanding of these matters?</p> <p>I was not at this meeting and cannot recall being involved in or advising on these matters. In any event this would have related to the terms of the agreements and associated matters which, as noted elsewhere, I was not advising on.</p>
<p>23.</p>	<p>We understand that in the middle of December 2007 negotiations took place at Wiesbaden, Germany, between representatives of BBS and TIE and that on 20 December 2007 an agreement, or heads of terms, were reached (the Wiesbaden Agreement) [CEC01431387] [CEC01431386].</p> <p>a) What was your awareness and understanding of the purpose and outcome of the discussions in Wiesbaden? By whom, when and how were you advised of these matters?</p> <p>I do not recall being advised on the occurrence, purpose or outcome of these negotiations.</p> <p>b) Were officials in CEC legal ever provided with a copy of the Wiesbaden Agreement, or briefing on the effect of the agreement?</p> <p>Not to my recollection.</p>
<p>24.</p>	<p>You were copied into an e-mail dated 18 December 2007 [CEC01397921] from Colin Mackenzie to Gill Lindsay stating the view that after the Council meeting, a letter should go to TIE from Tom Aitchison formalising the outcome of that meeting and setting out the product which TIE will be required to deliver before they receive authority to enter the BBS contract. He was concerned that they did not appreciate the gravity of the situation. He noted that there was still a remote chance that tie would not deliver sufficient comfort for Tom Aitchison to authorise financial close, simply because a number of matters were in the control of third parties. In this email he restates again that he does not believe the Legal Affairs Committee is the appropriate "sign-off" medium. The Chief Executive would require to be satisfied by his officers, and not by a Committee of a Council-owned company.</p> <p>a) What were your views on the points raised by Colin Mackenzie?</p> <p>I had no further comments. I responded to Colln agreeing with him that same day at 16.45 [CEC01394965].</p>

	<p>b) What were your views on Gill Lindsay's response?</p> <p>The response did not appear to give Colin Mackenzie much, if any, clarity. The issue referred to with regard to Councillor Wheeler related to the Operating Agreements.</p>
25.	<p>On 20 December 2007 Donald McGougan and Andrew Holmes presented a joint report to Council [CEC02083448] seeking members' approval of the Final Business Case, version 2 [CEC01395434] and seeking staged approval of the award by TIE of the contracts, subject to (1) price and terms being consistent with the FBC and (2) the Chief Executive being satisfied that all remaining due diligence was resolved to his satisfaction. It was noted that the estimate for phase 1a of £498m (inclusive of a risk allowance of £49m) as reported in October 2007 remained valid.</p> <p>a) It would be helpful if you could explain the evolution of the joint report including which individuals, from which organisations, you understood had an input into the drafting of the report?</p> <p>I do not recall either drafting or commenting on this Council report and am therefore unable to provide any clarification. I was, however, involved in drafting the Operating Agreement which was appended to this report.</p> <p>b) To the extent that information in the report was provided by individuals outwith CEC, what steps, if any, were taken to confirm the accuracy of that information?</p> <p>I am unable to comment as I am not aware of what steps may have been taken.</p> <p>c) Why was there a need to add the qualifications noted above in relation to giving approval to TIE to award the contracts?</p> <p>I am unable to comment on why those specific issues were added, but that type of wording is not unusual where delegated authority is to be given by Council to an officer on an effectively restricted basis (ie delegated to approve the final terms but only within certain agreed parameters).</p> <p>d) What did you understand to be the remaining due diligence matters that required to be resolved?</p> <p>I do not recall being involved in assessing any required due diligence matters.</p>

e) Do you consider that the report adequately outlined the risks set out in the Directors Briefing Note, noted above? Did you have any concerns in relation to the report to the Council?

In my view the report does not contain sufficient visibility of the risks identified in that note. However, as noted elsewhere, it would have been up to the owner of the report to decide on and approve which risks to include. As such I would have assumed at the time that these matters had been fully considered and deliberately left out.

f) What was your understanding, at that stage, of whether agreement had been reached between TIE and BBS in relation to which party would bear the risks and liabilities arising from incomplete and outstanding design, approvals and consents and how that was, or would be reflected in the Infracore price, and pricing schedule?

I was not aware of what agreement had been reached and/or how that was to be documented. As noted elsewhere, I was not advising on these aspects or how it would be documented.

g) What was your understanding at that stage of the main risks for the Council arising from the infrastructure contract, including which party bore risks arising from incomplete utility diversion works?

I am unable to comment as I was not involved in advising on this aspect of the project.

The Report to Council noted that that some allowance had been made for risk associated with the detailed design work not having been completed at the time of financial close (para 8.1). Nonetheless, it stated that the "fundamental approach" had been to transfer risk associated with design not having been completed to the private sector and that this had largely been achieved (para 8.10) (see also, however, para 11.59).

h) Were you concerned that allowance had only, apparently, been made for delay resulting from design and not, for example, for delay resulting from unforeseen ground conditions or issues with utilities?

I am unable to comment as I was not involved in advising on these aspects of the project.

i) Which risks associated with design work did you understand to be transferred to the private sector and which had been retained by the Council? What advice was provided to the Council in this regard and from whom?

<p>I cannot comment as I was not advising on the contractual terms or risk transfer provisions in this regard. I understood that Gill Lindsay was dealing with DLA on such matters.</p> <p>The Report noted that the risk contingency did not cover major changes to scope and that changes to the programme could involve significant costs that were not currently allowed for in the risk contingency (para 8.16). It did not consider what events might cause changes to the programme, how likely it was that they would arise and what, if anything, was being done to mitigate the risk.</p> <p>j) Did CEC legal officials seek further clarity on the costs that could arise from changes to scope or changes to the programme (including, for example, what events might cause changes to the scope or programme, how likely it was that such changes might arise and what, if anything, was being done to mitigate these risks)?</p> <p>I cannot advise further as I was not involved in advising on this aspect of the project.</p> <p>k) Was there ever discussion about postponing the award of the infrastructure contract until the design and utility diversion works were complete? If not, why not?</p> <p>I cannot confirm whether or not such discussions took place, but I do not recall any such discussions.</p> <p>The Report also noted that that some risks were retained by the public sector (para 8.13). These included:</p> <ul style="list-style-type: none"> • Agreements with third parties including delays to utility diversions • Finalisation of technical and prior approvals. • Absence of Professional Indemnity Insurance for TIE as it was wholly owned by the Council. <p>l) Were you concerned that the Council retained the risks noted above (and, if so, what was done to address any such concerns)?</p> <p>I am unable to comment as I was not involved in reviewing the contractual terms or the associated risk transfer provisions, proposed mitigations and allowances.</p>

	<p>m) Did there come a time when you were satisfied that the conditions in relation to giving approval to TIE to award the contracts had been met and if so, when and on what basis were you so satisfied?</p> <p>No.</p>
<p>26.</p>	<p>The Final Business Case, version 2, dated 7 December 2007 [CEC01395434], noted that the capital cost of phase 1a (Airport to Newhaven) was £498m and that there was a high level of confidence in the cost estimate (such that there was a 90% chance that the costs would come in below the risk-adjusted level). There was reference to Infraco being a "fixed" price or "lump sum" contract (paras 1.68, 1.71, 7.111, 7.127b, 10.53). The risks retained by the public sector were set out at para 1.85. It was noted that the public sector was "exposed to significant, but diminishing and manageable, risks during the remaining period of scheme development" (para 11.57).</p> <p>a) What was your understanding, at that stage, of the extent to which the Infraco contract would be a "fixed" price or "lump sum" contract (please explain your understanding of the meaning of these terms)?</p> <p>I was not involved in reviewing the Infraco contract terms or assessing pricing or related matters and am therefore unable to comment.</p> <p>b) What was your understanding, at that stage, of the main risks retained by the public sector, including, in particular, the risks to the public sector arising from incomplete and outstanding design, approvals and consents and incomplete advance utility works?</p> <p>I was not involved in reviewing the Infraco contract or assessing risk and can therefore not comment. In January 2008 I did flag high level risks to the project with regard to design and consents, but as noted above this was at a conceptual rather than detailed level.</p> <p>c) What was your understanding as to (i) why the risks to which the public sector were exposed were "diminishing" and (ii) how, and by whom, these risks would be "managed" during the remaining period of development of the scheme?</p> <p>I was not involved in reviewing the Infraco contract or assessing risk and can therefore not provide any clarification on this matter.</p>

Between January 2008 and May 2008

27. You were copied in on an email from Gill Lindsay to Colin Mackenzie on 3 January 2008 [CEC01400439] stating that all possible CEC resources relating to the ETN Project are utilised on a full-time basis as agreed, to support the legal work which requires to be undertaken as a matter of the utmost urgency during January to ensure financial close. The email also requested that Colin Mackenzie ensure that there was sufficient presence by this Division at Tie offices as required during this period. Finally it was requested that Colin Mackenzie have constant interface with Sharon Fitzgerald of DLA in respect of understanding and recognising and providing instructions as appropriate in respect of progress towards financial close and risk assessment on the principal contracts.

a) What role did CEC legal play in the project during January and leading to financial close?

The contract negotiations were led and controlled by tie. As detailed above, Gill Lindsay had decided to rely on DLA to advise it in relation to the appropriateness of the contractual and related terms. I understood that she was dealing with these matters with DLA. I was principally involved in negotiating the operating agreements with tie and TEL at the time.

b) What role did you personally play in supporting the legal work undertaken during January to ensure financial close?

I worked on a task specific basis as directed. During this period I worked mostly on the tie and TEL operating agreements and related governance matters. I was also absent on medical leave for a large proportion of this period.

c) Were TIE receptive to input from CEC legal?

Not always. In my view CEC Legal appeared to be viewed simply as another unwelcome governance hurdle to be overcome. By way of example, some of my concerns were later expressed in an email to Andy Conway on 17 March 2010 [CEC00482550].

d) What opportunity were you given to assess and comment on the contracts in advance of financial close?

As noted elsewhere, I was not involved in advising on or reviewing the contractual terms or related documentation as I was not appropriately qualified to do so.

	<p>e) Were you or other colleagues in CEC involved in the preparation of the attached spreadsheet [CEC01395099]? Were you satisfied that all of the critical decisions had been taken, to enable the Chief Executive to use delegated powers to enable tie to sign the contracts?</p> <p>I am unable to recall whether I commented on the spreadsheet.</p> <p>No, in the absence of an independent legal review I could never have been satisfied that the Council's position had been appropriately protected.</p>
28.	<p>The Legal Affairs Group met on 7 January 2008 [CEC01475121]. Again you did not attend this meeting however Colin Mackenzie reported back to yourself and others by email later that day [CEC01384528].</p> <p>a) Colin Mackenzie noted that not only did CEC legal have to finalise the list of Deliverables but CEC had to take a view on the minimum level of sign-off to be achieved by TIE in each category before CEC legal could make a positive recommendation to the Chief Executive. What minimum level of sign off was agreed? Was this agreed with Directors[CEC01397996]?</p> <p>I cannot confirm as I was not involved in agreeing these matters.</p> <p>b) Were the matters listed in Rebecca Andrew's email sufficiently addressed by CEC legal and tie [CEC01384528]? If not, why not?</p> <p>I cannot confirm. I do not recall being involved in advising on these matters.</p> <p>c) You were copied into an email from Colin Mackenzie to Gill Lindsay which informed her that CEC legal could not take the matter of deliverables any further and that in his view the Chief Executive should not concede on any of the deliverables before authorising the contract [CEC01400573]? What did you understand from Gill Lindsay's response to that email?</p> <p>I do not understand Gill's response and do not think I did at the time. It certainly did not appear to answer Colin's concerns.</p>

<p>29.</p>	<p>The report to the IPG on 18 January 2008 [CEC01398148] noted that TIE were to provide a list of exclusions from the Infraco contract with a value against each item and that CEC required a statement on the percentage of costs that were fixed, the percentage outstanding as provisional sums and a programme for moving these to fixed costs. Confirmation was awaited from BBS of the emerging quality of the design. Full details were required from TIE of the status and degree of completion of design work, including prior and technical approvals. If approvals risk was not being transferred to BBS, the Council needed to know the impact and likelihood of the risks and the strategy for managing the risks.</p> <p>a) What was your understanding of, and views on, these matters?</p> <p>I do not recall being involved in the detail of any of these matters and am unable to provide any further clarification.</p> <p>b) What was your understanding of the nature and purpose of the due diligence exercise being undertaken by BBS on the design?</p> <p>I was not involved in design related matters so am unable to provide any further clarification.</p> <p>c) In relation to risks arising from incomplete and outstanding design, prior and technical approvals, what was your understanding at this stage, of (a) who bore these risks, (b) the impact and likelihood of these risks arising and (c) the strategy for managing these risks?</p> <p>As detailed above, I provided some comment on the potential for risk arising from incomplete design in early 2008. However, as I was not involved in design related matters and nor was I advising on the related Infraco contract terms or risk provisions I am therefore unable to provide any further clarification in this regard.</p>
<p>30.</p>	<p>On 21 January 2008 you emailed Gill Lindsay [CEC01395072] noting that Colin Mackenzie's point was that in general, it was not clear that all issues would be closed out by Financial Close. It would therefore be up to the Directors to decide how much of the Council's requirements had to be satisfied before tie could be given the go-ahead.</p> <p>a) What were your views on this matter?</p>

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	<p>The original email chain had dealt with the Operating Agreements. It appears that I was being asked by Gill Lindsay, in Colin Mackenzie's absence, to look at the wider contractual issues. I was simply reiterating what I understood Colin's points to be.</p> <p>b) You queried whether it would be risky to allow the contract to be signed while certain issues remained to be closed out. By way of example, you noted the chance of a delay claim should negotiations with NR stall. What was Gill Lindsay's response to your email?</p> <p>I do not believe that I received one.</p>
31.	<p>The minutes of a meeting of the Legal Affairs Group on 21 January 2008, in relation to Consents and Approvals, noted that you asked <i>who would be liable if SDS does not work to the programme – MC [Mathew Crosse] noted that the SDS Novation Agreement would take care of this. At your request Mathew Crosse was to confirm that the Agreement contains details of who will take the risk on knock on effects of delays</i> [CEC01476409].</p> <p>a) Did Mathew Crosse provide a satisfactory answer to your question?</p> <p>I do not recall a response being provided.</p> <p>b) What was your understanding at the time of the risks that could arise if SDS did not work to programme and the party that would be liable for these risks?</p> <p>As I recall, this was a general point of concern raised by me at the time rather than at any level of detail. The risk appeared to me at that time to relate to possible costs of delay which may be incurred if the relevant consents were not in place. At its most simple, you cannot build something which has not been either designed or approved.</p>
32.	<p>By e-mail dated 22 January 2008 you noted <i>"a significant issue with regard to design approvals and consents"</i>, against the background that <i>"the design process is now over 12 months late in delivery"</i> [CEC00481318].</p> <p>By e-mail dated 29 January 2008 to Gill Lindsay you included proposed text to the Directors of City Development and Finance on the "Consents issue" as follows, <i>"as CEC has no real visibility on what is being delivered in relation to the currently approved drawings, this opens up the possibility of significant risk of increased cost to the project. I should be</i></p>

grateful if you would confirm whether or not you are of the view that CEC should accept the unquantified risk of claims for compensation as a result of this situation. Unfortunately the only way to exclude this risk entirely would be to require all drawings to be approved before financial close, which will be impossible on current timescales" [CEC01395151]).

a) What were your views on these matters?

My views and understanding at the time are as detailed in the email.

The concerns set out in my email primarily related to design delays having the possibility of causing two problems:

1. delay claims for prolongation eg re preliminaries. For example if design was not acceptable to Planning or required significant changes then the delay may be attributed to the Council which could incur additional costs; and/or
2. claims for betterment. Although I was not involved in the detail of the contractual terms, I understood from tie that BSC had priced for delivery of the Employer's Requirements which I understood to be the entire tram system. This was why I requested that City Development confirm that the Employer's Requirements did what the Council expected them to do. At a very simplistic level I was concerned that the Council's expectations re the standard of the system may only come to light through the planning process, so extra costs could be determined to be betterment and therefore for the Council/tie to pay for.

The possibility of additional cost as a result of what I understand was later concluded to be the fact that BSC had effectively only priced for part of the tram system (ie that designed up to November 2007) was not considered by me at this point as I was not aware of this issue until many months after signing.

To put this email [CEC00481318] and others in context, it is worth noting here my perception of what would have been "significant" in terms of cost increases to the project at the time. I recall at the time considering that a sum of eg £1m was a very significant increase in project costs and that the move from £508m to £512m in May 2008 was an enormous change. The reason for highlighting this is that, had I been aware of the possibility that design had been frozen and parts of the system had effectively not been priced for by BBS, then I would have advised at the time that the magnitude of the risk for the Council was far higher in terms of both likelihood and impact. Put simply, the materiality of the risk I was warning about at the time in relation to approval delays and betterment was far different from that which would have been the case had I known that the BBS price was based on drawings which only reflected delivery of a partial system.

33. On 22 January 2008 [CEC01395085], you sent an email to Gill Lindsay stating that your preliminary view was that the nearest way to protect the Council's interests re the consents issue was to seek confirmation from DLA that the Infracore suite of documents will only allow CEC to pay compensation for any delay in relation to consents/approvals in a limited set of circumstances. Those circumstances should be limited to (i) where CEC requests a change to the project which is outwith the agreed scope of works; or (ii) where CEC fail to meet deadlines as a result of CEC's own fault; or (iii) any other circumstances which City Development confirm are ok.

a) What was the purpose of your suggestions noted above? Were you concerned that the Council would be taking back the risk arising from outstanding design and approvals as noted in your earlier email dated 28 November 2007 [CEC01400081]?

My suggestion was simply a possible practical solution to the design and consents issue at the time for Gill Lindsay to consider. Again this was at a conceptual as opposed to detailed level as I was not advising on the exact contract terms. As I saw it at the time, if City Development were content with the full tram system requirements as set out in the Employer's Requirements, then if DLA were able to confirm that changes could only occur in very limited circumstances, this should in theory limit the Council's risk to areas which it fully understood and agreed to.

In my view it is the same issue requiring to be addressed in both emails. In the 28 November 2007 email I advised that CEC should not take on design risk on the basis that the drawings were not complete. In the 22 January 2008 email I was advising Gill Lindsay that CEC could seek to identify and exactly limit/define the extent of that risk by getting formal confirmation from DLA as to the legal position.

My overall position remained that CEC should not be taking on any undefined risk in this regard.

The email on 22 January 2008 was followed up over the next few days with other emails on the same matter.

b) At that time, what did you understand by the phrase "outwith the scope of the works"?

At the time I was not advising on the contract terms and was simply working in high level concepts, but from my perspective I understood from the fact that BSC were building to and had priced to deliver the Employer's Requirements. The real concern

	<p>I had was one of expectation and standards as set out above. As noted in my email of 22 January 2008, <i>"I think CEC accepts the principle that if it requests changes which were not agreed/required (eg re-route the tram via George Street or gold-plate the rails) then CEC will foot the bill."</i> What I recall being concerned with at the time was that there could be a subtle mismatch of expectation but Infraco could potentially argue that they had technically complied with an obligation. CEC, through Planning or otherwise would then have to request betterment, meaning extra cost.</p> <p>So, based on my knowledge at the time, "scope of the works" would have meant the entire tram system which, although I would not have reviewed them, was detailed in the Employer's Requirements and the other parts of the Infraco contract. In my view moving "outwith" should therefore have been limited to very few situations where the Council was positively seeking betterment or a required change through Planning etc rather than simply through a mismatch in expectations.</p>
34.	<p>By e-mail dated 5 February 2008 Alan Coyle of CEC advised Susan Clark of TIE that he was "disappointed" with the quality of information provided by TIE in respect of risk registers and that it was "unacceptable" that there was no quantification of "black flag" risks [CEC01508100] and [CEC01508101].</p> <p>a) What was your view on the quality of the risk registers provided by DLA?</p> <p>I was not involved in reviewing these risk registers so cannot comment.</p> <p>b) What was your view at that time, generally, on the quality of the information being provided by TIE?</p> <p>I have no comment on this as I cannot recall.</p>
35.	<p>By email to Colin Mackenzie dated 7 February 2008 [CEC01398550], Steve Hajducki stated that CEC should aim to get a complete set of acceptable consents through quickly, and [CEC] could always discuss variations or departures with BBS or whoever at a later stage.</p> <p>a) Did you agree with Mr Hajducki that variations or departures with BBS or other contractors could (or should) be agreed at a later stage?</p>

	I was not advising on consent or design matters and I cannot therefore comment.
36.	<p>On 8 February 2008 [CEC01398594] you were copied into an email in which Colin Mackenzie noted that there may be a need to balance the cost of delaying contract award against, for example, the cost of the Council meeting the risk of delayed Prior Approvals. He asked tie to ensure such figures were available for evaluation should this eventually arise. An e-mail from Susan Clark to CM stated that <i>"there should be no question about the Infraco contract award being delayed until all prior and technical approvals are in place."</i></p> <p>a) What figures was it envisaged would enable the council to evaluate the cost of delaying contract award against the cost of the Council meeting the risk of delayed Prior Approvals?</p> <p>I cannot comment as I was not involved in advising on this matter.</p> <p>b) What were your views on Susan Clark's point that quantifying the impacts of CEC delaying prior or technical approvals would be difficult?</p> <p>I was not involved in advising on this matter so cannot comment.</p> <p><i>By email dated 8 February, David Cooper stated "If we don't get the contract right we will end up with a situation where the Council in its statutory roles is put under enormous pressure to issue approvals. Irrespective of the fact that this could bring the credibility of the Planning and Roads Authority into question, it could result in a reduction of design quality, time delays and increased project cost.</i></p> <p><i>I would prefer to see some of the risk taken by BBS (sds) with project cost reworked accordingly although I see from your note that you consider this an unlikely outcome. I think the line of negotiation that TIE should be taking is that a workable realistic contract is surely better for all parties than one that is likely to end up in dispute." [CEC01400818].</i></p> <p>c) Did you agree with Mr Cooper's above comment that more risk should be taken by BBS and the project cost reworked?</p> <p>I was not advising on this matter so cannot comment. However, clearly I was of the view that the lack of finalised and approved drawings created risks for the Council.</p>

	<p>d) Did you agree with Mr Cooper's concern that if the Council did not get the contract right, the Council in its statutory role would be put under enormous pressure to issue approvals?</p> <p>As a potential outcome, yes. For example if it was discovered that the tie approved specification required a costly change through the consents process, tie may seek to pressure the Planners to approve the original specification.</p> <p>e) Did you agree with Colin Mackenzie that consideration should be given to whether the Infraco contract should be delayed until all prior and technical approvals were in place?</p> <p>It could certainly have been considered as an option.</p> <p>f) What was your understanding of the risks to CEC if the contract was not delayed until all prior and technical approvals were in place?</p> <p>I was not advising on this matter and cannot therefore comment beyond stating that risks would have existed and these would have needed considered and either accepted or otherwise appropriately dealt with.</p>
37.	<p>The Legal Affairs Group met on 18 February 2008 [CEC01474217].</p> <p>By e-mail dated 19 February 2008 [CEC01400919], Colin Mackenzie advised Gill Lindsay that "The position regarding novation of the SDS contract to BBS was given next to no clarification last night [i.e. at the meeting of the Legal Affairs Group], with a contradictory explanation from TIE". Mr Mackenzie also noted, "I regret to have to record with you my concern about TIE's lack of transparency and co-operation with Council officers. I do not take this personally, but find it unacceptable that the Council is constantly having to press TIE for relevant information and face an evasive response. This is hardly conducive to a good working relationship".</p> <p>a) What were your views on these matters?</p> <p>As I recall I agreed with Collin's general sentiments.</p> <p>b) What was your understanding of the effect of SDS novation at this time?</p>

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	<p>I was not advising on this matter and cannot comment.</p> <p>c) Were you concerned that the aim of the novation (i.e. to transfer risk arising from outstanding approved design to BSC) would not be met?</p> <p>I was not advising on this matter and cannot comment.</p>
38.	<p>On 18 February 2008 BBS produced a Design Due Diligence Summary Report, based on design information received by BBS by 14 December 2007 [DLA00006338]. That document raised various concerns about design, including that "more than 40% of the detailed design information" had not been issued to BBS.</p> <p>a) Did you see that report? Were others in CEC provided with that report? What were your views on the report? What was your understanding of how BBS could price for those works in respect of which detailed design was incomplete?</p> <p>Whilst I was not advising on this matter and cannot therefore comment, I was not aware of the Council having seen this report.</p>
39.	<p>By e-mail dated 22 February 2008 [CEC01474243] Graeme Bissett sent you a paper on "SDS -- Delivery and Consent Risk Management" [CEC01474244].</p> <p>a) What was your understanding from that paper of (a) the risks arising from the overlapping design and construction period and (b) who bore those risks?</p> <p>I do not recall reviewing this document as I was not advising on this matter and cannot therefore comment. This would have been a matter for Gill Lindsay to consider and advise on having taken advice from DLA.</p> <p>b) What was your understanding of the "process" and "set of contractual terms" that would enable TIE and CEC to manage the risks arising from the overlapping design and construction period?</p> <p>I was not advising on this matter and cannot comment. This would have been a matter for Gill Lindsay to consider and advise on having taken advice from DLA.</p>

	<p>c) What was your understanding of the contingency allowed for risks arising from design, approvals and approvals and how, and by whom, that contingency had been arrived at?</p> <p>I was not advising on this matter and cannot comment.</p> <p>d) The paper noted that it was at TIE/CEC's option that the risk contingency could be retained or traded for a cash sum and full risk transfer to BBS and that, at present, the tactic was to hold the contingency and seek to manage the risk. What was your understanding of these matters?</p> <p>I was not advising on this matter and cannot comment.</p>
40.	<p>Further concerns about the INFRACO contract were raised by the B team in the lead up to contract closure (see e.g. [CEC01567522] [CEC01567520] [CEC01560815] [CEC01508412] [CEC01400919] [CEC01400987] [CEC01399016] [CEC01399075] [CEC01401032] [CEC01401628] [CEC01401629]).</p> <p>The concerns included that there had been a material change from the Final Business Case put to the Council in December 2007, the price had risen by £10m, the project timetable was now three months later than predicted, the risk of approvals and consents had not been taken by the private sector and, there was a residual risk associated with design which, although the Council did not have any figures to assess that risk, "may be very significant".</p> <p>a) What were your main concerns around this time? Were these concerns discussed at Director level? Were your concerns ever resolved to your satisfaction?</p> <p>Although as stated elsewhere I was not involved in reviewing the contract terms and associated risks, the concerns raised in the documents referred to above were consistent with the broad concerns being expressed at the time, particularly by those in the B team. I cannot confirm which of these risks were discussed at Director level as I would not have been involved in such discussions but I would be surprised if they had not been. Many of these issues were not resolved to my satisfaction. I am unable to confirm how others came to be satisfied with the position.</p> <p>b) Were your concerns relayed to members of the Council? Do you consider that they ought to have been?</p>

	<p>I cannot confirm whether they were or not. That would have been a matter for the Directors, the Chief Executive and Head of Legal to consider and decide upon. My view is that many of these risks should have been advised to them if they had not already been.</p>
41.	<p>A Highlight Report for the IPG on 29 February 2008 [CEC01246993] gave an update in relation to Planning Prior Approvals and Technical Approvals. The Highlight Report included a draft Report on Terms of Financial Close dated 21 January 2008 (the "Close Report") (appendix 1). The draft was to be updated to reflect current negotiations.</p> <p>The draft Close Report stated that "<i>Infraco has a substantive responsibility in relation to consents and approvals but there is a critical interface with TIE/CEC which is being defined at this stage</i>" (p5).</p> <p>The draft Close Report also noted that, "<i>Crucially the price includes for normal design development (through to the completion of the consents and approvals process – see below) meaning the evolution of design to construction stage and excluding changes if design principle shape form and outline specification as per the Employers Requirements</i>" (p31).</p> <p>a) What was your understanding of the terms of the draft Close Report noted above?</p> <p>I was absent from the Council on medical leave from 28 February 2008 to 8 April 2008 and cannot therefore comment.</p>
42.	<p>By e-mail dated 3 March 2008 [CEC01506052] TIE provided CEC with a breakdown of the Quantified Risk Allowance [CEC01506053].</p> <p>a) What was your understanding of the allowance, if any, made in the QRA in respect of the risks arising to TIE/CEC from incomplete and outstanding design, approvals and consents?</p> <p>I was absent from the Council on medical leave from 28 February 2008 to 8 April 2008 and cannot therefore comment.</p> <p>b) What was your understanding of the allowance, if any, made in the QRA in respect of delays to the Infraco works caused by delays in the design and MUDFA programmes?</p> <p>I was absent from the Council on medical leave from 28 February 2008 to 8 April 2008 and cannot therefore comment.</p>

	<p>c) To what extent did TIE discuss the above matters with CEC?</p> <p>I was absent from the Council on medical leave from 28 February 2008 to 8 April 2008 and cannot therefore comment.</p>
<p>43.</p>	<p>You were copied into an e-mail dated 10 March 2008, in which Colin Mackenzie, when asked to draft the letter to Tom Aitchison noting the changes from the Final Business Case to the current position were in tolerable limits, advised that he would be willing to assist with the exercise from a factual perspective but that he could not support such a letter. He reiterated his view that the Chief Executive should report to Council again on the various material changes [CEC01399016]. You were also copied into the further e-mail later that day [CEC01399012].</p> <p>a) What were your views?</p> <p>I was absent from the Council on medical leave from 28 February 2008 to 8 April 2008 and can therefore not comment.</p> <p>b) Did you agree that there had been a change to the FBCv2?</p> <p>I was absent from the Council on medical leave from 28 February 2008 to 8 April 2008 and cannot therefore comment.</p> <p>c) Did you agree that a further report to Council was required?</p> <p>I was absent from the Council on medical leave from 28 February 2008 to 8 April 2008 and cannot therefore comment.</p>
<p>44.</p>	<p>You were copied into an e-mail dated 11 March 2008, where Colin Mackenzie advised Graeme Bissett that the B team were not yet in a position to advise Directors and Heads of Service that they could make a positive recommendation to the Chief Executive, enabling him to exercise his delegated authority to enable tie to enter into the contract with BBS. Colin Mackenzie asked for further information (detail on price and Value Engineering and the settled position on the SDS novation) to be provided at the briefing meeting [CEC01393838].</p> <p>The same day, (11 March 2008) Alan Coyle sent an email advising TIE [CEC01490289] that in order for CEC to approve the Intention to Award (ITA), CEC would require a letter from Willie Gallagher on certain matters, including that "the price is now fixed (excluding know (sic) estimated costs)".</p>

	<p>There is no question posed here but in any event I was absent from the Council on medical leave from 28 February 2008 to 8 April 2008.</p>
45.	<p>On 12 March 2008 Willie Gallagher sent a letter to Tom Aitchison confirming TIE's view that it was now appropriate to issue the Intention to Award letters [CEC01399076]. Mr Gallagher's letter also noted that the Tram Project Board had met earlier that day and had concluded that the final negotiated Infraco terms were consistent with the terms of the Final Business Case approved in December 2007.</p> <p>Mr Gallagher's letter did not, however, state that the Infraco price was fixed or address the matters in the emails sent by Colin Mackenzie [CEC01393838] and Alan Coyle [CEC01490289] or Duncan Fraser [CEC01544518] on 11 March 2008.</p> <p>a) Were you of the view that the price, and risks, were sufficiently clear and fixed at that time as to make it appropriate to issue an intention to award letter in respect of the Infraco contract?</p> <p>I was absent from the Council on medical leave from 28 February 2008 to 8 April 2008 and cannot therefore comment.</p> <p>b) What was your understanding, at that stage, of whether agreement had been reached between TIE and BBS in relation to which party would bear the risks and liabilities arising from incomplete and outstanding design, approvals and consents and how that was, or would be reflected in the Infraco price and pricing schedule?</p> <p>I was absent from the Council on medical leave from 28 February 2008 to 8 April 2008 and cannot therefore comment.</p> <p>c) Were you aware of the elements of the SDS design being redesigned by BBS [CEC01544518] and how that would be reflected in the price?</p> <p>I was absent from the Council on medical leave from 28 February 2008 to 8 April 2008 and cannot therefore comment.</p>
46.	<p>A letter dated 12 March 2008 from DLA to CEC [CEC01347797] advised that "an agreed form of draft Novation Agreement has been negotiated to close today. The terms of the Novation transfer responsibility for design, as required by the procurement strategy, to BBS (subject to the above)" (para 4).</p>

In contrast, the draft letter e-mailed the previous day by Graeme Blissett to Andrew Fitchie stated, "an advanced draft Novation Agreement is in play for negotiation to close. The terms of the Novation ... result in retained SDS performance risk for TIE" (para 3.4) [CEC01541242] [CEC01541243].

You were copied in on Colln Mackenzie's email dated 2 May 2008, in which he stated that he had already made known to GL your views about the role of DLA on behalf of the Council and the worth of their letters [CEC01247788].

a) What were your views about the role of DLA on behalf of the Council and, consequently, the worth of letters from DLA to the Council?

I was absent from the Council on medical leave from 28 February 2008 to 8 April 2008 and cannot therefore comment. However, as noted elsewhere, my view was that sole reliance upon DLA and their letters by the Council was not appropriate.

b) Were you aware that individuals in TIE had an input into the drafting of letters from DLA to CEC? Do you consider this to have been appropriate [CEC01551064][CEC01474540]?

I was absent from the Council on medical leave from 28 February 2008 to 8 April 2008. Nevertheless, I do not recall being aware of this fact. I am unable to comment as to whether another party having input would have been appropriate or not. Ultimately DLA would have been responsible for the content of such letters.

c) Were you confident that *responsibility for design* had indeed transferred to BBS? What did you understand responsibility for design to entail? Did you understand this to mean that as BBS were responsible for design, they would bear the risks and liabilities arising from incomplete and outstanding design, approvals and consents? Or did you understand that BBS were responsible for the design, but TIE and ultimately the Council retained the risks and liabilities arising from incomplete and outstanding design, approvals and consents?

I was absent from the Council on medical leave from 28 February 2008 to 8 April 2008 and cannot therefore comment.

I was also not involved with advising on the detail of the contractual mechanisms to transfer design risk or associated issues.

However, to hopefully assist the Inquiry, my recollection was that TIE had advised CEC they had sought to achieve transfer of design and consents risk to BBS. I was not involved in advising on how this was being effected but my general

	<p>understanding from tie was that BBS would build a tram in compliance with the Employer's Requirements and the other parts of the Infraco contract. At a very basic level this meant that if eg the Employer's Requirements required 20 tram stops then BBS had priced on the assumption of all 20 stops being built. If the Council requested betterment or something different in terms of Planning then that would be for tie and the Council's account. To the extent that there was approvals delay then this too would be for tie to pay for. I understood broadly that tie had evaluated any risk associated with design and possible delays and reflected it in a risk allowance. These were matters being dealt with by tie, DLA and Gill Lindsay in terms of contractual risk allocation and acceptability.</p>
<p>47.</p>	<p>On 13 March 2008 Colin Mackenzie sent three e-mails to Gill Lindsay, copying in yourself and Alan Squair, setting out certain concerns of the B team [CEC01399075], [CEC01401032], [CEC01401628]. The concerns included:</p> <ul style="list-style-type: none"> • the increase in price, and the fact that the risk of consents had not been taken by the private sector, meant that the negotiated terms were not consistent with the Final Business Case, • DLA's letter of 12 March did not offer the Council the degree of comfort it might expect and the Council were being asked to permit notice of Intention to award the contract and thereafter financial close while matters were still under discussion, and • A letter from Parsons Brinckerhoff to TIE [CEC01401629] advised of further reviews that were required to ensure full alignment of the Employer's Requirements and the Infraco Proposals. <p>a) What were your views on these matters?</p> <p>I was absent from the Council on medical leave from 28 February 2008 to 8 April 2008 and cannot therefore comment.</p> <p>b) How were the B team's concerns received by senior CEC officials?</p> <p>I was absent from the Council on medical leave from 28 February 2008 to 8 April 2008 and cannot therefore comment.</p>
<p>48.</p>	<p>On Friday 14 March 2008 (at 3:39 pm) an e-mail was sent to Alan Coyle [CEC01386275] attaching a Note that had been approved by the Solicitor to the Council, Gill Lindsay, [CEC01386276] confirming that it was appropriate for Tom Aitchison to authorise TIE to immediately issue a Notice of Intention to award the INFRACO contract to BBS.</p>

	<p>a) What were your views at that stage, on whether it was appropriate for authority to be given to TIE to immediately issue a Notice of Intention to award the INFRACO contract to BBS?</p> <p>I was absent from the Council on medical leave from 28 February 2008 to 8 April 2008 and cannot therefore comment.</p>
49.	<p>On 18 March 2008 Duncan Fraser sent an e-mail on the Current Project Status, which noted that a number of issues required to be addressed from the Councils perspective, in order to meet the programme for Financial Close, including <i>"Price and Funding – figure and scope"</i> [CEC01401041].</p> <p>a) To what extent were these matters addressed?</p> <p>I was absent from the Council on medical leave from 28 February 2008 to 8 April 2008 and cannot therefore comment.</p>
50.	<p>On 18 March 2008 [CEC01347796] DLA sent a further letter to CEC providing an update on the Draft Contract Suite as at 13 March 2008. The letter stated, <i>"We understand that TIE will confirm settled pricing for all major fixed price elements of the Infraco Contract. If TIE has achieved these objections and BBS has been able to confirm its commitment to abide by these positions, TIE should have every confidence in closing the contract suite efficiently, commencing with the issue of notification of intention to award today. We would stress that full cooperation of the BBS Consortium on this objective is essential"</i>.</p> <p>a) Did you see this letter? Did you consider it appropriate for CEC to authorise TIE to immediately issue a Notice of Intention to award the INFRACO contract to BBS despite the fact that <i>settled pricing for all major fixed price elements of the Infraco Contract</i> had not yet been achieved?</p> <p>I was absent from the Council on medical leave from 28 February 2008 to 8 April 2008 and cannot therefore comment.</p>
51.	<p>By e-mail dated 11 April 2008, Colin Mackenzie forwarded you a series of email exchanges concerning a difficulty that had arisen with the "Russell Road Bridge: Prior Approval" and which raised the question whether the sum allowed in the Quantified Risk Allowance for SDS delay (£3m) was sufficient [CEC01401109].</p>

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	<p>Alan Coyle noted that if SDS continued not to deliver, these type of issues could eat into the QRA (£3m for SDS delay, £6m for General Delay) pretty quickly. He felt that the matter required to be bottomed out with TIE and if there was not a satisfactory response at the Legal Affairs Committee the matter should be escalated.</p> <p>a) What were your views on these matters?</p> <p>I was not advising on this matter and cannot therefore comment.</p> <p>b) To what extent were elected members briefed on these concerns?</p> <p>I am unable to confirm. Following any escalation, it would have been for a Head of Service or Director to brief elected members as they considered appropriate.</p>
52.	<p>You attended the Legal Affairs Group met on 14 April 2008 [CEC01227009]. There do not appear to have been any further meetings of the Legal Affairs Group until October 2008.</p> <p>a) Why were there no further meetings of the Group until October 2008 including, in particular, why was there not a further meeting of the Group after the Infraco contract was in its final negotiated form but before it was signed?</p> <p>I do not know why there were no further meetings.</p>
53.	<p>You were included on the copy list of an e-mail dated 14 April 2008 in which Colin Mackenzie noted his view that it would be "<i>prudent and proper</i>" to report again to members before Financial Close of the Infraco contract was authorised given the various changes which had emerged since December 2007, including "<i>the new final estimate of £508 million; a four month delay to the revenue operating date; and continuing concern over the risks to the Council arising from the SDS programme</i>" [CEC01256710].</p> <p>The chain includes an e-mail dated 16 April 2008 from Jim Inch to Tom Aitchison which noted "<i>Given Colin's concerns it may be prudent to have a short meeting with Gill to confirm the present direction of travel</i>".</p> <p>a) What were your views on these matters?</p>

	<p>I had no reason to disagree with Colin's advice. Indeed, I expressed the same view to Gill Lindsay in an email on 11 April 2008 [CEC01395531].</p>
54.	<p>By e-mail dated 15 April 2008 [CEC01245223] Alan Coyle forwarded yourself, Gill Lindsay and Colin Mackenzie an e-mail of the same date by Stewart McGarrity attaching Schedule 4 of the Infracore contract [CEC01245224] and a cost analysis spread sheet [CEC01245225][note – document not legible].</p> <p>a) When did you first see Schedule 4? Did you read Schedule 4 at that time? What, if any, discussion was there within CEC of the meaning and effect of Schedule 4? Did TIE discuss the meaning and effect of Schedule 4 with CEC?</p> <p>As noted elsewhere, I was not involved in advising on or reviewing the contract or any of its terms. This would have included this email and its contents. I would not have reviewed them and cannot therefore comment.</p> <p>b) What was your understanding of the purpose and effect of the various Pricing Assumptions in Schedule 4?</p> <p>As noted elsewhere, I was not reviewing the contract or any of its terms and cannot therefore comment.</p> <p>Colin Mackenzie replied on 16 April 2008 [CEC01247693], (again cc'ing yourself) asking how the information provided fed through to the overall risk figure and the Quantified Risk Allowance.</p> <p>c) It would be helpful if you could explain Colin Mackenzie's query in relation to the risk figure and the QRA and whether he and yourself were satisfied with Mr Coyle's response (noted in the same thread)?</p> <p>I was not advising on this matter and cannot therefore provide any clarification.</p>
55.	<p>On 16 April 2008, Colin Mackenzie forwarded you an email that Andy Conway had sent to Susan Clark and others, asking whether TIE had "undertaken an exercise to determine the extent and cost of changes that will be required since the design freeze in November?" [CEC01247686].</p> <p>a) What were your views on these matters?</p>

	<p>I do not recall, but from reading the email now my interpretation is that Andy Conway was likely requesting tie to ascertain the impact of changes to design which had actually taken place since November 2007 as opposed to changes likely as a result of the freeze in terms of pricing which later transpired to have taken place.</p> <p>b) It would be helpful if you could explain Colin Mackenzie's comments in this email?</p> <p>I am unable to provide any clarity on this matter. Colin Mackenzie may be able to do so.</p> <p>c) What was Susan Clark's response to that email?</p> <p>I am unable to confirm.</p>
56.	<p>An email by Graeme Bissett dated 28 April 2008 [CEC01312358] attached a Report on Infraco Contract Suite [CEC01312363]. The Report on the Infraco Contract Suite noted:</p> <ul style="list-style-type: none"> • Price, "A number of core pricing and programming assumptions have been agreed as the basis for the Contract Price. If these do not hold, Infraco is entitled to a price and programme variation known as "Notified Departure" (p4) • Programme, "Following contract signature, it is expected that BBS will seek a Notified Departure on Programme due to SDS delay in design production" (p4) <p>a) What was your understanding of the provisions noted above?</p> <p>I was not involved in reviewing this documentation or advising on this aspect of the project so am unable to provide any clarification.</p> <p>b) At this time, what Notified Departures did you expect following contract signature?</p> <p>As I did not review this documentation, I do not believe that I was aware that there would be notified departures. I was not advising on this matter so am unable to provide any clarification in this regard.</p> <p>c) At this time what did you understand to be the likely cost of these Notified Departures?</p>

	<p>I was not involved in or aware of this matter so am unable to provide any clarification.</p> <p>d) How did you understand that had that been allowed for in the risk allowance?</p> <p>I was not involved in advising on this matter so am unable to provide any clarification.</p> <p>e) What were your views on giving the SDS provider (Parsons Brinckerhoff) a "bonus pot of £1,000,000" to incentivise the production of design?</p> <p>I was not involved in advising on this matter so cannot provide any clarification.</p> <p>f) Were elected members advised in detail on these matters in advance of the contract closure and if not, why not?</p> <p>I was not involved in advising elected members so am unable to provide any clarification in this regard.</p> <p>g) Was clarification of any of these issues sought by CEC officials? If not, why not?</p> <p>I was not involved in advising on this matter so cannot provide any clarification in this regard.</p>
57.	<p>By e-mail dated 30 April 2008 [CEC01246045] Colin Mackenzie informed Gill Lindsay that as requested, he and yourself had considered the letters received from DLA dated 12 March [CEC01347797], 18 March [CEC01347796] and 28 April [CEC01342368] and you were concerned that these letters could not give full comfort to the Council. This was on the basis that instructions have been given throughout by TIE to DLA, with little input from Council officers and accordingly no certainty that Council instructions flowed through to DLA. In addition to this, the email noted that the most recent letter narrated that matters regarded as risky for the Council would not be fully covered by the QRA.</p> <p>a) What was Gill Lindsay's response to that email?</p> <p>That email [CEC01246045] was not sent to Gill Lindsay. It did however note that the Directors would no doubt be "seeking confirmation from the Council Solicitor as to the acceptability to her of the DLA letter". The issues raised by Colin Mackenzie in his email had been raised many times with Gill Lindsay previously.</p>

	<p>b) For the avoidance of doubt, were you of the view that the DLA letters (3 number) provided sufficient comfort to enable the Council solicitor to advise the Chief Executive and Directors to agree to the contracts being signed [CEC01222037]?</p> <p>No I was not and, as set out elsewhere in this document, this was made this clear by myself and Colin Mackenzie on numerous occasions.</p> <p>c) What, in your view, was required at that stage, to provide sufficient comfort to enable the Council solicitor to advise the Chief Executive and Directors to agree to the contracts being signed?</p> <p>In my view, only a full independent legal review on behalf of the Council could have ensured that the Council's position was fully protected. That is what I would have required at the time in order to provide sufficient comfort. My views on the need for such a review had been highlighted consistently since Autumn 2007.</p>
58.	<p>On 1 May 2008 you emailed Colin Mackenzie to inform him that you fully agreed with the email he had sent to Gill Lindsay earlier that day. Mr Mackenzie's email advised Gill Lindsay that it was his understanding that BBS had increased their price by a significant amount and that there would be further negotiations over the weekend between tle and BBS [CEC01241689]. He was deeply concerned that members would not be advised of these recent developments when members considered the report to Council that day. He considered that officers' duty to the Council would be best served by either "pulling the report, assembling the true picture and reporting again to members, or by being open to them about the changed situation".</p> <p>a) What were your views? What was Gill Lindsay's response to this email?</p> <p>I have nothing further to add. The email highlighted our concerns at the time and I fully agreed with Colin's advice at the time. I am not aware of Gill Lindsay's response on this issue or if there was one.</p>
59.	<p>A Report to Council by Tom Aitchison on 1 May 2008 [CEC00906940] sought refreshment of the delegated powers previously given to the Chief Executive to authorise TIE to enter the contracts with the INFRACO and Tramco bidders.</p> <p>The report noted:</p>

	<p>(1) the cost of the project had increased from £498m to £508m (comprising a base cost of £476m and a revised QRA of £32m), which increase was noted to be largely due to the firming up of provisional prices to fixed sums, currency fluctuations and the "crystallisation of the risk transfer to the private sector as described in the FBC" (para 3.5).</p> <p>(2) 95% of the combined Tramco and INFRACO costs were fixed with the remainder being provisional sums which Tie had confirmed as adequate;</p> <p>(3) "As a result of the overlapping period of design and construction a new risk area has emerged which has been the subject of extensive and difficult negotiation. TIE Ltd advise that the outcome is the best deal that is currently available to themselves and the Council. Both TIE Ltd and the Council have worked and will continue to work diligently to examine and reduce this risk in practical terms" (para 3.10).</p> <p>a) What was your understanding of (1) the "new risk area" that had emerged as a result of the overlapping period of design and construction, (2) the "outcome" that had been arrived at in respect of that risk and (3) the steps that would be taken by TIE and CEC to reduce the new risk area?</p> <p>I was not involved in advising on this aspect of the project so cannot provide any material clarification in this regard.</p> <p>However, in my email to Colin Mackenzie on 17 April 2008, I did advise that a number of issues should perhaps be added to the Council report. This included "change in risk profile, esp re SDS, transfer of consents risk etc" and "change in price and how this affects amount of risk cash left". See [CEC01241572].</p> <p>b) The report provided no explanation of pricing Schedule 4, despite this having been provided to CEC legal on 15 April. Why did the report not mention Schedule 4? Was the purpose and likely effect of Schedule 4 ever fully explained to members (and if not, why not)? Were members ever addressed on the risk or likelihood of notified departures and the effect of that on cost and budget?</p> <p>As noted elsewhere, I was not involved in reviewing the contract terms so cannot therefore provide any clarification on this matter. This would have been a matter for Gill Lindsay and DLA to consider.</p>
60.	<p>By e-mail dated 2 May 2008 [CEC01222466] Colin Mackenzie sent Gill Lindsay a report [CEC01222467] prepared by the "B" team. The report noted the need to review the risk associated with consents and approvals and whether the present risk</p>

	<p>allowance of £3.3m was adequate. GL responded to this email stating, "I have considered briefly. My questions are is Tle aware of issues and have resolutions been agreed? Time is of the essence". She noted that Tle wished to be in a position to close with immediate effect if and when resolution was agreed. Any outstanding matters were to be resolved with Tle very quickly [CEC01222037].</p> <p>a) What were the B team's concerns? Why was it thought that the present risk allowance associated with consents and approvals of £3.3m was adequate?</p> <p>I was not involved in assessing this risk or associated terms and cannot therefore comment. I did however, follow up on a number of these concerns in my emails to Duncan Fraser and others on 6 and 8 May 2008 (see [CEC01246094] and [CEC01247809]).</p> <p>b) What steps, if any, were taken by CEC, and by whom, to review whether the risk allowance was adequate?</p> <p>I cannot comment as I was not involved in advising on this aspect of the project.</p> <p>c) In your view, did the three letters from DLA go into sufficient detail on these matters to enable CEC officials to advise the Chief Executive and Directors to sign the contract [CEC01222037]?</p> <p>Given the concerns raised by both Colin Mackenzie and I on a number of occasions, it was a matter for Gill Lindsay to decide whether the DLA letters gave her and the Council sufficient comfort.</p>
61.	<p>On 7 May 2008 Rebecca Andrew sent Gill Lindsay an e-mail [CEC01222074] attaching a draft report by the Chief Executive for the meeting of CEC's Policy and Strategy Committee on 13 May 2008 [CEC01222075].</p> <p>Gill Lindsay's response the same day noted, "Appropriate forum re Committee choice was discussed today with Council Secretary and Jim Inch. This will likely lead to discussion with Tom" [CEC01248981].</p> <p>By e-mail dated 8 May 2008 Stan Cunningham, Committee Services Manager, advised Ms Lindsay that the current plan for tabling the report meant that "it may be the first time that many of the members are aware of [the cost increase]. This is not satisfactory ..." [CEC01248988].</p>

	<p>By e-mail dated 9 May 2010 [CEC01351492], Duncan Fraser noted that he had redrafted the report to include key elements of a document e-mailed by Graeme Bissett on 8 May 2008 [CEC01294645], "Financial Close Process and Record of Recent Events" [CEC01294646] (the Executive Summary of which had been drafted to facilitate inclusion in the Council's report to the Policy and Strategy Committee).</p> <p>a) What were your views on whether it was appropriate that a decision on final approval for the tram project went to the Policy and Strategy Committee rather than a full meeting of the Council (or an alternative committee of the Council, for example, the Tram sub-committee or the Finance or Transport committees)?</p> <p>I did not have a view. It would have been for relevant senior officers to decide on the appropriate protocols for reporting to elected members.</p> <p>b) Do you know why (and by whom) it was decided to put the matter to the Policy and Strategy Committee?</p> <p>No.</p>
62.	<p>On 12 May 2008 (at 18.49 hours) Graeme Bissett sent an e-mail to you and others attaching a final set of TIE's internal approval documents [CEC01338846]. The Financial Close Process and Record of Recent Events dated 12 May 2008 (clean copy [CEC01338847]; tracked changes [CEC01338848]) noted that a response was received from BBS on 7 May 2008 which proposed a payment of £9m to BBS and "Further examination of the contract terms surrounding the design management process, which although unclear pointed to an extended design and consent programme with potentially material adverse consequences for the construction programme" (p4).</p> <p>a) What was your understanding of that matter?</p> <p>I did not review these documents as I was not involved in advising on these matters and cannot therefore comment.</p>
63.	<p>On 13 May 2008 the Council's Policy and Strategy Committee considered a report by the Council's Chief Executive [CEC01246115]. The report advised that the estimated capital cost for phase 1a was now £512.2 million. The report stated that "Offsetting the increase in cost is a range of negotiated improvements in favour of TIE and the Council in order to</p>

	<p>reduce the risk of programme delays and minimise exposure to additional cost pressures, as well as better contractual positions".</p> <p>a) To what extent were you involved in drafting the report to Committee? To what extent were TIE involved in drafting that report?</p> <p>I do not believe I was involved in drafting or commenting on this report so cannot provide any clarification.</p> <p>b) What is your understanding of the statement noted above?</p> <p>I am unable to provide any clarification.</p> <p>c) Do you agree with it? If so, what do you consider were the "improvements" and "better contractual positions" that reduced the risk of programme delays and minimised exposure to additional costs?</p> <p>I have no comment as I was not advising on this issue.</p>
64.	<p>Infraco contract close took place on 14 and 15 May 2008, as part of which a number of contracts were signed, including the Infraco contract [CEC00036952] and novation of the SDS contract to BSC.</p> <p>By way of overview, what was your understanding of the following matters at contract close:</p> <p>a) The extent to which detailed design was complete (and all necessary statutory approvals and consents had been obtained), the extent to which these matters were outstanding and when the detailed design was likely to be completed (and all approvals and consents obtained)?</p> <p>This was a matter for tie and City Development Department to consider. I cannot comment as I was not involved in this aspect of the project.</p> <p>b) The extent to which utilities diversions were complete, the extent to which these works were outstanding and when these works were likely to be completed?</p>

	<p>This was a matter for tie and City Development Department to consider. I cannot comment as I was not involved in this aspect of the project.</p> <p>c) The likely effect on the Infraco works and contract (and the cost of the tram project) if the outstanding design (and approvals and consents) and outstanding utilities diversion works were not completed within the anticipated timescale?</p> <p>This was a matter for tie and City Development Department to consider. I cannot comment as I was not involved in this aspect of the project.</p> <p>d) The provision made in the risk allowance for the above matters?</p> <p>This would have been a matter for tie, City Development and Finance to consider. I cannot comment as I was not involved in this aspect of the project.</p> <p>e) The concessions TIE had made to achieve financial close [CEC01031217]?</p> <p>I was not involved in this aspect of the project and cannot therefore comment.</p> <p>f) To what extent did TIE discuss the above matters with CEC?</p> <p>This would have been a matter for tie and senior Council officials to have consulted on. I cannot comment further as I was not involved in any such discussions.</p>
65.	<p>The pricing provisions of the Infraco contract were set out in Schedule 4 [USB00000032].</p> <p>a) What was your understanding of the extent to which the Construction Works Price of £238,607,664 was a fixed price?</p> <p>I cannot comment as I was not involved in this aspect of the project.</p> <p>b) What did you understand to be the main exclusions, provisional sums, assumptions and conditions?</p> <p>I cannot comment as I was not involved in this aspect of the project.</p>

	<p>c) In what circumstances did you consider that the price was likely to change?</p> <p>I cannot comment as I was not involved in this aspect of the project.</p>
66.	<p>In relation to the Value Engineering deductions shown in Appendix A of Schedule 4 of the Infraco contract [USB00000032]:</p> <p>a) What was your understanding of what would happen if the VE savings were not achieved?</p> <p>I was not involved in assessing Value Engineering opportunities or costs and cannot therefore comment.</p> <p>b) What were your views as to whether the VE savings were likely to be achieved?</p> <p>I am unable to comment as I was not involved in assessing this nor would I have been qualified to do so.</p> <p>c) In the event, were these Value Engineering savings achieved (and, if not, why not)?</p> <p>I am unable to comment as I was not involved in assessing this nor would I have been qualified to do so.</p>
67.	<p>Schedule 4 of the Infraco contract [USB00000032] contained a number of Pricing Assumptions. At the time of Infraco contract close:</p> <p>a) When did you first become aware of Schedule 4? What did you understand to be the purpose and effect of the Pricing Assumptions?</p> <p>As detailed elsewhere, I was not involved in reviewing the contract or related documentation and cannot therefore comment.</p> <p>b) What did you consider were the main Pricing Assumptions that were likely to change and result in Notified Departures and why?</p> <p>As detailed elsewhere, I was not involved in reviewing the contract or related documentation and cannot therefore comment.</p>

	<p>c) Approximately how many Notified Departures did you consider were likely to arise?</p> <p>I did not consider this as I was not advising on this matter and cannot therefore comment.</p> <p>d) What did you consider to be the likely total value of the Notified Departures?</p> <p>I did not consider this as I was not advising on this matter and nor would I have been qualified to do so. I cannot therefore comment.</p> <p>e) To what extent were the above matters discussed with CEC?</p> <p>I am unable to comment as I do not recall being involved in any such discussions and nor was I advising on this matter.</p>
68.	<p>Pricing Assumption 3.4 of Schedule 4 [USB00000032] dealt with design development.</p> <p>a) What was your understanding of the meaning of that Pricing Assumption, including which party bore the risk that development, or change, of design from the base date of 25 November 2007 would result in a contract change/Notified Departure?</p> <p>As detailed elsewhere, I was not involved in reviewing the contract or related documentation. I cannot therefore comment on the specifics of that pricing assumption or the risk transfer provisions.</p>
69.	<p>Schedule 4 defined the "Base Date Design Information" as <i>"the design information drawings issued to Infraco up to and including 25th November 2007 listed in Appendix H to this Schedule Part 4"</i>.</p> <p>Appendix H of Schedule 4, however, did not list any drawings and, instead, simply stated that the BDDI was <i>"All of the Drawings available to Infraco up to and including 25th November 2007"</i>.</p> <p>a) Are you aware why Appendix H of Schedule 4 did not list the drawings comprising the BDDI?</p> <p>No. I was not involved in reviewing the contract or associated documentation and cannot therefore comment.</p>

	<p>b) Did that cause any problems at a later stage (and, if so, what problems arose and how were they resolved)?</p> <p>I am unable to comment but conceptually if Base Date Design Information was effectively undefined or unclear then this would clearly be a significant practical risk issue.</p>
70.	<p>As part of the Infracore contract close, the SDS contract was novated from TIE to BSC.</p> <p>a) What was your understanding in relation to who would be responsible for managing the design process after novation and for ensuring that all outstanding design and all outstanding statutory approvals and consents were completed/obtained on time?</p> <p>I cannot comment as I was not involved in reviewing the contract or related documentation and risks.</p> <p>b) What responsibility and powers, if any, did TIE retain after novation in relation to managing the design process and ensuring that all outstanding design (and all outstanding statutory approvals and consents) was completed/obtained on time?</p> <p>I cannot comment as I was not involved in reviewing the contract or related documentation and risks.</p> <p>c) Do you consider that any problems arose from the fact that (i) changes to, and completion of, design was primarily under the control of BSC (as a result of novation of the SDS contract to BSC) but (ii) changes to design, or delay in completing design, could give rise to a departure from one of the Pricing Assumptions in Schedule 4 of the Infracore contract and, therefore, give rise to a Notified Departure (leading to an increase in the cost of the project)? Was any consideration given by CEC or TIE to that potential difficulty prior to SDS Novation?</p> <p>I cannot comment as I was not involved in reviewing the contract or related documentation and risks.</p>
Between June 2008 and December 2008	
71.	<p>On 25 September 2008 [CEC01057495 – note - actual date is 28 August 2008] Duncan Fraser sent yourself and other CEC officials an email noting that it could be anticipated that TIE would have to engage on extensive compensation events discussions with their contractors.</p>

	<p>a) When and how did you first become aware of the dispute between TIE and BSC?</p> <p>I cannot recall. Tie was dealing with these matters with DLA and to my knowledge CEC legal input was not sought. Colin Mackenzie responded to this email on 29 August 2008 [CEC01057495]</p> <p>b) What were your views on the main matters in dispute?</p> <p>Tie and DLA were dealing with this matter, so I am unable to comment.</p> <p>c) What were your views on the main causes of the dispute?</p> <p>I was not involved in this matter and cannot therefore comment. An email from around the same time (from Ysella Jago on behalf of Gill Lindsay) on 2 Sept 2008 [CEC01055335] requested an update on tram matters I was involved with and it appears from my response that around that time I was only working on the SRU agreement in respect of Trams.</p>
72.	<p>The minutes of a meeting of the Legal Affairs Group on 27 October 2008 [CEC01166757] noted that there was a "point of principle" between TIE and BBS in relation to the base date design information.</p> <p>a) What was your understanding of the "point of principle" between TIE and BBS in relation to the base date design information?</p> <p>I was not at the meeting and do not recall being briefed on this or asked for any advice in this regard and cannot therefore comment.</p>
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73.	<p>A dispute arose between TIE and BBS prior to the planned commencement of works on Princes Street in February 2009. By e-mail dated 26 February 2009 [CEC00858138] Alan Coyle attached a short note [CEC00858139] of some points to "set the scene" for a discussion on the Council's requirements from TIE relating to the contractual dispute. He considered there was currently a "vacuum of knowledge" from the Council's perspective.</p>

	<p>By e-mail dated 6 March 2009 [CEC01031402] Andrew Fitchie sent Ms Lindsay the parties' Position Papers in relation to the Princes Street dispute. In an e-mail dated 11 March 2009 [CEC00869667] Colin Mackenzie noted certain concerns. By e-mail dated 12 March 2009 [DLA00002542] Chris Horsley, DLA, sent a paper to CEC, "DLA Piper Response to CEC Questions" [DLA00001357].</p> <p>a) When, and how, did you first become aware that there was a dispute between TIE and BSC in relation to the works due to commence at Princes Street [CEC01057495]?</p> <p>I cannot recall, but likely to have been around early March 2009. See for example the email from Alan Coyle to myself and others dated 12 March 2009 [CEC00858455].</p> <p>b) What was your understanding of the nature of the dispute in relation to the works at Princes Street, including why BSC had refused to start work and the "root cause(s)" of the dispute?</p> <p>The Princes Street matter was dealt with by tie, DLA and senior CEC management. I do not recall being involved with this matter and cannot therefore provide any clarification.</p> <p>c) Did you consider at that time that you/ other CEC officials had sufficient knowledge and understanding of the Infraco contract and the dispute in order to advise the Council (a) on TIE's prospects of success in the Princes Street dispute and (b) more, generally, whether the Infraco contract was "sound" and "in all respects in the Council's best interests as client and funder"? If not, why was independent legal advice not sought at this stage?</p> <p>No. I am not clear why independent advice was not considered by those dealing with the matter at that stage.</p>
74.	<p>The Report to Council dated 12 March 2009 [CEC02083751] appears to be the first report to the Council to refer to contractual difficulties between TIE and BSC. The Report noted that while works were due to start in Princes Street in February 2009, it had been apparent in the preceding days that they might not start as intended. The statement made by the Council at the time made reference to the contractors wishing to impose unacceptable conditions in order to start the works (however, these conditions are not identified). In the report Tom Alchison merely states that "members will appreciate that I am restricted in what I can say</p>

	<p><i>while commercially confidential negotiations are taking place</i>". He states that TIE is maintaining an approach to what was agreed <i>"after tough negotiation before the contract was signed"</i>.</p> <p>a) The report stated that a <i>"fixed price"</i> contract had been entered into for the delivery of the tram project and that prior to financial close TIE had agreed an additional sum with BBS which had <i>"cemented the risk allocation position"</i> agreed by the parties. What was your understanding of these matters? Did you still consider the contract to have been a fixed price contract? Did your understanding in that regard change at any time (and, if so, when and why)?</p> <p>I am unable to comment as I was not advising on the contract or its interpretation.</p>
75.	<p>In an e-mail dated 7 April 2009 Colin Mackenzie made certain observations on the dispute between TIE and BBS [CEC00900404].</p> <p>a) What were your views on Mr Mackenzie's observations?</p> <p>Colin's observations matched my note on matters at the time (sent to Colin Mackenzie at 11.34 on 7 April 2009).</p> <p>b) What were the views of Gill Lindsay and other senior officers on the matters raised in Colin Mackenzie's e-mail?</p> <p>I do not recall being advised of the outcome or their views.</p>
76.	<p>By e-mail dated 9 April 2009 [CEC00900404] yourself and Colin Mackenzie prepared a report on the dispute between BBS and TIE [CEC00900405]. The report noted that there were presently 350 Notified Departures in process. The disputes could be grouped into a number of different categories, including who had responsibility for design management and evolution. BBS were taking the view that all changes to design were TIE's responsibility. The report noted, <i>"The main problem here stems from the fact that design was not complete at Financial Close"</i>.</p> <p>a) Do you have any comments on your report?</p> <p>No. The only point I would highlight was that this appears to be the first time that I became aware of the key issue which would later become apparent. This relates to the differing views on which party was liable for "normal design development".</p>

	<p>b) What were the views of Gill Lindsay and other senior officers on the matters set out in the report?</p> <p>I cannot confirm as I do not recall receiving or being advised on their views.</p>
77.	<p>You emailed Andrew Fitchie on 17 and 21 April 2004 [<i>note – should read 2009</i>] [CEC01033190] in order to ascertain what the legal implications would be for tie of (i) curtailment of the ETN (i.e. a shortened route); and (ii) early cancellation of the project as a whole.</p> <p>a) What was the purpose of your email?</p> <p>As I recall, senior Council officers were looking at what strategic options were potentially available to them.</p> <p>b) Were you satisfied with the answer that you got [CEC00900763]?</p> <p><i>Is this the correct document [CEC00900763]?</i> A briefing note was received on 22 April 2009 from Chris Horsley at DLA providing advice [CEC00857512 & CEC00857513].</p>
78.	<p>On 30 April 2009 the Council were given an update by the Directors of City Development and Finance that an agreement had been entered into in respect of the Princes Street dispute, to allow the works to be carried out on demonstrable cost. The report noted that this represented no further risk transfer to the public sector. The Princes Street Agreement was signed on 29 May 2009 [CEC00302099].</p> <p>a) What involvement, if any, did you or other council legal officers have in the negotiation and conclusion of the Princes Street Supplemental Agreement [CEC00491568][CEC00491569][CEC00892743]?</p> <p>I do not recall being involved in this matter. Again this would relate to amendment of the contractual terms which I was not advising on.</p> <p>b) What was your understanding of terms and the purpose of the agreement [CEC00491570]?</p> <p>I was not involved in the negotiation of this matter so cannot provide any clarification.</p>

	<p>c) To what extent were elected members consulted before the agreement was officially signed?</p> <p>I am unable to confirm as I was not involved in briefing elected members.</p> <p>d) What was your understanding of "demonstrable cost" and whether that represented any further transfer of risk (or price increase) to the public sector?</p> <p>I was not involved in reviewing or advising on this aspect so am unable to provide any clarification.</p> <p>e) Do you consider that Tie were open and transparent when reporting to the Council on the Princes Street dispute?</p> <p>As I was not involved in the detail of this matter I cannot comment on this.</p>
79.	<p>In late May 2009 TIE instructed Senior Counsel to advise on the interpretation of the Infraco contract [CEC00901461]. A consultation with Counsel took place on 1 June following which Counsel issued written advice ([CEC00901460] and [CEC00901462]).</p> <p>a) Did you, or any other Council legal officer, attend that consultation?</p> <p>I did not attend and to my knowledge no other Council legal officer attended.</p> <p>b) What was your understanding, following the advice of Senior Counsel, or TIE's prospects of success in their dispute with BBS?</p> <p>I do not recall as at the time I would not have been involved in advising on the contractual terms or related matters.</p> <p>c) Were you concerned that advice from Senior Counsel had not been sought before the Princess Street agreement was entered into?</p> <p>I was not involved in the Princes Street agreement matter so cannot comment.</p>

	<p>d) We understand that discussions took place between TIE and BSC in the second half of 2009 to explore the possibility of using the Princes Street Supplementary Agreement as the basis of a new, or supplementary, agreement in respect of the remainder of the on-street works. What were your views on the proposal that a new agreement, based on the Princes Street Agreement, be entered into for the remainder of the on-street works?</p> <p>This would have been a matter for tie and DLA to review and make a recommendation to the Council. I do not recall this matter but my email dated 10 December 2009 [CEC00473732] appears to deal with this issue.</p>
80.	<p>Andrew Fitchie confirmed on 16 June 2009 [CEC00859849] that you were due to receive a report from Counsel on supplementary questions later that week. You noted that it would be good to see the full opinion [CEC00859849]</p> <p>a) Were you concerned that the Council were not being given the full story?</p> <p>I cannot recall but from my email that would appear to have been my concern at the time.</p>
81.	<p>On 16 July 2009 [CEC00679401] [CEC00679402] you were sent an email from Andy Conway enclosing a letter sent from David Mackay to Dave Anderson stating "so much for the one team approach"</p> <p>a) What were the difficulties in relations between CEC legal, City Development and Tie officials at this time?</p> <p>I cannot comment in detail as I cannot fully recall, but I do recall tie being very protective of information and preferring that information only be restricted to more senior CEC officials. The project was very much seen by tie as being theirs to own and direct with as little interference from the Council as possible.</p>
82.	<p>A Highlight Report to the JPG on 27 July 2009 [CEC00688908] included a table discussing what members should be advised at the meeting of the Council on 20 August 2009. The table asked whether cost and delay should be reported and, if so, to what extent (p3).</p> <p>The table also noted TIE as admitting that 40-80% of changes and delay were down to them.</p> <p>a) What were your views on these matters?</p>

	<p>I was not at the IPG. As noted elsewhere, what to report to elected members was a matter for senior council officials to decide upon.</p> <p>b) What were the IPG's views on, these matters?</p> <p>I am unable to confirm. The Inquiry would have to ask the members of the IPG at the time.</p>
83.	<p>On 16 November 2009 Mr Hunter, Adjudicator, issued his decisions in respect of the Gogarburn Bridge [CEC00479432] and Carrick Knowe Bridge [CEC00479431] adjudications.</p> <p>a) What were your views on the decision?</p> <p>I do not recall reviewing these adjudications in any detail. They contained findings in relation to the detailed contractual terms which I was not familiar with. Administration of the contract was a matter which tie and DLA were dealing with and the Council was reliant on being kept informed by tie and DLA on relevant matters and progress in this regard.</p> <p>b) To what extent did you consider the decision favoured TIE or BSC (both in relation to whether there had been a change and in relation to quantum)?</p> <p>I cannot recall but tie was managing the adjudication matters and I do not believe that I would have been suitably knowledgeable from a construction law perspective to form an opinion in this regard.</p>
84.	<p>By e-mail dated 10 December 2009 [CEC00473732] you forwarded Alastair Maclean an e-mail you had sent Jim Inch, David Anderson and Donald McGougan expressing concern about the justification for entering into further supplemental agreements in relation to the Infraco contract.</p> <p>a) What were your concerns?</p> <p>I cannot fully recall but my email appears to indicate that I was concerned about the concept of effectively paying BBS twice for delivery of the same work which was assumed to have been originally contracted for. I was also concerned that unless we clearly understood the underlying reasons for the issues, the Directors would not be able to properly advise elected members as to why they were seeking new supplemental arrangements.</p>

	<p>b) Did Alastair Maclean have any views at that time on the matters set out in your e-mail? What was done in response to your email?</p> <p>The email was sent to Alastair Maclean for his information as he had only just joined the Council as the new Head of Legal. I do not recall whether or not he responded, but I did not expect him to.</p> <p>I cannot confirm what was done. I was advised by Dave Anderson by email on 14 December 2009 [CEC00473865] that my concerns were real and valid and that he was discussing the matter with tie.</p>
85.	<p>By email dated 24 December 2009 [CEC00451089] to Andy Conway; Alan Coyle; Ailie Wilson and Gill Lindsay you noted the various options you saw available to TIE.</p> <p>a) What in your view was the preferred option at that time? Did this change and if so why?</p> <p>There was no preferred option. As I noted, it appeared to me to be "a rock and a hard place". I was merely noting some of the potential options available at a very high level.</p> <p>b) What were your views on Alan Coyle's response of 5 January contained in this same email chain?</p> <p>I do not recall.</p>
86.	<p>We understand that sometime in 2009 Colin Mackenzie changed post to head up the Litigation Team and that while he was still involved in the tram project, he worked on it much less frequently.</p> <p>a) Who took over Colin Mackenzie's responsibilities for the tram project and when?</p> <p>I understood that Gill Lindsay had responsibilities for tram matters up to her leaving in Summer 2010.</p>

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87.	<p>On 4 January 2010 Mr Wilson, Adjudicator, issued his decision in respect of the Russell Road Retaining Wall Two adjudication [CEC00034842]. The dispute concerned whether certain changes constituted Notified Departures and the value of each change.</p> <p>a) Did you see, or seek, these decisions?</p> <p>Adjudications were being managed by DLA and tie at the time. I was passed the decision informally by Alan Coyle.</p> <p>b) What were your views on the decision?</p> <p>I did not recall reviewing this decision in detail as tie and DLA were leading on adjudications at the time.</p> <p>c) To what extent did you consider the decision favoured TIE or BSC (both in relation to whether there had been a change and in relation to quantum)?</p> <p>I cannot recall but tie was managing the adjudication matters and I would not have been suitably knowledgeable from a construction law perspective to form an opinion in this regard.</p>
88.	<p>By email dated 13 January 2010 [CEC00486982] Richard Jeffrey assured you that the team at TIE had been tasked with an intensive piece of work over the next 8 weeks looking at a whole range of issues including the options outlined in your email of earlier that day. He stated that he would expect the FCL committee to be closely involved with the progress of this work. Gill Lindsay suggested that CEC legal and City Development were to be involved in the preparations for the meeting with the FCL committee.</p> <p>a) What was the role of the FCL committee?</p> <p>I cannot recall but I believe it was similar to the LAG. It was, however, an informal group with no decision making powers.</p>
89.	<p>On 14 January 2010, an opinion from Richard Keen QC on the interpretation of the INFRACO contract [CEC00356397] was given to TIE, in the course of dispute resolution.</p>

The opinion found that TIE did not take full and proper account of the wording which appeared in the last three lines of paragraph 3.4 of Schedule 4 which provided, *"for the avoidance of doubt, normal development and completion of designs means the evolution of design through the stages of preliminary to construction stage and excludes changes of design principle, shape and form and outline specification."*

The effect of this wording was that *"Changes of design principle, shape and form and outline specification"* constituted "notified departures", entitling the contractor to seek further monies under section 3.2.1 of Schedule 4 of the contract.

The opinion was provided to the Solicitor to the Council and CEC legal officials on 12 April 2010 [CEC00356396].

a) What were your views on these matters?

I do not recall having a particular view except one of general concern. I was effectively being provided with advice from legal experts in construction as to the matters considered in the report. These views were also summarised in the report by McGrigors which I had been sent in draft in March 2010.

b) The contractual dispute had, by this time, been ongoing for some time. Do you have any views on whether this opinion ought to have been sought by TIE sooner? What other advice was procured by TIE and did they make this readily available to CEC legal [CEC00264717]?

I cannot confirm what advice was procured by tie and when. My recollection is that tie was protective of information and had to be constantly chased to provide relevant information. Accordingly, the Council was never quite sure whether it had the full picture at any given time. See, for example, Colin Mackenzie's email to Gill Lindsay on 19 Feb 2008 referring to tie's lack of transparency and being evasive [CEC01400919] and my email to Andy Conway on 17 March 2010 [CEC00482550].

c) Did you or other colleagues form a view, in light of that advice, of TIE's prospects of success (a) in challenging the adjudication decisions and (b) more generally, in relation to their dispute with BBS?

As I recall, at this stage the Council was still very much reliant on tie providing advice and information in relation to the disputes and the project generally. Tie were taking advice from DLA and McGrigors (and various Counsel) in this regard.

	<p>d) The decision not to challenge the adjudications. What were your views on this decision [CEC00242042]? Why was this decision taken? Did TIE provide adequate reasoning for their decision not challenge adjudication decisions? In hindsight, do you think that this was the correct decision?</p> <p>I cannot confirm as I was not part of this decision-making process and do not consider that I had sufficient information or experience in this field to provide a firm view. The Council was very reliant on tie and its professional advisers DLA and McGrigors in this regard. I had, however, queried the position as detailed in my email to Donald McGougan and Dave Anderson on 16 March 2017 [CEC00462294].</p> <p>It is however, worth noting that, although they were instructed by tie, the fact that McGrigors (and senior Counsel) were already involved provided some comfort to the Council as there was a fresh perspective to provide an unbiased view.</p> <p>e) Was any consideration given by CEC around that time to instructing its own legal advice on the correct interpretation of the Infraco contract?</p> <p>Yes, the Council did ask Dundas & Wilson to review the contract. I don't recall this being around these specific issues as both DLA and McGrigors were providing advice and the dispute issues were very much led by tie at the time.</p>
90.	<p>Alastair Maclean sent you, Dave Anderson, Marshall Poulton, Alan Coyle and Donald McGougan an email on 15 January 2010 [CEC00473816] seeking to take stock.</p> <p>a) What was discussed at this meeting and what was the outcome?</p> <p>Unfortunately I cannot recall whether this meeting took place or whether it did but with only the Directors and Head of Legal present.</p>
91.	<p>You were copied in on an e-mail dated 21 January 2010 [CEC00473835] in which Alastair Maclean advised that Tie/CEC we are being too reactive.</p> <p>a) It would be helpful if you could explain the thinking behind Alastair Maclean's comments noted above and what was done in response to these concerns? What were your views?</p>

	The inquiry would have to ask Alastair Maclean what he meant by this. What I took from it was that the Council should be more proactive in dealing with both the project and tie. It was helpful to have this view from a senior Council officer who was coming to the project afresh.
92.	<p>A highlight report to the Chief Executive's Internal Planning committee dated 17 February 2010 [TIE00896564] noted that you would be meeting with Richard Jeffrey, Dave Anderson, Donald McGougan and Alan Coyle on a weekly basis to update the Council on progress and matters arising.</p> <p>a) What was discussed at these weekly meetings?</p> <p>Unfortunately I am unable to recall.</p> <p>b) Do you feel that TIE officials were transparent at these meetings?</p> <p>I cannot recall. However, as noted elsewhere, tie were in my experience generally reluctant to share full information, particularly where it was in tie's view likely to be perceived by others to reflect negatively upon tie or the project.</p>
93.	<p>By email dated 26 February 2010 [CEC00551306] you provided Richard Jeffrey with a report from Dundas and Wilson.</p> <p>a) For what purpose was this report commissioned?</p> <p>To have a legal firm acting for the Council independently review the matters identified in the instruction letter. The Council was seeking independent verification of tie's options under the contract. See for example the email from Amanda Methven to me dated 2 February 2010 [CEC00479797]. See also my email to Gill Lindsay dated 10 February 2010 which also sets out the background to the review [CEC00480029].</p> <p>b) What were your views on the report and its conclusions?</p> <p>I had no reason to disagree with the report's conclusions. I summarised these in an email to various senior Council officers on 12 February 2010 [CEC00475278].</p>

	<p>c) Did anything in the report cut across that in the report from McGrigors obtained by TIE on 17 February 2010 [CEC00034550], 5 March [CEC00482010] and 25 March [CEC00591754]?</p> <p>I cannot recall. However, an email from Alastair Maclean noted that some additional points had been identified in his email dated 16 March 2010.[CEC00452876]</p> <p>d) What were the headline points of this advice?</p> <p>These are as set out in the note and my email of 12 February 2010 [CEC00475278].</p>
94.	<p>By letter dated 8 March 2010 [CEC00548728] Richard Walker of BBS wrote to CEC officials providing BBS's perspective of the dispute, expressing concerns as to TIE's interpretation of the contract and handling of the dispute and advising that it was likely that additional costs were in excess of £100m.</p> <p>Alastair Maclean gave his views in e-mails dated 16 March and 12 April 2010 [CEC00452358] and [CEC00235430].</p> <p>a) What was your view, at this time, on the matters in Mr Walker's letter of 8 March 2010, including the extent to which the Infraco contract was truly a "fixed price" contract?</p> <p>I cannot recall my view at the time but as I had not advised on the contract terms I would have been unlikely to have a view on this issue.</p> <p>b) Did you discuss these matters with other Council officers and/or with individuals from TIE and, if so, what was discussed and with whom?</p> <p>I cannot recall.</p> <p>c) What were your views on the advice provided by Alastair Maclean to Tom Aitchison on 16 March [CEC00452358]?</p> <p>I had no reason to disagree with the advice at the time. Dave Anderson had also previously commented on the letter [see CEC00473970]</p>

95.	<p>Adjudication decisions were issued (1) on 18 May 2010 (by Mr Hunter, re Tower Bridge) [CEC00373726] and [CEC00325885], (2) on 24 May 2010 (by TG Coutts QC, re Section 7A-Track Drainage) [TIE00231893] and (3) on 4 June and 16 July 2010 (by R Howie QC, re Delays Resulting from Incomplete MUDFA Works) [CEC00375600] and [CEC00310163].</p> <p>a) Did you see, or seek, these decisions?</p> <p>I believe that the Council eventually received copies of all adjudication decisions.</p> <p>b) What were your views on these decisions?</p> <p>I cannot recall but tie was managing the adjudication matters and I would not have been suitably knowledgeable from a construction law perspective to form an opinion in this regard.</p> <p>c) To what extent did you consider that the decisions favoured TIE or BSC (both in relation to whether there had been a change and in relation to quantum)?</p> <p>I cannot recall but tie was managing the adjudication matters and I would not have been suitably knowledgeable from a construction law perspective to form an opinion in this regard.</p>
96.	<p>By email to Alastair Maclean on 8 April 2010 discussing the council's response to the letter from Richard Walker [CEC00257052][CEC00257053] you noted that on the finance front, your instinct was that tactically BBS were stalling to allow Tie/ the council to run out of funds.</p> <p>a) Please explain your comments in this regard?</p> <p>I cannot fully recall, but reading my email again now I think I was concerned that it was the Council which was likely to suffer most from any delays in that if tie were to keep BSC working then in practical terms tie would need to keep paying them. If BSC kept putting matters into adjudication, eventually through this attritional battle tie and the Council may run out of funds.</p>

	To a degree this also accords with Richard Jeffrey's comments in [CEC00013441] on point 5 re "strategic endurance" being a greater risk to tie and CEC than to BSC.
97.	<p>By email dated 19 April 2010 Richard Jeffrey [TRS00010706] wrote to party leaders (namely Jenny Dawe, Ian Whyte, Steve Cardownie, Andrew Burns, and Steve Burgess) setting out TIE's position on the main matters in dispute.</p> <p>Mr Jeffrey noted that "there is disagreement over what is or is not included in the original 'fixed price' contract" and BBS are "refusing to get on with the works in an attempt to coerce us into agreeing to change the form of contract onto a 'cost plus' contract". He would not allow the city to be "held to ransom".</p> <p>In relation to the adjudication decisions Mr Jeffrey noted, "It is true that we did not get all the results at adjudication we would have liked, however, it is also true that the results do not support BB's extreme view of their entitlements either. I would like to be able to fully brief you on these adjudications, but they are confidential under the contract and to do so would put tie in breach of contract".</p> <p>a) What were your views on the e-mail? Did you agree with the views expressed in the email?</p> <p>I cannot recall. It was clearly Richard Jeffrey's view at the time and he had access to far more detailed information in relation to the status of the project than I did.</p> <p>b) What were your views on the assertion that members could not be "fully briefed" on the adjudication decisions because they were confidential and to do so would put TIE in breach of contract? Were members provided with the adjudication decisions? Did you regard that position as satisfactory? To what extent did that affect the ability of Council members, to take informed decisions in relation to the tram project? Why did CEC officials ultimately recommend that tie not disclose the adjudication decisions to members [CEC00242585] [CEC00012776] [CEC00013039]?</p> <p>I do not recall considering the issue of release of adjudication decisions to elected members at the time. I do not believe that I would have agreed at the time that elected members could not get access to this information or be fully briefed on it. Certainly some elected members did have access (eg Gordon Mackenzie).</p> <p>Note that the question "Why did CEC officials ultimately recommend that tie not disclose the adjudication decisions to members?" is not fully on point. It was recommended that the decisions not be released more widely into the public domain</p>

as this could be a breach of contractual terms as well as prejudice tie's and ultimately the Council's interests. This is entirely different to not being made available to elected members who may wish to see them. In [CEC00242585] I reference release "into the public domain" as being the issue of concern.

It appears that there was also a desire by BSC at one stage to make the adjudication decisions public. As noted in my email [CEC00012776], this was a very complex matter and there were clearly different views from both tie and BSC over who had "won". Bringing the matter in the public domain would in my view have simply increased the pressure and focus on the Council and tie, to BSC's commercial benefit. I was also concerned that agreeing to release could prejudice the Council's ability to maintain exemptions under Freedom of Information legislation [See CEC00690702 and CEC00478589 in this regard].

98. By e-mails dated 22 May 2010, 30 April 2010, you sent an e-mail to Alastair Maclean regarding Ms Lindsay's involvement with the tram project [CEC00242406][CEC00242287].

a) Please explain your views as set out in these emails?

It was my understanding that Gill Lindsay was retiring around August 2010. My understanding was that she was given responsibility for the Tram Project for the period between Alastair Maclean being appointed (December 2009) and Summer 2010 when she was leaving.

I cannot fully recall but my email indicates that my concern was that I was effectively briefing two masters and couldn't easily keep track of all the information or easily get guidance. Given the ongoing difficulties, I preferred to have a clear line of reporting to someone who was likely still be in post after Summer 2010. It is also fair to say that I felt more certain that Alastair Maclean would listen to, act upon or challenge my views or concerns.

It also appears that from an email dated 26 April 2010 from Dave Anderson to Tom Aitchison that a revised IPG was to be put in place. This was not to include Gill Lindsay so that will no doubt also have influenced my views at the time [CEC00257299].

b) You forwarded this email to Alastair Maclean on 12 November 2010 to provide him with "a flavour" [CEC00013273]. Please can you confirm what you felt this email illustrated?

As I recall Alastair Maclean was very surprised that the Council had not had an independent review of the contract carried out prior to signing in 2008. He queried what had been done in this regard. I had sent this email to him as an indication of the very clear views expressed at the time by both Colin Mackenzie and myself that an independent view should be sought but that this option had been ruled out.

c) We understand that Gill Lindsay left the employment of CEC around August 2010. Are you aware of when and why Ms Lindsay left CEC's employment?

Gill Lindsay's role as Head of Legal was combined with that of the Council Secretary in 2009. From memory Gill Lindsay had decided not to apply for the role and Mr Maclean was appointed through the competitive interview process.

99. On 24 May 2010 TG Coultts QC issued his decision in respect of section 7A-Track Drainage) [TIE00231893]

a) Did you see, or seek, these decisions?

I believe that the Council eventually saw all the adjudication decisions.

b) What were your views on the decision?

I cannot recall but tie was managing the adjudication matters and I would not have been suitably knowledgeable from a construction law perspective to form an opinion in this regard.

c) To what extent did you consider the decision favoured TIE or BSC (both in relation to whether there had been a change and in relation to quantum?

I cannot recall but tie was managing the adjudication matters and I would not have been suitably knowledgeable from a construction law perspective to form an opinion in this regard.

100	<p>On the 26th of May 2010 [CEC00442574] you made changes to the Council Report dated 24 June 2010.</p> <p>a) Do you consider that the report provided elected members with a clear picture of matters as they stood at that time?</p> <p>My comments would have been made to inform the report based on my state of knowledge at the time and Alan Coyle and I appear to have been collating wider comments. It would have been for the Directors to take a final decision as to what should be highlighted to elected members in that report, which would have been particularly sensitive during the dispute.</p>
101	<p>By e-mail dated 11 June 2010 [CEC00336394] Richard Jeffrey advised Andrew Fitchie that you had had a discussion with Alastair Maclean and that, amongst other things, you wished a CEC legal person embedded in the Carlisle negotiating team when detailed legal negotiations took place, it being reported that you were of the view that if CEC legal had been more heavily involved first time round "we wouldn't be in the mess we are in now".</p> <p>a) What discussions did you have with Mr Maclean around that time in relation to these matters? What were your views on these matters?</p> <p>I cannot recall this in any detail. However, I think both Alastair and I were keen that CEC Legal (with appropriate independent external support) were more involved moving forward. This would ensure that we were receiving information directly rather than through any filter. My reference to CEC Legal not being involved originally references the fact that I, and most likely Colin Mackenzie, were not reviewing the contractual terms and related documents at the time.</p>
102	<p>By e-mail dated 2 July 2010 you set out the consequences of TIE serving a notice on BBS under section 90.1.2 of the Infraco contract in respect of Infraco's alleged default [CEC00242631]</p> <p>(see also (i) Richard Jeffrey's e-mails in August 2010 advising that the first (of several planned) Remedial Termination Notices under section 90.1.2 of the Infraco contract and an Underperformance Warning Notice under section 56.7 [CEC00242889] had been issued and (ii) your draft e-mail dated 12 August 2010 [CEC00013658] noting that CEC had not "pre-approved" the serving by TIE of these notices but would require its own independent legal advice on the strength of TIE's case to terminate).</p> <p>a) What did you understand to be the outcome of project Carlisle and how did this effect TIE's resolve to issue a Project Notice 90.1.2 letter?</p>

	<p>I cannot recall.</p> <p>b) Did CEC seek independent legal advice on whether remedial termination notices should be served (and, if not, why not)?</p> <p>I do not believe so as the Council was reliant upon the taking advice and leading on this matter as the contracting party. Much of what was being suggested depended on the factual matrix which only the and their advisers could really establish. Per my email [CEC00013658], it was up to the to examine all the facts and decide how to proceed, but the Council was keeping a watching eye on matters and would expect the to fully explain and back up their proposed plans with legal confirmations as required. The fact that the Council perceived that Richard Keen QC and McGrigors were involved provided some level of comfort but my concerns re reliance on the were set out in the email. As Richard Jeffrey also set out in this email chain [CEC00242631], the appeared concerned about too much CEC Legal oversight/input. The Council did, however, seek independent legal advice with regard to the issue of termination from Nicholas Dennys QC. See the draft instruction letter dated 1 November 2010 at [CEC00012940 & CEC00012941], in particular sections 2.6-2.9 which sets out the practical position from the Council's perspective.</p> <p>c) Why were you of the view, as noted in your e-mail of 2 July 2010 that the duty of care owed by DLA to CEC as "virtually worthless"?</p> <p>My comment about it being "worthless" related to its effectiveness as an independent "check and balance" to specifically look after the Council's interests independent to those of the. In effect DLA were asked to "mark their own homework" and the Council was taking it on trust that the had appropriately instructed DLA in this regard. It was my strongly held view that the Council should have had an independent legal review of the contract and associated documentation carried out in advance of signing.</p>
103	<p>On 4 June and 16 July 2010 R Howle QC issued his decisions in relation to Delays Resulting from Incomplete MUDFA Works) [CEC00375600] and [CEC00310163].</p> <p>a) Did you see, or seek, these decisions?</p> <p>I believe that the Council eventually saw all the adjudication decisions.</p>

	<p>b) What were your views on the decision?</p> <p>I cannot recall but tie was managing the adjudication matters and I would not have been suitably knowledgeable from a construction law perspective to form an opinion in this regard.</p> <p>c) To what extent did you consider the decision favoured TIE or BSC (both in relation to whether there had been a change and in relation to quantum?)</p> <p>I cannot recall but tie was managing the adjudication matters and I would not have been suitably knowledgeable from a construction law perspective to form an opinion in this regard.</p>
104	<p>By e-mail dated 1 August 2010 (<i>note - actually 8 January 2010</i>) [CEC00473789] you sent Alastair Maclean a document, "Tram-Potted History" [CEC00473790].</p> <p>Your e-mail noted "dissemination of the actual history here could cause serious problems and we definitely don't want to set hares running ... be very careful what info you impart to the politicians as the Directors and TIE have kept them on a restricted info flow".</p> <p>a) What were the main points you sought to make to Mr Maclean in that document?</p> <p>The email and attached note were intended as an information update for the new Head of Legal who had joined the Council a few weeks previously. Alastair Maclean had been asked to meet with a senior politician to discuss the project and had requested a briefing in advance of this. The note was intended as a brief and digestible summary of a very complex project and it contained my perceptions of the history of the project as well as an update on recent events. My covering email noted that the views on the history may differ depending upon who you spoke to.</p> <p>The note itself is self-explanatory but it should be clarified that the note reflected my knowledge at the time of drafting as opposed to knowledge held at the time of the events described in the note.</p> <p>b) It would be helpful if you could explain your comment noted above?</p>

"dissemination of the actual history here could cause serious problems and we definitely don't want to set hares running"

Whilst I had no way of knowing what had in fact been intimated to elected members by tie or senior Council officers (as I was not involved in any such briefings), I considered that it was likely that some or all of the elected members would not be aware of some of the information in my note. I therefore wanted to ensure that Mr Maclean was aware that providing information from the note to one elected member based on my perceptions of the project's history could cause issues if it was not first verified and then shared only through the agreed channels. I simply wanted to ensure that Mr Maclean understood the sensitivities given the ongoing dispute and differing political views on the project.

"be very careful what info you impart to the politicians as the Directors and TIE have kept them on a restricted info flow"

The comment relating to the "restricted info flow" related solely to the route of the provision of information being through a consistent channel. It was imperative that relevant political groups were given the same information at the same time. This was to help protect tie's commercial position.

The "restriction" did not refer to any qualitative or quantitative aspects as I would not have either commented on, or indeed had any influence, in this regard. By way of example, an email from a month earlier from me to the Directors [CEC00473732] noted *"I do believe that we need a formal communication as to the reasons the existing contract do not work so that we are better able to inform Members when the time comes as to why the supplementals are needed in the first place"*.

c) Why (and by whom) had members been kept on a restricted information flow?

Contextually the email was sent at the height of the commercial dispute between the parties and the coalition was split on the issue of trams. It was my perception that both tie and the Directors of the Council wished to keep a cohesive approach and ensure that relevant elected members received accurate information at the same time through a consistent channel, which I understood at the time to be via Group Leader briefings. This was to protect as far as possible tie's commercial position and minimise leaks and speculation during a very intense period of the dispute. I am unable to confirm whether such briefings were in any way "restricted" from a quantitative or qualitative perspective as I was not involved with these.

Press reports were a source of concern during the project, particularly during the dispute. By way of example, this article from 10 days later shows how the press were using information gleaned from sources. Hence why I perceived that senior Council officers and those at tie wished to ensure consistency in how information was being shared.

	<p>http://www.scotsman.com/news/reports-say-dispute-with-tram-contractors-will-push-bill-past-163-600m-1-1228529 [WED00000173]</p> <p>This article appeared to follow articles in the Herald on 16 and 17 January 2010 which were sent by Stewart McGarrity to Alan Coyle on 18 January 2010 [CEC00479289, CEC00479290 & CEC00479291].</p> <p>A note was also sent by Donald McGougan on 7 June 2010 in relation to an article in the Herald [CEC00238912 & CEC00238913].</p> <p>As an aside, in early 2011 leaks of confidential information were such a concern (see, for example, the email sent by Sue Bruce on 17 March 2011 [WED00000172]) that staff working on the project and potentially also Councillors were asked to sign confidentiality agreements in order to access information [see WED00000170 and WED00000171].</p> <p>d) Did that comment apply to events, both before and after Infracore Financial Close?</p> <p>My note purely reflected the position at that time, which was at the height of the contractual issues. I cannot comment about what happened previously as I was not involved in any such briefings.</p> <p>e) Did you have any concerns, at any time, as to whether members of the Council had been, and were being, kept fully informed in relation to the tram project?</p> <p>I had concerns (including the discussion I had with Colin Mackenzie about approaching the Monitoring Officer noted above in the response to Question 19) but it was not my role to decide upon what to advise elected members and I did in fact have no knowledge of what had been intimated to them. Such decisions and the timing and content of Group Leader and other political briefings were for senior Council management to decide upon and deliver as they were best placed to do so.</p>
105	<p>On 19 August 2010, in the context of an email about the governance of the project [CEC00012371] you noted that despite repeated requests DLA had not provided their final views on the validity of the structure from a legal perspective.</p> <p>a) What were your views on DLA on that matter? We note similar concerns expressed in your email date 13 October 2010 [CEC00012732][CEC00012737][CEC00041697].</p>

	<p>The governance issues referred to related to the overall TEL/TIE/Lothian Buses governance structure which was to be put in place to deal with tram and bus operations. We were still awaiting confirmation from DLA that it worked from all relevant perspectives. DLA had yet to provide the assurances that the proposed structure was legally compliant despite being chased for it. In my view, given the ongoing dispute, the "Phase 2" re-structuring proposals were premature.</p>
106	<p>On 20 August 2010 CEC officials (including yourself) met with TIE representatives to consider TIE's Project Carlisle Counter Offer. A record of the meeting [CEC00032056] noted a range of costs of between £539m-£588m for the Airport to St Andrew Square and a range of between £75m-£100m from St Andrew Square to Newhaven, giving a total range of costs, from the Airport to Newhaven, of £614m-£693m.</p> <p>It was noted that this was essentially a re-pricing exercise for the completed design (which was thought to be approximately 90% complete) with the intention of giving TIE certainty and that all of the pricing assumptions in Schedule 4 of the INFRACO contract would no longer exist.</p> <p>a) What were your views on these matters?</p> <p>I cannot fully recall. Whilst Carol Campbell and I attended the meeting, the Carlisle proposals were being led and controlled by tie. The project was still very much seen as being tie's responsibility and accordingly tie would require to carry out analysis and make formal recommendations in a report to the Council which would then have to be fully scrutinised, including from a legal and financial perspective. As an initial view, the main concern would have been that this was well above the available budget.</p>
107	<p>Following a meeting between TIE and CEC officials you set out, by e-mail dated 27 August 2010 [CEC00013747] the information required by CEC to inform their decision making.</p> <p>Richard Jeffrey forwarded your e-mail to Andrew Fitchie, noting "I have explained to Dave Anderson that I consider this e-mail unhelpful and symptomatic of the CEC input lacking focus" [CEC00098050].</p> <p>a) What are your views on the comment by Richard Jeffrey noted above?</p>

	<p>My view is that this was symptomatic of tie's consistent approach towards CEC Legal throughout the project. It appeared to me that there was a desire to minimise or avoid CEC Legal input on any matter which tie did not either see as a priority or wish to have scrutinised. This made it exceedingly difficult to advise senior Council officers as you could not easily get responses to the questions you were asking and were also never convinced you had the full picture at any given time.</p>
108	<p>On 31 August 2010 [CEC00002041] [CEC00002042] you circulated a risk matrix to assist CEC officers to assess the most viable option for the project. It set out the pro's and cons of cancelling, continuing or postponing the project.</p> <p>a) What were your views on these matters?</p> <p>They were as set out in the note, the first draft of which had been commented on by others in advance of this circulation email. I had attempted to combine the potential options into an easily digestible form so that senior Council officials could assess matters and take relevant decisions. It was based on my knowledge at the time and would likely not have been a full picture of all possible information.</p>
109	<p>On 17 September 2010 BSC sent TIE a letter that stated that TIE served remedial termination notices without being referred to dispute resolution first and were therefore invalid (see [CEC00012621] [CEC00044541], [CEC00044540], [CEC00044543], [CEC00044544] and [CEC00044545]).</p> <p>a) What were your views on TIE's tactic of serving RTN's?</p> <p>This was the strategy employed by, and led by, tie as advised by multiple professional advisers. Until we had an independent legal review carried out, the Council did not have a fully informed view on the tactics being employed by tie. As noted in [CEC00242631], tie were keen that the Council not seek to do tie's job for them.</p> <p>Shepherd and Wedderburn were instructed to perform an independent view of the validity of the RTNs and grounds for termination [CEC00012498] [CEC00135311].</p> <p>b) Do you consider that CEC were provided with sufficient information to understand the extent to which there was an evidential basis for each of the alleged Infracore defaults, in order to form their own view of the validity of the RTNs and grounds for termination [CEC00135312] [CEC00012821]? <i>Note - these two references appear to be the same document</i></p>

	<p>I unable to comment as I cannot recall. However, I do recall that it later transpired that tie were seeking to serve notices without first establishing the full factual matrix of their cases (see concerns raised in eg [WED00000168]).</p>
110	<p>On 22 September 2010 Mr Porter, Adjudicator, issued his decision in relation to Depot Access Bridge S32 [BFB00053391].</p> <p>a) Did you see, or seek, these decisions?</p> <p>I believe that the Council eventually saw all the adjudication decisions.</p> <p>b) What were your views on the decision?</p> <p>I cannot recall but tie was managing the adjudication matters and I would not have been suitably knowledgeable from a construction law perspective to form an opinion in this regard.</p> <p>c) To what extent did you consider the decision favoured TIE or BSC (both in relation to whether there had been a change and in relation to quantum?)</p> <p>I cannot recall but tie was managing the adjudication matters and I would not have been suitably knowledgeable from a construction law perspective to form an opinion in this regard.</p>
111	<p>By email to Alastair Maclean dated 25 [note - actually 26] September 2010 [CEC00012450] you wondered whether Andrew Fitchie wanted to meet with yourself and Alastair Maclean in an attempt to try to flush out whether you were about to recommend his exit after the advice received to date appeared to be less than impressive.</p> <p>a) What were your views on the performance of DLA and Mr Fitchie?</p> <p>It would not be appropriate for me to comment on Mr Fitchie's technical expertise or capability. It was, however, inevitable that at some stage an independent review of the contract terms would eventually be required and, to a degree, this had already occurred with McGrigors and Counsel being instructed by tie in addition to DLA.</p>

	<p>It was, however, apparent to me at the time that Mr Fitchle could only see his interpretation of what he had been involved in drafting and/or negotiating. There was also the question of conflict to consider. If there was a fault with the drafting or advice it would not be sensible for the same legal firm to be reviewing it. It was possible that Mr Fitchle was concerned that any such independent review may potentially cause him and DLA issues and this may have potentially influenced any advice given by him in relation to tie's legal options.</p>
112	<p>By email dated 13 October 2010 [CEC00012760] Alastair Maclean noted with Donald McGougan that in his view the special planning forum was for CEC and not TIE and TIE should not take control.</p> <p>a) What were your views?</p> <p>I had no reason to disagree with this view.</p>
113	<p>By joint report to Council on 14 October 2010 [CEC02083124] Donald McGougan and David Anderson provided a refreshed Business Case for the tram project, focussing on a line from Edinburgh Airport to St Andrew Square, with a high degree of certainty of cost and programme certainty.</p> <p>The report noted that the contingency planning work undertaken by the Council and TIE had identified funding options which could address project costs of up to £600m. It was stated, "Due to the current uncertainty of contractual negotiations, it is not possible to provide an update at this time on the ultimate capital costs of the project" (para 3.1).</p> <p>It was noted that "The overall outcome of the DRPs, in terms of legal principles, remains finely balanced and subject to debate between the parties" (para 2.50)</p> <p>The report put forward termination of the contract as one option. It was noted that extensive legal advice had been taken and continued to be taken.</p> <p>The report did not, however, give an indication of the likely cost, or range of costs, of the different options with the Project Carlisle offers and counter offers, for example, not being referred to.</p> <p>a) Did you have any input into drafting that report?</p> <p>Legal commented on this report in early October 2010. For example see emails from me to Alan Coyle and Carol Campbell on 5 and 6 October 2010 with comments [WED00000174, CEC00035980 and WED00000175]. I also sent an email on 6</p>

	<p>October advising that the DRP parts were to be removed from the public report as it was decided that release of the DRP information into the public domain could breach confidentiality [see CEC00017848 following advice in WED00000174].</p> <p>b) We understand that on this occasion Councillors were unhappy with the level of detail provided and required a more detailed update of the Business Case. On what matters did members wish to receive more information and was sufficient information provided?</p> <p>I am unable to confirm.</p> <p>c) Did the statement that the outcome of the DRPs remained "finely balanced" accord with your understanding at that time? What legal advice was provided to elected members in relation to the contractual disputes? To what extent, if at all, was the legal advice that had been obtained by the Council and/or TIE made available made available as well as readily accessible and understandable?</p> <p>At this stage the Council did not have a full understanding of the DRP position; only tie's views on it. I am unable to confirm what legal advice was made available to elected members in relation to the contractual disputes as I would not have been involved in briefing them on such matters.</p> <p>If the adjudication decisions and legal advice were not provided and/or made available to members, to what extent did that affect the ability of members to come to informed decisions in relation to the tram project?</p> <p>The decision as to what advice or information was made available to elected members was one for senior Council officers to take.</p>
114	<p>By email dated 29 October 2010 [CEC00018575] you requested that TIE provide their views on the adjudication decisions.</p> <p>a) Why did you make this request?</p> <p>I cannot fully recall but it appears from the email that Donald Anderson had approached Tom Aitchison to advise that tie was not providing an accurate picture of the adjudications position to the Council. Tom Aitchison had therefore asked that this be checked. Tie provided their summary on 9 November 2010 [CEC00006489 & CEC00006490].</p>

	<p>It was certainly my perception that tie's presentation of adjudication decisions could perhaps be biased. The Council therefore asked Shepherd & Wedderburn to do a comparison between tie's commentary and the actual decisions in November 2010 which found that "Our overall impression is that whilst not inaccurate the commentary conveyed surprisingly little hard information".</p> <p>My final report on the adjudications issue following receiving advice from Shepherd & Wedderburn was sent on 9 December 2010 [CEC02082694].</p> <p>b) What was TIE's response?</p> <p>I cannot recall.</p>
115	<p>By e-mail dated 3 November 2010 [CEC00012969] Alastair Maclean requested that advice be sought from Shepherd and Wedderburn on a "novation issue". It was noted that "TIE/DLA are insisting that it is all ok which is an unacceptable position bearing in mind the very clear conflict DLA has arising from the significant defects arising from their drafting of the minute of variation".</p> <p>a) Do you recall what this matter related to? (see e.g. Alastair Richards' e-mail dated 1 November 2010 [TIE00697415] with attached paper [TIE00697416]).</p> <p>I cannot fully recall this but I think it related to tie's perception that the contractual issues to date were with Bilfinger and Siemens (tram and systems infrastructure) as opposed to with CAF (tram supply and maintenance). I recall that there was talk of a possible novation back out of the consortium of CAF, the trams and the relevant tram supply and maintenance arrangements. I cannot recall the exact issue, but there is reference to it in section 4 of the IPG report dated 1 December 2010 [CEC00013539].</p>
116	<p>On 4 November 2010 [CEC00012984], Alastair Maclean noted that CEC had been working on the assumption that TIE would be providing them with the full legal analysis by DLA together with the opinion of Richard Keen by Friday 19 November. This was to enable CEC to have their own independent analysis of TIE's position by CEC's QC and that McGrigors had been appointed to lead that work stream in place of DLA. You noted [I think this should refer to [CEC00013048] here] that TIE had since confirmed that this would not be available until a 30 November, leaving a very small window for CEC to gain their own independent analysis of tie's position.</p>

	<p>a) What were your views on this matter?</p> <p>I sent a draft email to Alastair Maclean and Carol Campbell on 4 December at 13.02 [WED00000176]. This was amended and sent by Alastair Maclean that same day [CEC00012984]. Alastair Maclean sent a follow up to the Directors [CEC00013048].</p>	4 December should be 4 November
117	<p>An e-mail dated 13 November 2010 by AM [CEC00013289] attached a paper setting out certain concerns [CEC00013290], including noting that "TIE had continued to use DLA as its advisors in relation to the potential termination, but following adverse comment from CEC TIE have engaged McGrigors" (para 2.5) and "as you are aware (and as we have seen from some of the adjudications to date) I have real concerns as to the quality of the factual information coming from TIE" (para 7.3).</p> <p>An e-mail dated 15 November 2010 from AM to Jim Inch [CEC00013308] noted that a consultation had taken place with TIE's QC and AM stated "One thing I can say at this stage is that I am more sure (rather than less) that my concerns of last week are real".</p> <p>In e-mails dated 22 and 30 November 2010 Mr Maclean expressed certain concerns about TIE and the legal advice received by TIE [CEC00013411] and [CEC00014282] (see also [CEC00012450]).</p> <p>In an e-mail dated 30 November 2010 [CEC00013550] you noted your personal view on the performance of TIE and DLA.</p> <p>In an e-mail dated 24 November 2010 to Mr Maclean [CEC00013441], Richard Jeffrey stated, "if the Council has lost confidence in TIE, then exercise your prerogative to remove TIE from the equation".</p> <p>a) What were your views on these matters?</p> <p>The issues were clearly set out in these documents. I have nothing further to add.</p>	
118	<p>On 16 November 2010 Richard Jeffrey advised Alastair Maclean of certain serious concerns he had in relation to events at the time the Infraco contract was entered into. On 17 November 2010 [CEC00013342] Mr Maclean produced a Note setting out Mr Jeffrey's concerns.</p>	

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	<p>a) Were you aware of Mr Jeffrey's concerns?</p> <p>I do not recall being aware of the concerns as set out in the note at the time. I only recall being aware of Andrew Fitchie receiving a bonus based on press reports at the time [CEC00039997].</p> <p>b) If so, what were your views?</p> <p>This is the first time I have seen this document and it raises very concerning allegations.</p> <p>c) What was done in response to Mr Jeffrey's concerns?</p> <p>I cannot confirm as I was not involved in dealing with this matter.</p>
119	<p>On 22 November 2010 [TIE00304261] Richard Jeffrey shared a draft correspondence to then Chief Executive of the council.</p> <p>a) What were your views on the matters expressed therein?</p> <p>The email was not sent to me so I am unable to comment.</p> <p>b) He noted that CEC expected to direct the strategy for the mediation and that if CEC wished to take control of the project, or any aspect of it, then he would like this to be formally communicated to the board. Did CEC or TIE ultimately direct the strategy for the mediation and to what extent were members of CEC legal involved?</p> <p>I was not sent this email but I believe that ultimately CEC directed the decision to go to mediation.</p> <p>Alastair Maclean attended the mediation for CEC Legal. I did not attend.</p>
120	<p>In addition to forwarding Alastair Maclean an e-mail Colin Mackenzie had sent Gill Lindsay on 15 August 2007 expressing certain concerns[CEC00013273] (as discussed earlier), on 12 November 2010, you sent Alastair Maclean a risk register that DLA had produced (and Gill Lindsay had requested) prior to Infracore contract close [CEC00013266] [CEC00013267].</p>

	<p>a) Why did you send Mr Maclean the risk register?</p> <p>I had sent it on to Mr Maclean as it was unclear why I was being sent this matrix at this time by tie. That same day I asked Susan Clark why she had sent it through as it appeared to me to have come entirely out of the blue [CEC00013268].</p> <p>b) What were your views on the risk register noted above including, in particular, whether it adequately covered the risks that materialised?</p> <p>The risk registers and their appropriateness and completeness were matters to be agreed between Gill Lindsay and DLA at the time of contract signature. I am unable provide any further clarification on this.</p>
121	<p>On 26 November 2010 Lord Dervaird issued his decision in relation to Landfill Tax [BFB00053475].</p> <p>a) Did you see, or seek, these decisions?</p> <p>I believe that the Council did eventually receive all adjudications.</p> <p>b) What were your views on the decision?</p> <p>I cannot recall reviewing it but tie was managing the adjudication matters and I would not have been suitably knowledgeable from a construction law perspective to form an opinion in this regard.</p> <p>c) To what extent did you consider the decision favoured TIE or BSC (both in relation to whether there had been a change and in relation to quantum)?</p> <p>I cannot recall but tie was managing the adjudication matters and I would not have been suitably knowledgeable from a construction law perspective to form an opinion in this regard.</p>
122	<p>By letter dated 6 December 2010 [TIE00668156] AM advised Richard Jeffrey that following a meeting that day with Tom Aitchison and Donald McGougan, CEC's preferred strategy (for commercial reasons) was to move to mediation on a short-term basis, ideally with a view to both sides "walking away" from the Infracore contract.</p>

	<p>a) What were your views?</p> <p>I did not have a view at the time as it was not my decision to make.</p>
123	<p>On 15 December 2010 R Howie QC issued his decision in relation to Approval of Sub-Contract Terms [BFB00053482]</p> <p>a) Did you see, or seek, these decisions?</p> <p>I believe that the Council did eventually receive all adjudications.</p> <p>b) What were your views on the decision?</p> <p>I cannot recall but he was managing the adjudication matters and I would not have been suitably knowledgeable from a construction law perspective to form an opinion in this regard.</p> <p>c) To what extent did you consider the decision favoured TIE or BSC (both in relation to whether there had been a change and in relation to quantum)?</p> <p>I cannot recall but he was managing the adjudication matters and I would not have been suitably knowledgeable from a construction law perspective to form an opinion in this regard.</p>
124	<p>On 16 December 2010 Tom Aitchison provided the Council with an update on the refreshed Business Case [CEC01891570].</p> <p>The report noted that a line from the Airport to St Andrew Square was capable of being delivered within the current funding commitment of £545m.</p> <p>At the meeting an amendment was passed by members to request a review of the business case by a specialist public transport consultancy that had no previous involvement with the Edinburgh tram project (see Minutes, [CEC02083128], p22).</p>

a) Did you have any input into drafting the report to Council?

I cannot recall but my emails indicate that I made only a very minor comment.

b) Why did members wish an independent review by a specialist consultancy with no previous involvement with the tram project?

I am unable to confirm.

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125 The Highlight Report for the meeting of the IPG on 21 January 2011 [CEC01715625] noted that both Nicholas Dennys QC (instructed by CEC) and Richard Keen QC (instructed by TIE) had advised that the best option was to seek to enforce the contract until grounds of termination could be established as a result of a failure to perform the works, which option would also place TIE in the strongest position with regard to any mediation/negotiated settlement. It was unclear to what extent there had been a rigorous approach by TIE to enforcement of the contract pending the Carlisle negotiations and the focus on the termination option.

a) What was your view on these matters?

I cannot fully recall but the note of the presentation by Alastair Maclean and myself sets out the position.

b) Were elected members advised of the matters noted above?

I am unable to confirm whether or not some or all of the elected members were briefed as I would have been unlikely to be involved in any such briefings.

c) Who decided that TIE/CEC should nonetheless proceed to mediation at that time and why?

	I am unable to confirm.
126	<p>Mediation talks were arranged for March 2011. In the run up to mediation:</p> <p>a) What preparations for the mediation were undertaken by CEC? (see e.g. the report to the IPG on 21 January 2011 [CEC01715625] and the Action Note of that meeting [CEC01715621])?</p> <p>I am unable to confirm as I do not recall being involved with these preparations.</p> <p>b) What part, if any, did you play in these preparations?</p> <p>I recall having very little input into preparations for mediation.</p> <p>c) What were the main objectives of the Council going into the mediation? (see e.g. the Project Phoenix Statement dated 24 February 2011 [BFB00053293])</p> <p>I was not involved in the mediation or setting its objectives.</p>
127	<p>Mediation talks took place at Mar Hall between 8 and 12 March 2011. TIE prepared a mediation statement [BFB00053300] as did BBS [CEC01927734].</p> <p>We understand that a statement "ETN Mediation – Without Prejudice – Mar Hall Agreed Key Points of Principle" was signed by the parties on 10 March 2011 (the principles of which were then incorporated into a Heads of Terms document [BFB00053262]).</p> <p>a) Which organisations and individuals were present at the mediation?</p> <p>I am unable to confirm as I was not present at the mediation.</p> <p>b) Were you present at the mediation? If so, what role did you play in the mediation and what advice, if any, did you provide?</p> <p>I was not present at the mediation.</p>

	<p>c) What discussion, and negotiation, took place between the parties during the mediation? Was there, for example, a series of offers and counter-offers?</p> <p>I was not at the mediation so am unable to confirm.</p> <p>d) To what extent, if at all, did CEC's position change over the course of the mediation?</p> <p>I was not at the mediation so am unable to confirm.</p> <p>e) To what extent, if at all, did BBS's position change over the course of the mediation?</p> <p>I was not at the mediation so am unable to confirm.</p> <p>f) What was the outcome of the mediation? Were the Heads of Terms noted above agreed at the mediation or in the following weeks or months?</p> <p>I was not involved and cannot therefore confirm but the document appears to be date stamped 12 March 2011.</p> <p>g) What were the views of yourself and other CEC officers on the outcome of the mediation?</p> <p>I did not have a view other than that it would hopefully get the project back on track.</p> <p>h) What did parties envisage would happen after the mediation to give effect to what had been agreed, and within what timescale?</p> <p>I cannot recall.</p>
128	<p>In an e-mail dated 12 April 2011 [TIE00686636] Steven Bell noted, in respect of legal advice in relation to the draft Minute of Variation of the Infraco contract arising from Mar Hall, that McGrigors should consider writing an advice note to CEC highlighting the significant amendments to the Infraco contract and to TIE's rights and remedies to ensure that that was clearly recorded in writing.</p>

	<p>He noted, "We would not want to repeat the type of issues raised/concerns expressed which have been raised with DLA and visibility of the original advice over the Infraco Contract".</p> <p>a) What were your views on Mr Bell's comments noted above?</p> <p>I do not recall whether I had any views at the time but Alastair Maclean responded in relation to these [see [TIE00687677]].</p>
129	<p>On 16 May 2011 the Council were given an update by the Director of City Development [CEC01914650].</p> <p>a) Are you aware whether the figures in the Heads of Terms noted above (i.e. a price of £362.5m for the off-street works and a target price of £39m for the on-street works) were available at the time of the Council meeting on 16 May 2011?</p> <p>I am unable to confirm.</p> <p>b) If so, are you aware whether these figures were provided to members at that time and, if not, when and how were these figures first provided to members?</p> <p>I am unable to confirm.</p>
130	<p>Parties entered into a Minute of Variation dated 20 May and 10 June 2011 [BFB00096810] (Minute of Variation 4), which varied the Infraco contract to allow certain priority works to take place.</p> <p>a) What was the purpose of that agreement?</p> <p>I cannot recall but from the report of 16 May 2011 it appears to relate to enabling priority works to be carried out as these were considered to be of strategic importance to the City.</p> <p>b) Why was it entered into in advance of the main settlement agreement noted below?</p> <p>I am unable to confirm but from the report of 16 May 2011 it appears to relate to enabling priority works to be carried out as these were considered to be of strategic importance to the City.</p>

131	<p>In June 2011 McGrigors produced a draft report, "Report on Certain Issues Concerning Edinburgh Tram Project – Options to York Place" [USB00000384].</p> <p>a) What was the purpose of that report? I cannot recall.</p> <p>b) Was the report ever finalised? I cannot confirm.</p> <p>c) What was your understanding of the advice in the report as to the best option for CEC? I do not recall being involved in this aspect so am unable to confirm.</p> <p>d) To what extent, if at all, did the report inform CEC's decision making as to which option to follow? I do not recall being involved in this aspect so am unable to confirm.</p>
132	<p>An e-mail dated 29 June 2011 [BFB00094944] by Marc Hanson, Ashurst, noted that CEC did not understand how the Target On Street Works Price had increased from £39m to £52m (and noted that the Off Street Works Contract Price had also increased).</p> <p>a) What was your understanding of these matters? I do not recall being involved in this aspect so am unable to confirm.</p> <p>b) How were these issues resolved?</p>

	<p>I do not recall being involved in this aspect so am unable to confirm.</p>
133	<p>On 30 June 2011 the Council were advised of the options for the tram project in a report by the Director of City Development [CEC02044271]. It was recommended that the Council complete the line from the Airport to St Andrew Square/York Place, at an estimated cost of between £725m and £773m, depending on the risk allowance.</p> <p>a) Did you have any views at that stage about the significantly increased cost of the tram project (for a shorter line)?</p> <p>Only that the Council ending up in this position was a matter of significant concern and regret.</p> <p>b) How was that received by members?</p> <p>The Inquiry would have to ask the elected members.</p> <p>c) What are your views on the matters in the informal note [TIE00688605] produced of the meeting of the Council? (the author of the note is unclear but it was sent by e-mail dated 1 July 2011 [TIE00688604] by Mandy Haeburn-Little to Susan Clark and Steven Bell)?</p> <p>I have no comment.</p>
134	<p>An e-mail dated 7 July 2011 [TIE00658366] from Terence van Poortvliet, Ashurst, noted certain issues in relation to proposed changes in the Employer's Requirements.</p> <p>An e-mail dated 15 July 2011 [BFB00097296] by Alistair Maclean to Alfred Brandenburger expressed certain frustrations about a lack of momentum in negotiations (against the background, as we understand it, that at Mar Hall it had been envisaged that the formal settlement agreement would be entered into on or before 30 June 2011).</p> <p>An e-mail dated 27 July 2011 [BFB00094966] by Mr van Poortvliet attached a "key issues" list of the major outstanding items.</p>

	<p>a) What were the main issues, or differences, that arose during the discussions to give effect to the Mar Hall agreement and how were these issues resolved?</p> <p>I cannot comment as I do not recall being involved in these matters in any detail. The Council had appointed expert legal advisers in Ashurst to ensure that the agreed terms were appropriately implemented.</p> <p>b) What was the cause or causes of any delay in entering the settlement agreement?</p> <p>I am unable to confirm.</p>
135	<p>We understand that at Mar Hall parties had envisaged that a full settlement agreement would be entered into by 30 June 2011. We further understand that a Memorandum of Understanding was entered into on 24 August 2011 to extend the timescale for the conclusion of these negotiations until 31 August 2011.</p> <p>a) Why was the timescale for the conclusion of negotiations extended until 31 August 2011?</p> <p>I am unable to recall.</p>
136	<p>On 22 August 2011 [CEC01733343], you were copied in on an email from [should read "to"] Colin Smith which noted that <i>"Historically the delay to design was not solely Infracore's but a symptom of the role in the design approval process (where they had no locus) and frankly CEC failure to deliver a joined up approvals process."</i></p> <p>a) What are your views on these matters?</p> <p>I do not understand the comment made.</p>
137	<p>On 25 August 2011 the Council were given a further update by way of a report by the Director of City Development [TRS00011725]. The report noted that Faithful and Gould had worked with Council officers in validating the base budget for the proposed works.</p>

22 August
should be
21 August

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	<p>There was a requirement for funding of up to £776m for a line from St Andrew Square/York Place (comprising a base budget allowance of £742m plus a provision for risk and contingency of £34m). Additional funding of £231 was required, which would require to be met from Prudential borrowing, at an estimated annual revenue charge of £15.3m over 30 years (which, applying a discount rate, resulted in a present day value of the additional borrowing of £291m). At the Council meeting, members voted in favour of an amendment that a line should be built from the Airport to Haymarket.</p> <p>a) Did you see any of these reports and, if so, what were your views?</p> <p>Yes, I would have seen the Council report. I cannot recall having a view.</p> <p>b) We understand that the report to Council in August included a confidential summary of a report dated 19 August 2011 by Faithful and Gould [CEC01727000]. Were members provided with the report or only a summary of the report? The full report by Faithful and Gould noted, in the Executive Summary, that the current costs for the on-street works for Siemens were "extremely high and not value for money" and that the cost of the other on-street works was "grossly inflated"? Were you aware of these conclusions? Why did the Council nonetheless agree to instruct these works?</p> <p>I was not involved in this aspect and am therefore unable to confirm. I do not recall being aware of these conclusions or seeing the Faithful and Gould report.</p>
138	<p>On 15 September 2011 a full and final Settlement Agreement [BFB00005464] was entered into between TIE, CEC and the consortium.</p> <p>a) What did you understand to be the main changes made to the Infraco contract to the Settlement Agreement?</p> <p>I am unable to comment on this as I was not involved in the detail of the changes made.</p> <p>b) What were your views on the Agreement?</p> <p>I had no views other than that it was hoped that it would lead to the delivery the remainder of the project.</p>

139	<p>Following the Mar Hall mediation and the Settlement Agreement, works progressed to complete a tram line from the Airport to York Place, which opened for revenue service on 31 May 2014.</p> <p>By way of overview:</p> <p>a) What were the main changes introduced as a result of the Mar Hall mediation and the Settlement Agreement?</p> <p>I am unable to comment as I am unaware of the full detail of the changes.</p> <p>b) Do you agree that the project appeared to run reasonably smoothly after the agreement and in line with the revised estimate and programme (c.f. events previously)? If so, why do you consider that was?</p> <p>Although I was no longer really involved in the project by this stage, post-settlement the project did appear to me to run more smoothly.</p>
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PROJECT MANAGEMENT, GOVERNANCE AND CONTRACTORS	
General	
140	<p>In general:</p> <p>a) What were your views on the governance arrangements for the tram project? Do you consider the governance arrangements were effective (and, if not, why?)</p> <p>Fundamentally there is no reason why in theory the governance structures in place should not have been capable of successfully delivering a tram system if properly executed. There were a number of governance matters which were in my view less satisfactory, including the lack of independent legal review and lack of recourse/accountability with regard to tie.</p>

b) Do you consider that the roles and responsibilities of each of the bodies involved in the delivery and governance of the project was sufficiently clear? Do you have any views on the suggestion that there were too many bodies and organisations involved in the governance of the project? Did this weaken accountability [CEC01562023]?

There were certainly a large number of bodies/committees involved and this may have weakened accountability. For example see the second last bullet of my email to Alan Squair dated 11 October 2007 [CEC01564889].

c) Which body or organisation do you consider was ultimately responsible for managing the main contracts in the tram project (e.g. Design, MUDFA and Infraco) including the interaction between these contracts?

Tie.

d) Did you have any concerns at any time in relation to the performance of any of the bodies, or the senior personnel of any of the bodies involved in the tram project? If so, what were your concerns? Did you feel the personnel of these bodies to be suitably qualified?

As set out elsewhere, I had concerns that tie wished to be left to get on with the project and did not welcome what they appeared to perceive to be interference from more junior Council officers. See, for example, my concerns in [CEC00013550] and [CEC00482550] and those raised by Colin Mackenzie in an email dated 19 February 2008 [CEC01400919].

e) Were more effective governance arrangements introduced following Jim Inch's Briefing Paper on Governance dated 20 July 2007 [CEC01566497] which had noted that it was "vital that more rigorous financial and governance controls are put in place by the Council"? Do you consider that they ought to have been?

I am unable to comment. New operating agreements for Tie and TEL were put in place but these were not as strong as they should in my view have been following tie seeking to reduce the impact and practical effectiveness of many of the originally proposed controls.

f) Which Council officer was ultimately responsible for ensuring that effective governance arrangements were in place in relation to TIE and in relation to the tram project?

The Chief Executive, advised by the relevant Council Directors.

g) Which body or organisation do you consider was ultimately responsible for ensuring that the tram project was delivered on time and within budget?

Ultimately it was the Council, but tie had primary responsibility for delivering this.

h) Why in your view was their ambiguity surrounding what really happened/was said around time of contract signature [CEC00013165]?

I cannot provide any clarification on this issue as I am not aware of why there should have been any ambiguity at the time and I was also not aware of these concerns at the time.

However, the issues identified in Alastair Maclean's note to the Monitoring Officer are of significant concern and these issues appear to have been raised very shortly after this email was sent.

i) To what extent did concerns over commercial confidentiality affect the information provided to and from Council members? What steps were taken to address any such concerns? Do you consider that concerns in relation to commercial confidentiality adversely affected Councillor's understanding of the project (including the problems that arose) and their ability to take informed decisions?

I was not responsible for briefing elected members so cannot comment. There were certainly concerns re matters being taken into the public domain, but in my view there should have been no reason why elected members could not have been confidentially and appropriately briefed on all relevant matters relating to the project (whether in writing, verbally or in a data room).

It is, however, fair to say that concerns were raised during the project about the tension between the need to keep members and the public informed whilst at the same time protecting the Council and tie's legal position. For example see the email from Andrew Fitchie [CEC00690702]. I also highlighted the issue to Alastair Maclean on 3 December 2009 [CEC00478589]. See also the third last bullet my email to Dave Anderson, Donald McGougan and Marshall Poulton on 1 June 2010 [CEC00257973] and my email trail to Richard Jeffrey on 14 June 2010 [CEC00336540] which highlight the tensions between the Council and tie re reporting to elected members.

TIE	
141	<p>In general:</p> <p>a) How would you describe the interaction between TIE and the Council legal team? Did TIE welcome input from the council? [CEC01241862]</p> <p>In my experience, although the relationships were generally professional and cordial, tie did not always welcome CEC Legal's input as we were often asking difficult questions which tie staff did not wish to have to answer (see for example the issues which I raised in [CEC00013550] and [CEC00482550] and those raised by Colin Mackenzie in an email dated 19 February 2008 [CEC01400919]). Tie were very clear that this was their project (see eg [CEC00242631]) and in my view would only involve CEC Legal where necessary or where it may have suited them to do so.</p> <p>b) By what means did CEC exercise oversight and control over TIE?</p> <p>This was through the Operating Agreement and the Tram Monitoring Officer.</p> <p>c) By what means did the Council's senior officers and members receive information and updates from TIE?</p> <p>I am unable to confirm as I was not involved in this.</p> <p>d) Why did the council not want TIE to have formal status as agent of the council [TIE00151085]?</p> <p>I cannot fully recall but I believe there was a tension between the Council allowing tie to take direct decisions on the Council's behalf as formal agent and concerns around VAT and other tax related issues with regard to TEL. The issue was also not clear at the time as I recall that tie indicated that it wished agency powers from the Council but was itself acting as principal in the tram contracts. Ultimately the Council would not have wished to grant tie wide ranging agency powers but rather only grant them within set parameters as set out in the Operating Agreements. This matter is briefly discussed in my email to Andrew Fitchie dated 13 December 2007 [CEC01394926]. It is also discussed re TEL in emails between PWC and DLA on 21 September 2009 [CEC00690001].</p> <p>e) Did you have any concerns at any stage in relation to TIE's project management of the tram project or the performance of any of TIE's senior personnel or Board members? [CEC00482827] [CEC00031292]</p>

Yes, I was concerned that we may not always be getting the full picture from tie and that any information provided may have been presented in the best light for tie as opposed to clearly setting out all relevant facts. I also had concerns when tie appeared unable to explain aspects relating to delivery of the Princes Street Side Agreement (see for example [CEC00472657]) and when it became clear that they had been serving formal contractual notices without first establishing the factual matrix to back up the notices (see also for example comments in my emails to Dave Anderson and Richard Jeffrey respectively on 22 December 2010 [WED00000168]). This gave an impression of poor practical risk management. Other issues were highlighted in my email on 30 November 2010 [CEC00013550] and to Andy Conway on 17 March 2010 [CEC00482550] and by Colin Mackenzie in an email dated 19 February 2008 [CEC01400919].

f) Did you have any concerns at any stage in relation to TIE's reporting to CEC (or others)? If so, what were these concerns and what was done to try address them?

Yes. I and colleagues constantly asked more questions and had to chase tie for answers, which sometimes appeared vague and/or partial.

g) Are you aware of there having been any tensions between TIE and CEC (and, if so, what do you think were the underlying reasons for that - see, for example, e-mail exchange involving Colin Mackenzie and TIE in September 2007, [CEC01687399])?

Yes, there were constant tensions. In my view tie begrudged being called to account in any way, especially by CEC Legal. By way of example, the negotiations over the Operating Agreements were an attritional battle which saw the Council's protections eroded and the requests made by CEC Legal questioned at every stage.

j) Do you think that the role of TIE was clearly defined? (See for example the second last bullet point in [CEC01565046])

No. However, it did become more clearly defined when the new Operating Agreements were implemented.

h) Generally did you consider that TIE had sufficient experience and expertise (both individually and as an organisation) to project manage a complex infrastructure project like the Edinburgh tram project?[CEC01465362][CEC00784171]

I am unable to comment on this.

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	<p>i) What were your views on the TIE bonus scheme, including whether it was appropriate that large bonuses were paid to senior TIE employees in addition to their salaries? How did CEC exercise control over bonus payments [CEC00039997]? Which officer in CEC was ultimately responsible for that? Do you consider that CEC exercised sufficient control over TIE bonuses?</p> <p>The controls which I had originally proposed in relation to the tie bonus scheme were intended to provide a good degree of control through the Operating Agreements (see clause 2.21 in the original draft circulated on 5 November 2011 [CEC01396621 & CEC01396622]). My recommended drafting was ultimately strongly resisted by tie. The "light touch" controls which were eventually agreed were in my view insufficient to protect the Council's interests. See also:</p> <ul style="list-style-type: none"> • the email chain on 24 March 2009 re bonuses [CEC00892623]; • I highlighted the difficulty with tie and bonuses to Gill Lindsay by email on 10 January 2008 [CEC01394985]; • Colin Mackenzie copied me into an email to Jim Inch dated 15 June 2009 in which he queried whether something should be done in relation to tie's bonuses [CEC00893459]; and • I emailed Dave Anderson and Donald McGougan with regard to bonuses on 30 April 2010 [CEC00257407] and Dave Anderson responded on 4 May 2010 advising that the matter would be discussed with Tom Aitchison [CEC00245922]. <p>j) To what extent do you think that the Council was misled by TIE? Or that council officers were not being provided with all the facts [CEC00038589]?</p> <p>This is a matter I hope the inquiry will establish. As I was not in a position to know everything that the Council was or was not made aware of it would not be appropriate for me to comment on this.</p>
<p>City of Edinburgh Council 142</p>	<p>In general:</p> <p>a) How were important matters relating to the tram project reported by TIE to CEC (including by whom and to whom)?</p> <p>I am unable to confirm as, whilst I was sometimes passed legal related information, I was not involved in this in detail.</p> <p>b) How did CEC officers, in turn, advise members (including the Council Leader, the Finance and Transport Convenors, Group Leaders and individual members) of important matters relating to the tram project?</p>

This was a matter for the Directors and the Chief Executive of the Council to have decided upon and implemented based on the information made available to them.

c) How were the views and requirements of CEC fed back to TIE?

I do not recall being aware of any set or formal route for this, although there was a Tram Monitoring Officer in place.

d) Were members always updated on significant developments relating to the tram project including, in particular, the problems that arose and the estimates of the cost of completing the project?

I cannot comment as I did not brief elected members and am therefore not aware of what information was or was not imparted and, if it was, when or how it was so imparted.

e) Did you have any concerns at any stage in relation to the performance of senior CEC officials or members?

I never had any concerns with regard to elected members. I also generally had no concern with regard to the performance of Council officers, although if I had been in their positions at the time then, based on the information which I was aware of at the time, I would have taken different decisions to those taken by them at the time.

f) Which officer (or officers) in CEC do you consider was ultimately responsible for ensuring that the tram project was delivered on time and within budget?

The Chief Executive, supported by relevant Directors.

g) To what extent did the need for confidentiality conflict with the need to keep members informed of matters relating to the tram project and what steps were taken to address that conflict? [CEC00855002]

The tension as I recall related to the sharing of information being made too widely (eg in a public Council report or briefing) making the legal privilege protection under Freedom of Information problematic. See for example my email to Andrew Fitchie dated 9 October 2009 in response to his email dated 8 October 2009 [CEC00690702]. This would have been considered on a case by case basis. This was followed up by Andrew Fitchie's email on 16 October 2009 [CEC00856424] in relation to

wishing to discuss protection of legal privilege in response to a recent leak. I also sent an email to Alastair Maclean on 3 December 2007 on this issue [CEC00478589].

Ultimately there is no reason why confidentiality issues could not have been resolved to allow elected members to be as fully briefed as possible (whether in writing, verbally or by way of data room). However, if advice was made public through formal or informal routes it could have significantly disadvantaged the Council.

See also my response to Q140(i) above in this regard.

h) Do you consider that members who sat on the Tram Project Board and the Boards of TIE and TEL had sufficient experience and expertise (including of major Infrastructure projects) to inform their decisions as members of these boards? Was training provided? Ought it to have been? [CEC01515433]?

I cannot comment on this as I have no knowledge of these matters.

i) Do you consider that any conflict of interest, or potential conflict of interest, arose from Councillors being members of both the Council and organisations with responsibilities for delivering the project i.e. TPB, TIE and TEL?

This conflict could occur but is no different to any current Council arm's length external organisation board membership. The Councillors' Code of Conduct recognises this as a practical issue.

j) To what extent, if at all, were elected members who sat on the Tram Project Board, acting as the "eyes and ears" of Councillors as a whole or at least a conduit between the two bodies?

I cannot comment as I am not aware of what the remit of their board appointment was.

k) To what extent do you think that the Council was misled by council officers?

This will be a matter for the Inquiry to determine.

Tram Project Board

143] In general:

a) What is your understanding of the role, remit and responsibilities of the TPB?

As I recall, the TPB was supposed to be the main strategic decision making body in respect of the project. It was eventually a committee of TEL. The role and remit were as set out in the TEL operating agreement.

b) What powers and duties were formally delegated to the Tram Project Board? As we understand it, the Tram Project Board had no legal status, and no powers and duties were formally delegated to it until sometime in 2008, when it became a sub-committee of TEL. Did the lack of legal status and formally delegated powers and duties cause you any concerns?

Yes, concerns were flagged in 2007 and early 2008 in relation to the position of TEL and the TPB. For example, see my emails to Alan Squair dated 11 October 2007 [CEC01564889], to Colin Mackenzie on 14 November 2007 [CEC01394838] and both Alan Squair and Colin Mackenzie on 26 November 2007 [CEC01394851]. This was formally rectified through the tie and TEL operating agreements.

c) How were important matters relating to the tram project reported by TIE to the TPB (including by whom and to whom)?

I cannot comment as I am not aware of how this took place.

d) How were the views and requirements of the TPB fed back to TIE?

I cannot comment as I am not aware of how this took place.

e) Given the delegation of powers from the TIE and TEL Boards to the TPB, what was the remaining role and responsibilities of the TIE and TEL Boards in relation to the tram project?

I cannot comment beyond that it would have been anything which fell outwith that delegated to the TPB.

f) What powers and duties were formally delegated to the Tram Project Board?

These were as set out in the Operating Agreements.

	<p>g) Did you have any concerns at any stage in relation to the performance of the TPB or any members of the TPB?</p> <p>No.</p> <p>h) Were you ever concerned that the Tram Project Board were not accountable to the Council [CEC01561555]?</p> <p>Once the new Operating Agreements were completed, both tie and TEL were accountable to the Council, subject to the caveats noted elsewhere that the Operating Agreements were not as strong as I recommended they should be.</p>
TEL	
144	<p>In general:</p> <p>a) What was your understanding of the role, remit and responsibilities of TEL and how did these change over time [CEC00475228] [CEC00475229]?</p> <p>TEL was the parent company of tie. As I recall, it was to become the strategic transport body for bus and tram operations.</p> <p>b) How were important matters relating to the tram project reported by TIE to TEL (Including by whom and to whom)?</p> <p>I cannot confirm as I do not recall being involved with this.</p> <p>c) How were the views and requirements of TEL fed back to TIE /CEC?</p> <p>I cannot confirm as I do not recall being involved with this.</p> <p>d) Did you have any concerns at any stage in relation to the performance of TEL or any members of TEL?</p> <p>No.</p> <p>e) Why was there reluctance on the part of Keith Rimmer, the Head of Transport for City Development for there to be an operating agreement put in place [CEC01565047]? Did this early reluctance affect the effective governance of the project?</p>

	I was unaware of such reluctance on the part of Keith Rimmer. TEL had an operating agreement put in place in 2008.
145	<p>Transport Scotland</p> <p>Following the debate and vote in the Scottish Parliament in June 2007, Transport Scotland's role in the governance of the project changed.</p> <p>a) How were important matters relating to the tram project reported by TIE to SG/TS (including by whom and to whom) prior to July 2007?</p> <p>I am unable to confirm as I do not recall being involved in such communications.</p> <p>b) How were the views and requirements of SG/TS fed back to TIE?</p> <p>I am unable to confirm as I was not involved in such communications</p> <p>c) What were your views on the decision taken around July 2007 that TS should play a lesser role in the governance of the project?</p> <p>I had no comment but would have noted that this did mean the loss of expertise in relation to the delivery of major transport projects.</p> <p>d) What regular reporting, and by whom, to TS took place after that change?</p> <p>I am unable to confirm as I was not involved in such reporting.</p> <p>e) Did you have any concerns at any stage in relation to the performance of SG/TS or any ministers or senior officials?</p> <p>No.</p>

	<p>f) Do you consider that TS's changed role after July 2007 had an adverse effect on the management, oversight and/or delivery of the tram project (and, if so, in what way)?</p> <p>I am unable to confirm.</p>
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Contractors	
146	<p>In relation to the main contractors involved in the tram project:</p> <p>a) Did you have any concerns at any stage in relation to the performance of any of the main contractors, or the senior personnel employed by these contractors?</p> <p>I have no comment on this.</p> <p>b) If so, what were your concerns and what was done to address them?</p> <p>I have no comment on this.</p>

CONSEQUENCES	
147	<p>By way of overview:</p> <p>a) What do you consider were the main consequences and effects (on residents, traders, businesses and developers etc) of the delays in completing the tram project?</p> <p>These include additional cost to the taxpayer, disruption to business and operations in the City and reputational consequences for all involved.</p> <p>b) What steps were taken by the Council by way of mitigation?</p>

The Council sought to improve communications and put in place business assistance measures such as reduced rates for affected businesses.

c) What do you consider to be the main continuing consequences and effects of the shortened tram line (i.e. on the parts of the city the tram line was due to, but does not, serve)?

Negative perceptions of the project and the Council.

d) What do you consider are the main continuing consequences of the cost and time overrun of the tram project?

Negative perceptions of the project and the Council and additional cost to the taxpayer.

FINAL COMMENTS

148 By way of final thoughts:

a) Do you have any views on what were the main reasons for the failure to deliver the project in the time, within the budget and to the extent projected?

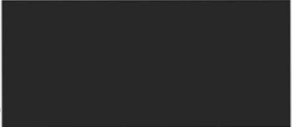
I hope that the Inquiry will identify these reasons. From my perspective the key issue appears to have been that the Council recommended and entered into a contract which it later transpired had only secured a fixed price for part of the tram line as opposed to the whole of it. This led to contractual disputes which both delayed the delivery of the project and ended up costing the Council significantly more than originally planned for a curtailed line.

b) Do you have any comments, with the benefit of hindsight, on how these failures might have been avoided?

An independent legal review by expert lawyers, as recommended by myself and others in 2007 and 2008, may have identified any concerns with the contract and the purported risk transfer. This may have assisted in protecting the Council and the City's interests. In addition, stronger controls and oversight in relation to the project would have assisted.

	<p>c) Are there any final comments you would like to make that fall within the Inquiry's Terms of Reference and which have not already been covered in your answers to the above questions?</p> <p>No</p>
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I confirm that the facts to which I attest in this witness statement, consisting of this and the preceding 117 pages are true to the best of my knowledge, information and belief.

Witness signature...  (NICK SMITH)
Date of signing..... 26/6/17

23 March 2018

Dear Mr McNicoll

I refer to your letter dated 18 March 2018 in which the Inquiry seeks my responses to a number of further questions.

I can confirm as follows:

Q.1	<p>At the hearings (14 September 2017, transcript pages 84-108, 137-141 and 165-167), you were asked about the report to Council on 24 June 2010 by the Directors of City Development and Finance (CEC02083184) including, in particular, the sentence in the report that <i>"The outcome of the DRPs, in terms of legal principles, remains finely balanced and subject to debate between the parties"</i> (paragraph 3.12 of the report). We have since identified an email dated 11 June 2010 from you to Donald McGougan and Dave Anderson which notes that you had given the draft report "a fresh read, agreed a few comments from Richard and drafted some conclusions and recommendations" (CEC00246713). The tracked changes in the draft report attached to your email suggest that you inserted the sentence in the report, <i>"The outcome of the DRPs, in terms of legal principles, remains finely balanced and subject to debate between the parties"</i> (CEC00246714, password "edinburgh").</p>
	<p>(a) Did you insert the sentence in the report, <i>"The outcome of the DRPs, in terms of legal principles, remains finely balanced and subject to debate between the parties"</i>?</p>
A.	<p>Although I could not recall it when giving oral evidence I can confirm that I did.</p> <p>Given the passage of time, I am unable to explain precisely why I chose that particular wording. For the purposes of this response, I have assumed that the wording was initially drafted by me without comment from anyone else. I cannot recall whether or not this was the case. The phrase <i>"finely balanced"</i> does not sound like my usual language. I note that in an email dated 1 June 2010 recording a discussion about the project I refer to this phrase in discussing Richard Jeffrey's preferred description about recent progress [see Doc Ref NS1.1].</p>
	<p>On reflection, the only explanation for that sentence which I can offer the Inquiry is that at the time I likely intended to convey to Council that it was the consequences of the DRPs on the wider legal principles which were still subject to significant legal debate between the parties. With hindsight I do not believe that I intended the sentence to be a summary statement on the outcomes of the specific adjudication decisions.</p> <p>Following insertion of this wording on 11 June, the report was subject to review by a number of individuals from the CEC and DLA, including members of the Tram Project Board and the report signatories. Dave Anderson circulated a further version on 16 June after his thorough editing [see Doc Ref NS1.3]. I now note that this draft changed my original wording slightly, although the sense of the sentence remained fundamentally the same. I also note that Andrew Fitchie made no comment on this wording when he provided his views on the report [see Doc Ref NS1.2a and NS1.2b].</p> <p>Despite the multiple reviews of the report between 11 June and formal signoff by the Directors, I do not recall any discussion or challenge in relation to that wording.</p>
	<p>(b) Did that sentence represent your views of the outcome of the DRPs at the time?</p>

Doc Refs
NS1.1-NS1.9 all
Doc ID
WED00000652

A	On reflection I do not believe that it did or was intended to, although please see the answer to question 1(a) above.
	(c) Did there come a time when your views on the outcome of the DRPs changed and, if so, when and why?
A	<p>Unfortunately I cannot now clearly recall my views on the outcomes of specific adjudications at that time. However, my views on them and their ultimate consequences at the time were heavily influenced by the views of tie and their advisers whom I accepted were more expert in construction matters.</p> <p>I believe that my views on the consequences of tie consistently appearing to lose the arguments they put forward did change during 2010. From memory I was querying matters and requesting further information and analysis to help inform the Council's understanding of the overall contractual position. For example, in my email to tie dated 27 August 2010 [see Doc Ref 1.4] I sought, amongst other matters, detail of the potential consequences of the adjudication decisions on a wider basis in relation to the contract. I do not recall such analysis and information being provided.</p>
	<p>The report to Council on 14 October 2010 by the Directors of Finance and City Development (CEC02083124) also includes the sentence, <i>"The outcome of the DRPs in terms of legal principles, remains finely balanced and subject to debate between the parties"</i> (paragraph 2.50). We have since identified the following emails: (i) an email dated 6 October 2010 from Alan Coyle to Dave Anderson and others (CEC00013930) which attached a draft (v1.5) of the report to Council (CEC00013931, password "14.5") which contains a discussion of the outcome of the DRPs but does not contain that sentence, (ii) an email dated 7 October 2010 from Alastair Maclean to yourself in which Mr Maclean stated, "Can't open as I don't know the password but suffice to say I don't like the idea of going into the detail of DRPs for reasons I have already made clear at the meeting earlier today. The agreed position was that we would not extend the risk beyond that taken inadvertently in June so I am surprised if Richard wants to do the exact opposite of that now. Please remove any wording that goes beyond June" (CEC00012663), (iii) an email dated 8 October 2010 from yourself to Alan Coyle (CEC00036170) in which you suggested a new paragraph in relation to the DRPs, which paragraph included the sentence, <i>"The outcome of the DRPs, in terms of legal principles, remains finely balanced and subject to debate between the parties"</i>, which paragraph then found its way into the final version of the report (as paragraph 2.50) and (iv) an email dated 8 October 2010 from you to Mr Maclean (and Carol Campbell), forwarding your said email to Mr Coyle, including your proposed paragraph in relation to the outcome of the DRPs (CEC00036173).</p>
Q.2	(a) In his email of 7 October 2010 Mr Maclean referred to not extending the risk "beyond that taken inadvertently in June". What was that a reference to?
A	I do not know what this was a reference to.
	(b) You appear to have inserted the sentence <i>"The outcome of the DRPs, in terms of legal principles, remains finely balanced and subject to debate between the parties"</i> in the report to Council on 14 October. Is that correct?
A	<p>That is correct.</p> <p>However, I would highlight that I also added the word "overall" between "The" and "outcome" in the October Council report and, as set out above, I believe my intention at</p>

	the time was to reflect that the consequences of the DRPs remained in dispute between the parties.
	(c) Did that sentence represent your views of the outcome of the DRPs at that time?
A	As stated in answer to question 1(b), I do not believe that it did, although please also see the answer to question 1(a) above.
	(d) What did you understand Mr Maclean to mean by the request in his email of 7 October 2010 to "Please remove any wording that goes beyond June"?
A	<p>On 6 October 2010, following views expressed by Mr Maclean on the DRP aspects of the draft report, I circulated a further version (1.6) of the report [see Doc Ref NS1.5a and NS1.5b]. As referred to in that email, a meeting of "bosses" was arranged to take place on the morning of 7 October to discuss. During the afternoon of 7 October I sent a short paragraph to tie in relation to the DRP decisions [see Doc Ref 1.6] which appears to be a shortened version of para 3.5 from the June 2010 report. This wording, with updated figures, was incorporated into the draft which was then sent by Alan Coyle to tie for final comment [see lower part of Doc Ref NS1.7a]. The "<i>finely balanced</i>" wording was not included in this draft.</p> <p>By email that evening [see Doc Ref NS1.7a and NS1.7b], tie requested that the report should include the following further wording at the end of what later became para 2.50 - "<i>Suggestions in the press that BSC have 'won 13 out of 15' adjudications are without any foundation and factually incorrect</i>". This followed an earlier email from tie [see Doc Ref NS1.8] which indicated that the inclusion of the DRP information in the report was important to them.</p> <p>What I believe I took from Mr Maclean's email (CEC00012663) was not to accept the additional sentence proposed by tie, but rather to effectively mirror what had been stated in June. Whilst I cannot now clearly recall, I suspect that I imported the final sentence from para 3.12 in the June report in an effort to find a middle ground between what tie had requested and what the Council could accept. A more comprehensive report was proposed to be brought back in December 2010 and the Council had instructed independent legal advice from Shepherd & Wedderburn that week in this regard [see Doc Ref NS1.9].</p> <p>The wording was then sent to Mr Coyle, Mr Maclean and Ms Campbell (CEC00036173). The report would then have been sent to the Directors for their final sign off prior to being put into the public domain for a week before the Council meeting.</p>
	(e) Did you have any concerns that if the wording in the report to Council on 14 October 2010 was not to go beyond that in the report to Council on 24 June 2010, the report to Council in October 2010 would not fully take into account the further adjudication decisions between June and October 2010 and may, therefore, be misleading or potentially misleading?
A	I do not recall having any concerns in this regard but, as set out above, I believe that I was referring to the wider legal position rather than to the specific DRP outcomes.
	(f) Did you have any concerns at the time that the sentence " <i>The outcome of the DRPs, in terms of legal principles, remains finely balanced and subject to debate between the parties</i> " in the report to Council on 14 October was misleading or potentially misleading? If so, did you bring that to Mr Maclean's attention?

A	No I did not. I would never have knowingly drafted or proposed wording for a report which I considered would mislead or potentially mislead the Council. I do not believe that my colleagues in the Council would have knowingly done so either. Whilst I can now see that the wording could have perhaps been clearer, its inclusion was not questioned at the time.
	(g) Did you have any discussions with Mr Maclean in relation to your proposed paragraph in the report in relation to the outcome of the DRPs after your email to Mr Maclean of 8 October 2010?
A	Given the passage of time I cannot recall.

As with my previous submission, I have tried comment to the best of my recollection and belief. Inevitably, given the volume of data and passage of time, there is a possibility that my recollection is incorrect or based on wrong assumptions or information.

I hope this is of assistance to the Inquiry.

Yours sincerely



Nick Smith