

**Edinburgh Tram Inquiry Office Use Only**  
Witness Name: Gordon Mackenzie  
Dated:

**The Edinburgh Tram Inquiry**  
**Witness Statement of Gordon Ferguson Mackenzie**

Statement taken by Duncan Begg.

My full name is Gordon Ferguson Mackenzie. I am aged 53, my date of birth being [REDACTED]. My contact details are known to the Inquiry.

My current occupation is as a Social Work Manager. My role in the tram project was as Councillor with the City of Edinburgh Council (CEC). In 2007, I was a Director of Transport for Edinburgh Ltd (TEL) and, in 2009; I became a member of the Tram Project Board (TPB). I have provided a copy of my curriculum vitae [CVS00000024].

Statement:

**Introduction**

1. In May 2003, I was elected as a Councillor for the Ward of Prestonfield as a Scottish Liberal Democrat, and I served until May 2007. In May 2007, there was an electoral reorganisation, as a result of which I served as a Scottish Liberal Democratic Councillor for the Ward of Southside and Newington until May 2012. Between 2003 and 2007, I held a number of positions in opposition, mainly to do with housing.
2. Prior to 2007, I do not recall that I had any particular involvement or direct relationship with the tram project. From 2007 onwards, however, I was a member of the CEC administration. From May 2007 to June 2009, I was the Convenor of Finance. From June 2009 to May 2012, I was Convenor of Transport. As a result of holding the Convenor of Finance role, I was

nominated to be a Director of Transport Edinburgh Limited (TEL). I continued as a Director of TEL when I became Convenor of Transport in July 2010. I was a Director of TEL between 9 April 2008 and 27 September 2011; a Director of Transport Initiatives Edinburgh Limited (TIE), between 4 July 2007 and 27 September 2011, and a member of the Tram Project Board (TPB), following my move to becoming Convenor of the Transport Infrastructure and Environment Committee, from 27 July 2010 [CEC00245349], which considered various tram-related matters. I also became Convenor of the Tram Sub-Committee as a consequence of becoming Transport Convenor in July 2009 as well as being a member of various other committees that were not related to the tram project.

3. I do not consider that I had any specific qualifications or experience, in relation to large scale transport projects or project management that assisted when taking decisions relating to the Edinburgh Tram Project. CEC provided general training for CEC officials and Councillors who were to become Directors of CEC arms-length companies and I received some training in that regard; I think it was a couple of hours training. I had a half day of PRINCE2 project management training provided by CEC which I undertook in relation to my scrutiny role as a Councillor but this was not specific to the Tram Project. Although not provided in relation to the tram, it was helpful to me in giving a basic overview of project management principles. I think more training in project management would, generally, have been beneficial to me in my various roles. While there might, potentially, have been benefit in having additional training on the duties of a Director, none of this would have substituted for senior level experience in large scale projects. I have subsequently become more familiar with PRINCE2 and project management principles through unrelated work but, at the time, I had no project management training or experience at a relevant level. In relation to the complex judgments that needed to be made in the course of the tram project, I do not think that my background assisted me to contribute additional expertise and knowledge beyond those issues which were related to public affairs and party political relations.

4. I do not think that any of the Councillors on the relevant boards or committees could have had sufficient training to bring us up to a level of knowledge or expertise where we were able to provide the technical or project management related expertise which would have benefited the project, within the time frame we are considering. Our lack of experience or knowledge of large-scale projects and the associated risks and complexities was too great to overcome by training alone. We relied very heavily on the advice of CEC Officers and TIE officials within both the CEC and the TPB. Given what I now know about tram projects, I do not think that there is any substitute for the experience and skills that come from working in an environment with large-scale, complex, projects. I do not think, particularly in relation to my position on the TEL Board and the TPB, there could have been any training that would have helped substantially improve that position.
  
5. Prior to the 2007 local elections, the Labour Party had formed the ruling Administration of CEC during which time they had proposed a number of transport initiatives, including the tram. Over time, the idea of a Tram network gained support from Liberal Democrat and Conservative Councillors as well. At the start of the 2003 to 2007 (Labour) Administration there were no SNP Councillors on CEC. A single Labour Councillor defected to the SNP Councillor, during that period and publicly opposed the Tram project when he became an SNP Councillor. This reflected the SNP position at a national level. After the 2007 local elections, the Labour Party, the Conservatives, the Liberal Democrats remained in favour and were joined in this by the Green Councillors who had been elected in 2007. The SNP group on the Council (which had grown to 12) opposed the tram project. Prior to the 2007 election, the project had been politically contentious but with the Scottish Executive backing the project there was a political support for the project at local and national level. Following the 2007 elections, to both CEC and the Scottish Parliament, that position changed and the project became even more politically contentious. We do not know how many voters were swayed by the tram project but it was clear it could have bearing on people's views and as a result it became the subject of intense political debate and division.

6. The problems or difficulties caused by the fact that political parties were divided in their position regarding the tram project had impacts in a range of ways. Within CEC, the fact that the SNP opposed the tram, whether they were in administration or opposition, was always going to generate political debate and division. The change in CEC political administration, in 2007, from Labour to a Liberal Democrat/SNP coalition had the effect that parties who were opposed to each other across the Council chamber had to work together to progress the tram project. I do not think that the differences between the Lib Dems and the SNP, the ruling Administration coalition, on the Tram project weakened the project or materially affected the decisions that were taken. The voting evidence, up until the very latter stages of the project, evidences that the pro-Tram parties were able to work together to get the required political support for key decisions. For background, this was anticipated and provided for at the time of the Lib Dem / SNP coalition administration being formed; there were discussions held between representatives of the SNP Group and the Lib Dem Councillors, which included Jenny Dawe, Phil Wheeler and Robert Aldridge, the outcome of which was that the SNP Group, at local level, would have freedom as part of the coalition agreement to vote their own way on the Tram project. I understand that the SNP Group had discussions with their colleagues in the Scottish Parliament about going into administration with the Lib Dems.
  
7. The Labour group were very unhappy that the Lib Dems went into coalition with the SNP. I took view was that this related to the fact they were no longer part of the CEC administration. They had been the political leadership of the Council for, I think, 20 plus years. The Lib Dem Councillors took the view that there would be sufficient support for the project, when you added in the support of Labour, Conservatives and the Greens to have a majority within the Council. The votes of the Liberal Democrats, Conservatives, Labour, and Greens totalled in excess of 40 in favour of the tram; the SNP had 12 Councillors at the time. There was therefore a large majority in favour of the tram. There was also a belief that the tram would be most politically contentious up to the point contracts were signed, after which the SNP would, potentially, lower their level of opposition. However there was no agreement

to that effect and although the SNP Councillors did, at one point, vote to ratify CEC's signing of the tram contract, their active political opposition to the project continued.

8. Towards the end of summer 2011, support for the project within the 'pro-tram' parties broke down to the extent that they were no longer able to work effectively together to progress the project. I believe this was largely in response to the major difficulties the project was causing those parties in terms of voter intentions. The tram was considered politically 'toxic' and political parties wanted to distance themselves from the project for electoral reasons. It is difficult to say what difference that made to the project overall; it certainly made little difference to the key CEC political decisions that had gone before. However when it came to a vote on whether the tram would be taken to St Andrew Square or Haymarket, different views were taken by the different pro-tram parties. The Conservatives and the Labour Party ended up voting together to terminate the project at Haymarket while the SNP abstained and the Lib Dems voted to for it to terminate at St Andrews Square. My personal view, at the time, was that the Labour and Conservative Councillors took the wrong decision to terminate the tram at Haymarket. However, following the intervention of the Scottish Government who made it clear that they would take back the funding if the Tram terminated at Haymarket, the Council decided to back the St Andrews square option.
9. The fact that the tram became so politically unpopular meant that there was always some political gain for the SNP to 'remind' voters of their opposition to the project. The fact that this led SNP members to continue to speak out against the project created some tension between Councillors who were part of the coalition but did not affect decision making. There were lots of things that we were not able to fall out about publicly, but the Tram was an exception. The SNP stance irritated Councillors of other parties, not just the Liberal Democrats but. did not affect key political decisions within the Council
10. Prior to becoming the Finance Convenor, I had not been closely engaged with the tram project. It was something that other Lib Dem Councillors were

leading on for the Lib Dem group. As I recall, it was promoted as an environmentally friendly way of moving large numbers of people along key transport corridors and a means of stimulation economic development. Looking at what other cities were doing, it seemed trams were a credible option. I did not have major concerns initially in relation to the project. The briefings and the reports about the project were largely positive and, according to the final report to CEC, there was a 90% chance of it coming in on budget. The general feeling I perceived around the tram project was that it would be a good project for the city. Edinburgh was getting most of the funding from the Scottish Government; it would help to alleviate some of our transport difficulties, and drive economic development. Additionally, the small contribution that, we believed CEC would have to make could be paid out of developer contributions and not affect other service budgets.

11. I knew there were concerns about the disruption that would be caused by the on-street works, and I was aware of problems encountered in Dublin, in that regard, so I knew that would be an issue. I had concerns that we would go through a period when the project would be very unpopular as a result, and that the Council would have to get through that period in order to deliver the project. In recognition of the impact this would have on businesses there was a package of measures to help support local businesses, which we were told was the most generous package that had ever been put together. I accepted that some disruption was a necessary part of delivering the project and was supportive of mitigation measures being put in place.
  
12. At national level, the change in administration from a Labour/Liberal Democrat coalition to a minority SNP Government in 2007 was a more significant issue. The SNP Government was quite clearly against the tram project, and stated that it would have spent the money elsewhere. It was effectively forced to fund the tram project by the other parties in the Scottish Parliament. The fact that the SNP government was against the project was considered to be one of the major risks to the project and featured on the risk register. Looking back, in my view, the fact that the Scottish Government was not taking any of the risk over £500m was also bad for the project. However, that didn't play a

major part in my thinking in the early stages, as the projected costs came within the overall budget being discussed. With hindsight, in my view, transferring risk from the Scottish Government, a much larger organisation with a multi-billion pound budget, to CEC, does not just transfer the risk; in some respects, it multiplies the risk as there is, proportionately, a far greater risk to the smaller body. The project had a risk register, which recorded all of the different concerns which the TIE management team and Directors perceived. I recall at one point one of the senior executives of TIE, saying that one of the major risks to the project was that the Scottish Government might 'pull the plug' on the funding. It is difficult to quantify the effect this had on decision making but I believe that the Scottish Government's opposition to the project made a difference in the sense that the project lost a supporter with significant financial and political strength. I understood it also meant that the project lost the technical and project management expertise which Transport Scotland (TS) could have brought. The fact that, thereafter, the project was essentially sponsored by CEC alone may have weakened TIE's position when it came to dealing with the contractor., as the Scottish Government has a much bigger budget and procurement programme for construction and civil engineering. This greater purchasing power and financial resilience could have made a difference in terms of the relationship with the contractor.

## Reporting

13. The principal officials within CEC who were responsible for advising Councillors of developments relating to the tram project were the Chief Executive, Tom Aitchison; the Head of Legal, Gill Lindsay, who was subsequently replaced by Alastair Maclean; the Director of Finance, Donald McGougan; the Director of City Development, Andrew Holmes, who was subsequently replaced by David Anderson; and Jim Inch, Director of Corporate Services. In terms of the relationships within senior officers of CEC, Jim Inch was seen as the right-hand man for the Chief Executive, he was also the manager of Gill Lindsay, Head of Legal Services, and the CEC

Monitoring Officer. Below those tiers of management, there were various managers who deputised for those individuals at times, such as Marshall Poulton, who became the Tram Monitoring Officer at one point; and Andy Conway and Alan Coyle. This group was less involved in the briefing of Councillors. It was much more the Directors, the Chief Executive and the Head of Legal that were involved in the key, strategic, briefings to my recollection.

14. From the second half of 2007 I was more informed of developments and detail than other Councillors because I was involved in TIE, TEL and the TPB. The majority of Councillors received briefings when there was a report coming up. More often than not, they would be offered a briefing by CEC officers, however, they could also request a briefing at any point. From time to time, there would be briefings for group leaders and the Convenor of Transport, which would deal with issues that were more commercially sensitive or needed to be dealt with at short notice. It was then up to the individual group leaders to disseminate that information to the rest of their group as they felt appropriate. All Councillors received or had access to reports that came to Full Council or any of the Council's committees.
  
15. In the main, it was the norm for Tram issues to be discussed in the course of the general business of the Council, most often at Full Council or the Policy and Strategy Committee. Some reports came to the Tram Sub-committee but these tended to be less strategic and more to do with specific detail. To the best of my recollection, no Full Council or Committee debate on the tram was ever curtailed. My recollection is that there was no sense of Councillors wanting longer at Council meetings to debate the issues. As the project became more unpopular I perceived that quite a lot of the Councillors in the pro-tram parties, would have rather spent less time, and had fewer reports, because they felt that it was damaging politically to have these reports brought to CEC due to the negative publicity they generated. That is what some representatives in other political groups said to me at the time. I do not recall thinking at any time there was a sense that Councillors of any party wanted more Council reports or more debate in Council about the tram, other



than if it suited a political point they wished to make. When information came very late to Councillors, however, more time could have been helpful to allow them to assimilate and question it.

16. The extent to which Councillors were given a free vote in relation to the tram project may have differed between CEC political groups. I do not think that there was more pressure put on individual Councillors within the Liberal Democrats to support the tram project than there was on other issues. I do not have direct experience of the other Council groups, but in the Liberal Democrats, we discussed and debated, at length, every contentious issue that came before us. If members of the group had views, they would be encouraged to state them. If people were against a particular course of action, there was an expectation that they would say so in front of the group, and we would then try to find an accommodation. If they were opposed to the majority of the group on an issue, they would be listened to and points discussed. They would usually get some sort of support from within the group for the fact that they had a different view, and we would try to find an accommodation that allowed us all to vote together. It was quite a supportive environment in that regard, although the process was sometimes very time consuming. I do not recall there being strong views expressed against the tram project within the group, although there were serious concerns about what was happening. I do not recall that we needed to amend or change our position on the Tram in order to accommodate the views of an individual. I do not recall anybody speaking out against the Tram at the time, although towards the end, one of my CEC colleagues within the Liberal Democrat group said that he had been against it from the start.
17. There were one or two Councillors in other pro-tram groups who were openly against the tram project. However I do not know how those political groups debated Tram issues internally or what, if any, pressure was put on Councillors who disagreed with the majority view within those groups.
18. Prior to the Lib Dem / SNP coalition administration being formed, in May 2007, there were discussions held between representatives of the SNP Group and a

team of Liberal Democrat Councillors, which included Jenny Dawe, Phil Wheeler and Robert Aldridge. I was not part of those discussion, so I do not know the detail of it, but I know that the outcome was that the SNP Group, at local level, would have freedom, as part of the coalition agreement, to vote its own way on the Tram project. I am certain that the SNP Group had discussions with their colleagues in the Scottish Parliament about going into administration with us.

19. Clearly, the Tram project created a tension between democratic and commercial needs which I do not think was ever satisfactorily resolved. In a paper on the "*Current status of the tram legal workstream*" [CEC00013290], it is stated (page 6, paragraph 15.2.6) that "*open decision making whilst necessary politically may pre-warn Infraco*". A notable example of how this affected interactions with Councillors occurred during the mediation process when it was agreed that Councillors would not be involved in the process until there was an outcome. In terms of the providing a 'space' for those discussions to proceed, this approach did reduce those tensions substantially, as matters were no longer coming into the CEC domain for political debate and division. The fact that contentious issues came up in reports to Councillors was clearly exploited for political gain, as it would be on any significant issue. However there was a concern that this process also offered the contractor an opportunity for commercial advantage. For example, CEC had to report on issues such as the extent of the delegated authority of the Chief Executive, which was, I think, £10m. As I recall BBS asked for another £10m, or just under that amount, at the time of contract close. Once that was agreed, a couple of months later they asked for another £10m. I have a concern that the contractors were given commercial advantage by CECs reporting requirements and I think it was one of the weaknesses of the approach taken.
  
20. I do not think that a political body, such as a Council, should take these types of projects forward; it creates too many opportunities for division and divulging information which may disadvantage the public purse. In retrospect I do not think that Councillors should have been on the TIE and TEL Boards, or the

TPB. It created difficulties in terms of conflicts of interest, which we felt that we were managing at that time, but didn't generate sufficient benefit to offset the potential conflict. It would have been more sensible, that Councillors were not involved in those boards.

21. The relationship between Councillors and the body that is delivering the project should be managed in a different way. For example there could be a committee or body, which meets for the purposes of interfacing with the project but where Councillors do not have Director roles and responsibilities. In the same way that there is supposed to be a professional 'distance' between Councillors and Senior Officials of a Council perhaps there also needs to be more of a safeguard in place for 'Arms length' bodies and Council owned organisations. In order to reduce the perception of a conflict of interest as well as a variety of other reasons, it may have been better to have a clearer separation between Councillors and the body delivering the project. Separately, I do not think that CEC should have been the body, through TIE, to have taken the project forward. I think that it should have been a national transport agency that did so, backed by the Scottish Government, and subject to separate legal advice.
  
22. An arrangement was put in place whereby group leaders and the Convenor of Transport were briefed separately, and they would disseminate information to their respective groups. After several 'leaks' of information which had been provided to this group, the Labour Group made it clear that they did not want to be part of a briefing with the SNP. There was a perception that, whenever there was a briefing for group leaders, sensitive information somehow leaked out into the press. The Labour Group representatives felt that it was likely the SNP were responsible for that, and decided that they wanted to have separate briefings. As a result, the Labour Group, the Liberal Democrats, the Greens and the Conservatives had one briefing, and the SNP had another. I do not know if the briefings were the same but I have no reason to believe they were different.

23. There was scope for individual groups to be briefed separately or request additional briefings. I am pretty sure that we, the Liberal Democrats had individual briefings on a number of occasions, but I cannot recall how often or how many. I am sure that other groups would have done likewise, but how often and how many of those briefings occurred was not shared between groups. The information from those briefings was then disseminated by the Councillors who had attended, to others in the group. The information shared would be dependent on the commercial sensitivity of that information. If the briefing touched upon commercially sensitive information Council officials would speak the group and give them an idea of the subject matter discussed, but there might be details that they or you would not be able to share for commercial reasons.
24. The briefings would normally constitute guidance on financial or technical matters, and the reports would include a certain amount of information exploring particular points or leading to a particular conclusion. I cannot remember the details of specific briefings. With the benefit of hindsight, what was not said may, perhaps, have been as important as what was said. There was opportunity to complain about or question the level of information provided, and to request further information, guidance, advice or clarification. However, if you did not know that there was a particular problem and you did not have the background in project management or large-scale infrastructure projects, you would not necessarily have known the pertinent questions to ask. I am thinking here, for example, about legal advice.
25. The Tram Internal Planning Group (IPG) Action note dated 27 April 2010 [CEC00236871] makes reference to an intention to discuss a report to CEC on 27 May 2010 with Councillor Dawe and myself before engaging other political groups. The conventional way of briefing political parties on any CEC business was that the CEC Officer would go first to the lead member of the Administration dealing with that issue. That would be the Convenor of a particular committee or, for something as high profile as the tram, the CEC Council Leader. It was normal practice that they would get the first look at it. Obviously, it afforded the lead Councillor an opportunity to comment or ask

questions on the report before it was in the public domain. The reason for that was largely to do with the political management of CEC business, so that the politicians, who were responsible for speaking on behalf of CEC, would know what was going to be said before they were asked questions about it. It would have been less common for the CEC Leader to be briefed on a report than it would be for the CEC Convenor of that committee. On this occasion, they came to me first as I was the Transport Convenor. I do not think that any Councillor would have seen anything untoward in that; it happened all the time. I was not aware of that happening more often towards the latter stages of the project, although there were potentially more times towards the latter stages when there needed to be briefings about what was going on.

26. If I had been a Councillor who was not involved in TIE and TEL, I would not have received as much detailed information on the project, unless I had asked for it. The majority of Councillors would receive only the reports which were provided for Committee meetings. I doubt that Councillors would have understood the operational detail of what was going on, with regard to the contractual matters for example, had this been given to them without interpretation or explanation by Council officials.
  
27. In some instances there was a reluctance to provide information to Councillors, for example on patronage projections. The reason given for this was that Lothian Buses considered parts of this information to be commercially sensitive. Latterly, information was provided about patronage numbers. I do not know if there were many Councillors asking for additional information, and I do not recall people saying that they asked for information and it was not given, other than what was deemed to be commercially sensitive. The amount and length of reports that Councillors were supposed to read for Council meetings could be quite demanding and I suspect that many Councillors felt swamped by information at times. In such circumstances it may be that only certain key points would have been taken in – for example, whether it was a fixed price, lump sum contract with no amendments. For a lot of Councillors, high level information was what they were comfortable with, and what they would have expected. I suspect there were relatively few

Councillors who would have been drilling down into the detail. Councillors for the wards affected by the works and some SNP Councillors were probably more motivated to do so.

28. For a considerable part of the project, I thought that I was being provided with sufficient accurate information. In light of subsequent events and information which has become available, I have concerns regarding the accuracy and balance of the information provided and the legal advice we received. At the time the contracts were signed I was relying heavily on the recommendation of senior officers and I thought that I was getting a fairly accurate balance of distilled information at an operational level. I formed the view that they were giving me the information that I required in order to make a decision at a more strategic level. I believe now, from what I have read in preparing for this interview, that clearly we were not being given all relevant information.
29. In my role as Finance Convenor, I asked for additional information on how the CEC funding contribution was made up, and in relation to the Dispute Resolution Procedures (DRPs), I had to push very heavily for information on the outcome of specific DRPs. There was strong resistance by TIE senior officials to give me details of the adjudications. I requested two out of, I think at that time, twelve adjudications as a sample, because I wanted to check that the information they were providing was an accurate reflection of the adjudications (one the adjudication decisions I was provided with was in relation to the Russell Road retaining wall). Those adjudications seemed to correspond with what I was being told in the TPB. However, they were very reluctant to provide that information to me, even as a TPB member. A third adjudication, which I have been provided with by the Inquiry but which I did not see at the time, would have had a far greater impact, had I read it at the time. (As I recall this adjudication related to design development but I would need to re-read the information provided to me previously and I don't appear to be able to access this at present)
30. In retrospect, I do not think that we were provided with some detail which would have been relevant to our considerations as Councillors and in that

regard it appears to me that the information provided was not sufficiently balanced, particularly in highlighting potential risks. This is my opinion in retrospect. At the time, however, we were being informed and advised by senior officials of both CEC and TIE, and I had no reason to suspect that we were being misled, deliberately or otherwise. I believed that the information that came from TIE, where it was the appropriate source, was accurate and had been checked by CEC officers. My assumption was that CEC and TIE were working together in sourcing the information to provide the details for the CEC reports. I did not have any concerns about the information flow at the time. Subsequently, I have seen documentation between CEC officers saying how they needed to lead me through that information carefully, but there was no reluctance expressed to me at the time. I believed I was getting the information that I required.

31. My understanding was that the vast majority of information relating to the tram project was provided by TIE, although the information on tram patronage numbers would probably have partly come from Lothian Buses, and information about issues such as Traffic Regulation Orders and road closures would probably have come from the CEC officers responsible for roads management. Any issues to do with the contract, which was the responsibility of TIE, would have come from TIE and been checked by CEC officers. I did not have concerns as to where the information came from and relied upon CEC officials to check the information provided.
32. I did not report on the tram project to my constituents, unless the subject was raised at a local meeting or on the doorstep. It was a politically damaging issue to be associated with the Tram project, especially as the project ran into greater difficulties. Liberal Democrat Councillors usually provided information to constituents through newsletters and attendance at local community groups. The newsletters did not feature the tram to any significant extent and the tram didn't arise at many community groups within the area I represented as it was not on the tram route.

33. Normally, those people who raised the subject were very anti-tram and it came across that they had very fixed views about the project but some people did continue to express their support. In my responses I tried to stick to the facts as I understood them and to beg to differ on the views of those who opposed the project. I cannot remember specific questions from individuals, or whether specific queries were raised.
34. As the Convenor of Transport, concerns were raised with me by people around the city. If they required a technical response, I would go to CEC officers for assistance. If they were from the business sector, I would go to my political colleague in the SNP, Tom Buchanan, who had responsibility for Economic Development and ask him to obtain a response from officials he was dealing with in order to compile a response.
35. My understanding and views on the tram were not significantly informed by what was reported in the media. Understandably much of the media coverage was about what was, or might be, wrong with the project. There were times when matters were raised in the media, of which I was not aware, and which had not come up at a TPB. Latterly, the Herald, in particular, appeared to be obtaining information which I presume came from the consortium. I suspect that the contractor used the media to a significant extent to put pressure on CEC. That is speculation on my part; I have no direct evidence.

### **Initial Proposals (2000-2006)**

36. I became a member of CEC in May 2003, and I understood Labour to be responsible for the creation of TIE in 2002. My understanding was that TIE was created for the delivery of transport infrastructure. An explanation was also given to me that TIE was created due to concern about the ability of the local authority to deliver the New Transport Initiative (NTI), including a tram network. This is detailed in a CEC document dated 2 May 2002, entitled New Transport Initiative: Framework for Delivery [USB00000232]. At that time, my



knowledge of TIE was that it was an arms-length company that had to report back to CEC. I had no more detailed understanding than that.

37. CEC had dozens of arms-length companies. I was involved with several of them in my time as a Councillor and was chair of CEC Holdings and EDI Group from 2007 to 2012. CEC was the sole shareholder of many arms-length companies. It had the ability to appoint and dismiss Directors, and the companies had to report to CEC. I had not familiarised myself with the details of the operating agreements between CEC and TIE. I didn't have a specific understanding of the means by which CEC would exercise control over TIE, and relied on my general understanding that CEC exercised control by being able to appoint the Board , provide funding and could dissolve the company if it chose to do so.
38. From what I have read, the income from road charging was very significant to the financing of CEC's transport proposals under the New Transport Initiative (NTI), including the tram network. There were a range of projects and initiatives the Council planned to take forward with the money it was to get from congestion charging. However, these plans were drawn up by the previous Administration and I do not have any recollection of what they proposed to do in terms of funding the tram project specifically, and I am not aware whether the project was dependent on the congestion charging income.
39. There was a political desire that the tram was to be self-funding on a day to day basis and that, as far as CEC was concerned, no funds were to come from the general funds available for other services. Instead, for the capital costs, the CEC contribution was to come from developer contributions and capital receipts. The developer contributions are referred to in an email dated 13 December 2007 from Lynn McMath to me and others [CEC01400622]. As far back as I can recall, the issue was how CEC's £45m contribution would be funded. There was to be an Act or legislation passed for developers to have to contribute to the tram project. My awareness was more in relation to the politics of it, rather than how much of that particular project was going to be

funded by the Scottish Government or by congestion charging, or other means. Opponents of the tram would argue that these were funds that could be spent on other projects or services. My understanding at that time was that the more funding that was attributable to the economic gains of having a tram the better, because then it would be more difficult for the opponents of the tram to argue that this was money that could have gone to other projects or services.

40. I understood that the Scottish Government funding of £500m was a grant and that it could not be made available for other projects or services in Edinburgh were it not to be spent on the Tram. From an Edinburgh perspective the funding offer seemed like a good deal. We would not have had that funding without the tram project. My interest in that aspect was partly as the Finance Convenor, and partly in considering how the project would be viewed by Edinburgh residents; had there been a contribution from the general revenue of CEC required the project would have been viewed less favourably.

### **The May 2005 Draft Interim Outline Business Case**

41. I was not familiar with the Draft Interim Outline Business Case dated May 2005 produced by TIE [CEC01875336], which describes the 30 month construction programme from July 2007 to meet an operational date for the tram by the end of 2009 as a “*challenging timescale*” (page 19). This document predates my direct involvement with TIE, and I do not recall receiving it subsequently. The report acknowledges a £206m shortfall in funding for capital expenditure for both lines 1 and 2, which appears to contradict TIE’s earlier assurances in their response dated 12 November 2004 to the review of the Preliminary Financial Case by Arup Scotland [CEC01705043] that (page 2) “*the figures previously reported by tie remain the best estimate of the likely future costs and there is no additional ‘£220m shortfall’*”. As far as I am aware, I was not given these reports and was not aware of this inconsistency, or why TIE and CEC were under pressure to meet such a challenging timescale.

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page 17

## 2006 Reports to CEC and Draft Final Business Case

42. A report to CEC on 26 January 2006 [CEC02083547] made certain recommendations for funding and phasing the tram network, given that the total estimate for lines 1 and 2 was £634m, and the total available funding was £535m. The figures quoted in the report to the Council appear to be based on the Edinburgh tram progress report of September 2004 [TRS00000209]. I do not recall discussion on the need to restrict or phase the scope of the tram network in relation to the reliability of the initial cost estimates, the affordability of the tram project and TIE's ability to deliver it. Clearly, it is in the reports, but I had not picked up on the significance of it at the time.
43. I have no idea whether the Scottish Government played any part in the decision that a first phase be built from the Airport to Leith Waterfront. I was not involved in any discussions around that or any other options which may have been considered. As I recall the projected patronage numbers for that part were better than some of the other sections being proposed and it was argued that accessing the Waterfront would offer greater economic development potential.
44. I do not recall having specific views or concerns on the draft Final Business Case for the Edinburgh Tram Network, of which members' approval was sought on 21 December 2006. As to how important a factor it was for the Council that the Council's contribution would comprise only such amounts as could reasonably be expected to be funded from future tram related development and receipts, rather than from general funds or from Council Tax; it was political important that the tram was to be self-funding. As far as the Council was concerned, no funds were to be coming from the general funds available for other Council services, instead they would be coming from contributions which would not have arisen were it not for the tram: from developer contributions and capital receipts. That was quite an important political issue given the divisions there were politically around the tram project.

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I note the joint report to Council by Donald McGougan, Director of Finance, and Andrew Holmes, Director of City Development, on 21 December 2006 [CEC02083466]. I was not directly involved in the tram project at that time. I would have seen the report, although I do not recall what I made of it. Any report coming to Councillors is open to any Councillor to have a look at, but if you are short of time, as many of us were, you pick and choose what or how much of the various reports you read. At that time, I was the opposition housing spokesman, so my focus was more likely to have been on housing. I did not have views on the most significant risks affecting the timely completion of the tram project within budget. Phil Wheeler and Fred Mackintosh were the Liberal Democrat Councillors involved with TIE and TEL at that time, and they took the lead in assimilating information and passing it on to other Councillors. I'm not sure I would have scrutinised it closely.

45. With reference to the matters noted in the report, I do not have a recollection of my understanding at that time of the steps that would be taken, and by whom, to maintain control over the capital costs of the project. Similarly, I do not have a recollection of my understanding at that time of the procurement strategy for the tram project, and the aims of the procurement strategy; the extent to which design and utility diversions would be complete before the infrastructure works commenced; or the extent to which the infrastructure contract would be a fixed price contract.

### **Events between 2007 and May 2008**

46. A Highlight Report to the Edinburgh Tram Internal Planning Group dated 20 March 2007 [CEC01565481] was brought to Phil Wheeler, who was Transport Convenor at that time, not to me. I do not have any recollection of it.
47. I was not involved in TIE/TEL in the first half of 2007. I was not aware of the difficulties that CEC were having at an operational level in obtaining information from TIE and TEL. I did not see the Briefing Paper for the Chief Executive on "TIE – Governance Arrangements" dated 20 July 2007

[CEC01566497] produced by Jim Inch. I would not have got the briefing paper because it went to the Chief Executive, although there may have been some sort of discussion with me about elements within it. I remember the line from the paper (para 3.1) that: "*The current governance arrangements for TIE are complex and reflect the complex relationships with respect to governance within each company and between the City of Edinburgh Council and these companies*". I had probably seen it in the CEC report dealing with the issue of what would happen to Lothian Buses, and whether it would be affected by these arrangements. There were concerns about the impact of the tram on Lothian Buses both financially and in terms of governance.

48. Most of the TIE and TEL meetings that I attended had at least one CEC Director, usually Donald McGougan, and sometimes Andrew Holmes or David Anderson. I assumed there would be senior executive discussions elsewhere as well as ongoing contact between the respective people for whom they were responsible. Information was therefore being shared backwards and forwards between TIE and CEC. The financial and governance controls at operational level, and the expectation of the Director of Finance and his staff to ensure they had the financial information they wanted, did not appear to be a pressing concern. It was something that Council officials were going to sort out, and they would make sure that the decision-making chain was there, for whatever decisions needed to be made, at whatever time.
  
49. Generally, I did not have strong views or concerns about, many of the detailed issues of governance. I was aware of tensions between senior Council executives and executives of arm's-length companies generally. The arm's-length companies generally paid a lot better than CEC, and CEC officers would sometimes comment, in private, that their jobs were in many ways more wide-ranging and more difficult than the executives in the Council owned companies. I was aware of those sort of issues from the other companies I was involved in, such as EDI Group. There was definitely a tension around this which came up occasionally.

50. I do not recall the detail of the reasons for the changes to governance arrangements proposed at a meeting of CEC, which I attended on 23 August 2007 [CEC01891408]. I recall that there were changes to the governance structure, and that it was generally held that it would improve decision-making structures. I do recall that, at one point, it would have been late 2007 or more likely 2008; I raised the issue of Willie Gallagher having the combined role of Chief Executive and Chair. I picked up on it because of unrelated press coverage, reporting on businesses in which combined roles did not seem to be good practice. I think that I raised the issue with Tom Aitchison, and was advised that they were looking to resolve it by separating the roles, and that David Mackay was being brought in from TEL. I understood that David Mackay was being lined up for the chairmanship role. I noticed that David Mackay, who was the Chair of TEL, became more of a presence at the TIE/TEL meetings over time, and sat beside Willie Gallagher, the Chief Executive, at many meetings. The Boards met separately originally, and then they met together. Willie Gallagher and David Mackay gave the appearance of working closely together at those meetings. Willie was still Executive Chairman of TIE, but Dave became more noticeably involved in those meetings. I do not recall the specific reason given for having those meetings of TIE and TEL together. Given my conversation with Tom Aitchison I suspected that it was a way of bringing in David Mackay, not to oversee Willie Gallagher as such, but certainly to be there as a check and balance to the fact that he had powers as both Chief Executive and Chairman.
51. I do not recall discussions around the establishment of the Tram sub-committee, which was a sub-committee of the Transport, Infrastructure and Environment Committee, but I have a recollection that there was a view that it would assist to improved scrutiny of more detailed tram matters. I think that there was an understanding, even at that stage, that Councillors were struggling with the amount of information that was being provided. The sub-committee would potentially free up time of the Transport Committee and assist in scrutinising details of the project. However, I do not know whether that was a view formed at the time or subsequently.

52. Around that time, as Finance Convenor, I asked for a briefing on a number of matters, including what contingency plan needed to be in place in case of a cost overrun on the Tram project. This is referred to in an email from Clive Brown to Jim Grieve dated 3 July 2007 [CEC01556572]. I wished to know what contingency plans needed to be in place in case of a cost overrun, what risk sharing possibilities were available, how much risk could be absorbed by the contractor, and how much cost overrun could be met by developer contributions. I wished to know what steps had been taken by CEC following the changed risk profile to protect its interests, including, in particular, to address, quantify and mitigate any increased risk and to ensure that Councillors understood the risks and liabilities arising from the tram project. In reply, I received a Briefing document from Donald McGougan and Andrew Holmes (undated) entitled "Tram Finance" [CEC01560744]. I was generally satisfied with the information I was given, which included details of the contingency plans put in place by the Council at that time in case of a cost overrun.
53. I have considered the minutes of the TIE Board meeting on 24 September 2007 [TIE00147433], which note that the detailed design work was 58% complete; that the Chairman was to visit the CEO of Parsons Brinckerhoff (PB) on 4 October to discuss performance issues; and that the Infraco bids were expected to conclude on 10 October 2007. I was aware of the slow progress with design, which was mentioned on a number of occasions. Whether it was mentioned at that meeting, or prior to that meeting, I cannot say. I do not recall if the risks of going to tender without complete design were highlighted, or whether there was any comfort or assurance given on this. It seems unlikely that it would not have been mentioned, but I cannot say hand on heart that I remember whether it was or not. Clearly it should have been. It is very difficult to distinguish between what I know now, and what I knew at the time. Clearly, I was aware later on that there was potentially an issue. At some point in the process, we were told that Infraco took on the risk for the development of design. There was comfort given to us at some point about the fact that the design was not complete but that it was okay because Infraco, BBS, had taken on that risk. I cannot remember whether that was

said at that time, or as part of the planning. I cannot recall whether Councillors who sat on TIE or the Tram Project Board kept elected members informed of these issues.

54. I cannot remember attending the joint meeting of the TIE Board/TPB/Legal Affairs Committee on 15 October 2007 [CEC01357124], at which the Boards were advised the Infraco bids were primarily based on preliminary design. I do not recall the discussion. I cannot say with certainty whether I had any concerns about a possible increase in cost when the bidders were provided with detailed designs. I was advised, at some point, - I do not recall exactly when but it was by a TIE executive and I believe it was before Contract close, that the design was sufficiently developed to give comfort on costs, and that the development of detailed design would give an opportunity for potential cost savings. Whether I was advised at that meeting, previously or subsequently, I cannot say.
55. My recollection of how and why TIE chose BBS as the preferred bidder in late October 2007 is that they had a decision-making matrix regarding the different aspects of the different tenders received, and they looked at both the technical side of bid and the cost. The track record of the bidders themselves was also considered. However, I was in TEL at this time, so my understanding may differ from that of Councillors who did not have access to the same information. I cannot remember the name of the other bidder who got towards the final stage, but TIE did not like the technical solution that they were putting forward. I think it was the track form, although I am not 100% sure. I do not remember details of the costs submitted, but I recall the discussions considered the technical aspect and the reputation of the bidder as well as cost.
56. Obviously, Bilfinger Berger are a large and well known company in civil engineering. It was also known that they had a major dispute over a contract, in Canada. It was not seen as particularly remarkable that BB had been involved in legal battles elsewhere. It was understood, or assumed, that any contractor could be difficult to work with, given the nature and culture of the



business. That was the view of TIE officials and independent non-executive Directors; I had no previous experience in this type of project. Those different factors were looked at separately and together within TIE and TEL before the recommendation was made. TIE chose BBS because, on the technical side, they thought BBS offered a better product. I do not remember how much of a price difference there was between the two bidders for the Infraco contract, and I cannot remember whether, on cost alone, BBS were the cheaper or the more expensive option. There was a concern, towards the end of the bid process that the bidders would get an inkling of who had been successful. The concern was that the unsuccessful bidder would then drop out, and the successful bidder would ramp up their price. Information was kept very close, and a final view was not reached until the very last minute.

57. On 25 October 2007, TIE prepared a report [CEC02083538] seeking CEC's approval of the Final Business Case, version 1 (FBCv1) [CEC01649235] in respect of phase 1a (Airport to Leith Waterfront). I do not have any recollection of the presentation to members given by Andrew Holmes, Willie Gallagher and Neil Renilson at the CEC meeting on that date [CEC02083536]. However, the view of FBCv1 [CEC01649235] was generally that it was very reassuring and I do not recall having any specific concerns. Similarly, I do not recall any issues arising from the 'sunk costs', or that these costs influenced my thinking, or that of my colleagues, as the FBCv1 was very positive. It did not feature as a consideration. My understanding was that TIE had provided for the estimated capital cost for phase 1a to be £498m, and that it had been scrutinised by CEC officials. I do not recall whether the report setting out the result of the tender evaluation was provided to CEC.
58. On 7 November 2007, Willie Gallagher wrote to me to thank me formally for my support towards the development of the project, without which he believed that TIE would not have achieved what they did [CEC01507335]. I only became involved with TIE in June 2007, and so I think that this was more of a formality sent to those members of CEC who were on the TEL Board when TIE reached a certain stage in the process. Other than setting down the motion at CEC, or speaking on the motion as Finance Convenor, I do not

think that I contributed a great deal towards TIE getting to where they did. Phil Wheeler was more involved as Transport spokesman, and so I think that it was more of a formality.

59. I was not able to attend the TIE Board meeting on Monday 12 November 2007 [CEC01271481], at which there were discussions regarding tension between PB and BBS, which could lead to problems with novation. Clearly, novation was an important issue for TIE and TEL, as it was felt that this would close off some of the risks in the design process. I understood that TIE and TEL wanted it to happen, and that they were delighted to announce that BBS had taken on PB, and the design was being novated. That was felt to be good news.
  
60. By email dated 3 December 2007 [CEC01397538], Alan Coyle sent a Briefing Note [CEC01397539] to Andrew Holmes and Donald McGougan setting out a number of concerns in relation to the tram project, including the report to CEC seeking approval of the Final Business Case. I do not recall this Briefing Note being raised with me or other members, although I was aware of the generality of some of the points raised. Specifically, I was aware of the communication restrictions sought by the Scottish Ministers, which was a fairly minor issue. I was also aware that there were ongoing issues with Network Rail and First Rail Scotland regarding design delays. In relation to the contract issues raised, we were advised that the Council solicitor was satisfied with the contract, and that we did not need a separate legal firm to review it.
  
61. I do not believe that members of the Council were made aware of the contents of the Briefing Note, and believe they should have been made aware of some of the issues, and certainly the legal concerns. It is very difficult to be objective, without the influence of hindsight, but arguably all of this information should have been shared. Some of the operational detail would not have been appropriate or required for Councillors necessarily, but a more balanced report would have noted those concerns and identified why the concerns could be set aside. If I, or members, had been aware of these concerns, I think that members would have debated the most worrying concerns, namely

the legal concerns. I hope that the Councillors would also have asked for a separate legal opinion in relation to Siemens, as mentioned in the Briefing Note. As a general comment, Councillors can sometimes be distracted by things which, perhaps, are not the most pertinent. However, I would like to think that they would have seen the legal issue as a very significant one, and I am confident that they would have sought a separate legal opinion.

62. The presentation to the TIE Board dated 11 December 2007 [CEC01387401] noted that increased certainty of pricing in the Infraco contract was proving slower than planned, which was concerning. We wanted to move forward to get a firm price as quickly as reasonably possible. There were assurances given that steps were being taken to address these issues, by getting the different parties in the process to speed up. There was not necessarily a high level of concern because it was part of a pattern. The delay in fixing the price meant that ongoing inflation in construction costs was eating into the budget available.
  
63. I had not previously seen the exchange of emails between Duncan Fraser and Geoff Gilbert dated 14 December 2007 [CEC01397774], which refer to a presentation by TIE the previous day and ask certain questions about the Quantified Risk Allowance. I cannot recall being made aware of the matters raised. My understanding was that the design was largely in place, subject to normal design development, which was a phrase that was used on a number of occasions. The impression I gained was that the design of the scheme was there or thereabouts, and that the details would be covered by normal development. I realise my understanding was not well informed and when considering changing designs, at that stage, I thought the concern was more about adding in an additional tram stop or something of a similar magnitude. The message given to Councillors, myself included, was in the context of a public debate about an extra tram stop on Princes St and the advice was not to change the scope of the project now or it would have an adverse effect on cost.

64. My understanding of design; detail design and scope, in terms of how price certainty would and could be achieved, was that TIE knew what they wanted and where they wanted it. I thought that it meant where the line was going, the size and location tram stops and of particular features. I did not understand the potential impact of the detailed design process on costs sufficiently well to properly inform my understanding of those risks.
65. My awareness and understanding of the negotiations that took place at Wiesbaden, Germany between 17 and 20 December 2007, was that the senior officers from TIE were going across to progress the contractual arrangements with BBS. I do not recall any specific feedback on those negotiations. I have no specific recollection of the heads of terms that were agreed, and I do not recall when we were told about them.
66. It was not my impression that TIE knew that the contract was not fixed price and might result in CEC breaching the terms of its funding agreement with TS. If I had known that was the case, then I would have been concerned by it. The CEC reports said that there was a 90% likelihood that it would come within price, so all Councillors had an awareness of the possibility that it could go above that price. However, my understanding of fixed price was that there was a high degree of certainty in the contract, which gave me comfort that there was very little chance of CEC breaching the terms of the funding agreement. If TIE knew that the contract was not fixed price, they did not flag it up in a way that made it clear to us that there was a significant risk.
67. On 20 December 2007, Donald McGougan and Andrew Holmes presented a joint report to the 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. I do not recall having any real concerns about it. I understood at that time that the design was incomplete. As I understood it, there were utility diversion works that required to be completed, and my understanding was that TIE had hugely over-estimated the amount, based on the utilities identified in its trial digs, in order to create sufficient headroom for anything unforeseen. I understood that there were design

development issues, and that there were utility issues, but I understood, wrongly as it turns out, that those had been provided for in the contract and budget allowances.

68. The fact that Councillors were told that it was a fixed price contract was very important to all those Councillors who had voted in favour of it. That was the top line message. Clearly, there were exclusions, of which I became more aware later. The senior officials had given it a clean bill of health and I think that was a major influence for most Councillors. My understanding was that the vast majority of the costs were known, and a very small part of the costs were not as yet clear. My understanding was that that came within the description of "*fixed price*".

69. My understanding was therefore that the risks to CEC arising from the infrastructure contract were relatively small. It was a fixed price contract, and there was risk provision within that. My interpretation of it was that there were things that had not been fully bottomed out, but a financial allowance had been made for those, which was more than adequate. I took from the report to Council that the case for the project was strong. We had got to a position, as we understood it, where we were going to get the tram line built, and it was going to come within the overall budget that had been set. There was no discussion of the terminology "*Optimism Bias*" that I recall. TIE had made it clear, in particular, that they had made far greater provision for utilities diversion than was indicated by the trial digs. I assumed at this stage that the price and terms of the infrastructure contract were consistent with the Final Business Case. I do not recall being told that they were not. To me, it was all wrapped up in one; the infrastructure contract and the price tallied with the Final Business Case, and that was my understanding from the report.

70. I was not concerned that, according to the report (para 8.1), allowance had only been made for risk associated with delay resulting from the detailed design work not having been completed; and not, for example, delay resulting from unforeseen ground conditions or issues with utilities. I knew about the design issues. I do not recall making a distinction between issues with the

utilities and unforeseen ground conditions, and I understood that provision had been made for issues with the utilities. I was not aware that there was no provision in the allowance for problems with ground conditions or utilities. It may have been spelled out, but that did not jump out at me and was contrary to the reassurances we had been getting from TIE executives, particularly on utilities.

71. I understood that the design risk had been transferred to the private sector through the process known as novation, and that any further design changes to what was already in the scope of the programmer were covered. If we introduced a new tram stop, because there were people who wanted more than one stop on Princes Street, I understood that would have been an addition to scope. I understood that the design risk had been transferred from TIE to the contractor, and I was not unduly concerned as I accepted the assurances of TIE officials in this regard.
72. I did not seek further clarity on the costs that could arise from changes to scope or changes to the programme. To my understanding, that meant something like extra tram stops as previously stated. There was an ongoing dispute about how many stops there would be, and where they would be. In my mind, there were no plans for major changes to the scope. I took the report as advice to Councillors not to change where it was going to go and where it was going to stop. I felt comfortable approving the Final Business Case in the context of that understanding.
73. To my recollection, there was no discussion about postponing the award of the infrastructure contract until the design and utility diversion works were complete. The final report and advice from TIE and CEC officers, recommending that we go ahead, was quite clear. There was also the concern that costs were going up by millions of pounds each month due to inflation within the sector.
74. I was not unduly concerned to note (para 8.13) that some risks were to be retained by the public sector, as I accepted the assurances of the CEC

officials in this regard, including that the agreement of third parties and finalisation of technical and prior approvals could be managed as normal business. I was not aware of the implications of the absence of Professional Indemnity Insurance for TIE as being exceptional for a Council.

75. I do not know what remaining due diligence required to be carried out to enable the Chief Executive to be satisfied that it was appropriate for TIE to award the infrastructure contract. I look at that as a catch all wording to allow the Chief Executive to deal with any last minute issues and outstanding legal matters. Rather than going backwards and forwards to the Councillors for every detail, the Chief Executive was to be given limited authority to do that. I do not recall being consulted on whether I was satisfied that the conditions had been met in relation to giving approval to TIE to award the contracts.
76. I do not recall what I was told of the negotiations that were underway at this time in relation to Schedule 4 of the agreement, which regulated payment and pricing. I was aware that there had been a trip to Wiesbaden, and TIE officials indicated subsequently that it was not clear what had been discussed. After Willie Gallagher left, Richard Jeffrey (who became the Chief Executive) commented on the fact that it was not clear to him what had been agreed. I do not have any recollection of what was agreed or reported to the Tram Project Board.
77. I am unsure why there were increases in the price of the infrastructure contract between January and May 2008. It was stated that various issues had arisen, which meant that there would be an increase in prices. I think that there were two separate times this was reported back; the costs appeared to increase by around £10m on both occasions. My recollection is that the justification given was about increases in costs within the BBS supply chain, and there was also, I think, mention of currency fluctuations adversely affecting the price. There was a view expressed, either by TIE or by CEC officials that once BBS knew that they were the preferred bidder, they were using whatever excuses they wanted to come up with to raise the price. The

fact that they did so within the delegated authority of the Chief Executive to authorise an additional £10m may give some credence to that view. The first time that we heard that the price was going to be increased by £10m, there was some attempt to justify it on the basis that I have just explained. There was also some issue about BBS having already carried out some works on line 1b and needing to be recompensed for that. Again, I think some suspected this was the contractor seeking to exploit the fact that they were now in a stronger commercial position.

78. I am not clear that there are any new matters, which I have not already discussed, in the progress report from TIE to TS dated 14 January 2008 [CEC01247016], which noted that discussions with BBS had resulted in the signing of an *"Agreement for Contract price for Phase 1a"* on 21 December 2007. My understanding of *"design development risk"* at that stage, and the extent to which the scope of the project had been fixed, remained the same. I understood that the design risk had been transferred to Bilfinger Berger, and that there were allowances within the contract for risks associated with design and utilities. I do not know what is meant by *"items outside the scope of the tram project"*. Similarly, I do not know what is being referred to beyond what I have already detailed as to my understanding of how these were *"separately funded"* or had been provided for in the overall tram project estimate.
79. The papers for the joint board meeting dated 23 January 2008 [CEC01015023] note (item 1.5) that the discussion on risk transfer was *"continuing with BBS"*. I knew that there had been a discussion on novation but I do not recall whether this reflects my understanding in December. I know about the *"continuing"* issues from subsequently reading more about it, but I did not know at the time what was *"continuing"* or what the issues were. I do not recall the content of the update (item 3.1) provided by Stuart McGarrity. I note from the minutes that I was at the meeting, but I have no specific recollection of it. Unfortunately, much of the specific detail of these meetings has blurred in my recollection.



80. The Project Director's (PD) Report (page 9) notes that the agreement with BSC (Bilfinger/Siemens/Construcciones y Auxiliar de Ferrocarriles (CAF)) meant that there was an effective transfer of design development risk. I understood this to mean the novation process. BSC had taken over the work of PB and were now responsible for that work. The price was based on the designs at that time, the base date that was agreed between the parties, and anything that was normal design development after that was, I understood, for BSC to manage within the price agreed.
81. The PD Report also notes (page 9) that the Governance Structures were approved. This appears to have been done outwith a meeting, and I do not recall being involved. I cannot recall the discussion at all and as a result cannot say what my views were on the proposal.
82. Generally, the slippage of MUDFA works (page 11) was a concern, but it was presented as manageable and recoverable. The effect that slippage would have on Infraco and TIE liabilities, I understood to be about time, and with time there is a cost associated. Infraco would have increased overheads, and TIE would be liable for the resulting increased costs. I do not know why it is that, by this stage, there was no coding or rating within the Risk Register of the risk remaining after treatment.
83. I do not think that I had any involvement in the finalisation of the Close Report (page 35 and following), and I do not know who else on the TPB had any involvement in it.
84. I suppose it is likely the TPB would recommend that all the contracts be entered into. Otherwise, there would be no point in having them executed. If there was a suggestion that the contracts did not stack up, however, I would expect that the non-executive Directors and the Councillors would pick up on that.
85. I do not recall that I made any specific attempts to satisfy myself that the statements made in the report were correct. I would have relied on the advice

of TIE officers and CEC officers. In terms of the technical detail, as Councillors, we would expect CEC officers to flag up matters that they were not content with, and we would be heavily reliant on them for that, given our lack of expertise in those areas. I assumed CEC officers would have the expertise or be able to access the expertise where required.

86. I do not know if anybody carried out an independent check of the statements in the report. I do not have any recollection of satisfying myself of the accuracy of the statement, in particular, that the "*principal pillars of the contract suite have not changed since approval of the FBC*" (page 38), and I do not know if anybody else did.
87. My understanding of the reference to a "*lump sum fixed price basis*" for the Infraco contract (page 39) was that there was little or no likelihood of substantial increases in cost. The report indicated there was a high degree of confidence in the costs within it, and substantial allowances made for areas where there was known to be some form of risk. The basis for my understanding was principally the advice and explanation of CEC officers and the TIE executives in relation to cost and risks. If CEC and TIE Executives had substantial concerns about those costs, they were not drawn to the attention of Councillors in a way that Councillors would have understood there to be a significant concern.
88. I do not recall whether there was any discussion at the TPB as to the allocation of risk (pages 64 and following), or whether the matter was left on the basis of the PD Report. I also do not understand what is meant by the statement (page 65) that, of the Infraco price of £216.3m, £219.9m are "*firm costs*".
89. I do not recall if there was an explanation provided for the statement that the price was based on the Employers' Requirements. I am familiar with the term and think that the concept of Employers' Requirements was explained at an earlier stage, but I cannot be certain. I would not be able to explain the Employers' Requirements in any detailed way. Nor can I explain the

Quantitative Risk Analysis (QRA) and Risk Allowance (page 68). I do not have any information as to the basis on which TIE assessed these as providing adequately for residual risk (page 69). Obviously there are risks that have been provided for in the contract, or in the budget. Again, I was relying on TIE and CEC officers for their knowledge or expertise in that regard. I do not know why TIE, rather than the TPB, carried out this assessment, in that it required a report to CEC via TEL. I do not have any detailed knowledge of the differences in the governance model for the next stage (page 80 and following).

90. The minutes of the joint TPB and TIE/TEL Board meeting dated 23 January 2008 [TIE00062616] note Willie Gallagher's explanation that obtaining consents was causing tension for the Systems Design Services (SDS) novation, as BBS had differing expectations of the level of design completion prior to novation; and his concern about programme impacts arising from approvals delays. I do not know the extent to which CEC or PB were responsible for the delays. I do recall that more resource was put in to the design approvals process by CEC, which indicates that at least part of the problem lay with CEC. I also recall that there were comments that the designs were late and not good enough either. TIE was pointing the finger at PB, and PB were pointing the finger at CEC officers for not signing things off quickly enough. Similarly, CEC officers were pointing the finger the other way, saying that the designs were not good enough. There was a feeling that heads needed to be banged together to get things through more quickly, and in a more efficient manner. In my experience CEC officers will tend to support each other, but I think that there was a view that the Planning Department was just not processing things quickly enough.
91. I was not at the TIE Board meeting on 29 January 2008 [USB00000293], and I do not know why a revised programme to Contract Award was suggested by BBS. At that time, Phil Wheeler was the Convenor of Transport, so he would have been the one who normally fed back to members of the Lib Dem group. As far as other Councillors were concerned, there was a Labour and a Conservative representative on the TIE and TEL Boards, and a Green

Councillor plus Tom Buchanan of the SNP on the TEL Board, though they did not attend meetings. The mechanism by which information was passed back to elected members was either through group representatives or through CEC officers in briefings and reports.

92. There was no formal briefing mechanism for when a meeting was missed. You were not taken aside by CEC officers or TIE or told what was discussed and what had been done. You were given the papers, including minutes from the previous meeting, for the Board the next time round, and would have the opportunity to ask questions if you so wished. As there was another Board member from the same political group in attendance, I could have a discussion with them easily enough if I wished to query a particular point. I also discussed Tram issues with Alan Jackson and Ricky Henderson (or Ian Perry), who were Conservative and Labour representatives respectively, from time to time.
93. I note that further concerns about the Infraco contract were raised by CEC deputy officials in the lead up to contract closure (see, eg, [CEC01567522], [CEC01567520], [CEC01560815], [CEC01508412], [CEC01400919], [CEC01400987], [CEC01399016], [CEC01399075], [CEC01401032], [CEC01401628], and [CEC01401629]), including 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 CEC did not have any figures to assess that risk, were thought possibly to be very significant. I was not aware of those concerns at the time. No documents were shared with Councillors and I think the first sight I had of any such documentation was when I was provided with the documentation in connection with preparation of for this statement. Other members of CEC were not aware of those concerns either, to my knowledge, but should have been made aware. We did become aware of the fact that the price had risen by £10m. I do not know that we were necessarily aware at the time, but we became aware subsequently.

94. If those concerns had been made known to me or to members, we would have been alerted to the lack of trust or transparency with TIE. My understanding when I read the documents in preparation for this statement was that CEC officials were saying that they were unhappy with the information that had been provided, or not provided, by TIE. I think the suggestion that TIE was being less than transparent, or worse, would have been quite a concern to Councillors. The fact that these concerns were not shared with Councillors would have raised the question about the reliability of what TIE was doing, and what they were providing to CEC officers upon which recommendations to Councillors were based. The fact that CEC officers did not trust, or there was perhaps a question mark over their trust of, TIE was not highlighted to us.
95. The fact that the project went so badly wrong evidences the fact that TIES was wrong in some of the things that it had been saying, or not saying. The fact that CEC officers did not provide Councillors with all of the information they had about a particular subject is not particularly significant in much of day to day Council business. That is quite different, however, from not telling them about a significant concern on such a major project. My view of these documents is that they did constitute a significant concern.
96. The papers for a meeting of the TPB on 13 February 2008 [CEC01246826] were not provided to the Councillor members of the TPB. I do not recall the detail of why the contracts had not been signed by the end of January, as indicated in the papers. It was part of a series of delays in nailing down certain parts of the contract: the novation of design, the price and other elements. The fact that contractual discussions were dragging on would have been a concern. It was in the minds of people around the TPB and TIE that every month was costing £8m to £10m. We wanted to get it concluded as soon as possible, although it obviously had to be done the proper way. I do not recall the fact that the contracts had not been signed off by the end of January being discussed with me. I am sure that if there had been an

expectation that they had to be signed by a certain date, and they were not, we would have been informed at the next meeting.

97. The Minutes of the previous meeting on 23 January 2008 (page 5) indicated that the MUDFA works were on time. However, the PD Report (pages 12 and 20) notes that the cumulative position was that they were running late. I do not recall any discussion of this at the time, or whether anyone raised this conflict. Similarly, I do not have any recollection of there being discussion of work on the Employer's Requirements (item 5.2, page 6), or why these still needed work after the date of approval of the contract. Furthermore, I do not recall why BBS had a different expectation of the level of design completion prior to novation (item 5.5, page 6), or whether this difference of view was relevant to their acceptance of design risk. I do not recollect having any specific concerns about this.
98. I do not have a recollection of a specific discussion at that Board meeting regarding design causing concern (page 20). What I do recall is that design was an ongoing issue, which came up at just about every Board meeting. PB were not going quickly enough, and it was hoped that they would speed up if we added more resources and worked more closely with them. It was discussed at meetings on a regular basis, and there were various mitigation strategies put in place to ensure that the designers came up with designs that were fit for purpose. There were peer review groups and experts in the area tasked to look at the issues to try and move things forward more quickly. The aim was to ensure designs were completed to the required standard and signed off as quickly as possible, and the focus of the TPB and TIE was to take out any inefficiencies in that process.
99. I do not think that I saw the Design Due Diligence Summary Report produced by BBS on 18 February 2008 based on design information provided to BBS up to 14 December 2007 [DLA00006338]. I do not recall whether I was copied into the document or the extent to which I was made aware of the matters within it. There were clearly concerns about progress of the design

process, but I do not have a recollection of whether it was discussed or what was said. I understood that BBS could price for those works based on the basic design, according to the base date design information, and we would not expect a significant change arising from that. The fact that the design was not complete, but had been accepted as the basis of the contract pricing, did not raise any particular alarm bells. I do not know how the issue of incomplete design was reflected in the risk allowance. I did not consider it to be a big issue because I accepted the assertion that normal design development was at the risk of the contractor. I was not expecting to see a huge risk allowance around that. I do not remember any discussion about the design not appearing to have moved on from the position set out in the minutes of the TIE Board meeting on 24 September 2007 [TIE00147433], which noted that the detailed design work was 58% complete. I do not know the reason for this.

100. The papers for the TPB on 12 March 2008 [CEC01246825] indicate that there was still no contract close in March. I understood there was an ongoing process of trying to nail down the contractor to particular points within either the prices or terms of the contract. There were tough negotiations going on, and it was taking time for people to reach agreement. My recollection is that we were concerned about the costs going up month by month in respect of construction inflation. The fact that there was still no Contract Close in March would have been a concern because that was adding to the cost.
101. I think it is a contradiction in the preceding minutes dated 13 February 2008 (page 5) that Donald McGougan is noted (page 6) as having asked if the design risk could be bought out. I do not know if it can be reconciled with the earlier statement that BSC had taken the risk of design development other than in the cost of the risk allowance. Obviously he was exercised about the fact that there was a remaining design risk and wanted that closed out.
102. Clearly, if the design risk was not transferred, it lay with TIE and, therefore, with CEC. There was discussion on a number of occasions regarding the need for the design to be delivered and approved. I do not know if this was

properly reflected in the risk registers. I thought that it was a small risk because of the novation. The fact that the risk turned out to be far greater was not reflected in the risk registers. As the earlier decisions had proceeded on the basis that this risk was transferred, it would have been appropriate to go back and reconsider what had been done and consider the amount of risk being carried by the public sector. I do not recall what was meant when Stuart McGarrity said (item 6.1, page 6) that there was a risk allowance of approximately £30m relating to £90m of non-firm future costs, or whether there was any allowance for risk in relation to firm costs. Similarly, I do not know how much of the sum allowed related to risks arising from MUDFA. The PD Report (page 13) mentions that the MUDFA works were slipping and that extra resources were to be brought in. I assume that meant more contractors and subcontractors.

103. The minutes of the TIE Board meeting of 12 March 2008 [CEC01282170] suggest that the Leaders of each political party within CEC should meet to ratify the contracts and provide TIE with the necessary signing authority. This seems to me to be an ill-considered suggestion. I cannot understand why anybody thought that was ever going to happen. There is no way that the leader of the SNP was going to sit down and ratify any contract for something that they so publicly and bitterly opposed. I do not think the suggestion was taken forward.
104. I do not think that I was aware that individuals from TIE had an input into the drafting of letters from DLA to CEC, such as the letter dated 12 March 2008 [CEC01347797] in which DLA advised CEC on the Draft Contract Suite, in respect of which Graeme Bissett of TIE appears to have had an input (see emails from Graeme Bissett to Andrew Fitchie dated 11 March 2008 [CEC01551064], [CEC01551066], and [CEC01541242], enclosing a draft of the proposed letter from DLA to CEC [CEC01541243]; and to Gill Lindsay and others dated 13 March 2008 [CEC01474537], attaching a draft of a further letter from DLA to CEC [CEC01474539]. I think it is fairly common that emails go backwards and forwards to make sure that wording is correct in terms of the requirements of the respective parties. That, in many ways, can be

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should be  
CEC01474540



appropriate and can save time. I would not necessarily see that as inappropriate.

105. Around August 2007, deputy officers at CEC had recommended that CEC seek independent legal advice on the risks arising in respect of the infrastructure contract. This is detailed in emails from Colin MacKenzie to Gill Lindsay and others dated 27 August 2007 ([CEC01567522] and from Rebecca Andrew, Acting Principal Finance Manager, to Donald McGougan dated 23 August 2007 [CEC01560815]). I recall the issue of independent legal advice being raised, and that TIE were very pleased CEC officers had agreed to the CEC solicitor reviewing the contract. I did not appreciate the significance of this at the time, and accepted that, given the CEC Head of Legal was prepared to do this; it was a satisfactory way forward.

Clearly, in hindsight, it appears a major error that CEC did not get expert legal advice at the time. TIE had its own legal advisors, DLA, who were involved in drawing up the contract. At one stage, there was an intention to get a firm of lawyers to look at it on CEC's behalf. CEC officials then decided that they did not need to do that and would get CEC's Head of Legal to look at the contract. To the best of my recollection, they reported that she agreed the contract was fit for purpose. Looking back now, this seems the wrong judgement. Clearly, given what has happened subsequently, the contract was did not do what CEC, or TIE intended. I do not know whether all the weaknesses in the contract would have been identified but another set of expert legal opinion could have made a significant difference.

106. CEC needed to take additional steps to satisfy themselves that the legal advice received by TIE was robust, but they were under pressure to progress the project. It would have taken time to go to obtain expert opinion, and for them to review the contract. There were comments made by TIE officials at the time to the effect that getting another company in was bound to lead to legal disagreement. It was also mentioned that we had the legal opinion of DLA, one of the biggest companies in the UK, and the CEC solicitors' own views as justification for not getting a further opinion. I do not think that any

training likely to be provided to Councillors, unless they had a legal background themselves, would have given them the knowledge and expertise to effectively query or challenge this advice.

107. I do not know why members were not given any update on the tram project at the full meeting of the Council on 13 March 2008 (according to the agenda ([CEC02083387] and minutes [CEC02083388]). From time to time, if it is not possible to provide a report that nails down the issues that need to be nailed down, or significant new information comes to light late in the day, a report will be withdrawn. There was not necessarily anything peculiar about that. As far as I recall the sequence of events, the project was not at a stage where they felt comfortable giving Councillors an update because there were still issues that needed to be bottomed out.
108. I note that on Friday 14 March 2008, an email was sent by Rebecca Andrew to Alan Coyle [CEC01386275] attaching a Note entitled "Edinburgh Tram Project", which had been approved by the Solicitor to the Council [CEC01386276]. The Note was to be signed by Donald McGougan, Andrew Holmes and Gill Lindsay, 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. The final contract price was £508m and the risk contingency had been reduced from £49m to £33m. I did not see this note at that time and it is difficult to recall what I knew of those issues then. I had a general awareness and understanding that CEC and TIE had to accept some further cost increases in order to get the deal signed. The fact that BBS was effectively the preferred bidder meant that it was in a strong position to ask for more costs. Any delays would have cost CEC an extra £10m a month. What this note is saying is that some of the risks had been bottomed out, and had been transferred from the risk contingency to the contract proper. With regard to what CEC was responsible for in relation to the novation of design, my understanding was pretty much the same until much later in the project. I did not disagree that it was appropriate for authority to be given to TIE to immediately issue a Notice of Intention to award the Infraco contract to BBS.

TIE had delegated authority to conclude the discussions, and their view was that it satisfied their remit.

109. I was not aware that David Leslie, Development Management Manager, Planning, CEC, sent an email dated 31 March 2008 [CEC01493317] and letter to Willie Gallagher [CEC01493318] expressing certain concerns in relation to prior approvals for design. Similarly, I was not aware that Duncan Fraser sent a letter to Willie Gallagher on 3 April 2008 setting out similar concerns on the part of the Transport Department relating to Technical Approvals and Quality Control Issues [CEC01493639]. I was not aware of the difficulties referred to in the letter, nor were other members of CEC to my knowledge, although they should have been made aware. I did not see any of the documents at the time. Considering them now, I believe that David Leslie is saying that there is a mismatch between what BBS understood they were going to get, and what they actually got. He is saying that BBS will not be happy further down the road, and would be likely to submit notification of change notices to claim additional costs. I believed that normal design development provisions would account for much of any changes. There would be pricing assumptions about the costs of works and, if the design was slightly different, there would be a schedule and associated prices to generate what the cost was. That was my general assumption about how these matters would be dealt with, and there were allowances within the contract or within the funding for that eventuality.

110. I do not believe that the extension to the membership of the TPB, as detailed in the papers for the TPB meeting on 9 April 2008 [CEC00114831], changed the way that it worked. In practice, the previous arrangement was that the TEL Board, TIE and the TPB all repeated much of the same discussion. It was decided to bring them together into one meeting, and to that extent it saved everybody a bit of time. I do not recall there being any significant difference to the running of the project. By this time, there was still no contract close, and it was taking longer than we wanted. I cannot remember specific discussions about it. There was a cost to the negotiations dragging on, particularly in regard to contract inflation, but clearly the details had to be

nailed down. I think it is very likely that the delay in conclusion of the contracts compared to target dates, the measures taken to address this, and the costs involved, were all part of the general discussion in the meeting, even though there is no record of it in the minutes.

111. The preceding minutes dated 13 March 2008 (page 5) record that the position with BBS was settled in terms of price. However, I have no recollection of discussions in relation to Schedule 4 of the Infraco Contract, which contained the pricing provisions. The issues arising in relation to SDS novation were discussed at Board after Board, although I do not recall what was discussed at that meeting specifically. I do not know what the SDS contract said about novation, and I do not know what was causing the delay.
112. I cannot remember the specific details in relation to the £10m increase in the project price (item 10.1, page 6).
113. I do not know what Willie Gallagher was referring to (item 10.4, page 7) regarding buy out of the risk of SDS non-performance, other than the general context. Clearly, it is referring to slippage in the design process and whether the designs were good or not. If the design was not available on time, then the contractor could be allowed to claim for an extension of time and extra costs. I think that he is referring to the fact that the risk appeared to lie with TIE and CEC. The overall message that was being conveyed was that they were trying to tie down the remaining elements that had not been fixed, and the design was part of that. I did not fully understand the implications of it, but Donald McGougan was looking for a buy-out of risk associated with the design. Willie Gallagher was suggesting that the buy-out of SDS non-performance was good value for money, and so it was a positive message that was being put forward. You could look at it differently, however, and query why that was not in place when CEC agreed to it. My understanding was that the risks from the design were not substantial, and clearly in this context that was a good thing. We were closing down a risk, taking money out of the risk allowance to do so, and that seemed to be positive. Stuart McGarrity summarised (item 10.5) the key items included in the specified risk

allowance going forward, and these included significant sums for programme delays, unforeseen delivery issues, design and consent issues, and MUDFA-related issues. I understood from the PD Report (page 10) that the position in relation to concluding negotiations was positive. It was being presented as we were moving forward and closing down the risks and it was a success story.

114. I cannot recall the discussion at that time about MUDFA slipping (page 13), or whether there was any consideration of the problems and conflicts that might arise from the fact that the Infraco contract was about to be awarded. Subsequently, there was discussion about the fact that Infraco could not get into every part of the pathway for the tram. It was thought to be unreasonable for Infraco to take the view that, because they could not get into one section, they could not work on any other part of the tramline. I do not think that it was a high level concern at that stage. I think it was the case that we did not want to give them any more opportunities to claim for additional cost than we absolutely had to.
115. I cannot explain the new format to the Risk Register (page 27 and following). We were told that the format was changing, but I cannot remember why it was changed, or the perceived benefits. My recollection is that it was intended to make it easier to read and to capture the necessary information, and I think it was considered to be an improvement. I felt that the layout was reasonably easy to access. I cannot say with 100% certainty that I understood or recalled it all, either before the changes or after, but I felt that I understood it sufficiently. I do not know what changes had been made to the draft Close Report.
116. I was not aware at the time of the concerns expressed in an email from Colin Mackenzie to Gill Lindsay dated 11 April 2008 [CEC01401109] regarding a difficulty that had arisen with the "*Russell Road Bridge: Prior Approval*" and whether the sum allowed in the Quantified Risk Allowance for SDS delay (£3m) was sufficient. Nor was I aware of concerns expressed by Alan Coyle, in an earlier email in the same thread to Andy Conway, Colin MacKenzie and

others dated 10 April 2008, (page 3 – 4) that this was contrary to the risk transfer to the private sector, and that insufficient information had been provided by TIE for CEC to accept the risk on these matters. To my knowledge, other members of CEC were not aware either, although they should have been made aware. In his email, Colin Mackenzie notes that *“this is getting very close to calling upon the Monitoring Officer to become involved”*. I think that this indicates the seriousness of the matter to him. I do not have a specific definition of the circumstances in which the CEC Monitoring Officer becomes involved, but my understanding is that the Monitoring Officer would be approached if there were a serious breach of CEC policies, procedures and/or a significant impact on CEC's finances or reputation. I think that members would have been very seriously worried if those concerns had been made known to them. It is likely there would have been a call for a report on those concerns by someone independent of the project.

117. Similarly, I was not aware of further concerns expressed by Colin Mackenzie in an email to Andy Conway, Alan Coyle and others dated 14 April 2008 [CEC01256710], in which he noted his view (page 2) that it would be *“prudent and proper”* 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 (page 2) *“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”*. Again, to the best of my knowledge, other members of CEC were not aware of those concerns and were only updated on a number of these issues in a report to Council on 1st May.
118. As noted above, I do not recall seeing, or being made aware of, Schedule 4 (Pricing Provisions) of the Infraco contract, as referred to in an email from Alan Coyle to CEC legal officers dated 15 April 2008 [CEC01245223], in which they were sent copies of the Infraco contract [CEC01245224] and a cost analysis spreadsheet [CEC01245225]. Similarly, I was not aware of the email from Gill Lindsay to Alan Coyle and Colin MacKenzie dated 16 April 2008 [CEC01247679], asking whether it would be appropriate to get a revised

statement from TIE confirming that the risk allowance was still sufficient. I do not recall whether officials ever reported to CEC on the pricing provisions contained in Schedule 4 of the Infraco contract, including the Pricing Assumptions and Notified Departure provisions or on whether the Quantified Risk Allowance was still sufficient. I do not think that it was made clear to members that the intention and effect of Schedule 4 was that the contractor was entitled to claim for additional payment over and above the final cost estimate of £498m.

119. I was copied in on an email from Willie Gallagher to Kenneth Hogg and others dated 23 April 2008 [CEC01228509], which stated that there were only a few outstanding discussions to finalise the Infraco contract, and the Tramco and SDS novations; and noted that the intention was to issue the final contracts to all parties to commence a seven day due diligence process. As I recall we were not provided with copies of the contract. We were pointed in the direction of a room where there were a number of boxes, and told that the contract was there. We were told, I think by Steven Bell of TIE, that unless we understood that particular area of law, it would mean very little to us. This seemed a reasonable summary of the facts as I understood them. I also took into consideration that the contract had been drawn up by DLA, who were a large and reputable legal firm and that the Council Solicitor had given her approval. The fact that we were not given a better briefing on it gives me cause for concern now, but at that time it did not.

120. I am aware now that on 30 April 2008, Colin Mackenzie sent an email to Gill Lindsay advising that BBS had increased the price by a significant amount and that urgent discussions were underway at TIE [CEC01241689] and referring to a Report that Tom Aitchison intended to present to Council on 1 May 2008 [CEC00906940] seeking refreshment of the delegated powers previously given to him to authorise TIE to enter the Infraco and Tramco contracts. Members would have been aware of the price increase from this report. The papers go out to every Councillor, and are in the public domain, so everybody would have been advised. I do not remember the specific timing of events but it appears clear Councillors would have very little prior

notification of the price increase. I do not recall, but assume that Jenny Dawe, Phil Wheeler and possibly I would have been informed immediately prior to it being shared with our group. My understanding of the reason for the price increase was that it was due to currency fluctuations. The extent to which that was true, or the extent to which it was just the contractor looking for extra money, I do not know.

121. I do not recall my understanding of the "*new risk area*" referred to in the Report (paragraph 3.10, page 3) that had emerged as a result of the overlapping period of design and construction at that time. We have subsequently read a lot about the novation and how that was not passed across to Bilfinger Berger, so I think it refers to that and the potential effect of design delays on the construction programme. I do not know that I fully understood that at the time. The overriding message was that the contract was now 95% fixed, and the provisional sums for the remainder had been confirmed by TIE as adequate.
122. The report further stated that work had been done since November 2007 to minimise CEC's exposure to financial risk (paragraph 2.3, page 1). I do not recall the specifics of what that work had been, but I do recall that there was ongoing work to nail down the design and prices. I assume that the reference in the report to "*significant elements of risk being transferred to private sector*" refers to the design risk. There were various risks which we were told were fully provided for. The fact that there were still risks does not, of itself, cause concern because it was understood that it was part of a process to be gone through and that work was ongoing. You start with a big risk and manage it down through various actions.
123. I do not consider that I and members of the Council were adequately briefed on the effect of, and risks arising from, the contract. In particular, there was no explanation of the significance of Infracore Pricing Schedule 4, despite the Schedule having been provided to CEC Legal officers. I think that members understood that there was a headline figure, and that within this there was adequate scope for problems that looked likely to arise, which had not been,



or could not have been, quantified at the time. The statement about the costs being 95% fixed (paragraph 2.3, page 1) suggested a very limited amount of wriggle room for the contractor. I think that was probably most peoples' interpretation of it, and it was my interpretation of it. That was the impression given to Councillors involved with TIE or TEL by senior CEC officials, TIE executives and independent non-executives. We were relying on their advice, and they were advising us that it was looking good; that it was 95% fixed; and that provision had been made for costs that were not fixed. I am not suggesting that Councillors were not in any way responsible, particularly Councillors such as me who were Directors of TIE and TEL. However CEC officials are responsible for making the facts and concerns clear to Councillors, and TIE had the responsibility for providing CEC officials with the information that they needed.

124. On 3 May 2008, in advance of the TPB meeting the following week, Willie Gallagher sent an email to myself, Councillors Henderson, Jackson and Wheeler and others [CEC01231125] providing an update in confidence. While TIE had been hoping to sign contracts on Friday 1 May, this did not happen as on Tuesday evening, Mr Gallagher received a call from the Bilfinger Berger UK MD requesting an urgent meeting, at which he was informed that Bilfinger Berger would not honour their finally agreed price and required an additional £12m. I cannot remember exactly who briefed me. Mr Gallagher noted in his e-mail that the details provided were sketchy but it involved commitments from their Supply Chain being broken due to Construction Price Inflation. I understood from TIE and CEC Officials that this was simply an attempt by Bilfinger Berger to get more money from CEC. BBS were arguing that their suppliers were saying that they had higher costs because of construction and price inflation, but nobody in CEC or TIE believed them.
125. On Wednesday, after the emergency meeting, Mr Gallagher requested that the UK MD of Bilfinger Berger be removed from the project, and he had a conversation with a German Board Director. I believe that this was to indicate that TIE and CEC were very disenchanted with that manoeuvre. I presume

that TIE wanted to disrupt Bilfinger Berger to some extent, and removing the UK MD was, potentially, a way of doing that.

126. I am not sure that I attended the emergency meeting that Mr Gallagher called to inform the TPB of the issue, but I do recall being aware of the overall problem regarding the £12m. The address for me on Mr Gallagher's email is incorrect, and I am not sure whether I received it. I was aware of the issue but I do not know what Mr Gallagher meant by the objective being "*to get as much of this increase of [sic] the table as possible*" (page 2). The increase was £12m and that was pretty clear. I also do not recall why TIE proposed to investigate the implications of bringing back Tramlines. I am guessing that Tramlines was the name of the unsuccessful consortium bidder but I do not recall specific discussions on the issue of removing BBS and replacing them with another contractor.
127. Mr Gallagher noted that meeting with the BBS board to try and get as much of the increase off the table as possible was by far the most likely to sustain the Project's momentum. The cost implication of bringing back Tramlines would be £36m to £48m, at a rate of £6m to £8m a month during the likely six month delay, as opposed to an increase from BBS of £12m. Consequently, trying to get Bilfinger Berger's signature on the contract looked like the best way forward. I do not know what TS's response was to this briefing.
128. A follow up email on 9 May 2008 (page 1) concluded that contract signature was scheduled to take place on Tuesday 13 May, which did not particularly concern me. It was important to get their signature on the contract before they decided to go for any further cost increases. The imperative was to sign it, although obviously the £12m increase needed to be challenged to see if there was a reasonable basis for it. As Phil Wheeler was the lead person within the Liberal Democrat group, he would have briefed the rest of the group and members on receipt of the email; CEC officials, including David Anderson, Director of City Development, were copied in as well, so CEC were aware of this at Directorial level, and other CEC officers would have been involved.

129. The papers for the TPB meeting on 7 May 2008 [CEC00079902] note, within the minutes of the preceding meeting on 9 April 2008, that 30% of all works were complete. I do not know the rationale for splitting the MUDFA works from the Infraco works. However, the same Board was addressing all of these issues, so the inter-relationship between the MUDFA works and the Infraco works would have been well understood within the TPB.
130. I have nothing to add by way of explanation of the increase of £17.8m in the base costs for Infraco, which was referred to by Stuart McGarrity (item 4.2; referring to page 4 of the Close Report: see [CEC00114831], page 50). There was an element of uncertainty in the prices when the full Business Case was agreed, and those had been firmed up and were in line with expectations. There is no indication of what those were, other than being procurement stage risks.
131. I think that there was concern that the programme dates were based on the assumption that there would be recovery in the MUDFA programme (Item 4.3). There was a view that there would be some recovery, but I do not specifically recall whether that was discussed at that meeting. I do not recall any specific discussion regarding further slippage in signature of the Infraco contract (item 7.2). Nor do I recall why Partnerships UK (PUK) were to cease attending the TPB meetings (Item 15.2).
132. On the issue of the transfer of design risk (PD's report, page 11), I understood that SDS had been under-performing and that options were being taken forward to address the issue. The main feeling, as the designs were being novated, was frustration with SDS that the designs were not in place. However, my understanding was that the risk associated with that had been transferred to Bilfinger Berger, so it did not unduly concern me. There would be an issue if the designs were not ready, because there would be a cost associated with any time delay. It was hoped that when BBS took on responsibility for SDS, they would help to address the issue.

133. TPB were very unhappy about BBS's request for more money on 30 April 2008 (PD's report, page 11) and, again, thought that BBS were 'at it'. I do not recall the specifics of the discussions regarding further MUDFA slippage (page 12), but it was discussed on several occasions. My recollection is that assurances were given that work was being done to speed things up. I have no idea why the Risk Register reverted to the old format (pages 16 and following), nor why the new format was abandoned.
134. My understanding was that BBS were seeking to extract the maximum amount possible from the situation, and it appeared that every time a report was to come back to members, there was a likelihood that the price would increase. The suggested tabling of a report before the Policy and Strategy Committee, noting the further price increase from £508m to £517.2m, as discussed in an email from Stan Cunningham, Committee Services Manager, to Gill Lindsay and others dated 8 May 2008 [CEC01248988], would have seemed at that time to have been the least bad option in the circumstances. Whilst Mr Cunningham noted that the tabling of a report at that committee meeting "*may be the first time that many of the members are aware of this matter. This is not satisfactory ...*", it was a meeting that would have been coming up very soon that had all party representation on it. The Policy and Strategy Committee was set up to some extent to make decisions that needed that level of approval between CEC meetings and it had delegated authority from the full Council to make these types of decisions. It had the powers to make the necessary decisions and get things done speedily, which was very desirable in the circumstances. That overrode the normal CEC approach or protocols, which would have been to take something of this magnitude to full Council. It was not ideal, but it was not as bad as delaying things even further and giving rise to further costs.
135. I attended the meeting of the Policy and Strategy Committee on 13 May 2008, shortly before contract signature, at which Tom Aitchison submitted a report to the Committee [USB00000357] advising that the estimated capital cost for phase 1a was now £512m and that, in return for the increase in price, TIE had secured a range of improvements to the contract terms and risk profile (para

2.11; see also paras 2.7 and 2.9). All committees have to reconfirm, or reappoint, their Convenor and Vice Convenor at their first meeting after the CEC AGM. This was the first meeting of the Policy and Strategy Committee after the AGM, and, therefore, Jenny Dawe and Steve Cardownie were re-appointed Convenor and Vice Convenor for the year ahead.

136. The minutes of that meeting [CEC01891564] note (para 11) that notice had been given "*at the start of the meeting*" that approval would be sought for Financial Close and notification of contract award. I do not recall how or when members of the committee were first given notice that the meeting would consider those issues, or what documentation, if any, they were provided with. Where there is reference to something being "*tabled*" at the meeting, it means that it has not gone on to the agenda a week in advance. It would normally have been shared with the senior members of CEC, as in the leaders of the respective groups, first.
137. I do not recall specifically what happened at the meeting: how long it lasted; how long was spent discussing the other 10 items noted in the minutes; how long the discussion lasted in relation to the tram project; or whether there were any differing views as to whether approval should be given for the contracts to be entered into. Nor do I recall the range of improvements to the contract terms and risk profile, or what members of the committee were advised. There would have been a report with a recommendation. If there was a vote on it, and if any member objected or dissented to the recommendation, there would be a minute of that. However, there would only be a record of a vote if there was dissent.
138. Although I, and Councillors Buchanan, Jackson, and Wheeler were also members of the TIE or TEL Boards, it was a non-pecuniary interest and custom and practice was that Councillors with a non-pecuniary interest could participate in such discussions and decisions. None of us were getting paid for being members of TIE or TEL Boards. In that respect, and going with precedent in CEC, that was not considered to be a conflict of interest that

would preclude Councillors from voting on these issues. In retrospect, however, I do not think that Councillors should have been on those Boards.

139. There is a difference as to how informed different members were in relation to the tram project. I, Councillors Jackson, Wheeler, Cardownie and Whyte, because of their respective roles as either group leaders or being on the TPB, would have had more information than others. It was about a year since CEC was re-elected in May, so they would have had a number of briefings and seen a number of reports. Additionally, Councillors Aitken, Edie, Hinds, Maclaren and Murray, I think, would have been there prior to 2007. As to whether they were sufficiently informed in relation to the tram project's potential risks and liabilities, they had the information from previous reports, but, as I commented on previously, I think, on reflection, that some aspects of the reports were unbalanced and misleading. I do not know what briefing the other Councillors got, and so I cannot say with any certainty, but I operated on the assumption that they would have been briefed on the content in a similar way to me. We were informed that the contractor's was demanding more money. Generally, though, I think that we were not as well informed as we should have been, due to the nature of the information that was put before us.
140. Fundamentally, I do not think that the right way to approach the management of this project was through CEC committees. Doing these things in public, where the contractor gets to see a lot of your strategies, discussions and debates, seems a deficiency in the approach to me. My view was that the reason for the increase in price was commercial opportunism by Bilfinger Berger. Therefore, there was always the possibility that they might up the price even further if they knew the recommendation. I do not think that the increased price and authority should have been considered by the Full Council. To do so would have extended the period during which there was a risk of further price increases.
141. I do not recall for definite but I think that it is highly unlikely that the Infracore Pricing Schedule (Schedule 4) [USB00000032] was mentioned or discussed at this meeting. Nor do I recall whether there was any discussion of the

concepts of Pricing Assumptions or Notified Departures; or that changes to the contract, with resulting increases in the contract price, were likely to arise.

142. Jenny Dawe ruled that a changed position in procurement negotiations for the Edinburgh Tram Network (ETN) constituted a material change in circumstances and should be reconsidered at the meeting on 13 May. I do not recall whether the matter was reconsidered.
143. A certified extract of the minute from the meeting notes that the committee authorised the Chief Executive to instruct TIE to enter into the contracts [CEC01222172]. In the absence of any other information, I assume that this was the final sign off, or approval, from CEC, as detailed in the papers for the TPB meeting dated 4 June 2008 [CEC00080738]. That is what it appears to be, and I have no reason to think that it was not.
144. The Infraco contract suite was duly signed on 13 and 14 May 2008, and I understood that there had been progress to close out risks and increases in the price related to that in part. I received general briefings, but I do not recall the specifics of pricing Schedule 4 being discussed. I recall that the Council Solicitor said that she was happy with the contract, but I cannot recall the detail of what she said as part of that briefing.
145. Relatively early on, somebody from DLA Piper – I think it was Andrew Fitchie – came to a TIE or TEL Board meeting to discuss the contract. I do not have a recollection of the specifics of what he described, so I cannot say whether pricing Schedule 4 was mentioned. I do not know if I would have fully understood what I was being told at that time. I might have been told about it, but in such a way that did not highlight to me there was a major concern. We received briefings from legal people a couple of times, but what that actually meant to me at the time has not stuck in my mind.
146. I understood that the novation of design meant that the risks arising from incomplete and outstanding design were being transferred to BBS. I understood that there were risks from delays, although the extent of the risks,

and how much I understood, increased over time. My understanding was that these risks were manageable and/or had been transferred. I assumed that the risk allowance provided for all the risks that CEC had retained; I understood that all the risks that they were aware of had been provided for. I assumed that either the risk allowance, or extra resource through additional sub-contractors to re-profile works, would be utilised. I understood that those were the various mechanisms by which the risks could be managed.

147. I understood that the infrastructure contract was 95% fixed price, with a very small allowance for variation. I do not think that I would have understood, or appreciated, the precise implications of the entitlement on the part of the contractor to seek further monies on the basis that there had been a variation under the contract. I understood that there was a 5% area that had a risk associated with it, and within that area there was an expectation that there would be costs that had not been bottomed out, and allowance needed to be made for those. If we were to change the scope of the contract, we would pay for that but the risk was small as I understood it. I do not recall being made aware of the purpose and likely effect of the Pricing Assumptions set out in Schedule 4. It did not register as an area that was of great concern. I understood that, at a very high level, the contract had achieved the principal aim of bringing line 1a within the funding available, and the aims of the procurement strategy had been met. I understood that it was a positive feature of the agreement that the Base Date Design was fixed, with reference to the design drawings of 25 November 2007, such that Bilfinger Berger were taking on responsibility for the normal design development. I understood it limited the scope for subsequent claims for additional monies, although that was quite the reverse of what actually turned out to be the case.

### **Events between May 2008 – December 2008**

148. I was sent papers for the meeting of the TPB dated 2 July 2008 [USB00000005], in which it is noted at item 12.1 of the June Minutes that membership of the TPB was to be reduced, but I do not know why this was.



149. The PD report (page 12) offers reassurance that problems are being addressed, identified and mitigated immediately where necessary. The impression given is one of a problem being managed, but now I see the potential for those statements to be interpreted differently and, indeed, what was not said.
150. The PD report also states (page 12) that Infracore progress, once the contract was signed, was disappointing. I cannot say for definite, but my recollection is that the Board members shared the disappointment, and some concern, and thought that the actions being taken were appropriate. I have a sense that it raised the profile and members became more focussed on it.
151. I do not recall the specific meeting, but there was general concern about both the slippage in design and MUDFA. However, those concerns were qualified by reassurances on novation, and the scope for extra MUDFA works and mitigation measures.
152. With regard to risk drawdowns, at meetings such as this, papers were presented to the Board on each drawdown and the Board was asked if they had any questions and whether they agreed to the risk drawdown, such as that in the papers (page 32). Sometimes, the Board would be informed at a previous meeting that there was going to be a paper brought forward on the latest proposed drawdown, but each drawdown, over a certain level I think, had to have a paper presented to Board, and the Board would look at it and sign it off if it felt appropriate. I do not recall any time when approval for drawdown was withheld or refused. I do recall Donald McGougan, CEC Director of Finance, querying the spend at one point in relation to the 'Open for Business Christmas Spending', but whether that was a risk drawdown or a spend that was already in the budget, I am not entirely sure. I cannot comment on what would have happened had approval for a risk drawdown been withheld. On that particular occasion, however, Donald McGougan was cautioning on spending too much of the money for building the tram on mitigation measures. I interpreted that as indicating that there was a little bit

of conflict between the two CEC Directors about how much money was being spent on 'Open for Business' at that time.

153. I was sent the papers for the meeting of the TPB on 27 August 2008 [CEC01053601]. The papers contained the minutes of the meeting of the TPB on 30 July 2008, which record (item 2.1) Willie Gallagher's concerns on MUDFA progress, and Infraco mobilisation and progress. I did not attend the meeting and do not know the view of the TPB in relation to these concerns. Similarly, I do not know what the issues with MUDFA works referred to by Susan Clark at item 2.3 were.
154. Willie Gallagher is noted (item 2.5) as saying that the Board should not be unduly worried about progress. The fact that progress was not as quick as we wanted was not unduly worrying, as we were getting reports that things were being done to mitigate any impact on the project.
155. It is noted (item 2.12) that the Infraco delay was due to poor 'Issued for Construction' (IFC) drawings. However, I do not recall what information the TPB was given about this.
156. The PD Report (page 9) says that works remain behind the programme, but does not say if the position was getting better or worse; I do not recall which might have been the case. At almost every meeting, at that stage, there was discussion about what was happening and, more pertinently, what was not happening, and whether things were getting better or worse. I cannot remember specific meetings, but there was a pattern whereby things seemed to be improving, and then they got worse, and continued to get worse as we went into quite a longstanding dispute. There was clearly a concern that things were not moving as quickly as TIE and CEC wanted. There were very few occasions that I recall any discussion or additional briefing directly with CEC or TIE officers outwith the meetings. Nearly all of the discussion happened at the meetings. If I had not attended, I would have caught up with Phil Wheeler, if there was something that was of particular concern. Similarly, if I was at a meeting and he was not, and there was something that jumped

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out as a particular concern, I would update him. Issues around things moving less quickly than we wanted them to would have been a concern generally, but it would not have been of particular concern unless there seemed to have been a significant change in direction or strategy by TIE or the contractor.

157. On the other hand, the design position is noted as getting worse (page 9), and certainly it was the case that the design issues were longstanding, as were the MUDFA works. We were getting reports that a whole range of actions were being carried out: extra staff were being co-located; meetings were being held with managers; and all those sorts of things. I cannot explain why the risk register does not record the risk that MUDFA will impact on Infraco (page 10), as it should. Similarly, I cannot explain why the risk to CEC of increased expenditure from delays in Infraco is not noted in the report.
158. I was not at the meeting of the TPB on 27 August 2008, as noted in the minutes within the papers for the meeting of the TPB on 24 September 2008 [CEC01053637]. The minutes state (item 1.5, page 5) that: "*The close out plan for aligning Infraco proposals with the SDS design (particularly roads and OLE) is being finalised and SB will report to the September TPB on the associated programme and costs.*" My understanding is that Infraco were taking on the SDS design to make sure that it was fit for purpose. Infraco had plans as to how they were going to do the Overhead Line Equipment (OLE), and had to make sure that the designs fitted with what they proposed to do. Steven Bell would thereafter report on any associated costs to the programme.
159. I did not pick up on the point at the time that a close out plan for aligning Infraco proposals with the SDS design was still being finalised when the Infraco contract had already been awarded. The fact that the contractor was still discussing with the design people the detail of specific aspects of the project did not strike me as being particularly concerning; perhaps it should have, but it did not. It was something like nine months after they had recommended that the contract would be signed, and the fact that there was still detailed ongoing discussion did not jump out as a particular concern in the

context of what had happened in the intervening months. I do not know if that is surprising or not, not having the experience of a project like this.

160. As I was not at the meeting it is difficult for me to comment on what Jim McEwan said (item 2.1, page 6) in relation to Infracore mobilisation. I cannot comment on the nature of the issue, what was causing it or being done to address it or what effects it was having or might have in the future. It is further noted (item 2.12, page 6) that: "*SB [Steven Bell] gave an update on the current status of design and consents and the issues being faced. Generally progress is positive and ~~tie~~ continues to work with SDS and CEC to achieve the relevant approvals. Key areas of concern include Forth Ports and roads Technical Approvals*". The issues about the designs not being ready or fit for purpose, and CEC not signing them off timeously, had been raised on a number of occasions already. Those issues had been ongoing for months, and my understanding is that this is a reference to those difficulties that had been highlighted previously. I assume that the consents refer to work on Forth Ports land, but I do not recall specifically. I do not recall what the effect was, or what was being done to address the issues.
161. As I was not at the meeting, I do not know the detail of the positive and negative aspects of Infracore progress summarised by Steven Bell (items 2.14 and 2.15). I could speculate that, on the positive side, they were meeting with the contractor and talking through the specific detail of what was holding things up, and so there appeared to be some engagement.
162. When I consider the progress table (page 10), there were nineteen parts of the tramline that were supposed to be in the process of being constructed, or had been constructed, according to an earlier programme, and none had been achieved. Contrary to what the table indicates, I do not believe that that meant that none of the work had been going on; some of these nineteen items could have been under construction but not yet complete. The table does not appear to be very good at capturing that.

163. The fact that progress was not happening at the rate that it should have been was a concern, and was commented upon in the minutes of the meeting. The point was made that there was potential for reputational damage to CEC. I think that there was progress, but it was slow, and that corresponded with the information that we were given. One of the TIE principals expressed a concern at this stage that the rate of progress was a deliberate strategy by the contractor.
164. The PD Report (page 9) mentions design slippage, which is not new. It was being reported to the Board that there was design slippage many meetings earlier, and the actions that were being taken to mitigate this. I do not recall that there was a specific intervention by the non-executive members. There was discussion at various points about the programme, in terms of the consequences of the designs being provided too late, and how some of that programme could be made up. To my recollection it was considered that there would be an impact on the programme, but that there would be opportunities to make up time. There was reference, at various points, to false logic within the programme (page 9), and other opportunities for moving resource around to catch up time.
165. I cannot recall whether the TPB was aware of the risks presented by delays in design, nor why no entry was made in the register in this regard. I do not know why some risks are referred to (page 12) but do not appear in the risk register or the QRA. I do not know what could have been done to further mitigate any risk that remained on the risk register. I cannot explain why the treatments for the risk presented by late delivery of prior approvals by SDS (page 15) were running late. Risk 48 relates to the late running of MUDFA, and there were concerns about this at the TPB on an ongoing basis. I do not know, however, what instructions should have been given to the executive team or what more could have been done.
166. I do not know what positive and negative aspects of Infracore progress were explained by Steve Bell during the TPB meeting on 24 September 2008 (item 2.20, page 6). The PD Report [CEC01053637] says (page 9) that a detailed

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breakdown of potential slippage and opportunities for recovery would be provided the following month. I do not recall whether it was provided or not.

167. I received the papers for the meeting of the TPB on 22 October 2008 [CEC01210242], although I was not at the meeting. The papers refer (page 9) to a Table in section 4.2 which identified slippage and action. I do not know what this is a reference to, nor can I explain why exactly the same wording and the same problem arises (page 11) in the December 2008 PD Report [CEC00988024]. I was not at the meeting, so I do not know if there was any discussion of the implications of there still being no construction work and the design failing to keep up with even version 31 of the design programme, as suggested by the tables (page 10). I think this refers to the slow progress on mobilisation, and the fact that the project was behind in terms of the programme. Construction work was not happening at the rate that it was supposed to be happening. All of these matters were discussed on a regular basis at the TPB.

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168. I do not know if there was any consideration of whether there was a fundamental problem which might pose a risk to the project as a whole. Likewise, I do not know of any discussion regarding the slippage of Prior Approvals and Structures Approvals, which the PD Report says (page 10) were progressing well. There is mention (page 10) of what happened when the traffic management measures for the Mound were implemented. My knowledge of what happened initially came from the public outcry at that time. I think the explanation that we got subsequently was that the traffic management had not worked as it was modelled, although I was not at the meeting so I do not know what explanation was given. The explanation from Marshall Poulton was, I think, that the modelling had said that it should work, but it had not, and they were going to tweak it to make sure that it did. However, there was still going to be a problem coming into and getting out of the city centre because Princes Street was being taken out of the equation, and that is where nearly all the buses went. We knew that it was a concern and we did not want something like this to happen again. I do not know if the problems had consequences for the way that the tram works on Princes

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Street were to be carried out. It raised the level of concern and negativity around the project in the mind of the public. There had been a very public breaking down of the plans on the closure of Princes Street; it was a very high profile problem. I think that that contributed to an undermining of public confidence about what was happening.

169. There was an ongoing problem with Infracore mobilisation being slow (page 11). It was an ongoing problem with the contractor not getting enough people on the ground, and there was a question of whether it was part of a strategy by the contractor to frustrate CEC and TIE, or whether there were genuine problems with getting the right number of people with the right skill sets in place. That was a general concern until it became evident that it appeared to be part of the strategy by the contractor. I cannot remember when that view consolidated. I do not recall whether I was surprised that the risk was noted (page 13) to remain the same from the previous period, in view of the risks that appeared to be crystallising.

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170. In the TPB meetings, the Councillors who were members of TEL or TIE were not contributing a lot to the discussions. None of us had significant knowledge of the matters under discussion, and so we were listening to what was being said, but we did not have an awful lot to contribute other than when it came to things like public relations. We attended as many meetings as we could, but it did not concern me particularly if I missed a meeting because there was the opportunity through the notes to get an update. Additionally, I could have spoken to people from TIE or from CEC, had I wanted to. I think the issue was more what knowledge and understanding we had of the underlying issues and what they meant for the project as a whole. I do not think we had the knowledge or the expertise to really understand some of the fundamentals of the project that others with a more relevant professional background would have understood. I think it would have made a lot more sense to have had people on the TPB, TIE or TEL who knew a lot more about large-scale civil engineering projects and legal issues, who were independent from TIE and CEC and who could have brought their expertise to bear. Leaving aside Councillors, the principal area of expertise of the non-executive

Directors on the TPB, or on TIE, was in the running of transport and within that they would have had some project management experience.

171. A Report to Council on 18 December 2008 from the Directors of City Development and Finance [CEC01043168] gave an update on Phase 1b and noted that, since summer 2008, work had been carried out to develop the business case for line 1b. It was noted that an indicative figure of £87m had been provided by BBS for Phase 1b, but that this was open only until March 2009. An earlier Report to CEC dated 1 May 2008 [CEC00906940] also noted that firm costs for phase 1a had increased by £27m, whereas the risk allowance had reduced by £17m (i.e. from £49m at FBC to £32m). Separately, CEC had noted [TIE00153367] that the movement in cost might impact severely on the ability to deliver tramline 1b. Despite the costs issue, CEC appear still to have been considering a network of lines 1a and 1b as at 29 April 2009 [CEC00860021]. CEC officers would continue to look at line 1b because it was something that the elected CEC members had asked them to do a year or two previously, and they would continue to do so until they reached an outcome. CEC has a large capital programme, and it also has the ability to borrow to increase that capital programme, so the fact that there were no funds within the original funding envelope to cover the costs of line 1b would not mean necessarily that CEC or CEC members would want to stop extending the tram project. CEC has aspirations to deliver many different projects across the city, and working to get line 1b to a stage where they could make a decision based on cost, and have a final design, is not inconsistent with that approach.
  
172. The Report to Council on 18 December 2008 went on to note that TIE were engaged with the contractor on re-programming phase 1a to address the slow start up of construction. I do not remember the specifics of the nature and cause of the slow start up, or what ongoing effect it would have. There were issues to do with the contractor getting their team mobilised and in place, but I do not know at that stage whether there was any concern about disputes in that regard.



173. I did not attend a meeting held at the City Chambers on Friday 28 November 2008 [CEC01069591], when Jenny Dawe requested that TIE suspend the implementation of phase 2 until after the embargo period. I do not know what impact this had on the project, but I am aware Phil Wheeler attended the meeting. As I recall, the programme was based on the contractor getting into various areas during pretty much the whole of the contract. There might have been specified periods where the contractor was not going to work on Princes Street, but I do not think that was the case here. I think that Jenny and others were concerned that the contractor being on Princes Street at that time would have been disruptive and problematic for the city and for businesses. The decision was reversed by the Policy and Strategy Committee on 12 May 2009. I assume that that was because the festivals were coming up in July, and possibly because of Christmas, and the Committee thought that it was going to cost us too much money to bar the contractor from working in Princes Street. Latterly, the contractor was no longer required to stop working on city centre sites during the festival period and in the run up to Christmas, per the Draft Communications Plan from January 2012 [CEC01942245].
174. At the time, I was not aware of an email from Councillor Iain Whyte to Jenny Dawe, Alan Jackson, Tom Aitchison and Donald McGougan dated 10 December 2008 [TIE00887286], which noted concerns about a comment made by David Mackay of TIE to the effect that TIE never started with a fixed budget, because (page 3) *"the design changes as you go along"*. I think that Alan Coyle's response is a fair summary of my understanding. The second paragraph of his response (page 2) states: *"The contract is fixed price provided no changes are made to scope and programme, but since contract close design changes have been made as have changes to programme which impacts on cost. There is provision within the risk allowance for impact of design changes..."*. He had a better understanding of the detail than I did, but my general understanding was that it was a fixed price contract. There were allowances for changes, but those allowances were within the overall budget and the risk allowance covered that.

175. I was sent the papers for the TPB meeting on 17 December 2008 [CEC00988024] containing the minutes of the meeting which took place in November. The issue that arose in relation to the Princes Street blockade (item 3.18, and following of the November Minutes), which was in place to allow the works to proceed, was that it was considered to be detrimental to business in the city centre. Businesses wanted the blockade lifted to make it easier and more attractive for shoppers and visitors to get into the city centre. Members of the TPB took a full involvement in this because it was obviously a very high profile matter. Princes Street is the principal shopping thoroughfare in the capital city of Scotland, so it was very high profile for politicians both within the city and nationally. There was concern about the reputational damage to the city. I think people saw it as an attempt by the contractor to hold the city to ransom; I believe that was the phrase used by various people. I do not recall what happened to the issue of an increase in budget mentioned previously.
176. I do not recall that there was anything different done at this time regarding the availability of design and the overrunning of MUDFA, as the reasons for slow progress. In hindsight, I would have expected there to be a report of a change to the risk allowances as a result. The table in Section 5 (page 46) appears to summarise a review of some of the risks on the risk register.
177. I find it difficult to recollect when I first became aware that there was a dispute between TIE and BSC in relation to the infrastructure contract. Clearly, there was a concern that there might have been a tactic going on there. I am not sure that I knew the reasons for the dispute at that time. I had no understanding at that time of which party or parties were primarily responsible for the dispute arising.
178. As far as I can recall, TIE officials presented it as the contractor trying to get more for the contract and essentially 'doing what contractors do'. On a couple of occasions during the project, I am not sure at which particular point; I asked the non-executive directors if this was normal. The response that I got on both occasions, as I recall, was to the effect that disputes were normal,

although the intensity with which the contractor was taking this forward was quite extreme.

179. I do not recall there being any use of contract dispute resolution procedures at the end of 2008, although I certainly recall their use later. I recall the TPB being briefed on the outcome of adjudications, and subsequently I checked a couple of those adjudications. As I mentioned previously, the ones I looked at appeared to accord with what TIE were telling us were the outcomes. I cannot say that it was necessarily made clear at the time of adjudication that there were much wider implications. In saying that however, I think in 2009, we got a briefing that there were some that had very profound implications for the project as a whole and an overview was given to us at some point. Again, I do not remember it being at this time in 2008; my recollection is that it was later in the process. I also recall a lot of frustration amongst myself and other Councillors, later in the project, about the time it was taking to get to the adjudications and that there appeared to be delay upon delay in taking things into the dispute resolution process.
180. TIE was quite quick to report on the first adjudication which came out in their favour, but a lot less clear and lot slower to come forward with information about ones that had gone against them. There was a very significant one, I think about design, that I recall I had to ask about only to be told that TIE had lost. That surprised me because I would have expected there to have been a much more high profile discussion at the TPB. Whether it was mentioned in such a way that I did not pick up on it, or it was buried in a report or whatever, I do not know.
181. I think there were times when things were discussed outside meetings by TIE and CEC officials that was an ongoing part of the picture. There were also meetings between the TIE Chief Executive, Richard Jeffrey, and the non-executive Directors before they came to the TPB. It is clear from the papers I have been given for the preparation of this statement that there was information that was not shared with Councillors. As I have previously mentioned, I understand, accept and think it is perfectly reasonable for there

to be discussions between professionally qualified people about technical matters. However, what is not okay is that quite clearly there were major implications, particularly from the legal side of things and the novation of design, that were not flagged up in a way that Councillors understood them to be concerning. I was not aware of this at the time, although towards the end of the project, around 2011, I became more aware of a lot of the issues. The fact that the adjudications had gone against TIE clearly illustrated that the legal advice we got, or that was reported to us, was not good. The issue around the fixed price did not mean what I understood it to mean.

182. TIE was very reluctant to share specific adjudications with me when I first requested them. I was due to go for an interview on "*Newsnight Scotland*" relating to the disputes and there had been leaks in the press about the outcome of different adjudications where it was asserted that the adjudication had come out very strongly in favour of the contractor. That, to some extent, contradicted what we were being told within TIE and the TPB. I felt it was my responsibility to go on to Newsnight as the Transport Convenor for CEC and address, or try to respond to, the concerns that were being raised and quite publicly discussed. TIE did not want me to go on to that programme because they felt that anything that was discussed would have potentially been a breach of the agreements that both sides, apparently, had signed up to. I wanted to be able to satisfy myself that what TIE was telling me fitted with what the actual adjudications were. Clearly in my mind at that point, I felt I had to satisfy myself that we were getting a balanced report from TIE.
183. Eventually it was agreed that I could have access to a couple of the adjudications, so I selected two at random and found that they corresponded with the information that TIE had given to the TPB. That was certainly my understanding from reading them and I felt that I understood them properly.
184. It was explained to us by TIE officials that there had to be planning put into the Dispute Resolution Procedure in relation to what was put in and when we put them in. There were particular issues such as who was responsible for delays, who was responsible for design changes and that sort of thing and

there were others that were more about who was responsible for a more discrete problem within the overall programme. At the start of that process there appeared to be a very high level of confidence in the outcome of the process and there was not, to my recollection, much input from the lawyers themselves at the TPB. As the adjudications went against TIE, my confidence in the legal advice that we had been given clearly started to drop. That led me to request that TIE look at getting a top QC on board to fight its corner and give some sort of reassurance and also to see if there was any way the legal position could be improved. Obviously there was DLA Piper at the start who had said what a fantastic contract it was and the Council Solicitor had communicated that she was happy with the contract. McGrigors also became involved at some point, I cannot remember exactly when. Things were not going well, however, and as time went on I asked a friend who is a lawyer to recommend the best person to have on our side. A couple of names were mentioned including Richard Keen QC and I passed his name on to Mandy Haeburn-Little who was the Communications Director for TIE by that time. A few weeks later Richard Jeffrey told me that Richard Keen QC was on board. There were now four different sets of lawyers involved and I thought we must surely be in the best place that we could be legally. I suppose factored into that as well was that when Richard Jeffrey came on board as the new Chief Executive he undertook a review of the strengths and weaknesses of TIE and I took comfort from that. Perhaps wrongly, I felt that if there were problems the various lawyers and the new Chief Executive would be looking it all over; there would be no reason for people to be misleading us and our position should be pretty robust. However, more and more things were coming out from the adjudications going wrong, time was extending and the dispute was ongoing, and that was clearly contrary to my hopes and expectations.

## **Events in 2009 and the Princes Street Agreement**

185. I attended the TPB meeting on 17 December 2008, the minutes for which are contained within the papers for the meeting on 22 January 2009 [CEC00988028]. At Item 2.3, Kenneth Hogg considered that there were

22 January 2008  
should be  
22 January 2009

issues with the governance structure and was concerned that at times the board could not discharge their functions fully. I do not remember what those issues were or in what way could the Board not discharge its functions fully.

186. Similarly, I do not recall if there was any discussion about whether there would be insufficient risk allowance for MUDFA, in view of the discussion noted at item 2.12.
187. A substantial amount of the PD Report and the Transport Scotland Report was the same as the month before. The Board were concerned about the fact that there was a lack of progress but if one party was refusing to engage, you do not expect to see progress happening in a speedy way. I am not surprised that the text is pretty much the same month to month on lack of progress.
188. I note that the design section of the PD report refers to good progress but also notes that reasons for design slippage were being reviewed. I do not recall what the position was.
189. I cannot say that I have a recollection of being particularly concerned that the statement about reviewing and recording reasons for design slippage was repeated with no feedback as to what was being achieved in this regard. It was acknowledged that there was slippage but that was being addressed.
190. I note that for the second month there is a statement that the quantum of designs required to go through re-design process as a result of the approvals process or Value Engineering would be reported in the future. I do not recall if it was expected that the approvals process or VE would be reported on or whether anything was said about this at the meeting.
191. I do not know why the late completion of utility works in one particular location was created as a new risk, as stated on page 43.
192. An action note following the meeting of the special tram Internal Planning Group (IPG) on 29 January 2009, which was attended by CEC officials

[CEC00867661], stated that absolute clarity was still needed on the price and noted that there was concern that BSC costs did not represent value for money. I do not recall getting a specific briefing about this. There was a general concern through this period and right up until the end that the costs were going up and that we did not know exactly what the final figure would be and we obviously all wanted clarity. I think that January 2009 was a bit before specific adjudications came through that clearly demonstrated BSC were overcharging in some respects. The fact that they were doing that, as it became clear later, would not have been a surprise to me; we had already been through situations where, it was believed they had been trying to get more money out of CEC without reasonable justification. The fact that it appeared they were still looking at other opportunities to get more profit out of the project does not surprise. There was clearly a concern that BSC were trying to get more money than we felt they were entitled to and that was a concern that we all held from before the contract was actually signed.

193. I was sent the papers for the joint TPB and TIE board meeting dated 11 February 2009 [CEC00988034], which contained the minutes from the previous meeting that I had attended on 22 January 2009. In the Minutes for January, there is a note on page 6 that the party with power to regulate governance was CEC but I do not recall a discussion around this. To me, CEC owned TEL so it would have been obvious to me that it was CEC's decision how they were to oversee it.

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194. I cannot recall what the concern was as to conflict of interests, as referred to on page 6, nor what was done to resolve it.

195. Similarly, I do not know why this issue was only arising now.

196. I am as confident as I can be that I was not involved in the internal audit on internal governance at item 2.11. I do not recall what it found, what recommendations were made or what improvements were required.

197. I do not know what Kenneth Hogg is referring to in paragraph 2.19 and cannot offer an explanation.
198. There is a reference to MUDFA being 65% complete, but I do not recall how complete it should have been and do not remember if there was a discussion about it. My recollection is that we were getting updates on MUDFA progress from time to time and if we had wanted that information we could have asked.
199. In the PowerPoint for the meeting there is a note on page 4 of the slides that there was a significant risk of a major dispute [CEC00988033]. I do not recall what discussion took place at the TPB about this issue and what could be done to avoid a dispute.
200. A dispute arose between TIE and BSC prior to the planned commencement of works on Princes Street in February 2009. I do not remember specifically when I became aware of it, but I was aware that Phil Wheeler was copied into an email sent on behalf of David MacKay to the Infracore (BSC) on Friday 22 February [CEC00867359].
201. I do not recall the detail of the explanation about who was saying what at that time. I clearly recall the way it was asserted to us by TIE, which was that BSC were trying to hold the city to ransom. My understanding was that they were looking for more money to do the works on Princes Street and the dispute was in relation to what they did or did not feel was in the contract regarding the amount of works that had to be done.
202. On 9 November 2010, I and others were sent an email by Mandy Haeburn-Little, which included a public statement on behalf of TIE to counter assertions made by BSC [TIE00306566]. It was obviously a very high profile dispute and was causing the city a lot of pain publicly and in reputation. We wanted it sorted but, at the same time, I believed that this was the contractor trying to obtain more money than they were entitled to. The fact that we had a pot of money, up to £545m, seems to me to almost to invite the contractor to try and get as much of that as they could. It tends to reinforce my views about why it

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was not a good idea for CEC to do the Tram Project and highlights the difficulty in trying to balance democratic and commercial considerations.

203. I cannot remember the detail of TIE's strategy to resolve the dispute. We clearly wanted TIE to do so, but we felt at the same time that they had to be very robust in resisting this tactic of the contractor. We felt that right was on our side, so to speak, but there had to be an attempt to try and find some way of reconciling the two different positions. The way that I understood it was that it was a straightforward fight between two organisations.
204. We were told that the eventual supplemental agreement did not create a precedent for further works on-street and it did not add to the overall cost. It does not strike me that TIE were open and transparent when you look at the whole history of it now. There may not have been additional costs over and above what was in the contract or there may have been scope within the risk allowance to pay for that section. From what I have subsequently read and understood, it did add significantly to the overall cost.
205. I think I believed that TIE were telling the truth at the time. I was minded to go with what they were telling me, that they were successfully and robustly defending the position of CEC. They were arguing through the points the contractor was coming up with and rebutting them where they could and they were taking action to mitigate problems that were arising. There were arguments on TIE's side that they were behaving in a reasonable, proper and diligent manner to protect CEC's interests. When I look back at it now, I do not think that they were being open and transparent. I think that there were various points when what they were telling us was misleading or, at the very least, did not provide a balanced account of the situation.
206. It was my impression that TIE were reluctant to use the contract dispute resolution procedures (DRPs) [CEC00664431], as there was a concern that this would reinforce or entrench a poor relationship. That was a concern that was expressed at some point early on in the process, before they actually got used. As you go through the DRP process, there are various stages that need

to be gone through before you get to an actual adjudication. I was frustrated about the length of time this took, and part of that frustration was that I felt that TIE were taking too long to get to the point where it would go in front of an adjudicator to make a decision. I know it was not just myself that felt frustrated about it; other Councillors and CEC officials made comments to that effect. I know that later on in the process David Anderson, who was the Director of City Development, made a comment about the fact that they understood that BSC had a dozen lawyers working on this from day one and that TIE had not done enough to counter that possibility. I do not recall him saying that at a TPB or a TEL meeting, but he was certainly quite clear that he had made that comment at some point early on, perhaps in discussions with TIE officials away from the TPB. I go back to the point about what was actually discussed between CEC officials and TIE officials and, possibly, other non-executives outwith those meetings.

207. Clearly BSC were involved in the project for commercial reasons and based on what I was told by TIE executives and other non-executive Directors I thought that they were extreme in the way that they behaved. I cannot complain about their motives, but I find it difficult to be dispassionate or objective about it.
208. I do not recall any disputes between TIE and BSC before the one about the works on Princes Street. There had been concerns about slow mobilisation, although I do not know if that constitutes a dispute. Additionally, Bilfinger Berger had demanded extra cash before the contract was signed and so it was not the first time that there had been concerns about their behaviour.
209. On 27 February 2009, Councillor Phil Wheeler sent an email to the Council Leader Jenny Dawe [CEC00868427] informing her about his meeting with Richard Walker of BSC. Similarly, I am aware that Mike Connelly of TIE advised David Mackay of his meeting with Margaret Smith MSP and Alison McInnes MSP by email dated 11 March 2009 [TIE00446933]. I was not invited to those meetings and I cannot remember if I knew that they were happening beforehand, although I heard about them afterwards. When I

became Transport Convenor later that year, I was invited to meetings with Bilfinger Berger, but I had not been invited to these particular ones. There was very little feedback from them, but what I did get was that Richard Walker had made many assertions and allegations about the contract and about TIE. Phil and Jenny had listened and everything had subsequently been rebutted by TIE and in that regard the meeting had gone as expected. Bilfinger Berger were saying that it was not them, it was TIE, which was what they had expected to hear, and TIE had refuted those points. I did get some feedback at some point, I think from Phil, that neither Margaret Smith nor Alison McInnes were impressed with TIE and they were concerned about what Richard Walker had said about TIE.

210. I received a copy of a letter dated 24 March 2010 from Tom Aitchison, Chief Executive of CEC, to Richard Walker in response to a letter received from BSC [TIE00304351]. The letter from BSC indicated a desire to keep CEC, as guarantor for the project, aware of their concerns. I got advice that it would potentially undermine TIE for Councillors at such a high level, the CEC Leader and the person who was leading on transport, to meet with them. I do not know whether it did or did not. Certainly, the view that I got subsequently from Phil and Jenny was that it did not shake their confidence in TIE. I do not know if it was or it was not appropriate. I felt that they would be criticised either way, whether they met them or not. I took a different view when I was Transport Convenor because I felt that it was not, on balance, appropriate or necessary for me to meet with them. I do not consider that it was significant either way.

211. I had understood that there was a risk allowance in the contract and that allowance within the fixed price allowed for some increased costs. I also understood that the contract allowed for normal design development and, while I was concerned that the risk allowances were being utilised, it did not seem inconsistent with the idea of a fixed price contract as I understood it or as it was explained to us. As I previously stated, the summary by Alan Coyle in the email of 10 December 2008 from Iain Whyte to Jenny Dawe and others

[TIE00887286], accorded with my understanding of what the contract allowed for.

212. I have considered an email dated 12 April 2010 from Julie Smith to Nick Smith and Gill Lindsay [CEC00356396] and I understand the reference to TIE not appealing the Wilson Hunter decisions is a query as to why TIE are not appealing one or more of the adjudication decisions.
213. At the time, I was not aware of a letter dated 5 March 2009 to TIE [CEC00870592], in which Tom Aitchison set out a number of measures required to keep CEC updated about disputes. Furthermore, at the time, I did not have the level of concerns that Tom Aitchison expressed. About a year or more later, I spoke with Alastair Maclean, who was CEC's Head of Legal by that time, regarding comments made to me by Richard Jeffrey in respect of Nick Smith who worked for CEC's Legal Department. Richard Jeffrey had been quite disparaging about Nick and I remember at the time thinking that his tone was a bit frustrated, angry and a bit petulant. Richard had made a point about Nick interfering and Alastair advised me that he was backing up Nick. Nick had been pressing TIE and TIE legal advisors for information on CEC's behalf that they were looking for better sight of what was happening. CEC at this stage did not feel that they were as clear about TIE's legal position as they needed be.
214. At the time this letter was written, I was not aware of the level of concern with CEC officers about TIE's non-disclosure and not providing of information. It was only after speaking to Richard Jeffrey, and thereafter Alastair Maclean, that I got a sense of the concerns that were in the letter.
215. In an email dated 6 March 2009, TIE's solicitors, DLA, sent the Solicitor to the Council the parties' position papers in relation to the Princes Street dispute [CEC01031402]. In an email dated 11 March 2009 [CEC00869667], Colin Mackenzie advised that CEC officers did not know whether the Infraco contract was sound; that it was possible the contract was not robust enough, and affordability became an issue; and that CEC were lacking the requisite

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information, certainty and confidence at that time. DLA's Chris Horsley responded to CEC attaching a paper entitled "*DLA Piper Response to CEC Questions*" [DLA00001357]. I do not recall receiving briefings from CEC officers around this time on the differing interpretations of the contract. I do recall that the implications of losing the DRPs were discussed at the TIE and TPB meetings. Although I do not recall the pricing schedule being discussed I knew there were different issues being pursued through the DRP process and there was some explanation provided of what the issues were for each DRP.

216. We were notified that DRPs were being utilised and sometimes we were told what the DRPs were about. I would not say that we were told in great detail what each DRP was about, but we were given the main point and we were told about the outcomes, although not necessarily in a suitably balanced or transparent way as it now appears. It became apparent that it was very significant that we had lost on design and on other issues, although it was not apparent to me what the cost implications were of specific outcomes.
217. I note that the slides for the joint Tram Project and TIE Board meeting on 11 March 2009 [CEC00379023] detail that the DRP was a means to make progress in anticipation of broader Infracore engagement. It was perceived that Infracore had either failed to engage fully or had done so in an unconstructive manner. I think the way that it is put there is that clearly there was a problem with the contractor not taking the project forward in the way that would have been hoped and anticipated.
218. The slides continue to discuss the strategic options of negotiating a settlement or termination of BSC or whether a replacement of Bilfinger Berger in the consortium may be a necessity. These were regarded as unattractive options at this point as it would delay the project. I think it is mentioned later that there would potentially be a further six month delay if we were to try and procure or replace them with somebody else. There was that and the consequent reputational damage to the city which would come from that. There was also the possibility that Scottish Government could withdraw the money and, I think, there was a possibility of having to pay BSC to walk away.

The minutes continue to note that TS require to be provided with a view of the impacts of current disputes with the Infracore programme and outturn costs by the last week of March 2009. I have no idea whether this was provided, nor what TS's reaction was.

I note the Report to Council on 12 March 2009 by the Chief Executive [CEC01891494]. 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. In his report the Chief Executive stated that *"members will appreciate that I am restricted in what I can say while commercially confidential negotiations are taking place"*. He stated that TIE was maintaining an approach to what was agreed *"after tough negotiation before the contract was signed"*.

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222. The Report to Council on 12 March 2009 [CEC01891494] refers to the contractual difficulties between TIE and BSC and Tom Aitchison refers to being restricted in what he could say while commercially confidential negotiations were taking place. I think commercial confidentiality was an impediment to some of the decision-making and was potentially an excuse not to share information, although I am not clear whether Councillors would have understood the commercial information and had the ability to make informed decisions. I am not sure Councillors themselves would have been able to discern who was in the right; we would be relying on CEC officers and TIE officials to advise us on that. In this context, it allowed officers not to provide information which would have helped inform Councillors, for example of the consequences of losing these disputes. There was a concern about what information was being shared with Councillors, and commercial confidentiality was potentially a good smokescreen for that. Agendas would be used at times in the process to address those concerns and to discuss confidential matters. There were also group briefings by senior officials and people who were supposed to know what they are talking about to senior Councillors, including the Council Leader, which we relied on heavily.

223. I do not know what conditions the contractors wished to impose in relation to carrying out works. The message was that they wanted to renegotiate the

contract in their favour and were saying that the contract was not fit for purpose, despite having signed it less than a year previously. We were being advised that they were 'at it'.

224. The report also stated that a "*fixed price*" 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 "*cemented the risk allocation position*" agreed by the parties. I have already covered my views on the fixed price terminology that allowed some room for change in costs related to exceptions in the contract and I understood that there were allowances to cover those. As time went on it became clear that the exceptions were far more widespread or far more significant than had been provided for. It is difficult to say at what point my view changed; the realisation came to me over a period of time. As the evidence built up, whether you called it a fixed price or not was immaterial; the cost was going up and we did not seem able to stop that. The point was that we did not have a contract that was doing what we were led to believe it should have been doing.
225. I do not know whether CEC were receiving any independent specialist legal advice at this stage about the contractual dispute.
226. I am now aware that Colin Mackenzie made certain observations on the dispute between TIE and BBS and raised certain concerns in an email dated 7 April 2009 [CEC00900419]. Similarly, I am now aware that Colin Mackenzie and Nick Smith circulated a report on the dispute between BBS and TIE [CEC00900405] in an email dated 9 April 2009 [CEC00900404]. I was not aware of these exchanges at the time, however. I was aware of the general position taken by TIE regarding normal design development, as well as the view of TIE that Bilfinger Berger were able to work on many areas and were being unreasonable in refusing to work without access to all areas. I know that TIE had agreed some additional preliminary costs, but I was less aware about ground conditions and notified departures. I had heard the term "*notified departures*" and I knew that it was associated with claims. I did not know that CEC had concerns regarding non-disclosure by TIE until later. I did

know that TIE were looking to improve relationships with Bilfinger Berger and that there had been management changes at Bilfinger Berger. I did not know until later in the project about the twelve claims specialists referred to earlier and my recollection is that David Anderson raised that very much later as having been known since early on. In saying that, it was assumed at the TPB that Bilfinger Berger would be looking at opportunities to maximise profit within the contract. The non-executive Directors, as I previously mentioned, advised that the claims-based approach taken by Bilfinger Berger was not uncommon. I knew from various discussions that I had as Finance Convenor regarding tenders, that one tactic used by contractors, that CEC officers had seen in the past, was that people would put in low bids and then claim for anything and everything they could within the contract, first of all to get the contract and then to make a profit out of it. That way of operating was not a complete surprise to me but I had no first-hand experience of it.

227. I think members of the Council were aware of some of these matters and they certainly should have been made aware at an overview level, but I do not believe they were aware of the lack of trust in TIE by Council officials unless that was expressed to them privately.
228. In as much as I was aware, I felt that TIE and CEC needed to be in the best shape possible to assert or support its position with regard to the legal dispute challenges. The concerns regarding TIE would have undermined my confidence and that of other members. They would have, I think, sought an independent view from third parties and assurances about TIE's position.
229. At Item 1.1 of the minutes of the 11 March 2009 TPB, contained within the papers for the meeting of the TPB on 15 April 2009 [CEC00888781], it is noted that David Mackay was going to meet John Swinney and Stewart Stevenson on 17 March. I cannot recall the purpose and outcome of that meeting. It was stated on a number of occasions that David Mackay and Richard Jeffrey were meeting variously with TS, Stewart Stevenson and, occasionally, John Swinney as the Scottish Government had a very close interest in the project. Richard Jeffrey made an off-the-cuff comment at one



point, that sticks in my mind that he was up and down to the Parliament every week. I suppose the significance of that was the Scottish Government's public position that this was an Edinburgh project but in fact, according to Richard Jeffrey, they had a very close interest. To my understanding, from what Richard Jeffrey was saying, TS and the Scottish Government had a very good idea of what was going on. Given the comments I have just discussed about information not being shared with CEC officers and the lack of confidence in TIE, however, there is every possibility that the Scottish Government and TS were getting an equally inadequate summary of what was going on.

230. I cannot recollect what use was made of PwC (Price Waterhouse Cooper) for advice on commercial issues during the DRP, as referred to at Item 3.2.
231. At Item 10.3, there is mention that the Board agreed to the Princes Street change which would lead to an increase in project costs. However, I do not have a recollection of that discussion. My understanding was that we had been advised that the Princes Street resolution had no additional costs for the project and did not create a precedent. I cannot recall why I did not pick up on that at the time. The context would obviously be significant if this was already within the provisions of the contract. Looking back at it now, it does not accord with what we were told previously. I cannot remember how I reconciled the two different versions of events and how they could have been reconciled. The initial one did not have an increase in project costs and this report is saying that it did. The only explanation I can give is that there was some allowance for this within the costs of the project overall. If it was a risk drawdown then there would be a report on how much that was, so it is not clear to me and I cannot explain how that was done. The way it was explained to us at the time, and I only recall this because I have read papers when preparing this statement, was that the Princes Street change was a change to a demonstrable cost basis. Instead of there being a lump sum overall for the contract that covered everything, in this particular area there would be a price per metre for the man hours it took to get stuff removed,

changed and put back in, rather than an average subsumed within the overall cost.

232. I do not recall specifically what lessons had been learned through the Princes Street process. Clearly one of the lessons appeared to be that Bilfinger Berger would stop at very little to try and get what they could. They were quite happy to shut down Princes Street and for nothing to happen for weeks upon weeks, they were prepared to play hardball. In terms of negotiating stances, I do not know what other lessons had been learned.
233. The papers [CEC00888781] also include the minutes for the 24 March 2009 TPB where, at Item 1.4, Steven Bell stressed that the Supplemental Agreement for Princes Street would not increase liability to TIE, compared to that previously, and that there would be no material difference in the way costs would have been agreed. That is not, in my view, a correct analysis. As I have just stated, it was being reported that there was an increase in costs and yet here is the Project Director saying there was no increase in cost. The two positions do not seem able to be reconciled.
234. At Item 1.8, it is noted that the Princes Street Supplementary Agreement (PSSA) would allow work to be completed in the first week of November, as originally anticipated: "*However, there would be no guarantee that this will be the case if there is a compensation event (same basis as the original contract)*". As I have already mentioned, my understanding of how the PSSA was to work was very superficial and was that it was based on demonstrable cost. The benefits of the PSSA were that it allowed the project to move forward and it was an obstacle that had been overcome. I do not recall a more detailed explanation being given to TPB.
235. At Item 1.11, Stuart McGarrity outlined the available headroom in the funding envelope and, at Item 1.12; he essentially said that this headroom only existed as long as there was no further disruption or delays. I do not recall the point at which members started having concerns about the budget envelope or discussing them. I think it likely that his comments would have

generated discussion, although I do not know if that had happened before or if this was the first time it had been raised. The risk allowance was being eaten into and there was still quite some way to go in the project. I do not know to what extent the risk allowance drawdowns that had already been agreed covered things that were to happen in the future. I cannot remember the discussion about it but there had been a growing concern about the project being achievable within the budget. I was hoping that it would be managed within the budget probably longer than other people who knew what they were dealing with hoped. I look back and think that I was being far too optimistic in what I was hoping for or what I thought might happen.

236. On 30 April 2009 the Council were given an update on the tram project by way of a report by the Directors of City Development and Finance [CEC02083772], which indicated that there had been negotiations that had led to a supplementary agreement for the construction of the Princes Street infrastructure works. My views regarding this at the time were that, basically, CEC officials supported the TIE position. The phrase within the report that *"the range of numbers indicates the base case scenario can be delivered within previously agreed funding levels"* stands out for obvious reasons. There was always to-ing and fro-ing about demonstrable costs and what it says is not clear. Councillors, myself included, did not clearly understand the ins and outs of what costs were involved, but it seemed to provide the reassurance that Councillors were looking for. It subsequently became clear that this was not correct but at the time we were reassured by the conclusions of the report that things were still manageable within the overall budget.
237. I do not know whether or not formal approval came to the TPB. I had no involvement in the negotiation of the PSSA [TRS00016944].
238. My understanding of the rationale behind the PSSA [CEC00934643] was, as I have already mentioned, very superficial and simply, at a very high level, that it was based on demonstrable cost and allowed the project to move forward.

239. At the risk of disparaging Councillors, myself included, I do not know that more time to consider a supplementary agreement would have made a difference to Councillors given our lack of technical expertise. In my view, the effect of the change was not made clear at a level at which we would understand it.
240. If CEC officials thought it was likely that, as a result of the outcome of the agreement, the budget limits would be breached, they should have at the very least raised the possibility. The statement that the full scope of the project could be delivered within previously agreed funding levels is misleading. If they thought it was the case that it was going to go above the costs, they had a duty to spell that out to Councillors in my view.
241. I do not recall what the strategic review carried out by CEC and TIE was nor why the entire programme was subjected to review. I do not know why they were doing a review at this time, when there had been an exercise conducted to review the effect of the slow start just four months earlier.
242. I do not have the technical expertise to state whether it was appropriate or sensible for TIE to enter into a supplementary agreement to the contract when there was still disagreement about the original contract terms.
243. I received papers for the meeting of the TPB on 6 May 2009 [CEC00633071], in which there was consideration of removal of Carillion from the MUDFA contract at page 12 and in the paper at page 26. The progress with the MUDFA contract was slower than was expected and there were concerns about performance, quality and cost. This was a recommendation from TIE as a way of improving performance and quality and of reducing cost and to that extent I thought it was a good thing. The explanation for the cost improvements was that when the MUDFA contract was originally put in place, McAlpines were the contractor and they were then taken over by Carillion. Carillion were having a difficult time as some of McAlpines' contracts did not look that good. It was not working out well for them and they were performing poorly at company level as opposed to just in the context of the tram project.

When those contracts were signed, which I guess was 2006, maybe even before that, price inflation within the sector was a significant factor and the costs reflected that. Come 2009, there had been a financial crash in 2008, construction work had more or less stopped and contractors were desperate for work. Prices had fallen quite significantly, so on the one hand Carillion was losing money on the contract and on the other hand, if they could be shifted out of the contract, you could get a contractor and sub-contractors in that would be cheaper. From my recollection at the time and reading the reports later on it looks like some of the savings and improvements were delivered, and it was believed that the cost implications would be either neutral or positive.

244. As I mentioned, and as identified in an email from Thomas Caldwell to Graeme Barclay on 5 March 2009 [CEC00956515], it was thought that it would be possible to get better terms because of the change in the wider economic environment. The collapse in the construction market meant that there were lots of people looking for work and there was no work going around.
245. It seems that the intention was that the MUDFA works at the two ends of the line would be handed on. However, it later seems that MUDFA works in the city centre were also handed on. I do not know what the reasons for this change in approach were but, given what I have said already, they would have taken any opportunity to get Carillion out and get a cheaper and better sub-contractor in. There was a suggestion at one point that Carillion were actually quite happy to get out of the contract because it was costing them a lot of money and, if there was a graceful way of doing so, they would not make too much of a fuss about it. Obviously, there was also a concern that Carillion would put in some sort of legal claim for extra costs, and that is what did happen. I cannot remember what the overall payment was but my recollection was that it was felt this was a successful move.

246. I do not remember the discussion at the meeting (page 9), about the dispute as to the movement between the "*Base Date Design Information*" (BDDI) and the "*Issued for Construction*" (IFC) drawings.
247. I do not recall what the mention (on page 16) of one of the identified risks being in relation to "*designs which may have been altered*" was referring to.
248. I do not know what process as a treatment strategy for the risk was envisaged that would act as a control mechanism for design changes (page 18).
249. On page 11, there is mention that it was considered that the slippage in the programme that had occurred from a very early stage could be made up with improved productivity rates. I think the point was made that past performance was not a good indicator as it was based on a period of dispute and that if relationships improved, performance would improve markedly. I do not recall the detail of the discussion but I believe this is referring to the programme as a whole as opposed to specifically the MUDFA works.
250. I do not recall what consideration was given to the effect of deferring works on Leith Walk because the MUDFA works were not finished ( page 13). With reference to my previous comments, there was a view that the contractor could move in to work in other areas and that there was false logic within the overall programme. The fact that there might be an impact on the works would have been noted and understood, but there would have been opportunities to mitigate that. I do not know how much was lost and how much was mitigated because I cannot remember the conversation.
251. In a TS report within the papers provided to me, it is noted (page 36) that work was continuing on Princes Street, Edinburgh Park Bridge, Gogarburn Bridge and the new access road at Verity House. As far as I am aware, Edinburgh Park Bridge and the Gogarburn Bridge are off-street structures, I do not know if Verity House is also off-street.

252. I remember there were comments about the fact that BSC were not taking forward on-street work to any significant extent and that, other than obviously with the PSSA, such progress as BSC were making appeared to be off-street. That was certainly noted and it would have been a concern that there was no progress happening. I do not remember a specific discussion about it at that time but I know that it was something that we were aware of.
253. I am aware that BSC were supposed to have almost 50% of the work completed and instead had done only 3%. In relation to some sections, it is noted (page 37) that the problem was that MUDFA works were not finished. My recollection is that it was TIE's view that the problem was that BSC were not minded to do on-street works as part of a wider dispute and that certainly seemed to accord with what we were observing on the ground.
254. In relation to works to the west of the city centre, there are several references to re-design of temporary and permanent works. Part of that, looking at the report, refers to the Gogar Interchange and I think the comment is that TIE expected that the costs of the changes in the design of the Gogar Interchange would be picked up by TS. As was referred to earlier, the Government cancelled EARL, which was to be a direct heavy rail link to the airport. It was decided that was not going to happen anymore and that there would be a link between heavy rail and the tram at the Gogar Interchange. That was new, that was something that was different and that was not in what had been agreed with the contractor at the start. In my opinion, reading it now, I would agree with the TIE view at the time that it should not be part of the extra costs for the tram project because it was something instructed by TS and therefore it was at their cost.
255. There were both "*approved*" and "*unapproved*" figures, but I do not think that was intended to reconcile with the change control update on page 22. The unapproved figure was regarding anticipated increased costs above whatever had been allowed for, but which had not yet been bottomed out. They were flagging up that we knew there would be an increased cost but there was no definite figure that had passed the internal checks within TIE. We were

getting close to the total available funding package so there may well have been an increased sensitivity around the total costs, although I do not remember. I do not know if there was a requirement for TIE to report to CEC if costs were going above a certain level, albeit below the £545m. I know that there was a requirement to report to CEC if TIE knew the costs were going to go above £545m, but I do not know if there was an interim stage or anything like that.

256. I do not know what risk was being reflected in the increase in the Anticipated Final Cost (AFC).
257. In the PD report on page 14, and the TS report on page 46, there is reference to £15.1m of the risk allowance having been used. I do not think the table at 3.3 on page 46 is intended to reconcile with the Report on Change Control Update on page 22. I do not think the intention was that they would not reconcile, although it not clear what that is referring to.
258. An action note [CEC00875417] dated 27 May 2009 noted that members' views were sought on how they interfaced with project. There was a suggestion that operational matters could be referred to a Transport Sub-Committee, freeing the TIE Committee to consider more strategic issues. I think this was partly to do with the view that many Councillors had an element of tram fatigue and that they were perhaps not as engaged as they should have been. There were certainly some within the Council who did not want to see more and more tram reports coming up to the Council for reasons that may have been to do with tram fatigue or may have been more political. I think I have mentioned before that some Councillors in the Conservative and Labour groups particularly had questioned the need to have the reports. They considered the reports were hurting the project every time they came up. The Lib Dem view, and the officers' view, was that if officers came to us saying something needed to be reported back to the Council, then that was what needed to be done.



259. In fairness to other Councillors, there were some fairly technical matters, which legally needed to be looked at by Councillors but did not need to be looked at by lots and lots of Councillors: matters that would take up a lot of time, for example environmental issues or Traffic Regulation Orders. That would therefore free up the TIE Committee to deal with other things that were more strategic. The only benefit I could really see from the Tram Subcommittee was that they would take more technical matters, or matters that needed more detailed scrutiny, away to a number of Councillors who would have to give up quite a substantial amount of their time to go through them.
260. It worked a bit in that it meant that some matters were taken away, but there were people, and I do not mean this was right or wrong, who wanted to pursue issues in great detail. The Moray Feuars would be an example as their concerns about air quality were very specific. To the wider TIE committee, however, that was certainly not a strategic issue. It was felt better that the detail, as it affected the Moray Feus area of Edinburgh, was dealt with by a sub-committee. I think that probably was the right decision and I suppose it did work well, but we ended up going over some stuff at sub-committee and then at full committee. In terms of the project overall, I do not think the Transport Sub-committee was a significant factor in the oversight of the tram project.
261. I was sent the papers for the TPB meeting on 3 June 2009 [CEC01021587]. In terms of the Infraco contract, the contractor was of the view that circumstances were such that where there was a deemed change to the contract requirements, they were entitled to serve an Infraco Notification of TIE Change (INTC). I do not recall the issue of INTCs being raised previously, although there was the general issue of what the contractor could claim. This was not the first time the contractor had made the point that they felt they were entitled to more money or more time.
262. I do not know how many INTCs had been served on TIE by the contractors by the end of June and I do not know what gave rise to them.

263. I note that in the minutes of the May 2009 TPB (at 3.8), it is recorded that there was a lack of an agreed programme and it would appear that this was because Bilfinger Berger were not coming back to TIE with details of confirmation of the programme. I have nothing to add to my previous comments regarding what the TPB were being told in relation to the lack of an agreed programme other than there would be arguments on both sides. TIE would want the contractor to agree to a quicker programme because they wanted to get the project back on track and the contractor's stance was not unless they were 100% sure they could actually do what was being agreed. They did not want TIE to then have complaints or be able to claim some sort of damage against them. The contractor would be wanting to give themselves as much leeway as possible and TIE would want to give them as little leeway as possible.
264. The effect of a lack of an agreed programme was that we were not making as much progress as we hoped to make, taking away any claims for loss of time or extensions of time. Claims for extension of time have a cost attached to them as the contractor could demand more money for overheads that were running even longer. I do not know what the nature of the discussions was.
265. There is mention (at 3.9) that a meeting was organised with John Swinney and Stewart Stevenson on 7 May, although I cannot recall what happened at that meeting and I do not think that I was at that meeting. Again, as I have mentioned before, I understood there were many meetings with various representatives of the Government both politicians and officials. I do not know anything other than the fact that the Scottish Government obviously wanted information on the project and TIE would try to do whatever they could to get the Government on board informally. I do not think there was anyone who realistically thought the Scottish Government, the SNP, were about to turn round and say they were happy with the project. There was a view that Stewart Stevenson was not against the project, and I guess they hoped there might be some thawing in relationships with the Scottish Government.

266. At 4.3 it is noted that some SDS design was being delayed by TIE. However, I cannot explain why, nor why designs were being redesigned. Similarly, I do not know why Siemens detailed designs were delayed, as is also mentioned in the same paragraph.
267. I do not know whether or not there were any issues with CEC processing approvals at that stage but, if TIE and the others were not taking the opportunity to apportion some blame on CEC, then I guess it probably is the case that there were no issues, although I do not know.
268. At 5.4 there is mention of design being done on Phase 1b, but I do not know why that was. I presume it was because it was felt there would be some residual value to future iterations of the tram project in taking forward 1b. At some point in the future, work that had been done on 1b up to that point would not be lost. If the same design team was kept together and all the designs were approved, there would at least be some value coming back to it when money became available.
269. There were some costs incurred on 1b which were part of the overall £545m pot. There were a number of reports by this time which said that part of the cost for 1b was included in the form of initial start-up costs and there was a payment that had to be made if 1b was not taken forward. A couple of times Bilfinger Berger said they wanted an increase in the overall price and one of the reasons they gave was that they insisted they would get an extra £3m plus if 1b did not go ahead. Those costs were known about and were part of the overall pot. The full cost of 1b was not included in the £545m, however, as it was known that it was going to be well above £545m if 1b was included. It was initially thought there were sufficient funds to pay for a good chunk of 1b and they were trying to get the most economical deal, I suppose. The cost of the tram depot would be pretty much the same whether or not you were building 1a or 1a and 1b. A lot of the costs for however many lines that are run in Edinburgh over the forthcoming decades has already been paid for. Where CEC are at the moment is that they have got some of the tram

infrastructure in place, so the cost of future extensions should be less than the average per mile to date.

270. The Minutes of the TPB meeting on 8 July [CEC00983221] note on page 7 that there was discussion of strategic options. I do not know if the strategic options had already been defined or had previously been the subject of a paper. Neither do I recall whether the paper was presented to the TPB nor who produced the paper.
271. In the reports to TS in early July 2009, the Time Schedule Report indicates (on page 41) that many matters had slipped but that recovery could be achieved. The timetable depended on the engagement of the contractor and the extent to which recovery was possible would reduce as time passed without progress. Initially that might have been a reasonable statement as, if the contractor came back on board, the programme could be full steam ahead and some, or all, of the time could be recovered. As more time passed, that statement became less tenable. Looking back in the light of what happened, it does not look at all realistic but at the time there was certainly a view that it was possible. I do not know whether you would call that Optimism Bias but the statement does not bear scrutiny now.
272. I think that if the parties had got together and worked together positively there could have been a recovery. The extent to which that was likely, clearly, was over-optimistic.
273. The programme was discussed on a number of occasions at the TPB and I do not recall discussing it elsewhere, for example with CEC officials. I do not know whether colleagues would have asked me about the detail of what they thought the estimated timescale for completion would be. It would be impossible to estimate that without there being an agreed programme and at this stage I do not think there was.
274. It became increasingly less likely that the tram could be built for £545m, as indicated in an email from Andy Conway to Alasdair Sim dated 15 July 2009

page 41  
should be  
page 38

[TIE00763898], in which Mr Conway noted that there was no mention in the minutes of the meeting of the TPB on 8 July 2009 of Richard Jeffrey's statement that "*there is no way we'll be able to build the tram for £545m*". I do not recall, however, exactly when I came to that conclusion. I recall there was a point when there was a discussion that it was clear the project was going to go over budget, and that discussion included the timing of formally notifying CEC and TS. There was awareness that these bodies had to be notified too; that was definitely in people's thinking, although I feel we waited too long before doing so.

275. The slides for the joint TPB and TIE Board meeting on 8 July 2009 [CEC00379021] stated various problems were baked in from the beginning. Those were the Risk Management Strategy, the Procurement Strategy, Design and Design Management, the appointment of the Contractor, the Contractor's behaviour and optimistic estimates. This was Richard Jeffrey's review after he had been appointed as the new Chief Executive. I did not disagree with him at the time largely because it was self-evidently true that these problems were manifest and he was detailing them in a way that they were more coherent and made sense as he explained them. I would not have come up with that wording because I would not have had the technical knowhow to analyse this. However, in as much as he was telling us what was clearly demonstrable on the ground, it did not surprise me and it did not cause me additional concern. We were already very concerned about how things were going and he was putting it into a framework I suppose.

276. The slides also noted there to be a "*lack of clear HR governance*", "*no recognisable people plan*", a "*lack of strategic clarity and individual level*", "*silos and politics, not one team*", a "*lack of clear purpose*", "*confused governance*" and "*infighting*". My understanding of the issues Richard Jeffrey was highlighting here included that there was the risk of TIE losing key staff. Clearly there were people involved in the project who had been there from early on and who knew all about the project. The project had a defined life and there was no programme of other projects that TIE would be moving on to, so these people were likely going to start thinking about their next jobs.

Indeed, possibly because of the heat that was coming to the project, they might think they did not want to be associated with it any more. Losing key staff would, potentially, seriously weaken TIE. I am not sure what Richard is referring to when he says there was a *"lack of clear HR governance"*. Nor do I know what he meant by *"The lack of strategic clarity and individual level"*. His mention of *"Silos and politics, not one team"* I believe refers to the arguments between the SNP at national and local level not supporting the project and every time a vote came up we got it through with the backing of other political parties. I think the mention of politics is related to that but I do not know what the reference to silos is. There are different departments within CEC and there were obviously CEC and TIE and there was an element of tension between the two. I suspect the reference to the *"not one team"* approach goes back to what I mentioned earlier regarding the view CEC officials had about not being informed properly and clearly and not getting sufficient information from TIE. There was maybe a bit of second-guessing going on. I am not sure what he was referring to by the *"lack of clear purpose"*. The purpose clearly was to build a tram, I thought. *"Confused governance"* was a feature that has been mentioned on a number of occasions and was not clear to me, although I think that probably relates to the issues around Lothian Buses and TEL, as to whether Richard was going to become the Chief Executive for the buses and trams or whether they were going to be staying separate. There was a tension and infighting between people at that level. That could relate to either TIE and CEC people infighting or TIE and Lothian Buses people.

277. The TPB approved Option 2 because Option 1 had not had any success. They thought it was going to be the best way of moving things forward and the other options were considered unlikely to provide a successful remedy or would be so disastrously expensive as to be unacceptable. Termination of the contract without good reason would have potentially been phenomenally expensive. Option 2 stood out as the best way forward to my reading of what was given to me. It might have been that others would have taken a different view and I have looked at subsequent papers provided and know there were other views floating around. I do not think that they were brought to the table

so that was the recommended option. It may have been that the information we received was slanted in that direction, I do not know, but looking at those options I found it easy to agree that Option 2 was the preferred option.

278. I think TIE should have been using these procedures at an earlier stage.
279. My recollection was that there had been some discussion between TIE senior officials and CEC senior legal people to challenge each DRP as it arose. They felt that they needed somebody else as they were losing confidence in DLA. I remember having a conversation with Alastair Maclean, CEC's Head of Legal, where the issue of McGrigors being involved was discussed and my impression was that TIE thought it was a good thing and he was quite happy with that. My recollection is that I thought that he either initiated it or was certainly involved in a discussion that led to the employment of McGrigors. Subsequently, from reading later papers, it looks like it was more TIE's idea.
280. On 10 August 2009, I convened a meeting of the Tram Sub-Committee of the Transport Infrastructure and Environment Committee, as detailed in the Notice of Meeting and Agenda [CEC00455402]. It is noted that an update report on Edinburgh Trams would be circulated and there would be a verbal update from the Director of City Development. The main messages were regarding Traffic Regulation Orders, mitigating the impact on businesses, the closure of Princes Street, depot progress and a governance report that was to come to CEC. It does not appear from the minute that there was an increased concern, although we were in the territory of everybody being concerned about the project. Things like the impact on business, the closure of Princes Street or whatever, were all big concerns.
281. On 13 August 2009, Richard Jeffrey of TIE wrote to Councillors/members of the Board [CEC00679723] to inform them about the significant developments in the relationship with BSC and TIE, namely that BSC were not happy to start works on Shandwick Place unless this work was undertaken on a cost plus arrangement. I do not recall if I fed this back to other elected members. I am likely to have fed back to the Council Leader but not further at that time.

282. Within the TPB Minutes of 10 March 2010 [CEC00379020], there is a suggestion that the PSSA paved the way for BBS to claim further additional costs in respect of other on-street works, such as Shandwick Place, by changing the basis of payment under the contract so it was no longer fixed price. I do not have a view on this other than to reiterate what we were previously advised by TIE executives that it did not set a precedent.
283. It has been suggested to me that the report to Council on 20 August 2009 [CEC00308517] was the first report to state that Phase 1a could not be delivered within the budget price of £545m. The report noted that a revised programme and costs baseline had not been agreed. The report further noted that utility works had given rise to additional costs of £7m. This was said to have arisen from programme slippage and also additional costs associated with measured works, including "*unexpected ground conditions*". My understanding is that the utilities work was far greater than expected and allowed for. I was told fairly early on that there had been some trial digs and that on the basis of those they had made an estimate of how much utilities work was needed. They had then added a huge over-provision and included that when working up the costs for the project. I also understood that the trial investigations had not been as extensive as would have been desirable, because they did not want to be digging up the city centre only to tar it all over again. That would have made the project even more unpopular. In effect, it appears they took a shortcut to get a figure and added a good lump on top of that to make sure, as far as they thought reasonable at the time, there was adequate provision for utilities. Clearly they could, or should, have done more of these trial investigations. They should have found a way to close roads or whatever for a couple of days to give them the time to look at it. I do not know what other technical opportunities they had, whether ground radar could have been used. Clearly this was a major black mark against the planning and preparation for the project. I recall that Audit Scotland had commented on the utilities works being a bit of an unknown and the way that TIE, I think, accounted for that was to put in a bigger provision than there would normally have been.



284. I am not aware whether any utility companies offered an assurance that their data was accurate, although I cannot imagine they would. I think anybody who has ever worked in the city centre would say that they had come across stuff that had been there for years and that nobody had on their maps. It would seem ludicrous for the utility companies to offer those sort of assurances. It was speculated that there were underground chambers dating back to the Second World War and there were basements going out from shops along Princes Street underneath the road. It was well known in and around Edinburgh that there was a whole lot of stuff down there that nobody knew was there. If people got assurances I do not think that they were right to accept them. There was a gas main that they came across, for example, that was over 100 years old, which was in a dilapidated state and was very dangerous to remove.
285. The report continued to note that TIE were invoking formal contractual dispute mechanisms. It was noted that TIE had taken Counsel's opinion but, given the nature of the process and the complexity of certain issues, it was unreasonable to expect that all adjudication outcomes would be awarded in favour of TIE. Early on, TIE was very bullish about its prospects of success in the dispute with BSC, but as time came closer to the DRPs the mood music was changing. It was not quite as bullish and here we have a report saying that you cannot expect to win them all.
286. My understanding, based on TIE officers' briefings, was that things might not all go TIE's way but the balance, based on what had originally been said, was that TIE's prospects were good.
287. I noticed at the time that the bullish nature of the briefings softened and it was commented on by, I think, David Mackay. In relation to what was coming from DLA Piper, the closer we got to litigation, or formal adjudication, the less bullish they became. His experience was that legal advice was often very bullish about the position at the outset and the closer the actual court date or the adjudication date became, the more equivocal the advice became.

288. I am sure that, in view of the disputes and as noted in the report, the fact that it was not possible to accurately forecast the budget outturn caused concern. Stating the obvious, if some of the DRPs went against TIE, there was going to be greater cost and I think, when I look back now, they were possibly loath to put any figures against it in case it went out into the public domain. I do not think TIE wanted to put reports forward that said that the costs might end up being over £545m until they absolutely had to. I have a recollection that TIE was not wanting to put numbers to the outcome in case things went against them at adjudication because it was so highly sensitive commercially and politically. They did not want that sort of information going into the public domain because it would have contrasted with the view they were putting across to the contractor that they were confident in their figures and the robust position that TIE was trying to hold in respect of negotiations. You do not want to show weakness if you are negotiating with another organisation was their argument, I think. In respect of the problems we were seeing in adjudications, I suggested they get more firepower in the form of Richard Keen QC who I thought would be somebody who could provide them with legal analysis and arguments they might need in prosecuting this course of action, especially if it came to court at the end of the day.
289. People were speculating about what the costs of the project might be and there were some leaks that clearly looked like they came from within TIE. That was very obvious from some of the things that were being discussed in the public domain that to everybody else's knowledge had not been discussed with Councillors, with CEC officials or with TS. Somehow, the information that was being discussed at the TPB was ending up in the public domain and that meant either people at the TPB were talking about it, or people within TIE were talking about it. TIE was employing dozens of people and I do not know if all of them supported the project. The fact that there were people within TIE who may not support the tram did not bother me. They had a professional job to do, which was what TIE were supposed to be doing. It would have obviously concerned me if people were leaking commercially sensitive information. There were some people who genuinely did not think that the tram was a good idea and there may well have been people within TIE or

within CEC who felt that there was information there which contradicted the public position, or even the position that was being presented to the TPB by senior TIE officials. The fact that there were people within TIE, or indeed within CEC, who did not agree with what TIE and CEC were doing is not surprising.

290. It caused concern that if things went wrong; the cost was going to go up and up and above the £545m and that meant we needed to do everything we could in order to win those adjudications.
291. The Council affirming their commitment to provide the whole of the tram line to Newhaven was clearly a political commitment or a desire. Politicians have on many occasions asserted that they will do things without knowing the full costs, usually for electoral purposes. I do not recall when they said they were going to Newhaven as clearly there was an option being considered to stop at Ocean Terminal, but there was a debate. There were also senior Labour Councillors based in Newhaven, or that part of Edinburgh, who wanted their constituents to benefit from the tram going there. I cannot remember the form of words but the intention to go down to Newhaven was quite important in keeping everybody together for political reasons.
292. I was provided with papers in advance of a meeting of the TPB on 26 August 2009 [CEC00739552], which contained the minutes of the previous meeting, on 29 July. At the meeting on 29 July 2009, Richard Jeffrey had been in the post for three months and gave his thoughts to the TPB on the five strategic themes, as mentioned on page 5. I missed his presentation and cannot recollect what his thoughts on the strategic themes were.
293. On page 7, the Minutes of the July meeting note that Infraco works were held up due to commercial issues arising from design changes. I do not have a specific recollection what was meant by this. I have mentioned design changes many times, but I do not know what this particular one meant.

294. I do not recall whether these commercial issues solely related to movement between BDDI and IFC drawings or whether were they related to other design changes.
295. The Minutes also suggest (page 9) that the DRP process that had been undertaken need not go all the way to a conclusion. I think that the agreement the TPB considered could be reached would be a mediated one that the parties could agree to after having established certain principles. I think my recollection of discussions was that there was a huge gulf between the two positions. The thinking was that once some adjudications came in it would narrow the scope for disagreement and the closer it got, the better the chances were for getting an agreed resolution. It was understood that that was, potentially, one of the benefits of the DRP process. For example, if a fundamental disagreement between position A and position B was resolved, we were perhaps closer to reaching agreement overall. We might not like it but we are going to be closer to it.
296. It was accepted that not all arguments would go in TIE's favour, as per the terms of the Project Director's Report. Clearly the consequence this would have for the project was that it would be negative. If some or most of the decisions went against TIE, the costs would be increased substantially and there was an awareness of that. There was discussion, whether at that meeting or another one, about what the significant DRPs would be and design stands out. There were also questions asked about the quantum of decisions going a certain way, although again I am not sure if it was at that meeting or one before or afterwards. I do not remember specific figures being given to us. There were figures mentioned but I do not remember what those figures were. Clearly it was going to be negative if any decisions went against TIE, it would mean increased costs and potentially further delays as well.
297. In the reasons for delay given in the Project Director's report for the August TPB, there is still reference to BSC failing to submit preparatory paperwork, on page 13. I do not know what the subject of this paperwork was, or which of the various listed reasons for delay would have the greatest effect.

298. Similarly, I do not know why there was a big jump for the figure for MUDFA works given to TS in the previous month, as mentioned on page 55.
299. A note in the Costs section of the Project Director's report states that TIE may not have "*sufficient contractual leverage to instruct commencement*" of works. It was said on a number of occasions that there was a clause within the contract that said that TIE could insist that works proceed even if there was a dispute about the cost. That note suggests, however, that that was not workable.
300. I do not know what was missing from the contract.
301. In the TS report for August 2009, there are references (page 46) to "*Temporary and permanent works re-design*". I do not recall what the nature of the redesign was nor why it was required.
302. I do not know for definite but my recollection is that part of the problem was that BSC would not start work until the cost impacts of the changes were agreed. I think that is the "*commercial resolution*" noted as delaying works in the table on page 46.
303. There was discussion at several meetings of the TPB of the issue of "*betterment*" in relation to recovery of the costs of the MUDFA works from statutory utilities. Betterment was the replacement of utilities that were discovered to require replacing when a hole was dug, which is more cost-effective than digging again in five years' time, or whenever. Part of the cost of doing that could then be claimed back from the utility companies. The tram project replaced thousands of kilometres of various cables, as far as I am aware, and part of the cost of that could be claimed from the utilities.
304. TIE officials had to pursue recovering a proportion of those costs. I do not think we ever got as far as sending the bailiffs round, but there was a measuring of what was done and agreement that bills would be sent with an

expectation they would be paid. I recall that it was a slow start and then money started to come in from various utilities for betterment. There was one they did not have much success with until quite late on, I think BT, who were slow to pay up.

305. There is a statement on page 7 of the minutes for the TPB on 29 July 2009 that Steven Bell was to prepare a summary statement for the August meeting of the TPB of the outstanding areas where betterment would arise. I am led to believe, however, that there is no such document in the papers for the next meeting or that is referred to in the minutes of that meeting [CEC00848256]. I find the wording of this slightly odd because I would not have thought there would be specific areas where betterment would arise; it would happen everywhere there were utilities. It might be that at a particular point in time we were working on a certain street and therefore we could send them a bill for that street. My recollection was that over the course of the TPB there were sums of money associated with kilometres of cabling or pipework or whatever, that had to be claimed back from utilities and there were discussions about how much betterment there was. I do not recall Steven Bell preparing a summary statement for the August meeting but I recall that there were summary statements prepared or summary positions reported to the Board on a number of occasions. Again, it is strange that it is not in the papers.
306. I was provided with papers in advance of the meeting of the TPB on 23 September 2009 [CEC00848256]. In relation to progress, the August minutes record on page 6 that, "*Steven Bell reported that progress remains slower than desirable for the Infraco works, largely due to ongoing contractual matters*". I do not remember the exact details of the discussions regarding performance or my views at that time, but the whole thing was overshadowed by the fact that we were in dispute with the contractor. The relationship with the contractor was poor and everything related to that set the context. The fact that progress in the Infraco works was slower than desirable was no surprise to anybody, I suspect.

307. The August minutes also record on page 6 that works on the Shandwick Tramstop had not started due to ongoing discussions with BSC regarding treatment of on-street sections. I do not recall the detail of the disputes that were holding up works in Shandwick Place. It fits in with the whole narrative of the dispute regarding what costs Bilfinger Berger thought they should be paid.
308. In September 2009, the Report to TS notes (page 57) that it was expected that programme recovery could be achieved in respect of the majority of items. I do not know what the basis for this view was other than that some recovery was felt possible if the relationship became more positive. My use of the words "some" and "if" summarises my views and the extent of my confidence.
309. In the TS Report for September 2009, there is a note that the fact matters had entered DRP meant that TIE could instruct BSC to progress. The significance of the DRP was that when there was an outcome to that process, a precedent was set for how costs were to be attributed and how much they would get paid for certain types of work or places of work. I think, as I mentioned earlier, it was hoped that resolution of those decisions would close the gap between the two parties about more than just that specific aspect. How the adjudicators were looking at the language of the contract would bring the parties to a similar view on how the contract actually worked and therefore lead to a settlement of the dispute, positive or negative. There was discussion as to whether this was likely to make it possible to break the deadlock and in some ways that was the main purpose. It started off with TIE holding them to the contract as they believed the contract said one thing, to them being not quite as confident but still thinking that the contractor was 'at it'. TIE felt it would bring them together and hopefully, they would want to get on with the project and get it done. I do not recall what the cost basis of work to such an instruction was. I think it would have been explained at the time but I cannot remember. The giving of such instructions was the subject of consideration at the TPB but I do not remember it getting to the stage where it was put forward as a recommendation. I have subsequently read other

reports which said that TIE did instruct the contractor to move ahead, but I had forgotten about that. I know that it was discussed at the TPB but I had not remembered that it had been taken forward and an instruction had been given.

310. In saying that, I still believed that Bilfinger Berger were being unreasonable and seeking to take maximum advantage as this was the view coming from TIE and the non-executive Directors. Obviously, as the adjudications came in saying that they had won and we had lost on certain adjudications, Bilfinger Berger had more grounds for arguing their case. However at the same time, while they were having success on the principles, the adjudications also demonstrated the contractor was overcharging in some respects.
311. Despite all the problems I have discussed in earlier months, the relevant section of the TS report begins on page 32 with reference to the appointment of direct BSC resources and the final appointment of package contractors. This was not, in my view, really the issue; it was the commercial position of BSC. The real issue was that they were trying to get as much as they could.
312. There is reference on page 33 of the September 2009 TS report to a "Challenge Process" to which possible disputes were subject before referral to DRP. This process involves getting a team of lawyers who have not previously been involved to examine and test the assumptions made by the lawyers already involved on both sides. In putting those assumptions and arguments to the test, that team of lawyers would carry out some sort of pseudo adjudication to find in favour of either side. Those adjudications would then be considered and arguments would be reorganised to try and achieve the best outcome.
313. Again in the September 2009 Report to TS, there is a statement in relation to design that "*This slippage has been addressed as part of the re-calibration of the programme. TIE is identifying and implementing opportunities to mitigate the impacts of this slippage*". I do not know how the slippage had been addressed as part of the re-calibration of the programme however.



314. Similarly, I do not know if opportunities were identified to mitigate the effect of the slippage, if any were implemented or, if so, how successful they were.
315. I also do not recall how long works at Shandwick Place were held up as a consequence of the disputes, as mentioned within the Minutes of the Transport, Infrastructure and Environment Committee (TIEC) meeting on 21 September 2010 [CEC01891463] and the Minutes of the TIEC meeting on 8 February 2011 [CEC01891622].
316. I was provided with papers in advance of the meeting of the TPB on 21 October 2009 [CEC00842029]. I was not at the meeting but I recall at other meetings we were given some information about the nature of the disputes, covering issues like extension of time and design.
317. There is a note on page 8 of the September TPB Minutes that Steven Bell was to prepare a summary report to the next TPB outlining areas of dispute within the current supplementary agreement arrangements [CEC00842029]. I believe, however, no such document is included with the papers for the October TPB meeting despite the fact that it was covered in his Project Director's review. I do not recall being provided with such a document as I was not at the meeting. I do not know if anyone else requested it and whether there was an oral briefing.
318. Similarly, as I was not there, I do not know what the position was in relation to the Supplementary Agreement for the Infracore works.
319. I do not recall it being discussed at meetings of the TPB other than in relation to the PSSA.
320. I was provided with papers in advance of the meeting of the TPB on 18 November 2009 [CEC00681328]. On page 9, the minutes for 21 October are the first to set out bluntly that BSC refused to carry out on-street works without a supplementary agreement entitling them to payment on a cost plus basis. I do not remember what specific briefings or discussions there were at

this TPB, but the lack of on-street working was noted and discussed at previous and subsequent meetings. It is no surprise from papers I have read for preparation of this statement.

321. Delays, the lack of on-street works and their causes were part of a range of disputes with the contractor, but I do not recall the specifics of the causes for the on-street issues. Delays were evident from the TPB updates on progress and this was one of a number of different disputes.
322. Despite the recognition that there was a refusal on the part of BSC to undertake works, the Minutes for October 2009 also state that there had been no on-street works due to lack of agreement on programme, suitable sub-contractor arrangements and completion of final design assurance checks. In the Minutes for October, Steve Bell is charged with preparing a quarterly report on betterment contributions for MUDFA. My understanding of this was that the Contractor did not want to commit to things that might result in them being held responsible for not making certain timescales, which would be part of why there was a lack of agreement on programme. I remember there was information, or discussion, on the sub-contractors' arrangements being unsuitable. I cannot recall the detail of that, although I suspect it was so that BSC did not have liability if the contract was terminated. I do not recall the final design assurance checks and I do not know if they were reported to full Council. I would not necessarily have expected that sort of level of detail to be reported to the full Council.
323. I think the Board received several updates on betterment contributions. I have a distinct recollection of this being reported and who they had got the money from and who they had not.
324. The minutes for the meeting which took place on 18 October 2009 also noted (page 7) that there were discussions with Carillion regarding their exit from the contract. The MUDFA works were said to be 98% complete. My understanding of why it was thought necessary and appropriate to make the change relates back to the issue of Carillion not performing and being more

expensive. Quicker progress and cost savings from using somebody else could have been made. My recollection is that there had been packages given to other companies before then. The discussions with Carillion were ongoing but they had effectively stopped in several areas and other people had taken over. The 98% referred to is not all the work of Carillion; they had done the vast majority of that, but there were other people by then working on parts of it.

325. I am led to believe that in the table on page 40 of the November report, all the figures showing the cumulative fall behind schedule (the right hand column) are inaccurate. The same is true of the table in the December Report ([CEC00416111], page 52), the January report ([CEC00473005], page 53), the February Report ([CEC00474418], page 33) and the March report ([TIE00894384], page 34). I do not recall that this was picked up at the time. Obviously, as part of the preparation for this statement, I have compared figures which indicate slow progress and which would have been of concern, but I assumed this was reflective of the dispute. Therefore, if we were not expecting to see progress and it showed that there was no progress that would not have been inconsistent and would not, therefore, have been of greater concern than it might otherwise have been. It would cause concern if the figures contradicted what we were being told, as in if we were told that there was being progress but there was no evidence of any.
326. I do not know who was conducting the review regarding Carrick Knowe and Gogarburn, or what considerations were applied.
327. I do not recall if there was discussion of the issues in relation to these disputes and whether certain matters constituted "Changes" under the contract. In relation to the specific DRPs, there was very little discussion about how TIE intended to take on those issues. They would have intended to contest them quite clearly but how they were going to contest was not discussed at the TPB.

328. I am sure it was a source of concern that, by the time of the November 2009 report to TS, it was apparent that nearly all the risk provision was exhausted and the Infraco works were only 10% done (pages 18, 40 and 61). I do not know that it was discussed in relation to the Infraco works specifically. The fact that we had exhausted nearly all the risk provision, and we were only where we were in the project, was clearly a concern.
329. I cannot say that I would or would not have recognised that the attribution of risk allowance was or was not in relation to the design issues. I thought of the issue of the movement between BDDI and the IFC drawings as one of the DRP issues and I was aware that there was, potentially, a significant sum associated with that DRP outcome. I knew that that was one of the issues that was being taken through adjudication.
330. I understand that in November 2009, DLA provided the Council Solicitor with an "Overview of Adjudicator's Decisions" [CEC00479382], in relation to decisions dated 16 November 2009 by Mr Hunter on the disputes relating to the Gogarburn and Carrick Knowe Bridges. I am pretty sure that I did not get a briefing on this at the time and it was only subsequently when I asked TIE officials, I think Steven Bell, what had happened in relation to that adjudication that he told me that it had gone against TIE. I remember at the time being surprised that was me just hearing about it. I have read the decision for in preparation for this statement and it is very clear that the TIE position got a real hammering. I do not know in legal terms what constituted this, but it is very clear that TIE lost the principle and it was a big issue. Having said that, I do not remember a big issue being made of it in the TPB, I remember having to ask what had happened. It might have been mentioned at a meeting that I was not at, or at the end of a meeting that I left early from, but I certainly had not picked up on it until I asked Steven Bell. I believe there is mention at some time of a decision that came out on, say, the 16<sup>th</sup> and the minutes of a TIE or TPB meeting on the 18<sup>th</sup> state they are waiting further clarification of that adjudication. This looks to me, looking back down the years, that there was a bit of orchestration about that. I cannot say that there definitely was

because I do not think you can prove it, but I was concerned about the design issue at the time.

331. I did not read those two decisions at the time. As I have previously mentioned, I read a couple of the decisions that had come out within the first dozen or so and they seemed to bear out what TIE had been saying but I did not read others at the time. I have read the one that was provided for this statement and it is very clear and it is very bad for the tram project.

## Events in 2010

332. I believe an opinion from Richard Keen QC on the interpretation of the Infraco contract [CEC00356397] was given in the course of dispute resolution on 14 January 2010. 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 of the Infraco contract 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 Council Solicitor and CEC legal officials on 12 April 2010 [CEC00356396]. Neither members nor I ever receive briefing from CEC officials or TIE on this opinion.

333. As far as I am aware, I was the person who asked that TIE consider employing Richard Keen QC as I was concerned at the way the DRP process was going. I wanted to ensure that there was top level legal assessment of TIE's position and an ability to take that forward in adjudication, presentations, court cases or whatever. In hindsight, I think that CEC should have sought external legal opinion before the contracts were signed, as I have said already. I think that I did not consider the option of CEC getting separate

legal advice at the start of the DRP process because I did not have the legal, governance or project management background to recognise the significance. As I have mentioned already, I spoke to Alastair Maclean at one point and I thought he indicated that McGrigors had been brought on board by TIE at CEC's behest and with CEC's agreement. I think CEC should have been looking to satisfy themselves that robust preparations were being made for the DRP process and I recall that view being expressed by CEC officers. They were concerned about it, it was on their radar, and whether they felt that it should have been separate or they were just exhorting TIE to get somebody in to have a look at it, I do not know.

334. I am not qualified to say why parties had differing interpretations of the contract. What I can say is that it has subsequently been commented on, or questioned, why the parties went down the route of a bespoke contract which had clauses that had not been tested in adjudications or courts before. I understand there is a standard form of contract that is used in a lot of civil s type contracts and I do wonder why they decided to go for a bespoke one.
335. I do not recall TIE or CEC officers ever reporting to CEC in detail on what was covered by the price in the original contract, nor why departure from that was necessary.
336. I am now aware that in January/February 2010, CEC appear to have instructed their own legal advice from Dundas and Wilson. This is detailed within emails dated 2 February 2010 [CEC00479797], 10 February 2010 [CEC00480029], and 12 February 2010 [CEC00450359], and a Report from Dundas and Wilson on Tram Infraco Contract dated 12 February 2010 [CEC00551307]. I was informed of the underperformance warnings, which is what came from that advice, via the TPB. I do not recall being advised that it came from Dundas and Wilson, nor where it came from. I was just led to believe that this was something else they could potentially use to further the cause of TIE and CEC. Another part of that advice was in regard to CEC officials looking at how to get out of the contract or downscale the works, but I do not recall being briefed on that either. I have no recollection of that but I do

have a recollection that underperformance warnings came up as a possible tool.

337. I understand that Alan Coyle sent the Directors of City Development and Finance a Briefing Note [CEC00474751] by email dated 4 March 2010 [CEC00474750], setting out the estimated cost of the three options that formed part of "Operation Pitchfork". The estimated cost of completing the works appears to have been between £644m and £673m. I do not recall specific discussions regarding the different options, but I do recall there were various discussions over this period on how to move the project forward and possible associated costs, not necessarily the costs referred to in this memo as I had not seen it previously. I recall the view being expressed by TIE that BSC were looking for an unreasonably large amount without a guarantee that they would deliver at that price. I do not recall when the option of building the line to St Andrew Square was brought to me. I do recall that when it was first brought to me I was not keen on the idea but I do not recall whether there were financial figures associated. I was not keen on the idea because we had given a commitment to go to Newhaven and also because this would not have taken the tram down Leith Walk. There had already been significant disruption to the people and businesses in Leith Walk and north of there and they were not getting anything for all that disruption. I recall much later, during one of Vic Emery's first meetings, that Richard Jeffrey provided an estimate to the TPB, which indicated he thought it would be around the £666m mark to build the whole tram line to Newhaven.

338. I do not think I was aware of those specific cost estimates because I did not get the Briefing Note from Alan Coyle at that time. As I have referred to, later on, Richard Jeffrey, when asked by Vic Emery (who subsequently became the chair of TEL/TIE), gave a figure which worked out about £666m for the whole thing, which was obviously his or TIE's estimate. Clearly we knew it was going to be well over £545m but in terms of just going to St Andrew Square those figures would have appeared really high at the time given the sort of information that was coming from TIE.

339. Richard Walker of BBS sent a letter to myself, Tom Aitchison, Donald McGougan and David Anderson dated 8 March 2010 [CEC00548823] stating that TIE had sought to insist that it had signed a fully fixed price lump sum contract when, in Mr Walker's view, the pricing assumptions and the adjudications on the interpretation of those pricing assumptions indicated that this was not the case. I think even before I got the letter, although I am not 100% sure, its contents were leaked to the press. I informed the Council Leader I had received it but I did not inform other Councillors. I think a lot of information that we were getting appeared in the press and there was certainly a letter at one point that we got from BBS that did appear in the press before it actually arrived on my desk. I cannot remember the detail of this unfortunately but, to the best of my recollection, I think that the information within the letter was in the public domain very shortly after, if not by the time I got the letter.
340. I asked the Chief Executive of CEC, Tom Aitchison, for advice regarding the matters contained in the letter and was advised by him not to respond and that he would address those matters. I was advised that this was the consortium asserting their position, that it was their interpretation of events and that it was selective in its nature. The assertions were not particularly new. Obviously I would not necessarily have had all of the detail in the letter but we were many months into a dispute with the contractor and their position was restated in this letter, pretty much. Therefore it was not new in that sense and therefore it did not cause any additional concern to the general concern I had that things were going badly.
341. I was advised against meeting with BSC by senior officers in CEC and TIE. I cannot say exactly who that was but it included either Richard Jeffery or David the advice I got was that it would potentially undermine TIE if I, as an elected member of the Council, was seen to be meeting them separately. That was quite consistently put to me.
342. Clearly the project was not going well in that TIE were trying to reduce the amount cost increase, while the consortium was seeking above the headline



contracted sum. It seemed to me appropriate to be fighting them tooth and nail, as it were, to try and keep the figure to a level that I felt, based on the advice I was getting, we were in the right about. It was a commercial dispute whereby they were wanting as much as they could get and we were resisting that as best we could and by whatever means we could. I felt TIE's strategy was a good strategy. The advice I was getting within the TEL Board was that this sort of approach by the consortium was not unusual. We were told the claims based approach, putting in a bid and then trying to 'up' the amount of money they were getting by submitting claims for changes, was not unusual in civil engineering and other similar types of contract. However, the views of the independent non-executives and the views of senior TIE executives, was that Bilfinger Berger particularly, but the consortium as a whole, were doing this much more than was the norm. This was their view within the to and fro of civil engineering contracts, which appears to be a pretty confrontational or robust type of environment. TIE resisting BSC with everything at its disposal seemed a sensible part of the strategy. The idea was that by resisting firmly the consortium would be brought to the table in a more realistic way in terms of what they were looking for, as I understood. The general view I took was that if somebody was coming in and asking for a very large amount of money, it would be resisted. Equally if you want a certain amount of money, you are not going to ask for less than you actually want. To some extent it seemed normal or the culture of these sort of disputes to be doing that but with a realisation that at some point you need to get to territory where you have some common ground. Part of the dispute process with the DRPs was to try and establish that common ground. If there are fundamentals regarding the interpretation of the contract, and the distance is too great between the two parties, you have to put that to somebody independently. That was part of the approach as well. I suppose there is an element I would put my hand up to of relying on legal advice. We had DLA Piper, one of the largest companies in the UK at that time, who had drawn up the contract and the Council's solicitor had given it her support, so to speak. There was always the possibility that the legal position could be, not so much undermined, but we would not get everything we thought we were entitled to. However, as it subsequently transpired, our lawyer's interpretation of the contract was wrong. Obviously,

when the DRP adjudications started to come through and they started to mount up against TIE, concerns ratcheted up significantly.

343. The minutes of the TPB meeting dated 10 March 2010 [CEC00379020] note that Richard Jeffrey and David Mackay had provided a detailed briefing to John Swinney MSP, the Cabinet Secretary for Finance and Sustainable Growth; Stewart Stevenson MSP, Minister for Transport, Infrastructure and Climate Change; and also to senior representatives of TS. I do not know what the involvement of Ministers in the project was at this stage. Other than being told that they were meeting with Ministers and TS, I had no knowledge of what was discussed and what their interests were. Obviously it had been reported to us previously and subsequently that Ministers in the Scottish Government were very interested in keeping a very close eye on what was going on, but we did not know why, other than the fact that the project was highly contentious. I understood that TIE were doing what they could to get the Scottish Government on board at an administrative or official level given that it was acknowledged that the SNP were clearly against the project.
344. As discussed above, the action taken by BSC in early February 2009, when work was halted on Princes Street, was resolved by agreeing an adaptation of the Infraco Contract in the form of the PSSA. The minutes of the meeting of the TPB on 10 March 2010 noted that BSC were seeking to impose a new set of terms governing all on-street works, which were unacceptable to TIE, not least because, if accepted, TIE would potentially be exposed to sanction for breach of procurement regulations and it would not offer best value. It was noted that a detailed counter-proposal had been prepared by TIE and would be a key feature of the search for resolution. I do not recall, however, if the nature of the counter- proposal was explained to the Board members.
345. The purpose of the performance audits of BSC that were reported by Steven Bell, as I understood them, was to identify areas where TIE might be able to evidence breach or underperformance by BSC, which would help to counterbalance any weaknesses in TIE's legal position. I do not recall specifics of the audits at that time but I do know that TIE used audits to try

and put pressure on Bilfinger Berger and identify potential areas of weakness in what they were doing in the project.

346. My understanding, based on what was being provided by TIE, was that BSC were not seeking to mitigate delay to the construction programme caused by utility diversion delays. Basically, we were being told that was what was happening and I had no other information to go on. There is also the fact that it was a dispute and I thought BSC would be looking to put as much pressure as possible on us, both TIE and CEC. Doing nothing was creating quite a lot of bad press for the project and I considered that was part of their strategy.
347. The minutes note that TIE had expressed concerns about BSC's approach to fulfilling certain obligations, and interpretation of particular clauses in the contract and noted that Richard Jeffrey confirmed that independent legal and Counsels' advice had been analysed and had affirmed TIE's approach to these matters.
348. I believe TIE had attended a series of detailed reviews of the current financial position with CEC and TS and that a detailed financial analysis had been undertaken over a range of possible outcomes. It was, or had become, increasingly likely that the costs were going to be well in excess of £545m.
349. I do not recall what new way of working with BSC was to be adopted in order to mitigate against further dispute risk, as is noted in the Minutes.
350. The reports to the TPB generally highlighted the efforts made by TIE to mitigate claims by BSC. Looking back, I do not think that they were reliable and I do not think they gave a true picture of the scale of the difficulties the project was in. It was clearly in a lot worse a position than came across from TIE briefings. Whether the actual numbers tallied accurately with the number of change requests, for example, I do not know. I now consider that it was clearly either inadequate or misleading in terms of the way that it was presented.

351. A Highlight Report for the meeting of the IPG on 17 March 2010 [CEC00462004] noted that I had called a meeting of the Tram Sub Committee on 22 March, for which three reports had been produced. The Minutes for that meeting are on the CEC website and record that the reports were updates on branding, updates on MUDFA and updates on Infraco.
352. I was provided with papers in advance of the meeting of the TPB in 14 April 2010 [CEC00420346] [CEC00379024]. I do not recall what the next steps outlined by Richard Jeffrey and the strategy presented by the Executive Team and referred to in the minutes of the April meeting [CEC00245907] on page 7 were. I do not recall any specifics from that meeting and I do not recall any discussion about the strategy and the advantages or disadvantages of any particular course. The prevailing views at that time were that we had to keep trying to find ways within the contract provision to undermine the consortium's commercial position and bring them towards what TIE officials advised us was a more acceptable or realistic figure to resolve the dispute. It was considered that our position and the resolution had to be watertight. The view that was coming across from TIE officers was that BSC continued to be 'at it', for want of a better phrase, overcharging, and we needed to have resolve to resist this. My view was based largely on what TIE executives were saying to us.
353. I am aware that Steven Bell reported on TIE's audit of BSC's performance and that it was noted that whilst TIE Changes had driven some of this delay, there had been no clear justification from BSC as to the reasons for overall delay or any evidence of design management and mitigation of delay. I am also aware that the minutes noted that the scope of what SDS had been asked to deliver had increased substantially compared to the base scope. This was reported within the context that the consortium were not cooperating, broadly speaking, and although the specific problems were of concern, the bigger picture was the greater concern. Potentially, evidence of BSC not doing what they were supposed to do might afford opportunities which TIE could exploit in terms of getting to a settlement. The context for this was that we were fighting an argument and so the fact that there was delay, which was potentially a tactic by Bilfinger Berger as I understood it, was not a surprise and did not cause

particular concern. It potentially offered opportunities because if they were in breach of what they are supposed to be doing in the contract, that would give TIE a lever to go back to them with a demand to offset the delay or underperformance against the fact that all the utilities were not done, for example.

354. I am led to believe that Richard Jeffrey confirmed that, whilst TIE had no dispute those utility diversion delays, which were to TIE's account, caused substantial delay to the construction programme, BSC had not demonstrated that they had effectively sought to mitigate delay. I do not think I have the technical knowledge to comment on whether BSC were or were not seeking to mitigate delay.
355. The minutes note that TIE expressed concerns about BSC's approach to fulfilling certain obligations and interpretation of particular clauses in the contract. Again, I do not think I have the technical know-how to comment on that. I was basing my views on what TIE were telling us and I was accepting what they were saying.
356. I am pretty sure we did not get any copies of the independent legal advice, including advice from Counsel, that Richard Jeffrey confirmed had been analysed and which had affirmed TIE's approach to these matters. I think I subsequently read in other documents what the legal advice might have been, but I do not recall at that time that there was anything presented to us. My recollection for the project as a whole was that there were not very many occasions, literally one or two, where we had anybody from a legal background explain anything to the TIE, TEL or TPB and give their view.
357. I believe that Richard Jeffrey further confirmed that TIE had attended a series of detailed reviews of the current financial position with CEC and TS. I believe that Stewart McGarrity reported that a detailed financial analysis had been undertaken over a range of possible outcomes and presented the results of this analysis to the Board. I do not recall the presentation but there were escalating concerns regarding affordability as time passed and particularly as

adjudications went against TIE. The report notes that it was unlikely that 1a would be completed within the £545m. I do not have any additional recollection to add to that.

358. Unfortunately I do not recall any discussion regarding a strategy for the way forward, amongst which a new way of working with BSC to mitigate against further dispute risk would be confirmed. What TIE were looking for was an agreement that would be binding on both parties and apparently there had been discussions between TIE and the consortium about possible figures for settling the dispute. What we were told, however, was that BSC were asking for a lot of money and they were not even prepared to guarantee that they would build the thing in the timescale; it was not a watertight agreement.
359. I was provided with papers in advance of the meeting of the TPB on 5 May 2010 [CEC00245907]. The minutes of the meeting on 14 April 2010 note (page 6) that MUDFA works were 94% complete. Six months earlier, in the October 2009 minutes, they were reported to be 98% complete. I do not recall an explanation or discussion as to why this percentage had gone down over the period.
360. The minutes for the meeting on 14 April 2010 also note (page 7) that a progress report was given by Susan Clark, however I do not recall that report.
361. On page 9, the Minutes note that the project budget increased to £530m, but I cannot recall what the reason for that specific increase was. It appeared to me that the budget was being made to expand as the risk elements crystallised.
362. I do not know if this is the normal way to manage risk in this context, nor what else could have been done.
363. The May Project Director's Report states (pages 18 and 19) that works could not be started on street where sites were available, as BSC had failed to

satisfy their contractual obligations. I do not recall what those obligations that BSC failed to satisfy were.

364. I agree that this seems at odds with the statements elsewhere that the problem was that BSC refused to work on street without a new agreement.
365. I do not know if the problem was a refusal to work by BSC or the fact that they had not done works required to enable a permit to be issued
366. The May 2010 report also indicates (page 31) that it is apparent that SDS were causing problems but I do not know what the problems were. Obviously, from previous and subsequent reports, work was not being done as quickly or to the standards required. I would have taken it at that time that the problem was that SDS were not submitting the designs completed to the required standard in time. That was the context for SDS problems throughout the project to the best of my recollection. I do not recall if other problems were referred to at that point.
367. I do not know if those difficulties were having a practical effect on the progress of the works.
368. I note that there is a reference to a design audit (page 32) but I do not know the outcome, nor if there was a written report produced and circulated.
369. There were concerns about the design programme but I cannot add anything to what I have already stated. We were advised that Bilfinger Berger were responsible by then and understood that it was their responsibility to manage the design element
370. On 16 April 2010 Richard Jeffrey e-mailed Board members [CEC00266715] to inform them that he and Tony Rush had met with Michael Flynn (Siemens) and Richard Walker (Bilfinger Berger). I do not now have much of a recollection of the relevance of Clause 80, a Clause 65 based approach for on-street, and the Siemens 33 initiative, nor what those clauses were about.

There were certain clauses that allowed TIE the right, when there was a dispute, to instruct the contractor to go ahead and do certain actions subject to various criteria being met. I do not recall hearing of the Siemens 33 initiative, and I could not say what Clause 65 was.

371. It did not unduly concern me that the Infracore were alleging they were owed £15m for work done that they had not been paid for. They were making inflated claims for the cost of works within the DRP process. The adjudicators had said they were claiming too much and their track record did not lend me to think that this was a particular concern.
372. It was my understanding there were not a great deal of positive signs from Siemens. The comments from Richard Jeffrey and David Mackay were that they sensed there was a bit of tension between members of the consortium and that Siemens were less enthusiastic about the claims-based approach and that the dispute remained ongoing. It was obviously very public, not just in the UK but throughout the industry. I think people were aware the project was going through major problems and Siemens seemed to be more concerned by that than Bilfinger Berger. Their theory was that Siemens were not as hard line as Bilfinger Berger in respect of wanting to pursue an aggressive claims-based strategy and that TIE may be able to exploit differences within Infracore to their commercial advantage. They considered it possible that Siemens and CAF would decide they wanted Bilfinger Berger out of the contract and would bring in somebody else.
373. I think Richard Jeffrey's position seemed plausible, based on the fact that he had come in with a clean sheet as far as the project was concerned, after Willie Gallagher had left TIE. He was not responsible for anything that had happened before and had done his review. If there were problems in TIE's position, I felt that we could rely upon him, as the new Chief Executive, and with experience in construction and civil engineering, to identify and highlight them and give us a realistic, objective view on where we were. I was looking at him as somebody who I would expect to provide us with a balanced view and to be actively seeking solutions and compromise. David Mackay, who



was the Chairman at the time, was very supportive of Richard Jeffrey and of what Richard was saying. There was therefore a very strong steer from the Chief Executive and Chair that we were going in the right direction.

374. With the passage of time, I cannot remember exactly what was discussed at the meeting, but the general view was that we should continue to fight on the legal points and seek to improve TIE's commercial position through any and every means available within the contract. The object was to bring the consortium to the table at a more acceptable price, but I do not recall what specific steps were discussed at that stage.

375. I am aware that Richard Jeffrey wrote an email to party leaders (namely Jenny Dawe, Ian Whyte, Steve Cardownie, Andrew Burns, and Steve Burgess) dated 19 April 2010 [TRS00010706] setting out TIE's position on the main matters in dispute. This email was forwarded to me as a member of the TPB shortly thereafter [CEC00245727]. In the email, Mr Jeffrey noted disagreement over the original "*fixed price' contract*" and that BSC were "*refusing to get on with the works in an attempt to coerce us into agreeing to change the form of contract*". He continued that he "*would not allow the city to be held to ransom*". In relation to the adjudication decisions, Mr Jeffrey noted that: "*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*". I suppose this email was a public relations exercise as much as anything else. I felt at the time that there was information coming into the public domain through the press which was quite critical of TIE's position. Most peoples' assumption at that point was that the consortium were selectively briefing journalists and what was out in the press was that they had won these adjudications. Richard Jeffrey was trying to; I suppose, counterbalance that public perception and offer some reassurance to these Councillors. I am not quite sure if it was perhaps cosmetic because Jenny Dawe would have been receiving briefings as would Ian Whyte and Andrew Burns from their colleagues on the TEL Committee about what the

position was. Steve Cardownie and Steve Burgess should have been receiving briefings either from their representatives on the TEL Board or from CEC officers. To some extent Richard is putting down in writing what they were briefing people who were part of TEL. I think at the time he was making the case for the TIE position and the course of action being taken by TIE. He was trying to state TIE's case when he mentions BBS trying to hold the city to ransom, looking for extra monies that they were not entitled to and there were definite arguments that supported that.

376. The email mentions legal advice having been received from a number of sources, but I did not see that advice and I did not give consideration around that time to whether CEC should seek its own legal advice. As I have mentioned, I subsequently had discussions with Alastair Maclean when he became CEC's Head of Legal, but I do not think that was at this particular time.
377. I have mentioned before that I sought and saw two adjudication decisions as a TPB member. I did not regard the position that we were not going to get to see the adjudication decisions as satisfactory. TIE were very resistant to the idea that I would get to see the adjudications, and I do not know if anybody else asked. I had to insist on seeing them and the ones that I did see had borne out what I was being told in the TPB and TEL Board. To that extent, I was satisfied by what I was being told. We were advised that to put the adjudication decisions to members or into the public domain would prejudice TIE's position. This, we were advised, was not because of what was in the adjudication decisions themselves, but because if they were put in the public domain, TIE would be open to freedom of information requests around the legal advice, which would be exploited by the consortium. It was reported to us there was a lot of discussion with the Information Commissioner because there were a lot of freedom of information requests coming in. It was considered that if that information was allowed in the public domain then the Rubicon would have been crossed, so to speak. Anything to do with that would then become pretty much fair game for information requests. It was not

a concern about the adjudication decisions themselves, it was a concern that the strategy TIE were looking to employ going forward would be exposed.

378. As I understood it, my position as a Board member was more strategic with responsibility for oversight of the officers. It seemed like the right thing to do, to dip in to what they were saying from time to time to satisfy myself that it was correct. This particular issue was so important, so central to what was going on, that I felt it was at a point where I wanted to press the issue. I do not think I had any reason to doubt what they were telling me, but I felt a responsibility to check certain things out from time to time. What also prompted me on that particular issue was that I had been waiting to hear about a couple of adjudications on what were considered to be very significant principles regarding the design changes. When those adjudications came in, very little was made of them and I had to ask what had happened. It was only when I asked that I was told we had either lost them, or lost them on principle. I felt unhappy that had not been brought more clearly to my attention. I do not know if it corresponded with a meeting that I missed, or if it was because they were seeking further legal advice on challenging them, or whether the presentation of the adjudication decisions in that way was done in order to minimise the significance of them. There was just something there that made me want to have a look and see what was being said. It was something I was not entirely comfortable with.

379. I cannot remember if we were aware at the time of a meeting between TIE and BBS on 21 April 2010 in Carlisle, though we certainly became aware. It was all very 'hush-hush' that such discussions were going on or had taken place and I cannot recall whether we were told that this was going to happen before or after. Along with a number of other recipients, however, I did receive emails from Richard Jeffrey on 30 July 2010 [CEC00387018] and a further one on 4 August 2010 [CEC00247389] referring to it.

380. The minutes of the TPB meeting on 10 June 2010 ([CEC00223543] (page 7) note that an independent expert review of the programme had been

10 June 2010  
should be  
2 June 2010

conducted and that it had concluded that delivery of Phase 1a could be achievable by December 2012.

381. On 24 June 2010 the Council were given an update on the tram project by means of a joint report by the Directors of City Development and Finance [CEC02083184]. The report stated that "*The essence of the [Infraco] Agreement was that it provided a lump sum, fixed price for an agreed delivery specification and programme, with appropriate mechanisms, to attribute the financial and time impact of any subsequent changes*" (para 3.3). It was further noted that "*Whilst there have been disputes on design-related matters ... it is normal in any large construction project for the scope of the project to change in material ways, for a variety of technical and commercial reasons*" (para 3.10) and that "*The outcome of the DRPs, [Dispute Resolution Procedures] in terms of legal principles, remains finely balanced and subject to debate between the parties*" (3.12). The Report also stated that it was "*prudent*" to plan for a contingency of 10% above the approved funding of £545m because of the current lack of clarity on programme and cost. Generally speaking, the report summarised what I understood the position to be from what was being reported at the TPB and TEL Board meetings and the briefings I was getting from CEC officers. The report expands on the phraseology of the term "*lump sum, fixed price*" and to some extent allows for, or includes the exceptions and changes to scope. It was clear that the project could not be described as fixed price in the sense by which most people, me included, would have understood it originally. There was, to my understanding, an element that it allowed for some movement. Going back to what I mentioned earlier about it being 95% fixed, rather than 100%, so there was always an element I understood that could vary.

382. I do not consider that members of the Council were adequately advised and informed, both when the Final Business Case was approved and prior to the Infraco contract being signed, of the risk or likelihood of the "*scope of the project to change in material ways*", with a resulting increase in cost. We

were not adequately advised in a form or a way that we understood the risks properly.

383. I look at the phrase that the Dispute Resolution Procedures were "*finely balanced*" and, as a general summary, and what would have been my view at the time, I think it is potentially misleading. I know that there were obviously options to challenge some of the decisions, so it was not necessarily the final position. TIE could have gone to court to challenge the adjudication of a DRP but, as became clear later on, the grounds were not very strong. Within the adjudications were elements on principle and elements on cost. TIE had lost several major principles but they had managed to reduce costs on specific items. You could argue that it was finely balanced but in terms of a general statement to members about the position of the disputes at the adjudications, that is not a fair or balanced summary. I think that "finely balanced" is a very nuanced term that does not really give a true picture of what had happened, although it would not be completely incorrect to use that.

384. I thought it was sensible and prudent to have a contingency, but at the time, and I still think this, I thought it was less sensible to tell the consortium that we were putting aside an extra £55m, it seemed a crazy way to do business. I was not clear that it could not be built for £600m or thereby, which was the approved funding of £545m plus a 10% contingency of £55m. I took from the advice of CEC officers that £600m was a prudent and realistic figure and I deferred to their expertise. I think if TIE or CEC officials thought it was likely to cost a lot more they should have reported that to members, though not necessarily in the form of a report to CEC. That would expose the weaknesses of the position to a commercial organisation that was looking to get as much money as they could. As I have said already, this is a daft way to run things. Clearly it would have affected the ability of members to come to a fully informed decision.

385. Generally, reports of cost overruns came after the difficulties had occurred. I would question whether members should have been advised at an earlier stage. My personal view, obviously not about any individual, is that a report

with no questions or figures would have been of questionable value to Councillors. It would have been taken apart by Councillors if they were told that there was a problem but it was not known how big it was. That would not have worked either, so I am not entirely sure what the best approach would have been. Indeed, had a report gone into the public domain, or gone to members, stating there was going to be more cost, but it was not known how much it would be, there might have been a knee-jerk reaction. The way in which reports were produced is, I think, key in anything like this and I do not know how extensive the detail could have been. It is also difficult regarding the DRPs, as I mentioned earlier, as showing your hand to the contractor does not seem a very sensible way to conduct commercial negotiations. The contractor would clearly have known what the outcome of the adjudications were but you do not want to be telling them what TIE's strategy or tactics would be to either recover those positions or to find other ways to mitigate them. I would question whether a Council as a public forum was the right body in which to discuss these things. Later on, after the mediation, CEC officers effectively took Councillors out of the loop. Councillors got a very restricted update on what was happening and from the point of view of running it on a commercial basis that seemed far better, in my opinion, although from a democratic point of view it was not.

386. I was provided with papers in advance of the meeting of the TPB on 30 June 2010 [**CEC00223543**]. I do not recall that there was any change in approach to BSC about this time in view of the decisions of the adjudicators in the disputes.
387. The Minutes of the meeting on 2 June 2010 note (page 6) that Richard Jeffrey outlined the current position regarding the options available in relation to BSC and that two options were being worked on. I do not recall the detail of what the two options were, but there was a discussion at various points about what was the best approach: whether to go through the DRP process; or to terminate the contract on a mutually agreed basis, or by default. Those were discussions at TPB as I recall.

388. The Minutes also note (page 8) that a contract was to be let for utility works in Baltic Street. It was a major concern that some of the utilities work was way behind schedule, but it was not a particular concern that they were awarding a contract at this stage. It was something that needed to be done.
389. The papers for the meeting on 30 June 2010 included a letter from David Mackay to Marshall Poulton dated 8 June 2010 formally advising CEC that the contract could not be completed within the funding envelope of £545m. It had been reported since August 2009 that this was unlikely to be possible and, as I recall, Donald McGougan was conscious in his role as Director of Finance that CEC had to be informed when it was clear it was not going to be able to be made within that figure. I think it was Donald McGougan who brought it up and insisted a letter be sent.
390. As far as I can recall, Marshall Poulton was at the meeting and I think he made comment about the making of the decision but it was more about the timing. I cannot remember enough of the detail of what his participation was.
391. The PD report for late June 2010 (page 24) notes that there were two such independent reports to the effect that recovery was possible. I do not recall if these were provided to me, nor the basis for their conclusions.
392. The PD Report (page 12) also notes a new 'twin track' approach to Infracore. One of the options of the old approach was just to grind on and try and get the whole of line 1a built with the existing consortium. It was jettisoned because it was not working: costs were going up, little progress was being made and there was no end in sight. I understood that the advantages of this new approach were that it would reduce the potential for overspend, and allow CEC and TIE to review options for the future.
393. The following paragraphs in the report refer to the outcome of the adjudication decisions, and I do not consider that they accurately represent the position. The position was far worse than had been anticipated prior to going to the DRP process. The paragraphs only detail what was said, rather than

including what was not said, and are very narrow in context. Generally, it was not going nearly as well as had been hoped.

394. I do not recall if there was discussion about what could be said of these decisions in the report to TS or others.
395. The PD report (page 14) notes that I had called for the termination of the contract with BSC (if there was not more progress). I did not inform the Board before making the statement, which had actually been made in an interview I had with the Editor of the Evening News. It was not a written prepared statement. The reasoning behind the suggestion was that the project was not going anywhere; we needed to get some new impetus to move it forward. That view, I am sure, was shared by David Mackay. The press reported at the time that David Mackay was asked and he basically said he understood my frustrations and concerns. In fact, it was slightly stronger than that and was a kind of supportive comment from him. My recollection is that it was not something he necessarily felt he could say, but he was quite happy that I had done so. There was no discussion at the TPB about my position. We needed to tell the contractor we were not messing about, and I obviously had a position as a politician outwith the TPB and TEL, which I could use to make that kind of statement. It was not an agreed statement and it was not discussed in advance.
396. To my knowledge, my making that public statement did not cause any problems. I suspect if there were any problems it would have been with Richard Jeffrey and the TIE officials. I only suspect that because I have clearly seen later on that there appears to have been differences between what we were being told and what was actually happening. I do not know to what extent Richard was keeping David Mackay fully informed about that.
397. I read the section at page 26 of the papers, which sets out the causes of problems in the Infraco works, as detailing a range of issues which would have variously affected different, if not all, parts of the route. I do not recall if we got any additional information.



I was provided with papers in advance of the meeting of the TPB on 28 July 2010 [CEC00244400]. The new 'twin track' approach is discussed in a bit more detail in the Minutes of the 30 June meeting (page 7). I do not think the intention was necessarily to terminate the contract or to merely cause concern to BSC. I think it was to progress the project in the best means possible and, if that was termination, fair enough. If exerting commercial pressure on BSC gave the result that was fine too. I do not think that it had to be one or the other, to my recollection, but there may have been views as to which was the better approach.

398. I am not sure what would have been done if the contract had been terminated at that time, as it would have depended on the terms of the termination: whether it would have been by mutual agreement, or by disputed breach. If it could be done legally, and CEC was in the right, obviously the costs would be lower. If it was done illegally, CEC would be sued by the contractor. A mutual agreement would be somewhere in between, depending on the strength of the relevant positions.
399. As I recall, the issue of service of Remediable Termination Notices (RTNs) was discussed quite a bit, although not the specifics. There was discussion around RTNs as another option, another way of potentially achieving a better outcome for TIE.
400. I think a guaranteed price to finish the work to an agreed point was the purpose of the discussions in the negotiations with BSC as to the second approach, as I understood it.
401. If Option A failed to produce a change, and the agreement necessary for Option B was not forthcoming, I understood that TIE and CEC would simply grind on with the existing approach until either option came back on the table or until somebody came up with another option.
402. On page 7 of the minutes of the meeting on 28 July 2010 [CEC00013703], it appears that advice had been taken on the merits of the RTN approach. I do

not recall who had given this advice, but I know from documents I have subsequently seen that it came from Dundas and Wilson. I presume it had also been reviewed by McGrigors, who were working for TIE by that point.

403. I understood that the approach being taken to the negotiations in relation to Option B was to nail down as much of the detail as possible with binding guarantees as appropriate.
404. I do not recall the means by which we, as Board members, were to be kept informed of each step of progress. I do not recall whether or not it was by email, and I cannot access my CEC emails from that time to check, although I am happy for the Inquiry to check those emails.
405. At page 47 of the TS report for July 2010 [CEC00244400], it appears to be the first time it is recognised that programme recovery is not possible, although I do not at this time understand why there was a change of heart. As a general observation, the further you get into the project without the required level of progress, the more difficult it becomes to recover the programme. At some point, you will reach a stage where it is clear that even with a fair wind you are not going to do that. I guess that whoever has put together the table or the analysis in the report has decided that there was just no way.
406. I am now aware that, on 1 August 2010, by email [CEC00473789], Nick Smith sent Alastair Maclean a document entitled "*Tram-Potted History*" [CEC00473790]. I have read this email, which notes that "*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*". This leaves me really concerned and unhappy at what I am reading, both in the email and in the document. Our expectation, as Councillors, was that senior officers would give us impartial, balanced advice and relevant information, whereas that document completely undermines that expectation. The comments, in my opinion, are profound for the tram project and for CEC as a whole. What it says about the culture of the organisation at that time,

1 August 2010  
should be  
8 January 2010

although I do not know this to be the case absolutely, I think was a view that was probably quite widely held and practised, in my opinion. It is unacceptable. It is cross-culture, in that Nick Smith was, at that time, a senior solicitor, I think, by no means the senior manager in that department, but somebody 'on the up'. He is now the Head of Legal for CEC but he was working within that culture. It additionally worries me that such a culture then becomes embedded into the future because people moving up through the organisation are going to see that as being normal and are likely to adopt the same type of approach. In some ways it could not be more profound for an organisation like a local authority that senior officers take such a view. I worked with some of these individuals quite closely, and I would say that they probably believed that they were putting the public purse, the organisation, first but they were wrong in the way that they approached it, in my opinion. The approach indicated in the e-mail is deeply, deeply damaging for the relationship between Councillors and senior Council officials. It is not that politicians are in any way shape or form angels, and I can understand why people, especially people in Councils, have a low view of some politicians, but it is simply not acceptable in my opinion to take that approach.

407. I think that it is very clear that I and others were kept on a restricted information flow. There are quite a number of documents I have read already in preparation for this statement that evidence the fact that we were kept on a restricted flow in relation to more than just minor details. I think it is quite right that minor detail should not be shared with Councillors as a matter of routine, but this was really significant information about legal advice, for example. These were the views of legal and financial officers that the project was not a lump sum to anything like the extent that was reported. In addition, there was legal advice that TIE was in a far worse position than we understood it to be. The fact that information such as that was not communicated in a balanced way to Councillors made it impossible, in my opinion, for Councillors to come to an informed decision.

408. I did not have concerns about technical information or minor details not being shared with Councillors, but I think that we were misled with regard to not

sharing more serious matters. I feel that I, personally, was misled by people that I was working quite closely with.

409. On 20 August 2010, CEC officials met with TIE representatives to consider TIE's Project Carlisle Counter Offer. I have viewed a record of the meeting [CEC00032056], which 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. 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. I cannot really say I am certain we were or were not informed about the detail of the BSC offer, my recollection is that we were advised the figure proposed by BSC was higher than was considered reasonable and without the guarantees that would have been necessary. I do not know for certain what was shared with us but I think the detail here is new to me. Obviously, we had a keen interest in what the offers and counter offers might be, but until there was something to discuss in terms of a firm offer or agreement, there was an element of there being little purpose to spending much time speculating, about what the final cost would be. There were definitely numbers going around, I just cannot say with sufficient certainty whether I did or did not know what they were or what my expectations were at the time. I obviously understood several months later, in March or April 2011, that the figure TIE considered relevant, their estimate of the cost to Newhaven, was around £666m.

410. I was provided with the papers for the TPB meeting on 22 September 2010 [CEC00013818], which contained the minutes of the meeting that took place on 25 August 2010. These minutes refer to Workstream A (page 7), which appears to be focussed on Contract Administration. In the minutes of the previous meeting in July, however, Option A appears to be focussed on termination of the contract. I do not know whether there is any significance to this. My recollection is not clear as to what exactly TIE's preferred option was.

As I have mentioned earlier, there was some discussion about what might be the best way forward as new information became available and I suppose, in some ways, all the options were on the table. I have also read documents in preparation for this statement that indicate that CEC officials considered TIE's views to be jumping around at this time. My recollection is that there was an uncertainty, or a definite fluidity, about what TIE considered to be the best option. As I recall, the preference was to get to negotiated completion, but termination and re-procurement was a real alternative. None of the alternatives were without their risks and hurdles. It appears to me from reading the Highlight Report dated 21 January 2011[CEC01715625] that there were discussions about preferred options between TIE and CEC officials, which were not shared with me. These were high level discussions about the options for the TPB and TEL, as referenced above. There were obviously discussions happening between TIE and CEC that I do not think were shared with me at that time.

411. The minutes (item 2.4) and the PD Report (page 15) note that there would probably be no further DRP referrals made. I cannot recall what further justification was given.
412. I do not really have anything to add to what is in the PD report (page 29) regarding the Contractual Strategy. Clearly, the DRPs had not worked anywhere nearly as well as hoped, so TIE were looking for other ways to improve their commercial position, such as RTNs (Remediable Termination Notices) and Underperformance Warning Notices (UWNs).
413. The minutes of the TEL Board dated 22 September 2010 note that David Mackay asked the Board to support the appointments of Richard Jeffrey as CEO Designate, and Ian Craig as COO Designate, of TEL [CEC00132866]. David Mackay made his own position clear, that he was uncomfortable about the developments over the last 3-4 months, and that this also made it difficult for the Councillors on the Board in terms of governance going forward. It is difficult to tell from the minutes what was actually being discussed, but I think it may have been the arguments that were going on at that time between

political parties, particularly Labour and the SNP, about risks to Lothian Buses from the tram project. What was being said was that any cost overruns or shortfalls in the revenue of the tram could potentially damage Lothian Buses' commercial position. It could put them at risk and they might end up being snapped up by competitors, such as First Bus or Stagecoach. There was quite a lot of political debate about the position of Lothian Buses and how it might be affected by the tram. Councillors were being asked to debate issues relating to the governance of TEL and Lothian Buses, and the protection of Lothian Buses, which may have had an impact on what the tram project could borrow, for example, or what income or costs it could share. That may be completely wrong but that is my interpretation of what he is referring to. Part of the context at the time was that Labour and the SNP particularly fighting over the same sort of areas of the political spectrum, and the tram was not winning any votes for Labour. Lothian Buses is a very popular organisation within Edinburgh, and so being viewed as protecting Lothian Buses would have been popular politically.

414. I do not think the appointments of Richard Jeffrey as CEO Designate and Ian Craig as COO Designate of TEL Ltd made much difference to the situation. I think it was a way of dealing with an emerging issue, which was who between Richard and Ian was going to be in charge when the Tram was up and running. I think it was a personnel matter, and this was a way they found of managing that at the time.
415. On 13 October 2010 [TIE00301406], BSC wrote directly to Councillors giving their views on the dispute. BSC advised that, of the nine formal adjudication decisions issued, BSC had had six decisions in its favour, there were two split decisions (with the principle found in favour of BSC) and there was one decision in favour of TIE. My views on that letter were that it was a tactical move designed to put pressure on TIE, to undermine people's confidence in TIE or support for TIE and, frankly, thereby to improve BSC's commercial position. Obviously, in hindsight, TIE's position was weaker than we thought, and our confidence in TIE was to a large extent misplaced, but at that time it looked like BSC were trying to wind up the pressure on TIE.

416. Again, as I have mentioned previously, adjudication decisions were not made available to members as it was argued by TIE and I think CEC officers that it would open up TIE to Freedom of Information (FOI) requests. They considered this would expose TIE's strategy going forward and give BBS a further commercial advantage. Clearly this affected members' ability to make informed decisions and I feel they could have been given more balanced information as to what the outcome of the adjudications meant, if not the actual outcomes themselves.
417. Within the letter from BSC there was more specific information than TIE or CEC officials had provided. The email from Mike Connolly to Councillors dated 10 October 2010 [TIE00463778] was presented in such a way as to reflect their view of what had happened, and what was happening, and they obviously did not focus on the fact that many of the adjudications had said they were overcharging. In the overall context, that is not the most important consideration but it perhaps evidences the letter was not as objective as the content purported it to be.
418. A report to Council dated 14 October 2010 [CEC02083124] noted that, at the Council meeting on 24 June 2010, the Council had required a refreshed Business Case, detailing the capital and revenue implications of all the options currently being investigated by TIE and taking into account assumptions contained within the original plan that either no longer applied or whose timescales had now substantially changed. I remember there was concern amongst Councillors about the level of detail provided, and I recall there was discussion of the implications of truncating the route. There was concern particularly about the implications for development contributions, and the income from passenger patronage, although there would have been other areas too.
419. The statement within the report that the outcome of the DRPs remained "*finely balanced*" is not an accurate reflection of where things were. I accepted to some extent the argument that there was still potential to challenge some of the adjudications and obviously parts of the adjudications had gone in favour

of TIE. Overall however, finely balanced does not do it justice; it is a phrase that is being repeated from the previous report, and it is not a properly balanced statement.

420. I do not recall any new legal advice being provided in relation to the contractual disputes. As far as I can recall none of the detailed legal advice from Richard Keen QC or McGrigors was provided to me or, indeed, to other members to my knowledge. The fact that an assertion was made, which was not consistent with the full content of the legal information available to CEC officers or TIE, meant that Councillors could not have been making an informed decision.
421. I was provided with papers in advance of the meeting of the TPB on 21 October 2010 [CEC00014055]. Within the PD Report is a note that Bilfinger Berger "*were intending to ramp down their workforce*" and I do not know if this was a response to a new TIE tactic. The report details monitoring of the sites in question, and I presume that this is in reference to any potential subsequent legal or commercial arguments.
422. I do not recall what justification Bilfinger Berger gave for this, but a general comment in their correspondence was that they were not going to work unless it was guaranteed to be paid.
423. I do not recall a specific discussion within TIE in relation to this news. It was seen as an escalation in the dispute, and people becoming more and more entrenched in their positions.
424. The TS Report for October (page 33) contains notes regarding all that had been done by way of serving notices on BSC. I think this was potentially with a view to terminating unilaterally for breach, to pressure BSC to agree a termination or to pressure them to get the works done more quickly and to the correct standard. We were trying to move things forward in whatever way we could to get to a mutually acceptable position and possibly open up other avenues to explore and improve TIE's commercial position.



425. I assume that the reference to a "*financial metric*" in the TS Report (page 31) is to the view that 70% of the project, as measured by financial value, was complete. This would be in regards to MUDFA, the utilities diversion works, and the tram vehicles being nearly completed, in what was 70% of the original financial budget.
426. I am now aware that on 4 November 2010, the Council solicitor, Alastair Maclean stated [CEC00012984] that CEC were to instruct "*our 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. I am also now aware that Mr Maclean expressed certain concerns about TIE and the legal advice received by TIE in emails dated 22 November 2010 [CEC00013411] and 30 November 2010 [CEC00014282] (and I note also an email dated 26 September 2010 from Nick Smith to Alastair Maclean [CEC00012450]). Similarly, I am now aware that, in an email dated 30 November 2010 [CEC00013550], Nick Smith stated his personal view on the performance of TIE and DLA; and, in an email from Richard Jeffrey to Alastair Maclean dated 24 November 2010 [CEC00013441], Richard Jeffrey stated that "*if the Council has lost confidence in TIE, then exercise your prerogative to remove TIE from the equation*". I was not aware of these matters at the time, although I was aware of some tension between TIE and CEC legal, as I have previously advised. I had spoken to Alastair Maclean about Richard Jeffrey being angry regarding Nick Smith's questioning of TIE's legal position, but I knew nothing of these exchanges.
427. I do not think I had any knowledge that CEC had decided to instruct their own QC at that stage. I only became aware some time later, although I do not recall when exactly. When I did become aware, I thought to myself that it was a good thing and I was pleased it was happening. When I asked for Richard Keen QC to be involved, I thought that was TIE getting another opinion of the legal position. I subsequently understand that that was not correct, and that Richard Keen QC would have been depending upon information provided to him from DLA.

428. Given that many of the dispute adjudications had gone against TIE it was reasonable to question the legal advice that TIE was acting upon. It was not clear to me that CEC officials had lost confidence in TIE as a whole although, clearly, that may have been the reality of the situation. TIE were working on the basis of legal advice, which turned out to be not very good, or worse. I was not laying the blame for the legal advice being poor or not correct at the feet of TIE officers.
429. I did not consider that CEC officials were starting to lose confidence at that time. I was not aware of some of the views that had been expressed by Nick Smith in his emails, as that information was not shared with me. Obviously, the fact that Alastair Maclean had asked for more legal digging, and McGrigors had been involved already, indicated that he was questioning the legal advice upon which TIE were basing their direction. There was also frustration being expressed at TEL and the TPB about the time it was taking for the legal views from DLA/McGrigors to come forward in terms of potential terminations.
430. Prior to the adjudication decisions, I had accepted the advice, as it was relayed to us by senior TIE executives, that our legal position was robust. I did not have any commercial or technical background to question the advice, and I did not see the independent non-executives questioning it either. At meetings, there were four Councillors, three independent non-executives, and several CEC officials, and nobody was really questioning the legal advice. As I have previously mentioned, David Anderson stated that he had questioned TIE's legal preparedness, but I do not recall him doing that at an earlier stage within a forum that I was part of. I do not doubt that he had raised it before, though perhaps in another forum. The legal advice was not being questioned to the extent that, in hindsight, I think it should have been. When I came into TIE, in 2007, I had not been involved in a commercial or private sector organisation before. The culture was new to me. There seemed to be quite a familiarity between senior people within TIE; they seemed to get on with each other very well personally. They would be quite robust in their language, and I think that was the culture that they were operating in. I did not really question

the expertise of TIE senior officers and I did not lose confidence in them until much later on.

431. Following the resignation of David Mackay, Richard Walker of BSC sent an e-mail to myself and other elected members on 5 November 2010 [CEC00013011] and attached a letter [CEC00013012] stating that the comments made by Mr Mackay in the media at the time of his resignation did not serve to progress the project and were sufficiently harmful to BSC's reputation to warrant legal action against him. The letter urged CEC to distance themselves from these comments and to request that David make a public apology. I believe a meeting took place between BSC and John Swinney on 8 November 2010. Furthermore, I believe the Chief Executive of CEC then wrote to BSC on 15 November 2010 [CEC00054284] restating that negotiations in respect of the contract must be carried out between Infracore and TIE, but indicating that CEC would be willing to meet with TIE and Infracore officials on a without prejudice basis. Similarly, I understand that on 16 November 2010 CEC leader Jenny Dawe wrote to the Managing Director of BSC to offer a meeting with CEC officers and that, later that day, Ms Dawe and Tom Aitchison met with John Swinney. On 18 November 2010, Jenny Dawe tabled an emergency motion proposing mediation as a means of progressing the tram project [TIE00306955]. To the best of my recollection, I was not aware of the proposed meeting between CEC and BSC. My recollection is that was something that the Chief Executive and the CEC Leader discussed themselves and I was not part of that loop. I cannot explain why they indicated this willingness to meet, given CEC's earlier position that it would not be appropriate to do so. I am not aware of what was discussed at the meeting with Mr Swinney, nor his views. None of these matters were discussed with members.

432. CEC should have obtained a better understanding of the dispute from TIE, not by meeting with BSC earlier. On 1 April 2010, Richard Walker wrote directly to Tom Aitchison [CEC00242156] expressing BSC's views on the dispute, and Mr Aitchison replied on 21 April [CEC00440216] stating he did not consider it *"appropriate for the Council to enter into separate discussions with the*

*Infraco*". CEC owned TIE and there were other options I think they could have employed to get a better understanding of what was going on. They could potentially have gone through TS, as an expert in the field that was not part of TIE or part of CEC, although my suspicion is that the Scottish Government did not want TS to be closely involved in the project in an advisory capacity. I think there were other ways that CEC could have increased their confidence and increased their understanding of BSC's position and TIE's position, without going directly to BSC at an earlier point. I do take the point that CEC meeting with BSC directly could have been seen to undermine TIE, which would have been to BSC's advantage.

433. I understand that Alastair Maclean sent an email to Tom Aitchison and Jim Inch dated 13 November 2010 [CEC00013289], which made reference to their meeting with Jenny Dawe and me on 15 November 2010. I do not recall that meeting and I am not sure I was at it. Obviously it would be a pretty important meeting given the timing and the context of what was happening and I think I would recall if I had been there and party to those discussions.
434. My recollection is that either Jenny Dawe or the Chief Executive told me that we were going to mediation and the contract was not going to be terminated. I do not recall being involved in the discussions that led to that decision, which I think was made by Jenny, presumably in conjunction with Tom Aitchison, Jim Inch and Alastair Maclean.
435. I was not given the accompanying paper [CEC00013290], in which Alastair Maclean noted that he had "*real concerns as to the quality of the factual information coming from TIE*" and, further, that "*CEC has limited factual information*" and was "*solely relying on TIE and TEL for the provision and accuracy of that information*". I did not know that those were his views and reading them now causes me concern in a number of ways: about the quality of the information they were getting and that he did not have better information from TIE that had not previously been interrogated. It concerned me that they had not exercised their position as TIE shareholder to get the information they felt they needed. As a lay person, my view is that if senior

CEC officers did not feel that they were getting the information they needed to make decisions, to write reports, and to brief and advise members, they had a responsibility to find a way to get that information and not to hide behind any 'governance type' issues.

436. I am now aware that, on 16 November 2010, Richard Jeffrey advised Alastair Maclean of certain serious concerns he had in relation to events at the time the Infracore contract was entered into. On 17 November 2010, Mr Maclean produced a Note for CEC's Monitoring Officer [CEC00013342] setting out Mr Jeffrey's concerns. I was not made aware of the concerns expressed that there had been a kind of a side deal done and that some senior people in TIE had possibly been improperly incentivised to do a deal.
437. At the very least, CEC's Monitoring Officer should have had some form of investigation by suitably qualified people. If it was being alleged that matters may be criminal in nature, then the Police should have been contacted, and the CEC Leader should have been informed, but I do not know if she was.
438. I note that a report to the meeting of the IPG on 17 November 2010 [CEC00010632] noted that a range of cost estimates for the different scenarios was being produced. The draft estimate for Project Carlisle varied between TIE's estimate of £662.6m and BSC's estimate of £821.1m. These estimates were for the full scheme and the report noted that the cost estimates, as they stood, indicated that delivery of the project to St Andrew Square could be delivered for £545m-£600m. We were not made aware of those figures around that time. As I previously stated, Richard Jeffrey provided a figure in March or April 2011 in response to questioning from Vic Emery that worked out about £666m. I remember commenting to Donald McGougan, who was sitting beside me at the time, that '666' is the number of 'the beast'. That has stuck in my mind, and is consistent with what is reported, but that was the first time that I had heard of that figure. Figures were not being routinely discussed in the TPB.

439. I was provided with papers in advance of the meeting of the TPB on 17 November 2010 [CEC00014175]. I think many of us were very shocked by David Mackay's resignation; I know that I was. I was also a little bit disappointed, personally, that he had not shared his thoughts or plans with me because I felt that I had been supporting him and TIE in difficult circumstances. We were taking a lot of political heat for the difficulties of the project and I was trying, as best as I could, to support TIE and I understood him to be protecting CEC's interests. I was a bit disappointed, I suppose, that I did not get any wind of it beforehand. David Mackay was a larger than life figure and, in terms of the workings of the TPB, it would be wrong to say he was a dominant figure, but he had a certain gravitas and presence about him and, if he said we were not going to do something, people would generally accede to him. Brian Cox is not that kind of character but, in terms of the workings of the TPB, I do not think it had a huge difference, but more of a personal impact on people around the table.
440. I do not recall where discussions had got to in Project Carlisle.
441. It had become clear by this stage that mediation was to be pursued and I knew by that point that Jenny Dawe had agreed with Tom Aitchison to do so. I was perhaps expecting a rough ride at that meeting because I did not know whether Richard Jeffrey had been told that CEC had made that decision. As it was, Richard presented it as his recommendation so we did not get into a debate about it. I do not know to what extent he had briefed people round the table and whether they were being polite or whatever. I was aware there had previously been dinners involving Richard and / or David with independent non-executive Directors the night before the TPB and TEL Board meetings, and I assumed that contentious issues like this had probably been pre-discussed at some level, although I do not know that to be fact on this occasion.
442. I do not recall that we were getting any more or less feedback from the TIE officers dealing with BSC than we normally got. That is to say, we were not getting anything that was positive or helpful.

443. I understand that an exploratory meeting took place on 3 December 2010 between Alastair Maclean and Donald McGougan on behalf of CEC; Richard Walker of Bilfinger Berger; and Antonio Campos of CAF; and that a record of the meeting was produced [CEC02084346]. I was not advised on what was discussed and have no views on BSC's position.
444. I was provided with papers in advance of the meeting of the TPB on 15 December 2010 [TIE00896978]. Richard Jeffrey raised the issue of mediation, as referred to in the November Minutes, in the specific order of events. I assume that he had been contacted by Tom Aitchison or one of the other senior officers of CEC to advise him that CEC planned to go down this route and that for reasons of presentation he wanted this to be seen as TIE's initiative. I have no idea what was said by the Scottish Ministers or TS. I do not recall any discussion of the outcome of the adjudication on Landfill Tax (page 16), and I was not provided with copies of the decisions on this and the other adjudications.
445. On 16 December 2010, Tom Aitchison provided the Council with an update on the refreshed Business Case [CEC01891570]. 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. It was noted that mediation discussions involving CEC and BSC would commence early in the New Year. By their nature, mediation discussions had to be conducted on a confidential basis and it would not be possible to report in detail on the mediation process until it was completed or until possible decisions emerged, which required consideration by the Council. 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 tram project (Minutes [CEC02083128], page 22). I took it that there was a reasonable possibility of a line being built from the Airport to St Andrew Square within that funding commitment, given that it was the view of CEC's Chief Executive.
446. Rather than considering whether members were provided with sufficient detail in the report to enable them to come to informed decisions, I think it would be

better to consider whether the information was fair and balanced, given what was known or suspected by CEC officials at that time. I do not think the report reflected officials' concerns regarding the information supplied by TIE. Given that it did not reflect those concerns, I do not think members were provided with sufficient detail to come to an informed decision, although I do not know if it would necessarily have changed the decision.

447. I was not consulted in relation to CEC or TIE's proposed approach to the mediation.
448. The independent review of the Business Case requested by members was carried out by Atkins Consultancy. My assumption at the time was that there was a concern that the information we were getting from TIE and CEC officers was not impartial and was questionable in some shape or form. There was obviously the change in the scope of the route, which would have a significant impact on patronage figures because there would be nobody coming from north of the city into the city centre. Similarly, people going to the north from the west were not necessarily going to take the tram as it would not take them to their ultimate destination, so they might opt to get a bus that would do so. The patronage figures needed to be looked at, and members wanted somebody else doing it. It is unlikely that such a review would have had merit at an earlier stage as we were talking about patronage figures on the truncated route. The fine detail of what can be done with an assessment of patronage figures is notoriously complex and depends very much on assumptions. I know this happened with the Stirling/Alloa/Kincardine (SAK) Railway and, subsequently, the Borders Railway. It depends what assumptions are put in. Getting this done by another organisation was in the hope of objectivity and accuracy but there was no guarantee. I think one of the opposition groups came up with the idea. It was not an unreasonable request and I thought that it was a sensible thing to do.
449. I was provided with the minutes of the TPB [TIE00897052] meeting on 12 January 2011. The papers contain the minutes of the meeting that took place on 15 December 2010. Both the papers for the meeting on 12 January



2011 and the minutes of the meeting on 15 December 2010 consider mediation, and the Board are said to want it progressed as soon as possible. In a sense, the decision on mediation had been taken out of TIE's hands by CEC. The CEC Leader and Chief Executive had taken the view that they wanted to go for mediation and, as the 100% shareholder of TIE, even though it had not as yet been ratified by CEC, there was no doubt that that was the way it was going to go. I do not think that there was really another viable option for TIE.

450. I do not recall what my understanding of the position was or whether this issue was raised at any other meeting.

451. I note that 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 or 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. The report noted (page 7) that "*TIE Ltd presently appear to be in a weak position legally and tactically, as a result of the successive losses in adjudications and service of remediable termination notices [RTNs] which do not set out valid and specific grounds for termination*". The consortium was noted to be extremely well prepared. I was not aware of these issues and would question whether there was a political move to mediation, from my personal perspective, other than in responding to officers' recommendations. My recollection is that I was not given any access to these legal opinions, so I was unaware of what they said. It was generally understood, because it had been stated at TIE meetings, that we needed to be well prepared for any mediation but, as I said, I have not seen the views of Nicholas Dennys QC or Richard Keen QC on TIE's position. It had been said that there was work needing to be done, which may have been the code for

"they are in a bad position", but that was not what was said and that was not put across in anything like the terms that are here.

452. The report also notes that *"there was a desire commercially and politically to move towards mediation notwithstanding TIE Ltd's (apparently) relatively weak tactical and legal position. That is likely to have a financial implication with the Infracore as the party in the stronger position faring rather better out of it than might otherwise have been the case. Against that there are financial and other costs involved in allowing matters to continue"*. Clearly, I was aware that the adjudications had gone badly, but I was not aware that the position was as bad as that. I think that I understood at the time that the preparation of the RTNs was slow, but I did not know that they were unworkable or unenforceable. The passage about the desire commercially and politically to move towards mediation, notwithstanding TIE's position, does not accord with my recollection of where we were. I recall that we were told we needed to get our house in order before we got into mediation and that there was quite a delay between Councillor Dawe deciding we were going to mediation and the mediator actually being in place. There was a general sense of frustration about that delay but I understood the reasons for that when they were explained to me. It was self-evidently daft to go into a situation where we were relatively weak and where more preparation was needed tactically. The interpretation that officers had put on the political position is incorrect, in my view. I would say that everybody, both politically and outside CEC, wanted to see the mediation move on, but not at any cost. I certainly understood that there would be a cost if TIE were unprepared, and that CEC officers would have needed to be quite clear and robust in saying it was not the right time. I certainly got that message when it was explained to me from TIE's side of things and from the conversations I had around that time with Alastair Maclean.
453. I was subsequently told that the delay in getting to mediation was in part due to TIE's lack of proper preparation. I am not sure whether it was Alastair Maclean or Donald McGougan who told me that, but I am pretty sure that it

was one of them. I was not given the advice that this note summarises at the time and I very much doubt that any other member was.

454. I was provided with the papers for the meeting of the TPB in February 2011 [TIE00897058] for information only, containing the minutes of the January meeting, where there was discussion (page 13) of the Audit Scotland report. I do not think that we were given a copy of the Audit Scotland Report at that time. I recall that there was a great reluctance for anybody other than senior executives of TIE and CEC to see that report. I think that it was said at the time that that was because of the potential commercial sensitivity of issues within the report, and that, if they got out into the public domain, or if the consortium got a hold of it, their position would be strengthened. There is a note in a minute that Richard Jeffrey and TIE officials have responded to the draft document and they have sought to ensure that the document is not made public because it can affect TIE and CEC's position. Looking back now, it is extraordinary that we, as Board members, were not trusted with seeing it. There was a long-established pattern, certainly at every meeting while David Mackay was there, of emphasis that things were commercially confidential and should not be discussed outside the confines of the Board meeting. Looking at it now, something like this should definitely have been shared with members of TEL, or the TPB at the very least, in order for us to be able to scrutinise it.
455. In the same Minutes, it is noted that there was discussion about the objectives to be secured at any mediation. I do not recall a difference of opinion about what would represent a desirable or necessary outcome. There is also a note that the responsibilities of directors of TIE and TEL were discussed, but I do not recall the content of this discussion.
456. The Minute (section 11) tasks Brian Cox with writing to CEC to express concerns as to the existing governance arrangements. However, I do not recall those concerns either, or whether they related to the letter from Brian Cox to Marshall Poulton of CEC on 18 January 2011 [TIE00081663].

457. In the paper on Project Change Control submitted to the February 11 meeting of the TPB ([TIE00897058]), there is a reference (page 23) to a “*write back budget*” of £13m. This increased the risk allowance and is also referred to in the TS Report (page 54). I do not recall what the write back budget was, but I did read something about a provision having been made in the budget for the whole project for doing stuff beyond St Andrew Square. Therefore, as that had been nominally drawn down into the spend profile, it was now being brought back from that. I think that is what it refers to, but others are better placed to answer that question.
458. Mediation talks took place at Mar Hall in March 2011, although neither I nor other members played any part in the preparations or the talks themselves.
459. There was little or no briefing in relation to the mediation. We were told that there was going to be a mediation, and that it was going to be confidential, and so nobody was going to be commenting on what was happening.
460. There was no invitation to express any views before or during the mediation. Afterwards, the outcome was obviously made known to us and to the general public, and there was then an understandable public outcry about the figure and the options that had been produced. During mediation there was no invitation to express any views and, in fact, any views were positively discouraged, in the sense that we were told quite clearly that it was going to be a closed discussion.
461. I and the Council Leader, Jenny Dawe, were briefed together before other members got to know the outcome of the mediation, this was normal practice where particularly sensitive or significant matters were to be made public. I cannot remember exactly who was in that meeting but I do remember that I was told the figure and I was shocked because it was way above what we had been led to believe was a figure for the whole project a few months before. Councillor Dawe misunderstood what she had been told initially in the meeting and thought that the £776m figure was for the whole of line 1a and not just to St Andrew Square. That stands out in my mind because I had the

uncomfortable experience of clarifying the point to her. This was so much more than I had expected the figure to be. There was no discussion or briefing at that point about the sums involved for on-street or off-street works that I can recall.

462. I was provided with the papers of the TPB meeting which took place in April 2011[TIE00897066]. The paper concerned with utility works (page 40) seemed relatively clear to me what they were talking about. TIE were seeking to get monies from utility firms for work that it had done on betterment. Basically, as they had been going along they were replacing old with new and improving the utilities assets underground. They were having to argue their case with the utilities companies to get money off them because they obviously did not want to pay up any more than they absolutely had to. There is, as is referred to within that report, some sort of agreement or protocol, which is not exclusive to the tram project. TIE thought that they had improved things, and the utility companies were wanting to look at it, and were not wanting to pay out more than they had to.
463. I received papers for the TPB meeting on 11 May 2011 [TIE00896987]. Kenneth Hogg expressed concerns in the May meeting (page 3) in relation to the mediation agreements. His concerns were that TIE, as the contracting party, should have been the ones to be formally asked to consider the revised minute. This refers to a revision of the contract. What appears to have happened is that CEC, supported by TIE officials, went to the mediation; had a discussion with the contractor and mediator; and agreed to change the contract. I do not think that they had any formal authority to do that. I think that Kenneth Hogg was right. I do not necessarily think that it was wrong that there was a revised Minute of Agreement. I do not think anybody in the room said that there should not be some changes. Kenneth was highlighting the fact that as things stood legally, TIE was the contracting party and they should have been the ones to consider the revised minute. As I understood it he was picking up on that issue only, and I feel that he made a fair point.

464. As far as general comments about any benefits or objectives stated in the Business Case that were not delivered as a result of curtailment of the tramline, the two main benefits stated in the Business Case, that I would argue have not been realised as a result of curtailment of the tramline, were the loss of development opportunity and economic growth north of York Place, where it had been argued that the tram would increase the opportunities for development and additional jobs along the route beyond York Place, and also that there would be benefits to air quality by replacing some bus and car journeys with the tram.
465. I note that a report to the Council on 16 May 2011[CEC01891389] stated that mediation had made progress and work had started in priority locations (Minute of Variation 4) while further work was done on other issues.
466. 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 CEC 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. The report stated that in the 12 months between preferred bidder stage and Financial Close of the contract there were significant negotiations on commercial matters including management of risk arising from incomplete design work. It noted that claims related disputes were apparent from an early stage and tested the parties' respective understanding of the contract. Difficulties were exacerbated by delays with utility diversion works; slow progress in clearing design related activities; and problems with sub-ground conditions during utility diversion works. I thought that going to St Andrew Square made the most sense and was the best option available at that time. Doing so would provide for more journeys and would get the difficult city centre sections finished, which would form a better basis for going further in future. If we did not get across the city centre at that point, it might never happen. From the figures that we were given, it also looked as though the St Andrew Square option would run without day to day operations requiring an ongoing revenue subsidy. The option of terminating at Haymarket would have required an ongoing revenue subsidy from operations.

It would also have missed the opportunity to go across the city centre, and some of the work had already been done in Princes Street. Consequently, I agreed with the recommendation by the Director of City Development.

467. I was hugely disappointed, obviously, at the greatly increased cost of the tram, for a shorter line. I decided to go with the advice of officers and taking into account that the Council had a new Chief Executive, I believed that advice would be to the best interests of the Council. Subsequently I am not as sure that that we go the best outcome.
468. I do not recall the confidential appendices to the report. It may have been that these were references to the Atkins Report about passenger patronage figures, but I do not know.
469. I was basing my judgement partly on the strategy of getting across the city centre, and thereby getting to a place where passenger numbers and revenue paid for the cost of operating the service on a day to day basis. In terms of strategic direction, I thought that the report was fine, assuming that the figures were reasonably accurate. On that basis, I thought that we were provided with sufficient information to come to an informed decision. In hindsight, and having read a subsequent report provided with the papers in preparation for my witness statement that the figures for getting across the city centre were, in their opinion, grossly inflated, I think that I would certainly have to look at that again. I am not sure that I would come to the same view. CEC voted against the St Andrew Square option initially and voted to go to Haymarket. I do not know whether TS or Ministers were aware of that report, because one of the key things that changed CEC's position was when TS made it clear that they were not going to pay out the remainder of the £500m grant if the Tram stopped at Haymarket. CEC would then have had to find the additional borrowing. I cannot say what the decision would have been if TS had decided that they would pay the extra grant but we had known that they were grossly inflated sums, it may have been better to re-procure the Haymarket to St Andrew Square element. However, as we were told later, Siemens had a very

strong hand to play in that regard, as they had all the equipment, and could therefore offer guarantees that other contractors could not necessarily offer.

470. I am not able to comment on any contrast between what was reported to CEC before Financial Close in May 2008 and what was reported in June 2011, nor whether there was a difference in what CEC were told.
471. Consideration was given to the interest that would accrue on the large sums that CEC was borrowing. It was clear that there would be a very substantial amount of interest accruing year on year. At the time, borrowing rates were at an historic low. Even so, it was millions of pounds that could otherwise have been spent on services for the people of Edinburgh, or to reduce the debt that the City of Edinburgh already had.
472. Prior to the vote on which option to pursue claims were made that terminating the tram project would be more expensive than building it to St Andrew Square [TIE00687940]. By the time that the vote was taken on these options, however, I think that that assertion, if not dismissed, was not being relied upon. That view had been discussed in the public domain and did not appear to be holding up very well. I think that Councillors based their decision on several other considerations, some of which were political, and some of which were about their preferred direction of the tram project. I did not consider the relative merits of the two options to be closely comparable, as I believed that the better value to the city was in completing to St Andrew Square. From what I have read subsequently, I doubt that the financial cost of terminating would have been greater than the cost of going to St Andrew Square. However, we would have got nothing by terminating the contract, whereas, by going to St Andrew Square, we would have something towards developing the city in the future.
473. 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 CEC officers in validating the base budget for the proposed works. There was a requirement for funding of up to £776m



for a line to St Andrew Square/York Place, which comprised a base budget allowance of £742m plus a provision for risk and contingency of £34m. Additional funding of £231m was required, which would require to be met from Prudential borrowing, at an estimated annual revenue charge of £15.3m over 30 years, which, it was reported, 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. At a Meeting of the Council on 2 September 2011, however, the Council overturned the decision to terminate at Haymarket. The Chief Executive, Sue Bruce, prepared a report for the Council meeting on 2 September 2011 [CEC01891495]). This appears to have been in response to a letter from TS stating that there would be no further payment of grant if the line stopped at Haymarket. In my view at the time the idea of stopping at Haymarket was politically motivated nonsense driven by short term electoral considerations, and I was pleased that the decision was changed. My reading of the Haymarket decision was that it arose because the Labour Party did not want to be associated with the disruption that there would have been from building across the city centre at that time. That may be grossly unfair to the Labour Party, as they may have had many other reasons for it, but that is what I thought was their principal reason for that decision. My reading of the Conservatives position was similar, in that the initial Conservative vote was, I think, to go for termination of the contract and, when that got voted down, they decided to go with the Haymarket option. Again, I may be being unfair but that was the febrile political environment at the time.

474. I have no knowledge of why TS were unwilling to provide further payment of grant if the line stopped at Haymarket. I wouldn't be surprised if they thought that Haymarket was too little of a return for their funding. I suspected, although I have no evidence for this, that the Scottish Government Ministers were probably behind the decision, and I welcomed it.

475. It has been suggested that the report to Council in August 2011 included a confidential summary of a report dated 19 August 2011 by Faithful and Gould

[CEC01727000]. The full report by Faithful and Gould noted (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". To the best of my recollection we were not informed of these statements. These statements would have jumped out to any Councillor who had seen them, and they would not have, in my experience of Council matters, remained confidential. That information would have been in the public domain within seconds of coming to the attention of many Councillors, and so I am as confident as I can be that it was not there. I do not recall if we got a summary of the report but, if we did, and I am assuming that we did since it says that it was provided, it did not say anything about extremely high, not-value-for-money, or grossly inflated costs. I think these conclusions would have had a significant impact on the views of Councillors of all political groups.

476. We had been advised by the new Chief Executive that a Settlement Agreement, which was entered into on 16 September 2011 between CEC and BSC, was the best deal available. Ultimately, it resulted in a reduced tram line from the Airport to York Place being built for a total capital cost of approximately £776m. With the threat of non-payment of the Scottish Government grant, I considered the St Andrew Square option was by far the better option.

477. It has been suggested that the main features of the contractual arrangements were set out in a confidential appendix to the CEC report dated 30 June 2011 [CEC01914665], including a lump sum price for the off-street section between the Airport and Haymarket, subject to certain exceptions; and a measurement contract basis for the on-street section, with CEC carrying certain risks, including those risks associated with utility diversions. I remember seeing reference to this document within CEC report for that meeting, but I do not remember seeing the document itself. I am aware that the CEC report contains an abstract or summary of what was in the report by, I think, Faithful and Gould, although I do not remember the phraseology, that the costs for the other on-street works were grossly inflated, and generally that the costs were

CEC report  
dated 30 June  
2011 should  
be ETP Update  
dated 26  
January 2011

extremely high and not value for money. I am fairly confident that that was not shared with members, as I think there would have been uproar.

478. I took the view that the alternatives to the Settlement Agreement were less desirable based on the advice received from senior officers in CEC in the CEC reports referred to already, and the briefings that CEC groups were given or requested. The advice that was given to members is in the report and briefings.

479. The additional funding of £231m came from additional CEC borrowing, and I felt that it was justified. I did not seek views from constituents. Residents who contacted Councillors were usually very anti-tram and, as such, I would not have concluded that their views were necessarily representative of the wider populous. There were obviously discussions and debate in the press around this time, and I was keeping an eye on that, but I did not go out and consult with constituents. To be honest, I do not know what benefit that would have been, given that a lot of the information was still confidential. I and other Councillors involved were struggling to deal with the technicalities of a project that we had been involved with for several years. I accept the point that politicians should be listening to constituents but, sometimes politicians have to make decisions based on information which was not available to constituents.

480. An announcement by Ministers that TS would oversee the project, and that the grant would be re-instated, was made on 14 September 2011. CEC appointed external project managers, Turner and Townsend, to assist with the process; revised the governance arrangements; and began to wind down TIE [TRS00012622]. On 19 January 2012, I am cited in a draft press release as stating that "*Thanks to new positive relationships, regular discussions now take place between the Council, the contractors and Transport Scotland to ensure the project can be delivered as efficiently as possible*" [TRS00015006]. Reading this now, I cannot help but think, even at that time in 2012, it certainly does not sound like something that I would want to be associated with. I am not sure whether that draft press release went out or was amended, and I do

not know what role TS played after the Settlement Agreement. It was during the mediation, and what happened afterwards was basically taken out of the hands of Councillors in a meaningful way. An All Party Oversight Group was set up, and we were largely just told what was happening. I did know that TS had some kind of involvement and had had a presence at the mediation discussions. I understood from speaking to the Chief Executive that TS were backing the mediation outcome. Therefore, we could rely on them providing the grant and not backing out without checking with Ministers. However, I do not recall being briefed on their involvement after the Settlement Agreement.

481. Turner and Townsend appeared to be project managing on the client's side after the Settlement Agreement.
  
482. At a meeting of the City of Edinburgh Council on 24 November 2011 [CEC01891428], Lesley Hinds noted that Jenny Dawe had requested an inquiry into the tram project and asked whether she would circulate this request to elected members. The letter from the First Minister confirmed that the Scottish Government would be delighted to have an inquiry into the problems surrounding this project. I think that calling for a public inquiry was a political necessity. Everybody was jumping up and down saying "*it wasn't us*" or "*we've got nothing to hide*" and asking for a public inquiry can be seen as one way of trying to convince the electorate that you had nothing to hide. By then, I had formed views on areas where I felt things had gone seriously wrong, and I got absolutely hammered in some press coverage for some of the things that I said about that. I was quite keen that there would be a public inquiry because it had gone so badly wrong. We need to learn from these situations, and we needed to hold people to account for their actions, which obviously include me. I am sure that we would all do things differently, but at the very least I hope that the public inquiry will help us not to do the same thing again.
  
483. The Chief Executive, Sue Bruce, was of the view that any Inquiry at that time would be an unwelcome distraction, and that it should wait until the project was complete. I agreed that it was not going to be helpful while work was

ongoing, but it was desirable to have a public inquiry after the thing was up and running because there was a lot that went wrong.

484. 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. Clearly, the mediation and the settlement agreement meant that the scope of the project had changed, and obviously the rest of the works around the city had to be tidied up. There was work to be done on Princes Street, which had not been done properly, or at least that was my general understanding.
485. Compared to what had gone before, the project appeared to run reasonably smoothly after these agreements. Without wishing to sound flippant, if the contractor has got what they want, things are made a lot simpler. Faithful and Gould's report concluded that the sums were grossly inflated, it was not value for money, and the contractor was one to watch. Usually you require two for an argument, but if one party is not arguing then things should go a lot better. The decision of the Scottish Government to withhold grant funding if the line only went to Haymarket, and agreeing to the grant if it went to St Andrew Square, meant that the SNP Government were on board, albeit they said very clearly that they had been against the project from the start. The SNP Councillors were on board, albeit they too said they had been against it from the start. Therefore, you have a contractor who has no incentive to start stirring things up anymore. The SNP, whether at local or national level, were not going to want to stir it up in the same way either, because they had signed up to this new agreement.

## Project Management and Governance

### IN GENERAL

486. At a very general level, CEC was the owner of TIE and TEL. The TPB was the operational part of TIE that had oversight for the tram project itself, and TS was the funder of £500m of the tram project.

487. As to whether I had any concerns at any time in relation to the performance of any of the above bodies, or their senior personnel, at an individual level, it had been reported that Willie Gallagher's behaviour was causing concern to senior managers within TIE. He was Executive Chairman of TIE and, I think it was in late 2008 or early 2009, he stood down. At the time, I was given to understand that it was because of his health. I think from 2010 onwards, as the adjudications started to come in, I became concerned about the legal advice that TIE was working on, and eventually suggested that they look at getting Richard Keen QC on board. I had a conversation subsequently with Alastair Maclean about what was happening, and was pleased that Nick Smith was pressing the TIE legal side to find out more about what they were doing. As I mentioned previously, there were some notable features regarding the culture within TIE as an organisation, which was new to me and which I was surprised at. They got on very well, but I got a sense that they were almost too close and I was not part of that. When I was asked to be part of the remuneration committee of TIE I had no prior experience of being involved with discussions on salaries and bonuses of senior managers. I thought it was odd at the time that people were sitting in a meeting where their bonuses were being discussed, but it was being chaired by one of the non-executive Directors of TIE, so I thought that maybe it was acceptable practice and I did not challenge it. There were other aspects of the culture of the organisation which, taken individually, did not concern me but I look back and put them alongside the very real concerns I had about their performance later on and I wonder if there was more there that I should have taken further at the time. I came to the view by late 2011, September I think, that Councillors did

not contribute as much to the scrutiny of TIE, or TEL as would others with more appropriate experience. I gave an interview to the BBC where I said as much. I did not think that Councillors were the best people because I do not think we brought much relevant knowledge or expertise. I feel that the TIE and TEL Board should have had more independent expertise on them that was relevant to the circumstances. A lot of the Board's expertise was in running transport companies and systems, as opposed to building transport infrastructure, although some of them did have experience in that area too. I would like to think that independent non-executives with more expertise in that area, and around relevant legal aspects, might have picked up on some of the decisions that were taken, and rejected recommendations from TIE managers. Similarly, perhaps CEC should have brought in independent expertise to support their oversight of TIE. However, at the time, I did not know that was an issue; it only became apparent to me later when I had more information and experience to draw upon and started to look back at what had gone wrong. Part of my concern about what happened then, and what may be continuing to happen, is that there are a lot of arm's-length companies that CEC has, where Councillors are in positions on company Boards, where I do not think that they necessarily have the correct expertise. They obviously bring a great deal of knowledge and expertise in the area of politics and what the expectations are of an organisation that is owned by a democratic body but beyond that they may have very little experience in the relevant areas. It appears to me that they should be appointed within a similar framework as that which applies to appointments to boards of non-departmental public bodies; there should be independent interview panels, people should be asked to apply and put forward their CV, and should be questioned on their knowledge and skills. Boards should be composed based on what it is they are being asked to do and the risks associated with that area of operation. The concerns that I had were mainly about legal or contractual matters and as I have mentioned before, I did raise those concerns but did not do so in the right way, to the right people, perhaps because I did not have the relevant experience.

488. I suppose there are two parts to governance arrangements for the tram project: one is the legalistic or mechanistic part of it regarding whose responsibility it is; and then there is the other part, which is that we all have a responsibility to do our level best to ensure that things are done properly. Within whatever bodies that are set up, and whatever the arrangements are between them, in my opinion people still have a responsibility. I am afraid that in terms of the legal side of this, governance arrangements were not something that I focussed on at the time, or have focussed on since. I had fairly straightforward view that CEC owned TIE, and therefore CEC should have been able to get the information that it needed from TIE. If it wanted, I believed CEC could have made certain that it got the information it needed, and it was right and proper that TIE had a certain amount of latitude to get on with operational matters and use their technical expertise. There is no point in setting up an arm's-length company and then shadowing every job within it, but there has to be effective oversight. From what I have read when preparing for this statement, I do not think that was done effectively and I do not think that that can simply be attributed to the operating arrangements between CEC and TIE; I think that it is to a significant extent attributable to what people did on an individual basis and the skills that they had.
489. I think it is a bit of an excuse, to be honest, if people are to be laying the blame on there being too many bodies or organisations involved in the governance of the project. I don't think that's why the wrong decisions were made. Many of the people on the different organisations and bodies were the same, and the key relationships were between the same people.
490. My initial thoughts are that CEC was ultimately responsible for ensuring that the tram project was delivered on time and within budget. Legally, they were responsible for any and all cost overruns that came about. I suppose a lot of the problems were on the technical side and the legal side, and you could go backwards and forwards saying that it was TIE or CEC. Ultimately, it is CEC's job to ensure that the arm's-length company they owned was doing what they set it up to do.



491. A paper drafted for the TIE Board, TPB, TEL Board, and CEC on 7 December 2007 summarised the proposed governance and management model as it stood at 3 December 2007 [CEC01387398]. I was a Director of TIE from July 2007 but did not attend the TIE Board meeting on 11 December 2007 [CEC01048838]. I am aware that, at this meeting, it was noted that the Audit Committee was not prepared to endorse the paper as it stood and, in particular, the draft Operating Agreement with CEC. The Committee also wished it to be noted that they could not endorse the Governance paper as it stood. The Chairman of TEL also wished it to be minuted that they also could not approve the paper in its current form. I do not recall what the issues were.
492. I do not think that the problems encountered throughout the project would have been minimised if there had been a clear operating agreement between TIE and CEC from the outset. It is possible that it may have helped but the absence of a suitable operating agreement could have been addressed by CEC if they felt that it was necessary.
493. The report to CEC on 25 August 2011 [TRS00011725] noted that: "*The existing governance arrangements for the tram project are complex and have not been effective*"; the governance arrangements had had to take account of the complexity of the arm's length bodies that were proposed to deliver an integrated transport service once trams had become operational; and there was a need to revise the overall arrangements "*to ensure effectiveness, accountability, probity and integrity going forward*". I did not disagree with the view that the governance arrangements could be improved, but I do not view them as being among the main reasons that the project went so badly wrong. I also do not agree that governance arrangements are the silver bullet to correct individual or collective responsibility, or that they will necessarily change the culture within these organisations. There were a lot of things that went wrong in this project and I do not think, on balance, that the reason they went wrong was that the governance arrangements were not right. There of course many reasons why it was important that effective governance arrangements were in place.

494. I note that Jim Inch noted in his Briefing Paper on Governance dated 20 July 2007 [CEC01566497] that it was "*vital that more rigorous financial and governance controls are put in place by the Council*". I do not know why effective governance arrangements had not been introduced at an earlier stage. I do not know the specific reasons why it was felt that there should be more rigorous financial governance arrangements put in place. As I have stated previously, I think that it should have been easily achievable for CEC to get the information they wanted, as they owned TIE.
495. I would have said that, operationally, it was CEC's senior officers' responsibility to ensure that effective governance arrangements were in place. Going back to the pre-2007 period, my understanding is that there was a wish to have cross-party political representation on the TEL Board, so there would then be wider political support for the project and opposition Councillors would be able to see what was going on first hand. There was a concern, though, about what could and could not be shared with the wider Council members because of commercial confidentiality. In my view, this meant that there were not as many places for people who had the requisite expertise and the presence of Councillors may have impacted, negatively, on the way the Boards operated. It may have affected the objectivity of Councillors, both those on the Boards and their party colleagues. Perhaps alternative arrangements, more similar to the ones that were put in place after 2011, would have been more effective.
496. I note that slides setting out a new governance structure [TRS00014775] were agreed by the Council on 25 August 2011 and 2 September 2011. Effectively, TIE was being wound up and was no longer involved in an operational capacity, but legally it still existed. Operational matters had passed directly to CEC, and were effective in separating Councillors from operational matters which were not relevant to their areas of expertise. In general, as I have already stated, it seemed a better approach but it was obviously operating in a very different context to what had gone before, both operationally and politically.

497. The paper notes that there will be an "All Party Oversight Group" and I understood that the role of this group was to ensure that elected members remained informed of progress on the tram project, and to allow a formal channel through which key issues could be raised [CEC01890123]. It is untenable to think that a Council would have a project like this going on and that there would be no political oversight. There had to be something where members of respective political parties were involved. In terms of the other parts of the governance structures that are in those slides, a lot are about CEC officers and people from the consortium meeting together on different committees. I cannot say whether they were effective or not. I do not really have any inside knowledge and I do not have any expertise in that area to say whether those parts were effective.

## TIE

498. As a very general point, CEC was the owner of TIE and CEC decided who the Board of TIE was. Through that, CEC obviously had an element of control in that they had Councillors on the Board of TEL and the TPB, including myself from 2009, as Transport Convenor. Since the TPB and TIE met as one, CEC had senior CEC officers in attendance too. When it came to discussing the Project Director's updates CEC officers were able to ask questions if they wanted and responded to questions if asked. If they had thought it necessary to do so, they could have asked Councillors to ask questions that they did not feel in a position to ask. That situation never arose, however, and my assumption was that CEC officers were getting the information they required through operational discussions with TIE. Obviously, there is a view that the operational arrangements between TIE and CEC were not suitably robust. I realise that Richard Jeffrey's comment, referenced previously, about CEC being able to replace TIE if they wished, was a nuclear option and would have had some cost to it. However, they had other means by which they could get information, and I am not clear why they allowed themselves to be frustrated by TIE in getting that information.

499. It was the legal situation that really started to concern me about the performance of TIE. I have mentioned before there was a lot of emphasis put to Board members on the need to restrict information on the basis of commercial confidentiality, and I look back at that and wonder if it was an excuse. Clearly nobody round the table wanted the consortium to get hold of any commercially confidential information, and that is how I viewed those warnings. I think that there were a couple of occasions where I felt that my political colleagues were probably getting pressure from their respective political colleagues. I think that they found it really difficult to be on the TIE Board with the views and concerns that were being expressed by their colleagues in CEC. I did not feel that Phil Wheeler and I were getting the same pressure from our colleagues. I think we were fortunate that the Lib Dem group respected the duties and responsibilities we had as Directors of the company, and so I did not feel that we were under as much pressure as the other Councillor - Directors perhaps were. Obviously, as time went on and it became clear that the project was in serious trouble, and that the legal advice was not reliable, I became concerned about the performance of TIE. As information started to come from CEC officers, much later on, about the legal advice, and the way that the legal evidence was being developed for TIE, it was a frustrating time. Senior officials of CEC indicated that TIE was not getting its act together in relation to having the legal case ready for potential termination, and then potential mediation. At that stage, I was concerned about the performance of TIE in addition to the fact that the adjudications had gone against them, but I was reassured by Alastair Maclean, CEC's chief legal officer at that point that CEC were pursuing this. Whether CEC got McGrigors involved, or whether TIE got McGrigors involved, I am not entirely clear. Nonetheless, they were involved and Mr Maclean advised they were interrogating the information that they were being provided with.
500. Senior officers attended the TIE Board, the TEL Board and the TPB, which, at times combined, so they were getting the information and the reports that went to Board members. They also received information from sub-committees, although I was not latterly part of any of any sub-committees, so I

do not know what was discussed. I assumed that there were various meetings where they were able to obtain information. I now know, from reading emails that I have been provided with for the preparation of this statement, that they were having one-to-ones and meetings between officials and TIE, and that they were communicating with each other, which is what I expected. I believed that CEC senior officers were getting a lot of information from TIE, which they were interrogating, and that they were providing briefings to us based on that information. TIE was also offering briefings and site visits to members and other stakeholders who wished to come along.

501. I do not think I had any concerns at any time about TIE's reporting to CEC. My concerns about the legal issues increased after my discussion with Alastair Maclean but I took some comfort from the fact that he was addressing these matters. In respect of CEC members, there was a lot of information that was considered to be commercially sensitive and I accepted that it could not be fully reported. Subsequently, and having read other reports for this statement, I have come to the view that we had been misled in that information had not been shared fully or reported in a balanced way.
502. At the outset, and for most of my involvement, I assumed or accepted 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, and that they had other commercial expertise coming into the project. That is what I took from reports that were prepared for CEC. Obviously, as an organisation, it had very little track record; it was set up for transport initiatives in Edinburgh, and this was really its first major project, but they asserted that they had the necessary skillset. The whole purpose of TIE was to establish an organisation that would be able to attract people with the relevant experience and expertise.
503. I do not know if any consideration was given to instructing an organisation with an established track record of project managing major infrastructure projects to assist CEC or TIE, prior to or post-2007. It was certainly not done

to my knowledge, or shared with me if CEC officers had thought about it. With the benefit of hindsight, I do not think that it was a good idea to set up TIE. I think that a better approach would be to have used TS to lead on the client side of the project. There would then have been a specialist organisation dealing with a programme of major transport and civil engineering projects that could move their expertise from one to the other and gain knowledge and experience in doing so. I think the project would have benefitted had TS had a much greater role throughout the project to take it forward.

504. I note that a TIE report on Ingliston Park and Ride One dated 14 September 2007 [CEC01465362] noted a number of "*lessons learned*". Those were: that there was "*no clear definition of roles and responsibilities between TIE and CEC*"; there were "*no check processes in place for design*"; that "*responsibility was given to Halcrow for the day to day management of the process and light touch management employed by TIE*"; and that "*extension of existing consultancy contracts for new commissions needs to be properly evaluated to ensure that this is appropriate*". I do not have any recollection of having seen the report previously. I have a vague recollection of the problems mentioned but not anything that made me think that TIE were being held responsible for them. The Park and Ride had happened by the time I came into TIE in July 2007 so it is not jumping out in my memory as something that I was familiar with. I recall there were references to it, but nothing specific that I can recall.
505. I believe that there is a suggestion that concerns had been raised about TIE's project management of the Stirling/Alloa/Kincardine (SAK) Railway, which was reported as costing more than double the original budget of £37m, and which opened in May 2008, apparently three years behind schedule. I first heard about the SAK line, and the issues around it, in 2007 or 2008. It was relatively early on in my involvement and it was TIE senior executives who raised the subject. TIE at that point had plans for becoming an organisation which would potentially take forward other transport projects in the Central Scotland area following the tram project. The way it was reported to me is that there was an argument between TIE and TS about what had happened with the SAK line. The version of events I was given was that TS saw TIE as

competition in some way. TS blamed TIE for things that had gone wrong with the SAK project, while TIE execs blamed TS. At the time this was mentioned it was more a case of someone from TIE giving me some background to the relationship between TS and TIE and it was not raised as an issue or a problem. Consequently when the SAK project came up in a Sunday Herald article in 2009 [CEC00784171], TIE had already told me about it beforehand and their version was very different. Unfavourable coverage of TIE was not unusual by that stage of the project. We were in the middle of a dispute and we had other things to focus on, it was not something that made me think I must look at it more closely.

506. A report to Council on 26 June 2003 [CEC02083550] noted that a performance-related bonus scheme had been introduced for TIE staff. I was not involved in the tram at that stage, so I do not know what detailed discussions there were about bonus schemes. The report referred to lays out details of the bonus scheme and, having read that and other reports, it appears that bonuses were there to try and incentivise staff to perform and were tied into the successful completion of the project.
507. As I was not involved at the time, I was not aware of the detail of the formal means by which CEC were to exercise supervision and control over the TIE bonus scheme. Later on, as a Director of TIE and TEL I was involved in the Remuneration Committee, where the bonus scheme was discussed. I also recall that the bonuses were to be reported back to the Chief Executive of CEC. There were changes made to the bonus scheme over the course of the project and, as well as the Remuneration Committee, which I have already referred to, those appear to be the main mechanisms by which there was supervision or control over the bonus scheme.
508. I know, through seeing it commented on in CEC papers, that CEC members were aware that bonuses were paid. However, I do not think that CEC members would have been aware of the sums paid in bonuses to TIE staff each year. Certainly, some of that information would be considered personal information, and I am not sure that it would have been considered appropriate

at that time for that information to be shared with all CEC members. As a member of TEL, TIE and the TPB, I was aware of the bonus scheme and the details of it, but I do not recall the specific amounts paid to individuals. I was aware of the criteria as part of the Remuneration Committee which, along with the timing of bonuses, was changed in the course of the project.

509. At the time I first became involved, from 2007 onwards, I understood that this type of bonus scheme arrangement was fairly normal within the private sector. I did not have experience of private sector work myself but, to my knowledge, having bonuses in the private sector was something that commonly occurred. It did not seem inappropriate that there were bonuses paid, especially where the bonuses were linked to performance. The performance required was to complete certain milestones, including getting the project up and running by the due date and within the budget. Therefore, to me, it did not seem inappropriate to pay people bonuses to incentivise their performance, as long as the incentives are proportionate and the criteria are transparent and fairly well defined.
510. I was not familiar with bonus systems, or what sort of criteria should be in place to ensure that sufficient and effective control of payments is exercised. I do not know that my control or scrutiny of them would have been particularly effective, but I know that there was a mechanism in place which predated my involvement. I subsequently became aware from documents passed between David Mackay and Richard Jeffrey that there were people within CEC, for example Jim Inch, who had access to personnel and other resources, and who scrutinised those bonus arrangements and concluded that they were okay. Whether the bonuses were appropriate is a different question, and I am not sure that I can give a sufficiently well informed answer to that.
511. I was a member of the Remuneration Committee, which approved the payment of bonuses on 3 June 2009 [CEC00935152]. I thought that it was appropriate to be approving the payment of bonuses at that time. Part of the reason was that at least some members of staff were entitled to those



bonuses contractually, and part of it was that the bonuses would be paid on successful completion of certain milestones.

512. The minutes of that meeting show that David Mackay was there, as was somebody who was taking the notes. My memory of this particular meeting has become slightly conflated with an earlier meeting, where members of the senior management team, to whom bonuses were paid, were in attendance. I remember thinking, at one of those meetings, that it did not seem quite right. I was comfortable with the people whose bonus payments we were considering to be in the meeting where we discussed what they thought their performance had been, and we could ask them questions. However, I would say that the proper way to do it would be that they leave the meeting and decisions could then be made without those people being there. The meeting was chaired by Brian Cox who was a non-executive Director of TIE/TEL at the time, and I took my lead from him. He obviously felt that it was okay, and I went with it. In hindsight, I do not think that I should have done so. I think that I should have said that it would be more appropriate for the staff involved to step outside while the decision was made.

513. I have been advised that David Mackay sent Tom Aitchison a paper [CEC00672874] by email dated 23 September 2009 [CEC00672873] containing proposals to revise the TIE bonus scheme. An accompanying slide presentation [CEC00672875] noted that: "*No formal linkage between bonus payments and corporate performance ... linked mainly to individual performance*" and "*Inadequate performance management processes to underpin/justify payments*". Additionally, I am now aware that, by email dated 25 September 2009, Jim Inch set out a number of concerns in relation to TIE's proposed revised bonus scheme [CEC00673126]. Mr Inch appears to have met Richard Jeffrey to discuss these concerns (see email dated 9 October 2009 from Richard Jeffrey to Mr Inch [CEC00674778]) and, by email dated 23 November 2009, Mr Inch advised Tom Aitchison [TIE00034046] that he was content with the mechanics of the new scheme. I was not aware of any of these exchanges previously.

514. I was not involved in any discussions about these matters, although I am aware that there does have to be an elected member sign-off for bonus schemes like this. I think that I was not involved in these discussions because the development of the scheme would be an operational matter. For strategic, including reputation, reasons, however, remuneration for senior CEC officers and arm's-length companies is something that elected members need to be informed of and consulted on.
515. The post of Chief Executive of TIE became vacant around June 2006, and Willie Gallagher acted as both Chairman and Chief Executive of TIE between around June 2006 and November 2008. His appointment as both Chairman and Chief Executive of TIE was never discussed with me.
516. I was aware that it was not considered to be good corporate governance for someone to be both Chair and Chief Executive, so I raised that point with the Chief Executive of CEC, who advised me that there were plans to separate the roles and that David Mackay, who was Chair of TEL, was going to be brought in. He was not specific as to how it would happen but he gave me a clear indication that those roles would be separated and that David Mackay would become the Chair in the future, although he did not give a timescale for that and I did not request one.
517. On 2 June 2010 [CEC00396762], Richard Jeffrey explained that the purpose of the policy was to bring structure to the remuneration package currently offered by TIE. The committee agreed that any existing anomalies in salary rates should not be dealt with, and the policy should be for future recruitment and guidance internally. I do not recall why that decision was taken.
518. On 21 October 2010 [CEC00014081], the minutes of the Remuneration Committee note that Richard Jeffrey asked the Committee for permission to change the Bonus Policy, to identify certain individuals, and to make the appropriate provisions in view of the fact that they were key individuals who were critical to the project going forward. My recollection is that this was agreed but I do not have the evidence. I certainly remember the nature of the

discussion was around the fact that there were problems with people leaving TIE and we were coming to a stage in the project where it was important that we kept certain key individuals. That seemed to be a reasonable concern. I am not sure what other mechanisms there would have been to keep those key individuals on board given that, as the project moved forward, it moved towards a time when it was going to finish and people would be looking to their next job. There was no programme of developments in place for TIE in order for them to retain staff. My understanding was that permission was granted and it seemed an appropriate means to try and incentivise people to stay with the business because it was felt that it would weaken the business significantly to lose those key individuals.

#### **CITY OF EDINBURGH COUNCIL**

519. In general, CEC had positions on the TPB for the Director of Finance and the Director of City Development and thereby could exercise oversight and control over the tram project. There were linkages between CEC officers and TIE staff at a lower level for the exchange of information, as I understood it. There were operating agreements and there was a Tram Monitoring Officer who was supposed to get information from TIE and be the first point of contact for any dealings with the tram. Alongside the involvement of Councillors on the TIE and TEL Boards and the authority to appoint other Directors, provide guarantees and other measures these were the main formal mechanisms for exercising control and oversight of TIE by CEC.

520. Obviously the Full Council gave authority for Contract Close, by which way members exercised part of their oversight and control over the Tram Project. Members also received numerous reports over the lifetime of the project as did the Transport Infrastructure Environment Committee and the Tram Subcommittee on certain specific elements of the project. The Council's Audit Committee also got information on the tram project towards the end. Councillors appointed to the TEL Board had access to more information than could be provided through CEC reports. This was partly seen as a way of managing the tension between commercial confidentiality and democratic

accountability. Latterly there was the Tram Oversight Group which came post-mediation. Members also received briefings from CEC senior officers and TIE senior executives as and when they requested and as such there were a variety of different mechanisms by which they could get information and exercise oversight. They could also ask questions at any time either informally directly to CEC officers, or formally through the CEC meeting process as well.

521. Up until the point of mediation, or perhaps a month or two ahead of that, I would have said I did not have any significant concerns about the oversight and control of the Tram Project exercised by Council officers. I believed they were able to get the information they needed and that TIE would provide that to them. I was not aware, as I have subsequently become, that they were not getting the information they were looking for, or indeed that TIE was not providing them with the information it should have been. To my knowledge, there is a history of tensions between senior officers of CEC and senior executives of some arm's-length companies. However, in the context of the Tram project I was not aware that there was anything more than possibly that. Even that did not seem to be particularly notable as it was with other arm's-length companies. I have expressed previously my views that as a lay person I had insufficient knowledge or expertise in matters regarding major civil engineering projects to be able to exercise a scrutiny role as effectively as people who would have had relevant knowledge or background. There were reports provided to Councillors and they had the opportunity to read those reports and ask questions. I think the bigger problems were the fact that the reports did not, as it subsequently appears, give a balanced view of the information that was available to officers or the risks that there were to the project. There were a couple of members of the TEL Board, Councillor Tom Buchanan, who has sadly died since then, and former Councillor Maggie Chapman who, although they were members of the TEL Board, did not attend the TEL Board right until the very end. I did express to Tom my concerns about his duties as a Director in not attending the Board meetings, although I did not have that discussion with Maggie Chapman. I understood that Tom had taken the post of Director in order to be able to get information from within

TIE that was not more widely available as there was concern in the SNP that nobody from their group would have access to that information. Tom was also more closely involved with the Tram project as he was Convenor of Economic Development in Edinburgh and had to liaise with businesses affected by the Tram.

522. Part of the reason that TIE was set up was because it was felt that CEC did not have sufficient expertise in the area of building tram projects to be able to effectively do so itself. Therefore, the extent to which officers were able to exercise effective oversight and control, it could be argued, was also limited to some extent. With that caveat, I think they should have been able to exercise more effective oversight and control because the levers were there through an operating agreement; as Richard Jeffrey pointed out, they could recommend sacking the Board of TEL and appointing new Directors if necessary. I am also aware from documents I have read in the preparation of this statement that some CEC officers highlighted to senior managers that they were not getting the information they needed and there should perhaps have been more independent scrutiny or validation of the information that was coming to them from TIE. I think senior managers should have been able to exercise effective oversight and control over the tram project with the various means at their disposal, but I do not think they did. Why they did not I cannot explain. I have read documentation that says there was a lack of trust that TIE were not providing information which, to me, would seem to be a reason to scrutinise it more closely. I do not know why that did not happen and I do not know why they did not choose to go for the independent validation of information that was suggested by more junior officers.
523. Councillors depended, to a large extent, on the information we were being given by CEC officers and TIE. That information was fairly consistent, in the sense that it told us that the project was for a lump sum fixed price and that TIE was doing all it could and should to resist the attempts by the consortium to claim more than TIE believed they were entitled to. With hindsight, I do not think Councillors were able to exercise effective control because of the way information was presented and because they didn't have sufficient relevant

knowledge or expertise to do so. I think that needed to be provided by people who were more appropriately qualified to do so.

524. I was interviewed for a programme called "*BBC Scotland Investigates: The Great Tram Disaster*" [CEC01515426], on which I made comments regarding the experience and expertise of Members sitting on the Boards of the TPB, TIE and TEL. As I have said before, I do not think Councillors had the knowledge and expertise to be able to properly perform the scrutiny role required of Board members in this specific situation. I also think that there are a number of other Boards where Councillors do not have the appropriate knowledge and experience. I know that flies in the face of the view of many politicians, but I do not think politicians necessarily bring the sort of qualities that are required in order to effectively hold senior executives to account for the sort of issues that went wrong here. We can all look back in hindsight and say we should have asked for independent validation of the contract, but we were acting on the advice of senior officers and senior TIE executives. I did not understand the nuances of why getting independent validation at the time we were looking to close the contract would be a better thing than going ahead with the project and saving perhaps £8m a month in running costs or inflation costs. There is a role for Councillors in arm's-length companies, perhaps in some sort of corporate social responsibility-type of role but there are other ways to get Councillors involved in the scrutiny or oversight of performance. Scrutiny by Directors is something that requires a particular skill-set depending on whatever the project or business is and given the wide ranging backgrounds of Councillors I would not expect many Councillors come ready equipped with that skill-set.

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525. I consider that a conflict of interest, or potential conflict of interest, arose from Councillors being members of both CEC and organisations with responsibilities for delivering the project. I do not think it is possible to be completely objective being a member of both, having Director duties as a Board member versus the public interest and the duties of Councillors; there is a tension between the two. However, most Councillors quickly become familiar with those sort of tensions and make declarations of interest before

Council meetings or Board meetings so that people know where those conflicts may arise. Generally, it is considered that where someone has a financial conflict of interest it is inappropriate for them to be involved. That was not the case for any of us involved in the tram project. However, if it is a non-pecuniary conflict of interest, the widely held view is that it is manageable; you just have to be clear about your roles. I think that is a reasonable approach, but such was the public interest in this project as it became more and more contentious, I think it was very difficult for Councillors to retain independence and objectivity of thinking in their respective roles. I know that I tried to keep those separate and I know that my colleague Phil Wheeler was doing that as well, but if you are working closely with people it can be quite difficult to retain objectivity. I think it would have been easier, or perhaps better, for Councillors to have been involved in a separate oversight body that meant they were not Directors of the company. That would have given an element of separation between the two roles that, perhaps, would have managed that potential conflict of interest better. The Nolan principles of public office also talk about the perception of a conflict of interest and I would certainly agree there would be a perception of that even if it was not actually the case. Overall, looking back, I believe it would have been better if Councillors were not members of TEL, TIE or the TPB. As I understand it, the rationale for Councillors being put on TEL was that it would help TIE with political groups but that is not a good enough reason to be a Director. It does not mean that because you are a Councillor you have the skills, qualities and expertise to be able to properly scrutinise a project of this nature. I think that if Councillors, MPs or MSPs, are going to be on those sort of bodies, it should be through a competitive interview process in the same way that other people are appointed to Boards, it should not be because you happen to be from a particular political party.

### **Tram Project Board**

526. I do not have a lot of knowledge of when and why the TPB was created. What I have read from the reports provided for the preparation of this statement was that it was a sub-committee of, I think, TEL, and I presume it was so that they could have more speedy decision-making and perhaps more

detailed discussions about specific issues without a need to involve the whole Board. I am not able to further specify the role, remit and responsibilities of the TPB.

527. I do not know any more about the powers that were formally delegated to the TPB, by whom or when, than is in the reports provided. As it worked out in practice, when I was involved with the TPB from mid-2009 onwards, the majority of the meetings, as I recall, were actually jointly TPB and TIE Board/TEL Board meetings because they were covering the same area and included many of the same people. I do not know and I do not recall what formal powers were delegated to the TPB but the majority of people who were on the TIE Board and the TEL Board were there for the majority of meetings.
528. The TPB would formally report to the TIE and TEL Boards. I should be able to remember this but I cannot remember if it was to one and not the other. TIE reported back to TEL.
529. I do not know the formal mechanism by which these matters changed over time, other than what I have read in the reports. As I have just mentioned, when I was the Transport Convenor the majority of the time the TPB met it did so jointly with people from the TIE Board and the TEL Board and that was an arrangement that I think suited everybody. It meant that, rather than turning up and repeating the same information at consecutive meetings over two or more hours, everybody that needed to be there was there around the table.
530. Whether it was the TPB, TIE or TEL, there were Councillors present as Directors and so in my view there was a sense in which other Councillors took comfort from that fact. They could not, however, necessarily disclose what was being discussed because of Directors' responsibilities in terms of commercial sensitivity. There was only one Councillor at a time on the TPB while I was there, Phil Wheeler from 2007 to mid-2009, and me from 2009 to 2011. As I said previously, there were other Councillors at those meetings who heard pretty much what I heard the vast majority of the time. It was not so much that they were reporting back to Full Council on what they heard, it



was the fact that they were there and could confirm what was being reported to Full Council was a fair reflection of what was being reported to TIE and TEL

531. The TPB was set up, I think, as a sub-committee of TIE or TEL. In theory it was there to make decisions in between full Board meetings. In practice, while I was part of the TPB, it often overlapped with TIE and as such Councillors from the three political groups who had nominated Directors to TIE: the Lib Dems, Labour and the Conservatives were present. They also consistently turned up for the TEL Board meetings, the Green and SNP nominated TEL Directors did not come to TEL Board meetings.
532. I did not have any specific concerns in relation to the TPB as an organisation or in relation to individual members of the TPB. I have already covered the concerns about TIE and TEL and, as I have said, the TPB was largely comprised from the same group of people.
533. I note the joint report by Andrew Holmes and Donald McGougan to CEC on 20 December 2007 [CEC02083448] which sought approval for the proposed new governance arrangements (as shown in appendix 1 of the report). The report explained that the TPB would be formally constituted as a committee of TEL (para 4.2). A certified extract of the meeting of the Council on 20 December noted that the Council agreed to the delegation of general authority to the TPB through TEL and TIE [CEC01247720]. I do not know when the TPB was formally constituted as a committee of TEL, nor what powers, duties and responsibilities had been formally delegated to the TPB before then.

### **Transport Edinburgh Limited**

534. TEL was created to bring together tram and Lothian Buses in one economic entity and to coordinate public transport in Edinburgh.

535. TEL mainly focussed on the tram, especially towards the end of the tram project, to ensure that it integrated with Lothian Buses. I believe its role, remit and responsibilities are detailed within the Minutes of a TIE Board meeting held on 18 December 2009 [CEC00656073], an email dated 8 February, 2010 [CEC00475228] and an accompanying Governance Model Presentation [CEC00475229]. There was an issue about it being a single economic entity, which was important for competition law. The tram needed to be part of the same economic entity as Lothian Buses or there would need to be a tender put out for who was going to run the tram. TEL's main role, as I saw it, was to make sure when the tram was built that it was fit for purpose and integrated with Lothian Buses, so TEL brought Lothian Buses and tram people together.
536. TEL formally reported to CEC. CEC delegated powers to TEL to oversee TIE and by extension the tram project. It also formally moved the shareholding in Lothian Buses to TEL so that, in terms of the relevant legislation, it was a single economic entity.
537. Over time, TEL met less frequently and, as I recall, meetings tended to be more TIE orientated. That might simply reflect the fact that that the meetings were more focussed on the tram and the tram dispute rather than any deliberate change in approach for any other reason. Various documents, which I read for preparation of this statement state that TEL and TIE met alternately. However, it certainly felt like it was TIE that was meeting all the time because we were focussing very much on tram matters.
538. I have mentioned already that Cllr Tom Buchanan and Cllr Maggie Chapman did not turn up to meetings of the TEL Board but I do not think that contributed to why the project went wrong in any way. Those were concerns I had about individual members of the Board and were in relation to their duties as Directors.
539. The papers for a meeting of the TPB on 7 December [CEC01400187] contain a status update on the TIE/TEL operating agreements from Graeme Bissett. The operating agreements were to be agreed by the full Council on

20 December 2007. CEC delegated to TEL to get the trams built and integrated with Lothian Buses, and they reported back to CEC as required. The Council and Council officers would decide, to some extent, which committees the reports came back to. Something like the signing of the contract would obviously come back to Full Council and then would go to the Policy and Strategy Committee, if required, because of timing. The Transport Infrastructure and Environment Committee received reports and updates, and as they looked at specific matters such as the environmental issues around the West End and Traffic Regulation Orders. There were therefore a variety of mechanisms open to CEC to receive reports from TEL. The Operating Agreement was something that governed the relationship between the Council, TEL and TIE and appeared less of an issue at a strategic level. I was aware that there was an Operating Agreement and that it was partly the means by which CEC got information from TIE about the tram project and that that information was then distilled into reports that came to Councillors.

540. I have covered as much as I can say about CEC, TIE, TEL and the TPB in considering the interface between the TPB, TEL, Tram Sub-Committee, Transport, Environment and Infrastructure Committee, CEC and TS throughout the various stages of the project. I have considered a number of documents in this regard: an email dated 1 October 2007 [CEC01667446]; Governance documentation for the TPB, TEL and TIE Boards and CEC in December 2007 [CEC01387399]; an email dated 8 January 2008 [CEC01431788]; and a paper on Governance arrangements dated March 2011 [TIE00787344]. I was aware that TS were the means by which funding came to CEC for the tram project and I was aware that TS withdrew from participating actively in the project in, I think, late 2007. I was also aware that TS had a keen interest on behalf of Ministers about what was happening with the project. I have read documents when preparing this statement which confirm they were very interested and received lots of information about what was happening with the project. I know that CEC and TIE had to provide information to TS as part of the grant conditions. Later on, at the time of mediation I know that TS were represented as observers although not formally part of the discussions. I was not aware of the extent of the role they had, but

the impression I got was that they were not formally involved in discussions but were present in some capacity.

541. My understanding is that some senior executives in Lothian Buses were not supporters of the Tram project when it was being promoted. I also understand that Lothian Buses were concerned which body would be responsible for ensuring integration of the tram and bus services. I'm also aware there were some tensions between Lothian Buses and CEC at senior executive level. We were advised the Transport Act does not allow Councillors to be on the Board of publicly owned transport companies like Lothian Buses. My understanding is that CEC, in bringing forward the tram project, had to find a way to get Lothian Buses and the tram together as part of one economic entity for the purposes of competition law. I think Lothian Buses concerns were that they did not want to be reporting directly to CEC. I think that TEL was created partly as a way to address those concerns.
542. A Labour Group amendment dated 20 August 2009 [CEC00664430] was made to the effect that TIE were to report back to the Policy and Strategy Committee on the finalised Operating Agreement between CEC and TEL and all related documents including the memorandum of Understanding, for their approval. I was a member of the Policy and Strategy Committee but I do not recall if the committee was provided with the finalised Operating Agreement between CEC and TEL.

### **Transport Scotland**

543. In 2007, when I first became involved, a couple of senior executives from TS came along to tram meetings but after a time stopped doing so. As I understand it, the Scottish Government decided that TS should no longer have an active role in the tram but that it should monitor the grant the Scottish Government had been made to provide. That was the change in TS's role and involvement in the Tram project I noticed at the time. As discussed previously there was an element of tension in the relationship between TIE and and TS possibly arising from their involvement in the SAK railway line

project. I think some of the TIE people were quite happy that TS were no longer as closely involved, but that was as much as I really noticed or was aware of at the time. I was not aware of the potential significance in terms of the loss of expertise to the project that these senior officials from TS may have been able to bring.

544. I was not involved in the detail of operations and I never went to any of the reporting meetings with TS. I know that reports had to be provided to TS on a regular basis from CEC and TIE was the vehicle that, or did so jointly with CEC officers. I recall Richard Jeffrey commented at one point to the effect that he was up and down the road to Holyrood to see TS more often than he was getting anywhere else. I cannot remember the exact phraseology, but he gave the impression he was there on a very frequent basis to brief them. There are documents that make it clear that Ministers wanted updates on specific matters that were happening ahead of CEC meetings, for example. However, I was not involved in those meetings and so I do not know what level of oversight they provided.

545. I think that TS's changed role may have had an adverse effect on the management, oversight and delivery of the tram project. I did not appreciate at the time how significant TS stepping back from the project could be or might be. Had they been there, they may well have looked at what was going on and been able to contribute something in terms of an overall knowledge of transport projects and big civil engineering projects. Equally, they might have stepped back and said that was a matter for CEC whether they wanted to get independent legal advice. They may have been able to influence those sort of decisions and I would like to think they would have. My suspicion is that TS were distanced from the project as part of an expression by the Scottish Government that they were washing their hands of it. It was very much the case that it was CEC's project and the Scottish Government were having nothing to do with it. They wanted to know all about it, but they were against it and did not want to be associated with it. My concern is that impression may have weakened the negotiating position of TIE /CEC with the consortium because, frankly, the Scottish Government is a much bigger beast.

546. My concern is also that with TS being less 'hands on', the project lost the influence of a body with experience of managing and delivering major infrastructure projects, to offer guidance and advice, and an element of oversight and control of the tram project. They were less involved in the project's oversight and therefore were probably less able to do so. I do not know to what extent, if any, their hands were tied by the Scottish Ministers in relation to the project. I think their expertise in managing large transport projects could have had a positive impact on the tram project but to be clear I don't think the project went wrong because TS were not involved. I think TS might have helped to identify and prevent some of the mistakes that were made.
547. A paper summarising the proposed governance and management model in the construction period as it stood at December 2007 [CEC01387398] suggests TS were still to have a role in the project. I cannot remember any discussion about this, all I remember really is that TS were standing down from the project. The fact that they are in that governance paper is slightly anomalous to me. I cannot remember whether the decision had been made that TS had been taken off or whether it was still to be made. I cannot remember the date on which TS formally said they were not going to be part of it anymore.
548. According to TIE officials, there were certainly lots of meetings between them and TS but what TS asked and what information TIE provided I do not know.
549. As I recall some of the discussions were about the timing of the drawdown of Scottish Government grant but I have no recollection, at this time, of what other subjects were discussed.

### **Audit Scotland**

550. Audit Scotland produced reports on the tram project in June 2007 [CEC00785541] and February 2011 [ADS00046] and I read those reports at or shortly after the time of their production.

551. The general conclusion drawn from the 2007 report was that the project looked okay. I re-read the report in 2010 because of a Labour amendment that was tabled for the meeting on 10 March 2010 [CEC00274560]. I noted at that time that the report was a bit more qualified in what it was saying, in particular with regard to the risks around utilities and design, than I had taken from it at the first time of reading. The general impression I got was that it looked like suitable arrangements were in place. My general feeling on the 2011 report was that it did not tell me anything I did not already know. The risks and the problems were very evident. There were references in the report to the caveats or qualifications that they had put in their report in 2007. There was also the bit about getting TS more involved. Those were interesting in a political sense, but what they were saying about utilities harked back to their report in 2007.

552. There was significant reliance placed on the June 2007 report by Councillors, indeed by Scottish Parliamentarians as well as I understood it. The Scottish Parliament decided off the back of that report that they were going to force the Scottish Government to fund the project. There was a lot of reliance put on the 2007 report both at Scottish Parliament level and at CEC level. The 2011 report, did not tell us an awful lot that was new. I felt there was some guidance as to how things should be done going forward and I think CEC officers took more cognisance of that than elected members potentially did in terms of how they organised things for the post-mediation decisions.

### **OGC Reviews**

553. I am aware that in May 2006 an Office of Government Commerce (OGC) Gateway Readiness Review of the tram project was carried out, and a report of the review was delivered to the Chief Executive of TIE on 25 May 2006 [CEC01793454]. I note that the overall status of the project was assessed as "Red", meaning "*To achieve success the project should take action immediately*". I did not see a copy of that report at the time and cannot comment on what concerns would have arisen for me.

554. A second OGC review was carried out in September 2006 [CEC01629382], which resulted in an "Amber" rating, but I did not see a copy of that report either. Both reports were prior to my involvement as Director and that is why I did not see either.
555. A third OGC Review was carried out in October 2007 [CEC01562064] and resulted in a "Green" rating, which meant "*The project is on target to succeed provided that the recommendations are acted upon*". I do not recall seeing a copy of this report either, but I do have a recollection that the fact that the project got a Green rating was mentioned and was noted at a TIE meeting.
556. I do not recall any concerns that were flagged up specifically as I do not remember any discussion on the review.
557. The OGC produced a further "Project Risk Review" report on 15 October 2007 [CEC01496784], which described the risk provision as "*prudent*", but I do not recall seeing that report either.

## **Public Relations and Communications**

558. Information was provided to the public in relation to the tram project in lots of different ways. There were reports to Council; there were stakeholder groups set up; there were press releases; there were newsletters; there were all sorts of community meetings, to which people from TIE and CEC went along.
559. A lot of the queries or representations by members of the public would be directed to designated Council staff. If they came to Councillors they would usually be directed to those staff who would, in turn, contact TIE where appropriate. The Council Leader would get more of these queries or complaints than average because people often write to the Council Leader if they are unhappy with the Council. She then passed them on to the CEC Officer, who would liaise with TIE or whoever to obtain a response. That was usually how specific queries were dealt with.



560. There was a whole lot of commercially sensitive information that the public would not have been provided with at the time. This created something of information vacuum into which drew in a swirl of information, comment and misinformation about the tram project, for example with regard to whether it was going to go to the airport. However, looking at some of the documents provided for the preparation of this statement, clearly some of the information that was provided was not accurate or being followed through. There is information about the notices of works to be done on Leith Walk, for example, which was not being done to a suitable timescale. There was a huge amount of information going out about the tram from a variety of sources. However, we know now that some of the information from TIE was being withheld or not being shared appropriately. I think most members of the public would have been confused by what was being said as well as perhaps suspicious or angry in some cases.
561. The tram project was being driven through the middle of Scotland's capital city and it was therefore going to affect a lot of people. It would have done that even if the project had gone smoothly and the communications part of that would always have been challenging. In saying that, clearly there were instances when TIE and contractors were not doing what they were supposed to in terms of providing information to the public or not handling the information and feedback well. If you are spending large amounts of money on communications you want it to be effective. A lot of the money that was spent on communications was to promote business and to some extent, counter the adverse publicity for Edinburgh that arose from the project for that audience. Some of the communications with the local and wider public went well but it could have been better in many instances also. This is not a criticism of the communications team working on the Tram project, it is more a comment that they had a very difficult job to do as a result of what was happening in the project.
562. There were quite a number of different measures put in place to mitigate the adverse effects of the tram works, as detailed in an email dated 16 May 2008 [CEC01231803]. Those measures included putting out information to

businesses, travel users and shoppers. There was lots of information put out because of the disruption that the works caused in certain places around the city. Even at that level, CEC decided not to do any non-essential work on major arterial routes into the city at the time, because there was such a sensitivity about the impact on the travelling public while this work was being done. Keeping the arterial routes clear was one of the mitigations. There were various schemes put in place to try and assist the business community from direct measures like compensation schemes and logistic support, to indirect measures like the "Open for Business" campaign and advertising Edinburgh. There were other measures such as helping businesses with getting a presence online. Other measures looked at were reductions in rates and providing additional or alternative parking. The fact that the project went through the West End, City Centre and down Leith Walk was very difficult for businesses in those areas, small businesses particularly. I do not think that anybody ever assumed that the mitigation measures would be 100% effective. However, in terms of the overall impact on some businesses I don't think it was enough.

563. I understand that an action note dated 1 December 2008 [CEC01069093] noted that Jenny Dawe met with Jane Wood, Chair of Essential Edinburgh, who informed her that TIE's communication with traders had been severely criticised. I think I was only peripherally aware of this. The issues around traders' concerns were dealt with by Jenny Dawe as the Leader of the Council; Tom Buchanan, as Convenor of the Economic Development Committee, who had a direct role in liaising with traders; and Phil Wheeler who, at that time, would have been the Convenor of Transport. I was aware of it because it would have been reported in the press and commented on at TIE Board.
564. I think everybody at CEC knew that there was going to be a significant impact on traders, because we were very conscious of what had happened in Dublin. As I recall, TIE thought that they had put in place the biggest package of compensation that had ever been offered. However by December 2008 we

were in the post financial meltdown period and so business as a whole was struggling.

565. There was such a focus on the tram, as a result of the difficulties of the project, that I think everybody knew they had to do better on the communications. It was a very hot topic and there were various attempts to improve. For a time, up until 2009, there would have been somebody in CEC, and somebody in TIE, leading on Tram issues. Eventually Mandy Haeburn-Little was brought in and became the lead person for tram communications. She was not a CEC appointment, she worked for TIE, but it became clearly understood that she would be the lead person for Tram communications across TIE and CEC.
566. When I was Transport Convenor, I would sometimes be contacted to comment on a story that was going to appear in the paper the next day or be asked to give a comment on radio or TV. That sort of thing was happening quite frequently. There was a certain amount of planned information going out from TIE or CEC and there was comments that were reactive to what others were saying, and often you would not have much time to deal with that. An email chain dated 11 January 2008 would be an example [TIE00147176].
567. There were calls for CEC to hold a referendum on the Tram Project [CEC01241182] and, in my opinion, there were two views. One is the representative democracy view, that people are elected to take decisions to look at information and that was the view that I, and I think the majority of Councillors, took in relation to the tram project. A deputation asked the question at a TIE committee meeting. We were in a contract, we were in dispute and potentially there would be a huge cost to abandoning the project by breaching the contract. As such it did not seem to me to be a sensible thing to have a referendum at that time.
568. By email dated 26 October 2007 [CEC01507257], Graeme Russell requested that TIE give consideration to increasing the funding behind the small businesses compensation scheme. He requested this on the basis that

savings of £47m had been widely reported. Public expectations were not properly handled because we were so early in the project and we had actually, relatively speaking, done very little, so it was premature to be reporting savings of £47m in that way.

569. Whether a compensation scheme was the best option depends on what you are looking for from it. A compensation scheme would probably have been seen as the best option by many businesses. I do not know if there would there have been value for money for the public purse from such an approach. Alternative options were things like attracting more business into the city through publicity; logistical support for businesses; helping them get online; and those options were considered and introduced. Rates relief was looked at as well.
570. The minutes of the TIE Board meeting of 12 March 2008 [CEC01282170] note that concern was expressed as to how TIE's reputation was perceived in general. It was suggested that the public be reminded of what "closure" actually means before the contracts are signed. One suggestion was to have a press conference with all relevant parties attending. Any proposed strategy should be circulated to Board members for comment prior to release. I do not recall this. Phil Wheeler would have been the lead person at that time. I think any suggestion that we would have all parties, which would mean including the SNP, attending a press conference for signing was a non-starter.
571. On 27 May 2008, I was sent papers for the tram operations group meeting [CEC01238879] to be held at Harvey Nichols with a view to addressing the problems which businesses were experiencing as a consequence of the construction. Logistic teams were put in place, as detailed in a document regarding Stakeholder Engagement Strategy [CEC01238880], which consisted of teams of people to carry items from vans that could not get near to a shop. I do not know if they were there throughout the project and the feedback I received was that they were effective for some people, but also that they did not turn up at the right time or at the right place for others.

572. I believe a protocol was prepared by CEC setting out the procedure for obtaining approval to work out with the hours set down in the Code of Construction Practice. I have read the Minutes of the Tram Operation Group dated 28 April 2008 [CEC01238881], but I do not know if this was discussed with BBS and TIE.
573. Leith Business Association (LBA) sent Jenny Dawe and, I think, Tom Buchanan an email on 30 November 2010 [CEC00127068] noting that, due to the lack of accurate plans, the utility works took far longer than was anticipated or communicated to the businesses on the route. LBA made a number of demands of CEC and there was a package of measures approved to improve the public realm, as it is described, on Leith Walk. It was as a result of these and other representations made by people along Leith Walk that they had all the hassle with utilities and nothing to show for it, that these measures were put forward
574. A tram briefing dated 23 February 2011 [TRS00014744] noted that I should be offered communication support when speaking to the press. I don't know if this was in response to a view that I had given poor interviews or said something senior executives disagreed with but I had regular contact with people from the communications team, mostly as I recall Lyn McMath and Mandy Haeburn-Little. I had quite a lot of support from those communications people which, generally, was helpful. Sometimes I disagreed with their advice but it was nearly always there if I wanted to take it.
575. Apart from me and the Council Leader, other elected members were not routinely provided with comms support on the Tram. Elected members could ask for support, briefing materials and advice.
576. In my experience as Transport Convenor there was communication support for me all the way through. It changed over time, and I am sure it could be argued it was improved, but it does not matter how much communication support you have got, if the project is going through terrible times, the communication support is not going to change the outcome that much.

577. The minutes of the joint project forum meeting on 25 April 2012 [CEC01891022] note that Sue Bruce referred to the article in the Evening News on 20 April initiated by me in relation to the "Time Bank". She apologised to Martin Foerder for the article which had not been officially sanctioned. Martin Foerder expressed concern about such reports being damaging as they were untrue and raised expectations that could not be met. He asked how this could be controlled in the future and Sue Bruce advised that, following the Council election on 3 May, she would be speaking to members of the new Council about ethics and behaviour. I do not think Sue Bruce spoke to me about this, although I apologise if that is incorrect. The comments were based around the fact that the projections, at that time, showed that there was quite a bit of what I understood to be 'slack' in the project plan and that if things went well, the project could be finished in late 2013, as opposed to mid-2014. That was the information that had been shared with us as part of the Tram Oversight Group and I do not think it was unethical to say that. Certainly, from my understanding of what we were being shown at the time, it looked like there was considerable slack in the post-mediation programme, although potentially Mr Foerder and CEC had information that I did not have.

578. I do not think Councillors were encouraged not to express their views on the project by senior CEC officials, if they were it was not heavy handed. If CEC officials had tried to do that, I do not think they would have been very successful. There is a pragmatic part to this in that some Councillors would not have wanted to express a view because it could have been bad for their prospects at election. Whereas other Councillors, particularly in the SNP, would be quite happy to raise issues about the tram, certainly pre-mediation, because they would have felt that would have worked well for them politically.

### **Cost Overrun and Consequences**

579. I received information that things were not going well and that costs or likely costs were increasing via the TPB, TIE and TEL meetings. As I recall

projected costs were expressed as a range depending on various assumptions such as whether DRPs went for or against us, although I struggle to say when I first became aware costs were very likely to go above £545. I am aware there was a report to the Council on 20 August 2009, which said it was unlikely that it was going to be able to be built in the £545m budget. Working back from that, it was probably in the three or four months prior to that over the summer, that I would have recognised the balance would have been shifting above £545m but I cannot recall a specific piece of information that changed my views.

580. My understanding as to how the additional contribution by CEC would be financed, following the Mar Hall mediation, was that it would be by 'Prudential borrowing'. There were other options potentially available such as the leasing of the tram vehicles themselves and the possibility of selling parts of the rights to income from the tram project. There were private financing options or CEC could sell property, land or other assets to raise funds. I do not know how much work was done on looking at these other options but I felt that long-term borrowing was the best option.
581. I do not consider that Councillors were properly informed of the risk of a cost overrun throughout the project, nor the likely amount of the overrun.
582. The most notable consequences of the failure to deliver the tram project in the time, within the budget, and to the extent projected, was the financial costs, which resulted in higher debt payments and consequent reductions in Council services. Other consequences included that, because the tram did not go to north Edinburgh, it was not going to promote or enhance the likelihood of development in the north of the city and because of the delays in construction there were greater than anticipated consequences for affected businesses along the proposed route. A further consequence would be the loss of predicted benefits to air quality. It was very bad PR for Edinburgh in a number of respects and further affected confidence in public sector project management.

583. My constituents lived away from the line of the tram, so they would have no direct impact from the works on the tram where they lived other than travel disruption as they were going about the city or if they worked or had businesses along the route. However, for the reasons I have detailed above , there would be an impact on Council provided services
584. The financial effect of the additional borrowing by CEC for the tram project is equivalent to about 1% of the total Council budget.

### **Final comments**

585. In my view the main reasons for the failure to deliver the tram project in the time, within the budget and to the extent projected, were in the poor execution of the plans set out in the year or so prior to Contract Close. In particular, there was poor legal advice on the contract, and a failure to scope out properly the extent of utilities and progress the design works required. Subsequent actions by a range of stakeholders compounded those earlier mistakes in some cases rather than rectifying or mitigating them.
586. These failures in scoping of MUDFA works and design development might have been mitigated or rectified had independent specialist legal advice on the contract been obtained by CEC and the contract revised prior to signing. Alternatively had CEC officers obtained independent legal and technical expert opinion earlier than they eventually did some of the cost overruns could have been reduced. I stated much earlier on that construction inflation in 2007 was around about £8m a month and that was potentially a reason why more thorough preparation was not undertaken. Digging up lots of roads and then having to close them again a year or two later would not have been popular but that was short-term thinking. I think that other areas to look at the composition of the Boards of TEL and TIE and the proper place of Councillors in the scrutiny process. Finally, there has clearly been an issue with the sharing of information between TIE and CEC officials and a failure by CEC



officials to provide the quality and balance of information required to enable Councillors to make an informed decision on some matters.

587. I think that shifting the funding responsibility from the Scottish Government to the local authority was an error because it shifted the risk away from a body which has a budget that is something like 30 times bigger than CEC and would have been more able to manage the risks financially. This would have, perhaps, helped in dealing with the tough negotiations that inevitably happened with the contractor and I think that having a Scotland-wide body to procure large scale transport project like this would have been a better approach rather than setting up something bespoke.

I confirm that the facts to which I attest in this witness statement, consisting of this and the preceding 192 pages are within my direct knowledge and are true. Where they are based on information provided to me by others, I confirm that they are true to the best of my knowledge, information and belief.

Witness signature..



Date of signing.....11/07/17.....