

## **The Edinburgh Tram Inquiry**

### **Witness Statement of Councillor R. Henderson**

My full name is Ricky Henderson. My contact details are known to the Inquiry.

I have been a Labour councillor in Edinburgh since 1999. I represented the Parkhead ward of the City of Edinburgh Council (CEC) until being elected to the Pentland Hills ward in 2007. I served as Executive Member for Sport Culture and Tourism between 2003 and 2006. I was an Executive Member for Transport from August 2006 to May 2007. Since 2007 I have filled the roles of Labour spokesperson for Transport and Education. I am Deputy Leader of the Labour Group. I was a director of TIE from 30 April 2002 to 19 July 2004 and then from 22 January 2007 to 2 September 2008. I was a director of TEL from 12 September 2006 to 21 August 2008. I also sat on the Tram Project Board (TPB) from January 2008 to July 2008.

Statement:

### **Introduction**

1. I was originally elected as a Councillor for the Parkhead ward in 1999 and re-elected in 2003. I was then elected as a Councillor for the Pentland Hills ward in 2007 and re-elected to that ward in 2012. I was, and continue to be, a Labour Councillor. I held a number of positions with CEC: I was originally Vice Chair of the Personnel Committee; I was Chair of the Personnel Appeals Committee from 1999 to 2007; I was the Executive member for Sport Culture and Tourism from 2003 to 2006; I was the Executive member for Transport from August 2006 to May 2007; I have been the Convenor of the Health, Social Care and Housing Committee and I continue in that role. In addition, I held a number of positions within the Labour group: I was Labour Group

Secretary from 2000 to 2003; I was the spokesperson for Transport from May 2007 to June 2008; I was then the spokesperson for Education from June 2008 to May 2010; and I was the spokesperson for Finance from May 2010 to May 2012.

2. I was also a director of TIE from 30 April 2002 to 19 July 2004 and again from 22 January 2007 to 2 September 2008. I was appointed to the Board of TEL as well. I was a director of TEL from 12 September 2006 to 21 August 2008.
3. I was an elected member of the Council throughout the Tram Project. As elected members of CEC, all Councillors were responsible for taking decisions on the Tram Project. I was also part of the 'hearts and minds' campaign to capture the hearts and minds of the people of Edinburgh and secure their support for the tram.
4. I had no specific training on the Tram Project per se, but obviously I had responsibilities as an elected member of the Council. I have experience in relation to finance and governance; however, I do not hold any relevant qualifications in relation to the Tram Project. Councillors require to take decisions for the Council as well as representing individual constituents. Prior to making those decisions, we would obtain information and take advice from professionals who were appointed for their experience and expertise in specialist fields. I think that training is always helpful; however, one has to be realistic about the level of expertise one can develop in specialist fields.
5. At different times the SNP Group voted in favour of certain things to do with the Tram Project but most of the time they opposed it. In May 2007 the SNP and Liberal Democrat Groups entered into a political coalition to run the Council. Between them they held 29 of the 58 seats. The Labour, Conservative, Liberal Democrat and Green parties were all in support of the Tram project. The SNP Group's opposition to the Tram project caused problems. The Liberal Democrat and SNP Groups were meant to be working together to the best interests of the city and yet they were singularly and quite vehemently divided on the Tram Project. The Labour Group was trying to

scrutinise and challenge the coalition, as is the job of opposition. The SNP/Liberal Democrat administration then expected us to follow them in all aspects of the Tram Project even although we did not have good working relationship on any other aspect of Council business. That caused difficulties.

## **Reporting**

6. There would be numerous officials who were responsible for advising Councillors of developments relating to the Tram Project. The main people who advised and reported to Councillors in this regard were: Tom Aitchison, (the Chief Executive of the Council until the end of 2010); Sue Bruce (Chief Executive from 2011 onwards) ; Andrew Holmes; Dave Anderson; Donald McGougan ( Director of Finance); Jim Inch (Director of Corporate Services); and Gill Lindsay (the Council Solicitor). They were the people that would have been expected to take a lead in terms of advising Councillors.
  
7. Issues relating to the Tram Project would frequently have been on the agenda at Council meeting as far as I can recall. There was always sufficient time at Council meetings to discuss and consider the project. Votes in relation to the Trams were done on party lines because it was a policy issue. Each political group would discuss matters privately. This would involve obtaining briefings and taking advice from officials or other experts if necessary. Any concerns or issues would be raised and resolved in that manner. Thereafter, the group would agree on the way forward and then everybody would vote on that basis. I do not believe that this method lead to the Tram Project not being fully scrutinised. I do not believe anybody was silenced. There was ample opportunity for elected members to raise concerns and to do so as often and as vociferously as they wished. Within my own party, there were some people who had doubts about the popularity of the Tram Project and how well the project would be received across the city. They knew that some people would react against it.

8. I think in general terms people were supportive of the concept of the Tram Project in terms of the upgrading and improvement of public transport. Some Councillors might have had reservations about convincing people that it was a good thing. However, in terms of the actual principle and the concept of the Tram Project, my understanding was that people were keen to see it happen.
  
9. I was kept informed of developments relating to the Tram Project by regular reports and updates from Council officers. It was their responsibility to bring forward any significant decisions and to provide all the relevant information and recommendations on the way forward. I then had the chance to scrutinise the information provided. Outwith Council meetings, we also obtained briefings from either officials or external advisors on certain aspects of the project. I do not think we were always updated on significant developments relating to the Tram Project. In particular, I do not believe we were updated on the problems that arose and the estimates of the cost of completing the project. At the time, I thought I had been updated on those matters. However, the Tram Inquiry has provided me with a lot of information that I was not previously aware of. I now think that I was not given updates as frequently as one would expect.
  
10. I understand the need for commercial confidentiality. I do not know what information, if any, was retained for reasons of commercial confidentiality. However, that should not have prevented information, if any, being shared with elected members. It should have been shared privately with Councillors. We have a system in the Council now that is known as the Data Room. If there is sensitive information that cannot be shared publicly, but which is important to a decision that is going to be taken, then the documentation will be made available to Councillors in an appointed place at an appointed time. If a Councillor, as an elected member, wants to see that documentation, he or she can do so. Councillors have access to everything they need, but they cannot take the information away. This satisfies the need for confidentiality and seems to work pretty successfully. I cannot recall if that system was used with the Tram Project.

11. I believe group leaders received separate briefings on the project on occasion. I believe that the group leader in my group did share that information. I was never a convenor of a Board so I do not know if they received information or if they passed on that information. Similarly, I was not a convenor of a Committee, so I do not know if they received separate briefings.
12. To the best of my recollection, the political parties tended to have separate briefings largely for practical reasons. The parties all have their own group offices and separate times for meeting, so officers would meet with one group at a time.
13. I would have expected to be provided with information and recommendations in respect of any decision which we, as elected members, had to make. I would have expected the information to include legal or technical input where necessary. I would have expected that information to have been scrutinised and I would have expected that it would be presented in a way that would allow us to make an informed decision.
14. At the time, I considered that Council members were provided with sufficiently detailed information in relation to the Tram Project. We had background briefings where members were provided with guidance to assist us in coming to decisions. Those briefings were delivered in a clear and intelligible form that I understood. I did have the opportunity to complain about the level of information provided, request further information, and seek further guidance, advice or clarification. I could do so by informing whoever was providing the briefings that I was not clear, or did not understand, what was being presented. I could ask for more information where I was not satisfied with the level of detail provided. There was no formal process in place. I would just ask questions and the information requested would be provided in another report. At that time, I thought the information and advice which I was being provided was accurate. I accepted what people were telling me was correct and accurate. I had no reason to believe otherwise at that time. I believed that the information provided was prepared by TIE and appropriately qualified experts who had been appointed due to their experience in their field. When I

received a report, I assumed that it was produced with information from all relevant sources. I had no concerns in this area. It was my belief that the information provided by TIE had been checked by Council officers.

15. In relation to how I reported matters to my constituents, I did not get an awful lot of enquiries from my constituents in respect of the trams. My Ward is in the south-west of the city, so it was not really impacted by the Tram Project. One or two people would have been in touch about the general principles of project. I would have responded to those enquiries as openly and honestly as possible. Neither my understanding of, nor my views on, the Tram Project were influenced by the media.

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

### **The New Transport Initiative and the Creation of TIE**

16. I was a member of the Council at the time the New Transport Initiative (NTI) was proposed and I was one of the first council directors of TIE. It was my understanding that the Council made the decision to create TIE, but did so in response to a suggestion, or a request, by Scottish Ministers. It was suggested that an arms-length company would be the best method of delivering the NTI.
17. The main reason for the creation of TIE was to give the Council the ability to be more flexible in recruitment. The creation of TIE allowed the Council to recruit people with expertise and specialisms that we did not have in-house and that we would not wish to recruit on permanent posts. You might only need certain expertise for a short period of time. TIE could employ people from the private sector with those relevant skills for the period that they were required. This was deemed to be a better way of operating. I could see the argument in some cases where it would be easier to get people from the private sector to come in for short periods of time. I didn't have concerns about the local authority's ability to deliver but accepted the points put forward

that an arms length company would have certain advantages in the recruitment and retention of specialised staff.

18. TIE was an off-balance sheet company. I do not know how important a factor that was to the creation of TIE. I cannot recall what the benefits were of proceeding in this manner. I had no concerns in this regard. TIE was a wholly owned company created by CEC and had a shareholders operating agreement which laid out the terms of the relationship. The obligations of TIE were to act on the Council's behalf and implement Council decisions.
19. The minutes of the meeting of TIE directors on 30 May 2002 (TRS00001870) referred to a paper on risk prepared by the Chief Executive, Michael Howell. That paper had identified as a key financial risk the scale of financial liability which could arise to the Scottish Executive from the total £850m to £1.5 billion capital spending which was being considered. I cannot say what proportion of that financial liability was attributable to the trams. At that time we were still in the early stages of considering the NTI package. We were still considering what could be taken forward and how it would be taken forward. Costs had not been finessed to any great extent at that stage. I did not think that the Tram Project was a financial risk to the Council at that time.

#### **Initial Estimates for the Tram Network**

20. Various STAG Appraisals and draft Business Cases for a tram network were produced between 2000 and 2004. STAG appraisal is a methodology that Transport Scotland used to appraise transport projects as they progressed. The consultants would be commissioned to provide input into a project's estimated costs. I cannot remember specifically which individuals or organisations were involved in preparing cost estimates for the Tram Project. There were a number consultants commissioned as part of the STAG appraisal process. I cannot recall if I had any views on the various STAG Appraisals and draft Business Cases produced during this time.

21. Varying estimates of cost for the proposed tram network were provided between September 2002 and September 2004. I note that a September 2002 TIE Report entitled *“Integrated Transport Initiatives for Edinburgh and South East Scotland, A Vision for Edinburgh”* (CEC01623145) considered that it would be possible for the northern loop and west lines to be built at a total capital cost of £355m and a south east tram line to be built at a cost of £123m. A 2003 Preliminary Financial Case (TRS00000054) for the northern loop only (referred to as line 1) estimated the capital cost at £287.3m. A 2003 Preliminary Financial Case (TRS00000016) for the west line only (referred to as line 2) estimated the capital cost at £336.3 million. A September 2004 Updated of the Preliminary Financial Case for lines 1 and 2 prepared in September 2004 (CEC01868590 and CEC00642799) estimated the capital cost for line 1 at £274m and the capital cost for line 2 at £320.9m. The varying estimates for the proposed tram network produced during this period did not cause me any concerns as to the reliability of the estimates. I don't recall it causing concerns for other Councillors either.
22. I note that a member of the public, Alison Bourne, emailed every Councillor on 10 December 2003 [CEC02082850] in relation to the imminent meeting at which Councillors were to approve the lodging of the Tram Bills. Mrs Bourne stated (on page 3): *“Costs – We note from the main report to Council (Trams) that, on 11 December, you are to be asked to approve the costs, as detailed in STAG 2 (page 71 for line 1; and page 88 for line 2) and Financial Statement. Are you aware that these documents show a different total cost (£566.7m) than the total being shown in the report to Council (£473.4m)?”* In an email dated 1 August 2007 from Ms Bourne to Councillor Phil Wheeler (CEC01926998), Ms Bourne stated that on 11 December 2003, she was part of a deputation to the CEC on the subject of the route of tram line 1 (TL1) and the costs which elected members were being asked to approve that day. The deputation, apparently, raised concerns that *“the cost of the project ... was being seriously understated and that realistic sources of funding required to be identified”*. I do not remember Alison Bourne's email or her deputation. I therefore, cannot remember what was done in response to the concerns raised.



## **The October 2004 Arup Review**

- 23.** I am now aware that in October 2004, Ove Arup and Partners Ltd, on behalf of the Scottish Parliament, produced a review of the Business Case for line 1 [CEC01799560]. I did not see and was not aware of Arup's report at the time it was produced. Nor was I aware that TIE had produced a response to Arup's report [CEC01705043].
- 24.** Looking at the Arup report I can see that, whilst Arup concluded that, in general, the approach described in the Preliminary Financial Case was reasonable and robust given the stage of development of the project, four main concerns were noted. First, it was noted that the benefit cost ratio ("BCR") of 1.21 did not appear to represent a particularly strong case in terms of economic value of the scheme. In addition, the economic case for the scheme was heavily dependent on the benefits from one area (ie Granton). Secondly, it was noted that there was a significant shortfall in funding, perhaps in the order of £82-£190m. Thirdly, it was noted that the total amount added for contingency on capital costs was 25%. It was stated that the project's averaging of mitigation factors was likely to have led to underestimating Optimism Bias uplifts. It was stated that further justification of the likely cost of the mitigation strategies should be provided. Fourthly, it was stated that the risk section in the Preliminary Financial Case did not specifically address the risks associated with the management of the interfaces between the providers of design, infrastructure works and systems integration and the tram vehicles.
- 25.** I did not see Arup report or TIE's response. I know that the BCR changed as the project progressed. It is difficult to state what further enquiries I would have made on a report I did not see at the time. I likely would have asked what the Council's position on the report would have been.

## **The 2005 Road Charging Referendum**

26. In February 2005, following a referendum, the public voted against the introduction of road user charging. The income from road charging was one of the methods that we were going to use to raise revenue to support the projects. Councillors were concerned about the affordability of the project without this income. Once we knew the outcome of the congestion charging referendum, we knew that other alternative sources of funding would have to be identified. We could not identify any alternative sources of funding.

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

27. In May 2005 TIE produced a Draft Interim Outline Business Case [CEC01875336]. This noted that either line 1 or line 2 were affordable within the Executive funding of £375m but a network of lines 1 and 2 was not affordable. The shortfall in funding for capital expenditure for both lines 1 and 2 was recorded as £206m. The acknowledgement of a £206m shortfall appears to contradict TIE's earlier assurances in their response to Arup's report that *"the figures previously reported by tie remain the best estimate of the likely future costs and there is no additional £220m shortfall"* [CEC01705043]. At the time I had not seen the Arup Report [CEC01799560] or TIE's response to it and so was not aware of any conflict.
28. The business case also noted that the programme anticipated construction of phase 1a commencing in December 2007 to meet an operational date for the tram by the end of 2009. The 30 month construction programme from July 2007 to meet the operational date for the tram by the end of 2009 was referred to as a *"challenging timescale"*. I cannot recall a *"challenging timescale"* being a big issue. I do not know why there would have been any specific pressure on TIE/CEC to meet a specific date.

## 2006 Reports to Council and Draft Final Business Case

29. A report to Council 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 £545m. This funding included £45m from the Council. It stated 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 (page 4).
30. I cannot remember if the need to restrict, or "*phase*" the scope of the tram network caused me any concerns in relation to the reliability of the initial cost estimates, the affordability of the tram project or TIE's ability to deliver it.
31. A first phase to be built from the Airport to Leith Waterfront was recommended because it was deemed to be the most economically viable route.. I do not know if the Scottish Government played any part in that decision. A first phase from the Airport to Leith Waterfront was considered to offer the greatest benefits. The proposed northern loop was reliant on a lot of development taking place in the North of Edinburgh. That did not take place after the crash in 2008. The tram was also meant to play a role in encouraging development in the North of the city. The view was that if the public transport links were there, then that would encourage builders and other businesses to locate in those areas. However, the first phase of the link from the Airport to the Waterfront was deemed to be more viable in connecting to existing areas of the city that needed served.
32. It was a policy decision 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 an important point that the Tram Project would not affect funds elsewhere.

- 33.** By joint report to Council on 21 December 2006 (**CEC02083466**) the Directors of City Development and Finance sought members' approval of the draft Final Business Case for the Edinburgh Tram Network. The estimated capital cost of phase 1a was £512m if built alone. The report noted (at paragraph 4.28 on page 11) that the most significant risks affecting the timeous completion of the project within budget were: (1) the advance utility works; (2) changes to project scope or specification; and (3) obtaining consents and approvals. The report noted (at paragraph 4.32 on page 12) that: *"To maintain control over the capital cost of the project the following actions will be required:- namely (a) enabling works, including utility works, should be authorised to proceed on a timetable that will not disrupt the main infrastructure programme, and (b) negotiations with bidders should continue with a focus on achieving a high proportion of fixed costs in the final contracted capital cost (so far as the public sector is concerned)."* I was supportive of the draft Final Business Case. I was responsible for taking it through full Council. I was Transport Convenor and Executive Member for Transport at the time.
- 34.** The most significant risks affecting the timeous completion of the project within budget were legitimate and appropriate and were appropriately highlighted.
- 35.** My understanding at the time was that the Council, TIE and the Scottish Government would take steps to maintain control over the capital cost of the project. I would have expected them to exercise scrutiny and oversight of the project and to utilise the expertise available from Transport Scotland. All three had a big stake in the project and it was in their interests to ensure that the project was monitored in a way that made ensure that costs were kept to budget.
- 36.** The aim of the procurement strategy was to try and fix as many costs as possible in order to minimise the risk to the Council and the Scottish Government. We knew that other projects elsewhere in the UK had experienced difficulties with utility works. It was recognised that the information available regarding the location of utilities is not always complete

or accurate. It was accepted within the construction industry that you do not know what you are going to find until you start digging up the roads. We had been told that, when trams were introduced to Nottingham, the construction works had been delayed as a result of problems that had been encountered when trying to divert the utilities. . This meant that a lot of delays built up, and delays equal cost. To avoid this occurring we wanted to separate those two activities and make sure that the utilities were cleared before the tram construction commenced. It was my expectation in December 2006 that design works would be completed before the infrastructure works commenced.

### **Events in 2007 to May 2008**

- 37.** A highlight report to the internal planning group dated 20 March 2007 (CEC01565481) noted that design for the tram system was progressing slowly and TIE had committed to carrying out an organisation and culture review to improve its approach. As part of that review it was noted that six CEC staff would 'hot-desk' at TIE's office to assist with the approvals process. The slow progress of the design was brought to my attention. I understood that approval from the Council was delaying progress with the design. The design process required approvals from the Council's planning department. There were also particular locations which were causing difficulties. For example, the Council did not have a clear vision as to what the top of Leith Walk was going to look like in the future. Nor was there a clear vision of what infrastructure would be necessary. In March 2007, decisions were still pending in that regard. Those decisions were going to influence what happened to the actual tram network design. The design work could not progress until those decisions were made. The highlight report noted that I was to receive a one to one briefing as a tram spokesperson, but I cannot recall receiving a briefing.
- 38.** The local government election on 3 May 2007 changed the administration of the CEC from a Labour administration to a Liberal Democrat/SNP coalition.

Prior to the 2007 election, the Tram Project was politically contentious. The Liberal Democrat Group went into coalition with the SNP Group, and the SNP Group was opposed to the Tram Project. Relationships were not good across the Council at that time. That led to issues in terms of getting the decisions through Council on the Tram Project. SNP members were part of an administration locally, but they did not support the Tram Project and that was a problem. The administration was divided on the Tram Project and that caused them issues. I was still supportive of the Tram Project and wished to see it proceed but realised that it could be more difficult. Although the Labour Group remained supportive of the Tram Project in a policy sense, we were in opposition of the coalition. It was up to us to challenge, scrutinise and oppose in the most constructive way we could manage. We were not in a position to control anything.

39. Following the formation of an SNP administration at the Scottish Parliament in the May 2007 election, there was a debate and vote in the Scottish Parliament on the future of the Edinburgh Trams and EARL projects. In June 2007, the Scottish Parliament called on the SNP administration to proceed with the Trams Project within the £500m budget limit set by the previous administration. Accordingly, the grant for the Trams Project from Transport Scotland remained in place but was capped at £500m. The new SNP Government distanced themselves from the Tram Project and they withdrew Transport Scotland from the Project Board.
40. On 20 July 2007, Jim Inch produced a Briefing Paper for the Chief Executive (CEC01566497) in relation to the governance arrangements of TIE. The paper noted that the governance arrangements for TIE were "*complex*", that it was "*vital that more rigorous financial and governance controls are put in place by the Council*" and that "*TS have previously urged the Council to implement a more robust monitoring of TIE's activities in delivering the project*". I did not see that briefing paper and the issues within it were not discussed with me. I do not know whether it was discussed with other members of the Council. I think that it ought to have been though. I cannot remember my views on the governance arrangements for TIE and the Tram

Project at that time. I did not have any strong views on the governance arrangements. Subsequently, those governance arrangements were changed through a Council report which would have been informed by the briefing paper. I do not recall when the changes were introduced.

41. A Highlight Report to the Chief Executive's Internal Planning Group (IPG) on 30 August 2008 (**CEC01566861**) noted that the capping of the grant from TS changed the risk profile for the Council. It sought guidance on the procurement of resources necessary to provide a risk assessment and analysis of the IFRACO contract for the Council within the available timescales (paragraph 4.1). Around that time Gordon Mackenzie, as Finance Convenor, sought information on a number of matters, including what contingency plan needed to be in place in case of a cost overrun (**CEC01556572**). I cannot recall what steps were taken by CEC following the changed risk profile to protect its interests. I do not know what, if any, contingency plans were put in place by the Council at that time in case of a cost overrun.
  
42. I attended a meeting of the Council on 23 August 2007 (**CEC01891408**) at which Councillors were asked to note the contents of the report by the Chief Executive (**CEC01566861**) with respect to the revised funding arrangements for the Tram Project and the implications for the transfer of risk to the Council. Councillors were also asked to note that a revised governance structure was required for the project and for the relationships between the various companies and agencies promoting it. Councillors were asked to instruct and delegate to the Council Solicitor to conclude operating agreements with TIE and TEL. Councillors were also asked to note that the roles of the Executive Chairman of TIE and Chief Executive of TEL were being reviewed with a view to clarifying the contracts and responsibilities of each post. It was necessary to revise governance arrangements due to the change of the National Government and their decision to cap the Government grant at £500m and to withdraw from the project. That put more responsibility on the Council. I cannot remember what changes to the governance structure were made in

the second half of 2007 and the first half of 2008. Nor can I recall when any changes were introduced.

43. The meeting was also asked to establish a subcommittee of the Transport, Infrastructure and Environment Committee with a remit to review and oversee decisions with respect to the Tram Project. It was thought to be necessary to establish a subcommittee of the Transport, Infrastructure and Environment Committee, the role of which was to review and oversee decisions with respect to the Tram Project to give greater oversight and involvement of elected members. I was appointed on to that committee because I was the opposition transport spokesperson at the time.
44. At that meeting Councillors were asked to note that the Chief Executive would report further to Council in September on a detailed scheme of delegation of powers to the various parties mentioned. Pending that report, the meeting delegated responsibility to the Chief Executive for any decisions that required to be taken. I do not have any recollection on how the roles of the Executive Chairman of TIE and the Chief Executive of TEL changed. Any changes to the governance structure introduced in the second half of 2007 and the first half of 2008 could have been successful if they had been operated correctly and robustly. It is all very well changing the structures, but they must then operate effectively. With regards as to whether the governance structures were operated correctly after the changes I am not in a position to comment as it is only with the benefit of hindsight.
45. I have been made aware that a joint meeting of the TIE Board/TPB/Legal Affairs Committee took place on 15 October 2007 [CEC01357124]. At that meeting, the Boards were advised that the INFRACO bids were primarily based on preliminary design. I cannot recall if I knew that or not.
46. On 25 October 2007 a report was submitted to the Council (CEC02083538) seeking the Council's approval for the Final Business Case, version 1, in respect of phase 1a (CEC01649235). The report advised that the estimated capital cost of phase 1a was £498m (which included a risk allowance of



£49m) and that there was a 90% chance that the final cost of phase 1a would come in below the risk adjusted level. The report advised that fixed price and contract details would be reported to the Council in December 2007 before contract close. The report also advised that a separate report was being prepared for the Council to set out the result of the tender evaluation and to give recommendations as to the preferred bidder for each contract. In October 2007, I was still supportive of the Final Business Case. I had no concerns at that stage. Support for the Final Business Case was sought after considerable cost had already been incurred on the project. That was not unusual. Any project of that size and scale would require expenditure to get to that stage. I think one would expect that to be the case.

47. It is explained within the report how and by whom the estimated capital cost for phase 1a of £498m had been arrived at and that is my understanding of it. Section 3.28 of the report to Council of 25 October 2007 notes that “capital costs have been finalised from the firm rates received from Infracore and Tramco bidders”. Section 4.9 of the same report notes that “capital costs have been benchmarked against those of other tram schemes in UK and Ireland”.
48. At the meeting of the Council on 25 October 2007, members were given a presentation by Andrew Holmes, Willie Gallagher and Neil Renilson (CEC02083536). I do not remember the presentation itself, but the slides are familiar. I cannot recall if a report setting out the result of the tender evaluation was provided to the Council. TIE chose BBS as the preferred bidder based on the indicative cost and the reputation of the companies in the consortium.
49. I am now aware of an email dated 3 December 2007 [CEC01397538] where 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. These included concerns regarding the report to Council seeking approval of the Final Business Case. The briefing note highlighted the potential for additional project costs arising from delays in design (paragraphs 3 on page 2). It highlighted concerns regarding the quantified risk allowance

(paragraph 4 on page 3) which had been reduced. It raised concerns regarding utilities (paragraph 6 on page 4). In particular it noted that the MUDFA works had a direct impact on INFRACO's ability to start work and that the MUDFA works were delayed. The briefing note raised concerns in respect of incomplete designs (para 7 on page 4). It noted that the design was incomplete and that this would increase the risk of variation orders and delay to MUDFA and INFRACO. The briefing also note raised concerns regarding PI cover and guarantees. In particular, the briefing note suggested that Council officials did not understand the contract and had not had any independent advice in respect of its terms. It stated (at paragraph 15.3) that *"Experience would tend to suggest that the presumed commonality between TIE and the Council cannot be taken for granted"*. I was not aware of that briefing at the time. I recognise those issues which emerged later on, but I was not advised at the time.

50. If the Council had been made aware of the concerns at that time we would have wanted clarification, explanation, more information, and an opportunity to consider whether we still wished to continue on the road we were on.
51. In an email dated 14 December 2007 [CEC01397774] to Geoff Gilbert of TIE, Duncan Fraser referred to a presentation by TIE the previous day and asked certain questions about the Quantified Risk Allowance ("QRA"). This included querying the provision made for the likely change in scope given the incomplete/outstanding design, approvals and consents. Mr Fraser stated, *"The scope of the works is not clear to CEC and specifically the quality and quantity and status of designs on which BBS have based their price. Also none of the designs are approved (none technically and only 4 out of 61 prior approval packages) hence the scope is likely to change, hence provision should be made for this"*.
52. In an email of the same date [CEC01397774] Geoff Gilbert replied, *"I have previously explained the inter-relationship between emerging detail design, Employer's Requirements and Infraco Proposals works and how price certainty is obtained out of this process and are (sic) in the process of*

*delivering such certainty. Therefore, please advise what scope changes you anticipate arising out of the prior approvals and technical approvals. The overall scope of the scheme is surely now fixed, is it not?"* I was not aware of those concerns being raised at the time, but I regarded the scope of the scheme to be fixed in general. In terms of the route, I knew there was detail that had to be finalised.

- 53.** Between 17 and 20 December 2007 negotiations took place at Wiesbaden, Germany, between representatives of BBS and TIE. On 20 December 2007 an agreement was reached (the Wiesbaden Agreement). I was not aware of the purpose and outcome of the discussions in Wiesbaden and cannot recall when I was advised, or by whom. It was not my impression that TIE knew that the contract was not fixed price. Nor was it my impression that TIE knew that this might result in the Council breaching the terms of the funding agreement with Transport Scotland. That was not the impression that they created.
- 54.** On 20 December 2007, Donald McGougan and Andrew Holmes presented a joint report to Council [CEC02083448] seeking members' approval of the Final Business Case, version 2 [CEC01395434] and seeking staged approval of the award by TIE of the contracts. That approval was subject to price and terms being consistent with the Final Business Case. It was also subject to the Chief Executive being satisfied that all remaining due diligence was resolved to his satisfaction. It was noted in the report that the estimate for phase 1a of £498m (inclusive of a risk allowance of £49m) as reported in October 2007 remained valid. I remained generally supportive of the Final Business Case. I did not have any concerns in that respect. Any concerns I did have would have been over the political management of the project and the tensions within the Council. My understanding at that stage, based on the content of the report, was that utility diversion works would be complete. Any difficulties arising from incomplete design of utility works could lead to delays and, therefore, increased cost. My understanding was that these would be tackled by mitigating management actions to ensure that things were kept on track, on timescale and within budget. The management actions to which I refer to were referred to in Tram Manager Reports for the project. For example, if

difficulties were being experienced locally then I would have expected resource to be increased at that location to rectify any issue. I would also have expected us to work with the contractor to try and resolve any issue they were facing.

55. I was of the belief that the infrastructure contract was fixed price, as per the report provided by TIE. It was important for the Council that the infrastructure contract was a fixed price contract. It was important because we had to have visibility of how the money was going to be spent. We also required certainty that the budget would be adhered to. I voted in favour of the Tram Project due to my belief that it was fixed price. The Council would have been a bit anxious about approving something that was open-ended. I would have voted differently had I known that it was open-ended.
56. I would like to refer to paragraphs 8.11 to 8.18 in that report [CEC02083448] which come under the heading "*public sector risks*". That section deals with the main risks to CEC, including which party bore risks arising from incomplete design, approvals and consents and utility diversion works. My understanding of the allowance made for these risks was that the risk would be reduced by negotiation prior to contract signing. I do not know how and by whom the risk allowance was quantified. I do not know whether any allowance had been made for Optimism Bias. I understood that any degree of uncertainty would be clarified and put into a fixed costs category prior to the contract being signed. When voting for the Final Business Case, I thought the aims of the procurement strategy had been met, and that the price and terms of the infrastructure contract were consistent.
57. The Report to Council also noted (at paragraph 8.1) that some allowance had been made for risk associated with the detailed design work not having been completed at the time of financial close. It stated (at paragraph 8.10) that the "*fundamental approach*" had been to transfer risk associated with design not having been completed to the private sector and that this had largely been achieved. I cannot recall if I was concerned that allowance had only been made for delay resulting from design and not for delay resulting from

unforeseen ground conditions or issues with utilities. I cannot recall which risks associated with design work I understood to be transferred to the private sector and which had been retained by the Council, or if there was any advice given in that regard.

- 58.** The Report noted that the risk contingency did not cover major changes to scope and that changes to the programme could involve significant costs that were not allowed for in the risk contingency. It did not consider what events might cause changes to the programme, how likely it was that they would arise and what, if anything, was being done to mitigate the risk. I cannot recall if I sought further clarity on the costs that could arise from changes to scope or changes to the programme. I must have felt comfortable approving the Final Business Case in these circumstances as I voted for it based on the information in front of us. I cannot recall if there was ever any discussion about postponing the award of the infrastructure contract until the design and utility diversion works were complete.
- 59.** The Report also noted (paragraph 8.13) that that some risks were retained by the public sector. These included: agreements with third parties including delays to utility diversions; finalisation of technical and prior approvals; and absence of Professional Indemnity Insurance for TIE as it was wholly owned by the Council. I cannot recall if I was concerned that the Council retained the risks noted above. The 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 is outlined in section 8.12 of the report. I cannot remember what the details were, but I must have picked it up in the report. I cannot recall if there came a time when I was satisfied that the conditions in relation to giving approval to TIE to award the contracts had been met.
- 60.** I am aware that between January and May 2008 there were a number of increases in the price of the infrastructure contract. I cannot remember the reason, or reasons, for these increases. Nor can I remember what these increases covered.

61. A progress report from TIE to Transport Scotland dated 14 January 2008 [CEC01247016] noted that discussions with BBS had resulted in the signing of an "Agreement for Contract price for Phase 1a" on 21 December 2007. It noted that the agreement was "*essentially fixing the Infraco contract price based on a number of conditions*". The report confirmed that a key point of the agreement was the "*Effective transfer of design development risk excluding scope changes to BBS*". I thought that this represented good progress. At that stage, I thought "design development risk" and the extent to which the scope of the project had been fixed, was manageable. The whole concept or principle of trying to minimise the risk to the Council and transfer the risk to the private sector was procurement strategy, and that appeared to be close to being achieved.
62. The report stated that another key point of the agreement was "*Certain exclusion from the fixed price of items outside the scope of the tram project, all of which are well understood and either separately funded or adequately provided for in the overall Tram project estimate*". I cannot recall what I understood to be the "*items outside the scope of the tram project*" which were excluded from the fixed price. My only understanding of these matters was from on-going reports and briefings from TIE and Council officers.
63. The papers for the joint board meeting dated 23 January 2008 [CEC01015023], which I attended, noted (at item 1.5) that the discussion on risk transfer was "*continuing with BBS*". I cannot recall any particular detail in relation to this discussion and have nothing further to add.
64. I now understand that concerns about the INFRACO contract were raised by CEC deputy officials in the lead up to contract closure. The concerns included that there had been a number of material changes from the Final Business Case put to the Council in December 2007. Four particular issues were highlighted. First, the price had risen by £10m. Secondly, the project timetable was, by that stage, three months later than predicted. Thirdly, the risk of approvals and consents had not been taken by the private sector. Fourthly, there was a residual risk associated with design which, although the Council

did not have any figures to assess that risk, "*may be very significant*". I did not have any awareness of those concerns being raised at the time. If they were shared with other members of the Council then I was not aware of that. These concerns appear to have been pretty significant. They ought to have been brought to the attention of elected members. Had they been brought to our attention, we would have requested information to allow us to understand the nature of the concerns were and to assess the consequences for the project as a whole.

65. Originally it was intended that with approval in December 2007, the contracts would be signed by the end of January 2008. The papers for the meeting of TPB on 13 February 2008 [CEC01246826] indicate that matters had still not been concluded by February 2008. I do not know why the contracts had not been signed by the end of January 2008 or if the TPB took any action regarding the delay. I knew there were delays, but I cannot remember the exact timescale for the delays or the reasons for those delays. I have been made aware that none of the members of the TPB who were Councillors were provided with the papers for the meeting on the 13 February 2008. I do not know why this was. I note that it was forecast that delay in concluding the contract would cost between £8m and £10m a month. I am not sure if I was aware of that. We were not provided with the papers, so I do not think we would have been aware that costs of between £8m to £10m a month were accruing. The Minutes for the previous meeting in January (pages 5 to 8) note that I was told that the MUDFA works were on time. The PD Report noted that the cumulative position was that they were running late. I do not know which is correct or if anyone raised this conflict. Item 5.2 in the January meeting notes noted works on the Employment Requirements. I cannot recall why these were still needing work after the date of approval of the contract or what the issue was. I cannot remember if the fact that BBS had a different expectation of design completion prior to novation was discussed. Nor can I remember if the difference in view was relevant to their expectance of the design risk, or if I had any concerns about it.

66. The issue of design was again causing concern on page 20 of this report [CEC01246826]. I cannot recall this being discussed or what was done about it. The risk register seems to show all treatments as in progress with nothing to be done and no untreated risks. I cannot recall what the position was, or what was done, in relation to the Peer Review Group (PRG). Nor can I recall if there was any resistance.
67. I have been made aware that at this time negotiations were underway in relation to Schedule 4 of the INFRACO agreement, which regulated payment and pricing. It has been brought to my attention that it was sometimes said that it arose out of the Wiesbaden Agreement. I cannot recall ever being informed of those negotiations.
68. I am now aware that on 18 February 2008 BBS produced a Design Due Diligence Summary Report, based on design information provided to BBS up to 14 December 2007 [DLA00006338]. The document raised various concerns about design, including that "*more than 40% of the detailed design information*" had not been issued to BBS. I was not aware of this report or the matters contained within it. It was my belief at that time that the detailed design was mostly complete and that BBS's price was based on completed detailed design. For the elements that were not complete, I believed that BBS could price for those works through discussion, negotiation and agreement. I cannot recall how at that time the issue of incomplete design was reflected in the risk allowance.
69. The papers for the TPB on the 12th of March 2008 [CEC01246825], which I attended, indicated that the contract had still not been agreed and signed by March 2008. I cannot recall what my view or the TPB's view on this was. In the February minutes Donald McGougan is noted as having asked if the design risk could be bought out. The response was that neither consortium would accept it. I do not know if that refusal was inconsistent with the earlier statement that BSC had taken the risk of design development or how these statements could be reconciled. If the design risk was not transferred, I do not know who it lay with. Nor can I recall if there were any discussions on this



matter or if it was reflected in the risk register. I do not know if it would have been appropriate to go back and reconsider what had been done and consider the amount of risk being carried in the public sector. I do not know what it meant when Stuart McGarrity said that there was a risk allowance of approximately £30m relating to £90m of non-firm future costs (page 6). I do not know if there was any allowance for risk in relation to firm costs, or how much of the sum allowed related to MUDFA. Within the report (on page 13) there is an action identified to address the slippages of MUDFA where they have been identified. More resources were to be provided. A programme review was also underway at that time to ensure that remedial action would be effective.

70. In a letter dated 12 March 2008 [CEC01347797] DLA advised CEC on the Draft Contract Suite. It is suggested that Graeme Bissett, TIE, had an input into the drafting of that letter. I was not aware at the time that individuals from TIE had an input into the drafting of letters from DLA to CEC. I had not seen the letters at the time, but having now looked at them it does make it very clear that there is a TIE input to the letters. I have no view on whether the TIE input was appropriate or inappropriate.
71. I am now aware that Deputy Officers at CEC had previously recommended that the Council seek independent legal advice on the risks arising to the Council in respect of the infrastructure contract. The possibility of the Council seeking independent legal advice was never discussed with me. I do not remember whether I gave consideration to the appropriateness of the Council seeking legal advice.
72. A full meeting of the Council took place on 13 March 2008. From the agenda [CEC02083387] and minutes [CEC02083388], members do not appear to have been given any update on the Tram Project. I do not know if members were given an update in relation to the Tram Project at that meeting.
73. I am now aware that on Friday 14 March 2008 an email was sent to Alan Coyle [CEC01386275] attaching a note that had been approved by the

Council Solicitor, Gill Lindsay [CEC01386276]. The note, to be signed by Donald McGougan, Andrew Holmes and Gill Lindsay confirmed 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 was not aware of those actions or the exchange of those notes at that time. The Council had the authority to authorise TIE to immediately issue a Notice of Intention to award the INFRACO contract. The Council made the decision to delegate that authority to the Chief Executive. I consider that it was appropriate for TIE to be given authority to issue a Notice of Intention to award the INFRACO to BBS. The reason for this is that the power had been delegated to the Chief Executive. He needed to be satisfied that it was appropriate for the go ahead to be given.

74. I have been made aware of an email dated 31 March 2008 [CEC01493317], where David Leslie, Development Management Manager, Planning, CEC, sent a letter to Willie Gallagher [CEC01493318] expressing certain concerns in relation to prior approvals for design. On 3 April 2008, Duncan Fraser sent a letter to Willie Gallagher setting out similar concerns by the Transport Department relating to Technical Approvals and Quality Control Issues [CEC01493639]. I was not aware of those letters or the concerns expressed in them at the time. I do not know whether other members of the Council were aware of those concerns. I do not know why we were not made aware. Having recently read the letters, I believe that the point trying to be made was that difficulties would lead to disagreements and further delay in terms of getting work done. At that time, my understanding of the pricing provisions was that such difficulties would have been resolved by negotiation and agreement between the various parties. I understood that there was a dispute resolution process that could be used as a last resort. I do not know what the contract provided in regard to that situation.
75. I received the papers for the TPB meeting on 9 April 2008 [CEC00114831]. I cannot remember if the extension to the membership of the TPB changed the way that it worked. By 9 April 2008 the contract had still not been finalised

and signed. I cannot recall why that had been delayed. The minutes of the meeting do not record the delay in the conclusion of the contracts, the measures being taken to address the delay or the costs involved in doing so. I do not know why there is no record of these matters in the minutes. I do not know if anyone in the TPB was asking questions regarding this issue. The minutes for March record that the position with BBS was settled in terms of price. I was not at that meeting. There was a full Council meeting that day and I was in attendance at that Council meeting. I know that that was one of our lengthy full Council meetings because that evening, TIE were holding a Burns Supper which the German contractors were present at and we were invited, but I did not go because the Council meeting overran. I was, however, provided with the minutes of the meeting. I cannot remember if I was advised of the discussion on Schedule 4. Nor can I recall whether the issues arising in relation to SDS novation were discussed at the TPB. Item 10.1 in the minutes (CEC00114831 at page 6) states that there had been a £10m increase in the INFRACO contract price. I do not remember why this increase arose. Item 10.3 states that considerable elements of the price increase related to: provisional sums which were not part of the fixed price; resource costs to provide better quality assurance and to deal with the interface with SDS; maintenance mobilisation costs; and push out of the construction programme to July 2011. I cannot recall why some of the components referred to in 10.3 were arising at that time. Item 10.4 states that Willie Gallagher had referred to the buyout of risk of SDS non-performance. I do not know what he was referring to. Item 10.5 states that Stuart McGarritty made reference to risk allowance. In particular he stated that programme delays, unforeseen delivery issues, design and consent issues and MUDFA related issues were included in the risk allowance. The PD Report included in the papers (on page 10) provided an update on negotiations between INFRACO and TRAMCO. I cannot recall my understanding of the position at that time. I do not know if there was any consideration of whether problems and conflicts would arise in relation to MUDFA. I cannot explain the new format to the Risk Register on page 27. I do not know what changes had been made to the Draft Close Report.

76. I am now aware of an email dated 11 April 2008 [CEC01401109], by which the deputy solicitor to the Council, Colin Mackenzie, advised the solicitor to the Council, Gill Lindsay, of a difficulty that had arisen with the "Russell Road Bridge: Prior Approval". That email questioned whether the sum allowed in the QRA for SDS delay (stated as £3m) was sufficient. Mr Mackenzie noted, "*This is getting very close to calling upon the Monitoring Officer to become involved*". Concern was expressed by Alan Coyle of CEC in an earlier email in the same thread that this was contrary to the risk transfer to the private sector. He stated that insufficient information had been provided by TIE and asked "*how many more of these things are going to come out of the woodwork?*" I was not aware of those concerns until I read the documents recently. I do not know if other members of the Council were aware of these concerns. I believe that we should have been made aware. When Colin Mackenzie made the comment, "*this is getting very close to calling upon the Monitoring Officer to become involved*", I think that he was of the belief that it was getting close to becoming an issue of dispute. The Monitoring Officer oversaw the relationship between the Council and TIE, as the Council body. He had the ability and the authority to intervene to manage where there was disagreement. If these concerns had been made known to me, or to other members, we would have wanted further information. We would have wanted clarification on what the concerns were, confirmation of what was going wrong and advice regarding the options for putting things right.
77. I am now aware of an email dated 14 April 2008 in which Colin Mackenzie set out certain concerns [CEC01256710]. In particular, I note his view that it would be "*prudent and proper*" to report again to members before Financial Close of the INFRACO contract was authorised. The reason given was the various changes which had emerged since December 2007, including "*the new final estimate of £508m; a four month delay to the revenue operating date; and continuing concern over the risks to the Council arising from the SDS programme*". I was not aware of those concerns at the time. Members of the Council should have been made aware of those concerns. If those concerns had been made known to me, or to members, we would have wanted to seek more information from Colin Mackenzie to understand what

the issues were, what the impact would be on the Council and the project and what options we would have going forward.

78. I am aware that in an email dated 15 April 2008 [CEC01245223] officers in CEC legal were sent a copy of Schedule 4 (Pricing Provisions) of the INFRACO contract [CEC01245224] and a cost analysis spread sheet [CEC01245225]. CEC legal replied on 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 was not aware of Schedule 4 (Pricing Provisions) at that time. I do not know if officials ever reported to the Council on the pricing provisions, pricing assumptions and notified departure provisions contained in Schedule 4 or on whether the quantified risk allowance was still sufficient. I do not know to what extent, if at all, members were advised 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.
79. I was copied in on an email from Willie Gallagher sent on 23 April 2008 [CEC01228509] which stated that there were only a few outstanding discussions to finalise the INFRACO Contract and TramCo and SDS Novations. The email noted that the intention was to issue the final contracts to all parties to commence a seven day due diligence process. He requested confirmation that all parties were agreed to sign by no later than noon on Wednesday April 30th. I was not provided with the final contracts.
80. On 30 April 2008, Colin Mackenzie sent an email to Gill Lindsay [CEC01241689]. The email stated "*You may know this already, but BBS have increased the price by a significant amount. Urgent discussions underway at TIE this afternoon. Wonder how this leaves the report to Council tomorrow!!*". A Report to Council by Tom Aitchison on 1 May 2008 [CEC00906940] sought refreshment of the delegated powers previously given to the Chief Executive to authorise TIE to enter the contracts with the INFRACO and Tramco bidders. The report noted that the cost of the project had increased from £498m to £508m. This increase comprised a base cost of £476m and a

revised QRA of £32m and was noted to be largely due to the firming up of provisional prices to fixed sums, currency fluctuations and the *“crystallisation of the risk transfer to the private sector as described in the FBC”* (para 3.5). The report also noted that 95% of the combined TRAMCO and INFRACO costs were fixed with the remainder being provisional sums which TIE had confirmed as adequate. The report noted that: *“As a result of the overlapping period of design and construction a new risk area has emerged which has been the subject of extensive and difficult negotiation. TIE Ltd advise that the outcome is the best deal that is currently available to themselves and the Council. Both TIE Ltd and the Council have worked and will continue to work diligently to examine and reduce this risk in practical terms”* (para 3.10). I was not aware prior to the meeting on 1 May 2008 of the price increase. Members were not advised at the meeting on 1 May 2008 of the price increase. I do not know why, or whether, any discussions with officers took place. I do not know when members were first made aware of the further price increase. I cannot recall my understanding of the *“new risk area”* that had emerged as a result of the overlapping period of design and construction. Nor can I recall the *“outcome”* that had been arrived at in respect of that risk. Nor can I recall the steps that were to be taken by TIE and CEC to reduce the new risk area.

81. The report further stated that work had been done since November 2007 to minimise the Council's exposure to financial risk, *“with significant elements of risk being transferred to the private sector”*. More of the risk elements had been fixed and included in the contract price. This removed the uncertainty. The report to the Council in 2007 indicated that risk was fully managed. I cannot remember if this apparent reduction caused me concern as to whether I had been given the full picture regarding risk to the Council. I was concerned that the aspiration was for financial risk to be minimised as far as possible, and that was the stated aim of the procurement strategy. At that stage I was still of the opinion that the risk lay with the contractor rather than the council. I do not consider that members of the Council and myself were adequately briefed on the effect of, or risks arising from, the contract. In particular, I do not consider we were adequately briefed on Schedule 4 of the INFRACO agreement which dealt with pricing. I believed that the contract

was fixed . This misunderstanding may have been due to the information that we were provided with. That information had not adequately described the position. Tom Aitchison is responsible for any misunderstandings, as he is the author of the report.

- 82.** On 3 May 2008, Willie Gallagher sent me, Councillors Wheeler, Jackson and Mackenzie and others an email providing an update in confidence [CEC01231125]. The email was sent in advance of the TPB meeting the following week. The email noted that whilst TIE had been hoping to sign contracts on Friday May 1<sup>st</sup>, this had not happened. The reason given was that on the Tuesday evening, Willie Gallagher had received a call from the managing director of Bilfinger Berger UK requesting an urgent meeting. At that meeting, Willie Gallagher was informed that Bilfinger Berger would not honour their finally agreed price, and required an additional £12m. Willie Gallagher noted that the details provided were sketchy but it involved commitments from their supply chain being broken due to construction price inflation. It was a recognised phenomenon, but it was very late in the day to come up with that type of issue and put that type of price on it. It caused me concern. Willie Gallaher also stated that the INFRACO were claiming that they had only been able to pull together their final price on the Tuesday the initial call was made. I cannot recall the reasons for this, but it caused me concern.
- 83.** Willie Gallagher called an emergency meeting of the TPB and informed them of the issue. I checked my diary and I was at an urgent meeting that day, so was not in the position to agree any actions. I was made aware of the agreed actions after the meeting. TIE was investigating the implications of bringing back Tramlines at this stage to apply pressure to Bilfinger Berger. Willie Gallagher noted that a meeting with the BB board to try and get as much of the increase off the table as possible was the approach most likely to sustain the Project's momentum. At the time that was probably the most realistic way forward, trying to achieve some sort of compromise. Willie Gallagher also noted that Transport Scotland had been briefed. I do not know what their response was as I did not see it.

84. On the Wednesday after the TPB meeting, Willie Gallagher requested that the Bilfinger Berger's UK Managing Director ("MD") be removed from the project, and had a conversation with his German Board Director. At that time Willie Gallagher felt that the UK MD was not acting in good faith.
85. A follow up email on 9 May concluded that contract signature was scheduled to take place on Tuesday 13 May. This did not concern me as the email indicates that progress had been made and I think the price was still increased, but not by the same figure. It had been mitigated. That email appeared to indicate positive progress and a solution. I cannot recall if I updated anyone in relation to that email. From having read it again recently, I note that Gill Lindsay, Dave Anderson and Donald McGougan were all copied in, so they were aware of the content.
86. The papers for the TPB meeting on 7 May 2008 [CEC00079902] contain the minutes for April which note that 30% of all works were complete. The experience from other projects, certainly in the UK, was that utility diversion works had caused subsequent delays to infrastructure works and that increased the cost of projects. The idea was to split the two and try and complete utility diversion before you had actual construction work taking place. The fact that 70% of MUDFA works remained outstanding would not necessarily have been an issue. At any given time, approximately seven different locations would be getting worked on. This meant that works could be phased. Therefore, once the utility diversion work was complete in one section, you could do the construction work in that section. As long as you did not have tram construction people being delayed by on-going utility diversion work then you were okay. At the outset consideration may have been given to awarding a contract to a company that could do both utilities and infrastructure works. However, in contracts for utilities companies tended to go to those companies that had the specialism in that area, the gas works, water, telecoms.
87. In item 4.2 of the close report contained within the papers (CEC0079902 at page 50) Stuart McGarrity referred to an increase of £17.8m in the base cost

CEC0079902  
should be  
CEC00079902

Close Report can be found  
in the papers for the April  
meeting (CEC00114831)



for INFRACO. That does not mean anything to me. Item 4.3 indicated that the programme dates were based on an assumption that there would be recovery in the MUDFA programme. I cannot recall if there was any concern in that regard. In other reports there were mitigating actions put in place where there was slippage on MUDFA. We knew where the problems were and it was intended that action would be taken to bring those works back on track. Whether that happened or not, I do not know, but those were the actions that were laid out as reported to the Board.

88. Item 7.2 of the meeting notes for April stated that the INFRACO contract had still not been signed. I do not remember what my view of that was or what I believed the cost to be to TIE.
89. Item 15.2 of the meeting notes for April stated that PUK were to cease attending TPB. It may be that they just completed the work that they were carrying out in an advisory sense.
90. The PD Report (on page 11) stated: "*At the time of writing tie is engaging with the Infraco bidder to determine the nature of their requirement and to rebuff any price increase. tie's (sic) is to address this issue with a view to signing the Infraco contract suite during the week beginning 5<sup>th</sup> May but without material impact on the cost estimation or programme.*". There were on-going discussions in relation to the repeated revisiting of this issue. I suppose it was not a surprise, given the size of the project, that a lot of detail would be subject to on-going engagement. This was just the latest update. I was expecting matters to move towards a conclusion once all the loose ends were tied up and work began. I cannot remember the TPB's response to the request from BBS on 30 April for more money. MUDFA slipping further is noted on page 12 of the PD Report. This was considered by the TPB and actions identified. There is an update of certain sites and actions that were to be taken. It looked like it was being managed. The Risk Register reverts to an old format (pages 16 and following). I do not know why the new format was abandoned.

91. I am aware of an email dated 8 May 2008 from Stan Cunningham, Committee Services Manager, to the Council Solicitor [CEC01248988]. In that email, Stan Cunningham made reference to a report that was to be tabled at a Policy and Strategy Committee meeting in order to seek approval for the Chief Executive to instruct TIE to enter into the relevant contracts. The report showed a further price increase from £508m to £517.2m. Stan Cunningham stated that "*it may be the first time that many of the members are aware of this matter. This is not satisfactory ...*". The Policy and Strategy Committee is authorised to make that type of decision. Where there are time constraints, decisions will sometimes be sought from the Policy and Strategy committee rather than from the full Council.
92. On 13 May 2008, shortly before the INFRACO contract was signed, Tom Aitchison submitted a report to the Policy and Strategy Committee [USB00000357]. The report advised 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. The report needed to be considered as a matter of urgency, to allow an "*imminent financial close*" of the contracts for the Edinburgh Tram Network.
93. I was not in attendance at that meeting. I understand that Jenny Dawe was appointed as convener of the Committee and Steve Cardownie as vice-convener. When the Labour administration had been in charge we had moved away from the traditional committee structure and created something known as a Cabinet System, or a Council Executive, where all the lead members sit on the same committee. The idea is that this committee meets every two weeks which means that you can make quicker decisions and that everybody is involved so there should be more knowledge across service areas. However, that was not universally popular. Some members disliked the system the Labour administration had introduced due to the fact that they thought it excluded them from the process. The new Lib Dem/SNP administration decided to abandon that and to go back to the old committee structure. That meant recreating the Policy and Strategy Committee and that must have been the first meeting of the new committee. As to the

consequences of reverting back to the old structure my own opinion is that the committee structure that was reverted to was less efficient than the Cabinet System.

94. As an elected member, the price increase would only have been explained to me via the report going to the Policy and Strategy Committee. TIE had further managed to increase the fixed price element from 95% by that stage, and minimise the risk element. Going to full Council to consider the increased price and changed contract terms would have ensured more scrutiny because all 58 Councillors attend. However, a meeting of the full Council takes time to arrange. The Policy and Strategy Committee allows urgent decisions to be made.
95. 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]. This would have been the decision of the Policy and Strategy Committee. If the Chief Executive is saying, "Right guys, I have got everything wrapped up as far as I can. This is a good deal for the Council. I recommend that you authorise me to crack on and do the business", then the Committee would give him the authority he needed to do that.
96. The INFRACO Contract was signed on 13 and 14 May 2008. I did not actually see the contract documentation. I would not have known the detail of any changes to the contract between December 2007 and May 2008. Obviously the contract would have evolved and I should have been updated on what changes had been made. However, I did not see the actual contract documents. I would not have been aware of what the detailed changes were. I did not receive a briefing from CEC legal officers, TIE or DLA on the effect of the contract, including Schedule 4 to the contract at any time. It was my understanding that the majority of the risk had been negotiated and transferred to BBS and that was part of the increased price agreement. I understood that any risk that remained with CEC would be resolved through negotiation. However, I do not believe that the extent of those risks, or how they were to be managed and mitigated, was ever detailed. There was, a

financial figure allocated for risk contingency. As far as I was aware the contract was 95% fixed price and the aims of the procurement strategy had been broadly met. I was aware that the contractor would be entitled to seek further monies if we, as the client, decided to make a substantial change to the project. For example if we wanted to extend it by several miles or we wanted to change the route. I was aware that that change of that type would increase costs. I was not aware that CEC would incur charges for any changes to design. I thought that those costs would be covered by the contractor.

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

97. I was sent papers for the meeting of the TPB dated 2 July 2008 [USB00000005]. I was sent these papers for information only. I was taken off the TPB. I cannot remember when and I cannot remember why. I did ask somebody why, I cannot remember who, but I was told that a decision had been made that it was no longer necessary to have councillors, apart from Phil Wheeler, on the TPB. That is why I was not consulted or involved in any discussions regarding these papers. From reading the PD Report I thought the position in relation to design was generally positive. There was nothing in the report to suggest otherwise.
98. The report stated that INFRACO's rate of mobilisation was disappointing (page 12). I was concerned at the slippage in the design and MUDFA. The rate of mobilisation was not what it could have been. While I was concerned at the progress in design, I was led to believe that most of the design was complete. If I had concerns, I would have raised these with Council officials. Page 32 of the report contains a risk drawdown which appear to relate to the identification of a utility diversion work that had not previously been identified or costed for. The risk drawdown sought to utilise funds from the contingency risk budget to get the work done. I do not know if there was any real chance that approval for drawdown would be withheld. I do not know what would have happened if approval for drawdown were refused in that sort of situation.

These were the last set of TPB papers I received and marked the end of my involvement with the TPB.

99. The minutes from the Council meeting dated 16 October 2008 [CEC01090795] and a Report to the Council from TIE dated 18 December 2008 [CEC02084242] noted that, from summer 2008 onwards, work had been carried out to develop the business case for Line 1b. The report from TIE continued to note that an indicative figure of £87m had been provided by BBS for Phase 1b but that this was only open for acceptance until March 2009. This had gone on notwithstanding the comments in the report to Council of 1 May 2008 [CEC00906940] that the firm costs had increased by £27m, whereas the risk allowance had reduced by £17m and this movement in cost might impact severely on the ability to deliver Tramline 1b. Despite cost issues, the Council had been considering a network of lines 1a, 1b at 29 April 2009 [CEC00860021]. I cannot remember if it was explained to the Council why work carried on notwithstanding the comments noted in the Minute of 1 May 2008 about the difficulty in delivering Line 1b in view of the increased costs of 1a. The reason why the council continued to consider the network of lines was that it was still a long-term strategic aim; it was still an aspiration to complete the first part of the project. There was a price on the table that was a discounted price. All the contractors were still in the city and we would just be able to move on. Whereas, if they had finished the first phase, packed up and gone home, remobilising them would have cost more. The minutes continue to note that TIE were engaged with the contractor on re-programming phase 1a to address the slow start up of construction. The slow start up was about the mobilisation of their workers, their teams of contractors. I cannot remember what the on-going effect of the slow start was.
100. At a meeting held at the City Chambers on Friday 28th November 2008 [CEC01069591], 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. This appears to be a private meeting that I was not invited to. There are only administration councillors there: two Lib Dem and two SNP councillors. The others are Council staff. I was not privy to these meetings.

That information was not shared with me and I was not part of that discussion, so I am not going to comment on what they discussed. The decision to suspend the implementation of Phase 2 appears to have been reversed by the Policy and Strategy Sub-Committee on 12 May 2009. I was not a member of the Policy and Strategy Committee, so I was not privy to that information or decision either.

101. I am now aware that on 10 December 2008, Councillor Iain Whyte sent an email to Jenny Dawe, Phil Wheeler, Alan Jackson, Tom Aitchison and Donald McGougan [TIE00887286] noted concerns about a comment made by David Mackay of TIE. The comment which caused him concern was that TIE never started with a fixed budget, because "*the design changes as you go along*". I was not aware of this comment made by David MacKay. It was my view that there was a fixed budget and a fixed price for the infrastructure contract, as reported by TIE and as set out in reports to Council.
  
102. Around this time, December 2008, a dispute arose between TIE and BSC. I cannot recall when, or how, I first become aware that there was a dispute in relation to the infrastructure contract. It was not always clear what the nature of the dispute was or what the reasons for the dispute were. I was told it was a contractual dispute but there was a lack of clarity as to what was involved. I was clearly disappointed that the dispute had arisen. I was frustrated that it was causing problems for the project. In terms of who was primarily responsible, I would have been told by TIE and CEC that the issues were caused by the actions and the behaviour of the contractor. TIE's strategy to resolve the dispute was never discussed by the Council. There was mixed information about resolving disputes. I was led to believe that the contractors were at fault for not complying with the terms of the contract. However, it then emerged that both TIE and CEC were taking a very cautious approach towards the dispute resolution process because they were scared that they would lose. That became a bit of a watershed moment. At this point in time I was no longer on the board of TIE. Up until that point, I had understood that the contract was fixed price, the risk had been transferred to a private sector contractor and it was a good deal. Initially Council officials were bullish on the

contractual position with BB. However, I found that Council officers were very cautious about using dispute resolution because there was a large amount of risk that we would lose. A number of disputes were referred to adjudication. I cannot remember in detail what I was told about the outcome of those disputes. I was given information via briefings from Council Officials, like Donald McGougan for example, about what happened with an initial batch of disputes. His briefing was the first concession that they were concerned at losing the disputes. The outcomes of those disputes were pretty mixed in terms. Nonetheless, there was a view that there was a high risk of us losing a large number going forward. My views on the contractual disputes changed as matters progressed. At the start I had thought that the contract was pretty robust and favourable to the Council, However, as matters progressed it appeared that there were weaknesses within the contract that the contractors were able to exploit. The costs were not as fixed as I had thought. The contractor was able to recover a higher fee than had been expected. I would note that I never saw the contract.

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

- 103.** I have seen an action note following the special tram Internal Planning Group (IPG) on 29 January 2009 [CEC00867661] which was attended by Council officials. It stated that absolute clarity was still needed on the price and noted that there was concern BSC costs did not represent value for money. I cannot remember if the senior Council officials who attended this meeting made either myself, or other members, aware that absolute clarity was still needed on the price. Nor do I recall whether we were advised that there was concern BSC costs did not represent value for money.
- 104.** A dispute arose between TIE and BBS prior to the planned commencement of works on Princes Street in February 2009. BBS had refused to start work on Princes Street. It stated that it was not obliged to do so under the terms of the agreement. By email dated 20 February 2009 [CEC00867359], David Mackay notified Councillors Dawe and Wheeler and the chief executive of a response

29 January  
2009 should  
be 28 January  
2009

that was due to be dispatched to the INFRACO. The response stated that *"Your response to my questions in relation to Princes St is typically overlaid with extraneous comments and bold statements of Infraco's position which are not backed up in any reference to the terms of the Contract"*. I cannot remember when, and how, I first become aware that there was a dispute between TIE and BSC in relation to the works due to commence at Princes Street. There was a disagreement about how the works were going to commence. There was not a single big issue that BSC pointed to and said 'we cannot go ahead because of that'. From my perspective there was a lack of clarity and it was confusing. The Council and TIE were saying that the contractor was primarily to blame for the dispute arising. I had no reason not to believe what I was being told. I was frustrated that TIE appeared to be unable to bring matters to a satisfactory conclusion. We were not briefed or given an input into what TIE's strategy was to resolve the issue.

105. The Princes Street Supplemental Agreement was brought to Council. A number of measures were put in place and agreement was reached in order to allow works on Princes Street to proceed. That agreement had to be signed off by Council. I do not remember what exactly what measures were put in place. I think that the majority of the measures related to traffic management of Princes Street. Agreement had to be reached on those because the measures were costly. I do not know if TIE were open and transparent when reporting to the Council on the Princes Street dispute. I think TIE were reluctant to use the contractual dispute resolution procedures to require that works be undertaken in the absence of agreement because of the high risks of loss involved. By that stage, we had received more information about the contract dispute resolution process. It is an industry mechanism, whereby, if there is a contractual dispute, both sides present their case to an adjudicator. The adjudicator makes a judgement and both parties are bound by that judgement. At the time, I considered that BB were responsible for the dispute. I had the impression that BB were not acting responsibly. This was based on what officials from TIE and CEC were telling me at the time. As it happens, I never actually met anyone from BB. Over time, my view on BB's actions has changed. That is what we were told by Council officials and TIE. I cannot



recall which particular individuals provided that information. As far as I was aware, the dispute in relation to the works at Princes Street was the first dispute between TIE and BSC in relation to the INFRACO contract.

- 106.** I have been made aware of a letter from Tom Aitchison to TIE dated 5 March 2009 [CEC00870592]. In that letter, Tom Aitchison set out a number of measures required to keep the Council updated about disputes. I was not aware of the existence of this letter. Having read it now, I believe its purpose was to secure clarification from TIE on the position of any outstanding disputes under the contract. The letter asked for daily updates. It also noted that the reporting mechanism needed to be put on a more formal basis. I think this indicates that Tom Aitchison, the Chief Executive, was requiring a more structured engagement from TIE. I had concerns as to whether TIE were keeping the Council fully informed regarding the disputes with BSC. Later it became clear that the relationship between CEC, TIE, the contractors and all the various governance structures were, at times, a bit opaque. It also became clear that the causes of disputes were complex and confusing. They did not always appear to be fully explainable.
- 107.** In an email dated 6 March 2009 [CEC01031402], TIE's solicitors, DLA, sent the Solicitor to the Council the parties' position papers in relation to the Princes Street dispute. In an email dated 11 March 2009 [CEC00869667] Colin Mackenzie advised that: *"what the Council officers do not know is whether the Infraco contract is sound and in all respects in the Council's best interests as client and funder. It is possible that the contract is not robust enough and as a result affordability for the Council becomes an issue. I appreciate we must be seen to be supporting the tie board in its contractual dispute, but I feel the officers are lacking the requisite information, certainty and confidence at the present time."* DLA's Chris Horsley, responded to CEC attaching a paper entitled ("DLA Piper Response to CEC Questions" [DLA00001357]). Other members and I received a briefing from CEC officers around this time on the differing interpretations of the contract. We were informed of the consequences for CEC if TIE's interpretation of the main provisions in the INFRACO contract was incorrect. That was when it became

clear that the details of the contract itself were subject to interpretation and argument. That made it clear that previous reassurances about it being fixed price were incorrect. We were then warned that costs would escalate if TIE's interpretation of the contract were found to be incorrect. We were notified about the use of the contract Dispute Resolution Procedures. We were not given a running total, but I think we were periodically updated. My colleague, Councillor Ian Perry, was then sitting on the Board of TIE, so he may have been party to more up-to-date information.

- 108.** I have been made aware that, on 27 February 2009, Councillor Phil Wheeler sent an email to Council Leader Jenny Dawe [CEC00868427] informing her about his meeting with Richard Walker of BSC. By email dated 11 March 2009 [TIE00446933] Mike Connelly of TIE advised David Mackay of his meeting with Margaret Smith MSP and Alison McInnes MSP. I had no knowledge of these meetings and Councillors were not given any feedback on what was discussed. Ordinarily you would not expect an elected member to intervene or to go off and try and broker a different outcome. I do not know if this jeopardised TIE's position in any way. I was concerned by that point that the contracts were not in fact "fixed price" on the basis that the contractor was entitled to seek further monies under the contract where the works deviated from the Base Date Design.
- 109.** The Report to Council dated 12 March 2009 [CEC01891494] was the first report to the Council to refer to contractual difficulties between TIE and BSC. The Report noted that while works were due to start in Princes Street in February 2009, it had been apparent in the preceding days that they might not start as intended. The statement made by CEC at the time made reference to the contractors wishing to impose unacceptable conditions in order to start the works. In the report Tom Aitchison stated that "*members will appreciate that I am restricted in what I can say while commercially confidential negotiations are taking place*". I do not believe that information that is subject to commercial confidentiality should be withheld from elected members. It should be shared with elected members, even if that needs to be done under controlled conditions. Relevant information requires to be provided in order to

ensure that elected members make decisions that are as well-informed as they can be. I was not aware that there was lack of information due to commercial confidentiality. I do not know if concerns in relation to commercial confidentiality adversely affected Councillors' understanding of the project or their ability to take informed decisions. I do not know what conditions the contractors wished to impose in relation to carrying out works.

110. The report [CEC02083751] 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. We had agreed to enter into the contract based on a fixed price approach. The knowledge of the disputes and the different interpretations of what the contract actually meant undermined our belief that the contract was "fixed price". Over that period of time I first became aware that there were cost implications and those appeared to be attributable to the details of the contract. Either there were going to be additional costs or there would be an impact on the delivery of the project itself. That started to become a real concern. I was not aware of any external legal advice at that stage. As far as I knew, it was all being handled internally by Gill Lindsay.

111. In an email dated 7 April 2009, titled "*Edinburgh Trams; Strategic Options and DRP*", [CEC00900419] Colin Mackenzie made observations on the dispute between TIE and BBS and raised certain concerns. By email dated 9 April 2009 [CEC00900404] Colin Mackenzie and Nick Smith circulated a report on the dispute between BBS and TIE [CEC00900405]. The report noted that there were at that time 350 Notified Departures in process. The disputes could be grouped into a number of different categories, including who had responsibility for design management and evolution. BBS were taking the view that all changes to design were TIE's responsibility. The report noted that the "*main problem here stems from the fact that design was not complete at Financial Close*". I had a general understanding about the root cause of the issues were between BBS and TIE and the notified departures. I was subsequently briefed on the large number of notified departures and the

potential impact on the project by Ian Perry, my colleague who was in TIE. I am not sure what information other Council members received. The emails referenced were not shared with me. We had been led to believe that the designs were more or less complete. I had understood that those that remained outstanding had been accepted by BBS, and they had accepted that risk at the Financial Close. Members of the Council were briefed on an on-going basis at various stages. I cannot recall at exactly what stages the briefings were given. It would only be if concerns found their way into formal Council reports that I could say with confidence that the information was reported to Council. By that time, it is not clear whether we could have done anything to resolve matters anyway. However, provision of the information would at least have allowed Councillors to consider matters more fully and better understand the options available.

- 112.** I am aware that on 30 April 2009 members of the Council were given an update on the Tram Project by way of a report by the directors of City Development and Finance [CEC02083772]. The Report indicated that there had been negotiations which had led to a supplementary agreement for the construction of the Princes Street infrastructure works. I did not have any involvement in the negotiation or conclusion of the Princes Street Agreement. I do not believe that other Councillors did either. A press release relating to the Princes Street Agreement [TRS00016944] noted that CEC was satisfied with the outcome. I am not sure that the Princes Street Agreement was approved by the Council, but I could be wrong. It was maybe reported to Council after it had been concluded. The decision to concede a supplementary agreement appears to have been taken quickly.
- 113.** The rationale behind the Princes Street Agreement was to try and get compromise and agreement in order to move forward. I have been shown a set of slides entitled "*Joint Tram Project Board and tie Board 24 March 2009*" [CEC00934643]. That document contains slides dealing with the Princes Street Agreement. It includes slides which consider the importance of the agreement and its key terms. I am having difficulty understanding the information contained within that document. It does not make it clear to me

how the agreement actually works. I am not clear whether those slides were actually presented to the Council.

114. The Report [CEC02083772] stated that the Princes Street Agreement allowed the works to proceed on the basis of “*demonstrable cost*”. The Report did not spell out exactly what was meant by this. However, it said that the contractor would be paid should it uncover unforeseen ground conditions. The Report claimed that this represented no further transfer of risk to the public sector. The Report noted that the matters that had arisen could impact on both cost and timescale. I cannot remember what my views on these matters were. I cannot remember if Councillors were given a sufficient opportunity to consider and comment on the agreement before it was entered into. I do not think we ever agreed to the principle that we were moving from a fixed cost to a demonstrable cost contract. .
  
115. The Report stated that, “*the range of numbers indicates the base case scenario remains that the full scope of the project can be delivered within previously agreed funding levels*”. This looked less credible as time went on. Officials should have made it clear to the Council that a likely outcome of the agreement was that the budget limits would be breached.
  
116. There was a statement in the Report that work had been undertaken by the Council and TIE to consider the strategic options available. This had involved providing a range of cost and confidence levels for phase 1a. These were not, however, provided in the Report. I do not know what strategic review was carried out by the Council and TIE. I do not know why the entire programme was subjected to review when there had been an exercise conducted to review the effect of the slow start just four months earlier. In hindsight, I think it was necessary for TIE to enter into a supplementary agreement to the contract when there was still disagreement about the original contract terms. It was necessary in order to move the works forward.
  
117. I have seen an email dated 13 August 2009 [CEC00679723] sent by Richard Jeffrey of TIE to certain members of the board. The email stated that BSC

were not happy to start works on Shandwick Place unless that work was undertaken on a cost plus arrangement. I think that Ian Perry, one of the recipients of the email, advised us of that development. I believe that the Princes Street Agreement opened up the opportunity for BBS to claim further additional costs in respect of other on-street works by changing the basis of payment under the contract so it was no longer fixed price.

118. The report to the 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. In relation to the latter, the report stated, "*While the slippage to the programme is regrettable it should be acknowledged that it has been a very challenging project with unexpected ground conditions, including the discovery of a number of underground chambers and inaccurate data held by utility companies and the Council having a significant impact*". Public utilities and the Council do not have a good track record of maintaining accurate records. Often you can only identify what is underground by excavating the site. I don't think anything more could have been done. It is what you expect in an urban area, particularly an historic city centre. I would be surprised if the SUCs offered an assurance that their data was accurate. I do not know what investigations were carried out to verify information obtained from those sources.
119. The report also noted that TIE was invoking formal contractual dispute mechanisms. It was noted that TIE had taken Counsel's opinion. It was also stated that, given the nature of the adjudication process and the complexity of certain issues, it was unreasonable to expect that TIE would be successful in all cases. There was a degree of anxiety about the prospects of success based on reports from Council Officials. My views on TIE's prospects of success changed. At the very outset, when these disputes started to emerge, I was under the impression that TIE's position was pretty strong and robust.

That was due to my impression that it was a fixed price contract. My impression of TIE's position changed as I became aware that the contract was not a fixed price contract. By August 2009, we were being told that we ran a risk of losing a lot of the adjudications and that the cost of the project could start to increase as a result.

120. The report noted that, in view of the disputes, it was not possible to forecast the budget outturn accurately. This would have been discussed within the Labour Group. We would have wanted to consider what options were available. Donald McGougan was taking more of a lead role at that time. He was the Director of Finance and would have had a very keen interest in matters.
121. The Council affirmed its commitment to provide the whole of the tram line to Newhaven, notwithstanding that it was not considered possible to accurately forecast the cost of the project. That was the Council's original stated aim and it is still something which the Council wants to achieve.
122. I am now aware that in November 2009 DLA provided the Solicitor to the Council with a document entitled "Overview of Adjudicator's Decisions" [CEC00479382]. That document provided a summary of decisions dated 16 November 2009 by Mr Hunter on the disputes relating to the Gogarburn and Carrick Knowe Bridges. I do not think that I or other members ever received a briefing from CEC officials, or from TIE, on this overview. We were periodically given updates on progress in terms of dispute resolution but we were not provided with a detailed breakdown of each one. Reading it now, it looks like the TIE case was rejected by the adjudicator. I did not read these decisions at the time.

## **Events in 2010**

123. 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 (at page 9) 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. Those words provided, *“for the avoidance of doubt, normal development and completion of designs means the evolution of design through the stages of preliminary to construction stage and excludes changes of design principle, shape and form and outline specification”*. The effect of this wording was that *“Changes of design principle, shape and form and outline specification”* constituted “notified departures”, entitling the contractor to seek further monies under section 3.2.1 of Schedule 4 of the contract. The opinion was provided to the Solicitor to the Council and CEC legal officials on 12 April 2010 [CEC00356396]. I did not receive a briefing from CEC officials or TIE on this opinion. I do not believe that other members did either. In hindsight, this opinion should have been sought by TIE sooner and the Council should have taken separate legal advice at an earlier stage. I think that the parties had differing interpretations of the contract that suited their own interests. I cannot remember if TIE, or Council officers, ever reported to the Council on what was covered by the price in the original contract, or why departure from that was necessary.

124. In Jan/Feb 2010 CEC instructed their own legal advice from Dundas and Wilson [CEC00450359] [CEC00479797] [CEC00480029] [CEC00551307]. That was the point at which the Council was considering terminating the contract with BBS. I do not remember if I was informed of the outcome of this advice.
125. By email dated 4 March 2010 [CEC00474750] Alan Coyle sent the Directors of City Development and Finance a Briefing Note [CEC00474751] setting out the estimated cost of the three options that formed part of “Operation Pitchfork”. The estimated cost of completing the works was between £644m and £673m. The options were briefed to us prior to a report going to Council, but I do not remember when that was. There was an acceptance that the budget was blown and that the relationship with the contractor was poor. Things had become a bit of a mess and decisions had to be made. There were a number of options available. I cannot remember what my views were at that time on which option was best. We were aware of the cost estimates,



but I think we were given those numbers in confidence. There were issues of commercial confidentiality. In particular, we did not want the contractor to know what options we were considering or how much we thought they were going to cost. We were made aware of that information but it would not have been placed in the public domain.

126. I am aware that Richard Walker of BBS sent a letter dated 8 March 2010 to Tom Aitchison, Gordon Mackenzie, Donald McGougan and David Anderson [CEC00548823]. In that letter he stated that TIE had sought to insist that it had signed a fully fixed price lump sum contract when that was not the case. I cannot speak for other members, but I did not see that letter at the time and those matters were not brought to my attention. I did not give any consideration at that time to meeting with BSC. I was not aware that TIE had a strategy other than the options that were being explored regarding terminating or reducing the scope of the project.
127. In an email dated 19 April 2010, [TRS00010706] Richard Jeffrey wrote to party leaders (namely Jenny Dawe, Ian Whyte, Steve Cardownie, Andrew Burns, and Steve Burgess) setting out TIE's position on the main matters in dispute. Mr Jeffrey noted that "*there is disagreement over what is or is not included in the original 'fixed price' contract*". He also stated that BBS were "*refusing to get on with the works in an attempt to coerce us into agreeing to change the form of contract onto a 'cost plus' contract*". He stated that he would not allow the city to be "*held to ransom*". In relation to the adjudication decisions Mr Jeffrey noted, "*It is true that we did not get all the results at adjudication we would have liked, however, it is also true that the results do not support BB's extreme view of their entitlements either. I would like to be able to fully brief you on these adjudications, but they are confidential under the contract and to do so would put TIE in breach of contract*". I did not see that email at the time. Looking at it now, it is obvious that the relationship between TIE and BBS had completely broken down. The email mentioned legal advice having been received. I did not see or seek that legal advice. I cannot recall if I gave any consideration around that time to whether CEC should seek its own legal advice.

128. We were briefed on some elements of how the dispute resolution process was progressing. I do not think we were given all the details of each case. I am not sure how enlightening that would have been at the time. I cannot remember if I ever saw or sought copies the adjudication decisions. The email stated that members could not be “fully briefed” on the adjudication decisions because they were confidential. The email stated that to do so would put TIE in breach of contract. I am not a lawyer, but, given that the Council were the funders of the project, I would doubt that sharing information with the Council would put TIE in breach of contract. I would have thought that the Council would have been entitled to see all details. I do not know if I was fully briefed or not. I would not have regarded the position as satisfactory if somebody had informed me. I believe this impacted my ability to make decisions in regards to the project. I cannot remember if I gave any consideration to requesting that BSC agree to the adjudication decisions being disclosed to members. I don't recall CEC Officials giving consideration to that either.
129. On 21 April 2010 a meeting took place in Carlisle between TIE and BBS. I was not aware of that meeting or any of the discussions that followed.
130. 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 (at paragraph 3.3)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*”. . I cannot remember what my views of this report were. The report 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*” The wording is more nuanced than in previous reports. It is not simply stated that the contract was a fixed sum contract. The use of language appears to be developing in a way that leaves more room for interpretation. I do not think the Council were adequately advised of the risk of the “*scope of the project to*

*change in material ways*”, either when the Final Business Case was approved, or prior to the Infraco contract being signed.

- 131.** The report also noted that *“The outcome of the DRPs, [Dispute Resolution Procedures] in terms of legal principles, remains finely balanced and subject to debate between the parties”*. The Report stated that it was “prudent” to plan for a contingency of 10% above the approved funding of £545m because of the lack of clarity on programme and cost. Privately I had been led to believe that there was a degree of anxiety about the risks that were associated with Dispute Resolution Procedures. They were not confident of success. I cannot remember my view on whether it was “prudent” to plan for a contingency of 10% above the approved funding of £545m. Nor do I recall whether I considered around that time that a line from the Airport to Newhaven could be built for £600m. Members should have been advised around that time that there was a significant risk that the actual cost of phase 1a would be much higher. The failure to provide this information affected our ability to take informed decisions in relation to the Tram Project around that time. Members were only given notice of cost overruns and difficulties after those overruns and difficulties had occurred. We should have been advised of those matters at an earlier stage. We should have been advised that decisions were being taken as part of the Dispute Resolution Process which showed that significant additional sums were likely to be due.
- 132.** I am aware of an email dated 8 January 2010 [CEC00473789] in which Nick Smith sent Alastair Maclean a document entitled “Tram – A Potted History” [CEC00473790]. Mr Smith’s email noted 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”*. I think Nick Smith’s summary, the potted history, is probably a pretty fair and accurate reflection. However, it appears to indicate, and concede, that important information was not shared with elected members. The information was not passed on to us. It appears that CEC Directors and/or TIE kept me on a “restricted info flow”. I was not aware of this at the time. At that time I thought

I was getting all the information. As a result of this process, I have now accepted that that might not be the case. I cannot speak for other members though. This would have affected my ability, and the ability of other members, to make decisions in relation to the project.

- 133.** I am now aware that on 20 August 2010 CEC officials met with TIE representatives to consider TIE's Project Carlisle Counter Offer. A record of the meeting [CEC00032056] noted a range of costs for delivering the tram. A range of between £539m-£588m was put forward for building the tram from the airport to St Andrew Square. A range of between £75m-£100m was given for building the tram from St Andrew Square to Newhaven. This gave a total range of costs of £614m-£693m for building the tram from the airport to Newhaven. It 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. It also noted none of the pricing assumptions in Schedule 4 of the INFRACO contract would remain in place. I was never aware of those discussions.
- 134.** In a letter dated 13 October 2010 [TIE00301406] BBS wrote directly to Councillors giving their views on the dispute. BBS advised that, of the nine formal adjudication decisions issued, BBS had had six decisions in its favour, there were two split decisions (with the principle found in favour of BBS) and there was one decision in favour of TIE. BBS stated that, in the interests of accuracy and transparency, and if TIE agreed, BBS had no objection to the disclosure of the adjudication decisions to elected members in order that they could make their own judgement. This demonstrated that the contractor had a completely different view of the position to that which had been presented to me. I suppose it created some confusion. We had been told TIE's view but BBS's letter gave a completely opposite perspective. It was also unclear why BBS was writing to us. On one view, the contractor was trying to inform us that we were not receiving the right information. However, the contractor could have been seeking to influence us in order to influence the Council's strategy. On that view, the contractor might simply have been trying to alter how TIE was dealing with them. One has to be realistic. These are very big,

very professional, commercial operators. They know how to work a situation. You have to be slightly sceptical sometimes.

- 135.** I cannot remember if I saw or sought the adjudication decisions at that stage, but they do appear to have been offered, subject to agreement from TIE. I am unclear whether TIE ever agreed to their release. The outcome of the adjudication process was very much after the fact. The Council had already given the necessary approvals to the Tram Project by that time. The agreements had already been signed. By that stage disputes had arisen and problems had escalated. I think viewing the adjudication decisions at that stage would have had relatively little impact on the Council's decisions about the project overall because by that stage it was too late in terms of preventing the escalation of the problems. At that time, I believe that BSC were favoured more in the adjudications. The information provided to Councillors by BBS was in complete contrast with information provided by TIE.
- 136.** I am aware that 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. That Business Case was required to detail the capital and revenue implications of all the options being investigated by TIE at that time. It also required to take into account assumptions contained within the original plan that either no longer applied or whose timescales had substantially changed. It has been suggested that Councillors required a more detailed update of the Business Case because we were unhappy with the level of detail that had been provided. I cannot remember the detail of that discussion. I am assuming that the detail was requested because we were a couple of years on from the financial crash of 2008. That affected economies all over the world, but had, more pertinently, affected the pace of development in Edinburgh. I think members felt that the Business Case would have to be refreshed in light of that. I cannot remember what matters members wished to receive more information on.
- 137.** The report noted that the contingency planning work undertaken by the Council and TIE had identified funding options which could address project

costs of up to £600m. It was stated, "*Due to the current uncertainty of contractual negotiations, it is not possible to provide an update at this time on the ultimate capital costs of the project*". It also noted that "*The overall outcome of the DRPs, in terms of legal principles, remains finely balanced and subject to debate between the parties*". The report does not, however, give an indication of the likely cost or range of costs, of the different options with the Project Carlisle offers and counter offers. The statement that the outcome of the DRPs remained "*finely balanced*" did not particularly accord with my understanding at that time from the information I was receiving from BBS and other informal briefings from Council officials like Donald McGougan. I am fairly sure that we had a number of sessions around this time where legal advice was explained to us by lawyers from Dundas and Wilson. They came and briefed Councillors so I think the legal advice was fairly open in terms of access. I recall that there was quite a lot of discussion around the option of terminating the contract.

- 138.** I am now aware of an email dated 4 November 2010 from the Council Solicitor, Alastair Maclean [CEC00012984], which stated 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. In emails dated 22 and 30 November 2010 Mr Maclean expressed certain concerns about TIE and the legal advice received by TIE [CEC00013411] and [CEC00014282].
- 139.** In an email dated 30 November 2010 [CEC00013550] Nick Smith listed his personal view on the performance of TIE and DLA. In an email dated 24 November 2010 to Mr Maclean [CEC00013441], Richard Jeffrey stated, "*if the Council has lost confidence in TIE, then exercise your prerogative to remove TIE from the equation*". I was not aware of these emails at the time or the correspondence within them. Reading it now, with the benefit of hindsight, it would appear that senior people in the Council were starting to doubt TIE's ability to manage the situation. I myself started to lose confidence in TIE when it started to become clear that the decisions from the Disputes Resolution Procedure were not favourable to TIE. Due to senior people in the

Council starting to doubt TIE's ability, counsel was instructed. I am not able to state why independent legal advice was not sought sooner.

140. Following the resignation of David Mackay, the Chairman of TIE, Bilfinger Berger wrote to elected members, including myself, on 5 November 2010 [CEC00013011]. The letter stated that the resignation was not conducive to progressing the project and that the comments made by Mr Mackay in the media were sufficiently harmful to BBS's reputation to warrant legal action against him. The letter urged the Council to distance itself from the comments and to request Mr McKay to make a public apology. I vaguely remember David Mackay's public statement about BBS. He called them "delinquent contractors" which caused a bit of fuss in the media at the time.

CEC00013011  
should be  
CEC00013012

141. I have been made aware that a meeting took place between BSC and John Swinney on 8 November 2010. The Chief Executive of CEC then wrote to BSC on 15 November 2010 [CEC00054284] restating that negotiations in respect of the contract had to be carried out between INFRACO and TIE, but indicating that the Council would be willing to meet with TIE and INFRACO officials on a without prejudice basis. On 16 November 2010 Council leader Jenny Dawe wrote to the Managing Director of BSC to offer a meeting with Council officers. I am told that, later that day, Ms Dawe and Mr 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]. I cannot comment on these matters as I was not involved in the discussions. I did not see the Chief Executive's letter to BSC and I cannot remember what Jenny Dawe's emergency motion was about. Jenny Dawe would not consult with me when she was drafting an emergency motion. I could not tell you what her thinking was. In hindsight, it may have been helpful for CEC to have met with BSC earlier in an attempt to better understand the dispute. That might have assisted with resolution of the dispute.

142. 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 INFRACO contract was entered into. On 17 November 2010 Mr Maclean produced a Note [CEC00013342] for the Council's Monitoring Officer setting out Mr Jeffrey's concerns. The issues that had been raised, and which were being investigated, related to incentives that had allegedly been given to certain directors and employees of TIE. It was suggested that they were incentivised to conclude a deal below a headline rate. There was concern that, in order to achieve that headline rate and so the bonuses, provisions that were detrimental to TIE were accepted. I was never made aware of these concerns. I cannot explain to you in detail what the Council's Monitoring Officer's role entailed. In light of the serious nature of the allegations within that document, I think it should have been investigated further and escalated to other authorities if deemed appropriate.

143. A report to the meeting of the IPG on 17 November 2010 [CEC00010632] noted that a range of cost estimates were being produced for each of the available options. The draft estimate for Project Carlisle varied between TIE's estimate of £662.6m and BSC's estimate of £821.1m. Those 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 between £545m and £600m. Those estimates were shared with Council ahead of decisions being taken.
144. I have been shown a record of an exploratory meeting took place on 3 December 2010 [CEC02084346]. The meeting was attended by Alastair Maclean and Donald McGougan on behalf of CEC, Richard Walker of Bilfinger Berger and Antonio Campos of CAF. I was never advised about the discussions that took place at that meeting.
145. 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. I do not recall whether, at that time, I considered that the tram line could be built within that budget. I cannot remember what my knowledge was of the bigger picture at that time. I do not



consider that members were provided with sufficient detail in the report to enable them to come to informed decisions.

- 146.** The report noted that mediation discussions involving the Council and BSC would commence early in the New Year. It explained that, by their nature, mediation discussions had to be conducted on a confidential basis and that it would not be possible to report in detail on the mediation process until either it was completed, or possible decisions emerged which required consideration by the Council. Elected members were not consulted in relation to CEC/TIE's proposed approach to the mediation.
- 147.** 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. Members requested this review as they were seeking confidence in the project. Given the history and the problems that had arisen, we were seeking confidence from somebody who had had no previous involvement. We thought would help us to cross-check against other details. I cannot recall if this review was ever carried out. The revised Business Case could not be completed until we knew how long the route was going to be. I think the review came at the right time for the Business Case being considered.

## **2011 to Completion**

- 148.** The Highlight Report for the meeting of the IPG on 21 January 2011 [CEC01715625] noted that both Nicholas Denny QC and Richard Keen QC 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. They had advised that that option would also place TIE in the strongest position with regard to any mediation/negotiated settlement. I was not aware of this discussion. I was only aware that termination had been looked at as an option.

- 149.** 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 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. It is further noted, "*However, 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 Infraco 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*". I do not know why BSC were considered to be in such a good position. By that stage I knew that TIE's position was weak. I knew that TIE had been losing adjudications. We were not confident of them being successful in other disputes. We were aware of other options. Those included: terminating the agreement contractor; seeking mediation; agreeing a higher price; and truncating the project. All that information had been shared at some time and we made a decision on the options available.
- 150.** Mediation talks took place at Mar Hall in March 2011. Elected members of CEC did not play any part in the preparations for the mediation or the mediation talks themselves. I believe that we were provided with adequate briefing and were provided with an adequate opportunity to express our views though. Sue Bruce had been appointed as the new Chief Executive in the January of that year. She took a very hands on proactive approach to resolving the matter. She led the team through that negotiation. The outcome was an understanding of what price would be required to complete the project to certain points. When the mediation was over, Sue Bruce reported back to the groups individually. The outcome of the mediation was what it was. The contractors were in a stronger position than the Council. The prices for the different sections were the best that could be achieved under the circumstances.

**151.** A report to the Council on the 16th of May 2011 [CEC01891505] stated that mediation had made progress and that work had started in priority locations. It noted that further work was being done on other issues. Members were advised at that meeting of the outcome of the mediation including the sums involved. I do not know if it was at that meeting. All Council reports are on line so they can be accessed. On 30 June 2011, members of the Council were advised of the options for the Tram Project in a report by the Director of City Development [CEC02044271]. It was recommended that the Council complete the line from the Airport to St Andrew Square/York Place, at an estimated cost of between £725m and £773m, depending on the risk allowance. The report stated that, in the 12 months between preferred bidder stage and financial close of the contract, there had been significant negotiations on commercial matters including management of risk arising from incomplete design work. It noted that claim related disputes were apparent from an early stage and tested the parties' respective understanding of the contract. At that time I was pretty much undecided on the best option as there was not a clear best option at that stage. The Director of City Development recommended that the third option in the report which involved the tram being developed to St Andrew Square. I partially supported that recommendation and partially supported the alternative recommendations. My political group moved an amendment. The terms of the amendment were as follows:-

#### Amendment 1

- 1) To note the recommendations in the report by the Director of City Development but not to agree them.
- 2) To also note that this was a project which Audit Scotland had given a clean bill of health in June 2007. Since then it appeared to have totally unravelled.
- 3) Further, to note that the original Tram Project, and the subsequent contract sign-off on 1 May 2008, had been predicated on the tram connecting Edinburgh's Airport with Edinburgh's Seaport/s and that the original project-scope was clearly no longer being delivered.

4) Additionally, to note that all political parties had originally supported the principle of developing the Tram Project and at the Council Meeting of 1 May 2008 all five political parties on the Council had agreed to the final sign-off of the current Tram Contracts.

5) To acknowledge that the city urgently needed certainty on this project and that Scotland - and its capital city - should see benefit for the money thus far invested.

6) Therefore to agree:

(a) that no commitment to additional Council funding, beyond the existing contractual commitments, be entered into;

(b) that additional funding would be provided via the disposal of equipment that was no longer required for the reduced scope referred to below;

(c) that the proposal with least construction risk was to build from the Airport to Haymarket as phase one of a longer-term, strategic plan only should funding become available;

(d) that prior to final commissioning of phase one, the Business Case for Airport to Haymarket be reassessed in the light of economic circumstances at that time;

(e) thus, to review and revise the business case for phase one so that it could be assessed whether it could be delivered without requiring an operating subsidy, ensuring that Lothian Buses were not at risk of having to cover such subsidy;

(f) that Lothian Buses be given a primary role in reassessing the Business Case, to ensure maximum operational income and public transport service integration;

(g) that these measures would ensure a fully operational tram line from the Airport to Haymarket (as phase one of a longer-term, strategic plan) by mid-2014; and

(h) the Chief Executive be instructed to seek to finalise such contractual requirements as necessary with this: certainty of destination, certainty of price, certainty of delivery date

7) Also, to instruct:

(a) that the finalised terms of the Settlement Agreement should be delegated to the Chief Executive to take forward, following consultation with political group leaders. Thus, to authorise the Chief Executive to enter into the Settlement Agreement substantively on the terms set out in the Settlement summary, contained in the confidential appendix, with such amendments as might be necessary to reflect the above and as might be considered appropriate and following consultation with political group leaders.

(b) that the Chief Executive explores whether or not it would be possible to obtain an option, exercisable by the Council, for proceeding with Haymarket to York Place once more information was confirmed about the risks and funding involved.

(c) further, to authorise tie Ltd to progress the priority works, in accordance with MoV4, and incur expenditure as referred to in paragraph 7.8 of the Director's report.

(d) that the Director of City Development finalise, in consultation with political group leaders, revised governance arrangements for the final delivery of the project.

(e) that, as shareholder, Lothian Buses be asked to assist in preparing for operations, by accepting a share transfer of ETL, subject to staff consultation, as soon as possible.

8) Finally, to note that as at March 2007 some £44million had been expended on the Tram Project and, by that time, two full Parliamentary Bills had received formal approval and were on the statute book. Expenditure on the Tram Project today (30 June 2011) stood at over £460million, indicating that some £100million per year had been expended, for the last four years (2007-2011), yet still no trams ran on the streets of Edinburgh.

9) To deplore this apparent failure, to date, of the SNP/Liberal Democrat Administration to successfully deliver any operational element of the Tram Project for Edinburgh.

10) Therefore, to confirm that the Council had no confidence in the current SNP/Liberal Democrat Administration; and to call for the Council Leader and Deputy Leader to consider their positions and resign with immediate effect.

The amendment was moved by Councillor Hinds and seconded by Councillor Hart on behalf of the Labour Group)

- 152.** I was disappointed and frustrated that the Tram Project had gone over budget. My understanding was that that the new estimates had arisen as a result of the negotiations that had taken place at Mar Hall. Confidential appendices to the report were made available to members. I cannot remember what documents comprised these confidential appendices. Nor can I recall why they were considered confidential or how they were made available to members. At that stage I do not consider that the other members and I were provided with sufficient information to come to an informed decision.
- 153.** The Report to CEC on 30 June 2011 outlined a different position to that presented to the Council at the time of financial close. I do not know why this position was not presented to the Council at the time of financial close. Consideration was given to the interest that would accrue on the large sums that CEC was borrowing. It had been claimed that terminating the Edinburgh Trams Project would be more expensive than building the line to St Andrew Square. This was one of the reasons that the Council wanted to proceed with

the project. I think the costs related to legal costs or compensation. However, that did not appear to take into account the amount of money that had already been spent without anything to show for it. There may have been disagreement about what costs were cost of terminating the contract. I cannot remember what the exact figures were but I think the briefing that we got privately by Council officials was that there was not any great financial benefit in termination. In fact there were further costs that would have been incurred and we would not have had anything to show for them at the end of the day.

**154.** On 25 August 2011 the Council received a report from the Director of City Development [TRS00011725]. The report noted that Faithful and Gould had worked with Council officers in validating the base budget for the proposed works. There was a requirement for funding of up to £776m for a line from St Andrew Square/York Place. Additional funding of £231m was required. This would require to be met from Prudential borrowing, at an estimated annual revenue charge of £15.3m over 30 years. At the Council meeting, members voted in favour of an amendment that a line should be built from the airport to Haymarket. That decision was overturned at a meeting of the Council dated 2 September 2011. The change was a response to a letter from Transport Scotland. Transport Scotland advised the Council that there would be no further payment of grant if the line stopped at Haymarket. John Swinney, who was the Minister at the time, issued an ultimatum that that decision had to be reversed. The Transport Scotland letter is the vehicle in which the decision was communicated. I do not know why Transport Scotland was unwilling to provide further payment of grant if the line stopped at Haymarket. I was disappointed at this decision. I had supported the decision to take an incremental approach and I was disappointed and frustrated. We had made a democratic decision that we thought was in the best interests of the city. Effectively, that decision was being overturned by Government.

**155.** The report to Council in August included a confidential summary of a report dated 19 August 2011 by Faithful and Gould [CEC01727000]. I do not remember seeing that document. The full report by Faithful and Gould noted, in the Executive Summary, that the 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*”. I was not aware of those conclusions. I do not believe other members were aware of the conclusions either. I do not remember that being highlighted as an issue.

- 156.** A Settlement Agreement was entered into on 16 September 2011 between the Council and BSC. That agreement resulted in a reduced tram line being built for a total capital cost of approximately £776m. That was the only viable option left open. I had to go down that route anyway because the Government got involved and I had no choice. The additional funding of £231m came from additional Council borrowing. I was not particularly happy with that aspect of it. However, if that was the only way of doing it then that was the only way of doing it. Nonetheless, I was unhappy about the consequential burden that then fallen on the city and the people of the city.
- 157.** An announcement that Transport Scotland would oversee the project and the grant would be re-instated was made on 14 September 2011. The Council appointed external project managers, Turner and Townsend, to assist the process. The Council revised the governance arrangements and began to wind down TIE [TRS00012622]. Transport Scotland had a greater involvement in the project after the settlement agreement. They were there to provide oversight on behalf of the Scottish Government. Turner and Townsend were appointed as the interface with the contractors to do the project management role.
- 158.** At a meeting of CEC on 24 November 2011 [CEC01891428] Lesley Hinds notes 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 thought having a public inquiry was a great idea if it would produce something constructive. To be of benefit it would need to identify what had gone wrong and why. That way it would assist future projects to avoid making the same mistakes. 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 with that view.

- 159.** Following the Mar Hall mediation and the Settlement Agreement, works progressed to complete a tram line from the airport to York Place. The tram line opened for revenue service on 31 May 2014. I cannot remember the main changes that resulted from the Mar Hall mediation and the Settlement Agreement. Clearly there was an agreement on price, delivery and governance. In addition, there just seemed to be more consensuses in terms of the way forward. At that stage, TIE was being wound down and being dismantled as a company. The project appeared to run reasonably smoothly after the Settlement Agreement was signed. A point could be argued that it was partly due to TIE being dismantled.

## **Project Management and Governance**

### **General**

- 160.** There were several different bodies that had different roles and responsibilities in relation to the Tram Project. The aim was to provide a tram system to Edinburgh which would serve the City and compliment the other public transport already in place. TEL's role was to ensure that the priority of having an integrated public transport system was delivered. TEL was responsible for ensuring that the different modes of public transport worked together and did not become competing interests. TIE was originally created to be a vehicle for the delivery of various transport projects in and around Edinburgh. Its role was to deliver the Tram Project for CEC. CEC was the client in terms of the project, but CEC also required to make the strategic decisions regarding the project. The TPB was originally established to ensure more detailed management of the project itself. Transport Scotland's role was to assist and oversee the project on behalf of the Scottish Government. It was also intended that Transport Scotland would provide the project the expert input that it possessed. The Scottish Government also had a role to play. Given

that they were responsible for the allocation of £500m of public money, I think they had a responsibility to ensure that money was properly utilised.

- 161.** I had concerns in relation to the performance of the above bodies which grew over time. I think it would be very difficult for me to point to any individuals or any specific actions that caused me concern. There were a number of problems and as more problems arose this resulted in an increase in concern over a period of time. The governance arrangements for the tram project seemed clear at the outset but seemed to grow more complex and confusing as time passed. The roles and responsibilities of each of the bodies involved in the delivery and governance of the project was sufficiently clear at the beginning. However, matters seemed to become a bit hazy as time went on. There were, perhaps, too many bodies and organisations involved in the governance of the project. There was at times, a lack of clarity regarding who had responsibility for particular matters. That lack of clarity led to a lack of accountability. I think TIE was ultimately responsible for ensuring that the Tram Project was delivered on time and within budget.
- 162.** The report to Council on 25 August 2011 [TRS00011725] noted that *“The existing governance arrangements for the tram project are complex and have not been effective”*. It noted that 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. It noted that there was a need to revise the overall arrangements *“to ensure effectiveness, accountability, probity and integrity going forward”*. I think the above quotes are generally an accurate reflection and I agree with them. I do not know why effective governance arrangements had not been introduced at an earlier stage. It was the responsibility of CEC and the Scottish Government to ensure that effective governance arrangements were in place.
- 163.** Slides setting out a new governance structure [TRS00014775] were agreed by the Council on 25 August 2011 and 2 September 2011. Changes were made to the governance structures around that time. The governance was slightly clearer, but it was still pretty complex. It was slightly clearer in that the

lines of accountability were more direct. I think that gave the Council a greater control. The Council was always the project owner, but this gave CEC more direct control over the project. The paper noted that there was to be an "All Party Oversight Group". 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. The All Party Oversight Group was developed to ensure the all-party involvement, which I think is important. I think that helped to improve confidence because everybody had an equal involvement and an equal stake.

## TIE

- 164.** TIE was a wholly owned company created by Council. There was a shareholder/operating agreement governing the structures and the operations of TIE. This provided the Council with the means to exercise oversight and control over TIE. The Council determined what it wanted TIE to deliver on its behalf. The Council would make strategy decisions and then instruct TIE to proceed on that basis. The Council also exercised control by placing Councillors on the Board of TIE. I was Director of TIE from 30 April 2002 to 19 July 2004 and 22 January 2007 to September 2008. In the very early days it was very much about establishing the company, so it was more about the legalities, the finances, the nuts and bolts of setting up a business. It was all quite high level and I think the guy who was the chair at the time, Ewan Brown, came from a merchant banking background, and the people on the Board at the time were very much from that background. During the latter period once the tram project was in its final stages of moving towards mobilisation, the private sector people appointed to the Board came more from a background of infrastructure projects, public transport, heavy rail and stuff like that. The Council initially recruited and appointed directors of TIE. The Board was supplemented with people through recommendations to the TIE Board. Thereafter, further directors were appointed based on recommendations. Directors that were serving were aware of other people that they had worked with in the past who had specific knowledge of comparable projects or comparable work streams. Those people were asked to come on

board for a period of time to bring that experience to the Board. I was Director of TIE from 30 April 2002 to 19 July 2004 and 22 January 2007 to September 2008. As a director, my role was to feedback to the Council and be a member of TIE. I also sat on the Tram Project Board from January 2008 to July 2008. The Tram Project Board was more concerned with the practical day-to-day issues, the actual stuff that was happening on the ground and getting reports back from the project managers on how the works were progressing and where there were challenges, and how it was being dealt with. The members of the board made decisions as a collective. I read all the papers provided to as a Board Member and believe I understood them, but colleagues on the Board would clarify anything that was not understood.

- 165.** I did not have any concerns about the performance of TIE, either as an organisation, or in relation to individual board members, or senior employees, at the time. My concern about the role of the organisation grew over time as the problems became more evident. I am not able to pinpoint the exact time I began to have concerns; however, I think it was around the time that results from the adjudication process were being returned. My concerns related to the organisation itself; however, the organisation's culture and structure was driven by the individuals within it.
- 166.** The Council's senior officers and members received information and updates from TIE through the formal Board papers. TIE would also give us briefings and presentations on various aspects of the project. I cannot recall how often that occurred. I did not have any concerns about TIE's reporting to the Council at the outset, but that concern certainly grew over time as the problems became evident in the project.
- 167.** TIE had sufficient experience and expertise to project manage a complex infrastructure project like the Edinburgh Tram Project. The people had the relevant experience in similar projects. No consideration was given to instructing an organisation with an established track record of project managing major infrastructure projects to assist CEC and TIE in project managing the Edinburgh Tram Project. The people who were project

managing the project came from a range of backgrounds, which should have covered all the necessary skills, expertise and experience that was required. The way it was explained to me was that the trams are light rail which is just a light version of heavy rail. There was a bit of a turnover of people and I cannot remember what all their backgrounds were. With hindsight, instructing an organisation that had experience managing major infrastructure projects might have been an alternative to using TIE. I do not think you would have had TIE in the form that it was and then also have had some sort of civil engineering company. I think that would have led to duplication and confusion.

**168.** A TIE report on Ingliston Park And Ride One" dated 14 September 2007 [CEC01465362] noted the following "lessons learned":

- *"No clear definition of roles and responsibilities between TIE and CEC.*
- *No check processes in place for design.*
- *Responsibility was given to Halcrow for the day to day management of the process and light touch management employed by TIE.*
- *Extension of existing consultancy contracts for new commissions needs to be properly evaluated to ensure that this is appropriate".*

I was not aware of the report or the concerns raised. I knew that TIE had delivered that particular project and there were some issues with it. However, they completed it. I was not aware of the concerns that were raised in terms of the management of the project. I do not recall any concerns in respect of TIE's project management of the Ingliston Park and Ride project being of any great significance.

**169.** There is a suggestion that concerns had been raised about TIE's project management of the Stirling-Alloa-Kinross ("SAK") Railway. It was reported as costing more than double the original budget of £37m and was apparently three years behind schedule. I do not recall those concerns and I do not recall it being that far over the original budget.

170. A report to Council on 26 June 2003 [CEC02083550] notes that a performance related bonus scheme had been introduced for TIE staff. I was advised that performance related bonuses were normal practice within the private sector, particularly in the construction industry. Therefore, the bonus scheme was required in order to recruit and retain the right people. The report itself highlights that a comparison had been undertaken. The salary structures had been set up in a way that was different to the standard in the construction sector. We were told that the bonuses were justified in order to make sure TIE retained and recruited the right people. It was the Council that approved this decision. I do not think that the bonus paid to TIE staff each year would not have been highlighted in any report to the Council. I was a bit uncomfortable about the TIE bonus scheme to be honest. It was an alien custom for me. I have worked in the private sector. However, bonus schemes can be contentious and their effectiveness is debatable. That said, in my view it was justified. A case was put forward which explained the necessity for it. Therefore, in spite of me feeling uncomfortable, I had to accept it was necessary. I do not know if CEC exercised sufficient and effective control over those bonus payments, as I am not aware of the detail. I cannot tell you what bonuses were paid, for what or to whom.
171. I am now aware that in an email dated 23 September 2009 [CEC00672873], David Mackay sent Tom Aitchison a paper [CEC00672874] containing proposals to revise the TIE bonus scheme. An accompanying slide presentation [CEC00672875] noted that there was "*No formal linkage between bonus payments and corporate performance ... linked mainly to individual performance*" and that there were "*Inadequate performance management processes to underpin/justify payments*". 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 those concerns. I was not aware of either the email exchange or the discussions. The original bonus scheme was set out in the operating agreement. It was a matter of record.

**172.** 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. I think Willie Gallagher being appointed as both Chairman and Chief Executive must have been discussed with me at some stage. I am fairly sure it was put to me that this would be an interim arrangement, and that it would be beneficial for him to perform both roles. It seemed effective for that period of time. Although, it was probably not consistent with good corporate governance for him to perform both roles. I did not have any concerns as to whether that could be detrimental to the TIE Board's ability to exercise independent and effective oversight over the company at the time. I was reassured by my other colleagues and felt this was the best way to proceed.

### **The City of Edinburgh Council**

**173.** CEC officers and members exercised oversight and control over the tram project through attendance at TIE Board meetings, TEL Board meetings, and TPB meetings. There was also regular and on-going interaction with TIE senior staff. I did not initially have any concerns about the oversight and control over the Tram Project. Concerns emerged when I started to become aware of the decisions coming out of the disputes resolution process and the emerging doubts about the assertion that the price for the contract was fixed.

**174.** CEC officers were not able to, and did not, exercise effective oversight and control over the Tram Project. In some cases they did not have the expertise in that particular field. However, I also think that they were unable to exert oversight and control because of the many layers of governance, which, at times, they found difficult to navigate. Another difficulty was the level of authority vested in the senior people at TIE. That made it difficult for Council Officers to exert control over them. I do not consider that members were able to exercise effective oversight and control over the Tram Project.

**175.** Members who sat on the TPB and the Boards of TIE and TEL should have had sufficient experience and expertise to do the job despite the fact that we

were not experts in the field. We had experience in analysing and scrutinising information. It is a question that has been debated before in public and it is simply unrealistic to expect elected members to be a combination of finance experts, civil engineers and lawyers. It is not going to happen. The project employed people with that background and those qualifications. Everybody brought something different. I do not recall any formal training. I do not remember getting sent away on courses. I might have had sessions on certain aspects of the project, but those would have been presentations. I was certainly not sent away to do training courses in that sense. Training and additional information is always welcome. However, you are not going to train elected representatives to be specialists in commercial contract law. The training provided should have been sufficient to enable me to fully consider the issues relating to the Tram Project that were brought before the Council. If we had been provided with the correct information and the right advice, and we had been given the opportunity to absorb it and scrutinise it, then that would have been enough to make the right decisions.

- 176.** We were obliged to declare any conflict of interest, or potential conflict of interest, which arose from Councillors being members of both the Council and organisations with responsibilities for delivering the project. In our case it would be what we call 'a non-financial interest' because we were not paid anything for being members of these Boards, so there was no financial conflict.

### **Tram Project Board**

- 177.** I cannot recall when the TPB was created. It was created in order to provide a more detailed project management function. It was concerned with practical day-to-day issues. It obtained reports from the project managers on how the works were progressing, where there were challenges, and how those challenges were being managed.

- 178.** I did not have a role in the formation of the TPB, but I was on the TPB for a period of time. I cannot remember in detail what powers were formally



delegated to the TPB, by whom they were delegated or when they were delegated. I only recall that the TPB had general oversight of the project delivery function. The TPB reported to TEL. I cannot recall how reporting changed over time. My involvement was limited to the period between January 2008 and July 2008. Elected members who sat on the TPB were not acting as the "eyes and ears" of Councillors as a whole. Nor were they acting as a conduit between the two bodies. I had a role as Councillor to ensure that the Council's interests were being best pursued. I do not think Councillors on the TPB would personally report directly back to Council. Reports would go back to Council via the TPB through either TIE or TEL. I am not able to say whether councillors were prevented from receiving the full picture of what was discussed at these meetings. I do consider that it should have been possible for a balance to be struck between democratic accountability and commercially sensitive information. As I stated previously, the Council does now have in place a process with the use of the Data Room to accommodate this.

- 179.** The Council's Director of City Development sat on the TPB. So did the Director of Finance for CEC. They had a responsibility for ensuring that anything of significance that needed to be reported to the full Council was reported. Initially, there was representation of all parties on the TPB. At some point, it seemed to get more selective. The only elected member that was represented was the administration's spokesperson on transport. That would have been Phil Wheeler initially and then Gordon Mackenzie. However, the other Councillors who were directors of TIE were not put on the TPB. The reasons for that were never fully explained to me. At the time, I did not have any concerns in relation to the TPB, as an organisation, or in relation to individual members.
- 180.** The joint report to Council on 20 December 2007 by Andrew Holmes and Donald McGougan [CEC02083448] sought approval for the proposed new governance arrangements. The report explained that the TPB would be formally constituted as a committee of TEL. I am sure it states in the report when the TPB was formally constituted as a committee of TEL. I do not

remember all the finite detail of what powers, duties and responsibilities had been formally delegated to the TPB before then. My understanding was that the TPB was charged with overseeing the project delivery, the day-to-day issues.

## TEL

- 181.** TEL was created to ensure that public transport would be run as an integrated system. I cannot remember in detail what the role, remit and responsibilities of TEL were, but the information is in the following two documents, [CE01875336] and [CEC00475229]. It was about ensuring that the tram network or the tram service, once established, was integrated with local buses and that they were not competing against each other. Any powers delegated to TEL were delegated by the Council, but I cannot remember when that happened. TEL formally reported to CEC. I cannot remember how these matters changed over time. I did not have any concerns, at any time, in relation to TEL as an organisation or in relation to individual members of the board or senior employees. CE01875336 should be CEC01875336
- 182.** Papers for a meeting of the TPB dated 7 December [CEC01400187] contain a status update on the TIE/TEL operating agreements prepared by Graeme Bisset. The operating agreements were to be agreed by the full Council on 20 December 2007. The full Council is the main policy creating body. The Transport Committee is a sub-committee of the Council although it has its own autonomous powers. The Tram Sub-Committee was a sub-committee of the Transport Committee. The operational agreements with TIE and TEL were created by Council to govern the Council's relationship with TIE and TEL. TIE and TEL did not have a direct relationship with the Transport Committee or the Tram Sub-Committee. Their formal route of accountability was with the Council. I was unaware that a change was proposed or made to the operating agreement from the position being that "TIE will ensure that it complies at all times with the funding agreement" to "tie will use best endeavours to make sure that it does not cause the Council to breach the terms of the funding agreement".

- 183.** Lothian Buses plc expressed certain concerns regarding the integration of the tram and bus services. Lothian were concerned about any detrimental impact that the trams might have on their own operation and therefore their financial success. TEL was created to ensure an integrated public transport system for the travelling public. It was not created to protect the interests of Lothian Buses.

### **Transport Scotland**

- 184.** Following the debate and vote in the Scottish Parliament in June 2007, Transport Scotland's role in the governance of the project changed. It is my understanding that Transport Scotland was withdrawn from the project at that time. I do not know why that decision was made by the Scottish Government. I thought this was a bad move by the Government. There was no reporting to TS after this development. I think that TS's changed role had an adverse effect on the management, oversight and delivery of the Tram Project. They had experience of major transport infrastructure projects, although I don't think TS had been involved in trams, given that there were none in Scotland. Nonetheless, they did have a wider understanding of big projects so their input was helpful. Their staff had the the qualifications and the background experience to understand what was being done. TS's changed role lead to less scrutiny of the information and estimates provided by TIE. TS's changed role reduced the opportunity for TS, as a body with experience of managing and delivering major infrastructure projects, to offer guidance and advice. It also meant that TS were not overseeing or controlling the Tram Project.
- 185.** My understading is that TS ceased being involved in the governance project at that time. I have been shown a paper summarising the proposed governance and management model in the construction period as it stood at December 2007 [CEC01387398]. It suggests TS were still to have a role in the project. That is not my recollection. I did not think that they had an active or formal role in the project. I do not know if TS were kept fully informed of the problems with the project as they arose.

## **Audit Scotland**

- 186.** I am aware that Audit Scotland produced reports on the tram project in June 2007 [CEC00785541] and February 2011 [ADS00046]. I definitely read the June 2007 report at the time. I cannot remember if I read the February 2011 one at the time, but I certainly did later on. The 2007 report was generally very positive. It was at the very early stage of the project. It highlighted that there would be issues to deal with going forward. However, it reflected favourably on all the arrangements that had been put in place at that point. It was a pretty positive report. In the 2007 report, Audit Scotland analysed the kind of structures and arrangements that had been put in place and it were happy with them.
- 187.** The 2011 report by Audit Scotland was less positive. It reflected the concerns about what was happening in the project at that time. Audit Scotland highlighted its concerns about the contractual dispute and escalating cost. It highlighted its concerns about the political division within the Council and the impact that was having. It highlighted its concerns about the complex nature of the governance arrangements and it also highlighted the fact that the reduced role by Transport Scotland was not helpful.
- 188.** I certainly relied on these reports. Audit Scotland was seen to provide an independent and objective point of view. That was helpful. I relied on them as a point of reference and also to note any points of concerns raised by the reports. I did not base any decisions on the Audit Scotland reports however. They mainly acted as a review on actions that had already been taken. I considered that the 2007 audit report was a good reflection on the tram project. As for whether Audit Scotland should have expressed a view on the accuracy of costs, I am not in a position to express a view.

## **OGC Reviews**

- 189.** In May 2006 an Office of Government Gateway (OGC) Readiness Review was carried out in respect of the Tram Project. A report of the review was

delivered to the Chief Executive of TIE on 25 May 2006 [CEC01793454]. The overall status of the project was assessed as "Red". The reference to "Red" was a reference to major/significant concerns that needed to be addressed. Or, put differently, problems that created a risk to delvier the project. I did not see a copy of that report.

190. A second OGC review was carried out in September 2006 [CEC01629382] which resulted in an "Amber" rating. "Amber" indicated that there were a number of concerns highlighted that needed resolved, but not to the same extent as the red category. I do not think I saw a copy of that repOrt either. However, I think it may have been referenced in other papers. Having not seen the report at the time, I was not put on notice of the issues raised in the report.

191. A third OGC Review was carried out in October 2007 [CEC01562064] and resulted in a "Green" rating. I cannot recall seeing a copy of this report. The OGC produced a further report on 15 October 2007, "Project Risk Review" [CEC01496784], which describes the risk provision as "prudent". I cannot recall seeing this report either.

## **Public Relations and Communications**

192. Many different forms of media were used to provide information to the public in relation to the Tram Project. Information releases were issued to the press and the media. This provided the general public with information. Meetings took place with groups that had issues that they wanted to raise. Meetings also took place with people who were affected by the project. Therefore, many different methods.How queries or representations by members of the public were addressed would depend on who had raised the issue and to whom it had been raised. Initially there was a communications function within TIE. I think that changed over time.

193. I think that the public were kept fully informed of developments relating to the Tram Project. I remember being involved in a number of public meetings and

working on a strategy to ensure that we got information to the public. Obviously we were looking to provide the public with positive information because we wanted to promote the project. We did do quite a lot of work to try and provide people with information that they would understand. We wanted to explain that there was going to be disruptions, but that the benefits would make undertaking the works worthwhile.

- 194.** A number of steps were taken to try to mitigate the adverse effects of the tram works. First we tried to ensure that we communicated with witnesses and residents so that they were aware of what was happening. Secondly, we looked at support that could be given to local traders affected by the works. This included: providing assistance with business rates; expanding the small business support to scheme to cover affected traders; and providing refunds to businesses who had paid to have tables and chairs on the pavements but were unable to use them. Thirdly, we tried to mitigate the difficulties caused by loss of parking spaces. We retained a number of the taxi and disabled parking spaces. We also investigated making Council parking facilities available to the public. Fourthly, we instructed those working on the sites to ensure that they kept them tidy. We instructed them to remove rubbish and to inspect fences on a regular basis. These steps are set out in more detail in an email from Leanne Maberley dated 16 May 2008 [CEC01231803]. I think these measures were effective to a certain extent. There was had a campaign entitled 'Edinburgh is open for business'. Large parts the city centre resembled a building site and that obviously had an impact on businesses in different parts. Leith Walk traders were particularly hard hit. The measures outlined in the email were an attempt to try and encourage people into the area and make life less disrupted as possible for the traders. There was an effort to try to mitigate the disruption. How far they went towards providing mitigation would be debatable, but there were a fair number of measures that were considered and implemented.
- 195.** An action note dated 1 December 2008 notes that Jenny Dawe met with Jane Wood, Chair of Essential Edinburgh, who informed her that TIE's communication with traders had been severely criticised [CEC01069093].

Traders expressed concerns throughout, mostly because their businesses were being adversely affected by the fact that streets were dug up. In some cases, during times of dispute between TIE and BBS, nothing was actually happening. No work was being done but the traders were still suffering the loss of business and the detriment. I completely understood their frustration. I could understand why they were annoyed or angry about the project as in many cases it was severely affecting them. If the project had have been managed properly in the first place, the disruption would at least have been over a shorter period of time The businesses would then have gained the benefits of the tram service once it was it was up and running. We did put in place a compensation scheme. Traders got relief on business rates. There was also a scheme which made payments to businesses which submitted applications that showed that their trade had suffered by a certain amount. I think it could have been avoided if the project had progressed and been completed as planned.

- 196.** An action note from the special Tram Internal Planning Group dated 1 December 2008 noted that a single Communications Plan for the whole project needed to be developed. I do not know if this was done. Members were not always informed of PR issues in good time. This issue was discussed in an email chain between Isabell Reid of CEC and Colin McLauchlan dated 10 and 11 Jnauy 2008 [TIE00147176].
- 197.** There were calls for the Council to hold a referendum on the Tram Project. I do not think it would have been responsible for CEC to launch into a lengthy and expensive referendum based on a request from a single individual. Particularly given that the request was made about a year after the local government elections. During those local elections all parties stood on manifestos that contained a reference to the tram project. The majority of parties and Councillors elected stood on a manifesto of pursuing the Tram Project.
- 198.** I am now aware of an email dated 26 October 2007 [CEC01507257] sent by Graeme Russell. In that email, he requested that TIE consider increasing the

funding behind the small businesses compensation scheme. The basis of the request was that it had been widely reported that savings of £47m had been made. This is an exchange of email messages that I was not privy to and I would not expect to be. I do not know what their expectations were. I do not remember anybody ever reporting that we were saving £47m. That is a completely alien figure. As I recall matters, a compensation scheme was what that the business community preferred. That was what they were pushing for. The alternative options were: the advertising campaign about Edinburgh being open for business; looking at parking restrictions around traders' areas to try and improve the ability for people to park; promoting local shopping areas; and other similar initiatives. For example, I remember that we tried to encourage focus on the specialist traders in the William Street area.

- 199.** Leith Business Association (“LBA”) sent myself and other Councillors an email on 30 November 2010 which noted 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 [CEC00127068]. LBA made six demands to the Council. First, they wanted road and pavement surfaces to be re-instated to the standard they were in before the project began. Secondly, they wanted re-instatement of all of the trees removed from Leith Walk. Thirdly, they wanted re-instatement of the permanent crossings and central islands that existed before the project began. Fourthly, they wanted assurances that TRO1 would be amended to exclude all roads which might be affected if the decision was made to terminate the project short of Leith Walk. Fifthly, they did not want any pavement narrowing or road widening to be carried out until such time as tram tracks were actually installed on Leith Walk. Finally, they wanted A new comprehensive financial support package to be set up for traders. They indicated that support should be available irrespective of the size or rateable value of the premises in question. I cannot remember how the Council responded to that email. I do recall that the Council consulted with these constituents throughout the project.



## **Cost Overrun and Consequences**

- 200.** I think the cost overrun started when disputes occurred between TIE and the contractors. The disputes led to an impasse which meant that the on-street works were not getting carried out. We became aware of the costs that were increasing when we were given information about the disputes resolution process, and the likelihood of TIE not winning all of the adjudications.
- 201.** Following the negotiations at Mar Hall it became clear that an additional contribution would be required from the Council. I cannot remember what the options in relation to financing were. My understanding on that was that the only real option was to borrow the money. The Council would borrow a capital sum and that would have to be repaid over a period of years. That is not uncommon and Councils do borrow money for capital investment. That is an accepted way for local government to raise funds. However, this would be an added burden to the Council's revenue and capital finances. I do not think that Councillors were kept properly informed of the risk of a cost overrun throughout the project.
- 202.** The main consequences of failing to deliver the Tram Project in time, within budget and to the extent projected was added cost to the Council, and therefore, to the people of Edinburgh. In terms of the cost increase, the Council had to borrow money. That burden then falls on the people of Edinburgh. The delay meant that there was an extended period of disruption to the city. In addition, we have not got the full tram service that was originally planned and budgeted for. It would have been far more successful if the full route had been completed. The failures in the delivery of the Tram Project have also damaged the reputation of the Council.
- 203.** In a general sense, the Final Business Case was based on the tram network going down to Newhaven and the Roseburn/Granton loop. This would have served a far bigger area of the city, both in a business sense and for residential areas. This would have provided far more patronage and financial

viability for the service, and would have contributed to helping the economy of the city.

- 204.** There was nothing cancelled due to extra borrowing by CEC, but it just added to the Council's borrowing requirements and that is always something that has to be kept under review. Our ability to borrow is flexible. Provided you can produce the revenue to service the loan, tyou can borrow if you think there is a capital project that requires it.

## **Final Comments**

- 205.** The main reason for the failure to deliver the tram was the fact that the INFRACO contract was not in the terms that the Council had understood it to be. The Council and the public were led to believe that it was a fixed cost contract where most of the risk had been transferred to the private sector contractors. I think the legal advice that the contract was sound and that it provided a good deal for the Council goes to the heart of the failure of the project. The legal advice had been provided by DLA Piper and had subsequently been signed on by the council's solicitor who expressed confidence in the robustness of the legal contract. I think the legal advice was provided in advance of the final contract sign off in May 2008. I think the political division within the administration of the Council over that period of time was not helpful. It led to the project becoming a bit of a political football for reasons that maybe some parties felt they could exploit. I think the withdrawal of Transport Scotland from the project did not help and probably contributed to the failure to get to the root of some of the problems that were emerging.
- 206.** Those failures might have been avoided if there had been better scrutiny and a clearer understanding of what the terms of the contract. The key was in understanding the meaning of the terms used in the contract and how the contract could be implemented and used. A greater degree of political unity about what could be beneficial for the city would also have assistd. I think

I confirm that the facts to which I attest in this witness statement, consisting of this and the preceding 82 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..... *24 May 2017* .....

