

Edinburgh Tram Inquiry Office Use Only

Witness Name: David MACKAY

Dated:

THE EDINBURGH TRAM INQUIRY

Witness Statement of David Mackay

Statement taken by Raymond Gray, in the presence of solicitor Simon Whyte.

My full name is David Mackay. I am aged 73, my date of birth being [REDACTED]

My contact details are known to the Inquiry. I have provided a copy of my Curriculum Vitae to the Inquiry [CVS00000028].

I am currently retired.

Statement:

Introduction

1. I would like to say that I am happy to be involved with the Inquiry. I have previously, almost three years ago, provided considerable information to the Inquiry Solicitor, Gordon McNicoll. 2005 to 2017 is a very long time and I was a Non-Executive Director not an Executive Director. I was not immersed in detail so trying to remember minutiae or looking at a sentence plucked out of a long report or long statements is very difficult and misleading and could be confusing.
2. I would also like to state that the Tram Project was a very complex project, the first of its kind in Scotland. The whole project was predicated on Edinburgh winning congestion charges and they did not win congestion charges. It

involved multiple agents and stakeholders with conflicting and competing views. It was always going to be a very serious challenge, a comment I made from the first day I joined, and this proved to be the case.

3. My primary role with the Tram Project was integrating trams and buses and dealing with the Competition Act. However, I did step into the breach when Willie Gallagher disappeared and the project was in a perilous state. I joined Transport Edinburgh Limited (TEL) in August 2005 after being head hunted for the role. I was appointed Chairman of TEL in February 2006 when the then Chairman, I think Gordon Burns, stood down. I became interim Chair of Transport Initiatives Edinburgh Ltd (TIE) in November 2008 and I Chaired the Board until my resignation in 2010. I was also Chairing TEL and Lothian Buses simultaneously at these points. I had previously been appointed an Executive Director of Lothian Buses in June 2008, Chairman Designate in 2009 and Chairman in 2010. I resigned from all three posts in 2010 and obviously from the Chair of the Tram Project Board (TPB) at the same time.

General

4. The benefit of the Tram Project was that we were able to integrate trams and buses, which was a huge challenge and which is now working well. Revenues are up and passenger numbers are encouraging so I think these are positives. The major problem and the whole crux of this, apart from the competing and confusing stakeholders, was the design. Design was incomplete and progressing the task without assured design was asking for trouble and proved so throughout. There were relentless campaigns of distortion that were either engineered internally or fed in. When you have stakeholders who do not particularly get on with each other - Lothian Buses, Transport Scotland (TS) and the Scottish Government, which eventually was totally anti-tram, you are going to have problems so that certainly did not help. Having city Councillors on the Board was never a good thing in my mind. They have different pressures, they have different ambitions, they are thinking about votes and

elections. It became almost a daily issue to wonder what might be on the Evening News front page. Information appeared to be getting fed in from various sources. I think the other great challenge was that the contract was illogical. I have used the word "*capricious*" many years ago. There was a section called Schedule 4 Part 4, I think it was. Despite receiving the best legal advice possible, including from Richard Keen QC, we were never able to get over it. Finally, I have to say, the choice of the main contractor, Bilfinger Berger, to me was a great mistake. A willing and supportive contractor may have been able to finish this job much earlier without as much of the pain. They were unwilling. I used the word "*delinquent*" to describe them and I meant it, in the English sense of the word. I understand that something of my words was lost in translation into German and they took exception at the time. In addition having separate MUDFA design and build, not linking these and not holding contractors responsible for all three, was also a major mistake.

5. The lack of design and incomplete MUDFA had a significant impact on timing and costs. I think that these were the main factors. Having separately unlinked contracts and stakeholders who did not particularly like each other were also factors.
6. As I have stated, the SNP were anti-tram and so they were antipathetic to the project. Lothian Buses did not want to have the tram and some in the City did not want the tram. Others did not want TIE doing the tram and perhaps even some in Transport Scotland felt that way too.
7. A number of people within the Council were very supportive, including the Chief Executive, Tom Aitchison, and many of his senior colleagues. On the other hand others were definitely not. Sometimes the impression was that TIE was an invader and that the City of Edinburgh Council (CEC) Transport Department or Transport Scotland should have been in charge. Lothian Buses certainly did not want TIE around.

8. I am aware that in June 2008 Graeme Bissett prepared a “lessons learned” paper. A version of this, described as a “First draft” ([CEC01344687] and [CEC01344688]), was emailed to me.

9. Although Graeme Bissett was the author of the paper, I had been involved in the preparation of it. My opinion was that it was a well-written and brutally honest paper. Graeme was a good strategic Non-Executive Director of TIE long before I got there. Graeme was also very keen that TIE could grow and develop beyond Edinburgh tram: he and others had aspirations to look at a modern rail link, along with other projects. One of the key points made is that design should have been integrated and not decoupled. I think all of that strategy went to the very early days of TIE when Michael Howell was the Chief Executive and the Tram Project Director was an Australian, Ian Kendall. In the early days, in 2005, when Willie Gallagher and I were invited to become Directors of TEL, as non-Executives, and we were sometimes allowed to sit in on the TIE Boards. My instinct at that time was that there was something wrong. There were conflicting messages and reports seemed to change. There were conflicting views about who was responsible for the design delay. However, nothing was ever said that design was going to be a problem throughout the contract. No one seemed to be grabbing the design by the scruff of the neck at this early stage. I think the obvious thing to me was that Infracore should have been responsible for design and Multi Utility Diversion Framework Agreement (MUDFA). You then have the main contractor responsible for A to Z and they are therefore then responsible if it does not go right. At some point down the line design was novated to Bilfinger Berger; however because of a debateable clause in the contract, it was novated without responsibility for the cost. I should say that the paper referred to was obviously discussed in some detail at the various Boards, including the Tram Project Board (TPB) and the TIE Board. I was not aware of a later version of this document.

10. The draft lessons learned paper considers that a separate delivery entity is a good idea (page 5) and I agreed with this point. With the best will in the world

the City themselves would have been incapable of being the delivery agent and so the alternative to that would have been Transport Scotland. It would however have been difficult for Transport Scotland to be an agent when it was foreseeable that there would be political implications. Before my arrival a company called Transdev was brought in to have responsibility for operating the trams. They knew what they were doing but it made no sense to me why they had been brought in, it was another overhead. I believed that Lothian Buses, who, incidentally, were one of the best passenger transport companies I have ever seen, were well capable of doing it, but they did not have the appetite. They saw the trams as a competitor and a threat. I do not think Transdev actually served any real purpose apart from being a political ploy to control Lothian Buses; I am not saying we did not learn from Transdev because I certainly did. It became apparent eventually that Lothian Buses could do the job better and more economically too. If TIE had not been around, I do not think the Tram Project would ever have taken place. In the early days we won some bruising encounters with Transport Scotland. I suppose it would have been good to have a private body from the start but there was not a chance of that because the City of Edinburgh demanded visibility and they wanted a hook in it. I agreed with the reasons that were detailed within the review. I think that it was the best solution at that time.

11. I note that the second Main Lesson (page 3) and comments on page 5 concerned the calibre of the people employed by the delivery entity. There is nothing easier than criticism, especially when criticising in hindsight. However I did think that there were some ineffective people around. I certainly perceived several oddities and weaknesses but I was in no position to do anything about it. When you are a Non-Executive Director, especially in a company's infancy, your job is to watch, listen and learn, not to rush to conclusions. Eventually Michael Howell moved on as Chief Executive and Ian Kendall also moved on from his post as Tram Project Director. I do not think they were a loss to the organisation. I thought Ewan Brown, who was the Chairman of TIE and who had already indicated that he would hand over the Chairmanship much earlier than anyone else, did a good, professional job. I

did have concerns about the organisation's reporting. I think that the longer Willie Gallagher and I worked there, the more critical we became. We started to say to the senior officers in the City that change was an imperative because it was going in the wrong direction. I think we were listened to, because Willie was eventually appointed to the TIE Board as Chief Executive and I took over from Andrew Burns as the Chairman of TEL. Andrew had already indicated it was time to step down and for a non-Council official to take over.

12. The review is critical of the use of third party consultants (page 7) and goes on to say that few of the primary advisers remained with the project. I think that says it all. I was never involved in the selection of the primary consultants so any views I express would be tinged with my later experience. I do not know who was responsible for the selection of third party consultants; I assumed at the time that it was TIE Board.
13. Page 12 of Graeme Bissett's report notes that the attempt to do without DLA Piper (DLA) for part of 2007 was not a success and was abandoned. I do not remember DLA being side-lined. I worked quite closely with Andrew Fitchie of DLA and there were certainly competitive pressures between CEC's Legal Department and DLA. I was not hugely impressed with some people in CEC Legal. In reference to page 12 of the report I do not remember the comment about Dundas and Wilson being involved.
14. I am aware that a number of reviews were undertaken, including Business Cases, Audit Reports, and OGC Gateway Reviews. I think the very fact that the internal resources proved inadequate and they had to go back to DLA demonstrated that lessons had been learned. The Business Cases, the Audit Reports and the OGC Gateway Reviews all went through the City hierarchy and Transport Scotland and were approved. Therefore, I would disagree with the view that none of the reviews identified the problems. Decoupling, for instance, was a massive issue, which was discussed in the report. I had no issue with the process involved in relation to the reviews, they had to be progressed that way.

15. In commenting on the paper above I have provided answers to a detailed set of questions which were put to me by the Inquiry Team. The structure of this statement reflects the set of questions which have been asked of me and the order in which they were asked. The original draft of this statement was provided to me by the Inquiry Team at the end of June 2017 following several days of interview in February 2017, and I have endeavoured to correct any errors and clarify any ambiguities in the limited time allowed to me. References to documents are invariably to those documents which the Inquiry Team provided to me for comment. In a number of cases these documents run to hundreds of pages yet I have been asked to comment only on specific pages or sections. Whilst I have endeavoured to provide answers to the best of my ability, generally speaking I have not seen any relevant documentary material, other than that which was provided to me for comment, since leaving the project. On various occasions I have been asked to comment on documents which were not authored by me, and whilst I have made every effort to provide an answer, the author of the document will generally be better placed to provide particular insight that I am.
16. In relation to how things could have been done differently I believe, in hindsight, that it was a gross error to decouple design, build and MUDFA. I also believe, in retrospect, that I would have liked to have seen a QC's opinion on the contract. However, I was not involved in that so I do not know if such opinion was sought. There were a very cleverly crafted couple of clauses as I have already referred to that killed our arguments in the contract that should have really been spotted by the lawyers. Additionally, as I have already stated I would not have had Councillors on the board. Some of them were good guys, some of them were enthusiastic and I did not mind being challenged by them. However, again as I have already stated, they could not keep anything confidential and the Trams became a whipping boy, when what we needed was for them to be championed. If you look at Dublin, if you look at Croydon and if you look internationally, when you excavate holes all over

the place the public hate it, motorists hate it and retailers hate it, but normally in the passage of time it is forgotten about.

Role within the Project Bodies

17. I started off in TEL as a Non-Executive Director and eventually became Chairman. I sat on the Board of TIE as an invited guest at first then, I suppose, as a Non-Executive Director and I also chaired the Tram Project Board. Inevitably there was some overlap between my roles, but we were not working in silos and there was a good reason for that overlap. There was very robust debate in and out of all of these Boards and that debate also included Lothian Buses. It was a good tension, it was constructive tension and in the early political days of looking over your shoulder, it was important that we all operated as a team. As I said before the Lothian Buses guys did not want to give up their primacy, Edinburgh Councillors wanted to flex their muscles and Transport Scotland rightly had a role to play as the major funder of £500m (“and not a penny more”). The job of the team was to balance these competing, or conflicting bodies and I think in the main we did that. As a result they became more collegiate than independent and separate.
18. However, when the main contractor reads and hears that the financier had said, “*not a penny more*” they suddenly think, “*Where is the money going to come from*” so they put pressure on the City. The City then puts pressure on the delivery body and the contractor in effect “*rubs his hands*”.
19. Before Willie Gallagher resigned in November 2008 I was Chairman of TEL and I sat on the TIE Board. Willie's sudden resignation could have been very damning and damaging therefore, for obvious reasons, someone had to step into the breach. I think, rather like a private in the Armed Forces, I volunteered. The project was in a poor state at that stage and people were shocked at Willie going, morale was low and suddenly the vultures were appearing in every direction.

20. I took over as interim Chair initially and I think was formally made Chairman around late December 2008. That required going in front of the whole Council and Council Leaders subsequently confirmed it. I was concerned about where we were in relation to the contract and met with Tom Aitchison, the Chief Executive of the City, and expressed my fears. I also thought that there had been a bit of a power game going on, I was concerned that some in TIE had their own ambitions about taking the business in another direction like tram/trains, similar to Europe. I took the view that there was a job to do here and if someone wanted to go beyond that, fine, but after we completed the Tram Project. I cannot remember the precise circumstances of Willie leaving, he just phoned one day to say he was not coming back.
21. I eventually appointed Richard Jeffrey as Project Director in May 2009. We had four candidates and he was the best and he was my recommendation, I was heavily involved in the process. Similar to mine, Richard's appointment had to be approved by the City of Edinburgh and Dave Anderson. David Anderson was, I think, the Development Director, and was involved in the interviews as well. It took a lot of persuasion to secure Richard as his track record at Edinburgh Airport had been pretty impressive and he was very well paid. Richard is an interesting man and his ambitions were not purely related to cash: he saw a huge challenge coming up and I also saw that. I was delighted when we secured Richard's services for the Tram Project.
22. At that time TIE was in a poor state and Bilfinger Berger were in the ascendancy. Our people were under enormous pressure. It was not in a good position to be in.
23. In some respects however Willie Gallagher's resignation created a new bond amongst people in TIE. There was suddenly a sense of, "*Let's get together and get on with this*". I certainly did everything I could to encourage the one team approach.

Skills within TIE

24. The term “*silos*”, appears quite regularly in papers. I think the only people who were in “*silos*” were the CEC people. They felt separated or kept away from the contract and to a certain extent that was probably true. Some of the quality there was not the best, although some were excellent. Along with Tom Aitchison, I was all for putting people from the Council in the same room as TIE to work together. This built up a 'one team' approach and was breaking down barriers. I think the TIE people learned from that and I know that the Council people learned from it and we got on better.
25. My views on the senior management team were that some were better than others. The main senior people were ready for motivation and were ready for change. I walked the streets with them, working late at night. There were times when they did not want to be there but I think we eventually built a very impressive team. Interestingly enough, further down in middle and junior management there was a 9 to 5 malaise. Bilfinger Berger had taken on Donald Anderson, who used to be the Leader of Edinburgh City Council so he was in the know and having fun and games as I recall. I did have concerns about complacency or carelessness regarding the security of information within TIE - if I walked round the building, I saw computers on, I saw sensitive papers and financial forecasts - and changing that took more effort than it did to get the top team going.
26. There was a mixture of employees: some were on the payroll and some were on a contract. A lot of the design people were on contract and eventually we had SDS and TIE design people working together to try and create a cohesive body.
27. The simplest thing for a contractor to say is, “*These people are not qualified to do this contract, we don't want to work with them, we don't trust them*”. I think that is nonsense but the contractors were playing the game and it suited some in the Scottish Government and in TS. I spent a lot of time with Tom Aitchison explaining what I thought about the quality of the team. I did not want any

changes at the top of my team, what I wanted was changes in Bilfinger Berger. I think it was a ploy by Bilfinger Berger and it was a ploy that was working.

28. I have no doubt that if I thought the Tram Project Director, Finance Director or some of the General Managers were incapable I would have taken action to remedy this.
29. The fact that the contractor was aware of the comment by John Swinney, "*Not a penny more*" did not help. I have never experienced this before where you would expose the limit of your budget to the contractor. How can you possibly take a very complex budget, the first of its kind in Scotland and say, "*It's fixed, it's £500m, it's fixed, that's it*".
30. I have been referred to an exchange of emails that concerns the removal of TIE from the Stirling, Alloa, Kincardine (SAK) Project [TIE00033344]. I was not at all unhappy that TIE had been removed from that project. It was onerous on TIE, but to me it was an unnecessary distraction from the main job, the Tram Project. I know that TIE were extremely unhappy about the way it was handled by a press release. It was basically being said that TIE were at fault for everything. I do not know the full details but TIE will argue that TS and Network Rail were also involved.
31. I do not think it is appropriate for me to comment on why the SAK project was taken from TIE. I do not know the issues of the SAK project other than it was delayed.
32. I have no knowledge of Background Notes intimating that TIE was inserted into the contractual arrangements at the insistence of the Scottish Government.

Tram Project Board

33. I believe that the idea for a Project Board emerged at a meeting that Graeme Bissett had with TS and CEC in 2006, as is referred to in an email of 18 August 2006 [TRS00002698] and attachments [TRS00002699] and [TRS00002700]. You cannot separate revenue from delivery, integration and design. I think I helped to produce this paper along with Graeme Bissett. Inevitably, matters change, things develop and progress and so does the structure. I think the structure, as proposed, seemed to cover all the interested parties and I do not think it was ever departed from greatly. The key point was the TPB became the focal point of discussion from the papers, the sort of workhorse engine room of the Tram Project.
34. The role of the non-executive members of the TPB I suppose was the same as any other Non-Executive Director. They were independent Directors challenging and supporting, as required. I do not ever remember a vote having to be taken at a Tram Project Board. Without being arrogant, I was probably quite a robust Chairman and I could carry most things as a result of doing my homework well in advance. I made a point of briefing Non-Executive Directors individually in advance and they were very good, quality people. I had no issues with any of these people.
35. I was satisfied with the quality of reporting to the TPB. I think some of the quality of the papers and the content was first class. They were issued well in advance and Directors were able to study them. There were also various discussions outwith the Board about who would do what in terms of debating in the Board. This ensured that my Directors and Executives were very well prepared, as were the Non-Executives, using appropriate Powerpoint presentations. Nobody at the Board was expected to go through 70 or 80 pages, line by line, chart by chart. What they depended on were articulate Directors summarising the position. The detail was there for those who wanted to pore into it before, or afterwards. In reality they were more interested in looking into the eyes of the author and judging, than poring through 400 pages or 60 charts.

36. It was only to be expected that some of it was repetitive. It has been pointed out to me for example the wording on Infraco mobilisation remains the same from month to month (see papers for October meeting page 10, [CEC01210242] and the subsequent sets of papers ([CEC01053731, CEC00988024, CEC00988028 and CEC00988034])). Due to the type of contract it was inevitable that charts would become repetitive and people would only dip in and dip out.
37. It has been suggested to me that the Report from the Project Director contains large amounts of text repeated from month to month. However, I do not think anyone could ever accuse anyone of there being a lack of information.
38. Although the papers were important in a recording sense, the main thing was that at these meetings people were able to provide, in a succinct form, the information that I required to receive in an understandable fashion. If anyone needed to explore it further or ask questions there was an opportunity to do this.
39. I have been referred to the TEL minutes of a meeting on 21 August 2006 [CEC01794941]. Within these minutes there is mention of the formation of the TPB as part of governance. I think that the decision to create a TPB originated from a discussion between me and Graeme Bissett and thereafter I was heavily involved in the decision to establish the Board. I think the crucial advantage was that they had brought the key stakeholders together. Minutes of power and authority are set out in Graeme Bissett's paper. I also cannot recall when the TPB changed to become part of TEL, I think that it was a natural progression. We started a committee and it grew and grew in importance. This was as a result of being able to distil a lot of the matters and then feed them into the TEL Board.
40. I certainly did not apply to be Chairman of the TPB; I think that I was elected. The Council wanted me to become Chairman and I am sure the proposal had

to be presented to all the Edinburgh City Councillors who then voted and approved it. There were a number of other factors involved; however someone obviously thought that I was the best person for the job. I think a Chairman has got to be able to stand above and I believe that I was the right person for the post.

41. I was the Chair of Business Planning Integration and Commercials (BPIC) sub-committee, which was one of the sub-committees of the TPB, and Willie Gallagher chaired the other one, which was the Design, Procurement and Delivery (DPD) sub-committee. At the end of the day there is a limit to how much any one individual can do but everyone worked together.
42. The Project Director's Executive Summary for February 2006 [TIE00090593] notes that the TPB was to "*Champion*" the best interests of the Tram Project. I do not think it was at all contradictory for the TPB to be tasked with this, in fact it was fundamental and it did not mean to say it did not also challenge. Our role was very much bigger than that, it was one of both championing the trams and attempting to deliver them, if possible, within the specified parameters. I would emphatically refute any suggestion that the Tram Project Board was so committed to trams there was a risk of inappropriate processes and procedures.
43. CEC and Transport Scotland were rightly fully involved with the decision making process. There is a comment on page 10 at 5.21 of the report that states, "*Members of the TPB are required to champion the best interests of the Tram Project within their respective organisations*". That is a subtle way of saying that I expected the Chief Executive of Lothian Buses, despite his personal views and antipathy, to champion the trams. We did however disagree several times and, in fact I gave him the closest thing to a verbal warning that unless he pulled together and stopped briefing negatively, speaking to outside politicians and others, I would be recommending we wave farewell to him without any tears.

44. I note that at page 10 of the same report the function of members of the TPB is considered. Councillors who sat on the TPB were meant to be independent watchdogs similar to the role of Non-Executive Directors. They were also obviously representing their wards and voters. Some were very much better than others but there was too much politics involved and there was a lot of leaking. Politics and business do not go together.
45. There was some familiarisation. I would sit down with any new Board member and explain the structure of the papers and so on. The mantra at every Board meeting was that, *"Everything we say is confidential. There are people outside who would love to know what we are saying just now. Please do not talk about this"*. There was one Councillor, she was a Green Councillor, who never attended a single Board meeting but did receive all the papers. These Councillors had all the duties of a good Non-Executive Director: to challenge, be supportive and to maintain confidentiality. They also had responsibility to the people who voted for them and to the City of Edinburgh Council. There should have been no conflict in either of these matters, but there was.
46. The conflict that arose was as a result of both the political background and general issues. There were SNP Councillors who had misgivings and who were certainly anti-tram. Labour had held supremacy in the Council for many years and were very unhappy about what was now happening. Seldom did they seem to operate cohesively; they operated more as individuals, although some of them were very good.
47. There were robust and wide-ranging discussions during TPB meetings, everyone participated and it is fair to say at times over-participated. I chaired the TPB meetings and individuals presented their reports. Reports were debated and either approved or people were asked to come back with more information, either at the next Board or before that. There were always minutes recorded at the meetings and I normally approved them along with one of the other senior Directors. I thought the minutes were always accurate and detailed and were a summarised account. If anyone did not agree with

content it would be addressed. I thought that they were very professional Boards. I also arranged that the management met regularly before a Tram Project Board. Everyone knew what was required, but I was making sure that they were properly prepared to make sure that we knew precisely the pros and cons of everything we were going to discuss.

48. Executive members were questioned regularly during these meetings and were able to provide responses to the questions put to them.
49. Once the Project Director had completed and presented his report it was finalised or the areas that they could not follow up were noted for forwarding. It was a comprehensive document. This was what the Board was all about. You would start with the minutes of the last meeting, matters arising, and then the meeting would normally start. Finance was normally first and then the Project Director, health and safety, risk and then Lothian Buses. It was always very well-orchestrated. Everyone knew their role within these meetings.
50. I would normally receive the information for the meeting about a week before and more often than not I was satisfied with the content. My only complaint, on occasion, would be the volume of information. However I accepted it was a requirement and it was better to have more than less. If I thought there was something that was missing I would insist it was added.
51. I have been directed to the TPB papers dated November 2008 [CEC01053731] where it was reported to the TPB that "*prior approvals were progressing*" (pages 11 and 29). I certainly thought the reports accurately reflected the position. I had one golden rule for the Board meetings and that was that there should be no surprises unless they were good surprises.
52. The lack of progress in design, MUDFA and Infracore were constant items on the agenda and the subject of constant discussion. No one had any doubts that these were behind schedule. Although I was not directly involved in MUDFA, I think we changed contractors three or four times during my term.

On two occasions we were given quite clear evidence, and justification, that the contractor wanted out, because they could not cope. On other occasions they were found to be falling well short of their paperwork requirements in terms of actual reports. Quite often I would walk the whole tram route and you could tell good contractors and bad contractors. A bad contractor would not have proper protection on and there would be little work done anywhere, whereas with the good one, it was night and day.

53. I do not recall any specific concern that lead to the discussion regarding the clarity, quantity and quantity of the reports and papers presented to the TPB, as referred to in the March Minutes of the TPB papers for April 2007 [CEC00688584]. If there was discussion it was specifically about that Board meeting and the fact that we might require further information for clarification.
54. The reports were so detailed you had to accept the fact that somebody at the meeting would provide that information. If you get paid as a Non-Executive Director you have to do your own work and I hasten to add I thought the non-executives were very good. The import thing was that there was complete transparency. These matters did not concern me. It was the way it worked.
55. The Board had sight of all papers, irrespective of how comprehensive they were. There was no suggestion that the Board was selective in what it dealt with in the way of reports. It was all fully transparent.
56. I was always asking for additional information; that is the way I work. I would always ask for explanations and clarity from whoever the author was, be it the Finance Director, the Tram Project Director or the Risk Manager. I always strived to be as fully informed as possible prior to Board meetings.
57. I always considered that the Project Director and Transport Scotland reports provided an accurate and complete picture of the project as it progressed, although I would agree that there was a great deal of repetition from one month to the next. This was inevitable, but I would not say that made it difficult

to determine precisely what was happening at any time and what the key elements were. If work was not on-going or incomplete in one month, it was unlikely that it would change the next month. I cannot recall any challenge from Transport Scotland or indeed others on this issue.

58. I am aware that a draft letter from Willie Gallagher to the Council is mentioned in the TPB minutes around December 2006 [CEC01695695] and refers to the Tram Business Case having been reviewed by the TPB. This was a detailed line by line discussion in advance of the Tram Project Board and I am sure there would have been four or five key Directors involved in this. I cannot remember the exact detail around this but I was part of the discussions
59. At page 46 of the TPB report there is reference to a draft letter from Transport Scotland to CEC. We were producing, out of good governance, draft letters, which were required by Transport Scotland and the City of Edinburgh and which were also for the Board concerning the various matters that had been completed. It was not an edict or a diktat so Malcolm Reid of Transport Scotland or Tom Aitchison could change any word that they chose. The Board were simply saying, "*We require to tell you X, Y and Z here is a draft which says so. If you want to change that, change it*".
60. We, as the TPB, were the engine room. We were not determining the content of any letters. They were part of good governance. I am quite sure Andrew Fitchie of DLA would have been involved in the drafting of these letters and what was required. The Business Case was prepared by a combination of the Finance Director, Graeme Bisset, the Project Director and myself. We were all contributing to this and in turn so were CEC.
61. I do not see any problem with the TPB drafting a letter saying, "*We, Transport Scotland, acknowledge the sense of this approach*" in relation to the phased construction, it was a draft letter.

62. I refer to the last paragraph of the draft letter in relation to the possibility of extra funds from TS. I knew that additional funds were unlikely, not because of Transport Scotland, but because of policy by the Scottish Government.
63. In referring to page 48 of the report I note the text of the proposed letter from CEC to TEL, again I would highlight this is the text of a draft letter. It is a bit like going through your bank for a mortgage or a loan, where they provide a draft letter, addressed to them, for you to sign.

Governance

64. I have previously described, in general terms, the roles and relationships of the different groups involved with the Tram Project. CEC were the owners and they delegated authority to TIE, TEL and the Tram Project Board. TIE was primarily design, TEL was integration and the Tram Project Board was the engine room and workhorse, preparing and proposing the detail. It was inevitable, as time went on, that there would be duplication. This was not unhealthy; it was a great check and balance actually. CEC were represented on the Board and we were in daily contact with CEC officers. Transport Scotland were also represented on the Board until they chose to withdraw. Below the senior management level there was also liaison with CEC Transport Department, the Legal Department and others. There was a network which was very active all the time. I suppose that Willie Gallagher's resignation led to further duplication as I now had responsibilities for the whole organisation and so that probably meant some alteration around how matters were structured or discussed. It certainly did not mean any paucity in information, far from it. Over time I would certainly say that all processes and procedures developed naturally.
65. I believe that the existence of TIE was a good idea. It was beneficial to have someone between the City and the activity and TIE was independent and not politically driven.

66. TIE were there to deliver the trams without the political influence there would have been if CEC had undertaken the Project themselves. I am not being critical of City executives, however they were not staffed by project managers and they would then have had to staff up with appropriate resources. I think it was much more appropriate for an independent body supervised by CEC. If CEC had recruited themselves for the Project I think it would have caused mayhem in the Finance, Operations, Transport and Legal Departments. With TIE, the CEC Finance Director sat on our Board along with the Development Director and as a result they were able to monitor and report accordingly.
67. I am aware that on page 34 of the papers for a meeting on 26 September 2007 [USB00000006] there is mention that having TPB, TIE and TEL prevents duplication. I am also aware that on page 76 of papers for a meeting on 23 January 2008 [CEC01015023] it is stated *"It is recognised that there is inevitable duplication between the scrutiny by the TIE Board of its Executive activities and the oversight role performed by TEL and the TPB. However, this situation is normal, if TIE's role of providing a service to its client, in this case TEL, is borne in mind."* This mention of duplication also appears to have been recognised in the TEL Board meeting of 11 December 2006 [CEC01830410].
68. I am also aware that the papers for the September 2007 Meeting [USB00000006] refer to the new CEC Tram Sub-Committee and mention that it was to have an oversight function.
69. TIE was the initial body that existed, then TEL and then the Tram Project Board. TEL was intended to be the long-term body, demonstrated by the fact that it still exists, although it is now referred to as Edinburgh Transport Ltd and not Transport Edinburgh Ltd. It would be the operator long after the design and build finished although elements of TIE would probably have survived to do tram extensions etc. The plan was that TEL was going to be the constant, the others were, to some extent, temporary. There was another view: the City

obviously thought they could not have Lothian Buses operating trams, because of possible competition complications and that is why Transdev appeared.

70. In the papers for the TEL Board meeting of 11 December 2006 [CEC01830410] reference is made again to "*inherent duplication*". 2006 is a long time ago and I think that this is a snapshot in time. I felt sub-committees were a good idea because MUDFA was behind the timetable and there were precise skills required to deal with MUDFA. These precise skills were not appropriate for the Board but they were appropriate for the committees who reported to the Board. I thought that made sense at the time and I still think it makes sense now.
71. It was my proposal to transfer the Elected Members of the TIE Board and its Non-Executive Directors to the TPB. I have no further comment to make on this.
72. There was duplication at times, which I think was unavoidable, although I do think it was a beneficial duplication as it ensured the process was robust. If something had been missed it would be picked up on. Duplication did not blur any lines in terms of demarcation. There is a quote at page 35 of the December 2006 meeting, "*The precise structure of the delegated authorities will be reassessed in due course and if different from the current authorities will be subject to appropriate approval processes.*" Therefore it is natural development as the project progresses. However, generally, the paper sets out quite clearly what the governance procedures were and why. The committee mentioned in those papers [CEC01830410] is actually a committee created by the City of Edinburgh and not by TEL or TIE. I think it was to give position and some influence to the transport spokesman in the Council and some of his colleagues in the Transport Department.
73. There were normally separate meetings for both TEL and the TPB, however they presented the Business Case to the Board together.

74. TIE was the official body charged with design and build. The Tram Project Board was a Board with delegated authority from the two senior Boards. The TPB would pass on recommendations for either TEL or the TIE Board. This was a better way to channel huge volumes of information through a Project Board as opposed to a main Board. If you were not involved this can appear very complex, but that was not the case. It was not complex, it was structured, necessary and it worked. I suppose that the interpretation that the TPB were a “*pivotal oversight body*” was correct, however the final authority would always be taken by the City of Edinburgh and Transport Scotland.
75. There is a difference between a working Board and a supervisory Board. The working Board was vital and the supervisory Board made sure that nothing was approved when it should not have been. Both Boards were absolutely essential for the Project.
76. It was not unusual for the same people to sit on a number of Boards. Different Boards had different responsibility so people are not repeatedly requiring brought up to speed. This complemented the process and in my experience was not unusual. During my time as Chief Executive of John Menzies, for example, there were area Boards and regional Boards, and then finally we would have the main Board. When you got to the main Board they assumed final responsibility and were the decision-maker. Recommendations went up the way and decisions came down the way.
77. I understood the need for the City and Transport Scotland to monitor, however often they were inhibitors in that process rather than a good quality check. I knew and understood the reasons for this but that does not mean to say it always made me happy. The main reason was the finance. £500m from the Government, £45m from the Council. The inference being, “*It is our project not your project and if we want pink seats in the tram shelters we will have pink seats in the tram shelters not blue seats.*” This led to some internal conflict, but that was not unusual in a large Project such as the trams.

78. The decision to have the Chief Executive of Lothian Buses sit on the Board of TEL was a deliberate tactic by me. I have already explained that he was anti-tram, but he was a very good bus operator with international experience, organised, articulate and reputable. In addition, he was not afraid to challenge anybody or anything. What I was trying to do was convert him and persuade him that Lothian Buses were not under attack and in actual fact they would become supreme because they would be the operator for all the integrated transport throughout Edinburgh.

79. The Readiness Review document of May 2006 [CEC01793454] recommended setting up the Tram Project Board in May 2006. To me it did not matter that it was a sub-committee of TEL rather than TIE. TIE had responsibility for progressing design. TEL had a much more long-term view of where we should be. This arrangement was my recommendation to the Board and owners and following due process, the Board and owners backed my recommendation.

80. TEL did not present any problem for the Project. The major benefit was that people, if they wanted, pored into the detail and sought more detailed clarification. I think it was part of a structure and evolution.

81.

I have been asked about the governance structures shown in Graeme Bissett's paper to the TIE Board in August 2006 [CEC01758865]. I consider this a good paper drafted by Graeme in consultation with me and others. The content of the paper is self-explanatory, though I do not consider that the diagrams in the Appendix are of particular assistance.

82. There was always a danger of assumption that the Tram Project Board had primacy over the TEL Board. At the end of the day, any decisions taken by any of these Boards had to be referred to the City of Edinburgh and Transport

Scotland. We could have been overruled at any stage. I have to say seldom did that happen, but I think it was important. The final check and balance was that we could not spend all the risk allowance on X, Y, Z if it was not approved at the Board and then reported on accordingly.

83. I acknowledge the content of the papers for the meeting on 26 September 2006 ([TIE00000905] and [TIE00000906]) which proposed a significant change in the proposed governance structures in that the TPB would become an independent body. It also notes that the members of the TPB have authority from their respective appointing bodies to take decisions. The paper provides that the Tram Project Board will now be an independent entity rather than a sub-committee; however that did not mean anything different in practice. The author was again Graeme Bissett, that was his skillset, but there was also input from myself, Willie Gallagher, our Finance Director Stewart McGarrity and discussions with Transport Scotland.

26 September
2006 should be
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84. In a paper submitted to the TPB meeting in August 2006 [CEC01758865] are two diagrams on page 4; however I do not have any particular comment on them. These are schematics and a way of demonstrating something. The format is either something which you like or you do not. It seems to be a work in progress.

85. I note the TPB papers for the meeting in December 2007 [CEC01023764] and the proposals regarding governance on page 46. This is largely the same document contained within previous TPB papers and this version still provides that TIE will have only one major project, the trams. On page 49 it states that TIE's role is to deliver a tram fit for purpose, on time and on budget. That was its commercial imperative, that is why it was created and this is totally consistent with what had been proposed before. The information is all relevant, although that does not appear as clear when you look at specific points rather than all the content. Highlighting one sentence out of a whole report can be confusing and misleading, but I thought that the Governance section of the report was a good document.

86. I am aware that Willie Gallagher provided a PowerPoint presentation on 25 June 2008 [CEC01353228], however I had no involvement with this and therefore can provide no explanation of the slides or content. We both provided presentations the same day to the City of Edinburgh Executive on different subjects and the presentation that I provided was completely different to this. The theme of my presentation was, "*Don't fluff decisions*" and I spent 20 minutes going through the history of the decisions that had been avoided, fluffed or not reported, some relating to Tram Projects and others relating to separate issues.
87. I, Tom Aitchison, and others were sent an email and attachment on 25 November 2008 ([CEC01162044] and [CEC01162045]), the attachment being a paper in relation governance with two options. I think this was after Neil Renilson and Willie Gallagher had either left or were due to go and suddenly we had a loss of two major players. As a result of this I was asking, "*What do we do about this? What is the best way of tackling it?*". TEL's role, at that stage, was not yet specific, as in there were no trams to operate. There was a lot of groundwork in relation to producing Operating Agreements, in respect of competition, policy, structure, revenue professions and revenue projections. There were a lot of processes on-going but there was no physical operation for TEL to manage. We were working on policy, integration and planning and the proposal was to merge and move forwards. There were actually three options not two and I think option A was the one that favoured TEL absorbing TIE. Once again the paper was drafted by Graeme Bissett with input from me and I am certain that CEC Legal would also have had an input. I assume that Andrew Fitchie in DLA would be involved because of the contractual issues. There was a danger in changing whoever was contracted to Infraco. If you gave them an excuse to say, "*You have changed the name of the party contracted to*" there may be a possibility of having to start over . We had received a great deal of high quality legal advice about the pitfalls.

88. I have been directed to a table on page 79 of the Joint Board Meeting on 23 January 2008 [CEC01015023], which is an update of the Governance model. The table is self-explanatory and I do not believe any further comment is necessary.
89. I have been referred to an email with attachment from Graeme Bissett to myself dated 17 January 2009 ([CEC00040050] and [CEC00040051]). I also note a further email with attachment from Graeme Bissett to myself dated 27 January 2009 ([CEC00040052] and [CEC00040053]). The attachment with the email dated 27 January 2009 is an options paper produced by DLA. It was a case of us examining the options, but at that time none of these options were progressed and the changes were not implemented in 2009.
90. I thought that the presentation on the Review of Governance undertaken by Deloitte in February 2009 [CEC00111617] was a factual and largely supportive document. I was happy to have Deloitte as an independent examiner. Even if I did disagree with anything in it the review would have been discussed in full by the Board so it is not me but the Board that makes the decisions. The Board would either accept or reject it and on this occasion it was obviously accepted. The quote was, *"The governance arrangements appear to be operating effectively. No control weaknesses were noted. There are opportunities to improve the current arrangements as the project moves to the construction phase through to the commissioning operation"*. You would expect governance to change as the Project developed. In reference to the comment, *"from commissioning to operational"*, this is true; it is a completely different ballgame.
91. In my email to Tom Aitchison on 7 September 2010 [CEC00020497] I am putting a bit of context to my concerns. This was about a month before I needed to throw in the towel and I was beginning to get frustrated about future appointments, or confirmation of future appointments. We had been developing a guy called Ian Craig who came from Lothian Buses; he was talented and fitted the bill. There was support for him generally across the

Executive and Non-Executive, however two Councillors, Jeremy Balfour and Alan Jackson, were being difficult about it. I think they were being difficult about a) the salary and b) that TEL did not have the right to make Chief Executive or Chief Operating Officer appointments without full approval of the Council. I was worried about putting Ian Craig into the situation where Infracore and others would not know what the plans were. I was looking for authority to proceed, subject to the City of Edinburgh. I think what the Council were saying was, "*Why do we need a Chief Executive of TEL when we are not up and running here*". My response was that they were being short sighted and I did not want to lose Ian. Ian was better than Neil Renilson had been at many things and was the ideal Chief Operating Officer of the entire Project, I could also see him developing further down the line. I think they were trying to insist that all appointments had to be approved by them and it was not within my remit. I think Tom Aitchison's view was, "*Leave it with me I am going to get it sorted out*". I think the minutes of the City of Edinburgh Council are actually worth reading. These confirm what we were trying to do and why. I would not be recommending anyone unless I thought they were up to the job. I had lobbied my Board. I had exposed Ian to the Board meetings and he had been present at presentations.

92. I have been referred to the TPB meeting of March 2007, which contained the minutes of the February 2007 meeting [TRS00004079] and note the comment on page 7 about speed and efficiency of decision making by stakeholders. I think I recall this was me moaning about CEC Legal and CEC Planning being slow taking key decisions about Park and Ride development, traffic management and various design structures. I think there was some disagreement about me and what I was saying. Every change in the design was going to cost the project something. We wanted rapidity with decisions.
93. The practical effects were an extension of time and cost. I think sometimes in management that relatively simple things were being converted into complex discussions, which led to a split in views.

94. There were elements in both CEC and Transport Scotland responsible for going down this route. I often said at Board meetings, *"I expect the people here to have the authority to take or recommend decisions not just defer them"*. The papers were going out a week to ten days in advance so if you had done your homework and there was something you knew you required further authority for, you should have sought that authority and been able to discuss it. I think I am right in saying that Transport Scotland took the decision they would no longer attend the Tram Project Board meetings. They had implemented a different structure, weekly phone calls and further supplementary Boards. That is when you start to muddy the water. When TS were there they could sit and look at me and my Board and in turn I could sit and look at them along with my Board. It was then difficult to avoid the issues.
95. The authority to make binding decisions by individual political parties was granted by their peers. Everyone who attended the Board meetings was expected to have that authority or were expected to be able to provide a valid reason why they would have to defer their decision. Time critical construction and delays in decision making was seized upon by Bilfinger Berger and Siemens. I think that at one point we had hundreds of changes in relation to extension of time and other related issues.
96. Sufficient notice was always provided in respect of the decisions that were required, which allowed for appropriate discussion within individual parties.
97. I have been asked about an extension to the membership of the TPB, but I am unsure what is meant. There would be people who often attended the Tram Project Board who were not members of the Board, who would be there to make a presentation. We could request that certain people attended meetings, perhaps a party leader, a transport specialist or a tram operator. These people were not members of the Board, they were presenting to the Board and would answer questions. Subsequent to this it would be up to the Board to make a decision. This was not an extension of membership and there were no extra decision-makers.

98. I have been referred to the Minutes of the January 2008 Board meeting contained in the February 2008 TPB papers [CEC00988034] and note that at page 6 there is reference to concern from CEC as to conflict of interest from the members of CEC and the Councillors sitting on the TPB. It was inevitable that there was conflict. If you were an SNP Councillor or a reluctant supporter of the Project then you could be difficult. There was always a suggestion that CEC could overrule whatever we said and I think the Board were unhappy with this. Their general thoughts were, *"If that's the way you want to run this get on with it because we are not working our backsides' off for someone who is not involved to take a senior decision which did not seem to have a justification"*. It was an unnecessary interruption. I have to confess that I had started trying to be more selective about what we put to elected members. Quite often we would get a draft of a report that would be going to the full Council meeting. The amount of editing that I and others had to do made it almost a re-write. I felt uncomfortable at the prospect of Bilfinger becoming aware for instance that we were employing Richard Keen, QC to give us advice on Schedule 4 Part 4; if that leaked our negotiations would be severely compromised.
99. If we had put what we knew in relation to risk allowance in an open forum this would have shown our hand to the contractors. We were battling every day with Bilfinger and Siemens and I did not want to be battling with the Council as well.
100. I was not directly involved with the internal audit on internal governance, referred to at item 2.11. The Audit Committee would come to me with questions but I did not undertake the auditing and they were totally independent. I was one of a group of people that would be questioned. I agreed with the content of the paper. My strategy was quite simple: I was trying to integrate TIE, Lothian Buses and TEL. The long-term gain for us would be one organisation, fit for purpose. The audit was largely supportive and the Board agreed with it or the minutes would say otherwise. I do not

know what specific recommendations were made that far back. However, they would be sensible, approved and actioned.

101. The issue with the assignation of contracts arose around a change of the holders name. If we changed the name of the holder, the principal, of the contract from TIE to TEL did that give Infraco an opportunity to say, "*That's a change, we now want ...*". As a result we took a lot of legal advice about that.

Legal Advice

102. I am aware that a TEL document dated 20 March 2006 [TIE00090459] notes at page 3 that Brodies LLP are mentioned as legal advisers. I think that the reason why Brodies were the legal advisers was that Lothian Buses also had them as legal advisor. Neil Renilson probably suggested that they had done a lot of work on the competition issues for the buses and it made sense to engage them. I took the view that was fine although DLA were currently providing advice to TIE, therefore there was no reason why they should not give advice to TEL. I knew DLA more than I knew Brodies and recommended to the Board that using one set of legal advisors was economically and commercially sound.
103. I have been referred to a letter sent by Andrew Fitchie to myself dated 3 April 2006 [CEC01853967], which confirmed that DLA would provide legal services to TEL in connection with their involvement in the Tram Project. I probably spoke to Andrew Fitchie two or three times a week and there will be numerous records of what was discussed. It would be in relation to contractual issues and questions, competition issues and general business advice. It was comprehensive and we got our money's worth in terms of time from DLA. There will be separate invoices from DLA to TEL which would explain this fully. They certainly provided a lot of advice on integration. Eventually we also engaged Brendan Nolan from McGrigors who was also providing advice to TIE. However I think that his role would be more peripheral on the advice that

he was giving TEL. I think this demonstrates the good business thinking of the Board.

104. TEL had another legal adviser, Stewart Jordan, who was employed by DLA at its London Office. Stewart was apparently a specialist in contractual disputes.
105. DLA would provide advice to TEL, which would be shared with TIE, there were no barriers. The Finance Director or I would give instructions as appropriate. We were not operating in silos, all the senior people would know what was going on. We would have topical discussions about it. Stewart McGarrity was a talented Finance Director but he left TIE before I had a chance to appoint him as Finance Director of TEL. We all worked together, our desks were across the corridor from one another so there was no demarcation. I think Andrew Fitchie's letter confirms that DLA were satisfied there was no conflict of interest between TIE and TEL.
106. Richard Jeffrey was not getting any information that I did not know about. It is important to note that Willie Gallagher had left long before Richard Jeffrey arrived.
107. I do not recall Willie Gallagher being nominated as a person able to provide instructions on behalf of TEL, however there were informal exchanges between TIE and TEL on a daily basis. The issues that affected TIE were liable to affect TEL and vice versa.
108. Someone has to take responsibility for the capricious part of the contract and I suspect the responsibility for that lies with DLA.
109. I think that DLA have a large amount of responsibility for the problems that we had with the contract. I liked Andrew Fitchie however I think he was exhausted at the end and brittle. His assistant, Sharon Fitzgerald, I think, was a junior lawyer, she was good and she was hungry. There was a third person, Stewart Jordan, from the London office. He was taken on, at my insistence, because I

just thought Andrew required assistance. I also think that we were being out-bullied in the legal arguments by the weight of Bilfinger Berger's legal advisors.

110. I have no knowledge of Andrew Fitchie being taken on secondment. Andrew had a contract to us so I do not see how this could be viewed as a secondment.

Operation of Contract Bodies

111. I would refute any suggestion that the TPB, TIE and TEL Board agreed matters in advance of any meetings. There was always robust discussion and there were often different points of view. The discussion was healthy, but I do not ever remember a vote having to be taken. This meant that we had reached collegiate decisions without having to have "*punch-ups*", figuratively speaking.
112. Members of the Boards were always well informed and able to make decisions on the matters brought before them.
113. What was agreed before any meetings was what Directors and I were presenting and how we would present this. I never wanted a Non-Executive Director to be presented with surprises.
114. In addition to these joint meetings we normally met every morning for a cup of coffee. We would also meet in the evening to reflect on what had occurred during the day. I was in regular telephone contact with Non-Executive Directors and with the City officials. I think the professional Non-Executive Directors were first class, very helpful and very supportive.
115. I can recall some of the Non-Executive members. Neil Scales who was a professional from Liverpool who was first class. Kenneth Hogg was from the Scottish Civil Service. I think we had a consultant, Mike Heath, who came in

and presented to us. He was involved on the Gateway Review. Brian Cox who knew the history of logistics and passenger transport and was very good; I think he chaired the business role after I left. These were top drawer Non-Executive Directors.

Edinburgh Trams Limited

116. Edinburgh Trams Limited was a company set up - before I arrived - by Neil Renilson and Lothian Buses with a view to making sure there was a separation between buses and trams. Alistair Richards was a chap with some considerable experience in trams and he was made a nominal Managing Director, which was merely a titular thing. When I became involved I heard the company had wound down and Alistair had subsequently become General Manager of tram operations. The company had no significance.
117. The share capital had initially been in the ownership of Lothian Buses because, and I can only assume, Lothian Buses took that decision. I do not know what the approvals were for that, it was before my time.
118. Edinburgh Trams Limited had no connection with TIE or TEL. It was wound down.

Seeking Tenders for Infraco and Contract Close

119. I have been referred to a draft TPB/TEL recommendation letter dated November 2006 [CEC01758866]. I cannot remember a discussion in November 2006 around this, however I have no doubt that it would have been discussed by the Board. There were a number of features of schemes from continental Europe that were utilised for the Tram Project. We had a Spanish designer of trams, Construcciones y Auxiliar de Ferrocarriles (CAF), who was fantastic: they were supportive, flexible, listened and they recognised cultural

differences between Europe and Scotland. They provided us with good advice. Additionally, tram systems in Germany, Holland and France were all looked at. There was no criticism in relation to the design of the tram, however there are limited shelters and I do not think the ticket machines are very good, but I lost that battle.

120. I do not know why, at page 5, it is detailed that the cost for both lines 1a and 1b was down to £592m compared to higher figures that were previously referred to.
121. I had no role whatsoever in relation to the Wiesbaden Agreement. I was aware that Willie Gallagher and Matthew Crosse were going and it was meant to be a meeting of minds of senior TIE people and senior officials in Bilfinger Berger. There was no prior discussion as to a terms agreement, the only people who could approve any changes in the agreement were the Board, not individual executives.
122. In the TPB Papers for 19 December 2007 [CEC01526422] is mention of a need to have an agreement in place by 20 December 2007. This relates to the Operating Agreements for TIE and TEL. We could not sign a contract if we did not have Operating Agreements, which were required to allow the relevant person at TIE to sign the contract. It is not the Wiesbaden Agreement that is discussed within the TPB Papers.
123. Wiesbaden was a meeting of minds and my recollection is that Willie reported back verbally to me. A table was produced and a report to the Board, of further "*price gouging*" by Bilfinger Berger. This was hopefully going to be offset by savings elsewhere, including Value Engineering and design. There was also a further message that Bilfinger Berger would "*knuckle down*" and become a supportive and more responsible contractor than they had been previously.

124. I note an email and attachments from Stewart McGarrity to myself and others dated 16 November 2006 ([CEC01758864] to [CEC01758868]). The attachments relate to the TEL Board papers and the approval of the Draft Final Business Case (DFBC). I was heavily involved and asked a lot of questions of the DFBC. I went into great detail and both I and the whole Board received a lot of assurances. TEL was exercising its responsibility to scrutinise, which we did. Eventually the Boards were satisfied with the integrity of the Case, of the quality, the efficacy of the numbers, capital costs, risks and affordability.
125. There was a significant amount of scrutiny by both TEL and TIE. It was also scrutinised by CEC because of their representation on the Board; particularly the Finance Director, Donald McGougan, who sat on the Boards. There were no stones left unturned in this process.
126. I would have thought that there would be extensive records of the discussions that took place regarding the DFBC, including Board papers and supporting minutes. I remember two numbers here £512m and £80m, which immediately put the pressure on phase 1b because we only had £545m to work with. The ultimate recommendation was not to approve 1b but to press on with 1a. It was hoped that savings in Value Engineering would release funds which might allow 1b at a later point.
127. At item 4.1 of the TPB Papers for October 2007 [CEC01357124] there is mention of the Final Business Case, Version 1, for which we had numerous reference documents which provided all the required information to reach an informed decision.
128. The Boards were satisfied with the integrity of the case, the efficacy, the quality of the numbers, the allocation between capital costs, risks and affordability. That was the basis of the endorsement. What would normally happen in these circumstances is there would be a PowerPoint presentation by two or three people to explain fully the detail and their recommendations.

They would explain any potential effect of their recommendations. This would be fully recorded and documented within the minutes and there would be detailed supporting papers so that people did not just have to rely on memory. Copies of the slides for any presentation would be handed out prior to or during any meeting. I certainly always had my slides before the meeting was presented.

129. The decision as to the preferred bidder, item 8.1, was endorsed through recommendations and conclusions from the Business Case. Section 3 of the minutes illustrates the discussion which led to the decision to endorse.
130. I was not involved in the direct preparation of the Final Business Case, mine was more of a supervisory role in relation to the scrutiny of it throughout the process. Neil Renilson was a vigorous and shrewd interrogator who contributed positively. Neil probably asked more questions than most people and maybe “cheesed” people off eventually by not listening to the answers he was provided. In the final analysis, Neil, along with all the other Directors and senior Executives detailed in the Minutes, were content to approve it. I do not now remember anyone physically signing the document; that is more of a turn of phrase.
131. The draft resolutions dated 23 January 2008 ([CEC01515189], [CEC01515190] and [CEC01515192) approve the draft contract suite and appoint Willie Gallagher, Neil Renilson and myself as a committee of the Boards of TEL, TIE and the TPB to finalise matters and approve the contracts. The roles and procedures were agreed with Brian Cox, who was the senior Non-Executive Director of TEL, and the Board. We knew this was delegated authority and that we could not deviate from the conditions; we did not have supreme powers. We were subject to Board approval throughout and nobody was standing in a corner insisting, because they were TIE or TEL that things should be a certain way. The process worked as intended and it was a unanimous decision to approve.

132. Part 4 of the Schedule to the Infraco contract dealt with price and I am of course aware it was this that later caused considerable problems. I had no direct involvement in respect of the price to be paid for works, it was approved by the Board and I think this was long before I was responsible for such matters.
133. Originally it was intended that, with approval in December 2007, the contracts would be signed by the end of January 2008, however by the date of the TPB meeting in February 2008 there was still no contract in place. I would need to have sight of the Tram Project Board minutes to comment fully on this, however I suppose like everyone else involved, I had become so used to Infraco dragging their heels for various reasons that I became accustomed to it. Inevitably there had been long discussions on what the cost impacts were, how could we offset them and what we could do about it. The reason for the delay in my opinion was that we had a reluctant contractor and design was also causing major problems. The contractor was refusing to work on anything they did not have total and free access to and all of this will be recorded, extensively, in the relevant Board minutes. There was a lot of discussion of the cost implications for the project as a result of the continued delays. There was obviously contingency factors built into pricing but you would see these disappearing in the contingency and that was a major concern.
134. In the first few months of 2008 the price of the works was increased on a number of occasions by BBS and I have seen a summary of those price increases [CEC00132442]. I had no direct involvement with the incremental price increases that was outwith my responsibility at that stage. I did, however, have an indirect involvement and my reaction to the last minute demand for payment was fury but not surprise. I clearly remember being at a meeting on 5 May when BB representatives came across from Germany and I had a bit of a verbal "*slanging*" match with Dr Keysberg and Richard Walker. I was making the point to them that it was ludicrous, at this stage, to come forward with further price increases. Their explanation was that the cost of steel had apparently gone up because of supplier pressure and in addition

there were currency swings and there was nothing they could do about it. They were therefore passing the price on. A chain of emails ([CEC01274986] and [CEC01376389]) dated 5 and 6 May 2008 indicates some of their arguments.

135. Willie Gallagher was so incensed about Richard Walker at that stage that he wanted him removed from the project. He highlights some of his concerns in emails [CEC01231125] dated 3 May 2008 to the TIE Board and [CEC01372584] to me dated 8 May 2008.
136. Siemens seemed strangely unaware of the situation and were certainly not getting involved in price discussions. There were, however, limited options available to us: we could re-procure, or say that we were not going ahead with it, there was after all a Scottish Government who were not in favour of trams and recommended the end of the project; alternatively we could try to negotiate the sum which would be lower than the cost of doing anything else. A paper dated 5 May 2008 was produced outlining all our options [TIE00359941]. There was a background of political change and attitudes in the Scottish Government and there was no appetite for litigation, which in any case was not recommended by Labour representatives. The choice was negotiate or else.
137. As a result, we negotiated and came to a compromise of sorts, which I was not entirely comfortable with, but this was better than re-procuring with 'Tram Lines', who had been the failed bidder. We would have been severely disadvantaged in that situation. There was also the view that Siemens might, at that stage, have an appetite to become the lead contractor and to bring somebody else in. That was an option that was explored many times throughout the years I was there. Every possible alternative was considered, but none were viable for various reasons.
138. The final decision to proceed was taken at a meeting of the TIE and TEL Boards at which Neil Renilson and I represented TEL and Willie Gallagher

represented TIE (see Minute [CEC01289240]). There was a healthy discussion at this meeting and not surprisingly there were protagonists and antagonists. There was a lot of noise, which had to be balanced by common sense and politics; however the final decision was unanimous. The three of us were delegated to proceed but, again, subject to Board approval. There was then a separate, lengthy, discussion with the City of Edinburgh who were made aware of the pros and cons and potential impacts. At that time we were also being provided with strong legal advice that in actual fact the contract was in the Council's favour. The ludicrous part of the subsequent Infraco argument was that if they decided to buy a different material, a different type of pole or a different type of concrete to save money, that was regarded by them as a TIE change. The cost for such a change, according to the contract, went to TIE and that is how absurd this thing became. The minute in the document is the culmination of the whole process that had been proceeding since the delegation in January. All the letters should have been corrected and approved by the Board. We were provided with documentation and that was what we were being asked to approve. If we considered it to be proper we would approve it. I think it was the best option available at that time.

139. I recall Graeme Bissett copying myself and others into an email dated 13 May 2008 with various attached documents prepared in relation to Contract Close [CEC01340801 to 809]. I was not involved in the drafting or indeed, the preparation, of these documents; however I was advised about them. Graeme Bissett obviously had considerable input from DLA and we also received advice from CEC and Transport Scotland.
140. It would be nonsense to suggest that it was inevitable that the TPB would recommend that all the contracts were entered into. Our Board would never have entered into an execution of contracts if they thought that in doing so we were endangering the City or Transport Scotland. As I have continually stated, there was full and frank discussion, if there had been problems we would have delayed execution and in fact we probably did delay execution several

times. It would only be approved if it was appropriate and within our guidelines.

141. I satisfied myself that the statements within the Contract Close Report were correct. I gathered as much advice as possible from our senior executives, my lawyers, the City and Transport Scotland.
142. I am sure that there was an independent check of the statements in the Report, although I would not be able to name who actually did so. I do not think, however, that the statement that the principal pillars had not changed since the approval of the FBC within the Contract Suite Report at page 1 [CEC01340808] is necessarily correct. Elements of the contract had been subject to quite significant change. The reference however appears to be in relation to scope and risk transfer, not the contract suite in its entirety. These were separate matters.
143. I never had any doubts that it was not a fixed price contract. You could never have a contract of this complexity without changes. The design was incomplete, MUDFA was running late and there were extensions of time. In addition the City wanted changes made and there were other factors. It was never a fixed price contract, as is referred to in an email string dated 10 and 11 December 2008 [CEC01054035].
144. I am aware that there is reference to a "*lump sum fixed price basis*" for the Infraco contract on page 39 of the Joint Board meeting on 23 January 2008 [CEC01015023]. I do not think there was anyone who had any doubt that the price was not fixed, although elements of it were. There were many variables and that is why we had a risk provision and a risk analysis. If the design changed, for example, or if CEC wished changes, MUDFA held things up, everything stopped. Everyone knew that with an incomplete design there were going to be additional costs and that is why decoupling design was a major weakness.

145. . Approaches were made a couple of times to Bilfinger Berger to say, "*This nonsense, it has got to stop, there is not a never ending pot of money here. We should buy out the design risk*". I think there was a buy out of some of the risk, but that did not make any difference, they still came back asking for more money.

Changes following Election in 2007

146. I have been asked to comment on the reaction of TIE, TEL and TPB to the election result in 2007. Some people approved of the election result, others were ambivalent and some people were disappointed. Election results are elections results and there is nothing you can do about it. I think that Willie Gallagher's request for a '*Council of War*' after the election [CEC01653467] was merely a figure of speech. We knew we had different politicians to deal with who held different views. The challenge was to assist them in getting an understanding of the Tram Project. My recommendation was that we should meet with them as soon as possible using TS as the conduit, bring them up-to-date on where we were and try to gauge their political standing on the matter. However, despite this, I knew that the new Government was lukewarm at best towards the Tram Project. I could also sense the change in TS: they were probably looking at their own security and future. I think it was around this time that John Swinney made a public announcement along the lines of "*£500m and not a penny more*", which, I feel, summed up exactly their attitude.

147. I have been made aware of a letter from Willie Gallagher to Malcolm Reed of TS dated 28 May 2007 [CEC01674960], which suggests that TIE had been instructed not to enter into any new financial commitments. At this time I was not at TIE although I was aware of the situation and vaguely remember this letter, which I think reflects what I was saying about TS looking at themselves very carefully. There was no direct impact on TEL and no instruction given, but I am pretty sure that I advised the TEL Board of the situation. Malcolm Reed

was a real professional and I think that he was a supporter of trams, however he had the proverbial handcuffs put on him and I understand that.

148. After the go ahead was given later in 2007, it was clear that the Scottish Ministers wished there to be changes to the role played by TS. The new approach is summarised in an email from Willie Gallagher to me and others dated 24 July 2007 [TRS00004566]. An email from Bill Reeve of 21 August 2007 emphasises that they would no longer participate on the Board [CEC01666597]. Up to this stage, Bill Reeve and Damian Sharp had represented TS on the TPB and they were good participants. They both knew what they were talking about and they were certainly not afraid to challenge aggressively, which was good for the Board. They had both been able to provide useful input and insight into key decisions. I am sure they were placed on the Board to identify key issues and ask questions, however their contribution went beyond that and they were contributors and believers in the strategy. They were not pussycats but they wanted trams to be up and running and they thought it was good for the city.
149. There is a comment on page 6 that TS would continue to ensure responsible spending of taxpayer's money; however it was in fact the case that we were all responsible for obtaining value for every penny of the public purse.
150. I was hugely disappointed when TS withdrew from the TPB and I am sure we all privately had our own thoughts of who was pulling the strings. This was a further reason why we got together and said we have to manage this very carefully, it was a huge loss and disadvantage not having TS on the TPB. It also meant that we had to create and work through another channel outside the Board. As a result, we undertook a different reporting structure, meeting structure and held separate briefings, a lot of duplication. This would have been unnecessary if the two guys sitting on the Board had remained. I really was disappointed. I am pretty sure that they reported to the best of their abilities.

151. I actually later recruited Damian Sharp from Transport Scotland and employed him at TIE as an Executive, because I thought we missed his experience and I thought very highly of him as a project manager. Understandably though, people like Bill Reeve had a career ahead and there was no way he or anyone else in that position would stick his neck out.
152. New governance arrangements were required to accommodate the withdrawal of TS, as referred to on page 67 of papers for the TPB in August 2007 [CEC01018359]. Transport Scotland and the Government were the main funder and whether I liked the conditions or not I complied with them, I had no choice. I thought the previous arrangement was much more satisfactory but I followed what I was instructed to do. I think there might have been a view in the Scottish Government at that stage that TS had been too close to the Project, which I think was good for the Scottish Government and the Project, but now they were looking to distance themselves.
153. I think the general feeling was that the delivery of the Project was managed very tightly by CEC, TS and Scottish Ministers. This sometimes seemed not to be for too much purpose, but the person in charge of the purse strings calls the tune. There might have been an air of discord in TIE and TEL and I think some people were considering whether they wanted to be involved. I had to redouble my effort in motivating, retaining and encouraging people. We were starting to lose people and we had some very sensitive team talks in small groups, some of which were successful, others less so. The project swallowed three or four Chairmen, three or four Chief Executives, innumerable Project Directors and Deputy Project Directors, these guys could pick up easier jobs elsewhere. If they could secure easier jobs in Europe why on earth would they want to live in a situation like this. It was not easy, it was very difficult.
154. I have no doubt that if there had been more support from the Scottish Government and TS, a lot of the discord could have been avoided. The Scottish Government had been making noises for a long time that they did not want trams, they would rather have used the money for something else and I

can understand that. It was however some peoples' bread and butter and a number of them had put their life into it, they had relocated their families.

155. Relations with the City of Edinburgh were also often difficult, some Councillors and officials were challenging. I did not mind this however, Tom Aitchison the Chief Executive, Donald McGougan the Finance Director, Dave Anderson and Marshall Poulton were consummate professionals.
156. As referred to in the June Minutes within the TPB papers for July 2007 [CEC01565576], I asked that members did not enter into speculation as to the Government decision that was awaited on the trams. The reason for this was that I was being 'good old uncle David' saying, "*Don't speculate for something you can do nothing about*". We had an action plan, which I have previously referred to, which was to get to the Government very quickly through TS in an attempt to build up a relationship with Stewart Stevenson and John Swinney, who I thought we had a relationship with. After I had left I read his statement about "*a tissue of lies told by TIE*", which I just could not believe and was incomprehensible to me. There was no reason why anyone would tell lies about that.

Design Issues

157. The design process was the crux of the major problems with the contract, apart from the attitude of the main contractor, Bilfinger Berger. Much of this is outside my direct bailiwick and portfolio; however the management of the design went from bad to worse. Although it was novated, Bilfinger Berger refused to accept financial responsibility, using a capricious contract to transfer all the risks and changes. We had hundreds of hours on this with lots of experts and we also had head-banging meetings with SDS. We even took on additional accommodation to bring SDS on site and to enable our planning team to work with them. They promised much and delivered very little. The quality of their work was very poor. They were threatened with removal and

they were penalised as part of the contract, which led to a series of counter-claims by them.

158. I chaired a meeting in August 2006, which was described as a "*Planning Summit*" [TIE00000147] and was a meeting of City executives and a chap called Ricardo Marini, who was involved with an internationally proclaimed specialist designer called Terry Farrell. He had very strong views about what the city should do with structures, gardens and fountains. They had grandiose ideas, but we had a budget; every change that was made would cost and the costs were rising.
159. The failure of SDS to produce designs on time was a matter mentioned in almost all of the TPB reports, for example on page 2 of the TPB papers for August 2006 [CEC01688881]. These papers note that the completion by SDS of design deliverables was a major concern. If we did not have design, there were large areas of the project that Bilfinger Berger did not want to work on or could not work on. It was extending the time and the cost and was a permanent concern that never went away. Despite that, the Board got credible reports that a compliant designer and a willing contractor could recover the lost time.
160. The effect of the state of design was that everything, including MUDFA, ground to a halt. Additionally though, there were other issues having an impact on MUDFA: in a city as old as Edinburgh, what the map says is underground is not necessarily there. When the contractor is doing their preliminaries, they know that it is an old city and once they get below a certain depth there are likely to be things they did not expect. The City also knew that they were sitting on a time bomb with the utilities, because they had been down there a long time and modern technology was changing. Everybody knew that when they started digging there were going to be surprises. That is why we had a risk allowance and that is why there were contingencies.

161. I am aware that on page 4 of these papers [CEC01688881] it is noted that the delay could compromise the risk transfer objectives. In essence, Bilfinger would not accept the risk transfer; it was deadlock.
162. On page 5 there is reference to the procurement strategy being revisited to maintain the objective of the transfer of risk. As I have mentioned earlier, I think this was a regular view that we could maybe buy out some of the risk and start a deal afresh, but it did not happen.
163. Page 44 refers to the SDS contract being novated to Infraco to transfer design risk. Design was months and months behind and every change meant a redesign. Some of these changes were driven by the City, some by TIE, some by the contractors and some were driven by utilities. Bilfinger Berger were meant to be managing SDS and did not. If the design had been complete before the Infraco contract concluded, there would not need to be a novation.
164. It is easy to be wise after the event and with hindsight it certainly was not appropriate to continue with the procurement and then the construction programmes without the design. I think it was a major error of judgement to go ahead with an incomplete design. The Board accepted the decision to go ahead because we were promised by SDS, with considerable confidence, that the design could be brought up to date, as is covered in the long-term project reports.
165. Again with hindsight, it was not appropriate to seek bids for and award the Infraco contract despite the absence of completed detailed design and in the knowledge that late design was causing delays to MUDFA. At the time I was not at the discussions regarding the design, but I was aware of the underlying issues. I am sure that decision was taken long before the TPB existed, however.
166. On 27 September 2007 I sent an email regarding settlement of a claim by Parsons Brinkerhoff, which generated a number of responses

[CEC01653317]. In my opinion this was tit-for-tat: we were making a claim against Parsons Brinkerhoff, they were making a claim against us and I think the emails set out the whole story. I was one of a group of people who were aware of the arguments for and against setting up the SDS claim and at the end of the day it was a TIE decision. I believe they took the most appropriate decision in light of the timetable and the situation, which is well set out in the papers.

167. Project Directors and senior Executives were required to prepare papers in advance of the Board meeting to set out potential claims and to give an update so that everyone knew what was going on with SDS. This is evidenced in an email and attachments from Geoff Gilbert to me dated 2 September 2007 ([CEC01630600], [CEC01630601] and [CEC01630602]) and also a report from him [CEC01632267]. I think his paper was quite clear and although I was not directly involved with this, I was heavily interested. I thought the counter-claim, which is mentioned in the papers, was speculative at best, although I could understand what was going on. We were saying, "*If you claim for that, we will claim for...*" and they were saying exactly the same. I was much more interested in getting it resolved and getting on with building a tram line. Geoff Gilbert's paper also sets out what the Board was being asked to do to mitigate future failures.

2 September
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168. I read the papers for the April 2007 meeting of the TPB, which are included within the papers for May [CEC01015822]. At 5.4 of the Minutes, Andrew Holmes raised the issue that, in view of the SDS performance to date, how could there be confidence they would adhere to the latest programme? Matthew Crosse, who was the Project Director, and Geoff Gilbert, who was the Project Commercial Director, responded as is contained within the Minutes. I was satisfied with their responses at that time, but you really have to look at the whole Minute, which is quite detailed, not just a short extract.

169. At item 5.4 of the June 2007 minutes, within the July papers [CEC01565576], in relation to discussions of SDS issues, Matthew Crosse is noted as saying

that both parties have played a part in leading up to the situation that had developed. TIE played a part by making changes in the design and if they did not do the design and did not have qualified staff, or had unproductive staff, then they were at fault. Similarly, if the City made changes they contributed, so there was a multi-contribution. I thought it was nonsensical to be where we were, but I was just satisfied by the assurances given by Matthew Crosse. The minutes at 5.3, 5.4 and 5.5 set that out in some detail. At 5.7 I talk about the current level of detailed scrutiny being maintained, which I think indicates my level of dissatisfaction. I was not at all happy.

170. A paper on the status of procurement milestones on page 80 of these papers [CEC01565576] has a passage which suggests that design delays could be mitigated by allowing price adjustment after the conditional award recommendation to take account of design uncertainties. It was not a fixed price contract, the price was only fixed if the design did not change and obviously there were changes.
171. I am sure there were discussions as to the consequences that might follow if tenders were sought on an incomplete design, but I cannot remember those discussions with any clarity.
172. I am sure one of the considerations would have been to put the tendering process back to allow time for the designs to be completed, but I take the view that had that happened, it would have been the end of the Tram Project.
173. I am aware that Willie Gallagher said at item 3.2 of the Minutes for the July meeting, which are included in the papers for August [CEC01018359], that a line on the design may have to be drawn. I think what he was probably saying was "*We are going to have to settle this one way or another*", but I am guessing.
174. At item 5.9 there is a note that I expressed concern that the chosen bidder would increase prices when the final design was delivered. I did not have

confidence we were not going to be gouged on price and I wanted to know what steps we could take in that situation. What people were saying, either rightly or wrongly, was that half of Edinburgh was dug up, MUDFA was incomplete and there would have been all that inconvenience for nothing if we were to just tell them to go away because we were not happy with the design of it. What would be said to the citizens of Edinburgh and how would the elected Councillors have reacted?

175. In the progress report with the August papers [**CEC01018359**] it is noted that designs have been late for the MUDFA works (page 10). An SDS Update Paper with the August papers notes that delivery of designs will be "*just in time*" with no "*float*" (page 34). SDS responses, progress and performance was flawed and unacceptable. The responses I received were often contradictory. The "*inter-disciplinary design process*", I think the term is, was not there and they continued to perform unacceptably all the time I was there.
176. I am certain alternatives were evaluated and identified, but people, on balance, took the decision it was better to battle on than have the courage to say it was not going to happen. There was an obvious risk to the project; however I do not think there were any viable alternatives. The Council knew exactly what was going on too, as there were elected Councillors sitting on the Board. The design risks and the MUDFA risks in the Primary Risk Registers in these papers were all identified as "*Red*" risks.
177. At item 3.5.1 of the Minutes of early September 2007, within the papers for late September 2007 [**USB00000006**], it was noted that Issued For Construction Notices (IFCs) remained a concern for MUDFA. This was an indicator that designs were still not available on time from SDS. The other Board members and I were very much concerned at this and there was much discussion as to the risk that poor performance presented for award and commencement of Infraco. If there was a delay in MUDFA as a result, there was an obvious opportunity for Infraco to press for extension of time and

therefore there would be additional costs, delays and further pressure and I strongly supported Willie Gallagher sending a strong message to PB.

178. At item 3.8 of the same Minutes there is discussion of settlement of the SDS claim. My view is as stated at item 3.8.5 that *“a clearer link should be provided between commitments under the claim settlement and progress against programme, including details of the design due diligence programme.”* The advice as to the decision to settle and the sum offered was given to the Board, not just to me, and I think we gave suitable authority to get on with it and try and close it. I do not think the Board were surprised to learn that the TIE counterclaim I discussed earlier was speculative. I was furious because I thought we had not been provided with the full facts by Geoff Gilbert and Matthew Crosse.
179. The late September Minutes, at item 20 within the TPB papers for October 2007 [CEC01357124], note that 58-60% of detailed design was completed. To say at that time that SDS were 58% to 60% complete gave the Board some comfort; there was a feeling we were getting there. The design review process had begun to address quality issues with CEC’s input; in fact there is a trail on the minutes which confirms that. Item 3.2.2 evidences that the City and TIE were working together so there was a feeling that progress was finally being made, although there was still a lingering concern as to the effect this might have on the tendering exercise for Infracore.
180. Bidders were able to price other items without detailed design, as is indicated in the Minutes at 3.3 by Geoff Gilbert. I guess some are simpler to design and others were much more complex. Laying a track from outside the Airport across green fields with no utilities could have been done by anybody, but they chose not to do that. They would not move from the so-called design map.
181. I am aware that in the progress report with the papers for the December 2007 TPB [CEC01023764], at item 1.2.3, page 12, detailed design is noted as 66%

of Phase 1A complete and that it was expected that about 75% would be complete by the date of placement of the construction contract in January 2008. This was a cause for concern, but at that stage was not critical.

182. The slow provision of design information was always a concern, as is recorded at item 3.2 of the Minutes for the early December meeting, page 5, which are with the TPB papers for the meeting on 19 December 2007 [CEC01526422]. Anything to do with design and its delay was high priority, as is highlighted by Andrew Holmes at item 3.3, when he queried the impact of the late delivery and particularly its knock-on effects on the MUDFA programme. I do not think, however, there was any re-think of the strategy . In the minutes Steven Bell also mentions "*provisional pricing*", however I am unable to explain what that was.
183. In the Minutes of the late December 2007 TPB meeting, within the papers for January 2008 [CEC01363703], item 5.4 on page 6 suggests that the programme could accommodate up to a six month delay caused by late design. Whilst this may appear to be at odds with the statements made before that design would be just in time with no "*float*", I would never have felt comfortable saying that the programme could accommodate up to a six month programme delay. There is a huge difference between the words "*accommodate*" and "*afford*" and the knock on effect of six months would have been very much more than six months. Having said that, Willie Gallagher's response was robust, at item 4.1 in the Minutes, and the strength of that response gave the Board some comfort.
184. I am aware that on page 20 of the papers for the TPB in February 2008 [CEC01246826] is a note that design was still causing concern. This was at a stage when it was intended that the contract should already have been awarded and detailed reviews and discussions were underway with SDS, CEC and BBS to provide solutions.

185. On page 6 of the papers for the March Meeting [CEC01246825], in the February minutes, Donald McGougan is noted as having asked if the design risk could be bought out. The response is that neither consortium would accept this, by contrast with the earlier statement that BSC had taken the risk of design development. There was an understanding that design had been novated and with that went risk and management, however they were not managing SDS and they were not accepting financial responsibility. This all hones in on the interpretation, or misinterpretation, of Schedule Part 4 of the contract, which was a constant theme.
186. Those few words about design development in the contract were examined by many lawyers, including QCs, for interpretation, but if the design risk had not been novated, responsibility lay with us. An element of that responsibility is reflected in the risk registers, although it is impossible to fully reflect all the risk.
187. Earlier discussions had proceeded on the basis that this risk was transferred and there comes a stage when you cannot go back and reconsider what had been done and the amount of risk being carried in the public sector. What you can do though is turn up the heat on the stakeholder and point out that the risks to the public sector were going to increase by stakeholder changes.
188. At item 10.4 of the papers for TPB in April 2008 [CEC00114831], Willie Gallagher referred to buying out of the risk of SDS non-performance; however I do not really know what this is referring to. At item 10.6, Stewart McGarrity highlights that *"the position reflected the fact that 95% of the combined Infraco/Tramco price is firm and the remainder had been reviewed by both TIE and BBS for adequacy"*, so there was some sort of assurance.
189. At 4.3 of the May 2009 Minutes within the June 2009 papers [CEC01021587], Steven Bell notes that some SDS design was being delayed by TIE and some due to redesign and that Siemens detailed design was delayed. It was not the fault of TIE that there were delays, it was the actions of TIE and those actions

were driven either by changes proposed by the City, or by changes required in the design. I cannot give a specific reason as to why designs were being redesigned, however. There had been no problems with Siemens in the early days; however I seem to remember that CEC were highly critical of the poles and how the poles were to be secured, the size of the work at junctions and other issues. I think that is why the detailed designs were delayed, but up until then they were regarded as being quite good.

190. Steven Bell also notes that there was no issue with CEC processing the approvals, however I think it would have been better to say that there was no longer an issue with CEC processing the approvals.
191. The 'Base Date Design Information' (BDDI) to 'Issued For Construction' (IFC) issue was a major one with designs. There was a requirement to change designs after the contract was awarded both to get approvals and because it was determined that there was a problem with the initial designs. There was also the issue of utility improvement and betterment, which, in theory, meant that when we dug up the utilities they got top quality 2010 technology and material. Accordingly, there would be a price for betterment which would be paid by the utility companies and the City were charged with dealing with that through their Finance Department. If the original drawing assumed something was somewhere and it was later found to be elsewhere, that led to a change. The utility companies tried to take advantage and getting them to pay after the work was done, rather than before, was a waste of time; therefore the figures the City had built in for betterment were seldom achieved. This goes back to the whole decoupling process and if design had been part of the Infraco contract and MUDFA it would have been managed considerably better.
192. I believe the Minutes of the July meeting, within the August 2009 TPB papers [CEC00739552], note on page 7 that Infraco works were held up due to commercial issues arising from design changes. I suspect this was again about contractual interpretation and who would be responsible for paying for

the changes. I do not know if these were solely related to the BDDI – IFC issue, however I suspect there were other changes.

193. I am aware that in the TS report within the same papers there are references on page 46 to “*Temporary and permanent works redesign*”, however I do not know what the nature of the redesign on that particular part of the route was, why it was required, nor why it had arisen at that time.
194. On page 31 of the May report to TS [CEC00245907], it is apparent that SDS are causing problems, but I cannot specifically say what the problems were. I knew that SDS were still causing problems and that those problems were certainly having a practical effect on the progress of the works, but I can provide no greater detail.
195. There is reference to design audits on page 32 and I believe the written report of these audits is contained within these papers for TPB members. The outcome of these audits was that there was little evidence of better management of SDS by BSC, and the lack of support in supplying the Design programme strengthened the evidence of poor design performance.

CEC

196. I had never had any doubts about CEC having the appetite, the ability and the commitment to see the project through. I was, however, aware of the political manoeuvring and pressure and I knew there were antagonists, for example Steve Cardownie who crossed the floor from Labour to SNP. Another Councillor never attended a Board meeting, although she did get all the papers. There were also other Councillors who had long-term relationships with Lothian Buses and who were keen to protect that company. Despite all that, I was confident there were enough people with sufficient appetite to see it through.

197. I am aware of emails, sent about the time the Wiesbaden deal was done, by Andrew Fitchie and Graeme Bissett [CEC01500899]; voicing concerns they had as to whether the Council were up to the task. I did not agree, I thought they were up to the task. There was some quite clever play going on here by Infracore in suggesting we were not up to the task and that if we were not up to the task, CEC were not either. I am not sure about the timing of this and what Donald Anderson's part was at this stage, but he was a past master at playing the PR game.
198. There was no acceptable reason for the inordinate delays referred to in an email string noting frustration and the inability to conclude the operating agreements with CEC [CEC01546916]. This had nothing to do with the contractor's ability or commitment, we had to have formal Operating Agreements signed and I was very unhappy that simple Agreements could not be drafted and approved by CEC Legal and then turned round within a week. I still do not know what the reasons were.
199. Dave Anderson of CEC wrote to me on 18 November 2008 to express some concerns [CEC01161766], which did not surprise me and in fact I was delighted. To some extent he was the new kid on the block as the Director of Development and he was alive to opportunity. He was a fast decision-maker, he was impressive and providing he was managed, I think he was an asset. He sat on my Tram Project Board and I loved talking with him and watched his interplay with great satisfaction. I would not say that all of my colleagues necessarily agreed with that because this was CEC beginning to bring stronger influence in, but I welcomed it.
200. It is apparent from his email to me of 20 November 2008 [CEC01161790] that Graeme Bissett was not impressed. He had a lot of frustration about over-managing, but I thought Dave Anderson was making very good points about tram design.

201. Graeme Bissett emailed me again on 20 November with an agenda for a meeting with CEC [CEC01161796], which I was not unhappy with. I particularly agreed with his comments regarding CEC's interior design queries and his suggestion that we prepare nothing, but instead make a point of the implications of anything substantive being introduced at that stage.
202. In March 2009, Tom Aitchison of CEC wrote to me setting out a number of requirements of TIE [CEC01031749], to which I also replied in writing [CEC00934221]. This was evolution as we were beginning to make better progress. Tom was Head of CEC throughout my time and, although I did not always agree with everything he said, I respected him enormously. He was the boss as far as I was concerned and if push came to shove I did what I was told. I was very happy about people like Marshall Poulton coming in as Tram Monitoring Officer (TMO). He was a modern addition to the CEC Transport Team and looked forwards, not backwards. I had researched what he had been doing with Transport London and found him to be very well qualified and a very useful addition to the team.
203. Tom raised the issue of why there were 250 changes under the contract, which I agreed was inordinately high. I think he was surprised at the response as to how many came from CEC, how many were TIE driven and how many were Infracore driven.
204. I liked what CEC were doing at this point, although I also defended my team as I felt appropriate. Some people did not like to have CEC sitting hanging over their shoulders because for a long time they had not been. There was a sea change going on that Tom Anderson, Marshall Poulton and others helped to drive. I worked with them as I thought it was good for us and good for the project and I certainly did not see the request of the Council for this information as interference, I saw it as assistance.
205. Tom Aitchison and I spoke almost every day, certainly several times a week, and also had taking-stock meetings, an example of which being an email from

him to me dated 1 May 2009 [CEC00973612]. This email is also the beginning of us raising a very sensitive issue regarding security of information, leaks and commercial sensitivity. I think the Leader of the Council at this time was Jenny Dawe, who I went to see regarding people leaking information. I told her that unless she started tightening things up, I would have to do something about it. I do not think anything ever happened, but we put a note out in the papers to the effect that "*These papers are sensitive and are highly confidential and should not be discussed*".

206. There had been a series of painful leaks that could only have come from internal sources, which prompted me to send a letter to David Anderson on 20 July 2009 [TIE00317803]. We were beginning to talk about things like Project Carlisle and Pitchfork, which is why I insisted on verbal briefings. I thought that verbal briefings did not affect the committee of CEC to have an oversight, but did affect the ability of people to leak information and actual papers. There were still leaks, but at least we stopped the floodgates and the ability of CEC to exercise oversight was not affected.
207. As is apparent from a document "*Notes on Meetings with Group Leaders 14th July 2009*" [CEC00736584], we were being proactive in briefing the various party leaders to make sure they were personally aware of the facts and not the fiction. I think they generally welcomed that and we were able to build stronger foundations.
208. In July 2010, Deloitte presented the results of an Internal Audit and review of Commercial Strategy that they had carried out. The final paragraph on page 32 of the presentation [CEC00111659] notes that the way that information as to anticipated costs was provided to CEC changed, because of the uncertainties in the position with BSC. This was the constant theme now. I was paranoid about confidentiality and it was picked up by Deloitte that we were doing more and more verbal briefings for security reasons. I thought the July 2010 internal audit was very supportive of that approach.

209. On 8 June 2010, I gave formal notice to CEC that the project could not be completed within budget in a letter to Marshall Poulton [TIE00084642]. Doing so was part of the Operating Agreements, as is detailed within a Paper to the TEL Board of 2 June 2010 [CEC00110362]. An email to me of 20 July 2009 from Gregor Roberts [CEC00795031] details some of the general strategy we adopted, however, as is apparent in all of the TPB Minutes from August 2009 on, the Board and the City were aware long before that it could not be completed within budget. Consequently, I did not consider it necessary to inform the Board, as Richard Jeffrey queried in an email of 22 March 2010, of how this would be reported within Council papers. Later in March of that year, the Scottish Ministers [TRS00010646] were also advised that the entire scope could not be delivered within the £545m envelope.
210. I am aware that later, in November 2010, documents were prepared by TIE suggesting that a line could be provided from the Airport to York Place within the budget of £545m, detailed in an attachment to an email from Stewart McGarrity to Gregor Roberts of 8 November 2010 ([CEC00112862 and CEC00112863] on page 2). I had left by this stage and, although it has been suggested to me that this seems to be an anomaly, this was a change in scope and a truncation of the contract called Project Carlisle.

Traffic Problems

211. As works started in 2008 there were a number of instances of traffic chaos in the city, as is referred to in an email for example from Neil Renilson to me and others dated 7 August 2008 [CEC01241273]. When a city like Edinburgh is dug up, where everything has to go along Princes Street, there are going to be traffic problems. This was not a TIE problem; it was a Lothian Buses problem because the modelling fell down between the buses and the City. If they had been working together, not separately, this would not have happened. In October 2008 there were delays of up to an hour and 45 minutes because Lothian Buses ignored all the advance warnings when we

closed the Mound junction. I thought Neil Renilson's reply to Dave Anderson was very good as they offered to get together to help them learn about traffic management. It was a useful offer to make, but it caused quite a rumpus because the City's reaction was that they knew about traffic management. I encouraged people to sit down together, there was willing on either side and lessons were learned, people did get together although I do not think it happened again. I also note from the document that Neil Renilson emphasised that the incident referred to had "nothing to do with Tram/MUDFA".

Risk

212. I do not think I am qualified to say what risks were identified as requiring management and how they were managed. There were several professional Risk Managers and Tram Project Directors responsible for identifying, managing and monitoring risks and those risks were routinely drawn to the attention of the Board.
213. I have not worked on a design and build contract before, however risk management has always been a priority for me throughout my management career. In any event, Corporate Governance these days dictates that all Boards have to be risk registered, normally on a traffic light basis, and therefore I am aware of risk management.
214. It is difficult to say without question that risk management was entirely effective. There is evidence that some risks were significantly under-estimated and some were over-provided. We used huge chunks of the risk allocation. But that is what it was there for in the first place. I thought the Board papers were comprehensive and did not disguise anything and I thought that the budget was set at a realistic level. I took some considerable comfort from the feedback and the comments on risk that the Board got from Deloitte and the Gateways Reviews. There are software programmes used in risk analysis

which are extremely complex and the Risk Manager would be better placed to describe them, but we had a risk register and a risk pot and nothing could be allocated without justification and the approval of the Board.

215. As is standard practice with all projects, risks would be identified, explained and justified. Consideration would be given to whether they could be offset in some way and, if not, when they were going to hit and the Board would then take the decision as to what to do. Donald McGougan, the Finance Director of CEC was very vocal about risks, he was a testy man and rightly so.
216. Drawdowns were made against the risk allowance month by month and had to be fully justified. Approval was not automatically given, there would be vigorous debate, it was not a ticking of boxes exercise. Sometimes drawdowns were deferred and in fact I clearly remember approvals not being given by the Board in some cases. The Board would want to see what the alternatives were and if it could be changed.
217. In the March Minutes TPB April 2007 [CEC00688584] cost figures on page 21 include entries for risk, opportunity, Optimism Bias (OB) and contingency. These are not alternatives to one another; they are individual factors and are largely self-explanatory. OB is something that TS insisted we put in when we were bidding. A layman's explanation of OB, although there will be a full definition somewhere, means if you say something is going to cost £300m you have to put in a degree of additional coverage for Optimism Bias.
218. The Board accepted the package contained within the Close Report [CEC01340807] and the Project Director and Risk Manager examined and reported on the actualities of the Quantitative Risk Analysis (QRA) and the Risk Allowance; as detailed on page 27, section 8.6 of the Report. I was not involved in that level of detail and I could not say whether all risks were evaluated in this way, but I believe all risks were evaluated professionally.

219. If a risk was not noted in the Risk Register and it was approved by the Board as a new risk then the QRA could be adjusted to accommodate it.
220. There was no allowance for the commercial dispute regarding the interpretation of Part 4 of the Schedule as there was no way to quantify what the value of that risk would be.
221. If we had known the seriousness of the risk associated with the issues that might arise with Part 4 of the Schedule before, the contract would never have been signed. There was no way; however, those risks could have been anticipated standing the legal advice we had on the contract.
222. I was not directly involved in the use of the Active Risk Management (ARM) software referred to on, for example, page 30 of the papers for the TPB Meeting of 20 March 2007 [TRS00004079] and I do not know whether it worked well or not. It is specialised software used by the Risk Managers, including Mark Hamill who was the last one.
223. Extracts from Risk Registers were often produced at TPB meetings, for example in the April TPB Minutes within the May papers [CEC01015822] it is noted at item 5.18 on page 7 that the risk register was taken as read. There was always a full discussion about risk, everyone would have a look at the Risk Register and that month, although there were perhaps no further additions, the Register was noted as a matter of record. Consideration of whether assessments were accurate would be carried out by the Board and the Risk Manager and the Financial Directors of TIE and CEC would be heavily involved.
224. Risk Treatments mentioned in the Risk Register were evaluated by the Risk Manager and the Project Director to assess whether it was likely that they would be able to mitigate risk or whether they were in fact doing so. Although I was never happy with the overall value of risk, I was content that the Board were receiving full information.

225. As I have mentioned, during the project there were significant disputes in relation to changes in drawings, sometimes referred to as the BDDI – IFC issue, and BSC's refusal to start work. The financial risk of these was always assessed by specialists and their analysis was broken down reasonably simply, evidenced and explained to the Board. If a risk was realised it was offset by taking funds from the risks pot. Princes Street was not like that; it was the subject of a Supplementary Agreement and was not a risk that anyone anticipated. It was reported in the most finite detail because it was one of the major events in the Project's timeline.
226. The Reports in the TPB papers routinely note that risks have been reviewed, which was both to identify new mitigation measures and to quantify the risks and make adjustments to the project cost.
227. It was not possible to quantify the BDDI – IFC issue, there were too many plans. The early plans produced by SDS were pretty poor quality and the City's lack of involvement added to that problem.
228. On page 7 of the papers for the August 2007 TPB [CEC01018359], the Minutes for July note that following the election the risk register needed to reflect the additional funding risk to CEC. The SNP were against the Tram and it was a live issue that we were patently aware of and that appeared in the top five risks within the Risk Register.
229. The risks retained by the public sector are listed in Papers for the TPB of 9 April 2008 at page 71 [CEC00114831], which refers to "*Stakeholder instructed design changes*". This belies the suggestion that anyone ever thought this was a fixed price contract. There was a huge importance expressed about stakeholder instructed design changes and the impact they would have on the timetable and indeed costs. CEC and Transport Scotland were continually put on notice of the financial risks if they failed to ensure an adequate approvals process or made changes.

230. I believe the risks facing the project at that time were adequately identified in the Risk Registers, including on page 11 and following of the TPB Papers for August 2006 [CEC01688881]. Despite there being no particular reference to the risk of poor governance of the complexity of the structures and the danger that they gave rise to a situation in which it was not clear which party or parties had responsibility for particular issues, they were certainly known. This problem was addressed way before setting up the TPB.
231. In hindsight it was not reasonable that the risk of late provision of design was coded green on page 16. I do not know the justification for that, especially given the comments at the start of these papers regarding SDS performance.
232. On page 3 of the TPB Papers for January 2007 [CEC01360998], there is mention of a review of the risk register. Each one of the risks was examined and commented on as appropriate, all the more so given that risk 282, regarding the procurement strategy having a high level of risk transfer to contractors, was reinstated having been previously removed.
233. Risk 870, within the March Minutes on page 25 of the TPB Papers for April 2007 [CEC00688584], relates to SDS Designs being late and not providing the detail Infracore requires. The Treatment Strategy refers to a review of the "AIPs for structural information", however I do not know what this is an abbreviation for and I cannot give any further detail. The Risk Managers would be able to explain, however the problem with utilities had already surfaced. I was very concerned about the delay in design and it was certainly discussed at the Board.
234. Similarly, I cannot explain Risks 139, 164 and 280 and their treatment, referred to on page 26, nor can I say how likely it was that these risks would materialise.

235. Item 4.3 of the April Minutes on page 6 of the TPB Papers for May 2007 [CEC01015822] notes that the trial MUDFA dig had found a number of unexpected utilities, which meant that the risk 164 had materialised. There was a full MUDFA presentation and report to the Board of everything that was going on, as detailed on pages 33 to 51, and there was a lot of discussion of what could be done and what the consequences might be. We started considering getting rid of Carillion, or splitting up the work and having more than one contractor so that we were not dependent on them operating west/south, north/east. We were looking at alternatives because of the anticipated possible effect on the time it would take to carry out the MUDFA works and the knock on consequences.
236. On page 25 of the TPB Papers for July 2007 [CEC01565576] is a note "*OB included in risk (QRA at P90 confidence level) as agreed with TS*", which refers to Optimism Bias, as I have already stated, however I am not able to explain what this comment means. That level of detail was for the specialists, not for me as part of the Board.
237. I do not know specifically, but I suspect that because risk was becoming more of a factor, the Board agreed that the Legal Affairs Committee (LAC) should be the forum to review risk allocation, as referred to at item 3.2.7 on page 6 of the TPB Papers for late September 2007 [USB00000006]. I was not in the LAC, which was chaired by one of the Non-Executive Directors, Kenneth Hogg I think, with input from DLA and was addressing something which was certainly required.
238. Slide 51 of a TPB PowerPoint Presentation of October 2007 to the TIE Board by the Project Manager, the Project Director and the Risk Manager [CEC01358513], notes that there was 15% allowed for "*risk and contingency*". I think this presentation was intended to bring the Board up to speed and I was satisfied that we were being briefed fully and professionally. The risk and contingency allowance of 15% must have been approved by the Board and I believe at that stage that these numbers were realistic. The figures given on

Slide 52 are qualified by various caveats: that there be no major delays or cost overruns and that the programme and scope were adhered to by the Council and TIE. The headroom on Slide 53 had nothing to do with the risk; it was something that was built into the figures.

239. I have read the Minutes for December included within the Papers for the TPB of 9 January 2008 [CEC01363703]; however I cannot comment on the point that was made at Item 4.4 "*SMcG (Stewart McGarrity) confirmed that the risk profile had been adjusted to take account for changes in the pre-Financial Close risks*".
240. In the Minutes for 9 January within the Papers for the Joint Board Meeting on 23 January 2008 [CEC01015023], item 1.5 notes that the discussion on risk transfer was "*continuing with BBS*". This had been my understanding in December and goes back to where the responsibility for risk lay with SDS novation, which was continuing as we had not achieved a proper solution.
241. On page 9, the Project Director's (PD) Report notes that the agreement with BSC means that there was an effective transfer of design development risk excluding scope changes. The content of these papers is comprehensive and my understanding of what this meant is as is explained within them.
242. There is reference in the Report with the June 2009 papers to the purpose being to ensure that the QRA output was as accurate as reasonably possible [CEC01021587] on page 17. None of us expected documents that were not as accurate as was reasonably possible and this sounds like a reinvestigation by the Risk Manager, Mark Hamill, to satisfy the Board that every question had been answered that could be answered.
243. The PD report for September 2009 [CEC00848256] notes at page 19 that "*TIE will continue to report on the risk allocation at Financial Close until a new budget (with an updated QRA) is approved*". I think this is self-explanatory and

I believed the risk allocation was within the range set by Transport Scotland and CEC.

244. On page 78 of the papers for the late July 2009 TPB [CEC00843272] is a graph showing the “*Sensitivity Analysis of ETN Risk QRA*”; however I cannot offer any explanation as to its content.
245. It was obviously a source for concern that by the time of the November 2009 report to TS [CEC00681328], nearly all the risk provision was exhausted and the Infracore works were only 10% done (pages 18, 40 and 61). However 98% of MUDFA was completed, 85% of Princes Street was completed and on page 21 there is further mention of novation. It is made perfectly clear on page 15 that it is unlikely the project can be completed within £545m, which was not the first time this had been said, it had been said for several months by this point.
246. BDDI - IFC may have been responsible for chunks of the risk allowance being used, but it was not possible to identify the values in advance.

Reporting Cost

247. Transport Scotland required that an Anticipated Final Cost be noted in the PD Reports to the TPB and the Report to TS. This was only one element of measuring progress and was used by the Board, TS and CEC as a “*ready reckoner*”, in layman’s language.

248. Paragraph 2.5 on page 57 of the TPB papers for July 2007 [CEC01565576] reads "*From the analysis of the Infracore bidder initial proposals in early January 07 it was identified that VE savings and negotiated reductions will be required in order to deliver Phase 1a within the affordability target of £500m*". The TPB's view was that the project remained affordable both by VE and by negotiation. Willie Gallagher had brought in a talented VE specialist, Jim McEwan, and the TIE Board were encouraged by what he was suggesting, he was a "tough cookie". The focus was on reducing the cost by realistic VE and any other means we could. That did not mean, however, that there was an attempt to do whatever was required to get the figures below a "*magic number*", without really considering whether it could be achieved.
249. Slide 50 of a TPB PowerPoint Presentation for October 2007 [CEC01358513] refers to "*firm prices and rates*" and my understanding is that there were caveats to that. The bids were not settled by that stage and there were many factors to get to the figure of £498m, as is shown on the slide.
250. I am certain I was provided with the detail of the estimate of the cost provided by Stewart McGarrity, as referred to in the Minutes for December 2007 within the TPB Papers for 9 January 2008 [CEC01363703]. I think there were perhaps two interpretations of the Wiesbaden Agreement. BSC did not assume design risk, although they may have said they were. I believe there is mention elsewhere of them entering a "*gentleman's agreement*", however I cannot think that a hard hitting contractor that behaved in the way Bilfinger Berger did, would ever have gone into a gentleman's agreement. Nobody on our side had any such authority to enter any such agreement that I know of.
251. At Item 3.4 of the Minutes of the October 2008 meeting within the November papers [CEC01053731], there is mention of discussion on the timing of announcing any increase to the £512m budget. Item 3.7 states it was agreed that Stewart McGarrity would provide a full budget review and report to the January 2009 TPB.

252. The issue referred to in an email from Alan Coyle to Donna Rodger of 19 January 2009 [CEC01182601] is in relation to the increase in costs. It would appear from the email that I attended a meeting with TS, but I do not have a specific recollection of it, I attended so many meetings. It certainly was not the first disclosure to Transport Scotland that there were issues on cost and they were very unhappy about it, they were seeking all the monthly reports and they had verbal contact.
253. I am not sure what precipitated this exchange and whether we were dealing with a governance issue that formally had to be tackled, because there were no surprises for TS. I really do not know what had to be said to Transport Scotland that they did not already know they were in communication all the time.
254. On 6 March 2009, Stewart McGarrity copied me into an email [CEC01009883] and attachment [CEC01009884], which includes reference to the additional costs being sought by Infracore. I think I must have thought that the "gentleman's agreement" referred to in the email and the Wiesbaden Agreement were the same thing, but whether I am right or not, I do not know. A paper had been produced that gave details of the Wiesbaden Agreement, the terms of which are referred to in the email, and the books balanced.
255. I think it is very important to read the whole of those documents and not just quote from parts of it. The information is comprehensive and was a better understanding of what was going on at that time. The contractor was asking us for somewhere between £50m - £80m extra that they were not prepared to justify and they would not get on with the job until we agreed it. I was commenting publicly, and deliberately, in the press at this stage "*How could you possibly do business with people who say that*".
256. There is further reference to claims about a "Gentleman's Agreement" in an email from Mike Connolly to me dated 13 March 2009 [TIE00445185]. Mike was the Communications Manager and was quite close to one or two MSPs

and Councillors. They were at the presentation from Richard Walker where he was saying that the gentleman's agreement was with Willie Gallagher.

257. Page 14 of the PD Report with the May 2009 Papers [CEC00633071] refers to an unapproved increase in the Approved Final Cost (AFC) to £527.1m to reflect risk, while the approved cost estimate remained at £512m. There were a range of figures given to Transport Scotland, from £522m to £540m, as detailed at 4.1 of the Minutes. The Board would have to understand why there was a change before approving any increase. We would then have to take that increase to Transport Scotland and the City to fund it. We would be told it was unacceptable and asked what we were going to do about it and that is when we started looking at truncation or getting rid of Bilfinger.
258. Also on page 14, within the PD report and in the TS report on page 46, there is reference to a £15.1m increase in the risk allowance, which was for costs that may have been incurred that had not been approved. In my view this reconciles with the table at 3.3 on page 46, which the note below confirms along with the Report on Change Control Update on page 22. The table on page 46 relates to a single financial year, 2009-10, not to the overall figure and I do not think it is a comparison of like for like.
259. On 3 July 2009 Stewart McGarrity emailed me and others with a paper containing cost estimates ([CEC00766443] and [CEC00766444]). The top end estimates exceeded the available funds by a large margin and it was a brutal picture. This was the worst that could happen and we considered whether we could truncate, get rid of anything, whatever we could do. The top end figure was also given to the Council and they were constantly on notice of the consequences of making amendments and changes which were all contributing. To be fair, their amendments and changes were significant but not as significant as what was happening from Bilfinger Berger. In general terms, there was an acceptance that there was a liability for the changes, however there were a host of reasons for the figures and although the BDDI - IFC dispute was a major reason, it was not the only one.

260. I do not accept that the statement within the PD report for the August 2009 TPB meeting [CEC00739552] is the first reference to it being unlikely that the project could be completed for £545m and that it was not possible to predict accurately a revised budget outturn. I think the statement was made at this time to highlight the need to change direction and find alternatives and to spur people into action. We looked at all the realistic alternatives from truncation to cessation. The TPB were given the full details, written and verbal, each month and they were debated. There were also audit committees, Deloitte papers and Board discussions so there was full transparency and nothing was disguised. The only thing that was withheld was commercially sensitive information which might go into the public eye.
261. After a review carried out in 2009, Deloitte reported in September that the AFC could not be considered robust as a result of the ongoing commercial disagreements ([CEC00111623], page 4). This was reflected in what the TPB had been reporting for months to the Board, to CEC and to Transport Scotland. The audit goes on to say, on page 6, that the information is distilled into a clear and consistent position and when challenged individuals can provide information readily. That would never have been said if the auditor had considered it was not the case.
262. Richard Jeffrey copied me in on an email he sent to Bill Reeve on 2 October 2009 [TRS00017211] in which he discussed project costs. This was discussed with me before it was sent and I certainly did agree with the content. The figures within the email were our best estimate at the time. We had some hope that, after weeks of mediation, we might be getting somewhere with Infracore and we had won some significant reductions in their claims, many millions of pounds in actual fact.
263. The purpose of saying that it could be completed for £524.5m "*plus an allowance for settlement of the claims from the consortium*", was that I knew there was going to be an awful lot of discussion about settling any claims with

the consortium. BB were still, as far as we were concerned, restricting the contract and so there was a lot to do to finalise that. I cannot say what the extra sum required would have been.

264. Page 9 of the April 2010 Minutes of the TPB within the May Papers [CEC00245907] note that the budget has increased to £530m. The Board determined the increase was required both to accommodate the increasing risk elements and the additional costs. I do not know what the alternative to managing those would be, they cannot be ignored and so the figures have to reflect that.

MUDFA

265. I was not involved in the appointment of the MUDFA contractor; it was very much a TIE role. As a formality, to make sure the two Chairmen knew, Andie Harper, then the Tram Project Director, sent Willie Gallagher and I a letter dated 12 September 2006 with the recommendation for the appointment of the contractor [CEC01645609]. McAlpines (later Carillion), Clancy Docwra and Farrans all did on-street work and were all MUDFA contractors.
266. By April 2008 it was clear that the MUDFA contract was slipping, as referred to in the papers for TPB of April 2008 [CEC00114831]. In the papers for the May meeting [CEC00079902], it is noted that MUDFA was 30% complete. About this time, work was ongoing to get the Infraco contract finalised and awarded and consideration was of course given to the effect of the MUDFA slippage and what might happen. As I understand it, the recovery was based on expert opinion saying "*It was recoverable provided that people worked normally*" and I also think the Project Director was confident it could be recovered. I was not an expert and I was not directly involved, although I was listening to that.
267. I am aware that at Item 4.3 in the April minutes, within the May papers [CEC00079902], it appears that the programme dates are based on the

assumption that there would be recovery in the MUDFA programme. I have talked before about poor underground geography both with utilities and other obstacles and that was the key reason given for delayed design and delayed progress. The Board were encouraged by positive statements from the Project Director, who I rated very highly, and his team. Recovery was expected to occur and later action included getting rid of McAlpines, and even later, Carillion. There was a massive spotlight on MUDFA because there were holes all over Edinburgh and quite often no sign of any activity. The concentration on MUDFA was enormous by City officials, by the press, by us and it was causing great annoyance to businesses, retailers and the public. I said before that that is replicated in every tram operation I have ever seen, except ours took far too long. There was great emphasis on it and it was accepted that it could be recovered.

268. The longer the TIE specialists got into this the weaker they found McAlpine's performance to be. In the period from September 2007 to June 2008 there were no records of any of the MUDFA work carried out by Carillion. TIE repeatedly requested this information and were informed each time that there was none available. TIE then conducted a formal audit on Carillion and their momentum was pretty obvious, they were treading water.
269. We had everything on record and warning notices had been issued and it became clear that Carillion wanted out, but with a cost to us, not to them. I do not think the contractor knew what the position would be if the recovery did not materialise.
270. There was huge concern at the TPB about the slippage in design and MUDFA and the effect it might have on Infraco. This was reflected in detail at items 1.4. 2.1, 2.4 and 2.5 of the Minutes for the July meeting within the papers for August 2008 [CEC01053601] and I am certain it was covered in the Risk Register too. Although I was not directly involved, the Board were aware of the issues and were discussing them. The issues are also mentioned on pages 9 and 10 of the PD's report.

271. It is also recorded in the Minutes for this meeting that Willie Gallagher noted that the MUDFA delays were not design driven but were driven by poor logistics and management. I was content to accept this as he, as the Chairman of TIE, was closer to all the action than me and we had received reports of bad record keeping. There was a strategy to remove Carillion and employ others and I was satisfied with that and his statement at item 2.5 that the Board should not be unduly worried about progress.
272. I think the extent to which the TPB monitored works by Carillion and the Board's view of the performance of the MUDFA contract is self-evident. Carillion were being heavily monitored by the Project Team, we were all concerned about their performance. There was unanimous support that the way to tackle the problem was to remove Carillion, as referred to on pages 12 and 26 of the TPB papers for May 2009 [CEC00633071]. This was greatly helped by the fact that there was strong feedback that Carillion wanted out anyway.
273. It was much simpler to remove a MUDFA contractor and that is why this was more drastic and firm action than was taken in relation to the SDS contract and the Infracore contract. A MUDFA contractor can be readily replaced, but getting another designer in would have been a very long and difficult task and the project would have died. Although I was not involved at all, there was some very tough negotiation regarding the closure of the original MUDFA contract and affecting the transfer. I cannot remember the conclusion, but there was an exchange of money.
274. I think it was initially the intention that just the works at the two ends of the line would be handed on, as referred to on page 29. The idea of having more MUDFA contractors was to get activity all over Edinburgh and not in isolation and subsequently works in the city centre were also handed on.

275. On page 13 it is noted that it had been necessary to defer Infraco works on Leith Walk because the MUDFA works were not finished. MUDFA was obviously going to have a serious effect on the programme but there was still some confidence that a good recovery had been made. There were, however, many unforeseen circumstances in Leith Walk and it was one of the biggest negative publicity areas for the project; the traders in Leith Walk went through agony and I felt a great deal of sympathy for them. A lot of the businesses really suffered for no benefit, at the end of the day, because there are no trams going down Leith Walk.
276. I cannot comment on the suggestion that the figure for MUDFA works completed, on page 14 of the papers for the August 2009 TPB [CEC00739552], shows a big jump from the figure given to TS in the previous month, but I suspect that would not be a comparison of like for like.
277. Page 7 of the Minutes for October 2009, within the papers for November 2009 [CEC00681328], note a discussion with Carillion regarding their exit from the contract. These papers also note that Steven Bell reported that MUDFA works were 98% finished, however I cannot comment on that figure.
278. I am aware that the Minutes for January in the papers for the February 2008 TPB [CEC01246826] report that the MUDFA works were on programme and on budget. I recognise that the PD Report in the same papers notes the degree of slippage, however Steven Bell, the Project Director, would be best able to state what the position was in detail.

Infraco

General

279. The Mar Hall Agreement happened after I left and Sue Bruce was not Leader of the Council during my time. I am on record, however, drawing the consortium's attention to the fact that, despite all the design delays and MUDFA problems, there was only one kilometre of the tram line that could not be worked on. I guess the consortium were once again using tactics to try to bring us to our knees by not undertaking any on-street works under the contract and waiting until after Mar Hall. They should not have been able to behave in this way and after I left, I think someone must have paid them a lot of money to get them to behave better. I have got no doubt that we could have bought ourselves out of most of the problems on this contract, had we chosen to and had we been authorised to do so by the City. In reality however I was challenged by getting value for money and looking after the public purse. It was against my whole logic, my values and my standards, to give money away and so paying twice or thrice was never in my strategy. Anyone can compromise, but that is not what I would call compromise.

Advance works

280. I do not agree with the proposition that if one bidder was asked to undertake advance works, they would be put in a position where they would know it was virtually inevitable they would be awarded the main contract. It would have no effect on the ability to continue negotiations with them and, to my recollection, this was not a matter that was discussed at the TPB.

Initial implementation of Infraco

281. Implementation of the Infraco works was very poor. The problems included the decoupling of the design, the incompleteness of the design, the lack of an assured design, sub-contractors of Bilfinger not being signed up properly and constant delays. The rhetoric from the contractor seldom or never matched our expectancy or vice versa. They were belligerent, they were delinquent.

The first demand for additional monies coming before a single sign of action on the streets of Edinburgh was a warning light to us all and that was the pattern going forward. The contract demanded that sub-contractors had to be signed up properly, with proper authorisation and they constantly said they were still signing them up. This was something that was monitored by TIE and they repeatedly gave out written warnings. Mobilisation did not proceed and we were all of course alarmed, although Willie Gallagher would be better able to say what triggered it.

282. As the contract got under way there were still ongoing delays in designs, consents and MUDFA. The TPB thought that strong action should be taken with the MUDFA contractors. Willie Gallagher and Steven Bell would be better informed on what that action was, however ultimately contractors were removed from the job. The Board and the stakeholders, Transport Scotland and the City, were patently aware of the problems.
283. There is reference within many of the PD Reports and TS Reports to slow mobilisation on the part of Infraco and the fact that they had not entered into contracts with sub-contractors. As I mentioned, it was a condition of the contract that we had proper, formal arrangements with the contractors and sub-contractors. I think TIE suspected this was a delaying game which would eventually lead to an extension of timeframes and that certainly happened. Willie and the Board did not just sit and watch it; there were very strong letters sent demanding contractors were signed up. There will be a trail all the way through the Board papers to show that they were not complying despite giving assurances that they would.
284. The first report of Infraco progress after the contract had been signed was that it was disappointing (Papers for July TPB [USB00000005], page 12). My reaction and the Boards were the same: there was a very strong exchange at the Board meeting about what would require to be done. It was not TIE's specific job to manage the contractors, it was Infraco's, and it was part of their

contract. Item 6.2 and 6.3 on page 6 covers that as does the last paragraph on page 12. The Board were hugely disappointed and were promised action.

285. SDS design remained incomplete after Infraco had been awarded and there was still work being carried out to align Infraco proposals with design. This is detailed at Item 1.5 of the August TPB Minutes in the papers for the September 2008 Meeting, [CEC01053637]. It is not unusual to have a “close out” plan as it was being finalised. Item 2.15 of the Minutes on page 7 shows how the concerns were raised.

Princes Street

286. There is reference in documents throughout that there had been discussions in November and December 2008 about problems getting Infraco to carry out the works in Princes Street. I think the PD Report with the March 2009 papers [CEC00573427] does not detail the emergence of the dispute because by that time it was a three month old issue. There was no disguising the fact that this was the most important street in the whole of the project and we were being, in my words, “held to ransom”. At every Board Meeting, and also in between those meetings, members knew step-by-step what we were doing and what we were recommending.
287. I am aware of the Position Papers dated 2 March 2009 in relation to the referral of the dispute to the Dispute Resolution Process (DRP) in so far as it addressed the refusal to commence works on Princes Street ([CEC01032608] and [CEC01032611]). I think Princes Street was used as the excuse, or an attempt to negotiate a very different deal for the whole Infraco works going forward. The TIE Position Papers are very straightforward with regard to their ability to work versus their decision not to work. If traffic is stopped on Princes Street, the whole of Edinburgh stops and it has a knock-on effect on everything. It was the biggest possible pressure point anyone could apply and did.

288. The bus lane factor, as referred to at item 5.2 of the October Minutes in the papers for the November TPB [CEC01053731], was just another excuse. Bilfinger refused to work because they wanted unrestricted access, while we queried why they could not work on the other side. It was nonsense and still makes me angry today. The implementation of a bus lane was not related in any way to the traffic chaos that had resulted when Traffic Management arrangements were introduced and then abandoned in 2008.
289. Once the Consortium had indicated that they would not commence work, in a letter of 19 February [CEC00417040], I wrote to the Chairman of Siemens setting out TIE's response. I was writing as I did not think it would have been appropriate for the Project Director to do so and there was no Chief Executive at that time. I was trying to divide and rule by splitting Bilfinger and Siemens, a pretty obvious strategy, because our intelligence suggested that Siemens were getting fed up and may well have supported the removal of Bilfinger.
290. Dr Keysberg of Bilfinger Berger wrote to me on 23 February, 2009 [CEC01009884], making reference to this letter and other correspondence and concerning the request for additional monies and the impasse on Princes Street. In this he points out that the contract is not fixed price and that Part 4 of the Schedule placed some liabilities on TIE. I remember the letter very clearly. As I have said many times, we never had any doubts that the contract was not fixed price but we had a strong view that there was much about Princes Street work that was included in their preliminaries. We did not want to be paying two or three times for work which we had already paid for. When the contract first went out to tender, they looked at the whole route, including Princes Street. They did test drills and they built in a provisional price for what that work would cost. We knew that there would be further costs but they were ignoring the preliminary factor altogether. They were looking for a 65% premium on top of the preliminaries and we settled at 17½%.

291. I was directly involved in the discussions with BB that led to the resolution of this dispute, as referred to in an email from Stewart McGarrity to John Ramsay and others dated 20 March 2009 [CEC01009977]. I had been sent for by the Deputy First Minister, John Swinney, and in very clear language I was told to get it sorted out. I spoke to him about our values and standards and my values and standards and the fact that we were charged with looking after the public purse. I told him that the only way to break this impasse was to pay more and that we had already paid for Princes Street in the agreements. I was told to get it sorted out and to break the impasse. As I have already said, it is a fact of life that you can often pay yourself out of trouble. Personally I could not see any justification for paying. I immediately advised Tom Aitchison of the discussion, as he would be the person ultimately to authorise any deal. I then went back to see my team and we pored over all the appropriate sections of the contract to see if there was an exit to deal with it. In fact it was Alistair Richards who raised the question of paying on the demonstrable cost basis, supported by timesheets and material sheets. I have to say, I personally struggled with that, but I was under instruction so I contacted Dr Keysberg by telephone and verbally gave him the shape of the agreement on a demonstrable cost basis. We agreed to put our senior teams and our lawyers into a locked room until they came up with a solution which we would either approve or reject in due course. They did and having agreed a supplementary agreement, which we both signed, the Princes Street problem was over and they started to work. It was a short-term victory, there is no question of that, because we had just opened the floodgates for these sorts of demands in places like Burnside Road and that is what they had been looking for. In an email to me dated 3 March 2009 [CEC01033040] Andrew Fitchie referred to a Princes Street "*protocol*", however a protocol suggests to me that we were accepting that was going to be the rule of the game going forward and we were not.

292. I am aware of an email from John Ramsay to Bill Reeve and others dated 23 March 2009 referring to my meeting with John Swinney [TRS00016963] . I think the email correctly says that the Princes Street Supplementary

Agreement gave a formula, or a payment mechanism, for additional costs in the event of unforeseen ground conditions; it does not say it would result in Bilfinger not being paid any more money. I was charged with solving the problem of Princes Street and I did so to the best of my ability, however I was concerned that no one anticipated that the unforeseen ground conditions would lead to greater costs. I would argue that an efficient and well qualified contractor would look at the Princes Street test drillings and the utilities maps that were available, realise it was going to be complex and build those factors into their price. BB did not.

293. Steven Bell records in an email of May 2011 [TIE00690752] that the Princes Street Supplemental Agreement (PSSA) was agreed by me with express authorisation from Tom Aitchison of CEC. We had been working all night for two or three nights, speaking with lawyers and it was a very difficult negotiation. I had been keeping Tom Aitchison briefed regularly by telephone and similarly all the Boards were fully aware what was happening, briefed by me personally, including whether to offer a supplementary agreement. When we eventually got to the stage where I thought we could finalise an agreement which made some sense and the lawyers were satisfied, I phoned Tom Aitchison and told him it was outwith my authority level to approve it. I advised him that the Board were supportive, but as CEC were the owner I wanted his authorisation, which he gave verbally at the time and which he followed up with a letter. There was no need for me to do the same with Mr Swinney because I had been told by him to sort it out. I later presented to an Emergency Board meeting that Transport Scotland were kept posted. The advantages of the supplementary agreement was that they were back at work, the city was beginning to return to normal and there was a great lift in the anti-tram lobby, which also helped some of the officials. The disadvantages were that I always knew it was temporary, though it had to be done, and we had set a hare running.
294. Tom Aitchison sent me a nice letter dated 24 March 2009 [CEC00990488], that CEC were very happy with the resolution of the Princes Street dispute. I

had been working extremely long hours and I was happy to get some support. Willie Gallagher had gone by then and so I welcomed the support and assistance. I also knew that there was a message in the paper, possibly from comments made by Tom's senior people, to the effect that the City wanted to get closer to the action and I understood why.

295. At item 10.3 in the 11 March 2009 Minutes, within the April 2009 Papers [CEC00888781], it is noted that lessons had been learned through the Princes Street process. As I have said, you can solve most problems by spending money with, or without, proper justification. I could have solved many more problems by paying up, but I did not think that was what I had been engaged for and normally the Board were looking after the costs.
296. There is a note on page 8 of the September Minutes, within the papers for October 2009 [CEC00842029], that Steven Bell was to prepare a summary report to the next TPB outlining areas of dispute within the current supplementary agreement arrangements. The summary report was in the form of an oral briefing and I think it was actually about the On Street Supplemental Agreements (OSSA), rather than the PSSA. There were no areas in dispute at that stage in relation to the PSSA. I do not recall anyone requesting they be provided with a written copy of the report and the OSSA never happened in any case.
297. I think the records show that the DRP process in relation to the Princes Street dispute was withdrawn because of the successful mediation and the PSSA.

OSSA

298. I do not think there was ever an OSSA after the PSSA, although Bilfinger Berger were demanding various ones. I think the majority of the Board's view, and indeed my view, was to use caution. Having done the PSSA we had to evaluate very carefully whether they would choose another area, or before we

knew it everything they touched would be on a supplementary agreement basis.

299. In the TS report with the May 2009 TPB papers [CEC00633071], on page 36, it is noted that work was continuing on Princes Street, Edinburgh Park Bridge, Gogarburn Bridge and the new access road at Verity House. The first of these were under the PSSA and the others are off street structures. Against the background of the problems on Princes Street, there was of course concern that BSC were not undertaking any on-streets works and that they were far behind in achieving milestones, as per the table on page 37. I think it was a combination of the fact that MUDFA works were not finished and, to a greater extent, their attitude and their disinclination to do on-street works, that was the real problem. The first paragraph of the TS Report gives a complete reference to the redesign of temporary works causing delays to the west of the city centre.
300. I cannot honestly say that it was a surprise to me that BSC were refusing to carry out on–street works without a supplementary agreement entitling them to payment on a cost plus basis. This is set out bluntly on page 9 of the Minutes for October, within the November 2009 papers [CEC00681328]. Their behaviour had pre-warned me, but I did not have any formal notice. I was told that there had been no on street works due to a lack of agreement on programme, suitable sub-contractor arrangements and completion of final design assurance checks. They were all ongoing factors, along with many others and were not one-offs. Together with an unwilling contractor and a capricious contract, that meant work did not proceed.
301. I thought Richard Jeffrey's email of 3 December 2009 [CEC00585352] regarding the Consortium's refusal to start work without a supplementary agreement was very sensible and I welcomed it, although we had discussed it in advance anyway. He raised the need to stop and consider the options and suggests a negotiated exit. I was a Non-Executive Chairman but I was in the office almost every single day and we discussed things openly. I think it was a

good paper and a good challenge. The only bit that I do not agree with in the paper is his comment that Princes Street was completed at a vast expense and way over budget. As I have said, they were looking for a premium of 65% and we settled at 17½%. Quite frankly, I think the budget was immaterial anyway in light of events, because the groundworks and the supplementary agreement meant that we were going to pay more.

302. Pages 18 and 19 of the May 2010 PD Report state that works cannot be started on street where sites were available as BSC had failed to satisfy their contractual obligations [CEC00245907]. They had constantly failed to fulfil obligations in relation to sub-contractors agreements. They had also failed to submit preparatory paperwork. This was not at odds with statements elsewhere that the problem was that BSC refused to work on street without a new agreement at all, it was both. They had not done the works required to enable approvals to be issued. The Board agreed we were aggressive in managing the contract and we were absolutely in control at every possible opportunity. It was a strategy, we were issuing remedial termination notices, we were issuing underperformance warning notices, we were pressuring them for a purpose.
303. Page 26 of the papers for late June 2010 [CEC00223543] sets out what the causes were of problems in the Infraco works. I thought the causes put forward were complementary, which we the Board received as verbal briefings in addition to what was stated in these reports. Page 27 of the report talks about the consortium claims being inaccurate and about the successes of DRP.

Programme

304. By May 2009 it was clear that the programme had slipped to a material extent. At the May 2009 TPB, within the papers for May 2009 [CEC00633071], page 11, it was considered that the slippage could be made up with improved

productivity rates. Slippages were measured on a month by month basis, we were always voicing our concerns. The suggestion that it could be made up with improved productivity rates came from two independent specialists and the paper spells that out. In addition, at that stage they were working well on Princes Street and, although the quality of the work was very poor, there was a reasonable ground for optimism that when they were working they could continue to work.

305. In the Minutes of the May TPB, within the papers for June TPB [CEC01021587] at 3.8, it is recorded that there is a lack of an agreed programme. I have stated many times that there was a lack of an agreed programme because of SDS failure, BSC failure, MUDFA delays across the board, BSC's failure to sign up contractors and their refusing to work. This was not new, it had been going on for many months and the TPB knew exactly what was going on. The effect on the project of this extension of time was further costs and chaos.
306. In the reports to TS in early July, with the TPB Papers [CEC00983221], the Time Schedule Report on page 41 indicates that many matters have slipped but that recovery can be achieved. We accepted the statement by the Project Director that recovery could be made, he was the specialist. The Board just did not accept everything as a given, there were robust challenges, however I do not know how far the Board delved into that table. I considered that there could be recovery on the basis of honest assurances from the Tram Project Director and others. Steven Bell was a tremendous Project Director, he was a workaholic and I cannot remember ever finding out that he said something to me that was not accurate and I tested it often.
307. Month by month, the slippage on the Infracore works increased. For example in May, the works were 42.4% behind [CEC00633071], at the start of July they were 47.1% behind [CEC00983221], page 30, and by late July, they were 49.3% behind [CEC00843272]. The Project Director's reports list a number of complementary reasons and factors. It was the combination of factors that

were reported repeatedly and, as is stated on pages 35, 36 and 37 of the July report, we were increasingly using DRPs and strong management strategically.

308. The August Minutes within the papers for September 2009 [CEC00848256] record that works on Shandwick Place tram stop had not started due to ongoing discussions with BSC regarding treatment of on-street sections (page 6). I do not specifically recall the Shandwick Place issue in any detail, there were so many issues like that, although that does not mean to say it was not brought to my attention. The minutes also state that BSC were resisting further supplementary agreements pending resolution of the wider contractual matters and that seemed very strange indeed. I do not think my understanding of the position taken by the contractors changed at all. The causes of the delay remained the same; it was more money or else, along with the eight complementary issues listed on page 32 of the report.
309. In the same papers the Report to TS continues to note that it was expected that programme recovery could be achieved in respect of the majority of items (page 57). That statement would have been supported by evidence or information, otherwise it would have highlighted it was not possible. That is not to say we did not challenge these statements, however I remained confident that the causes of the delay in the Infraco contract remained the same, but that there could be a recovery for the same reasons I have already identified.
310. In the September 2009 Report to TS, within that same document [CEC00848256], is a statement in relation to design that "*This slippage has been addressed as part of the recalibration of the programme. TIE is identifying and implementing opportunities to mitigate the impacts of this slippage*". I think by recalibration Steven Bell here simply means that you adjust the programme to take account of the fact that it is running late and therefore you push it backwards. Opportunities were identified to mitigate the

effect of the slippage, however I cannot be specific as to what they were, the Project Director would need to say.

311. It has been pointed out to me that in the table on page 40 of the November 2009 report [CEC00681328] all the figures showing the cumulative fall behind schedule (the right hand column) are inaccurate. The same is true of the table in the December Report ([CEC00416111], page 52), the January report ([CEC00473005], page 53), the February Report ([CEC00474418], page 33) and the March report ([TIE00894384], page 34). I am not familiar with these tables but I have to say, as a general comment, I was not interested in the "Delta" column or other factors, I was interested in facts and information and this seems, to me, to be selective extraction of information which, quite frankly, was not material to me at the time. If the tables were repetitive it was because they had to be repetitive. I think to expect me to have noticed this error is unrealistic. I would always do my prep by reading the papers thoroughly in advance, prepare my questions and get answers before the Board Meeting and then ask questions again. However, I would not pore into the Delta column in these tables.
312. In the report to TS with the papers from February 2010 [CEC00474418] there is a statement on page 27 that there were no on-street Infraco works "*due to a lack of agreement on programme going forward.*" We had been reporting this for many months and there is no question that Transport Scotland knew exactly what was going on; there would be no purpose in misleading TS.
313. I am aware that the May 2010 report to TS [CEC00245907] notes that although 82.6% of Infraco works should have been done, only 16.1% had been completed (page 35). The report against milestones indicates that not all of the milestones can be recovered and the colour coding shows the range. There was discussion and considerable concern about this. We, as a Board, and the Executive, were fast reaching the conclusion that we would have to truncate the tram line or replace BSC and examine other options like encouraging Siemens to become the key.

314. The Minutes of the meeting in early June ([CEC00223543], page 7) note that there had been an independent expert review of the programme conducted and it had concluded that delivery of phase 1a could be achievable by December 2012. Seldom would a report of that importance not be seen by me, although I do not know when I did see it. The independent expert, Tony Rush, had taken apart all the information and came up with a reasoned outcome based on information available to him.
315. The PD report for late June within the same papers [CEC00223543] notes on page 26 that there were two such independent reports to the effect that recovery was possible. These would also have been provided to me and they included the caveat that recovery depended on a proactive approach being taken and that *“the longer the current impasse remains the more unlikely a late 2012 completion becomes”*.
316. A month later, the TS report for July 2010 [CEC00244400], page 47, recognises that programme recovery is not possible. I do not think there was a change of heart, but it was getting more and more difficult and there were more “red” colour codes than there were before and that is why we were looking at reduced scope and other possible alternatives.

Disputes

317. In terms of the Infraco contract, where the contractor was of the view that circumstances were such that there was a deemed change to the contract requirements, they were entitled to serve an Infraco Notice of TIE Change (INTC). This might entitle them to additional payment under the contract or additional time in which to complete the works. I do not know how many INTCs had been served on TIE by the contractors by the end of June 2009. Some of them were due to BDDI - IFC, some were TIE imposed change, some were City imposed change and some were the contractor applying

change. There were numerous reasons. Obviously we would try to avoid INTCs because INTCs were going to cost money and time.

318. I cannot recall when I first became aware of the BDDI to IFC issue. The papers sent to me following a meeting on 5 February 2009 ([CEC01213972 and CEC01213973]) are comprehensive and explain the position that TIE adopted in relation to the issue, why no provision was made in respect of this in the risk analysis and how it related to the cause of the Princes Street disputes. We were disputing the issue. We had general risk provisions anyway, but how could we possibly evaluate or identify a specific sum to cover an unknown situation. I did not think it was connected at all to the Princes Street dispute, which was a supplementary agreement and was totally different.

319. On 12 February 2009 I sent a letter to Dr Keysberg [CEC00900093], which spelt out the context very clearly. I have set out in this letter four matters that are at the heart of our serious concerns about Edinburgh tram network since the contract signature with BSC. I knew what was going on, I was heavily involved and the letter is explicit and self-explanatory.

320.

I have been asked about what is described as a "Principals meeting" with BSC on 17 February 2009 [CEC00994345]. I don't specifically recall the meeting but the attachments to this email are self-explanatory.

321. The dispute as to the move from BDDI - IFC drawings had arisen by the TPB in April/May 2009, within the papers for May 2009 [CEC00633071] and was considered at the meeting (page 9). There is reference to "*constructive discussions*" and I think this is the setting up of a Project Management Panel (PMP) as outlined in the paper. I believe that Bilfinger's Project Director, I do not know which one because they had at least three, and our Project Director, Steven Bell, and two other senior executives, sat on the Panel. It was always

a locked door session and they were told not to come out until they had achieved some progress. It was meant to be constructive and I think this had been identified by Richard Jeffrey along with discussion with David Darcy and others in the consortium. It shows we were trying everything we knew to get people to speak.

322. At page 16 of the same papers, one of the identified risks is in relation to "*Tramworks based on a design that may have altered*". We were saying that you just cannot change things without approval, because if we made the change the cost was down to us. The treatment strategy for the risk was to establish a process that would act as a controlled audit with approval from the Board for future design changes.
323. In the Minutes of the early July Meeting, with papers for the later July 2009 [CEC00843272], there is a note that Richard Jeffrey outlined options for the consideration of the Board (item 3.6). As you would expect, I was intimately involved in those options in advance of the meeting. We had been examining various alternatives and after debate we went for option 2, which was to set out on the DRPs. This was based on external legal and commercial advice, probably from Richard Keen QC, not DLA. The Board were made aware that there were no guarantees and that we might lose some. All of that was presented in very full detail to the Board, in fact the papers noted that the Board asked for further information as to whether there was reasonable confidence in BB interaction and they got legal opinion on that. We were not looking for compensation, we were not looking to win, we were trying to get settlement and progress but there is a very full discussion contained in the minute and the DRP was not risk free.
324. We knew that it was possible that the DRP might give rise to outcomes that were not the ones wanted and there was discussion of what TIE could do in that situation and/or what the financial and practical consequences would be. We considered the options of appealing, paying up and changing tactics.

There was a range of proposed options discussed and the Board were fully apprised.

325. The Minutes of the July meeting in the August 2009 papers [CEC00739552] also suggest that the DRP process that had been undertaken need not go all the way to a conclusion (page 9), which relates to the point I was making previously. If BSC recognised they were going to lose a DRP, we were not trying to get buy outs, we were trying to get it settled and get progress. Progress to us was more important than getting compensation.
326. The Framework Management Approach that I referred to in an email of 12 March 2009 to Dr Keysberg [CEC00966706] looked like a big breakthrough. Richard Jeffrey had been having discussions with a Siemens Executive, Dr Scheppendahl, and he had been talking about this framework management approach, people sitting down together, debating. I was trying to seize upon this approach and I was trying to make sure we got a hold of it fast and had a look. I thought it was important to register that approach with Dr Keysberg and that is why I wrote the email. It looked at that time as if all the pressure of DRPs and RTNs was having an impact.
327. An email to me and others from DLA dated 12 March 2009 and its attachments ([CEC00944872], [CEC00944873] and [CEC00944874]) set out their views on whether there had been an Infracore default. I cannot explain the legal advice any better than is contained in the papers prepared by the lawyers. We had put very heavy pressure on DLA, Andrew Fitchie and Stewart Jordan were producing a lot of paper. Stewart Jordan was meant to be the specialist, although I have to say I was not happy with a lot of his input, which to me had little clarity and I felt that when we sat face to face with the consortium and their lawyers, we were disadvantaged. I think we produced a Clause 90 Notice of Default and proceeded with it.
328. A paper to the TPB meeting in late July 2009 [CEC00843272] proposed that the Financial Commercial and Legal Sub Committee (FCL) should oversee

resolution of disputed areas, page 32. Before the FCL there was the Legal Affairs Committee (LAC), which I think became the FCL. The TPB at this stage was a standalone entity, not a sub-committee, and we were getting involved in a lot of disputes. I think the Board thought it was appropriate and the best approach to have a specific sub-committee for dispute resolution. The FCL was populated by very senior people, the Chief Executive, the Project Director and others. I guess rather than immersing a whole Board in the minutiae of these questions, it was much better to have a dedicated task force which would then report back to the Board. It was not taking any responsibility away from the Board; the final responsibility lay with the Board. I do not know why this paper about it was directed to TIE, rather than TEL, however the FCL were targeting specific issues and reporting on them, whether it was to the Board of TIE or TEL.

329. As this paper says, a document entitled Resolution Strategy [CEC00750538] was presented for TPB approval on 29 July 2009. I think the purpose, from memory, was for the Challenge Team, referred to on page 11, to act as the other side in a mock DRP. The legal guys must have been involved in this and determined which issues to progress, as detailed on pages 9 and 10.
330. The Consortium sent a letter to Tom Aitchison of CEC dated 8 March 2010 [CEC00548823] and a further letter dated 1 April 2010 [CEC00356310] with, in particular, allegations of obstructions from utilities and changes in scope. They were saying they could not work in the city because they did not have free access. We were arguing there was only one kilometre in the whole route where they could not work. To me this was typical propaganda from Richard Walker and was tit for tat, because I was not writing to Richard Walker, I was writing to Dr Keysberg or Dr Scheppendahl or Martin Goss of Siemens. I found Richard Walker to be disingenuous, he agreed to things and then denied them. I was unhappy with his dealings with other people and I did not want anything to do with him. I think there might also have been some effect at this stage of aggressive management of the contract that was making them respond differently. This letter from Richard Walker was leaked to the press.

331. Richard Jeffrey and I organised a meeting with representatives of Siemens, which I had in Edinburgh on 16 June 2010 and a very full aide memoir [CEC00322176] was produced. The meeting was designed to put pressure on the consortium and I was appealing to Siemens saying “*You know where you are heading here and it is bad place*”. David Darcy of Bilfinger was new and surprisingly willing to talk, he was a pragmatist that could carry messages, but he had limited authority to do anything. We were hoping that we were going in a better direction and we thought we were getting a bit of impetus. We were threatening to kick them out and telling them that we needed to find a solution other than the courts.

Outcome of Adjudications

332. There were various outcomes from the Adjudications: some we won, some we lost, although I know we lost more than we won. They were all reported to the Board in full detail. We knew there was no guarantee of winning anything and they seemed to be having a positive effect so, as a tactic, I strongly believe it was the right thing to do. We saved considerable numbers of millions of pounds by doing so, although I could not say I was not disappointed overall. The advice that we, the Board, received from our Legal advisors and Tony Rush was that it was worthwhile doing and that remains my view. If a QC or specialists like McGrigors are advising on a couple of themes that there is a 60% or 70% chance of winning or getting a sizable reduction, then, as the costs involved are not great, it was worth doing and the Board agreed.

333. I and others received an email dated 19 November 2009 from Steven Bell [DLA00002696], forwarding the adjudication decisions in relation to Gogarburn and Carrick Knowe Bridges ([DLA00001651 and DLA00001652]) and considering what should happen next. I am not a lawyer, these were extremely lengthy legal decisions and it is not possible for me, personally, to summarise them, we lost. We considered what the possible actions were.

There was a general view that there was no point in appealing, we had lost and that was it. The outcome was against our arguments and we had just been prolonging unnecessary delays so it was time to move on to another strategy. I think it was about here that we decided DRPs should be dropped.

334. In theory there was no strict timetable to appeal decisions and for months after the decision were given, the TPB papers note that the decisions were “*under review*” by TIE. I think the Board’s view was quite strong though, that if the experts had come up with the arguments against us there was no more wasting time.
335. I received an email from Richard Jeffrey informing me of the decision on the adjudication conducted before Lord Dervaird on 9 August 2010 [TIE00295743]. I personally thought this was a body blow because the confidence level of us winning this was very high. The advice we were given by McGrigors and others was that there was a very high chance of winning, which would have been a body blow to the other side, and we were astonished. I cannot add anything to the summary because it was provided by Richard and I cannot add anything to Lord Dervaird’s judgement. They ruled against us and there was no point in appealing Lord Dervaird’s decision.
336. The PD Report for late June 2010 [CEC00223543] refers to the outcome of the adjudication decisions. I refute any allegation that there was inaccurate reporting. The Board were never misled and there was no doubt that the Board, the City and TS were aware of the full and final outcome for the DRPs.
337. At both item 2.4 on page 8 of the August 2010 Minutes in the September papers [CEC00013818] and in the PD Report on page 15, there is a note that no further DRP referrals would be made. I think it was recorded in the Minutes from November 2009 that DRPs were going to be dropped, which was due to the cumulative build-up of the lack of qualified success and was not just an acceptance of the decisions regarding Carrick Knowe and Gogarburn, which had gone against TIE.

338. Shepherd & Wedderburn, Solicitors, produced a report [CEC00013525] dated 26 November 2010 on the information provided by DLA and TIE to the Council regarding Adjudicators' decisions. I asked Shepherd & Wedderburn to do an independent report on the outcome and that independent report suggested that we were being less than clear in saying who had won or lost. I have to say, I think that some of our paper was ambiguous and did not say, as the first sentence, "*We have lost this*", however, I have no doubts that the Board and Transport Scotland and the City knew we had lost. I think this shows the effect of the pressures on people like Steven Bell who had done these surveys. I would accept criticism that some of the materials given to the Council did not always make it explicit which party has been successful. Undoubtedly, a clear statement on this issue was essential to a proper evaluation of the outcome of these processes, although nobody had any doubts as to the outcome.

Supplementary Agreements

339. As I stated previously, the Consortium made it clear that they wanted a new agreement to cover on street works because they wrongly assumed, having agreed to a supplementary agreement on Princes Street, we would have happily paid them on a supplementary basis elsewhere. That was not the case and, as I have explained before, we were having enormous problems in reconciling and auditing the timesheets and other claims made for Princes Street. I believe, however, that the TIE position changed after I left.
340. An OSSA was not desirable, it would have increased costs without control and it was a tactic of BSC's which probably did not surprise me. I thought it was against the terms of the contract.
341. In the Papers for March 2010 [TIE00894384] the absence of such an agreement is given as one of the reasons for the works being delayed. There

was not an acceptance that it would not be possible to compel works, we were still trying to do that.

Projects

342. The various projects such as Pitchfork, Carlisle, Notice and Termination were a host of strategies that were not necessarily applied at the same time. The strategy was simple: to try and force Infraco to get to work professionally and normally. Carlisle was a concept of truncating their work at Haymarket. Notice (later Termination) was getting rid of Bilfinger Berger, probably by having Siemens as the lead constructor and bringing somebody else in to replace Bilfinger. We were taking further specialist advice and we were looking at doing everything we possibly could to find a solution and not just accepting what was going on. We were trying to make life extremely uncomfortable for Infraco.
343. I was familiar with all of these projects as Chairman of the Board. Andrew Fitchie was the DLA Advisor, Tony Rush was the Specialist Consultant and Richard Jeffrey was the Chief Executive. Tony Rush was the lead on Project Carlisle. All of these plans were shared with the Board and I think it is fair to say I had very heated discussions with Tony Rush on many topics. He was used to doing things his way and he upset a lot of people within the organisation. I think, however, Infraco had huge respect and fear of Tony Rush and I think he upset a lot of middle managers with his incessant demands for its duration.
344. Andrew Fitchie and Tony Rush were drafting letters for me to send [CEC00098384] as they were experts paid by us. I did not put my name to anything until I was fully satisfied and unless I had Board approval to do so. This is not an uncommon practice and in my life as a Director I have often had people draft letters for me in specialist areas.

345. I was getting towards the end of my time on the Project, but I remember reading the Minutes of the Project Pitchfork meeting of 23 September 2010 [CEC00088214] and the Minutes of the Project Pitchfork meeting of 5 October 2010 [CEC00088249] in detail. We were casting a fly for Siemens to take over because our intelligence was suggesting that Siemens were maybe getting fed up with BB's behaviour. We were preparing the case to kick out Bilfinger Berger and we wanted them to know we were doing that. Tony Rush and Michael Flynn of Siemens had a rapport and the intelligence we were getting was quite positive.
346. On 23 December 2009 I wrote directly to Andreas Goss of Siemens [CEC00583991] to bring him up to date with the strength of feeling within our Board regarding the lack of thrust in the contract and their support of Bilfinger Berger. It was a very detailed and self-explanatory letter, however it made no difference to their approach or their behaviour.
347. On 5 March 2010 BB wrote to me following a meeting I had with Kenneth Reid [CEC00579534]. Our research indicated that one of the main Board Directors of Bilfinger, based in Germany, was Dr Kenneth Reid, a Scotsman. We discussed meeting him to have a heart to heart instead of having problems with, perhaps, German culture. He was a charming guy and I had an hour with him in Edinburgh when he came to see me. I wrote to him afterwards to thank him and proposed various potential solutions to him. Needless to say he went to Germany, came back and confirmed they were going to press ahead with their strategy anyway and he fully supported everything that Bilfinger had been doing.
348. Stewart McGarrity sent an email to me and others dated 26 April 2010 [CEC00316561] with an attached spreadsheet [CEC00316562] of cost estimates. We were preparing the case in the expectation of possible truncation, sacking or compromise so we had a range of numbers and outcomes which are very clearly set out in the paper. On the basis of these estimates we continued down a multi-track strategy.

349. Tony Rush copied me into an email of 27 April 2010 [CEC00335481], which seemed to signal that Tony's liaisons with Siemens were beginning to pay possible dividends and was very encouraging to me.
350. I understand that Project Carlisle continued under the code name Project Phoenix after Richard Jeffrey and I had gone and resulted in the tram being truncated. We had run out of money and the City had to reach a compromise as to where the tram would go. The negotiations were extremely feisty and I think the documents are probably fulsome. The problem was that it was going to be a shortened track for more money than was sensible.
351. As is indicated in a File Note of a meeting in May 2010 [CEC00301115], I represented TIE in some of the negotiations because I was Chairman at the time. If either the Chief Executive or I were not at the negotiations, the other would be, or both of us would be. I cannot recall the discussions line by line; however we accepted that we were not going to be able to do certain things to achieve the best solution. We considered whether we were going to work together, how we could do certain things without breaching contract issues and so on. There were very detailed discussions, which we then took to the Board, Transport Scotland and the City for further discussion.
352. Andrew Fitchie and Tony Rush worked together on delegated authority from Richard Jeffrey, myself and the Board; however they had no authority to do anything without clearance from us and the Board. They would not do anything without copying Richard Jeffrey and I in and Richard and one of us would then conduct the meetings on behalf of TIE.
353. In the second half of 2010 there was a move to put TIE in a position in which they would be able to terminate the contract. I was heavily involved in that and the exploratory discussions to that end. It was viewed as one of many possibilities about which legal advice was taken, particularly from McGrigors and also, less so, from the Council and DLA. We were doing everything we

could to find a sensible compromise without burning money unnecessarily and the advice was full, comprehensive and supportive.

354. The Minutes of the late June 2010 meeting within the papers for July [CEC00244400] discuss what it termed the “*twin track*” approach. There was healthy discussion of termination of Infracore as a real option, but at the very least to cause BSC concern. I do not think there were marked differences of opinion among the members of the TPB as to what should be done, but people were asking a lot of questions as you would expect.
355. I would have been delighted if the contract was terminated at that time, providing we had a solution to continue the project, however the prospects of doing so at a reasonable price were remote. The issue of service of RTNs was discussed in enormous detail within the Board, as was the phrase “*a mature divorce*” in discussions with BSC. We were telling them we could not work together, that they were no longer interested and that we would like to truncate it somewhere within affordability. They were saying they were not getting enough money and we were suggesting they should just pack up their bags and go, on the basis of a properly constructed debate. They were listening and my personal opinion was that we were within a whisker of getting rid of them.
356. If the service of RTNs (Option A) failed to produce a change and the agreement necessary for BSC to complete part of the project and for TIE to re-procure the remainder on an incremental basis (Option B) had not been forthcoming, we would be in limbo and that was to be avoided.
357. As detailed on page 7 of the minutes of the July 2010 meeting, within the August papers [CEC00013703], advice was taken from various specialists on the merits of the RTN approach. This was obtained from various specialists, including Tony Rush, legal opinion from Brandon Nolan, or one of his colleagues, and I believe also Richard Keen QC.

358. The negotiations for Option B were tough and uncompromising, but we were looking for a solution, with Board approval. The July Minute notes that Board members were to be kept informed of each step of progress though the coming week and beyond, which was done by personal telephone calls.
359. I sent a letter dated 23 August 2010, which is self-explanatory, to Joachim Enenkel of BB on [CEC00131076] and he responded the same day [CEC00131792]. I was again saying that only one kilometre of on-street works could not be worked presently and for the first time he did not reject what I was saying. He did not say he was going to do it but they were not rejecting it out of hand.
360. Siemens sent me a letter dated 25 August 2010 [CEC00077851], which was familiar, bold Siemens. They knew that we were not getting any more money from Transport Scotland; they knew that we were trying to truncate and so they were asking whether we had the funds. Extracts of that letter then appeared in the press and it was a pressure point. If they really thought we would, or could, not pay their bills, they would not be working at all.
361. I sent a light-hearted email to Tony Rush dated 27 August 2010 [CEC00132394], within which I was suggesting there were times of the day when it was very useful to speak to Herr Kitzman of BB and other times it was inappropriate. I was suggesting in this email that we had got him at a good time because he had told me they were prepared to write off £37m; I really could not believe it.
362. I think the suite of Project Carlisle documents [CEC00129799 – 803] are self-explanatory, they were a build-up to our prep work. To be honest, they were within a couple of weeks of me resigning and I believe, mentally, I had already made up my mind it was time for a change of personnel. I had given it everything I could.

363. I think all that was said about the Contractual Strategy in the PD Report with the September 2010 papers [CEC00013818] on page 29 is in the report. It was all designed to increase pressure on the consortium.
364. Page 33 of the TS Report for October [CEC00014055] notes all that had been done by way of serving notices on BSC. This was a combination of moving to terminate unilaterally for breach, pressuring BSC to agree a termination and getting the works done more quickly and to the correct standard.
365. I think the change of approach at the end of 2010 in that instead of terminating the contract, TIE instituted the mediation process which ultimately lead to settlement, was due to a different view from the City and others. I was not involved, but I think we took a mediation process and a lot of money had exchanged hands, which ultimately led to settlement.
366. In an interview with the Scotsman, I described BB as a "*delinquent contractor, who scented a victim, who probably greatly under-bid and who would use the contract to make life extremely difficult for the city and they have done exactly that*". That is still my view and I have explained many times that I really think that they underbid. They used the lack of design claims to exploit every possible loophole and were not at all a supportive and caring contractor. I think there is documented evidence from around the world of that sort of behaviour by them, in Canada, Qatar and elsewhere. I recall that Graeme Bissett prepared a TIE paper on these issues.

Meetings with Ministers/TS

367. I had the following meetings with Ministers:
- With John Swinney on 17 March 2009 [TRS00016926];
 - With John Swinney on 21 March 2009 as the Princes Street dispute drew to a close [TRS00016963]; and

- With John Swinney on 10 March 2010, which Richard Jeffrey also attended [TRS00010646].

Additionally, there were lots of informal meetings or exchanges not only with John Swinney but with Stewart Stevenson too. If I was at them there would be a briefing prepared before the meeting and an aide memoir after; I invariably wrote aide memoirs. Occasionally they would not be put in open files; they would be put in a confidential file by the PA, for obvious reasons. These meetings were either initiated by the Ministers or by us and we were either getting instructions or a ticking off, but they were communication meetings. Discussions revolved around progress, or the lack of progress, and they would sometimes appear supportive, sometimes they were very reluctant funders. It probably depended on the messages we were giving them. To the best of my ability I gave exact updates of where we were and where I thought we were heading. If they wanted to exert influence on the decisions taken by the TPB and/or TIE, they did so simply by telling us to get it sorted out.

368. I have already talked about the Princes Street dispute, about which Ministers were unhappy, but there were other disputes too. I know they were getting information from Transport Scotland but Bilfinger were doing a good job on the M74 and they were not having problems there. My argument, however, was that the M74 was nothing like the Edinburgh Tram Project and it was odious to compare the two. Donald McGougan, the Finance Director of CEC, was often with me at these meetings to answer the questions and also to make sure that the City knew.
369. In March 2009 as the Princes Street dispute took hold, John Swinney said he wanted more contact between CEC, TS and TIE, as referred to in an email from John Ramsay dated 4 March 2009 [CEC00888693]. As a consequence, there was more contact; I think there was a weekly phone call, a monthly meeting and a third format. The word "*compromise*" came up quite often in these discussions with the Ministers. John Swinney was a great believer in mediation, as was I when it worked, however mediation is not a one-sided thing. Again, there would always be aide memoirs done for these, which would

allow me to be briefed before and to brief people afterwards. They were marked "*Personal, Private and Confidential*", but nonetheless some of these notes appeared in the papers. These discussions were on a host of topics: the contract; progress; work in progress and so on.

370. David Middleton refers to the meeting I had with John Swinney on 17 March 2009 in an email [TRS00016926] in which he records that I considered that the relationship was getting better. There were sounds that David Darcy and others were beginning to listen to us and I probably explained to the Ministers that that was the case. I certainly was not giving the impression that we had won the game or that there had been a complete about-turn, but they seemed to be getting more responsive and, on his instructions, we had dealt with Princes Street.
371. Prior to the meeting I was provided with a briefing on costs from Stewart McGarrity [CEC01003783]. This was nothing to do with the Princes Street dispute or the BDDI to IFC issue that had already emerged. As I have said, you cannot quantify individual BDDI - IFC issues, there was a general pot and sufficient headroom in the risk contingency for those. If TIE were not correct in our interpretation of the contract it was a doomsday scenario, for which a contingency would be enormous. It would be impractical to have a contingency of this size. As is also recorded in this email, to the end of February 2009 there had been 284 notices of changes, which was a concern, it was an absurd number. I think the answers to questions 5, 6 and 11 in Stewart McGarrity's paper answers the issues to some extent and additionally, question 13 says, "*Any re-procurement ... would give rise to longer delays ... additional costs*".

Pay and bonuses

372. I have a letter [WED00000161] which shows that my total salary was £94,546, which was split between £26,957 for TEL, £26,957 for the TPB, £17,492 for TIE and the remainder, £23,140, for Lothian Buses. My salary from Lothian Buses was relevant because I was trying to run an integrated transport set up and Lothian Buses was part of that. I also recall that when Willie Gallagher went and I stepped into the breach that, retrospectively, I think I was paid £5,000 a month for four months in recognition of the fact that I was being the Chairman and Chief Executive. I cannot find precise details about that but £5,000 gross sticks in my memory. I was working long hours, seven days a week. I was not doing it for the money but for the project.
373. I did not determine the bonuses to TIE employees and I do not recall anyone on a contract basis getting a bonus, but I could be wrong. Steven Bell would deal with the project team, with Line Managers below who would deal with their people below them. Line Managers would assess each one on a qualitative basis, I would look at the recommendations and either agree or disagree and report accordingly to the Remuneration Committee, chaired by Brian Cox, who took the decision. The whole thing was carefully governed, although I suspect there was considerable antipathy amongst CEC people about the level of bonus payments.
374. On 27 March 2009, I sent an email [TIE00169024] proposing a new bonus scheme. I was suggesting that part of the bonus should be set-aside and would be earned if people stayed on. Therefore if I guy was to get a £5,000 bonus, I was suggesting they got £2,500 of that after a year, building him a pot. These people were valuable and could have much better paid jobs with less hassle in all the other tram areas in the UK. I think this was ultimately introduced and I think it worked.
375. I had no involvement in Willie Gallagher's bonus or conditions, however I sent an email of 28 March 2009 [TIE00169011] and attachment [TIE00169012] to Philip Barr at CEC regarding his bonus, to detail how it was constructed. I thought it made interesting reading and, if memory serves me correctly, I think

28 March 2009
should be
27 March 2007

I also sent it because Willie was claiming a bonus after he had gone. I think he was saying that if he had still been there he would be entitled to the bonus he had earned up to then.

376. On 14 April 2009, Colin McLaughlin, the TIE HR Director, sent me an email with attachments regarding bonuses [CEC01009329 to 337]. I was not wholly satisfied about HR in TIE and how they tackled the bonus position so I was asking for total transparency. Additionally, there was disquiet in CEC and in TIE about bonuses. I wanted to pore over the details, reach my own views and I also wanted to have a proper discussion with the Remuneration Committee. I did ultimately take it to the Remuneration Committee and got them to make up their mind about how we should tackle bonuses in future. Bonuses are the most emotional factor I have ever come across and people really have to understand what they had to do to earn them. Bonuses are not a right, salary is the right if you work and bonuses are on top of that. I did not get any bonuses, I was not jealous, you have to earn bonuses and the system for paying them has to be transparent and auditable.
377. I am aware of an email and attached spreadsheet with figures for remuneration sent by Gregor Roberts, the Acting Finance Director, to Steven Bell on 13 May 2009 [CEC01008285 and CEC01008286]. I do not recognise this document, and I cannot explain its contents. However having looked at another related document supplied to me [CEC01010196] it appears that the figures in the former document include some form of aggregated forecasts covering a total period of four years. .


Leaving

378. I had seen the project through many difficult times by the end of 2010, when I decided to leave because it was time for a change. The project was not in a good state at that time, I was exhausted, my health was suffering and my wife was very unhappy; it was time for someone else to take the reins. I had

described the project in an interview as "*Hell on wheels*", as mentioned in a transcript of an interview [TIE00303494]. It was the most difficult project I have ever been involved with and I found Bilfinger virtually impossible to deal with. There was no trust and enormous negatives. I was such a great believer in trams, in integrated transport; they were destroying the city and I could do little about it other than burning public money, which was unjustified.

379. At the time I left the project, I made a statement describing BB as a "*delinquent contractor*". By that, I meant that they were failing to fulfil the principal obligations we thought they were meant to do via the contract. That is exactly how I felt about them. They eventually sued me for using the word "*delinquent*" - which they had mistranslated as meaning "criminal" - there was a High Court injunction, which was eventually withdrawn, and then the case was dropped. My view, however, remains the same.

I confirm that the facts to which I attest in this witness statement, consisting of this and the preceding 104 pages, where they are within my direct knowledge, 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..... 8th August 2017

Statement of David Mackay - Errata

1. In paragraph 2, in the fourth line, insert the word “often” before “competing”.
2. In paragraph 3, in the sixth line, delete the words “I think Gordon” and substitute “Andrew”.
3. In paragraph 4, in the first line, delete the first word “The” and substitute “A”.
4. In paragraph 4, in the third line, insert the words “and profits” before “are up”.
5. In paragraph 4, in the final line, delete the word “contractors” and substitute “a single contractor”.
6. In paragraph 9, in the sixth line, delete the word “modern” and substitute “Borders”.
7. In paragraph 12, in the fourth line, delete the word “tinged” and substitute “tainted”.
8. In paragraph 17, in the final line, insert the word “rather” before “than”.
9. In paragraph 19, in the second line, delete the word “sat” and substitute “was invited to sit”.
10. In paragraph 21, in the first line, delete the words “Project Director” and substitute “Chief Executive”.
11. In paragraph 30, in the third line, insert the word “not” before “onerous”.
12. In paragraph 35, in the first line, delete the word “some” and substitute “most”.
13. In paragraph 40, in the sixth line, insert the word “probably” before “the”.
14. In paragraph 86, in the seventh line, insert the words “examples of” before “the history”.
15. In paragraph 87, in the final line, insert the word “potential” before “pitfalls”.
16. In paragraph 91, in the third line, insert the words “decided I” before “needed”.
17. In paragraph 103, in the third line, insert the word “Eventually” before “I”.
18. In paragraph 108, in the first line, delete the word “part” and substitute “sections”.
19. In paragraph 111, in the first line, insert the word “totally” before “refute”.
20. In paragraph 119, in lines six and seven, delete the words “was fantastic” and substitute “were first class”.
21. In paragraph 122, in the fifth line, delete the words “It is not” and substitute “I do not believe it is”.
22. In paragraph 138, in the last line, delete the word “think” and substitute “believe”.
23. In paragraph 158, in the fifth line, delete the word “fountains” and substitute “furniture”.
24. In paragraph 164, in the third line, delete the word “the” and substitute “an assured”.
25. In paragraph 166, in the sixth line, delete the words “setting up” and substitute “settling”.
26. In paragraph 173, in the final line, delete the word “guessing” and substitute “assuming”.
27. In paragraph 181, in the final line, insert the words “viewed as” before “critical”.
28. In paragraph 189, in the fourth line, insert the word “sole” before “fault”.
29. In paragraph 191, in the seventh line, delete the words “would be” and substitute “should have been”.
30. In paragraph 194, at the end of the final line, insert the words “as I have said before”.
31. In paragraph 204, in the second line, delete the word “hanging” and substitute “looking”.
32. In paragraph 205, in the seventh line, insert the words “propose to” before “do”.
33. In paragraph 230, in the final line, delete the word “way” and substitute “long”.
34. In paragraph 236, delete the final line and replace the comma in line 4 with a full stop.
35. In paragraph 252, in the sixth line, delete the word “seeking” and substitute “seeing”.
36. In paragraph 338, in the third line, delete the word “I” and substitute “We”.
37. In paragraph 343, in the final line, delete the words “its duration” and substitute “detailed information”.
38. In paragraph 365, in the fourth line, delete the word “we” and substitute “they”.

Additional Questions For Mr David Mackay

1. Did Andrew Fitchie inform you in October 2007 that he had been told by Bilfinger Berger (BB) that the works would cost £80m more than the tender sum?

With the caveat that I am being asked to recall something that is claimed to have been said approximately ten years ago, I do not think that Andrew Fitchie told me anything about this in 2007. As I said in my statement, I reacted with surprise and fury when Richard Walker said in February 2009 that Bilfinger were seeking a further £50-£80m to complete the work, and accordingly I do not think I had any prior warning of Walker's view on the "need" for this additional level of funding.

I only had limited contact with Andrew Fitchie before I became interim Chair of TIE in November 2008. I had frequent contact with him once I was in post. It would be very odd for a matter of this significance to have been raised with me only in conversation and not in writing. The same point applies to 2 and 3 below.

2. Did Andrew Fitchie report to you that BB were not willing to enter into a fixed price deal?

Not that I recall.

3. Did Andrew Fitchie report to you that he had doubts about the sub-contracting chain BB said they had in place?

Not that I recall, but I knew that TIE had their own doubts on that issue because Bilfinger had failed to sign up their sub-contractors in time.

4. In what context were you told of these matters?

Not applicable.

5. What did you do with the information and with whom did you discuss it?

Not applicable.

6. What difference did it make to the decisions as procurement of INFRACO?

Not applicable.

7. Was it discussed in the context of reporting to CEC and, of so, what decisions were taken in relation to it?

As I have said, I have no recollection of Andrew Fitchie raising these matters with me. Had he done so, I would have reported them to the CEC officials with whom I had regular contact on the TPB. Until I became Chair of the TIE board any formal reporting function between TIE and CEC lay with others, albeit that I had frequent contact with Tom Aitchison and kept him informed of my views and concerns.

8. Did Andrew Fitchie report to you on 6 February 2008 (or any other date) that Pricing Assumption 1 in Part 4 of the Schedule was fixed and could not be negotiated and that it would be difficult to claw anything back?

According to my diary I did not see Andrew Fitchie that day. I do not recall him saying that to me.

9. After you became interim Chairman of TIE, did Andrew Fitchie advise you as to the effect of the Wiesbaden Agreement?

I don't recall him doing so.

10. What did he say?

Not applicable.

11. What impact did that have on the approach you took to the relationship with the contractors?

Not applicable.

12. Did Andrew Fitchie recommend at any time that the award of the INFRACO contract should be delayed?

I don't recall him making any such recommendation to me. However as I have said above, I was not in post at TIE prior to contract close. He would normally have been reporting to Willie Gallagher in this period.

13. If so, when and why did he make his recommendation and what was the response to it?

Not applicable.