Edinburgh Tram Inquiry Office Use Only
Witness Name: Colin Mackenzie
Dated:

THE EDINBURGH TRAM INQUIRY

Witness Statement of Colin George MacKenzie

Statement Taken by Drew Fox on 8 and 29 March 2016.

My full name is Colin George MacKenzie. My contact details are known to the Inquiry. I am now retired. My role in the tram project was as Principal Solicitor to the City of Edinburgh Council.

Statement:

DUTIES AND RESPONSIBILITIES

1. I undertook what was then a legal apprenticeship with the City of Edinburgh District Council from September 1978 until January 1981. I was then appointed Solicitor in Ettrick and Lauderdale District Council in February 1981. I remained there until February 1983. In that post I was responsible for undertaking clerking duties at the District Court, Council house sales, general conveyancing and legal advice to the Council and its committees. From March 1983 until February 1992 I was employed by City of Edinburgh District Council as, first of all, Solicitor and then as Senior Solicitor undertaking all aspects of a busy civil Litigation Team, both in the Sheriff Court and the Court of Session; arbitration work and Employment Tribunals. From March 1992 until April 1996 I led and managed the Court Team as Acting Principal Solicitor, managing a team of five Solicitors and six support staff. I also attended Committees of the Council to provide advice on a range of powers or vires issues. Following the Local Government reorganisation in 1996 I was appointed to the post of Solicitor in the section called Legislation and Advice. Within a month or two I was moved up to the position of Senior Solicitor. I worked in the same Section from 1997 until April 2004. From May

2004 I was the Principal Solicitor in the re-named Commercial Practice Team. From August 2006 I was Principal Solicitor in Litigation, heading up the Team dealing with all aspects of Civil Litigation, including childcare and Employment Tribunals. I also provided advice to Committees, Joint Boards, the Police Board, the Fire and Rescue Board. I suppose, I was effectively seconded onto the Tram Project from August 2006, probably for the sake of continuity given the Commercial Practice role which I previously undertook. In effect my duties were split between managing the Litigation Team and corporate work on the Tram Project.

2. As Principal Solicitor in terms of the formal Job Description I was required to direct, control and manage, in conjunction with the Council Solicitor, the provision of a legal service to the Council and its associated bodies to ensure the effective management and provision of a range of legal functions. I further acted as Solicitor in a wide range of legal support to the Council and associated legal bodies. The Principal Solicitors and the Council Solicitor formed the Division's Management Team. As Principal Solicitor in the Commercial Practice Section, from April 2004 until August 2006, I had specific responsibility for managing that section. My role entailed undertaking all Council legal work, including a lead role in corporate projects, particularly the most complex, sensitive and important work. I was also expected to deputise for the Council Solicitor, as and when required, on any matter, and, therefore, act in the capacity of the Council Solicitor.

3. My involvement and time commitment as Principal Solicitor grew as the Tram project developed. Apart from the formal terms of the job description which I described earlier, I exercised a lead role in the Tram Project as a so called Corporate Project.

4. Initially my involvement with TIE officers was on land assembly issues that concerned CEC as authorised undertaker. CEC had been granted compulsory purchase powers under the Tram Acts. A decision was taken at higher level that the Council would work with TIE, assisted by Dundas & Wilson, to put together all the land that was necessary for the project. In the early days, my involvement

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was working with people such as Alistair Sim from TIE and solicitors/ planning specialists from Dundas & Wilson. We met on a regular basis. TIE were doing most of the legwork but it was CEC's statutory role and functions under the Tram Acts that we were seeking to protect. There was fairly early liaison with TIE officials but I would say it comprised a limited range of TIE officials. There was very little in the early days of interface with, whom I would describe as, TIE Directors. I would say that we were dealing probably with the professionals, mostly engineers who were working at the coalface. That then changed as time went on, as the project developed and as governance and contractual issues came to the fore. It was then that people higher up in the scheme of things began to get involved in more strategic decisions. I therefore ended up meeting some of the Directors of TIE. I think the same probably applies to CEC involvement. As matters progressed, more and more senior involvement and decision making was required from persons higher up in CEC.

5. I am asked whether I reported to Gill Lindsay, as Line Manager, until she left the employment of CEC around August 2010. The post of Council Solicitor, held by Gill Lindsay, disappeared in a departmental restructuring at the end of 2009. Up to that time I therefore reported to Gill Lindsay. Thereafter, all the Principal Solicitors, including myself, reported to the Head of Legal and Administrative Services, Alastair McLean.

6. Before the end of 2009, I saw my role as both keeping Gill Lindsay in the loop with regular updates on progress with the project, but also referring to her for decisions. Certainly in terms of how CEC saw it, I didn't have the delegated power to make any significant decisions in furtherance of the project: my remit was restricted to procedural matters of land assembly, third party agreements and monitoring progress of the project. I could make recommendations which were then referred up the hierarchy for a decision. My powers were limited. After Financial Close in May 2008 , I was beginning to wind down my involvement in the project. I can't draw a line in the sand and say exactly when my involvement stopped because even when I was pretty well fully returned to my litigation management duties, there were still one or two odds and ends which required my

input. A role which I had to perform in relation to the tram project was for example, to seek orders from the Sheriff for the disinterment and re-interment of various bodies from the Graveyard at Constitution Street because the tram line was planned to come pretty close to the wall of the cemetery. That was the only involvement I really had in 2010. I perhaps had some minor building fixing agreements to finalise, but as far as the INFRACO and governance issues were concerned, there was no involvement. I would say I had no really significant involvement from some time midway through 2009.

7. It was mostly because of my reduced involvement post 2009 that there was little, if anything, to report to Gill Lindsay . I would describe my working relationship, on a professional level, with Gill Lindsay as being satisfactory, although our views sometimes differed on aspects of the project.

8. I consider that I had a good working relationship with other Council officials, especially those in City Development and Finance who were involved in the Tram Project. I worked well with many other Council officials in my extensive non-tram work e.g. the Waverley Railway Project and on aspects of legislation and advice and litigation.

9. As far as the relationship on the Tram Project was concerned, it was a good working relationship. It was principally myself and Nick Smith, who in the earlier stages was my Commercial Practice Senior Solicitor, and Alan Squair, Principal Solicitor, who was in charge of the Planning Team. We had a good relationship. We were all absolutely focussed on best protecting the Council's and the city's interests in delivering the project. I think that is clear when one looks at some of the emails which were exchanged. I would describe it as a happy relationship. It was hard work but we got on well together. We had a laugh from time to time about how TIE were behaving. We worked well as a Team. We all had other non-tram duties to perform as well.

10. Our working atmosphere more widely in the CEC legal department had its ups and downs. Broadly, most staff got on well with each other. My own teams of

Commercial Practice, and then latterly Court , worked well together. It was a broadly comfortable and happy existence.

11. It was probably an ironic description when we coined ourselves as the B Team. That was myself, Nick Smith, Alan Squair, Andy Conway and Duncan Fraser from City Development and Alan Coyle from Finance. It sometimes included Rebecca Andrew from Finance. I know she had a period of maternity leave so I'm sure she wasn't always a member of the group. There were other members who came in and out of the group e.g. Steve Sladdon from the Council Estate Surveyors; and David Cooper from the Planning Division. That was broadly the B Team. We called ourselves that because we realised that we were the lower team. We were the ones in the early days working at the coalface.

12. In contrast, by implication, the A Team were the Directors, and Gill Lindsay, Council Solicitor. There were a range of people who broadly fell into the camp of the A Team. This included the Chief Executive, Tom Aitchison; the Director of City Development, Andrew Holmes; and the Director of Finance, Donald McGougan. Initially it was the A Team who were the ones interacting directly with TIE and TEL at an Executive level; their counterparts in effect. Donald McGougan and Andrew Holmes would have been interacting with TIE and TEL from a relatively early stage. They were possibly both Directors of TEL at some stage. They would be the ones interacting with people like Willie Gallagher and the other Board members of TIE and TEL.

    There wasn't a definitive line between A Team and B Team in terms of interaction with TIE and TEL. In the early days of the Tram Project it was the B Team which had most input to the relationship with TIE colleagues. Infrequent reports were made verbally, sometimes in writing, upwards to our Line Managers and Directors whom we called the A Team. As problems with TIE began to manifest themselves to the B Team , we started to put more of our concerns in writing to Gill Lindsay and respective Directors. We got the impression that the A team thought we were making a fuss about nothing and that we should be working with TIE as members of the same family. Eventually the Chief Executive and the A Team members

accepted that there was substance to our concerns. Amongst other steps put in place, the Chief Executive formed his Internal Planning Group which effectively merged the A and B Teams. He also instructed, in discussion with TIE Directors, the setting up of the Legal Affairs Group. He directed more senior hands on involvement and attendance by Gill Lindsay, Donald McGougan and Andrew Holmes at the Legal Affairs Group meetings. This high level responsibility and involvement was mirrored in the route to financial close when CEC directed Gill Lindsay, Donald McGougan and Andrew Holmes to certify to the Chief Executive their satisfaction on various critical aspects of the project. I was asked by Gill Lindsay to draft such a letter to the Chief Executive, Tom Aitchison. By emails dated 10 March 2008 (**CEC01399016**), (**CEC01399012**) I advised that I would be willing to assist with the exercise from a factual perspective but that I could not support such a letter.

13. I find it difficult to pinpoint the date when the idea started to take root in the A Team that changes required to be made in terms of the relationship with TIE and the B Team. One of the key dates would be in the run up to the setting up of the Legal Affairs Group. That's probably documented in terms of the first meeting. It's possibly around July or August of 2007. I don't remember the exact date. It was definitely more of a gradual change. I think it's fair to say it took the B Team months to persuade the A Team that there really was something to be concerned about.

14. I was previously the Solicitor in CEC involved in promoting, along with Parliamentary agents, the City of Edinburgh Guided Busways Order Confirmation Act. I was also involved, in conjunction with legal colleagues from Scottish Borders Council and Midlothian Council, with promoting, again with the assistance of Parliamentary agents, the Waverley Railway (Scotland) Act 2006. For both of these pieces of legislation I was much more heavily involved in the drafting, consultation and seeing the Bill's progress through Parliament. With regard to the Tram Bills, TIE at first thought that they were the promoters and would end up as the authorised undertakers. I had to explain to them that they did not possess the statutory powers to be the promoters. Only the Council could do that in terms of the Local Government (Scotland) Act 1973. TIE, however, used Dundas and

Wilson to promote the Tram Bills. I had a less hands on approach to that legislative process.

THE PROCUREMENT STRATEGY

15. I am referred to the email exchanges dated about 5 November 2007 and found at **CEC01383325**. When I read this email chain it was not clear to me that it was really about Procurement Strategy. It's headed up '*Tram Funding Strategy'* and it was written by David Cooper, a Senior Planning Officer in the Council, and it dealt with, as I understood, the Council's contributions as developer to the Tram Project Funding. While it dealt with pre tender arrangements I don't think that it dealt with the Procurement Strategy in terms of how the contracts would interface with each other. I was not involved at the early strategic points in the procurement exercise. I would say that it's possible that Chief Officers and the Director of City Development may have been involved in formulating the Procurement Strategy. After the decisions had been made I was made aware of the broad principles of how the contract suite was going to be structured and interfaced with each other. The establishment of the Procurement Strategy was prior to the start of my involvement with the Tram Project.

16. The purpose and aim of the Procurement Strategy were not explained to me at the time of its creation. I wasn't involved then. I did come to hear of it when it was already a fait accompli. In considering the purpose and aim much later, I presumed that it was an attempt to spread the phases of the project among suppliers and consultants best able to deliver each discrete branch.

17.

17 The Edinburgh Tram briefing from myself to Gill Lindsay dated 2 May 2008 and found at **CEC01247788** was written before I headed off on a period of annual leave. It set out a range of position statements at, or around, the time of

Financial Close, including the expression of concerns about procurement issues and the role of DLA on behalf of the Council. The full Council had met the previous day, 1 May 2008, and had taken decisions on a number of matters pertinent to signing off the contracts. I set out my concerns in the paragraph entitled "*Procurement Issues*". The Procurement Strategy was determined some considerable time before. The matters which were of concern in May 2008 related to the pricing of the various bids and a mooted structural change late in the process.

18. As far as I can recall both DLA and Dundas & Wilson were procured by TIE before I had any involvement in the project. I wasn't party to their procurement and presumably there was a proper procurement exercise. I'm assuming that was done. Issues obviously came up later. It is difficult to gain an understanding of why that legal input was split. I don't think that it was ever satisfactorily explained to me why two legal firms were procured. There may well be a very simple explanation e.g. it was too big for one firm to handle or a decision was taken to split it for good commercial reasons. I just don't know.

19. As far as protocols with DLA were concerned, I recall one instance in particular. There was a Scottish Power distribution agreement. I recall Gill Lindsay was the officer authorised, in terms of delegated authority protocol, to sign the document. Gill Lindsay and I had a discussion about the terms of a protocol. The protocol had been previously agreed with DLA. It was noted that DLA hadn't adhered to the protocol. I think it came to light because DLA had sent in a document for execution by Gill Lindsay with just a complement slip. Quite rightly, she was not happy with that. DLA had not followed the protocol. I don't recall the same issues occurring with Dundas & Wilson.

20. The use of TIE as the contracting party as opposed to the Council was a fait accompli and not a matter I was asked for an opinion on. It didn't make sense in my view to set up a delivery company from scratch, which as a corporate body had no previous experience of Tramway construction. TIE was in a sense no

different from a firm of engineering consultants or designers acting on behalf of the Council, except that such consultants would not normally have been the contracting party delivering such a project. .

21. My awareness of the roles of Dundas & Wilson and DLA Piper arose after the contracts had been awarded respectively to them. There may have been an explanation offered but I don't recall what that was. I note the administrative meeting held on 30 May 2007 referred to in the minutes dated 30 May 2007 and found at **CEC01641232**. I wasn't present at that meeting. I was on annual leave. I don't recall if a protocol was put in place to govern the relationship between DLA, Dundas & Wilson, TIE and the Council. On balance probably not although, as mentioned earlier, I subsequently believed that there was a protocol in respect of signing agreements and certifying them. That was insisted upon in relation to DLA's work. I note from the minute that there's a reference to it being the case that, contractually, Dundas & Wilson were procured by CEC and DLA by TIE. I don't know who carried out the procurement exercise which led to the contract supposedly between the Council and Dundas & Wilson. Other people in the Council might have an answer to that but it certainly did not come through my Commercial Practice Team. I didn't see any fee notes from Dundas & Wilson. Maybe they were sent to TIE. The nature of the relationship was never really fully explained or visible to me.

22. In practice the relationship actually worked quite well with Dundas & Wilson. The relationship between Council officers and D&W was better, easier, more business-like and relaxed than with DLA. The relationship with DLA was a little bit different. This was probably because of the nature of the business. Their role was dealing with the INFRACO contract guarantee and finalisation of financial close. It was a different of type of relationship. The relationship probably wasn't as smooth with DLA as it was with the Dundas & Wilson set up.

23. My general recollection of my understanding in late 2006 / early 2007 was that design work was not going to be completed and statutory consents and approvals obtained before the INFRACO contract was entered into. I recall that it was a

regular item for discussion and concern within the B group meetings. Design matters were outwith the control of CEC. What I mean here is that the design of the Tram route and layout were the responsibility of SDS through the contract with TIE: SDS supplied design drawings to TIE. These drawings may have been shown to the Council for comment, but the Council had no contractual control over said drawings as far as I was aware. Statutory consent, such as planning and roads, was within CEC control as a matter of law. Other consents and approvals, such as utilities, would also be outwith the control of the City Council. The design was not completed by the time of signing of the INFRACO contract. I can't be specific about when I understood that this was going to be the case. It was over the course of the B Team's meetings. Without having access to my record of the meetings in a series of notebooks it's difficult to be specific as to a date.

24. The incompletion of design at the point of contract signing was probably an issue which became apparent later on down the line. It certainly wasn't one of the first issues flagged up to me when I became involved i.e. no one was saying that there is a mismatch between the SDS contract and the INFRACO contract. That came later. I can't be more specific about dates. I have a similar recollection concerning the MUDFA works progress. I later became aware that they were not progressing as expected in the programme run up to the signing of the infrastructure contract. Again I can't be specific about dates, having no access to my notes of B Team meetings.

25. From relatively early on there was an awareness shared within the B Team who were getting reports, obviously from their engineer colleagues in TIE, that progress was not as it should be. I understood, at the start of my involvement with the Tram Project, that the design and MUDFA would be complete by the time INFRACO was signed.

26. I think all issues about design, consents, approvals and MUDFA were reported to us at B Team meetings by our engineer colleagues from City Development. The B Team meetings did not involve TIE staff. Later the Legal Affairs Group was set up to bring TIE and the Council officers closer together. However, in the early to

medium term there were no joint meetings (other than in connection with land acquisition), certainly not involving CEC Legal and TIE. The engineers within City Development did have a closer working relationship with their counterparts at TIE. It was typically Andy Conway of City Development who was reporting information into the B Team meetings during the initial stages. He was a senior engineer with CEC.

27. One concern I had from quite early on in my involvement was 'why TIE?' I didn't know why TIE had been set up. It seemed a strange and unusual vehicle. CEC could have gone down another route. They could have procured the services of engineers or a firm of consulting engineers who had experience in designing and building tram routes. Certainly down in England a number of local authorities were constructing tram projects. It would have been possible to draw on experience from consulting engineers. It seemed strange that a brand new company was set up. I had misgivings about that. I also had slight misgivings about how the Council got round any possible procurement issues in entering into the services arrangement with TIE, without as far as I was aware any competitive process.

28. If the contracts had not been separated out and, instead, a joint design and build contract had been put in place some of the issues might have been overcome e.g. TIE would have been able to operate in its capacity within CEC and not as the contracting party responsible for delivery of the entire project.

DESIGN

29. I recall a general and continuing awareness of delay in design and obtaining the statutory approvals and consents. I recall picking up on a reference by TIE to the settlement of a claim made by SDS . The amount proposed rang warning bells, as I recall the figure was at or above the limit laid down by the Council for TIE. I felt it my duty to raise concerns, particularly about governance and authority concerning financial settlements coming so soon after Council consideration of such matters. My recollection was that TIE's explanation for delay and design issues was due to problems within SDS. I'm not sure if that was put down to

resourcing or some other reason. I don't recall whether TIE provided full reasons why there were delays, from their own perspective, in the form of a document. There were certainly discussions between TIE and CEC about why there was a delay with the designs. We may have had a verbal briefing by Alistair Sim but my recollection is not as good on that without reference to my my Tram Project notebooks. I am referring here to the period before the establishment of the Legal Affairs Group.

30. I refer to my email exchanges with Gill Lindsay about 6 February, 28 February and 15 April 2008 found at **CEC01400818**, **CEC01400987, CEC01399489**. The main risk to the Council was of a financial nature. The Council was to act as guarantor to TIE's contractual obligations with third parties. To a lesser extent there were risks to the project aims and reputational risks for the Council. From a governmental perspective, there were also issues which I flagged up in the email to Gill dated 28 February 2008 (**CEC01400987**). I asked whether the Chief Executive could validly exercise delegated powers from the Council on 20 December 2007 given the changing circumstances. Officers had serious concerns about unresolved and un-quantified issues. There was consideration being given to whether there had been a material change in the situation since the Council decision on 20 December 2007. Risk was mitigated, as far as possible, by sticking as close as possible to the final business case. This ensured that only quantifiable and acceptable issues were made. I distinguish Council led changes from delays resulting from inadequate applications by SDS. What I mean here is that the applications submitted by SDS were not of a sufficient technical standard and quality to enable proper consideration. That is covered in my email of 7 February (**CEC01400818)**. Those risks were accepted by the public sector. In other words, as I refer in my email, certain risk items lay more appropriately with the Council and its statutory responsibilities for planning approvals and as Roads Authority for bridges and structures. I was concerned about a risk management approach which fettered the Council's statutory responsibilities. I covered that in my email of 7 February 2008.

31. I think, in general terms, there was a lot of work put in by TIE with regards to risk in their negotiations with INFRACO. They were the ones really trying to drive towards the conclusion of the project, or Financial Close , and ensure that management of the SDS design was carefully scrutinised. TIE were trying to sit on top of SDS. They tried to get SDS to produce the designs (working closely with the Council in its other statutory roles as roads, bridges and planning authority) and make sure that a decent package was put forward for consideration by the Council. However, there was a question mark hanging over the amount of cash set aside by TIE to cover these risks. There were obviously tensions between getting the design right, getting it right within a tight timescale, satisfying the Council so that it could issue its approvals and consents and trying to keep within the price.

32. I think, in terms of mitigating the risk, there were clearly discussions taking place within CEC. I couldn't go so far as to say there was a protocol because I didn't see it. There might have been one. Planning, roads and bridges officials from CEC would work closely with TIE and SDS and state the quality and the standard of design that was needed to be able to consider the design within CEC's statutory timescales. In other words, if SDS could not reach those standards then it would cause CEC difficulties. There was an agreed process between SDS, TIE and Council officials.

33. As to whether CEC could have done anything once they became aware of the risks I think there are two different issues there. There's the technical side of things in trying to ensure a good package was put together so that the SDS product could be run as smoothly as possible i.e. approvals by the Council wearing its hats as roads/bridges and planning authority. On the other hand there was the Council as client promoter of the Tram Project and the likelihood that it might have to bear the cost of the additional risk. There was always that potential for conflict by the wearing of various hats. CEC had to ensure that, on the one hand, the statutory functions of planning and roads weren't fettered in any way (and weren't compromised). On the other hand CEC as client and promoter wanted to achieve best price possible and ideally cut out any risk. In general

terms the responsibility for cutting out risk lay with TIE as the negotiating and contracting party, not with CEC.

34. I was not involved in discussions between TIE, SDS, and BBS on the design delay. These discussions may have involved Council engineers but I'm not certain of that. I would hazard an educated guess and say that possibly people like Duncan Fraser and maybe Andy Conway were involved in the discussions. They were both engineers.

35. I refer to the draft opinion from Richard Keane QC on the interpretation of the INFRACO contract given in the course of dispute resolution dated 14 January 2010 and found at **CEC00356397**. At paragraph 13 he paraphrases paragraph 3.4 of the INFRACO contract. It is stated there that *"for the avoidance of doubt normal development in completion of designs means the evolution of design through the stages of preliminary to construction stage and excludes changes of design principles, shape CONFIDENTIAL and form and outline specification."* My best recollection is that I was no longer involved to any significant extent in the Tram Project when this opinion of Senior Counsel was issued on 14 January 2010. I actually left the Council in April 2011. However, at that point in January 2010 I was almost exclusively working in litigation. I don't recall being shown this opinion. I was not aware of this clause in the contract until disputes arose after the award and after I had read about it in this opinion. This statement was given over two days, namely 8th and 29th March. Between these two dates I was supplied by the Inquiry Team with additional documentation which allowed me to confirm that I did receive Schedule 4 of the Infraco Contract on or around 15th April 2008. My views now are that this particular Clause was unsatisfactory from the Council's interest. It had the effect of setting in stone as at 25 November 2007 the design drawings, a date which turned out to be many months before Financial Close.

36. The overriding feeling, in summing up on design, is one of disappointment and frustration that a contract for design could have been let in such terms that ultimately led to uncertainty, risk, and ultimately additional costs for the Council.

It was surprising that time constraints were not inserted into the SDS contract. Particularly when it must have been known by TIE that the SDS contract was one of the early significant building blocks in the contract suite and that following upon that there was clearly going to be an INFRACO contract which depended fundamentally on the performance and output of the SDS contract.

UTILITIES

37. I am referred to the email I am copied into dated 4 July 2007 and found at **CEC01641228**. I don't recall the detail in 2007 of delay and difficulties in undertaking the utilities diversion work. However, referring to the email of 4 July 2007, issues raised about the two agreements with the utility companies were still to be concluded and I had concerns about the risk to the CEC. I was copied into these emails. MUDFA updates were reported regularly to the B Team meetings by CEC engineers. Any delay with the MUDFA works may result in financial risks which could lead to an increased price of the contract. In effect, it was similar to concerns about the SDS contract. It was another critical building block in the whole suite of contracts. If there was delay and additional expenditure in the MUDFA contract then that, more than likely, would impact on the INFRACO contract. In as much as I can't remember whether it went over budget, I can't comment how much the MUDFA contract actually cost in the end.

38. In an email chain dated 7 April 2008 and found at **CEC01541528** Andrew Fitchie notes that TIE's project management had wished to proceed with MUDFA, with as little CEC involvement as possible. The first time I saw this email was during my preparation for this Inquiry. I am not included in the email chain. . They perhaps viewed CEC involvement as having potential for delaying or obstructing progress with MUDFA. . More CEC involvement in MUDFA in my opinion could only have helped rather than hindered the progress as CEC engineers would be used to working alongside utilities companies in roads and bridges maintained by the Council throughout the City. Engineers could have worked or been seconded to TIE to work alongside on the MUDFA contract. More CEC involvement in MUDFA probably would have helped at the time but whether it then would have blurred

roles, or the separation of roles, between CEC and TIE , that may well have been an issue. Overall, it's difficult to opine on.

39. It is suggested that, when the MUDFA contract was entered into, the MUDFA contractor appeared to have sought a covenantal guarantee from CEC of TIE's obligations under the contract in the event of TIE default. I have considered whether a covenant was provided by CEC to the MUDFA contractor to deal with the possibility of TIE default. Not to my knowledge or recollection but I'm happy to stand corrected if such a document were produced for consideration. It's not within my knowledge. Council engineers may be better placed to comment on this matter.

40. The email from Rebecca Andrew dated 7 February 2007 and found at **CEC01730123** notes that that in order for the land acquisitions to take place (and therefore drawdown around £10m of grant), the Council needs to issue GVD2 ("General Vesting Declaration") notices at least 28 days before the year end. The Council Solicitor would not be prepared to sign GVD2 notices before being satisfied on the term of the Ministerial approval and conditions attached. I do not recall that land acquisition by CEC working with TIE and Dundas & Wilson through the GVD procedure was a risk issue contributing to delay of the project. There was no mention of it as an outstanding issue at financial close in May 2008. I make reference to document **CEC01247788** which is my briefing note to Gill Lindsay. Dundas & Wilson will be able to confirm when the land acquisition was actually completed, but I see also no mention in report to Council of 1 May 2008 under reference **CEC01228336**. If I'm wrong and GVD procedure was delayed, it was not a matter which led to delay of financial close and signing of the contracts. The overriding causes of delay were outlined in the report to Council on 1 May e.g. minimising risk across the contract suite.

41. I am referred to the minutes of meeting between CEC and DLA and TIE dated 30 May 2007 and found at **CEC01567363**. The minutes note that the process of negotiating with the utilities, especially on indemnities, has been a laborious one with each utility taking different positions, in some cases disproportionate to the

scope and volume of the actual diversion works. I was not present at this meeting on 30 May 2007. I've checked my personal diary and I was on annual leave. I do not recall if I was subsequently privy to the minute of this meeting. I can fully understand why Telewest and Scottish Power would have wanted to see TIE's covenant supported by CEC. They had no assets of their own to speak of and they were wholly funded by City of Edinburgh Council and behind the Council funding came from Scottish Government.. The process of negotiating with a number of utility companies is customarily difficult in my experience on other projects e.g. the Borders Railway. They're always extremely protective of their equipment and spare no effort in negotiating any relevant agreements.

42. In an email dated 4 July 2007 and found at **CEC01641228** Andy Conway noted that the MUDFA works would be delayed by CEC refusing to become party to the SP and Telewest agreements. CEC confirms that OCIP (insurance extends to them) and agreed to underwrite the contracts around July 2007. I was a recipient of this email of 4 July. I'm not sure why there was a delay between what appears to have been a useful meeting on 30 May 2007 airing the issues regarding Telewest and Scottish Power and proposing a solution. I do not know precisely when that minute of meeting under reference **CEC01567363, CEC01556713, CEC01641244, CEC01567363 and CEC01641402**was produced to the CEC officials, City Development or Legal. Matters seem to have been in abeyance until the flurry of emails in early July finally brought a conclusion to the Telewest and Scottish Power agreements.

43. Generally, taking an overview of the correspondence, the discussions appear to have been protracted until the pressure was turned up by Andy Conway's email of 4 July 2007. Concerns were escalated to the Council Solicitor and Director of Corporate Services (Jim Inch) over the course of a few days. The matter was also escalated within TIE as emails involved Directors too. I would agree that in the final days of the dialogue there was pressure from TIE to sign off the agreements **CEC01712270**, **CEC01641276** and **CEC01567362**. However, I would note that the agreements were still unsigned in August of 2007 under reference document **CEC01566861** paragraph 2.1 of that report. CEC had to chase up the matter.

44. It is suggested that the utilities design and utilities works for phase 1b, the Roseburn link, were at least initially carried out before the utilities design and utilities work for phase 1a, the line from the airport to Leith waterfront. I am asked whether it is the case that, at least initially, the utility design and utility works for phase 1b were carried out before the utility design and utility works for phase 1a. I am unable to respond to these questions without reference to documents. City Development Officers would be better placed to give an answer to these timings.

INFRASTRUCTURE

45. The email dated 22 March 2007 by Rebecca Andrew found at **CEC01558752** notes that TIE had budgeted for the back-filling of various CEC staff, including two solicitors, which would result in Legal Services gaining extra resources at no additional cost, but that Gill Lindsay and John McMurdo had decided not to appoint that additional cover. I was aware of the offer of funding to backfill various CEC staff as set out in Rebecca Andrew's email of 22 March 2007. A considerable amount of my time as well as that of my colleague, Alan Squair, was being spent working on various aspects of the Tram Project e.g. land acquisition, planning approvals, governance, risk etc. This took us away from our other duties on managing respective teams and non-tram legal work. Our time and input was essential on the Tram Project but there were pressures from other work. This was recognised by TIE and CEC members of the Legal and Property Working Group. The possible resolution was to make available additional funding to TIE from CEC so that temporary cover for myself and Alan Squair could be employed to deal with non-tram legal work. I do not recall why Gill Lindsay and John McMurdo decided not to appoint the additional cover.

46. I can't remember whether additional cover was ultimately provided to CEC. At that time, as far as I can remember, it was mostly myself and Alan Squair. I can't remember exactly when Nick Smith started to work on the project, nor how his involvement built up. I was aware that a person (s) were appointed in an in-house Solicitor capacity at TIE. I may have met one in-house member of staff. I don't

recall whether that was an enduring post. It was probably earlier in the project than later. My recollection is that it came as a surprise initially that they did have an in-house Solicitor. I understood that person or persons to be working on the commercial side. I may have met them once. I think it was a female. There was certainly no joint working between CEC Solicitors and TIE's in-house Solicitor.

47. The Highlight Report to the IPG dated 30 August 2008 found at **CEC01566861** notes that the capping of the grant from TS for the Tram Project at £500 million changed the risk profile for the Council. The report sought at paragraph 4.1 guidance on the procurement of resources necessary to provide a risk assessment and analysis of the INFRACO contract for the Council within the available timescales. Having read the document, I'm unable to recall specifically what steps were taken following the report to the Chief Executive's Internal Planning Group. I probably came to understand the risks that were there through a selection of briefings, documents and meetings. As to dates and times I can't remember. A workshop on risk comes to mind which was probably run by TIE. This was the sort of issue that was discussed at the Legal Affairs Group. It was a regular item in the City Development's Department's reports to the Chief Executive's Internal Planning Group. It was almost a standing item. In the run up to financial close; it was almost a mantra i.e. *"be aware of this"*. It was one of the key issues for the Council.

48. Primary responsibility for ensuring the affordability of the Tram Project to the Council would fall on the Director of Finance, Donald McGougan, and the Director of City Development, Andrew Holmes. They were also responsible for ensuring that the Tram Project was delivered on time, on budget and that the Council understood the risks and liabilities arising from the INFRACO contract. They received support from the Council Solicitor, particularly on the risks and liabilities. Indeed, as a matter of governance full Council required these two Directors and the Council Solicitor to certify their satisfaction on all matters to the Chief Executive before the latter was in a position to move to Financial Close. It was therefore a Council instruction that the Council Solicitor supported these Directors with advice on the risks and liabilities arising from the INFRACO contract.

Information was passed across through CEC's involvement with the Committees, for example, the Legal Affairs Committee. I'm talking here about the ultimate step of signing of the contract and the mechanism which full Council agreed to. Ultimately, the Chief Executive had to be satisfied, in writing, by the Director of City Development, Director of Finance and Gill Lindsay certifying to him that everything was in order. Of course, below that, there was all the other governance mechanism and groups considering the position and feeding that into the final approval.

49. The minutes of the first Legal Affairs Group dated 25 July 2007 are found at **CEC01660091**. I was not in attendance as I was on previously approved leave that afternoon. It was most unusual for me to miss a Legal Affairs Group meeting thereafter. The role of the Legal Affairs Group, to my recollection, was born out of frustration with the relationship between CEC officers and TIE. There was a lack of information coming from TIE on the project progress. A closer eye had to be kept on TIE. The report to the Chief Executive's IPG Group on 30 August 2007 under reference **CEC01566861** at paragraph 6.2, states that *"A Legal Affairs Committee has been set up attended by Willie Gallagher and TIE Colleagues, Directors of Corporate Services and City Development, Council Solicitor and colleagues. This meeting will support and drive co-ordination and progress in a critical delivery period for the project."* As I recall this was the machinery put in place by the Chief Executive following concerns raised by the B Team. No doubt the Chief Executive also had discussions in private with Willie Gallagher about the sensitivities of this.

50. The Legal Affairs Group dealt with a broad range of issues. SDS design and MUDFA were the principal issues but there would be other significant issues discussed too, including governance, land acquisition, utilities agreements, third party agreements and building fixing agreements. The agenda changed as the project moved through various phases. The Legal Affairs Group might have discussed issues surrounding procurement and the negotiation of the INFRACO contract. There was a strand of concern about the INFRACO contract and duty of care i.e. who was acting in the Council on the Council's behalf to protect its

interests etc. In summary, however, on the establishment of the Legal Affairs Group I can only say there were a raft of issues which were of concern to the B Team which I think ultimately led to the Chief Executive taking the decision that matters needed to be resolved.

51. There could have been a separate committee involving TIE and CEC that dealt with procurement issues specifically but I didn't have knowledge of one.

52. There is an email TIE sent Gill Lindsay dated 31 July 2007 found at **CEC01660253** and a letter from DLA to TIE dated 23 June 2005 found at **CEC01660254**. DLA confirm in this correspondence that they owed the same contractual duty of care to CEC as they owed TIE, subject to certain conditions. In an email from Gill Lindsay to Graeme Bissett dated 10 August 2007 and found at **CEC00013273** Gill Lindsay advises Graeme Bissett that CEC required a legal acceptance from DLA that the Council was a joint client with TIE or was the ultimate client i.e. CEC required there to be a direct client / legal adviser relationship and not merely a duty of care. I do not know what prompted a discussion between Gill Lindsay and Susan Clark of TIE about DLA (referred to in **CEC01660253**). Meetings, discussions and telephone conversations quite often took place at a higher level than the B Team and their counterparts in TIE. High level discussions and outcomes were not always fed back to the B Team. I would refer to the full terms of my email to Gill Lindsay dated 15 August 2007 found at **CEC00013273**. This email was very carefully put together following lengthy discussions between myself, Alan Squair and Nick Smith. We knew it would not sit well with Gill because of the views expressed by her to Graeme Bissett on 10 August. In simple terms we did not agree with her approach to this hugely significant issue. I cannot explain the line that Gill took.

53. I cover why Council Officers wished an acceptance by DLA that CEC were a joint client or the ultimate client in paragraph 5 of my email of 15 August 2007 (**CEC00013273**) and paragraph 7 and 9 regarding my, or our concerns, on joint client issues (also **CEC00013273**) . It was Gill Lindsay who was pursuing the idea of joint client. I had major concerns about this. I felt that DLA providing a

document confirming CEC and TIE as joint client provided no additional protection or comfort. I set out my reasons in my email. There were too many doubts about the practicality of it. I set out further my views in the email to Gill dated 24 August 2007.

54. My actual concern was that there was a conflict of interest. That was written large in my view. There were two separate legal entities here; the City of Edinburgh Council and TIE. The Council, certainly through its legal officers at my level or below, hadn't been involved at all in determining the procurement strategy. They hadn't been involved in procuring, in particular, the legal services respectively from Dundas & Wilson and from DLA. This was a view shared by both Alan Squair and Nick Smith. We took quite some time discussing these concerns . It was not a matter which was referred up to Gill lightly or quickly. We were sufficiently concerned that what was being proposed was not in the Council's best interests. We took quite some time to put the emails together. . There's also the additional issue which caused us concern. We were concerned that CEC, in its wider sense, through City Development, Finance and Legal had not been involved in the early days of the work done by TIE and legally supported by DLA. I thought it was too big a gap to close by saying *"here's a duty of care letter, we've always acted in the Council's best interests"*. I felt that that could not be closed. Even if it could have been closed I didn't think it afforded proper protection to the Council's best interests.

55. There were probably concerns from early on about roles and responsibilities. I had concerns about who was doing what, why 'so and so' was doing this and why 'so and so' was involved here. However these were probably not issues which were really nailed down until July / August of 2007. We were busy with other aspects of the project, particularly land acquisition. Until that time we probably hadn't any reason to really pursue these matters. I think the concerns began to crystallise with the progression of INFRACO. They also crystallised when it began to be considered as to how the Council would give approval to TIE for signing off the contract and what documents or due diligence was necessary. This all fed

into us beginning to look more closely and asking *"who is protecting the Council's interests?"* and *" is that the best way of protecting the Council's interests?"*

56. At the time I thought it would have been beneficial to have a separate legal firm instructed to represent CEC on the project. Whether it would have changed things I can't say. It certainly would have eased my concerns if an independent reviewer, backed up with professional indemnity, had taken a fresh look from the Council's perspective on the evolution of the whole process and contractual framework with associated risk matrix. This would have been notwithstanding the fact that the Council would be guarantor for all of TIE's obligations through the INFRACO contract. The independent reviewer would provide comment as to whether the structure was fit for purpose and working in the Council's best interests. I remain unshaken from these views. I can't say whether it would have made an actual difference to the outcome of the project in terms of completion date, cost and operational readiness but, certainly in terms of comfort, it would have.

57. With regards to why an independent review wasn't done, I think it became clear that the deal had already been done. The pass had been sold when Gill responded to me in her memo of 17 August 2007 (**TIE00897231**). I'm sure she said that a decision had already been taken and this is how it's going to be.

58. The email dated 1 August 2007 from Nick Smith to members of the B team found at **CEC01564769** expresses concern about the notion that TIE's instructions are in effect the Council's instructions and raises the question of whether DLA have been fully considering CEC's needs/requirements to date. He notes that the project advisers themselves appear to have concerns that CEC and TIE's interests may not always coincide. He suggests a quick external review. I think that Nick was referring to DLA when he notes 'project advisers'. This was very early in our thought process. We went on in the course of the following days and weeks to refine our views. Whilst Nick set the ball rolling, we had further discussion and agreed 100% what went out in my e mails to Gill. I absolutely agreed with an external review to ascertain whether CEC's interests had been

taken into account. At paragraph 4 and the final paragraph in the email I sent to Gill Lindsay dated 24 August 2007 (found at **CEC01567520**) I recommended such a review.

59. I think Gill Lindsay misunderstood what I had said in my first email, because when she came back to me in her memo of 17 August and found at **TIE00897231** she said *"from the information you've supplied to me and from other information which I've been required to source elsewhere, I'm of the view that professional negligence is more likely to arise if the Council to adopt a do nothing approach being the preferred option in my paper"*. I think she either didn't read my memo properly or misunderstood. It was absolutely not the position that I was taking. My memo could hardly have been clearer.

60. I refer to the email chain dated 8 August 2007 involving Graeme Bissett and found at **CEC01660541**. I note that Susan Clark emails Graeme Bissett in response and states that the intention had always been for contracts to be entered into between TIE and the bidders, suggests that this issue should have been raised earlier and that TIE had offered to sit down to discuss issues with me but that no request to meet had been made. Why I viewed it as important to email Graeme Bissett directly on this issue can be found in the first paragraph of my email. I state that *"I have been considering the matters raised at last week's Workshop held at tie's offices, particularly the role of the Council in relation to the TRAMCO and INFRACO contracts. Susan Clark indicated at the Workshop that the Council was not expected to be a party to either of these contracts being procured by tie."* Susan Clark indicated to the workshop that the Council was not expected to be a party to either of the contracts being procured. I can't remember if Graeme had perhaps been at the workshop and that I thought it was appropriate to raise these matters with him. I suspect that's the case but I can't be absolutely sure. He was a regular contact for issues of governance within TIE. He ended up taking lead responsibility for the financial Close Reports etc. Clearly there was a link with him and I think that link derived from the workshop. It certainly wasn't unusual for me to be emailing him directly.

61. I refer to Gill Lindsay's email of 17 August 2007 and found at **TIE00897231**. I read her email as saying she was not in favour of an independent review. I make reference to paragraph 2 where she says "*It is for this reason that the decision to instruct DLA on behalf of both Tie and the Council in extension of the previous duty of care arrangement was taken over a week ago. I did not understand and certainly had not been advised of DLA not being in a position to so act.*" I was not impressed with Gill Lindsay's reply to me. I disagreed. Her position was quite clear from the final paragraph of her memo when she says *"in all the circumstances there will be no further dialogue of this nature"*. I found this unacceptable. I went on to ignore that and carried on as I thought it was appropriate to act in the Council's interest and tease the matter out. I think there may have been further dialogue that perhaps wasn't recorded with Gill Lindsay on the topic. There was a meeting certainly on Friday 24 August 2007. There may have been possibly another meeting but certainly that is one I have seen as referred to in one of the emails. I felt there wasn't anything further I could do other than raise the issue with Gill Lindsay. I continued to raise it, maybe forcefully, but I took the view that, at the end of the day, the decision was hers. Whether I agreed with it or not I had to defer to the decision being taken by, or partly being taken by, the Council's Solicitor. I have to say, I don't think that we (the authors of these emails - myself, Alan Squair and Nick Smith) ever saw what was finally agreed in writing between the Council Solicitor and DLA. Certainly throughout the remainder of August, and I think there may be references to it beyond that, we still wished to see what had been agreed. I don't believe we ever did. Gill Lindsay was my line manager throughout both when I was Principal Solicitor in Commercial Practice and when I was thereafter Principal Solicitor in Litigation.

62. I believe Nick Smith drafted the paper on the INFRACO / TRAMCO options dated 2 August 2007 and found at **CEC01567430**. I cannot remember if he ran it past me before issuing to Gill Lindsay. On balance I would suggest he probably did because that was how we customarily ran things. I suspect he probably would have shown it to me for comment or approval before he sent it to Gill given that

we were working together. We had a particularly close working relationship at that time on these issues of concern.

63. With regards to the options discussed within the paper (**CEC01567430**), I did not agree with option 1 i.e. CEC carry out a review of all relevant documents. I was not in favour of that. I agreed with Nick that we didn't have the experience or the resources to carry out such a review, especially within the timescale available. I can't recall if we were even shown the contract documents as they were at that stage. We believed them to be voluminous . To take a cold look at that, not having been involved in the drafting or the presumably numerous discussions which took place between TIE and DLA, we just felt it was a was a step too far. Option 2 was DLA being asked to provide CEC with an issues paper. Nick mentioned that there could be a Chinese wall arrangement. That was never very appealing. It had the advantage that DLA were up to speed with all the documents and negotiations and that we'd be party to it. However, as far as we were concerned, DLA had always been advising TIE and were likely to consider themselves conflicted. Therefore they were unable to advise CEC directly on such issues. As an aside, it does seem odd that reference is made to a duty of care letter. I think this must go back to Susan Clark's email to Gill. She said such a letter had been in existence since something like 2003 (possibly 2005) and was never sent to CEC. That was another issue which caused us a bit of consternation. Nick goes on to say *"in addition they will likely say that they cannot provide such advice as CEC's advice or responses over the past few years regarding negotiations may have differed from TIE's thereby changing any potential negotiated outcomes, ie, the task could be considered impossible".* I agreed with his conclusion that that option was theoretically possible and desirable but it was unlikely to succeed. It would always come back to the fact that the advice was based on TIE's and not CEC's instructions to DLA. Option 3 is that *"an independent law firm is asked to review the documentation fresh".* The advantage of this was that the Council could be certain that all relevant issues had been looked at in detail and any particular concerns dealt with appropriately. The disadvantage was that it was unlikely to be practicable given timescales, especially given the amount of documentation involved and the lengthy history of

the project. It was likely to be impracticable in the circumstances. I still felt it was the most appropriate option for protecting the Council's interests. Option 4 was for the Council simply to rely on what TIE had done to date and approve the Council's position as being considered and covered off as best as TIE could achieve it on CEC's behalf. Nick said that that was easily achievable within the timescale. It is noticeable that he only devotes two lines to the advantages. Against that, this option relies on TIE having considered the Council's interests as opposed to their own throughout the negotiations. It notes that even DLA advises that the two parties will have different interests from time to time. An example of this was that TIE was interested in the delivery of a tram and the Council were interested in the wider operating ramifications. This option might invite criticism from the Council with regards to it may be asked why there's not been more involvement in the process to date. The Councillors would have to seek sign off from the Council's Solicitor from the Council's perspective in any event. This would not be possible without a full review which would take time. He says that ultimately the decision as to whether to trust what TIE have done would be a commercial and not a legal decision. He concludes that this is likely to be the most practical solution given the timescales but is clearly open to criticism on a number of fronts. He also concludes that it increased the Council's risk profile as CEC sign up to arrangements it did not negotiate. I am asked, in all the circumstances, what action was taken by CEC Legal in order to alleviate their concerns that the contract may not protect the Council's interests. I should first state that Nick Smith's paper, issued early in August 2007 prompted very serious discussion within the small CEC Legal team, leading to the series of internal e-mails discussed above. Short of repeatedly raising concerns with the Council Solicitor and making alternative recommendations, it was felt that the matter could not be pursued beyond that. All that remained, in an unsatisfactory situation, was that CEC Legal did its best to work closely with colleagues in City Development and Finance to maintain a detailed overview of the progress by TIE towards Financial Close, concentrating on mitigating risk . Under the auspices of the IPG matters of concern about risk arising from Infraco were raised on a regular basis. As is detailed elsewhere in my statement CEC Legal was unable to influence the contractual terms of the Infraco agreement, but took what steps were open to

insist that TIE were as transparent as possible in sharing information on risk and its quantification. In effect we were left to run with the preferred option adopted by the Council Solicitor, namely relying on DLA. CEC Legal did not conduct a separate assessment of the evolving contract documentation.

64. I felt frustrated and disappointed at the time raising these issues time and time again and nothing being followed through. We held these views genuinely and considered them to be in the Council's best interest. We never really understood why they were rejected. To my mind it was not fully explained why. On looking back at the issues and timescales, it would have been possible to have secured an external independent review of the contract documentation when one considers that the desirability of such a review was raised in August 2007 and many months passed before Financial Close was finally achieved in 2008.

65. I refer to Graeme Bissett's email to Susan Clark dated 8 August 2007 and found at **CEC01660541**. I note that Susan Clark emails Graeme Bissett in response and states that the intention had always been for contracts to be entered into between TIE and the bidders, suggesting that this issue should have been raised earlier and that she had offered to sit down to discuss issues with me but that no request to meet had been made. I haven't previously seen this email before my preparation for the Inquiry. It is clearly an internal memorandum within TIE. I have to say it was fairly typical of the brusque approach by the author when questions were raised by CEC Legal. I would observe that she did not make much of an effort to respond to the points I raised with Graeme Bissett and the dialogue moved on with other people internally and with TIE and DLA Piper. I'm asked whether this is a general view across CEC of TIE as a whole or just of certain individuals. Certainly some individuals were more difficult to deal with than others at TIE. I had a good working relationship with people like Alistair Sim. I worked with him for several years as the land assembly and numerous agreements and difficult issues were progressed. Susan Clark was probably one of the less easy to deal with at TIE. Stuart McGarrity was also in that category. The meeting probably ultimately didn't occur between myself and Susan Clark. I don't think the meeting would have been much use in any course. The main

dialogue had to take place between DLA and Gill Lindsay. I don't think it would have advanced matters significantly meeting with Susan.

66. In my email dated 15 August 2007 found at **CEC00013273** I set out at length various concerns of the "B Team" as to whether CEC's interests were sufficiently protected by DLA treating CEC and TIE as joint clients and raised the possibility of CEC seeking independent legal advice on the INFRACO and TRAMCO contracts. The B Team comprised solely CEC staff. It was officers from Legal Services, Finance, City Development (it included planners, surveyors and engineers). It came together as a grouping of officers involved in pursuing various aspects of the Tram Project and looking after the Council's interests. It was not a formal grouping appointed by Councillors or Directors. Its roles and remit were not defined in writing or set by Council Committee. I, along with my legal colleagues Alan Squair and Nick Smith, were becoming increasingly concerned about the duty of care issue tied in with the role of DLA Piper in relation to the obligations of the Council. In my view, having regard to all the concerns expressed in my email of 15 August and subsequently in my email dated 24 August (**CEC01567520**), independent legal advice was in the Council's best interests. In addition, the client departments wanted independent legal review of the contract documents. I refer again to **CEC01567520** which was an email from Duncan Fraser to his Director and others. Gill Lindsay was not persuaded to our point of view. Concerns raised at our level were often disregarded . They were reported, they were raised and on some occasions nothing further was heard. I am unable to offer a view as to what extent DLA informed TIE about the consequences of Schedule 4. It would not have been customary for the Council to have been copied into such advice. On the other hand DLA did , following their agreement with the Council Solicitor, offer a series of explanatory letters on Schedule 4 in the period prior to Financial Close.

67. I am asked what I understood from Gill Lindsay's response to my email of 15 August 2007 outlining concerns of the "B Team" found at **CEC00013273** . In Gill Lindsay's response dated 17 August 2007 and found at **TIE00897231** she states that *"In all the circumstances there will be no further dialogue of this nature. Future communication must be confined to advance the agreed way forward ..."*

I felt we were just being told to shut up by Gill Lindsay. She was essentially saying "*don't give me any more hassle about this issue*". I am asked how I viewed that on a professional basis. I found I could not agree with Gill Lindsay's approach which in my view was not in the best interests of the Council. I did not feel that I had sufficient grounds to understand why she was proceeding as stated.

68. I refer to the email between Andrew Fitchie and Gill Lindsay dated 16 August 2007 and found at **CEC01711054** and the draft letter he proposed to send to the Council to affirm DLA's duty of care to the Council and that the Council and TIE were joint clients of DLA found at **CEC01711055**. I note that this letter was in the same terms as the letter provided by DLA to TIE on 23 June 2005 found at **CEC01660254**. It is clear from the email that it was not sent to anyone other than Gill on 16 August 2007. I was made aware by Gill of the email but cannot be certain of exactly when. I do make reference to it in my email of 24 August 2007 (**CEC01567520**) at paragraph 3. Having now considered Andrew's letter I may have understood the passage quoted from said letter as I dealt with it in my email of 24 August in the third paragraph from the end. I have to say that it's a somewhat contradictory letter. A general observation is that there were sometimes discussions taking place above my level that weren't fed back down to me. I was missing pieces of the jigsaw. Obviously, this is set out in the letter as Andrew says to Gill *"I very much appreciate your call and the direct contact"*. I don't know what was said in that conversation. I don't know what, if anything, might have been relayed by Gill about what we had been saying internally to her. Suffice to say they discussed matters. I did find it a very odd letter. I did not consider it was my place to review the legal advice provided by DLA: I was more concerned about the various roles and positioning in relation to the Council's interests. I don't recall whether a signed version of Andrew Fitchie's letter was provided to CEC. Were it provided I assume it would have been sent to Gill by Andrew Fitchie. I do not have any recollection of seeing such a letter.

69. In the email I forwarded Gill Lindsay from Duncan Fraser dated 23 August 2007 and found at **CEC01567520** Duncan notes that the outcome of the Government's

decision to make the Council *"funder of last resort"* significantly changed the risk profile of the Council. He further noted that the client department and City Development had given an informal instruction that an independent legal review be urgently initiated of the contractual risks for the Council. I was aware of the concerns expressed by Duncan Fraser in his email as the email had been copied to me. I had previously discussed the issue with Duncan Fraser and agreed with his requirement for external legal resource. Gill's views on the issue are to be found in her memo of 17 August 2007 (already considered at **TIE00897231**). I do recall that she was not sympathetic to the recommendation and instruction. Duncan Fraser was a client of ours. He was a client officer within City Development Department so this was, in effect, an instruction from him. However, the decision had already been taken to instruct DLA on behalf of CEC and TIE, referring back to Gill's memo of 17th August 2007. I would also draw to the Inquiry's attention the email of 31 July 2007 from Susan Clark to Gill found at **CEC01564769**. She states *"since over two years' worth of work under the TIE mandate has been completed by DLA with relatively little interaction from CEC"*. In my mind that was a significant admission and that certainly wasn't CEC's fault. Things had been moving along without TIE seeking input from CEC.

70. I refer to the same email thread found at **CEC01567520**. I suggest that before CEC accepted the conditional duty of care offered by DLA, Gill Lindsay should obtain written confirmation from Andrew Holmes that all instructions given to DLA by TIE were and are *"identical to CEC's instructions as if emanating from CEC itself and as taking into account CEC's requirements, objectives and best interests"*. I also suggested that Gill Lindsay, as Council Solicitor, would wish to be similarly satisfied that this was the case. I'm not aware whether Gill Lindsay sought from Andrew Holmes the written confirmation suggested. This is on the basis that Gill did not correspond further on the matter with me.

71. I do not believe that I was satisfied in August 2007 that all instructions given to DLA by TIE were *"identical to CEC's instructions as if emanating from CEC itself and as taking into account CEC's requirements, objectives and best interests"*. My concerns are set out in my email of 24 August 2007 found at **CEC01567520**. I

state *"it is not clear to what extent the Council has been consulted over the past four years in relation to the complex deal structure and negotiations. The critical issue is that DLA are unlikely to be able to advise CEC what the outcome of the negotiations would have been had DLA received their instructions direct from CEC for the past four years".*

72. I have considered whether there were specific examples of why I wasn't satisfied that all the instructions given to DLA by TIE were identical to CEC. None come to mind. There were issues which came up later about whether TIE were withholding information from the Council, not giving full enough information and not updating things. However, looking back, at that time I can't remember any specific issues.

73. DLA's correspondence to CEC dated 29 August 2007 and found at **CEC01560936** discusses the allocation of contractual risks in the INFRACO contract. I don't recall whether I read and responded to this document and therefore cannot recall whether in 2007 I agreed with DLA's assessment. In any event I was not familiar with the number of documents referred to in the report to CEC. I am asked whether I have any views in hindsight after having seen the document. I have no comment.

74. I refer to the email with attachments from me dated 6 September 2007 and found at **CEC01651751**, **CEC01651752**, **CEC01651753**, **CEC01651754**, **CEC01651755** and **CEC01651756**. It provided Andrew Fitchie with Duncan Fraser's assessment of DLA's risk matrix. I refer to my email dated 6 September 2007 wherein it reads as if I was simply acting as a post box between Duncan Fraser and Andrew Fitchie. I am unable to recall if I discussed with Duncan Fraser his assessment of DLA's risk matrix and therefore cannot confirm whether I thought this risk matrix communicated an accurate picture of CEC's risk. I would defer to Duncan who undertook the assessment. I was probably sometime later drawn into commenting on the risk matrix. I certainly was not involved in the assembly of it.

75. I refer to an email to CEC dated 18 March 2008 attaching an INFRACO Risk Allocation Matrix produced by TIE and DLA which can be found at **CEC01399118**. In an e-mail of the same date, in the same thread, I advised that the document was *"a bit too abstract and one would really have to read the entire contract suite to put it in context and gain a full understanding"*. I went on, *"I still have concerns about the general movement of the more significant risks from Private to either Public or Shared"*. The risk registers were of some use in that they gave a concise method of allocation between public sector / private sector. However, they did not provide the full picture. One would really have to read the entire contract suite to put it in context and gain a full understanding. My concerns at 18 March were about the general movement of the more significant risks such as design approvals from private to either public or shared. These general concerns were shared with B Team members and Gill. I do not recall anybody taking immediate steps to address my concerns. I suppose it ground inexorably to a level of satisfaction by financial close.

76. I refer to the email from Susan Clark dated 11 September 2007 and found at **TIE00060115** and attachment found at **TIE00060116**. The attached note titled *'CEC approvals of Tram INFRACO / Tram Contracts'* sets out her understanding of the matters in respect of which CEC officials would require to satisfy themselves before making a recommendation to the full Council on the preferred bidder for the INFRACO and Tram contracts. I agreed that I and other CEC officials required to satisfy themselves on the matters listed in the opening paragraph of that note. This would have been the subject of previous discussion and agreement at Legal Affairs Group where CEC was represented by the Directors of Finance and City Development and the Council Solicitor. I don't recall now whether there were any additional matters on which I and other CEC officials would have required to be satisfied. TIE held all the cards. They were the main repository of information. We depended on them feeding that to us. We could only gain access to matters we may require to be satisfied on if TIE provided the information in the first instance.

77. The Invitation to Tender Notice for provision of consultancy services dated 18 September 2007 is found at **TIE00678245**. I think this is possibly the first time that I've seen this document (in preparation for the Inquiry interview). I doubt if it was placed by the Legal Department because the contacts mentioned are Duncan Fraser and Rebecca Andrew. They are respectively City Development and Finance officials. I believe that, in any event, CEC did not obtain independent legal advice on the risks to CEC arising from the INFRACO contract. I was not privy to any such advice. There was discussion within Team B on the provision of exterior consultancy services. It was an issue which was exercising not just legal but the client officers in Finance and City Development as well. This was reflected in Duncan Fraser's email referred to earlier at paragraph 69. He wrote directly to Gill Lindsay on the matter. This tender did come as a surprise when I saw it within the package of documents sent to me by the Inquiry. I see there's a contact officer. I can only presume it was someone in the Council's Procurement Department who actually put that document together and published it in the appropriate procurement journal. This is the only explanation I can give for it. It's a very odd one. Paul Bell isn't a name that means anything to me. Somebody obviously gave him instructions to do this because it's a fairly well informed submission. I would have welcomed the appointment of someone to undertake this role. I was surprised when I saw the tender when it was sent to me in the package of documents by the Inquiry. Initially, on reviewing it, I thought it came from TIE. Then I analysed the document and noted the memo from Steven Bell who was one of the Directors of TIE. He states that *"this was published yesterday. Did we expect it and are there any issues to manage from a communication perspective with the bidders or other stakeholders. It seems an extremely sensitive brief to put out into the public domain at this time."* I can understand where his concerns come from. It probably hit him like a thunderbolt. Normally, in terms of delegated powers from the Council as far as I can recall, only the Council Solicitor had the authority to seek external legal advice on behalf of the Council. Clients ought not to have been doing it themselves. Here it might well have been that the clients did it. It's fair to assume that it wasn't Gill who did it given her clearly stated position on the matter. I find the tender inexplicable. Clients didn't, in a general sense, independently do this sort of thing in terms of

the project i.e. advertising for roles. If it had been mentioned to us it would have come as good news. It hits the nail on the head in terms of what we wanted. I would suggest that Rebecca Andrew and Duncan Fraser, given their names have been inserted as contacts, may be able to shed further light. They would have been the ones able to arrange the meetings with the relevant personnel. It's still very odd that they didn't mention it to us. We would have welcomed this support at that juncture of the project. It is very close to the profile of the role we envisaged for an external consultant. Time wise it's interesting that it comes on 17 September 2007. It's coming after a very detailed dialogue within Legal and follows less than a month after Duncan Fraser's email. It was clearly carefully put together and mentions allocation matrix, the infrastructure and tram vehicle contracts and involves those risks that remain with the public sector.

78. In summary, I did not agree with the decision not to take independent legal advice as that had been my recommendation in August 2007. Reference is made to my email of 20 September 2007 to Gill found at **CEC01567660** where I dealt with this question. I quote *"You made reference to the instructions given to Andrew Fitchie. It would be helpful for us to receive a copy of any formal letter of instruction sent to Andrew, together with his acceptance or terms of engagement letter. This would give us good understanding of his role and remit. Can you confirm that DLA's appointment will endure through to financial close and that by implication an external independent legal review is not to be sought".* I pursued clarification again on 21 September under reference to the same document. I do not recall if I received a response. It's entirely possible that the matter was closed down by Gill Lindsay.

79. In an email from Andrew Fitchie dated 5 October 2007 and found at **CEC01714253** Andrew Fitchie advises that one of the INFRACO bidders was content with a Level 2 letter of comfort described as a qualified form of guarantee of TIE's payment obligations, while the other bidder required a formal guarantee from CEC covering full financial and performance undertaken. I do not recall having seen, prior to Andrew Fitchie's email of 5 October 2007, any of the differing guarantees. According to Gill's email of 8 October 2007 (found in the same email

chain) she had discussions on the matter with the Directors of Finance and City Development. I do not recall being a party to these discussions. I must therefore defer to the explanation given by Andrew Fitchie, namely, that the "Level 2" letter of comfort was qualified in some way in relation to TIE's obligations. The guarantee was a full undertaking by CEC, financial and performance. It is clear from Geoff Gilbert's email of 9 October 2007 (found in the same email chain) that the issue of guarantees went way back to early days of the bidding process. It does rather imply that CEC Legal had only been brought into discussion or consideration of the matter relatively late in the chronology. I am asked whether a "Level 2" letter of comfort would have resulted in CEC taking on fewer liabilities in respect of the INFRACO contract. I don't think I had taken a view on this aspect since Gill was clearly leading for CEC in these deliberations and discussions. She had discussed the matter with client Directors in the Council. She did seek "much more info" on risks and costs and deliverability from Andrew Fitchie in her email of 8 October 2007. I'm unable to comment with any degree of certainty why such a letter was insisted upon by CEC instead of a guarantee. However, Geoff Gilbert appears to imply that TIE and the Council had little choice in the matter as *"it was a condition laid down by both bidders at the outset that such guarantees are provided by CEC and Transport Scotland at that time".*

80. I refer to the email dated 19 October 2007 from Rebecca Andrew to Donald McGougan and others, including myself, and found at **CEC01399632**. An email of the same date from Duncan Fraser sets out three critical issues, including concerns about the MUDFA works being behind programme with the potential for cost impact on INFRACO and that the risk of change after financial close was very high. As Duncan Fraser was a respected engineer of many years' experience and embedded in the Tram Project, I took his concerns seriously and believed that they would be well founded. I and Gill agreed with Duncan Fraser's concerns. As suggested by Rebecca Andrew, I am sure the issues would have been tabled at the meeting of the Legal Affairs Group that evening on 22 October 2007, where there was usually high level representation from CEC, TIE and DLA. Without reference to the minute of the Legal Affairs Group meeting, I cannot say what action was agreed to address these concerns.

81. I refer to the joint report dated 25 October 2007 provided by Donald McGougan and Andrew Holmes and found at **CEC02083538**. The Full Business Case version 1 is found at **CEC01649235**. The report advised that the estimated capital costs of phase 1a was £498m and that there was a 90% chance that the final costs of phase 1a would come in below the risk adjusted level. Fixed price and contract details would be reported to the Council in December 2007 for contract close . This report to full Council was prepared by officers in Finance and City Development. It was customary to circulate a report in draft format to senior and chief officers to comment and offer suggestions. This report would probably therefore have been circulated in draft to Gill and to myself. I would refer to the section on Risk Management at paragraphs 4.27 to 4.34 inclusive. TIE report that many of the development and construction risks are now either crystallised, superseded or effectively mitigated through management action or transfer to the private sector. However, some significant risks still lie with the public sector and given the cap on Government funding, they impinge directly on the Council as funder of last resort. Section 11 of the Final Business Case sets out the project's approach to the identification, allocation and mitigation of these risks. The current risk contingency in TIE's budget was considered sufficient. The detailed contractual apportionment of risk and responsibility between the public and private sector remained in October 2007, the subject of structured negotiations up to and beyond the selection of a preferred bidder. The procurement strategy aims at an outcome and risk retention and transfer which is balanced, transparent and market aligned while taking account of the relationship between affordability and the true cost of a risk transfer position for CEC. Procurement strategy aims to minimise risk to work costs by placing risks with those best suited to managing these risks. Paragraph 1.84 and Appendix 2 deals with the risks retained by the public sector. I also refer to Appendix 3, project risks, for which see paragraph 2 to 6 inclusive. These highlighted the risks to the Council. The report emphasised that a lot of work remained to be done to nail down design and to ensure as much of the design was built into the contract at close and avoid changes thereafter. The report did accurately reflect my understanding of the allocation of risks

between public and private. There wasn't anything within the report that didn't reflect my understanding or which I felt should have been mentioned.

82. I refer to the slides for a presentation by Andrew Holmes, Willie Gallagher and Neil Renilson for a meeting held on 25 October 2007 and found at **CEC02083536**. I do not recall attending the Council meeting on 25 October 2007. It was customary for only Directors and Heads of Service to attend meetings of Council. I do remember attending some subsequent meetings of Council, along with Gill Lindsay, particularly if I had input to drafting of a report on governance matters. In this case, for the report, I was not an author. I refer to Mr Gallagher's comments on one of the slides. He states in respect of capital costs, that there was a *"firm bid for Infrastructure for Phase 1a – subject to due diligence"* and *"In total, 99% of costs now firm – fixed or based on agreed rates"; "If programme and scope are adhered to by Council & TIE, very limited exposure to cost overrun"; Private sector responsibilities – design, manufacture, construction, commissioning & maintenance*; and *"Risk management & mitigation (already in place) – Robust contracts with unambiguous risk allocation."* I have considered the statement that 99% of the costs were at that time firm and whether that was my understanding at the time. I very much doubt that that was an entirely accurate statement. I can't remember specifically what the risk allocation was in October 2007 but I would be very surprised if it was down to around 1%.

83. I thought that TIE's presentations to CEC were extremely optimistic and probably were not entirely accurate. I need to caveat that TIE had most of the information. I think we subsequently discovered that not everything that should have been disclosed to the Council was disclosed at the appropriate time.

84. In my email to Gill Lindsay dated 23 November 2007 and found at **CEC01399996** I advised Gill Lindsay that following Andrew Fitchie's move to TIE there had been little, or nothing, in the way of discussions between Sharon Fitzgerald of DLA and Council officials as to the on-going negotiations with BBS and that *"on the face of it no instructions have been sought from the Council in respect of the Council's interests in the outcome of the negotiations. Since Andrew's appointment as a*

Director of TIE it is fair to say he can only act in that company's best interests". I advised that the proposed letter by DLA *"does not satisfactorily protect the Council's interests"* as *"It is founded upon a commonality of interests between TIE and the Council which cannot always be assumed"*. I am referred to my email of 28 November 2007 to Sharon Fitzgerald found at **CEC01544715**. I advised Sharon Fitzgerald that the recent meeting of the Legal Affairs Committee (**CEC01500853**) had noted that *"DLA would report to the Council independently of Andrew Fitchie, who would be acting in his TIE Contracts Directors role"*. At some point, on or before 23 November, I had become aware that Andrew Fitchie had moved to TIE. This had led to a hiatus in discussions between DLA and CEC officials on on-going contractual negotiations with BBS. No instructions had been sought from the Council by DLA. Discussion with Gill on these matters involving myself and Alan Squair had taken place on the morning of 23 November 2007, the same day that I sent the email to Gill.

85. My email of 23 November 2007 and found at **CEC01399996** referred to Andrew Fitchie's appointment as a Director of TIE. Beyond that I could not say whether Mr Fitchie was employed by or seconded to TIE. I was clearly of the view that, whilst a Director of TIE, Mr Fitchie could only act in that company's best interests. Further, although not expressed in terms, I did not consider it appropriate for Mr Fitchie to continue to give advice on behalf of DLA to CEC. At the time I had doubts about Mr Fitchie's roles: he could not be wearing two hats, respectively being TIE's Contracts Director and also a partner of DLA. The solution appears to have been arrived at whereby Sharon Fitzgerald would be the contact point in DLA. Gill Lindsay's views were clearly not the same as the view held by myself and Alan Squair. In my email of 23 November 2007 at paragraph 3 I state *"against that background we take the view that any letter from DLA to yourself in the terms we discussed this morning could not provide the necessary reassurance for the Council"*. Other than what I recorded in that email I cannot recollect what Gill's views were on the matter. Some assistance may be derived from my email of 28 November 2007 to Sharon Fitzgerald reference **CEC01544715** where I said *"the Council Solicitor has instructed me to ensure that we have DLA's advice on the contract terms being negotiated leading up to the Council report of 20*

December". It is relevant to draw attention to the part of my email where I said *"I believe that the formal relationship between the Council and DLA was a matter dealt with by Gill and Andrew Fitchie. I therefore presume that you're happy to continue that relationship for the purpose of providing advice to the Council's Solicitor in relation to the following matters".*

86. I had one or two dealings with Sharon Fitzgerald so she was known to me. My recollection is that we needed another point of contact within DLA and she was the natural choice. As to whether Sharon Fitzgerald was formally appointed as the contact within DLA in order to overcome a potential conflict of interest i.e. perhaps with a Chinese wall between herself and Andrew Fitchie, that's a likely explanation. It still didn't remove my concerns. It stunned us to hear that Andrew Fitchie had been seconded into and became a Director of TIE. CEC officers in the B Team were quite taken aback by that and taken by surprise. It clearly presented difficulties. It may have had practical benefits for TIE but it didn't do anything to my mind for CEC's interests. In particular I am referring to potential problems concerning DLA's duty of care.

87. The minutes of the meeting of the Legal Affairs Group on 5 December 2007 are found at **CEC01500867**. I attended and noted that there would be further negotiations between TIE and BBS between the Council meeting on 20 December 2007 and financial close on 28 January 2008. The minuting of action points was brief and in summary terms. Without access to my own notes of this meeting I can only rely on the official minute prepared by TIE. Matthew Crosse noted that between 20 December Council meeting and 28 January 2008 (financial close) *"there will be further negotiations taking place, more design being completed and some risks mitigated and, as a result, some movement is likely (probably both up and down) in final project and profile".* I did not think there was anything out of the ordinary in this statement. I undoubtedly thought that the negotiations would continue past 20 December given the projection by Tie of another five weeks until Financial Close.

88. My email to Gill Lindsay dated 7 December 2007 and found at **CEC01400190** attaches a Director's draft briefing note setting out *"very real concerns about the Council report, and indeed, whether there should be a report on 20th December"*. This was a paper prepared by me, along with colleagues in Finance, and it reflected our very real concerns about the outstanding issues outlined in the Schedule to the Council report on 20 December (e.g. incomplete design, PI cover). We were concerned that it was not appropriate to report to the Council on the 20th of December 2007, given the number of outstanding issues. I cannot recall what Gill's views were on the matter set out in the briefing note. I do not recall if I received a response to my email of 7 December 2007. I am not able to say whether there were or were not meetings on the topic with Gill. I do not recall.

89. The Action Note to the Chief Executive's Internal Planning Group meeting held on 11 December 2007 is found at **CEC01391159**. The Action Note shows that I spoke to the report and, in particular, identified the current issues of concern with respect to the readiness of Council officers to report to Council on 20 December. Undoubtedly there would have been discussion. There was no verbatim record of discussions. Instead there was an agreed outcome and action allocated against specified officers. I have no recollection of Gill's views on the extent to which, if at all, Council members should be advised of the concerns in the briefing note and whether it was appropriate for there to be a report to Council on 20 December at all. I have no recollection of any informal meetings or telephone conversations on the topic with Gill Lindsay. I make a general observation that there was a clear trend that I would raise matters and sometimes there would be responses and other times there would be silence. This also relates to Gill Lindsay's general communication with the B Team.

90. There is an email dated 10 December 2007 by Nick Smith found at **CEC01394893**. The email attached a paper entitled *"TIE Operating Agreement – Outstanding Issues"* (**CEC01394893**). The paper responded to issues raised by Graeme Bissett in his email dated 3 December 2007 and found at **CEC01394894**. The paper provided under a general comment at the end that "*The Council report*

in August noted that the Operating Agreement with tie would be "robust". With the recent watering down of the Council's rights and apparent lack of insurance availability, the agreement is certainly not "robust" given that it provides no effective remedies. This may have to be accepted by the Council as being the position, but the members should perhaps be made fully aware of this risk." I'm not able to recall with certainty why there was a lack of insurance availability for Council. Nick Smith was leading the work on the TIE operating agreement and liaising regularly with me. The answer may lie in the penultimate paragraph of the paper found at **CEC01394894**. Nick Smith states *"it had originally been intended that the Council could rely on TIE's PI cover as a last resort. As we understand this is not an option available to the Council now, it means that CEC are in a much less protected position than if independent third party manager had been appointed".* I fully agreed with Nick Smith's position that the Council's rights were being watered down. Nick had liaised directly with me on this piece of work. He was seeking to implement the Council's instructions from August 2007 to secure a robust operating agreement. In various respects he was being pressed by TIE Directors into changes which eased obligations for TIE. They were seeking less or weaker rights for the Council. In general terms it's the rights to hold TIE to account that were being watered down. It was the best shot, or the only shot that we had, of making clear to TIE *"these are what your obligations are in delivering the contract"*. These were the rights which the Council had, or should have. In general terms we felt undermined. It was a constant chipping away by TIE. Nick started off quite properly with 'absolute duties' and 'best endeavours'. He was met in discussions with a constant *"no that's not acceptable"* from TIE. What we ended up with in the Operating Agreement was, to my mind, much less than what we should really have achieved in line with Council's instructions from August 2007. I think it was Graeme Bissett who was leading negotiations from TIE's perspective. I would also have to say that senior officers in City Development did not support us. In my opinion they gave in too easily to some of the points that TIE were disputing or attempting to dilute . I do not think that there should have been an independent legal advisor appointed to CEC to review the operating agreements. I think this was fully in the remit of CEC. We were clearly taking a view that the Council had instructed a robust operating agreement, that we were

bound by instruction to secure that, and TIE were spending the Council's money. We wanted to make sure that, as the only shareholder and owner of TIE, we were doing what the Council expected and acting in the Council's best interests. I think TIE were looking to water down the Council's rights to make life easier for themselves and make it less onerous in terms of reporting to the Council. I don't think they fully appreciated their role in the matter. I felt like it was 'the tail trying to wag the dog'.

91. The minutes to the Legal Affairs Group meeting of Monday 17 December 2007 are found at **CEC01501053**. At the meeting Susan Clark presented a paper identifying the deliverables that would require to be completed to allow TIE to be given authority by CEC to enter into the contract. I have no detailed recollection of what was discussed at the Legal Affairs Group meeting on 17 December 2007. The minute of the meeting merely reflects that Susan Clark presented a paper. She would most likely have spoken to the terms of said paper which fell under the heading of Review of Critical Items.

CEC01501053 should be CEC01501051

92. Willie Gallagher advised the Legal Affairs Group that the INFRACO contract was 97% fixed price with BBS taking on design risk. Outstanding issues included seeking clarity on what elements of SDS on-going design activity would be included or excluded from the novation agreement between BBS and SDS. Other outstanding matters are narrated in paragraphs 1 to 12 of Susan Clark's note. With regards to the figure of 97% fixed price as of 17 December 2007, I think we were then a few months earlier in the proceedings. On present reflection I'd probably be sceptical that it was as high as 97% fixed price given that we were still almost six months away from financial close and there were still issues arising from the mismatch between SDS contract and INFRACO. The risks that flowed from that were largely laid at the public sector's door. I would say 97% was extremely optimistic. I refer back to paragraph 82 above and to the Council meeting of 25 October 2007 at which Willie Gallagher indicated that 99 % of costs were now firm.

93. The email dated 17 December 2007 sent by Andrew Fitchie to Gill Lindsay found at **CEC01500974** attached a letter dated 17 December 2007 and found at **CEC01500975**. The letter advises on the draft contract suite as at 16 December 2007. It appears strange that Andrew Fitchie, by then a Director of TIE, was sending a DLA Piper support letter to Gill Lindsay. This is clearly not the separation of roles I would have expected. Indeed this was contrary to the position agreed at the Legal Affairs Group meeting in November 2007 when it was noted " DLA would report to the Council independently of Andrew Fitchie, who would be acting in his TIE Contracts Director role." At that time the only source or sources for a position statement on the main risks for the Council was TIE supported by DLA. I recall that nobody from the Council, and certainly not from CEC Legal, was involved in discussions with BBS. The Council was therefore reliant on information on risk being relayed by TIE and / or DLA. For the reasons stated above I cannot say my understanding at that time of the main risks for the Council arising from the draft contract suite did or did not correspond with DLA's views in the letter of 17 December 2007. TIE had updated CEC Finance Officers regarding updated risk and I was not included. I make reference to a document **CEC01500975**.

94. CEC was not involved at all with the drafting of the contract suite. Later on we were asked to comment. We simply weren't brought into detailed discussions between BBS and TIE/DLA. The view I took then, and still take, is that there clearly had to be a separation. It was black and white. It was all or nothing. I didn't consider it to be in the Council's best interest for us to be brought into comment on bits and pieces of the contract. It continues to be my view that it was inappropriate for the Council to be looking at bits of clauses here and there.

95. Gill Lindsay did not agree that a third party at this juncture should take a view and advise CEC. She had determined with Andrew Fitchie the way forward and it was 'all hands to the pump'. Taking a current view it was actually far from over. Negotiations continued for another seven or eight months before INFRACO was finally resolved and Financial Close reached. With a big dose of hindsight, even in December 2007, there would still have been time. However, it would have

been very difficult to project forward and say there would have been time. I know TIE continued to work on things.

96. I can only recall hearing after the event that discussions had taken place in Wiesbaden between representatives of BBS and TIE. As far as I can recall no details were provided to me in writing. I might have heard at the Legal Affairs Group on 7 January 2008. I note Willie Gallagher gave some sort of update. I refer to **CEC01475121** as evidence of this.

97. Prior to the negotiations that occurred in Wiesbaden I not was aware of any CEC involvement in terms of being briefed as to what was going on prior to the negotiations or immediately after. I didn't even know they were going to take place. I can't even say it would have been reasonable to assume that Gill was aware. It could just have been possibly the Chief Executive or Andrew Holmes and Donald McGougan. If it was shared at all with the Council I would expect it only to have been shared at a high level and not with B Team members. Afterwards, I suppose the fact that Willie Gallagher mentioned it meant it was such a significant step. There was a briefing of sorts after the event. It was certainly viewed as a significant event that TIE had considered it necessary to go and meet with BBS in Germany. I think until then we were aware that discussions were taking place locally and that BBS had people on the ground in Edinburgh. I recall at some point that they had a suite of offices out at the Gyle. They had a reasonable representation in Scotland. We listened to what Willie Gallagher had to tell us about it. I have considered whether it was my sense going along that CEC's role was just to listen to what the Executives of TIE had done rather than necessarily being actively involved. Given that that information was shared at the Legal Affairs Group, while there's a representation of the B Team and TIE and CEC senior officials there, my recollection is that we were simply being informed this is what happened. We were given summaries of what took place rather than attending consultations.

98. Donald McGougan and Andrew Holmes presented a joint report to the Council on 20 December 2007 which is found at **CEC02083448**. It sought members'

approval on the Final Business Case version 2. The report for Council on 20 December 2007 would have followed the usual evolutionary route whereby middle manager ranked officers in the relevant departments, in this case Finance and City Development, commenced the drafting. The primary authors were Rebecca Andrew, Acting Principal Finance Manager, and Duncan Fraser of City Development. That was a tier up from Alan Coyle and Andy Conway. Although reports to Council were always signed by the relevant Directors, their involvement came later in the evolutionary process. It would not be unusual for a report of this significance and importance to go through several drafts before being signed off. I do not recall when the drafting of this report would have commenced but it would have been some day or days before 14 December 2007 at which point Alan Coyle circulated what he described as the latest draft. Gill was clearly considering the draft report (I make reference to her email of 14 December 2007 found at **CEC01397758**). Other members of the B Team, within the Council, were consulted in the drafting including Planning and Estate Surveyor for their respective interests. A decision was taken to convene a weekend meeting amongst CEC Directors, TIE Directors and more junior CEC officers to consider the draft report. From a note in my personal diary I see that I attended a meeting at the Council Headquarters on the afternoon of Sunday 16 December 2007 which involved CEC Directors as well as TIE Directors. Most made contributions to the discussion on finalising the draft report. Following the conclusion of this meeting I met with Duncan Fraser in my own office to work on the redraft of the report to Council on 20 December 2007. This redrafting was then presented to the respective Directors for final sign off on 17 December 2007.

99. I am unable to dispute Gill's contention that there was an earlier version of the report which was more explicit in respect of risks. From my response, and explanation above, there were a number of people making suggested amendments to the report. Without the benefit of seeing track changes to the report, it would be impossible to say when, by whom and why the risk matrix was changed. Setting that to one side, all the people who mattered (CEC Directors, the Council Solicitor, TIE Directors) had a final kick at the ball on Sunday 16 December 2007. Risks were pulled out of the risk matrix when they are

resolved. It was ever changing. It was a slowly changing document because of the on-going work that was being put in by SDS, TIE, Council officers. It was a work in progress.

100. The joint report to Council dated 20 December 2007 is found at **CEC02083448**. It explained that members' approval was sought for the Final Business Case version 2 and for staged approval of the award by TIE of the contracts, subject to (1) price and terms being consistent with the FBC and (2) the Chief Executive (supported by the Directors of City Development and Finance and the Council Solicitor) being satisfied that all remaining due diligence was resolved to his satisfaction. Advice was given by individual officers in the Departments of Finance through Rebecca Andrew and Alan Coyle; City Development which would be Duncan Fraser and Andy Conway, and officers from the planning and surveying backgrounds, all supported by Gill and myself. Paragraph 8.11 of the report dealt with public sector risks and explained why an unqualified power for award of the contracts could not be given to TIE. Rather than go back to full Council once all the different work strands and the contract had been concluded, it was decided to delegate authority to the Chief Executive. Due diligence items were set out in paragraphs 8.13, 8.14 and 8.15 of the report and in the final business case at Section 11. The report at paragraph 8.1 explained the financial implications in relation to the design work completed as at October 2007. Allowance had been made for the risk associated with detailed design work not being completed at the time of financial close. I cannot comment in detail as to how that was reflected in the pricing schedule. Risk contingencies and the final approved design were confidently said by TIE to be accommodated within the funding available. I did not have any concerns at that stage about this.

101. The Final Business Case, version 2 dated 7 December 2007 is found at **CEC01395434**. It noted that the capital cost of phase 1a was £498m and that there was a high level of confidence in the cost estimate such that were was a 90% chance that the costs would come in below the risk adjusted level. There is reference to INFRACO being a fixed price or lump sum contract. The risks retained by the public sector are set out in paragraph 1.85. I had not been invited

to comment or review TIE's business case at any stage of the project to date and therefore relied upon figures produced at various stages by TIE on the headline costs of the contract. Again, I would say that this issue goes back to the stance I recommended for an independent legal review of the contract documents on behalf of CEC. I did subsequently have a look at the Final Business Case in February of 2008.

102. The main risks for the public sector were land assembly; third party agreement, for example, Network Rail which was proving to be a really difficult stumbling block; utilities through the agreements with Scottish Power and Telewes;, planning consents and approvals; Traffic Regulation Orders and Temporary Traffic Regulation Orders; and third party agreements with objectors. Risks for all the above were under the control of CEC with the exception of outstanding design. The latter was constantly being worked upon with the fall back position that the SDS contract would be novated to INFRACO. I refer to my email of 7 December 2007 found at **CEC01400191**. I highlighted the concern that BBS were unhappy with accepting the novation because SDS had not been bound to process the designs within specific timescales, whereas BBS are to be time bound in terms of project delivery. BBS would be taking the risk but asking TIE whether there were any approvals upon which CEC could take back the risk .

CEC01400191 should be CEC01400190

103. I understood that work continued on design and that CEC itself was pressing on with matters under its control e.g. planning, roads approvals with regular updates to the Chief Executive's Internal Planning Group on progress (**CEC01398245**). Broadly speaking, in terms of consents which had already been obtained, the risk was with BBS. In terms of consents and approvals still to be obtained that was at the door of the public sector. The risk to the public sector posed by design delay was, as previously indicated, that there was concern about the mismatch between the SDS contract and the requirements to deliver. There was concern that there was no requirement to deliver to a set timetable and the fact that that could impact on the INFRACO programme leading to possible compensation events arising from that. I am asked how and by whom, the risks arising from incomplete design would be managed during the remaining period of the development scheme. The

strategy, so far as I had been aware, was much closer working between SDS, TIE and the City Council to make sure that at the start of that process the designs (which were being prepared by SDS) would be of a suitable standard to be processed. In other words they would pass muster at first time of asking rather than having to be refined and further delay caused. It was a closer management scrutiny of the process. In reality the quality of the designs, as far as CEC were concerned, was not adequate. I can't remember what the percentage figures were but there's certainly a reference in one of the documents (and I don't know the reference) that CEC were saying that they're still getting problems. They're still not of sufficient quality or standard to allow the Council to start processing them.

104. I seem to recall TIE saying not quite 'everything will be alright on the night' but that progress was being made with the negotiations with BBS. We were working through things and it was a better working relationship. As time went on it came to pass that TIE were seen to be putting a gloss on the reality of the situation. There were reassuring messages from TIE but that's not quite how it was working out in practice.

105. In my email to Gill Lindsay dated 18 December 2007 and found at **CEC01397921** I state the view that after the Council meeting, a letter should go to TIE from Tom Aitchison, Council Chief Executive, formalising the outcome of the meeting and setting out the product which TIE will be required to deliver before they receive authority to enter into the BBS contract. I stated that I was concerned that TIE did not appreciate the gravity of the situation. I note that there was still a remote chance that TIE would not deliver sufficient comfort for Tom Aitchison to authorise financial close simply because a number of matters are in the control of third parties. I state that I do not believe the Legal Affairs Committee was the appropriate sign off medium. My concern related to governance and an appropriate line of authority. I was employed by CEC and took instructions from the Council, its committees, Directors etc. The Legal Affairs Group, in my opinion, was not a committee of the Council and had no legal status. For that reason I did not consider the Legal Affairs Group to be vested with the powers to respond to

what would become the Council instruction to the Chief Executive telling him what to demand of TIE before he could be satisfied. That power could not be presumed to be exercised by the Legal Affairs Committee.

106. Although I didn't view the Legal Affairs Committee as an appropriate sign off medium in reality that was the function it was undertaking. I feel that there was a move by TIE to draw in Council officials to share the burden of doing that. Quite clearly the intention of the report to Council was that it would be TIE who had to write to the Chief Executive to say that they considered they were ready to ask for his authority to sign the contracts. I felt that TIE were trying to bring the Council back into that i.e. Council officials. It was a clear separation, in my mind, as to how the approval protocol would work. It was for TIE to give comfort to the Chief Executive. TIE were doubling back on that and trying to draw us in as members of Legal Affairs Group and say *"well you help us with this"*. I didn't think that was appropriate. I didn't feel that TIE were trying to circumvent the CEC to speak directly to Tom Aitchison. I just felt that they weren't following the role that the Council had clearly set out. This is the mechanics of how we want final approval to be put together, this is what you have to do and I felt TIE were saying *"come on guys from the Council you do this with us"*. I reiterate that the Council had its own part to play in the protocol which was the reporting on due diligence satisfaction by the Director of Finance, Director of City Development and by Gill Lindsay, Council Solicitor. Between them they would put together an appropriate form of wording to the Chief Executive. . It's obviously more advantageous to separate the two out. For the avoidance of doubt Council on 20 December 2007 authorised the Chief Executive to instruct TIE to enter into contracts with the Infraco Bidder (BBS) and Tramco Bidder (CAF), providing the remaining issues were resolved to the satisfaction of the Chief Executive as detailed in the joint report. The report at paragraph 8.12 stated that the Chief Executive will be supported in that final part of the approval process by the Directors of City Development and Finance respectively, together with the Council Solicitor. In practical terms the Chief Executive would receive a written report from these three officers confirming that they were satisfied that everything was in order, thus allowing the Chief Executive to issue the appropriate instructions to TIE.

107. I note that Gill Lindsay responds to note that she will be content to look at a draft letter to Tom Aitchison. I don't recall if such a letter was drafted for Tom Aitchison. I have no means of checking whether it was or not. Reading what I've read here, and it was considered at the time, I'm slightly surprised I didn't see it (if it existed). Then again I didn't necessarily see all the pieces of the jigsaw. There were times Gill would maybe ask me to do a draft for her. I don't recall seeing this particular one.

INFRASTRUCTURE (JANUARY TO MAY 2008)

108. I refer to the Legal Affairs Group held on 7 January 2008 and the associated minutes found at **CEC01475121**. My recollection is drawn only from the terms of the minute. Willie Gallagher was generally positive about the contract negotiations with BBS following the meeting in Wiesbaden. They had achieved fixity on price, scope and programme as previously reported to the Council on 20 December 2007. Due diligence work by DLA on BBS was around 60% complete, contracts were expected to be signed on 28 January 2008. A lot of legal work was anticipated between DLA and BBS before then. I do not have any recollection of the meeting. In hindsight, Willie Gallagher's comment surprises me because what I learned later was that it still took another five months to draw the matter to a satisfactory conclusion. At the time you're told something and it's generally a positive message. The next time you're told you look back and say to yourself *"wait a minute there's not been sufficient movement"*. The approval was delayed until finally mid-May of 2008. With hindsight, it's not a great picture. Looking back each time a positive statement had to be queried. Looking back you think *"well that was not an accurate reflection/position"*. Again, I qualify my comments by saying we weren't embedded in TIE. They held all the information, some of which the Council did not have.. The level of disclosure to CEC was not what it should have been.

109. A final risk matrix for review by the City of Edinburgh Council was promised for 18 January. There was no record in the minute of 7 January 2008 of any paper

being circulated by TIE on the risk matrix. There was a verbal update from TIE on SDS design status advising that SDS had completed 70% of the detailed design. A negative message was sounded about BBS's reluctance to sign up because of the mismatch of the obligations between the two contracts. TIE continued to work with BBS. The question of who would bear the risk had not been settled at 7 January 2008. I don't have any recollection of my response around about the time the comments were coming forth. If I voiced a concern I tended to put it an email.

110. The minutes for the Legal Affairs Committee dated 7 January 2008 are to be found at **CEC01475121.** The minutes note that Matthew Crosse would prepare a paper for 14 January 2008 Legal Affairs Committee meeting and that Duncan Fraser and Damian Sharpe would be asked to present the current design status approvals process to that group. The minutes of that meeting note that all actions arising from these minutes had been completed. At that date I presume, from reading the minutes, that my concerns were on the way to being satisfied since I did not object at the status report. There's probably a degree of comfort.

111. I refer to the report to the IPG on 18 January 2008 and found at **CEC01398148**. It noted that TIE were to provide a list of exclusions from the INFRACO contract with a value against each item and that CEC required a statement on the percentage of costs that were fixed, the percentage outstanding as provisional sums and a programme for moving these to fixed costs. Confirmation was awaited from BBS on the emerging quality of the design. Full details were required from TIE of the status and degree of completion of design work including prior and technical approvals. If approvals' risk was not being transferred to BBS the Council needed to know the impact and likelihood of the risks and strategy for the managing of the risks. I do not recall what my understanding was on 18 January about works that were excluded from the INFRACO contract and the value of these works. The point in the report to IPG was that TIE had the lead role in negotiations with BBS. CEC were not at the table, hence the requirement for a list to be produced by TIE for CEC to consider.

112. TIE had the detailed information on costs, movement and resulting fixing of costs and it wasn't flowing through to us in the Council.

113. I have considered what my understanding was of the nature and purpose of the due diligence exercise which had been undertaken by BBS on the design. Presumably BBS wanted to test the practicability of the operations of the tram and be satisfied that, if they accepted novation of SDS design contract, the quality and standard of the design was fit for purpose.

114. As far as who bore the risks arising from the design at that time, the issue appeared not to be finally settled but was leaning towards BBS. With regards to prior and technical approvals the risk lay with the public sector. Paragraph 3.5 of the IPG report dealt expressly with risk, reference (**CEC01398148**). TIE were still to identify black flag risks and indicate the likelihood of such risks occurring and produce a strategy to avoid these risks occurring.

115. In my email dated 18 January 2008 to Gill Lindsay found at **CEC01400601** I sought confirmation of the nature of the appointment of DLA, namely whether there was either a duty of care or full agency in place. I also noted that there were a number of significant risks which had still to be resolved or minimised including the novation of the SDS contract to BBS. I do not recall Gill replying to my email of 18 January. In the same email I refer to Gill Lindsay's desire for DLA to provide an updated letter of comfort with no caveats. I note that I do not think that this will be possible given the outstanding risks to the Council. While some risks were reducing it was still a distance from being settled. I outlined the *"unusual contractual framework"* as potentially risky for CEC. Among the most significant risks I pointed to were the SDS, BBS mismatch, the weakened operating agreement between CEC and TIE, Network Rail issues and the loss of grant liability. I do not recall whether there was a response, oral or written, from Gill Lindsay to my comment that an updated letter of comfort with no caveats may not be appropriate given that some risks have not yet been closed out.

116. The minutes of a meeting of the Legal Affairs Group on 21 January 2008 are found at **CEC01476409**. In relation to consents and approvals noted, Nick Smith asked *"...who would be liable if SDS does not work to the programme – MC [Matthew Crosse] noted that the SDS Novation Agreement will take care of this. At NS's request MC will confirm that the Agreement contains details of who will take the risk on knock on effects of delays"*. I was unable to attend the Legal Affairs Group meeting on 21 January 2008 due to illness. I would have gained awareness of the matter a few days later, probably from Nick Smith updating me. I consider it was a pertinent question put by Nick Smith. The response from TIE's Matthew Crosse seemed just to move it on to another day or stage in the proceedings. The details were possibly provided in broad terms but I can't be certain.

117. An e-mail from Nick Smith dated 22 January 2008 and found at **CEC00481318** notes *"a significant issue with regard to design approvals and consents"*, against the background that *"the design process is now over 12 months late in delivery"*. An email from Nick Smith to Gill Lindsay dated 29 January 2008 and found at **CEC01395151** includes proposed text to the Directors of City Development and Finance on the "Consents issue". It states *"as CEC has no real visibility on what is being delivered in relation to the currently approved drawings, this opens up the possibility of significant risk of increased cost to the project. I should be grateful if you would confirm whether or not you are of the view that CEC should accept the unquantified risk of claims for compensation as a result of this situation. Unfortunately the only way to exclude this risk entirely would be to require all drawings to be approved before financial close, which will be impossible on current timescales."* I fully agreed with Nick Smith's very thorough and detailed approach to this issue with regard to design approvals and consents. I believe that Nick was concerned about compensation claims from BBS against TIE as the contracting party but impacting on CEC as ultimate client and funder/guarantor of the project. BBS would see the risk as the public sector's responsibility if betterment was involved, for example, or there was a mismatch in standards between CEC's expectations on design and what TIE had contracted for. Nick Smith recognised in his email of 22 January at paragraph 2 that it was originally

intended that before financial close most, if not all of the, approvals required would have been obtained by SDS. On that basis BBS would have been able to accurately specify and price the project materials. CEC would have approved the quality of design and materials used and there would be little, or no, risk of project delay as a result of lack of consents. The fixing of the price would also have been much more certain.

118. In my email to Gill Lindsay dated 29 January 2008 and found at **CEC01398360** I expressed the view that *"it is premature for tie today to grant authority to Willie Gallagher to take the various actions on behalf of the company"* and disagreed that *"all approvals and conditions to execution having been satisfied in accordance with the delegation of authority arrangements..."* My email of 29 January 2008 reflected that I thought it premature for TIE to grant authority to Willie Gallagher to take the various actions on behalf of the company. I did not at that stage agree that TIE can say *"that all approvals and conditions to execution having been satisfied in accordance with the delegation of authority arrangements etc"*. In my view, from the Council's perspective, the Chief Executive was, at that stage, still to be satisfied that TIE had demonstrated to Andrew Holmes, Donald McGougan and Gill Lindsay, sufficient confidence that the contracts can be executed. The email was written on the day after the Legal Affairs Group met on 28 January 2008 when it was clear there was still a considerable way for TIE to go before it met all the requirements set by CEC officers.

119. I refer to the report to the IPG dated 30 January 2008 and found at **CEC01246994**. It contains a table (appendix 1) that listed activities and deliverables that were expected to be achieved by 9 February 2008 to allow formal award of contracts by TIE on or around that date. Most of the activities and deliverables were coded as "red" (outstanding). I was concerned about the number and impact of activities and deliverables which were outstanding. Too many listed items were close to, or beyond, 9 February 2008, e.g. risk was 13 / 14 February 2008, pricing and funding 13 February 2008 and Network Rail 13 February 2008. I believe that I would have been sceptical about overall achievability. In hindsight I view them as definitely not being achievable.

120. I refer to the e-mail from Alan Coyle to Susan Clark dated 5 February 2008 and found at **CEC01508100** and **CEC01508101**. He advises Susan Clark that he was *"disappointed"* with the quality of information provided by TIE in respect of risk registers and that it was *"unacceptable"* that there was no quantification of *"black flag"* risks. I agreed with Alan Coyle . I viewed generally, at that time, the quality of the information being provided as not of a sufficient standard. I viewed the quality of information being provided by TIE on the risk registers as falling below what the Council reasonably expected. In particular there was no quantification of 'black flags'. This was very unhelpful to the Council.

121. I do not think that there was anything further that CEC could have done to get information from TIE. Whether it would have been appropriate to escalate the matter up to the Council's Chief Executive and say *"look this is just not working satisfactorily"* and ask him to pull in Willie Gallagher I don't know. That didn't happen very often as far as I know. It was extremely frustrating time and time again to not get the information that we needed. It was contrary to TIE's interests as well because they probably brought some of the difficulties on their own heads. I don't recall Gill Lindsay's response to me making her aware that insufficient information was being provided. I'm not sure if she offered a view. I have considered whether I think it would have been beneficial to pass my concerns up the line to Tom Aitchison at that time and, if that had been done, whether it would have made any difference. It could have made a difference. He had instituted changes in the past to bring about Legal Affairs Group. That was in response to concerns expressed and referred up the line by members of the B Team so it might have helped. I can't say what he felt about the project difficulties. I wasn't privy to his thinking.

122. In an email to Susan Clark dated 7 February 2008 and found at **CEC01508412** I advised Susan Clark that I was aware of a serious debate on-going about consents and risk and that a decision may require to be made between (1) balancing the cost of delaying the award of the contract; and (2) balancing the cost of the Council bearing the risk of delayed prior approval. I cannot now recall

specifically or in detail what was in my mind when I wrote that email on 7 February 2008 to Susan Clark. I was maybe talking generally about debates, first of all between TIE and BBS and secondly within the Council team of officers.

123. Whether the award of the INFRACO contract should be delayed until all outstanding design, approvals and consents were available was a matter in the minds of various Council officers. That was clearly in my mind on 7 February when writing to Susan Clark. Alan Coyle also had it in mind when he wrote to Susan Clark under reference **CEC01508100**. He states *"there may come a point where our Directors will want to weigh up the risk of pressing ahead with contract award with certain agreements outstanding against the cost of delay should signing not be approved"*. In retrospect delaying the award was something that was practical, however, at the time I probably had doubts as to whether it was practical. Senior Council officers were naturally concerned about reputational consequences in delaying the project.

124. I think pausing at that time and getting all the approvals and consents in place before novation would have removed a lot, if not all, of the outstanding risk. It would have given much more certainty on price. BBS would have had a full set of drawings knowing that this is the way forward. They would be able to say *"we've got everything and that satisfies us"*. There may well have been issues on build ability but at least the consents would have been there. Buildability was a risk for BBS to take. I assumed that in an ideal world, come the point of novation and Financial Close, everything would be in place. That was the intention of the procurement strategy.

125. In the email to me from Steve Hajducki dated 7 February 2008 and found at **CEC01398550** he states that they can discuss variations or departures with BBS or whoever at a later stage. In initiating the dialogue, Andy Conway of CEC was clearly attempting to find an acceptable and practical solution to minimising risk to the project and to the Council. He made suggestions and circulated these to Council planning officers along with the Council roads and bridges officers. To my mind the suggestions were honestly and sincerely put forward but I was

concerned that the Council's statutory powers and duties under planning and roads provisions should not be fettered or compromised. Planning agreed with that caveat and that was mentioned in Steve Hadjucki's email of 7 February. I don't recall what my position was at that time in relation to the agreeing of variations or departures with BBS or other contractors at a later stage. I don't know whether the dialogue with BBS was actually followed through. Some of these things just disappeared into the ether. Maybe I presumed that they were done. There was no feedback to confirm otherwise.

126. I refer to the Rutland Square Agreement between TIE and BBS which was entered into around 7 February 2008 and found at **CEC00205642**. I do not recall when I was made aware of the fact that such an agreement had been entered into amongst TIE, BBS and Siemens. Further I cannot recall if, or when, I was given sight of the signed agreement. As an observation it appears to be some sort of pre-INFRACO agreement dealing with nailing down price, timetabling, programme movement and positioning of the partners i.e. BBS, Siemens and CAF. I do not know if TIE sought permission from CEC to enter into this agreement or explained their aims and intentions beforehand. I am able to say with certainty that it was not a matter raised before the event with B Team officers. It is difficult at this juncture to understand the need in February 2008 for such an agreement. In hindsight I think it is unusual that CEC weren't involved with the agreement. I would have thought definitely City Development Officers, the engineers, maybe Finance and possibly in third place Legal would have been involved had CEC been allowed an input. I honestly can't remember whether the Rutland Square agreement was discussed at the Legal Affairs Committee in any form at all.

127. In my email of 8 February 2008 and found at **CEC01398594** I noted there may be a need to balance the cost of delaying contract award against, for example, the cost of the Council meeting the risk of delayed Prior Approvals. I asked TIE to ensure such figures were available for evaluation should this eventuality arise. The email in reply from Susan Clark states *"there should be no question about the INFRACO contract award being delayed until all prior and technical approvals are in place."* I'd said I would imagine these figures would, for example, have shown a

weekly cost of delaying contract award to satisfy basic time and cost considerations. Principally it was the people in TIE who had access to the contract documents and the pricing as was. Maybe CEC Finance could have offered a view and assessed or evaluated the cost of delaying. As Director, Donald McGougan would have primary responsibility but it might have been a matter more likely delegated to Rebecca Andrew or Alan Coyle. I believed Susan Clark to be correct in saying that quantifying the impact of CEC delaying prior technical approvals would be difficult. However, she did not say it was impossible. After all, TIE had all the information within their control to draw up such figures. I am asked whether I agreed with Andy Conway's concern that if tie did not get the contract right, the Council in its statutory role would be put under enormous pressure to issue approvals (**CEC01400818**). This observation about getting the contract right didn't come from Andy Conway. It came from David Cooper who was a Senior Planning Officer in City Development. This was a difficult balancing act for the Council as Tram Project client and funder and as guarantor of TIE's obligations against the statutory roles under planning, roads and bridges legislation. I emphasised in my email of 7 February that, as already explained to the Legal Affairs Group, SDS and BBS had to be made aware of the different hats worn by the Council and what impact the contract would have on the Council in light of this. With regards to my views on whether the INFRACO contract should be delayed until all prior and technical approvals were in place, I recall I considered it as a possible option but the reality was, I suspect, the Council Directors would be reluctant to take that difficult step with concerns about slippage and delivery dates for tram operation and undoubted PR fall out. At that date we still had no definitive figures from TIE and a Susan Clark reassurance that *"processes are in place to ensure that we manage the process to deliver these."* I was of the view therefore that CEC was still potentially at risk but had no quantification thereof.

128. In my email to Gill Lindsay dated 12 February 2008 and found at **CEC01401419** I set out further concerns in relation to un-quantified design risks and whether these had been properly reported to the Council. My concerns were headed up *"Edinburgh Trams SDS novation"*. Specifically I was concerned about design risk,

quantification of design risk and absence of costings of that risk and the impact of this on the public sector, CEC. Finally, I expressed concern about movement of the overall price reported to Council on 20 December 2007. I was reminding Gill about the limit of the Chief Executive's authority at £498m. I also raised the point about whether the procurement process could survive a challenge by a third party given the change in the risk profile and liability arising from the new SDS deal. I believe that I was referring to the novation of the SDS contract. TIE or DLA should be asked to give a view on the prospect of surviving such a challenge. I do not recall if there was a response from Gill Lindsay.

129. I refer to the Design Due Diligence Summary Report produced by BBS dated 18 February 2008 and found at **DLA00006338**. It was based on design information received by BBS. The document raised various concerns about design including that more than 40% of the detailed information had not been issued to BBS. I do not recall seeing this report nor do I recall being made aware of the detail. I was aware detailed design was incomplete from Duncan Fraser in his email of 23 January 2008 to Nick Smith (reference **CEC00481318**). The percentage of consents and approvals achieved was at 27%. The 40% figure is pretty disappointing. I would have thought there was something wrong if I'd heard back in December that 40% of the detailed design was yet to be achieved. I am asked whether there was any way in which CEC would have known that that was the case. I think probably the engineers would have a better awareness than I did because they were closer to it. They were helping to work on the solution and to get the designs approved.

130. The figures reported in the Design Due Diligence Summary Report appears to contradict Willie Gallagher's comments in December that there was a 90 to 95% fixed price. What the remaining 60% of design might equate to in terms of risk and lack of fixing in the price certainly wasn't a few percentage points. It must have been more than that. Looking back there is a discrepancy between what was reported by Willie Gallagher and what was happening on the ground.

131. In my email to Gill Lindsay dated 19 February 2008 and found at **CEC01400919**. I advised Gill Lindsay that *"The position regarding novation of the SDS contract to BBS was given next to no clarification last night, with a contradictory explanation from TIE"* and recorded my concerns about TIE's lack of transparency and co-operation with Council officers. My recollection, assisted by reading my email of 19 February 2008, showed that I had no clear understanding of (a) the position regarding novation of the SDS contract to BBS and consequently (b) had no clear understanding as to which party would bear the risks and liabilities arising from incomplete and outstanding design approvals and consents. I cannot recall what Gill's response, if any, was to my email. I can't say either way whether I ever got the impression that Gill Lindsay shared my concerns about TIE's reported lack of transparency and co-operation with Council Officers. I was obviously flagging it up. Whether we had offline discussions and she said *"you're right"* I just don't remember. The dialogue was not always just by email. There were times that we would have sit down discussions about things. There were times where we were obviously at Legal Affairs Group meeting from time to time. That wouldn't necessarily be the place to be sounding off about TIE obviously. I wouldn't rule out the possibility that we did have an informal discussion about it but I just can't remember.

132. There were persons at CEC more senior that I could vent these concerns with, but the normal route would be to raise in the first instance with Gill as my immediate line manager. It was a fairly strict hierarchical body. As a group (B Team), things did work their way up to the Chief Executive. This happened sometime in 2007 when there were concerns about TIE performance. It was probably not at that time about the lack of full disclosure. The Chief Executive got to know about things but it was not the sort of body where you knocked on the Chief Executive's door and said *"I think you should be aware of this"*. There were recognised routes to go. CEC could be described as a pyramid structure.

133. I refer to the email between Graeme Bissett and Andrew Holmes and others dated 22 February 2008 and found at **CEC01474243** with an attached paper entitled "*SDS – Delivery and Consent Risk Management*" which can be found at

CEC01474244. BBS would be liable for design quality risk only in respect of packages delivered to them by SDS with the requisite approvals by financial close. I note that the number was not spelt out in the body of the report. All other incomplete design packages that were yet to be submitted and/or approved were at the public sector's risk. This was my understanding in February 2008.

134. The process was described under bullet points 1 to 4 in the recent process improvements section of the report. Briefly, co-location of staff, improved contract management arrangements, focus of resolution of outstanding design issues, closing out third party agreements. The TIE advice was captured in "Contractual Underpinning" section of the report.

135. Contingency allowed for risks were stated to be £3m but that was stated by the TIE paper to be subject to a refreshment of the QRA in the run up to financial close. This resulted from the CEC TIE workshop which was attended by Alan Coyle, Susan Clark, Damian Sharpe, Tom Hickman and Mark Hamill. I note from the paper (**CEC01474244**) that it was TIE/CEC's option that the risk contingency could be retained or traded for cash sum and full risk transfer to BBS and that at present the tactic was to hold the contingency and seek to manage the risk. Presumably that meant the quid pro quo with BBS getting a better deal for accepting the risk from CEC and TIE. This was my understanding at the time.

136. I am referred to my e-mail to Gill Lindsay dated 28 February 2008 and found at **CEC01400987**. I set out my view that there had been a number of material changes to what had been reported to Council on 20 December 2007 and recommended that members receive a further report explaining the material changes in the Final Business Case. Gill Lindsay replied on 29 February 2008. I then noted "*We do appear to be having difficulties with nailing down the SDS novation and fixing the price and risks flowing from that*". At page 2 of my email dated 28 February 2008, I drew Gill's attention to various paragraphs of Final Business Case version 2 dated 7 December 2007 (**CEC01395434**) namely paragraphs 7.50, 7.53 and 11.57. I note that paragraph 7.50 states " the anticipated novation of the SDS contract to the INFRACO will mean that

responsibility for the design and all risks arising are transferred to the private sector system integrator (INFRACO), without the normal disadvantage of an increased risk premium, that bidders would apply to uncertainty, if they had to carry out all of the design work post contract award. I note that paragraph 7.53 is in the following terms: "The original assumption was that overall design work to Detailed Design would be 100 % complete when the INFRACO contract is signed. Due to a number of delays, largely outwith tie's control, this is not now achievable." The next reference 11.57 is to the effect that " the public sector is exposed to significant, but diminishing and manageable, risks during the remaining period of scheme development."

137. I did not consider that the factual position in late February 2008 in respect of those paragraphs remained the same as at the time of reporting to Council in December 2007. It was still unclear to CEC what the risks were for the Council flowing from the SDS and BBS novation. There was no clear evaluation by TIE for CEC. I also set out concerns about a possible increase in the £498m price, advised to the Council in December 2007. I was therefore concerned that because of these changes, the Chief Executive may not be able to validly exercise his delegated powers from Council decision on 20 December 2007. Gill appeared to take on board the points I had raised when she replied the following day to my email. She saw them as important issues that would be evaluated over the next few days. I don't recall what other senior officers' views were. I did not consider, at the time, that I was kept fully advised as to the on-going discussions between TIE, SDS and BBS. I commented in my email of 28 February and the penultimate paragraph that there had been no further update from TIE on the various discussions with SDS and BBS. The Council was still awaiting the first revised QRA of 2008 from TIE. I had a reasonable understanding from TIE's paper the previous week in terms of broad principles but was not clear on the costs of risk to CEC. It is probably the case that that was because they hadn't been provided by TIE. I took from Gill Lindsay's email that her concerns about the robustness of risk and contingency were whether the detail, certainty and costs of these issues would stand up to scrutiny. She appeared concerned at the lack of figures to assess residual risk while stating that residual risk re SDS may be very significant. That

appeared to my mind to be a contradictory position. I pressed for dates on the QRA meeting otherwise we had to wait for TIE.

138. A Highlight Report for the IPG on 29 February 2008 is found at **CEC01246993**. It gives an update in relation to Planning Prior Approvals and Technical Approvals. The Highlight Report included a draft Report on Terms of Financial Close dated 21 January 2008 (the "Close Report") (appendix 1). The draft was to be updated to reflect current negotiations. The draft Close Report stated that *"INFRACO has a substantive responsibility in relation to consents and approvals but there is a critical interface with TIE/CEC which is being defined at this stage"* (p.5). The draft Close Report also noted that *"Crucially the price includes for normal design development (through to the completion of the consents and approvals process – see below) meaning the evolution of design to construction stage and excluding changes if design principle shape form and outline specification as per the Employers Requirements"* (p.31). The draft report, which had been prepared by TIE, was more than one month behind Duncan Fraser's report to IPG of 29 February 2008 (**CEC01246993**). I consider that the statement quoted from page 5 was woefully short of a clear picture. There was absolutely no detail. I'm bound to say I do not understand the text quoted at page 31. It begs the question of whether the other readers of the report on the Tram Project Board, the TEL Board and TIE Board would understand it either.

139. On page 4 of the Close Report it is stated that *"In broad terms, the principal pillars of the contract suite in terms of programme, cost, scope and risk transfer have not changed materially since the approval of the Final business Case in October 2007"*. In hindsight, looking at this comment, I would say that this was lacking in accuracy.

140. I refer to the email between Mark Hamill and Duncan Fraser / Alan Coyle dated 3 March 2008 found at **CEC01506052**. TIE provides CEC with a breakdown of Quantified Risk Allowance. The attachment can be found at **CEC01506053**. I was only occasionally involved in this sort of area. The lead person, if you like, on that and the person who would be best placed to comment was usually a Finance

Officer. He/she would be the person able to explain issues which I may not have been familiar with or may not have understood.

141. There is an e-mail from me to Ysella Jago, Rebecca Andrew and Alan Coyle dated 4 March 2008 and found at **CEC01398928**. Gill Lindsay is copied into the email. I note that a meeting was to take place that day between Gill Lindsay and Willie Gallagher. I do not recall whether that meeting took place nor whether Gill gave feedback to me.

142. In an email between Gill Lindsay and Graeme Bissett dated 9 March 2008 and found at **DLA00006379** Gill Lindsay noted that *"We will expect to see reference to SDS position on agreed risk transfer which is as we are now aware and will be documented through novation agreement and other documentation".* I can see that I was included on the copy list to this email. Not having been privy to the negotiations between TIE and BBS or privy to the discussions between Gill and Graeme Bissett, I did not understand what was meant by agreed risk transfer. I had no understanding on 9 March of whether agreement had been reached between TIE and BBS in relation to who bore the risks and liabilities arising from incomplete design and outstanding approvals and consents.

143. I refer to an email dated 10 March 2008 from Graeme Bissett to me and others found at **CEC01393819**. That email attached drafts of the Close Report **CEC01393820**, DLA risk matrix **CEC01393821**, DLA letter to CEC **CEC01393822** and DLA report on INFRACO Contract Suite **CEC01393823** . The email notes that while, generally, the documents were in final form, negotiations on a range of issues continued. The main outstanding issues in the draft Close Report included *"the section on the pricing schedule (being finalised)"* and *"the Appendix on design and consents will require to be updated to the final position on submission and consent status".* I am asked about how I understood that the pricing schedule would reflect the risks being borne by each party in relation to incomplete and outstanding design approvals and consents. My understanding of this was derived from the Close Report version 7 at paragraph 8.4. Namely that the public sector, TIE/ CEC would retain the risks associated with the process of obtaining Traffic

Regulation Orders and temporary Traffic Regulation Orders. That is because these were statutory and matters within the power of CEC as Roads Authority. The report then dealt with all other required consents and approvals, either design or construction related. Various principles applied. First of all INFRACO, including SDS, will bear any costs and programme consequences associated with design quality and constructability for all consented and/or approved design. Secondly, for consents and approvals outstanding at financial close, TIE and CEC would bear any incremental construction programme cost consequences of SDS failure to deliver design outputs in a timely and sufficient manner to the consent or approving authority. This was insofar as the cost is not recoverable by INFRACO from SDS under capped liquidated damages provision or can otherwise be mitigated by the INFRACO. Thirdly, TIE and CEC will bear the incremental cost and programme consequences associated with a delay in granting consents or approval having received the required information in a timely and sufficient manner and / or the cost programme consequences of changes to design principle, shape, form and outline specification as per the employers' requirements required to obtain the consent or approval. Risk allowance was described at paragraph 8.6 where reference was made to the QRA and risk allowance *"the only material change in the risk allocation matrixes between preferred bidder stage and the position in financial close is in respect of the construction programme costs associated with any delay by SDS in delivery of remaining designs, submission into the consents and approvals process beyond financial close".* Overall risk allowance was stated to be £32m and broken down to include £8.8m in respect of specifically identified risks held by, and to be managed by, TIE during the construction phase including adverse ground conditions, unidentified utilities and the interface with non-tram works and post close alignment of the INFRACO proposals with the SDS design. £3.3m in respect of post-financial close consents and approvals risks which provides with the cost of programme consequences of imperfections which may arise in the elements of the consents and approvals risks transfers as described above. Certain qualifications to these figures were made by TIE. The risk allowance does not provide for the costs of significant changes in scope from that defined in the Employers' Requirements, whether such changes were to emerge from the

consents and approvals process or otherwise, and also significant delays to the programme as a result of the consenting or approving authorities failing to adhere to the agreed programme (INFRACO and SDS having met their own obligations) or any other TIE, CEC initiated amendment to the construction programme which forms part of the INFRACO contract.

144. I still didn't feel that I was getting a complete picture with regards to risk, which wasn't satisfactory. I thought at that time that this wasn't the complete picture. I was taking comments from TIE at this stage perhaps with a pinch of salt. We were into March, almost three months beyond the date they claimed that the Final Business Case had been met, yet there were still negotiations with SDS and BBS. The picture was beginning to become *'more of the same'* and *'we've heard this before'*. Obviously there was pressure to get a deal done but it wasn't clear how close the Council officers were to being satisfied so that they could recommend to the Chief Executive that the deal was able to be signed. To that extent, the doubts were increasing and the trust in what TIE were telling us was decreasing.

145. I felt in March 2008 TIE were saying to us *"we're very nearly there"*. I don't know how much doubt I had as to whether that was true. The sums in the overall risk allowance was what was concerning me. It was still quite a high percentage of the total construction cost. Even without a more detailed breakdown, without sight of the QRA, that was a big figure and of concern. I wondered *"when was that going to be closed out to remove the risk?"*

146. I refer to my e-mail to Alan Coyle and others dated 10 March 2008 and found at **CEC01399016**. I had been asked to draft the letter to Tom Aitchison noting the changes from the Final Business Case to the current position are in tolerable limits. I advise that I would be willing to assist with the exercise from a factual perspective but that I could not support the position that changes from the Final Business Case to the current position are in tolerable limits. I reiterated my view that the Chief Executive should report to Council again on the various material changes. There is a further email sent by me to Gill Lindsay and others later that

day which can be found at **CEC01399012**. The change to the risk allocation on design approvals was that previously a very clear statement had been made that the private sector would be taking these risks. As at 10 March, I was clearly doubtful whether TIE could realistically confirm that the terms recommended are consistent with the Final Business Case version 2 given the state of knowledge at that date. Risk on design approvals was not all with the private sector as the Final Business case said it would be. At best, it was mixed. This can be seen in particular in the TIE Close Report referred to above on division of risks and costs related thereto (**CEC01393820**).

147. In my view the change in price was material having risen to £511.7m from the figure considered by the Council in December 2007. I also considered new governance issues between TEL and Council to be relevant. Finally, I noted in my email of 10 March 2008 the defeated opposition amendment at Council in December 2007 concerning the availability of the full risk report. I concluded by saying to Gill that *"arguably there is still a duty on officers to notify members of the changes to cost, risks and delivery dates since December 2007"*. Price increases, following negotiations between TIE and BBS, were communicated to CEC sometimes in the form of phone call from the engineers saying *"did you know, here's the latest"*. By way of explanation, quite a few of the Council engineers were actually working and had been working in TIE's offices for some time. They were closer to the action and picked up information. . TIE obviously shared information with them and very quickly the Council engineers would let us know. It was sort of a full disclosure to us because we (Council officials within the B Team) were all singing from the same hymn book. We were all trying to protect the Council's interests and a jump in price was a matter of some importance and concern. There was concern that there was a delay with TIE providing CEC information about these upward variations in the price . There were delays. I wouldn't like to quantify the timescale for them. I don't know if it was a case of holding back until TIE really felt they had no option but to tell the Council. There was a consistent pattern of not being kept up-to-date with changes, certainly at my level. .

148. In an e-mail to Graeme Bissett dated 11 March 2008 and found at **CEC01393838** I advised him that the B team were not yet in a position to advise Directors and Heads of Service that they can make a positive recommendation to the Chief Executive, enabling the latter to exercise his delegated authority to enable TIE to enter into the contract with BBS. I asked for further information (detail on price and Value Engineering and the settled position on the SDS novation) to be provided at the briefing meeting. I cannot recall to what extent TIE were forthcoming with information at the briefing meeting on 11 March without my notes. Alan Coyle's follow-up email of 11 March at 1830 hours shows progress was made but more information was needed. I do not recall any response from Gill Lindsay on B Team's views on the matter. That's not to say she didn't respond, I just don't recall.

149. In an email dated 11 March 2008 from Alan Coyle and found at **CEC01490289** he advised TIE that in order for CEC to approve the Intention to Award (ITA), CEC would require a letter from Willie Gallagher on certain matters, including that *"the price is now fixed (excluding know (sic) estimated costs)".* On 11 March 2008 Alan Coyle sent an e-mail giving an update on negotiations following a briefing with TIE (**CEC01407769**). Mr Coyle's e-mail noted that *"Novation – This is still on-going. TIE are meeting with SDS this evening. TIE are more upbeat than yesterday and have said that nothing will change re price or risk allocation presented to us. If it does, they'll come back to us before ITA ".* By e-mail later on 11 March 2008 (**CEC01544518**) Duncan Fraser advised TIE that CEC required a statement confirming the elements of the SDS designs that are being re-designed by BBS, if any, the working assumption to date having been that all of the SDS designs were to be adopted by BBS. In a reply, Graeme Bissett stated *"the information you want is embedded in the INFRACO proposal ... As I think we discussed today, the liability would sit with BBS/SDS in relation to any redesign".* Alan Coyle's email would have been sent after the briefing meeting with TIE on 11 March. At this stage we were getting close to the point of approving the intention to award. My understanding was that CEC Finance wanted as much transparency and certainty about fixing the price and minimising, or even removing, estimated costs.

150. In the second email (**CEC01407769**) Alan Coyle was briefing the Director of Finance, Donald McGougan, on where discussions with TIE had reached. This was because Donald McGougan had a key role in satisfying the Chief Executive that TIE could be authorised to accept the contract referring back to the mechanics of the Council approval in December 2007. I refer to paragraph 106 above. It was a checklist on critical issues. The email of 11 March from Duncan Fraser **CEC01544518** was a request for a statement from TIE confirming the elements of the SDS design that are being redesigned by BBS, if any. Finally, my email of 11 March had been sent to Graeme Bissett at 1320 hours ahead of the planned meeting later than afternoon. Alan Coyle's email was sent to TIE after the briefing at 1830 hours the same day and copied to me.

151. I refer to a letter from DLA to CEC dated 12 March 2008 and found at **CEC01347797** which advised that "*an agreed form of draft Novation Agreement has been negotiated to close today. The terms of the Novation transfer responsibility for design, as required by the procurement strategy, to BBS*" (para 4).

152. It appears that Graeme Bissett of TIE may have had an input into the drafting of that letter. I'm not aware whether any individuals in TIE had an input into the drafting of the letter from DLA to CEC dated 12 March 2008. There is clearly a difference between actively participating in drafting a letter as in terms of the first paragraph "*in accordance with our agreement with the Council we have taken instructions from TIE on all matters on the basis that those instructions are consistent in all respects with the Council's instructions and interests*". I have considered how Andrew Fitchie fits into this in light of the fact that he clearly had roles in both DLA and TIE. A very odd situation. It's difficult to know exactly what was going on between TIE and DLA: I felt from the Council's interest it was an unsatisfactory position.

153. It is not clear to me that the draft DLA letter was emailed by Graeme Bissett to Andrew Fitchie. I'm not sure if I was missing a covering email from Graeme

Bissett but if indeed Graeme Bissett was revising or drafting a legal letter intended to be sent by DLA to CEC. The second point arising is what Andrew Fitchie's role was at that stage. I recall that since around November 2007 he had been a Director of TIE. It has to be asked which role was he performing.

154. As noted above, the letter dated 12 March 2008 and found at **CEC01347797** which advised that *"an agreed form of draft Novation Agreement has been negotiated to close today. The terms of the Novation transfer responsibility for design, as required by the procurement strategy, to BBS"* (para 4). In contrast, the draft letter e-mailed the previous day by Graeme Bissett to Andrew Fitchie stated, *"an advanced draft Novation Agreement is in play for negotiation to close. The terms of the Novation... result in retained SDS performance risk for TIE"* (para 3.4) **CEC01541243**. There therefore appears to be a contradiction between the final letter (**CEC01347797**) and the draft (**CEC01541243**). I go on to say that in my email to Gill Lindsay dated 2 May 2008 and found at **CEC01247788**. I was reiterating previous concerns about the role of DLA on behalf of the Council. I had previously and many months earlier raised the matter in an email to Gill dated 15 August 2007 (**CEC00013273**). The Council had not been involved in the lengthy and complex negotiations to date. It was not clear what comfort or assistance the joint client role would actually provide in practice. There could have been procurement issues. However, at such a late stage it would require the Council to fully understand all the previous negotiations and to be satisfied that the position to date was acceptable. I was wondering how much of it let TIE off the hook in respect of its obligations to the Council. Also, it would imply that the Council had trusted everything that TIE had done. CEC officials had recently been informed that commercial negotiations were being led by TIE's in-house Legal Team and that DLA had not been involved at all stages. Information had also been received that DLA had simply been providing advice on specific issues as negotiated between TIE and the bidders direct. Further, I raised concerns about possible conflict between TIE and CEC and how DLA would reconcile that conflict, having duties to two clients. After considering the terms of DLA's revised letter on acting for the Council , (based almost entirely on a letter which had previously been provided to TIE and was intended to be passed to the Council in 2005 and was

not), I thought it unlikely that it would be possible for CEC to categorically accept that such instructions have always taken the Council's requirements, objectives and best interests into account. DLA are unlikely to be able to advise CEC what the outcome of the negotiations would have been had DLA received their instructions direct from CEC for the past four years. I also raised doubts as to whether commonality of interest in the project has ever been reached. The worth of the letters from DLA to the Council did not, in my view, put the Council in any better position than I had predicted many months before. In the intervening period, CEC officers had continually pressed TIE for information on negotiations on critical matters, e.g. SDS, BBS interface, risks on consents and approvals almost down to the last day. It is difficult to equate that with commonality between TIE and CEC so I was not reassured by the letter of 12 March from DLA to CEC which provided CEC with an update on the contract documentation in the lead up to the planned close date of 24 March.

155. The letter from Willie Gallagher to Tom Aitchison dated 12 March 2008 and found at **CEC01399076** confirms TIE's view that it was now appropriate to issue the Intention to Award letters. Mr Gallagher's letter also noted that the Tram Project Board had met earlier that day and had concluded that the final negotiated INFRACO terms were consistent with the terms of the Final Business Case approved in December 2007. Mr Gallagher's letter did not, however, state that the INFRACO price was fixed or address the other matters in Alan Coyle's e-mail dated 11 March (**CEC01490289**). At 12 March I was not of the view that the price and risks were sufficiently clear and fixed as to make it appropriate to issue an intention to award letter in respect of the INFRACO contract. I had received no additional clarity or definitive information at that stage as to whether agreement had been reached between TIE and BBS in relation to which party would bear the risks and liabilities arising from incomplete and outstanding design approvals and consents and how that was or would be reflected in the INFRACO price and pricing schedule. In other words, we had not received satisfaction on the points raised in Alan Coyle's email of 11 March reference **CEC01490289**. I am broadly referring to CEC. I'm not sure actually at that time whether the B Team were still actively running or meeting at all. We had been subsumed into the Chief

Executive's IPG Group which was effectively the A and B Team working and meeting together. I cannot say whether Gill was of the view that it was appropriate at that time to issue an intention to award letter in respect of INFRACO contract. Without the benefit of access to my notebooks, I can't recall any discussions with her, , or any meetings including her where she proffered her views. Presumably if there had been correspondence from her this would have been available to the Inquiry.

156. I refer to the document dated 13 March 2008 and found at **CEC01386276**. It appears that Tom Aitchison had been given an update by Andrew Holmes, Donald McGougan and Gill Lindsay recommending that he accepts TIE's recommendation to permit them to immediately lodge the notice of intention to award. I do not recall that I was shown this update at or around the time of its communication to Tom Aitchison. I thought that it was premature to immediately lodge the Notice of Intention to Award. My primary concern was still the risk issue with SDS and prior consents.

157. There are three emails sent by me on 13 March 2008 which can be found at **CEC01399075**, **CEC01401032** and **CEC01401628**. My concerns included (a) the increase in price, and the fact that the risk of consents had not been taken by the private sector, meant that the negotiated terms were not consistent with the Final Business Case; (b) DLA's letter of 12 March did not offer the Council the degree of comfort it might expect and the Council were being asked to permit notice of intention to award the contract and thereafter financial close while matters were still under discussion, and (c) that a letter from Parsons Brinckerhoff to TIE (**CEC01401629**) advised of further reviews that were required to ensure full alignment of the Employer's Requirements and the INFRACO Proposals. I was copied the letter from Willie Gallagher to Tom Aitchison dated 12 March by another member of the B Team, Rebecca Andrew in Finance, on 12 March late in the day. Other members of the B Team also received a copy. I have no record in writing as to how my concerns were received by Gill and other senior Council officials. I can't remember in detail the view in my immediate Team upon discovering that the recommendation had been made by the Directors of Finance

and City Developemnt, along with the Council Solicitor that the Chief Executive accepts TIE's request concerning the notice of intention to award. I'm guessing by saying that we would have been perturbed and thought that it was still premature. We're still talking there of 12 March, almost two months before the financial close. I think the gun had been fired too quickly. I've no recollection what Gill and the other senior officers did immediately after receipt of my three emails on 13 March expressing concerns. I'm asked if later on there was anything done with my expression of concerns. I don't think they were met or dealt with.

158. I refer to the agenda and minutes to the full meeting of the Council which took place on 13 March 2008 and can be found at **CEC02083387** and **CEC02083388**. It is suggested that, from the agenda and minutes, members do not appear to have been given any update of the Tram Project despite the highlight report to the IPG on 29 February 2008 envisaging that a report on the Tram Project would be provided to members at that meeting. Having read the agenda and minute of meeting of full Council held on 13 March it suggests to me that no official update was given by Chief Officers to Councillors at said meeting. A decision must have been taken by the Chief Executive and relevant Directors sometime after 29 February (which was the last IPG meeting) and 6 March which would be the circulation deadline for the Council agenda not to give an update report. I cannot comment further on the possible reasons why no update report was considered appropriate for Council on 13 March. It's just not within my knowledge.

159. I have considered whether I think, given the timescales involved, the papers could have been prepared and tabled for the meeting on 13 March given my experience of papers and reports being prepared. I know a dim view was normally taken of failing to meet the deadline for circulation of papers for Council meetings. I think the Council Secretary was quite averse to sending out supplementary papers. However, it was not unheard of. I can't recall many occasions where there was a late paper. I didn't go to many Council meetings. I don't recall there being many occasions where something was simply tabled. That would be unfair to members and arguably in breach of the provisions of the Local Government (Scotland) Act about access to information etc. I make reference to the meeting held on 20

December 2007. I think here that ran very close to the wire as a paper was being drafted on the weekend (Sunday 16 December 2007). It went to Directors on 17 December 2007, which was the Monday. I don't know whether it would have been circulated on the Monday or the Tuesday. This is an example of where it did happen that less than the required seven days' notice was given.

160. I refer to the email from Graeme Bissett to Gill Lindsay dated 13 March 2008 and found at **CEC01474537**. Graeme Bissett appears to respond to matters discussed between them by phone that afternoon. He attaches *"on behalf of DLA a draft letter which updates their letter to you dated yesterday"* and states *"Please note that we asked DLA to give you this draft form of letter which presumes that the INFRACO matters above are satisfactorily concluded"* (**CEC01474540**). I was not aware that an employee/director of TIE had had a role in drafting a letter from DLA to CEC. Again, I note, Andrew Fitchie's reference on the letter. I do not consider, having now seen this document, that this is appropriate. In my view it is inappropriate as it confuses the roles of agent and client. It also causes more problems for the so called joint client role of DLA. It caused me concern and confusion that Andrew Fitchie who, in my understanding was the Director of TIE, had his reference on a letter from DLA.

161. A letter sent from DLA to CEC dated 18 March 2008 and found at **CEC01347796** provides an update on the Draft Contract Suite as at 13 March 2008. The letter states *"We understand that TIE will confirm settled pricing for all major fixed price elements of the INFRACO Contract. If TIE has achieved these objections and BBS has been able to confirm its commitment to abide by these positions, TIE should have every confidence in closing the contract suite efficiently, commencing with the issue of notification of intention to award today. We would stress that full cooperation of the BBS Consortium on this objective is essential"*. I am asked what my understanding of the above passage was? I do not recall when, or if, I was copied into this letter addressed to Gill and marked as *"not for distribution"*. It gives the impression of still being conditional, in a sense, by the words *"if TIE has achieved these objections"* (presumably meaning objectives) and *"BBS has been able to confirm its commitment to abide by these positions"*. In other words, it

was still dependent on two further steps before issue of notification of intention to award. It's an aside but this is not a letter which carries the AF reference. A lot of correspondence was sent directly to Gill Lindsay and I was not always copied in at the time of transmission.

162. I understand that the IPG met on 19 March 2008. The Action Note in respect of the meeting is found at **CEC01391254**. I have no recollection of what was discussed at the IPG meeting other than to rely on the Action Note. I suspect from reading the Action Note that no Highlight Report was produced by City Development. The only document tabled was the risk report which was merely noted.

163. I refer to the letter from DLA sent to CEC dated 20 March 2008 and found at **CEC01544970**. The letter stated *"We understand that TIE will confirm <u>with BBS</u> settled pricing for all major fixed price elements of the INFRACO contract. If TIE has achieved these objectives and BBS has been able to confirm its commitment to abide by these positions <u>including programme,</u> TIE should have every confidence in closing the contract suite efficiently, commencing with the issue of notification of intention to award. We would stress that full cooperation of the BBS Consortium on this objective is essential <u>and this has been confirmed by letter from BBS to TIE yesterday"</u>* I note that the changes from DLA's letter dated 18 March are shown underlined. As I note earlier, I do not recall when, or if, I was copied into this letter addressed to Gill and marked as not for distribution. I note that in the opening paragraph of DLA's letter, which again has an AF reference, indicates that Andrew Fitchie had made a verbal report to Gill on Monday 17 March. It may be a matter of supposition that a discussion took place between Gill Lindsay and Andrew Fitchie about amending the terms of his earlier letter. The updated letter makes it slightly clearer to whom TIE would be confirming settled pricing for all major fixed price elements of the INFRACO contrac,t namely to BBS. It specifically made reference to BBS abiding by the programme, reference was made to a confirmatory letter from BBS to TIE.

164. Willie Gallagher sent an email dated 21 March 2008 found at **CEC01491920**. The email wasn't sent to me . Willie Gallagher advised *"Last night, we successfully concluded agreements on the price schedule and the INFRACO detailed contract. There is no change to the overall price, scope and Programme reported to the Board"*. On or about 21 March 2008, and acknowledging I was not privy to the Willie Gallagher email, I was not aware whether the INFRACO pricing schedule had been agreed. If anything I probably assumed that it was still under negotiation. I was no further forward either in terms of knowing whether agreement had been reached between TIE and BBS in relation to which party would bear the risks and liabilities arising from incomplete and outstanding design, approvals and consents and how that was, or would be, reflected in the INFRACO price and pricing schedule. In other words, I was no better informed than as at 11 March 2008 and the update requested by Alan Coyle found at **CEC01490289**.

165. I refer to the provisions of the pricing schedule of the INFRACO contract (Schedule 4) (**USB00000032**) including, in particular, the consequences likely to arise from the fact that the base date design information was fixed with reference to the design drawings issued as at 25 November 2007 (at which point detailed design was not complete and the majority of statutory approvals and consents had not been obtained). I refer to an email from Alan Coyle dated 15 April 2008 and found at **CEC01245223**. I note Alan Coyle forwarded to me an email of the same date by Stewart McGarrity attaching Schedule 4 of the INFRACO contract and the cost analysis (**CEC1245224** and **CEC1245225**). I note I replied on 16 April 2008 asking how the information provided fed through to the overall risk figure and the quantified risk allowance (**CEC01247693**). I cannot recall how much time I would have devoted to reading these documents at this distance in time, but within 24 hours I replied by email to Alan Coyle with a question which clearly came from having read Schedule 4 and the accompanying spreadsheet.

CEC1245224 should be CEC01245224; CEC1245225 should be CEC01245225

166. I refer to paragraphs 2.3, 3.2, 3.3 and 3.4, 1 to 4 of Schedule 4 (**USB00000032**). Paragraph 2.3, which is entitled *"Base Date Design Information"* referred to design information drawings issued by SDS to INFRACO up to and including 25 November 2007 and listed in Appendix H to the said Schedule, part 4. In my

view, this was an early date, some five months prior to the version of Schedule part 4 issued by TIE to Alan Coyle on 15 April 2008. I note in passing that Appendix H contained no information whatsoever. The overall effect of fixing such an early date for base design information would be to reduce the number of completed designs between 25 November 2007 and final execution of conclusion of the contract. Reading paragraphs 3.2, 3.3 and 3.4 together, this dealt with the construction price or purported to do so. As soon as paragraph 3.1 had provided for the construction works price to be "*a lump sum fixed and firm price*" the following paragraphs then went on to set out exceptions to that principle. Certain assumptions had to be made and it was foreseen that certain of these pricing assumptions might relate to the notification of a notified departure immediately following execution of the contract. There was an obvious contradiction in the sentence at paragraph 3.2 and I quote "*this arises as a consequence of the need to fix the contract price against a developing factual background*". The following sentence was obviously anticipating the clear distinction between the theoretical and the actual facts and circumstances. Paragraph 3.3 sets out exclusions from the construction works price. Briefly these were utilities diversions, except where undertaken by INFRACO, St Andrew's Square public realm works, ground conditions which were unforeseeable and Bernard Street public realm works. While INFRACO was required to undertake any of these specified exclusions, this would constitute a notified departure. Paragraph 3.4 dealt with pricing assumptions, most significantly stating that the design prepared by SDS will not be amended from what was set in stone as at 25 November 2007. This was a matter of concern to me, as already stated elsewhere. By fixing the number of completed designs ready at 25 November 2007, that still left a number of unfinished designs over the ensuing months, the direct consequence of which was that an element of the price was not settled. They will not be amended as a consequence of any third party agreement, they will not be amended as a consequence of the requirements of any approval body, a term not obviously defined in Schedule Part 4 but which includes the Council in its role as planning roads and bridges statutory functions. I am not quite sure what was meant by sub-paragraph 3.4 at bullet point 2, it could be read as "*realigning the previously unspecified delivery dates for SDS to a new programme within INFRACO's*

construction delivery programme". SDS design was effectively warranted as complying with INFRACO proposals and the employer's requirements. The design delivery programme was not capable of, or permitted to be amended. In the course of the project, certain things stick in one's mind i.e. what I would call the milestone documents. This was clearly a document that I had been wanting to see for some time. TIE had been under an obligation to provide it to us for quite some time. When it came I did read it, but I don't have much recall of what is said in it and much of what I've said in contemplation of the Inquiry is regurgitating the document itself.

167. I refer to an email from David Leslie to Willie Gallagher dated 31 March 2008 and found at **CEC01493317**. It attached a letter to Willie Gallagher which can be found at **CEC01493318**. The letter expresses certain concerns in relation to prior approvals. I drew Gill Lindsay's attention to this letter in an e-mail dated 4 April 2008 and found at **CEC01395476**. On 3 April 2008 Duncan Fraser sent a letter to Willie Gallagher setting out similar concerns by the Transport Division of City Development Department relating to Technical Approvals and Quality Control Issues. I am asked what my understanding was of the "difficulties" that could be created in coming months" where BBS have been forced to make assumptions in their bid which do not correlate with our own expectations, as noted in Mr Leslie's letter. This letter can be found at **CEC01493639**. I think Mr Leslie may have been describing what he saw as problems for BBS on the one hand, assuming a programme could be guaranteed for processing of prior approvals by the Planning Department, but being frustrated at any failure to adhere to these timetables. On the other hand, Mr Leslie probably anticipated pressure being applied to his officers to keep to a strict timetable so that INFRACO did not fall behind its overall programme. I had no understanding at that date as to how the pricing provisions in the INFRACO contract dealt with such difficulties given that I had received no finalised details on risk regarding prior approvals. At that date there was no final quantification of risk to TIE/CEC that I had been made aware of. The last position statement was probably the overall risk allowance mentioned in TIE's Close Report, version 7, dated 10 March where it was stated to be £32m including £8.8m in respect of post-financial alignment of the INFRACO proposals with the

SDS design and £3.3m in respect of post-financial Close consents and approvals risks.

168. In my email dated 11 April 2008 and found at **CEC01401109** I raised an issue that had arisen with the "*Russell Road Bridge: Prior Approval*" which posed the question whether the sum allowed in the QRA for SDS delay (£3m) was sufficient. I described my concern in the email of 10 April 2008 as *"one of the dreaded scenarios which we have regularly discussed at PLIG which stood for the Property and Legal Issues Group and co-ordination meetings".* The concern was that, even before financial close, a situation had arisen which could, under the INFRACO contract, give rise to a claim against the public sector brought about by the fault of another party in failing to secure a timeous prior approval. I came close to calling for the Monitoring Officer to become involved to request information or an explanation from TIE. The Monitoring Officer was designated as the Director of Corporate Services who was the Line Manager of Gill Lindsay. He had a statutory responsibility delegated by the Council to deal with any questions of illegality and, if he thought fit, make a report. The Monitoring Officer at that time was Jim Inch. The matter was raised with Gill in my email of 11 April 2008. She responded by suggesting we obtain a view from Finance regarding the QRA and from Directors of both Finance and City Development on the issue. She recommended the issue then be put to TIE for awareness and resolution. Both Alan Coyle and Andy Conway brought matters to the attention of their respective Directors. I have no knowledge of what was done by the client Directors in response to these concerns. I was not aware whether any consideration was given to delaying signing the INFRACO contract until the concerns were resolved. There was no hint of that in Gill's response to me on 11 April.

169. I didn't contact the Monitoring Officer directly (Jim Inch). Whether Gill discussed it with him I have no means of knowing. . My anxiety was such that I thought this might be a matter where he was called upon to become involved. It was an observation. I didn't pursue it directly with him in any shape or fashion. I did make Gill Lindsay aware though.

170. I do not recall why there appears to be no further meetings of the Legal Affairs Group until October 2008. According to the minute of the meeting held on 14 April 2008 there was an intention to meet again on 21 April 2008. I can only speculate that somebody, most likely in TIE, decided that Legal Affairs Group meetings over that period April to October 2008 were not required. They always issued the agenda for the meetings and they did the minuting, the clerking of the Committee and sent out the papers. I think it was probably their decision not to pursue it. It would be inappropriate for me to say if I thought anything about it at the time in question or whether I was concerned or not. I was possibly relieved, because of other work demands in the Litigation Team which I was managing. It would have been beneficial for the meetings to have carried on throughout that period. Things didn't come to a stop so I think it would have been useful. It maybe was not necessary to meet every week. It could have been reduced, the frequency perhaps, to two weekly or something like that, and if there was no business to discuss, the meeting could have been cancelled by email beforehand. To lose the opportunity was probably to the detriment of the on-going discussions between TIE and CEC. I saw the Legal Affairs Group meetings as beneficial to the whole process. They tackled some difficult aspects of the project. It had a good breadth of representation and brought the Council Officers, the B Team, Gill and Directors face to face with their opposite numbers in TIE. That was a useful thing.

171. In my email dated 14 April 2008 and found at **CEC01256710** I noted that, in my view, it would be *"prudent and proper"* to report again to members before Financial Close of the INFRACO contract was authorised, given the various changes which had emerged since December 2007, including *"the new final estimate of £508 million; a four month delay to the revenue operating date; and continuing concern over the risks to the Council arising from the SDS programme"*. An email in the same chain dated 16 April 2008 from Jim Inch to Tom Aitchison noted *"Given Colin's concerns it may be prudent to have a short meeting with Gill to confirm the present direction of travel"*. I considered it would be prudent and proper to report again to members before financial close because of the material changes since the Council meeting of December 2007. The authority granted to the Chief Executive, in my view, needed to be updated in

light of the changed circumstances having given the transparent update report to Councillors. A fresh Council decision formulated after consideration of the material changes would also give protection to the Chief Executive. I do not know what Gill's views were on this matter. My concerns reached Jim Inch the Director of Corporate Services via his Business Manager. Jim Inch appears to have raised the matter with the Chief Executive suggesting a short meeting be held with Gill to confirm the present direction of travel.

172. I refer to a report provided to the IPG on 16 April 2008 and found at **CEC01246992**. It noted that the Planning and Roads Departments had written to TIE recording their concerns about the delay and quality of submissions for approvals and consents. There was concern that prior approvals may require to be revisited if there were substantial changes in design. The report noted *"There is potential for the approvals to cause a delay to the construction programme"*. I agreed with the position stated by Duncan Fraser in his report to IPG on 16 April that *"there is potential for the approvals to cause a delay to the construction programme"*. At that stage I understood that delays in the prior approvals could be laid at the door of the public sector leading to compensation events on the basis that INFRACO programme was delayed. CEC had been told by TIE that a risk allowance of £3.3m was in the Qualified Risk Assessment for this issue. There was an assurance from Stewart McGarrity of TIE that this allowance, along with the management procedures in place, were enough to mitigate. The Russell Road Bridge issue had, in itself, the potential to be extremely expensive. There was a possible price tag of maybe £2m put on that so very quickly, in respect of just one issue/location, the £3.3m would be more than halved. I was concerned, and it was a general sweeping statement, that this allowance, along with the management procedures in place, were enough to mitigate. It was probably still too risky.

173. The report provided for the IPG on 16 April 2008 and found at **CEC01246992** attached (as appendix 1) an update of the table, "*Critical Contractual Decision to enable Chief Executive to use delegated powers to approve tie to sign the contract with BBS*". Para 7.4 of the table stated *"What design version was the*

BBS contract priced against and what changes have subsequently taken place", to which there was a response, *"Report by TIE on the INFRACO Contract states in section 'Design Expectations of the INFRACO' that V26 updated from V22 of the SDS design has been used for Price and Programme – Schedule 4 on pricing received from TIE"*. I had not seen any versions of the SDS designs at this stage of the process . As far as Schedule 4 was concerned, I note that at the Legal Affairs Group meeting on 14 April (**CEC01227009**) Stewart McGarrity was to send CEC a copy of Schedule 4 pricing as this was now mostly agreed. I had not been appraised directly of which design formed the basis for the INFRACO price nor how the pricing provisions in the INFRACO contract addressed any changes from that version of the design.

174. My understanding of whether agreement had been reached between TIE and BBS in relation to which party would bear the risks and liabilities arising from incomplete and outstanding design approvals and consents and how that was, or would be, reflected in the INFRACO pricing schedule, was derived from the internal Financial Close Report prepared by City Development as an appendix for the IPG on 16 April. Namely, that the QRA had been updated to allow a sum of £3.3m for SDS delay and TIE were assuring CEC that they were satisfied that the drop from £50m to £30m was enough cover. The absolute definition of who carried the risk on design was still not visible. Stewart McGarrity was tasked at the Legal Affairs Group on 14 April to send a copy of the INFRACO Pricing Schedule (Schedule 4) to CEC.

175. The report by Tie on the INFRACO contract states that version 26 of November 2007 was used for Price and Programme and I am told that version 26 of the design reflected the design available as at November 2007. As to whether I have any general view or opinion on the design being fixed in November 2007, if the Council was misled and not given accurate information about which version of the design was fixed then that could clearly have an effect on risk. My thinking was that if the design was fixed at a much earlier stage of drawings then that correspondingly led to greater uncertainty and therefore risk on behalf of the Council. This was because there were many more drawings outstanding when

financial close was reached. There was a difference of six / seven months between the setting in stone of the design version and financial close. That gap would suggest to me that the Council was more at risk.

176. The Action Note produced following the IPG on 16 April 2008 and found at **CEC01228374** noted under 'Communications Plan' *"Keylines / press release to state that risk has been transferred/nailed down, new price is prudent, planned, one of the most audited public projects ever in Scotland"*. The Action Plan, under INFRACO, states *"Note pressures on planning processes – planning prior approvals. Note that these constitute something of a risk – may have to be revisited if there are any substantial changes in design. Also similar risks associated with technical approvals …"*. . It's not how I would have communicated the position to the media, but communication to the media was not my role. Risk had still not been finally nailed down in my view. Prior approvals was clearly a risk and comments are dealt with elsewhere about the Head of Planning's concerns about the pressure on his statutory functions through the SDS delays.

16 April 2008 should be 17 April 2008

177. I refer to the draft INFRACO contract as at 22 April 2008 circulated by DLA and found at **CEC01312367**. I was concerned to note that DLA's document on the contractual allocation of risks in the draft INFRACO contract on 22 April, although I don't recall exactly when I saw this, at Section 19 stated *"consents clause 19 still under discussion"*. This was showing most of the risks were allocated to the public sector. I could not be certain whether this document accurately or fully communicated the risks. There was nothing from BBS to reflect their position. It was a case of accepting DLA or TIE's version. CEC had no direct input into the TIE / BBS negotiations. I don't think TIE made any serious effort to describe the risks. It's just as you would see columns ticking public, private or shared. It was a helpful aide memoire, a summary document but it gave less than the full picture. I am asked whether this was something that was on the table when I was in discussions e.g. at the Legal Affairs Committee, on the topic of risks or whether it was something that was updated after the meetings and progress was made. I'm not sure how and when it was updated because I was not a party to that task. I

saw at least two versions of it. This one was on or about 22 April 2008. I can't remember when the previous one was and I didn't stop to compare and see what had been moved from public to private. It was probably more of a checklist for DLA than being of any serious use to the Council. The QRA was much more telling and significant than a string of columns ticked indicating public, private or shared. This document was of limited use.

178. The email from Graeme Bissett dated 28 April 2008 and found at **CEC01312358** circulated an updated draft of the Close Report (**CEC01312359**) and other documents. The updated draft Close Report noted (a) there had been an increase in the base cost of INFRACO of £17.8m compared to the Final Business Case, which increase was as a result of *"substantially achieving the level of risk transfer to the private sector anticipated by the procurement strategy"* and (b) the increase of £17.8m approximated closely to *"the allowance which was made in the FBC for procurement stage risks i.e. the increase in Base Costs which might have been expected to achieve the level of price certainty and risk transfer which has been achieved"* (p.4). I am asked to what extent these passages were consistent with my understanding at the time of the risks and liabilities retained by the public sector. The only source of information on these matters was TIE itself so, in that respect, this information provided the only basis for my understanding of the position. It appeared on a simplistic view that where risks were being transferred to the private sector that was reflected in an overall price increase. This paragraph should be read in conjunction with paragraph 185.

179. The statement was effectively a broad sweeping statement of the cost of just the transfer. You had to dig down further into a variety of other documents to try and find how the risk allocation worked in a range of stated circumstances. Paragraph 8.4 of document **CEC01312359**, the TIE draft Close Report, deals with responsibility for consents and approvals. Allocation of risks is split between BBS for costs and programme consequences associated with design, quality and the constructability for all consented and/or approved design. In simple terms, every other risk appeared to be allocated to TIE / CEC. Allowances were to be £3.3m for delays associated with outstanding design work at financial close in addition to

a £6.7m provision for general programme delay. The total risk allowance for the project was £32m. Responsibility would be clearly delineated along with risk allocation in the contract and schedules spelling out consents obtained at financial close and remaining consents. TIE would be carefully managing the programme of delivery and take mitigating action as necessary. In paragraph 8.8 I put alignment of QRA and risk allowance to the DLA letter and risk matrices. TIE were making some progress towards answering long standing CEC questions about risks and liabilities retained by the public sector in respect of outstanding and incomplete design, approvals and consents. They did acknowledge that there had been a change in risk retained by the public sector since approval of the Final Business Case in December 2007. Cross referring to the DLA letter at 7.1 and I quote *"consents, delay on post-close consents"*. This is the one significant change in the risk profile retained by the public sector since December 2007. The exact nature of TIE and CEC's continuing risks have been well rehearsed and are detailed in Appendix 1, as are the mitigating actions and processes TIE has in place to manage these risks. The risks summarised in the DLA report are therefore accommodated in the risk and contingency allowance to an acceptable degree. I am actually quoting the view of DLA. TIE also advised that they had worked closely with CEC technical people to look at the management processes for controlling risk and that these factors could be relied upon to manage the exposure successfully.

180. I refer again to Graeme Bissett's e-mail of 28 April 2008. He attached a Report on INFRACO Contract Suite found at **CEC01312363**. The Report on INFRACO Contract Suite noted (a) Price, *"A number of core pricing and programming assumptions have been agreed as the basis for the Contract Price. If these do not hold, INFRACO is entitled to a price and programme variation known as "Notified Departure"* (p.4); (b) Programme, "*Following contract signature, it is expected that BBS will seek a Notified Departure on Programme due to SDS delay in design production"* (p.4); and (c) Managing Approvals Risk, *"The risk of securing approvals has been shared between SDS and TIE Ltd. SDS takes the risk of achieving delivery of batches for approval on the agreed date to the agreed quality. That risk is capped at £1,000,000 pounds liquidated damages at*

approximately £10,000 per package. Provided the application for approval is made on time and the quality of the application is in line with agreed expectations then TIE Ltd takes the risk that the Council does not process the application within the 8 week period included in the programme. SDS is also incentivised by a bonus pot of £1,000,000 pounds with approximately £10,000 attaching to each deliverable package. (p.8). I'm not clear that I did have an understanding of the provisions noted above. I don't recall forming an understanding at the time of receipt of the report and the INFRACO contract suite. I did address some issues. I am asked what notified departures I expected following contract signature and what allowance had been made for this in the risk allowance. The real concern about possible notified departures was likely to be INFRACO programme delays due to design being late or inadequate and I noted that the issue had been discussed earlier about the bridge at Russell Road. In terms of the allowance made for this in the risk allowance, I could only note the figures set out by TIE i.e. the CAP of £1m liquidated damages at approximately £10k per package. TIE's Close Report under the heading '*Increase in Base Costs*' broke down and included figures of £8.8m or £6.6m or £3.3m respectively depending on the reason. I am asked about incentivising. My recollection about the views I held giving SDS a bonus pot of £1m to incentivise some production and design was one of dismay. The SDS contract had not been sufficiently tightly drafted so as to require the timed output of design. In effect, the Council/ public sector was being saddled with meeting the cost of a contract not fit for purpose. I did not consider that to be appropriate, it could be seen in some ways as a reward for slow or poor design programme.

181. Referring again to Graeme Bissett's e-mail of 28 April 2008 it also attached a letter dated 28 April 2008 from DLA to CEC and TIE which can be found at **CEC01312368** and a DLA/TIE Risk Matrix as at 22 April 2008 **CEC01312367**. Again I am asked what my understanding was, at this stage, as to who bore the risks and liabilities arising from design approvals and consents and how that was addressed in the INFRACO contract/pricing schedule. Andrew Fitchie in DLA indicated in a letter to Gill that the pricing schedule, INFRACO Contract Schedule, part 4, had been extensively discussed over the past six weeks and it was now

settled as to its key assumptions. The letter dealt with risk, value engineering items, provisional sums and fixed prices and noted that TIE had assessed the likely financial impact of the assumptions not holding true and triggering changes. They observed that delay caused by the SDS design production and CEC consenting process had resulted in BBS requiring contractual protection and a set of presumptions surrounding programme and pricing. An immediate BBS request for a contractual variation was expected. In respect of these issues I understood the public sector would bear the risks.

182. I understood the references to "*liability caps*" and "*BBS responsibility for design and performance post novation*" in the letter from DLA to TIE and CEC to mean that BBS were attempting to shift design liability, post-novation, back to the public sector. I understand "*contractual protection*" for BBS to mean that they would not be liable for programme delay resulting from design production and the consenting process. There was a set of assumptions surrounding programme and pricing which would only apply if the design production and the consenting process took place on time. If there was delay in the design production and the consenting process BBS would not be liable for delay to the construction programme. I view it as almost certain that there would be notified departures given my knowledge of the SDS INFRACO mismatch. TIE and DLA also seemed to expect a new construction programme and I note the statement *"TIE are prepared for the BBS request".* DLA did not spell out in the letter of 28th how TIE were prepared to manage such notified departures nor the consequences of such notified departures. I refer to the TIE Close Report at paragraph 8.8 and 5.2, project master programme and comment that £6.6m was equivalent to two to three month's delay. The risk allowance accommodates TIE's assessment of the anticipated immediate contractual variation which flows from the final integration of SDS design and construction programme.

183. I refer to an email sent by Nick Smith and myself to Andy Conway and Alan Coyle dated 30 April 2008 in respect of DLA's letters of 12 and 18 March and 28 April 2008 found at **CEC01246045**. The concerns I had outlined in that email were about the ability of DLA to effectively review their own work. I found it difficult to

see how any letter from DLA could give full comfort to the Council. My long held preference, discussed and agreed with Nick Smith and Alan Squair, was that the Council should seek independent legal advice. I considered all the DLA letters to be heavily caveated and referred to instructions from TIE for positions sought by TIE. CEC were to give a guarantee in respect of all TIE's financial obligations arising from the INFRACO contract. Instructions had been given throughout by TIE to DLA with little input from CEC officers and accordingly there was no certainty that Council instructions flowed through to DLA. The letter from DLA of 28 April did little to remove doubts and uncertainties. No comfort, apparently, was given on the risk profile and acceptability in relation to the market norm. The letter narrated matters which appeared to CEC Legal to be risky for the Council and are not fully covered by the QRA. I'm not aware whether these matters were discussed at senior level and, if so, what was the outcome of any such discussion. Our views on the role of DLA and the worth of their acting for the Council had been put to Gill regularly in the preceding months. I do not know whether, as part of the triumvirate she discussed this with the Directors of Finance and City Development before reporting to the Chief Executive. By triumvirate, I refer to the Council instruction of December 2007 (see paragraph 106 above) whereby the Chief Executive was to receive the report from Andrew Holmes, Director of City Development, Donald McGougan, Director of Finance and Gill as Council Solicitor saying *"yes they were recommending to him that having checked everything that was within their domain, they were happy to recommend to him that he exercised the powers delegated by the Council".*

184. I refer to my remarks sent to Gill Lindsay dated 30 April and 1 May 2008 and found at **CEC01241689** and **CEC01241689**, advising of my understanding that if BBS had increased their price by a significant amount, there would be further negotiations and members would not be advised of these recent developments when Council considered the report that day. I also raised concerns that members would not be advised of a *confidential* increase in the price payable to BBS when Council considered the report later that day. I considered that the officers' duty to the Council would be best served by either *"pulling the report, assembling the true picture and reporting again to members, or by being open to*

them about the changed situation". My recollection of when I first became aware that BBS were seeking further sums, without having access to my notebooks, is that I probably I heard by telephone from either Finance or City Development B Team colleagues that BBS were seeking further sums. The first contact, I am assuming, would have been on 30 April. Such was the import of the news that I am sure I would have alerted Gill immediately. I cannot recall from reconsidering my emails, what the increased sums related to. The matter was understood to be under discussion between BBS and TIE. I had been led to believe by a B Team colleague informing me of developments that Councillors were not to be advised on these recent developments. I cannot recall whether the B Team member was an officer from Finance or City Development. If pressed to be more specific it was more likely to be an officer from Finance.The Council came to consider the Tram Report later that morning of 1 May 2008. I recall discussion at the last IPG meeting something being said to the effect that there was a *"duty to respect Council as a corporate body"*. I thought that duty would be best served by either pulling the report, assembling the true picture and reporting again to members or by being open with them today about the change to the situation. I would have been concerned about implications for all Council officers from the Chief Executive downwards, not just the professional legal advisors. The report did not directly involve professional legal advisors as authors but they were aware of its terms and the Council Solicitor was part of the final sign off arrangement.

185. I refer to a report dated 23 April 2008 by Tom Aitchison presented to the meeting of the Council on 1 May 2008 and found at **CEC00906940**. The report sought refreshment of the delegated powers previously given to the Chief Executive to authorise TIE to enter the contracts with the INFRACO and TRAMCO bidders. The report noted *(a) the cost of the project was now £508m (comprising a base cost of £476m and a revised QRA of £32m), which increase was largely due to the firming up of provisional prices to fixed sums, currency fluctuations and the crystallisation of the risk transfer to the private sector as described in the Final Business Case; (b) 95% of the combined TRAMCO and costs were fixed with the remainder being provisional sums which Tie had confirmed as adequate; and (c) as a result of the overlapping period of design and construction a new risk area*

has emerged which has been the subject of extensive and difficult negotiation. TIE Ltd advise that the outcome is the best deal that is currently available to themselves and the Council. Both TIE Ltd and the Council have worked and will continue to work diligently to examine and reduce this risk in practical terms" (para 3.10). The report's primary, or lead authors, were Alan Coyle, Finance and Andy Conway, City Development. The first draft would have been circulated within the Council at officers' level for comment and amendment. Almost certainly to Gill and to myself, the two Directors, Finance and City Development and to the Chief Executive. I do not recall how many versions the report would have gone through. I cannot be sure whether the draft report was circulated to anybody in TIE. I recall that TIE were closely involved in the production and finalisation of the report to Council in December 2007. I probably did provide advice and input to the drafting of the report. This would not have been directly to the Chief Executive but to the authors Alan and Andy. The Chief Executive would have been expected to give final sign off but I see this was actually done by Jim Inch. Presumably the Chief Executive was not available at final sign off. It is not actually clear from the minute (**CEC02083356**) if members were advised of the very recent increase in price. The decision of the Council clearly reflects that they noted what the price in the written report was, namely £508m. However, referring to paragraph 6 of the decision, there was a noting of *"the adverse movement in the estimated cost of the Tram Project since the final business case".* I am not sure if that note was a comment on change in the price from December 2007 to 1 May 2008 or if it was a comment on a supplementary oral update on 1 May report figure. In essence I do not know if members were advised of the recent increase in price and, if they were, what explanation they were given for the reasons behind that increase.

186. I have considered what was my understanding at this stage of the risk and liabilities that had been retained by the public sector in relation to design approvals and consents. Reference was made in the report (**CEC00906940**) in paragraph 3.10 where it states that *"a number of the adjustments to risk allocation are positive, reflected in the reduced QRA. As a result of the overlapping period of design and construction, a new risk area has emerged which has been the subject of extensive and difficult negotiation. TIE Ltd advised that the outcome is*

the best deal that is currently available to themselves and the Council". I was not aware that there had been any change since the TIE Close Report a few days before. As to whether I considered that the risk retained by the public sector in relation to design approvals and consents was consistent with the statement in the report to the Council that there had been a crystallisation of the risk transfer as described in the final business case, I do not recall whose words were *"crystallisation of the risk transfer to the private sector".* On current reflection, these words are not fully consistent with the position reached between TIE and BBS as the public sector was clearly taking some of the risks as mentioned in paragraph 3.10 of the report referred to in the preceding paragraph. The INFRACO costs I understood to be provisional were those matters still not settled in discussions between TIE and BBS. As to whether any of these provisional sums related to risks and liabilities arising from design, approvals and consents, I understood under reference to paragraph 3.10 of the report that some of the provisional figures related to risks and liabilities arising from design, approvals and consents and I quote *"both TIE Ltd and the Council have worked, and will continue to work, diligently to examine and reduce the risk in practical terms".* Re my understanding of (a) the new risk area that had emerged as a result of the overlapping period of design and construction and (b) the steps that would be taken by TIE and CEC to reduce the risk. I think this wording was an attempt to explain the fact there was a mismatch between SDS design output and the INFRACO construction programme. In truth this mismatch had been known about for some time and was not new since the December 2007 report. I do not recall whose wording *"new risk area"* was other than to indicate it was certainly not mine.

187. An e-mail from me to Gill Lindsay dated 2 May 2008 (**CEC01222466**) attaches a report entitled "Reports of Terms of Financial Close ("Closed Report") dated 30 April 2008 and found at (**CEC01222467**). The report was prepared by members of what had beenthe B *team "prior to the hiccup on price".* The report notes the need to review the risk associated with design consents and approvals and whether the present risk allowance of £3.3m was adequate. Gill Lindsay responds to the email on 2 May 2008 (**CEC01222037**). She states *"I have considered*

briefly. My questions are is Tie aware of issues and have resolutions been agreed? Time is of the essence". She notes that "*TIE wish to be in a position to close with immediate effect if and when resolution was agreed. Any outstanding matters must be resolved with TIE very quickly*".

188. My concerns, shared by colleagues in the B Team, were compiled in the report found at reference **CEC01222467**. At para 2.3 we state that the Employer's Requirements had only partially been considered according to DLA letter of 28 March. At para 6 we raise concerns that clarification on land for construction was required from BBS. At para 8.4 we state we have a concern of the consents and approvals on the basis of SDS delivery of programme to date and in relation to programme 31. We question whether the SDS design and consents risk cover required to be increased. At para 5.2 and 7.1 we refer to the varying potential costs for delay. At para 10 we note, with regards to the INFRACO suite, that Gill Lindsay was to confirm with DLA and TIE reports that there is adequate cover for CEC. In Appendix 1 we refer to the DLA matrix. We note that advice was needed on any necessary changes in cost or risk. We also note that DLA could not give legal assurances regarding the current contents of the employers' requirements and their consistency with INFRACO core terms. I also mention the QRA contract negotiations and ask whether had there been any changes and, if so, what were the cost implications. By the time of Gill Lindsay's response I was actually on annual leave. Looking back at her response I would say "no" her response did not adequately address my concerns. She merely raised questions as opposed to commenting or resolving the issues. I did not return to work until 20 May. Gill Lindsay appeared to ask Nick Smith to progress matters in my absence. She wanted any outstanding matters resolved with TIE very quickly but said nothing about her role in resolving matters with DLA concerning their letter. I form these views from looking at Gill Lindsay's email consequent to it being produced for me by thelinquiry.

189. An email dated 2 May 2008 from Duncan Fraser to Gill Lindsay and others is found at (**CEC01222037**). Although I appear in the earlier exchanges of the email chain I am not copied into Duncan Fraser's email of 2 May. I note Duncan Fraser

states *"Can you advise me on your advice about the DLA letters (3 number) and whether they go far enough in meeting your expectations on quality and risk to enable you to advise, or not, Chief Executive and Directors on the contractual position towards agreeing for the documents to be signed."* I was not copied into the email from Duncan Fraser as I was on leave. In my absence he copied the email to my colleague Nick Smith. My view is that Duncan Fraser, was quite properly, raising this matter with Gill Lindsay as she was under specific instructions from the full Council to complete this task as part of the due diligence exercise. These are my views in retrospect having seen that email in the documents sent out to me by the Inquiry.

190. An email from Graeme Bissett dated 8 May 2008 and found at (**CEC01294645**) attaches a document titled "*Financial Close Process and Record of Recent Events*" (**CEC01294646**). Mr Bissett's email noted: *"At this stage, we cannot guarantee that material new points will not be introduced given recent events"* and that the Executive Summary was *"subject to the terms finally negotiated"*. I did not receive a copy of this report. I was on annual leave and therefore am unable to assist with commenting on this email or attachment.

191. Graeme Bissett's email dated 12 May 2008 (at 18.49 hours) and found at (**CEC01338846**) attaches a final set of TIE's internal approval documents. These include the Financial Close Process and Record of Recent Events dated 12 May 2008 (clean copy (**CEC01338847**]); tracked changes (**CEC01338848**). It noted that a response was received from BBS on 7 May 2008 which proposed a payment of £9m to BBS and *"Further examination of the contract terms surrounding the design management process, which although unclear pointed to an extended design and consent programme with potentially material adverse consequences for the construction programme"*. A simple explanation for why I was not included on the copy list in Graeme Bissett's email could be that I was on holiday. However, I doubt if I would have informed TIE that I was on annual leave. There may have been another reason why Graeme Bissett did not send me a copy of this report. It should also be observed that this was the second time within a week that Graeme Bissett had not included me in the email circulation. I

cannot recall if I subsequently saw the final version of these documents. I am unable to say whether Graeme Bissett's omitting to send me two e-mails was either intentional or unintentional.

192. Tom Aitchison's report to the Council's Policy and Strategy Committee dated 13 May 2008 and found at (**USB00000357**) advises that the estimated capital cost for phase 1a was now £512m and that, in return for the increase in price, TIE had secured a range of improvements to the contract terms and risk profile. The Committee ultimately authorised Tom Aitchison to instruct TIE to enter into the contract. I did not provide any advice to the Chief Executive in relation to that report as I was on annual leave. On reading the report, I understand the reason for the increase in price to be as set out in para 2.9 of the report *"following the introduction by BBS of additional cost pressures late in the due diligence process, TIE Ltd held negotiations with BBS to substantiate its request for contract price increases and to seek to limit the increase. To help reduce the risk of programme delays, the price increase will be paid as a series of incentivisation bonuses over the life of the contract. On achievement of specified milestones, this approach should minimise the risk to businesses and residents of Edinburgh of delays to the agreed programme of works. These changes of increased costs by £4m to £512m but have corresponding advantages by further transferring risks to the private sector"*. I would consider more or less that the report properly reflected the risks and liabilities to Council officers arising from incomplete and outstanding design and approvals. Paragraph 2.7 states "offsetting the increase in costs is a range of negotiated improvements in favour of TIE Ltd and the Council in order to reduce the risk of programme delays and minimise exposure to additional cost pressures as well as better contractual positions. As far as I am aware, members of the Council were not ever properly advised of the risks and liabilities arising from incomplete and outstanding design, approvals and consents. I form this view mostly from memory. It wasn't an issue that was further discussed after I returned from my annual leave.

193. I only returned from leave on 20 May, the week following sign off for the INFRACO contract suite. My role in the tram project had been in abeyance for two weeks

and I was not sent vital documents such as TIE's Final Close Report. Nor had I been involved in the report to the Council's Policy and Strategy Committee. I was therefore not fully informed of the risks and liabilities in relation to design, consents and approvals that had been transferred to the private sector and the risks and liabilities in relation to these matters that had been retained by TIE and CEC. Taking a broad view, if you were involved in a matter, you would be copied into emails regardless of whether you were on holiday. It would be the exception not to be copied into emails on issues you were involved with. It's difficult to explain TIE's reasons for not copying me into these reports.

194. As to whether I have any view on the sum allowed for risks associated with the liabilities in relation to design, consents and approvals in the QRA I can only refer to the Policy and Strategy Report at paragraph 2.8 which mentions an overall QRA of £32m. I had no access to the QRA and cannot give a more definitive answer.

195. To explain my query in relation to the risk figure and the QRA and whether I was satisfied with Mr Coyle's response noted in the same thread, I was keen to know from the document (and it should be noted that the document had not been released to CEC until very late in the day by TIE) what implications these conditions had for the ballpark figure of risk allowance previously advised by TIE. Schedule Part 4, when finally produced, was the most definitive written document from TIE that I had seen setting out as it did the very heart of the price negotiated and what was included and, just as significantly, what was not to be included in the fixed price. It was evident to me that paragraphs 2 and 3 excluded a fair amount from the certainty of the fixed price. I was therefore wanting to know if the figures mentioned in the accompanying QRA would be enough to meet all the foreseeable risks. I was satisfied with Alan Coyle's response against the background of TIE's delay or reluctance to provide CEC with detailed information over a period of time. There was an element of resignation on my part, and I suspect by Alan Coyle, that we had to accept that TIE were being transparent and accurate with CEC.

196. I considered that information was important from the Council's point of view as the promoter and funder of the project. I also considered it was important because the Council was giving a full financial guarantee of all TIE's contractual obligations. I therefore wanted as much information as possible to be able to fulfil my role in alerting the Council to the possible risks that it faced. These were matters which we kept pressing TIE on. I can't be specific but it seems to me over a period of probably months, it was an item which kept appearing on the agenda of the Legal Affairs Group meetings that we had with TIE. TIE's reluctance (or perhaps just simple delay) in producing the definitive figures left us frustrated. The information was generally requested through the Legal Affairs Group meetings rather than through correspondence. If there was a matter outstanding then it was generally reflected in the notes what the actions of various parties were to be and what they were expected to deliver. I do not specifically recall any discussions amongst Team B members on the topic but there was a general sense of frustration. We needed these figures and there was always some sort of excuse followed by the statement that "*we'll get them to you*". The information was something we needed in black and white to be able to understand the Council's position and its liabilities.

197. The QRA was something which was being constantly worked on over a period of months. That was certainly more visible and the headline figures were relayed to us. Schedule Part 4, however, was something which only came to light in April. It was to my mind a key document. It had obviously been worked upon by TIE for some period of time without being shown to me. I don't know if it was shown to Finance. I can't answer for Finance but, based on my experience of trying to get information from TIE, I would say I doubt if it was shown to them. It was probably only shared on 15 April 2008. There was certainly a sense of frustration that it came so late.

198. I would wish to make an observation that setting the base date design information so far back in time, particularly when detailed design was not complete and the majority of statutory approvals and consents had not been obtained, could have the unfortunate consequence for CEC that the risk balance was distorted in favour

of BBS and to the inevitable detriment of CEC. A more balanced position would have been to set the base date design at the point of financial close or execution of the contract. It was the contractual terms in and around the base date itself which caused the extra risk to the Council. Particularly in light of the mismatch between the SDS contract and the main INFRACO contract. It is a fact that there was no 'time of the essence' in the SDS contract and there was knowledge that all of these design documents had to feed into the INFRACO contract. Setting the base date design six months earlier than conclusion or finalisation of the main INFRACO contract was a matter of concern.

199. I am asked whether I expected there to be more than one departure following the signing of the contract. The way that Schedule Part 4 was structured, from my reading of it, was that it was almost inevitable that there was going to be an immediate notified departure. From the way in which the contract was constructed, TIE anticipated notified departures were coming. Just how many was not clear.

INFRASTRUCTURE (MAY 2008 ONWARDS)

200. The Highlight Report to the IPG dated 11 June 2008 and found at **CEC01246990** notes that the Council still awaited certain information from TIE in relation to the deliverables for award of the contract. The matter was raised again in the report to the IPG on 9 July 2008 and found at **CEC01236707**. My recollection is that not all deliverables for contract award had been obtained by the Council from TIE. There were some unspecified deliverables outstanding on 11 June and remained so on 9 July 2008 at the IPG meeting. My recollection is only derived from reading the action points from the IPG. The action recommended in IPG report of 9 July was that the Director of Finance should formally write to TIE Ltd to resolve this but I don't recall seeing a letter from him. I wouldn't necessarily expect to have been copied into it.

201. The minutes of a meeting of the Legal Affairs Group on 27 October 2008 found at **CEC01166757** notes that there was a point of principle between TIE and BBS in

relation to the base date design information. I cannot remember when I first became aware of the fact that there was a point of principle between TIE and BBS in relation to the base date design information. This was, I think, the first Legal Affairs Group meeting in many months. I had little or possibly no contact with TIE over that period since Financial Close. I cannot recall if I had any prior warning from the B Team colleagues before the LAG meeting of 27 October 2008. I do not recall my understanding of the detailed nature of the dispute and have to defer to the Legal Affairs Group minute's terms where it states "*we were not shown any correspondence on the matter and Steven Bell appeared optimistic about TIE's prospects*". Putting this comment into context, I took it at face value. However, as time went on, statements of an optimistic nature from TIE proved to be ill-founded. At that point I had no reason to question it.

202. My understanding of the nature of the dispute in relation to the works at Princes Street was formed by the document entitled "*Position Paper Pursuant paragraph 9.2 of Schedule Part 9 (Dispute Resolution Procedure)*" dated 2 March 2009 and found at **CEC01031403** and following the meeting I held with Alan Coyle and Alan Fitchie on 5 March 2009. The nature of the dispute concerned whether BBS was obliged in terms of the INFRACO contract to proceed to carry out the works on Princes Street from 21 February 2009, at the latest. There were related issues concerning BBS's reasoning for not commencing and the validity of instruction to proceed despite excuses being offered and the time at which commencement was required under the contract. There was also an issue in dispute regarding the correct method of calculation of overheads, profits and preliminaries. Although the dispute focussed on Princes Street, TIE believed they should seek to establish a general principle about the true contractual method of calculation which could be applied elsewhere on the project. As far as I can recall this was my understanding at the time but, it's probably assisted by reading the document again for the purpose of the Inquiry.

203. I did not consider that I, and probably other CEC officers, had sufficient knowledge and understanding of the INFRACO contract and the disputes in order to advise the Council on TIE's prospects of success in the Princes Street dispute. More

generally, I did not consider I had sufficient knowledge and understanding of the INFRACO contract to advise whether the said contract was "*sound*" and in all respects "*in the Council's best interests as client and funder*". Prior to contract sign off and as far back as August 2007, I was of the view that Council's interests in the tram project contract would be best served by an independent legal view. That suggestion had not been taken forward by senior officials and the way forward was seen as accepting suitability certification by DLA on behalf of TIE and CEC. I offered a view to the Chief Executive in my email dated 11 March 2008 and found at **CEC00869667** that "*it is just possible that the contract is not robust enough and, as a result, affordability for the Council becomes an issue*".

204. In my role as Head of Litigation I had no remit in relation to contractual disputes between BBS and TIE particularly since the Council was not a contracting party. I was effectively seconded into the project at the point I became Principal in Litigation. Prior to that it was more appropriate because I was Principal of Commercial Practice and that's really where project involvement was best placed. As Head of Litigation it didn't make an awful lot of sense but, I think, for the sake of continuity that there was a sound reason for it. My litigation skills and experience were not needed for the sort of work that I was then doing on the tram project. My role was on the contractual/ corporate commercial and governance aspects of the project. There wasn't, to my knowledge, anyone at CEC who did become involved with offering advice on the dispute aspects of the project. I would have known this if it had been somebody in my Litigation team. I know Nick Smith effectively took over my corporate project role. I can't be precise about the timing of that. He grew more into the tram project as I moved on to other things within litigation. I suspect that he probably got a lot closer to the disputes than I ever did but I cannot say for certain that this was the case. It is fair to say that my role as Principal Solicitor Litigation would have been not as focussed on the tram project as perhaps it would have been previously. I can't put a finger on the calendar, particularly without access to my Tram exclusive notebooks, and say exactly when my involvement with the project started to wind down but it certainly was set to diminish as a direct consequence of reaching financial close in May 2008.

205. I note that the report to IPG dated 25 March 2009 and found at **CEC00892626** discussed the contractual dispute between TIE and BBS and considered various options. "Prime risks", identified by TIE to CEC were, firstly, the commercial between TIE and BBS relating to the lack of agreement over design changes preventing progress of critical works, secondly, that the MUDFA contractors do not finish diversion works prior to commencement of the INFRACO, thirdly, a lack of visibility of design changes from November 2007 and, fourthly, a failure of SDS to supply "as built" drawings to TIE. This is my understanding from reading the document more recently. I have no recollection of my understanding of the main INFRACO risks at the time of the document. As to whether the Council gave any consideration at this stage to seeking independent legal advice on the interpretation of the INFRACO contract and the potential risks and liabilities for CEC, the matter was raised in the IPG Report at page 3 where it states *"it is recommended that independent expert dispute and project management advice is sought to ensure that the Council's best interests are being met and that a full understanding of the Council's liabilities are identified*". It is not clear to me whether that wording extended to independent legal advice on the interpretation of the INFRACO contract and the potential risks and liabilities for CEC. I do not recall there being any action taken on the independent legal advice by the Council solicitor. I would have welcomed any such independent legal advice at the time were it put in place. It was my view at the time that the Council would have been better served by independent legal advice on the contract before it was executed.

206. In my email to Gill Lindsay dated 7 April 2009 and found at **CEC00900404** I make certain observations on the dispute between TIE and BBS. I do not believe I received a response from Gill Lindsay and other senior Council officials on the matters raised in this email and therefore can't comment any further.

207. An email from myself and Nick Smith to Gill Lindsay dated 9 April 2009 and found at **CEC00900404** attaches a note that Nick Smith and I prepared on the dispute between BBS and TIE (**CEC00900405**). The note highlights that there were presently 350 notified departures in process. The disputes could be grouped into

a number of different categories, including who had responsibility for design management and evolution. BBS were taking the view that all changes to design were TIE's responsibility. The note states that *"the main problem here stems from the fact that design was not complete at financial close"*. I do not believe I received a response from Gill Lindsay or other senior officers on the matters in our note. I, therefore, cannot comment on what their views might have been.

208. An email dated 20 April 2009 sent by Andrew Fitchie to Gill Lindsay found at **CEC01003720** attaches a Summary Paper on DRP issues. DLA's paper in the paragraphs under heading "DRP1 Preliminaries", sets out the contractual basis for establishing the correct method of calculating Head Office overheads and profit, consortium preliminaries and other preliminaries elements in respect of the change Order 21 regarding Princes Street. They advised that all these elements are defined in the INFRACO contract. The dispute is based upon the method of calculation applied in Schedule Part 4. Their argument to interpretation was that this estimate should be valued in accordance with Clause 80.6.3 or 80.6.4 of the INFRACO contract, therefore, the Head Office overheads and profit, consortium preliminaries and any other preliminaries elements are to be valued in accordance with valuation rules 1.1 to 1.5 inclusive and set out in Appendix G – process for agreement of value of TIE changes to Schedule Part 4 pricing. This is my understanding formed by reviewing the document sent to me by the Inquiry. I did not see it at the time. I am asked whether the advice in the paper differs in any material way from the analysis set out in my and Nick Smith's note (**CEC00900405**). As far as I can recall from re-reading the joint note prepared by Nick Smith and myself on 9 April, we made no comment on the appropriate contract terms relevant to correct interpretation of the INFRACO pricing schedule. I cannot make any detailed comment other than point to the indication that *"the difficulty here is that it is a very bespoke contract, TIE are considering seeking a QC opinion to provide it and CEC with confidence regarding the issue"*.

209. In my note of 7 April 2009 (**CEC00900405**) I set out the issue relating to responsibility for design management and evolution. TIE contends that BSC took on responsibility to financial close for "*normal design development*". BSC

maintain that any difference between design in December 2007 and issue for construction drawings is to the account of TIE. Dennis Murray of TIE accepts the design was not complete at financial close but completion of that does not fall outwith "*normal design development*". Accordingly, this matter is to the account of BSC. He argues that the onus of proof lies with BSC to show why completion, however minor a task, lies outwith the definition. My comment was that an independent expert view may be required to settle this difference. My recollection is that this was the first time this issue had been brought to my attention. Whether, in hindsight, such a matter should have been brought to my attention at an earlier juncture is a moot point. Essentially it was TIE's function to manage the delivery of the Tram Project in its entirety. That included day to day management of the various contracts including Infraco. Whether there was any value in CEC Legal continuing to have any role once the Infraco contract was being implemented is perhaps for others to consider. The point was that CEC Legal could only advise the Council and not TIE. From a more general aspect I would say that once TIE knew that there were problems with implementation of the contract they should have been bringing them to the attention of the Council's Tram Monitoring Officer who was an Engineer. He, no doubt would have ensured the matter was thereafter reported to the Chief Executive's IPG meeting. I expressed no view on TIE's prospects of success in relation to the normal design development. I also mentioned in my note on 7 April, the action note from the IPG meeting on 25 March 2009 "*It is significant to note that trust must be built. Having met with TIE and their solicitor as well as receiving feedback from colleagues in City Development, it is clear to me that trust does indeed need to be dealt with in two distinct relationships. Firstly, between the Council and TIE and secondly, between TIE and BSC*". I continue "*It is very clear that Council, particularly the Tram Monitoring Officer, was not in receipt of full disclosure from TIE in the latter part of 2008 and early 2009. Whilst much of that is now history, nevertheless, it does highlight that TIE needs to be much more transparent with the Tram Monitoring Officer, complying with the terms of the operating agreement*". As a general observation, TIE were regularly bullish in reporting to CEC their prospects for success in disputes with BSC. Later it appeared that the bullishness was misplaced.

210. Disputes were expected given my knowledge at the time parties entered into the signing of the INFRACO agreement. There was no surprise when they did emerge. My expectation was derived, in part, from a general overview of the contract rather than any detailed consideration. It was also derived from the sort of flavour that we'd got: not that I was ever close to discussions between TIE and BSC, but it just seemed not to be a satisfactory contractual relationship.

211. A report providing an update on the tram project to the Council by the Directors of City Development and Finance dated 30 April 2009 is found at **CEC02083772**. The report notes that an agreement had been entered into in respect of the Princes Street dispute, to allow the works to be carried out on demonstrable cost. The report noted that this represented no further risk transfer to the public sector. I've read the report referred to which was prepared by Alan Coyle and Andy Conway. I am unable to state, with certainty, if I provided any advice to the Directors of City Development and Finance in relation to this report. I cannot comment on whether any other Council legal officer provided advice. If anybody had done so it might have been Nick Smith.

212. I had no involvement in the negotiation and conclusion of the Princes Street supplemental agreement (**CEC00302099**). I doubt if anybody from CEC Legal would have been involved. I have read this agreement for the first time in preparation for the Inquiry. I note the definition of demonstrable cost is set out in paragraph 1 of this agreement. The report to Council on 30 April 2009 at paragraph 3.3, advises that "*This represents no further transfer of risk to the Council*". Notwithstanding the fact that I can't be certain if TIE contributed to the Council report, I have to say that the wording comes from the Finance and City Development officers.

213. I did not attend the consultation with Senior Counsel on 1 June 2009. I do not know if any other Council legal officer attended that consultation. I doubt if they did. I wouldn't have expected anybody from Council to attend the consultation

given that the Council was not a party to the contract and TIE were de facto agents representing the Council's interests.

214. I did have sight later of the written advice provided by Senior Counsel found at **CEC00901460** and **CEC00901462**. I saw some understanding of TIE's prospects for success in their dispute with BSC. In the note of 2 July 2009, it was indicated "*This opinion is fairly balanced and examines TIE's position. There is no legal right or wrong here on most of the issues but (what) is certain is that there is no guarantee that TIE would win all their arguments*". I can't remember how I came to see Senior Counsel's written advice. Whether it was somebody from TIE or DLA passed it on to us for information I cannot say. I think either of those parties passing on the information is probably the most likely scenario. I can't recall but it is more likely I received the advice 'just for information' rather than I was expected to provide comment to the Council.

215. I refer to an advice note regarding a possible claim by TIE against PB produced by DLA dated 25 June 2009 and found at **CEC00328657**. An updated paper on SDS liability was produced by DLA in September 2009 (**CEC00801439**). I do not recall having seen the Advice Note or paper. Therefore I am unable to state that I had an understanding at the time of TIE's prospects of success in any claim against Parsons Brinckerhoff. I think, given the date, that it would be more likely, if these documents were distributed, they would have been provided to Nick Smith. It's probably fair to say that around that time, Nick may just have dealt with it himself. My involvement had started to diminish a year before that so issues like this were more likely to be dealt with by Nick Smith.

216. The Highlight Report to the IPG dated 27 July 2009 and found at **CEC00688908** includes a table discussing what members should be advised of at the meeting of the Council on 20 August 2009. The table asks whether cost and delay should be reported and, if so, to what extent. The table also noted TIE as admitting that 40-80% of changes and delay were down to them. Without access to my notebooks, I am unable to confirm that I was still attending IPG meetings in July 2009. This was the type of issue which exercised my mind earlier in the project, i.e. what to

tell members. I believed in being honest and transparent giving members as much information as possible when asking them to make decisions on tram matters. Reflecting on the terms of the report, I would agree with the presentation in the IPG report, definitive financial details should be published. This had to be balanced with the commercial sensitivity about how BSC might react.

217. I was the Principal Solicitor in commercial practice from 20 April 2004 until 15 August 2006. Thereafter I was Principal Solicitor of Litigation. I was clearly involved to a significant extent in the tram project in 2007/08 even though I was managing the Litigation Team. After financial close in May 2008 my role in the tram diminished by a significant degree. Nick Smith took over my responsibilities for the tram project. Team B existed following my change of roles but I think most of the meetings that we had were within Legal Affairs Group. There may have been pre-meetings of the B Team before attending the Legal Affairs Group just to see what was the Council's position and where were we at with various matters and then go into the meeting of Legal Affairs Group.

218. My recollection is that there was a significant degree of CEC officer continuity after I became Principal Solicitor in Litigation. People like Alan Coyle, Andy Conway and Steve Sladden were still with the Council when I left in 2011. I would expect that if the B Team meetings continued, these would been the appropriate officials attending and representing the various interests across the Council's functions.

219. I refer to an email from Nick Smith to Alistair Maclean dated 22 May 2010 and found at **CEC00242406**. I wasn't copied into this email and have not seen it until my preparation for this Inquiry. I'm not surprised by what Nick Smith said in his email to Alastair Maclean. The suggestion of lack of interest and advice on Gill Lindsay's part is not dissimilar to my thinking back in 2007/08. This is evidenced by the few written responses to the emails I sent to Gill Lindsay covering a range of highly important issues.

220. In an email from Andrew Fitchie to Richard Jeffrey dated 11 June 2010 and found at **CEC00336394** I note Andrew Fitchie responds to a suggestion made by Nick Smith that *"If CEC legal had been more heavily involved first time round we wouldn't be in the mess we are in now"*. Mr Fitchie notes that *"If there is any suggestion that CEC Legal were not involved there are many communications between myself and Gill Lindsay during 2007 and 2008 that contradict that position"*. This email chain suggests to me that Andrew Fitchie did not carefully read the email from Richard Jeffrey. The critical words are *"if CEC Legal had been"*, more heavily involved. Andrew Fitchie responds at paragraph 2 *"if there is any suggestion that CEC Legal were not involved"*. My reading of this email is that he misses the point. Nick Smith was making a good point, albeit with the benefit of hindsight. Compared to the involvement of CEC engineers, who had the greatest level of involvement in the project followed by, to a lesser extent, my Finance colleagues, I would say that CEC Legal had the least involvement in the tram project. I, along with Nick Smith, was aware that there was direct contact between Gill Lindsay and Andrew Fitchie but I suspect we were not copied into the full extent of their email exchanges. Furthermore, we did not attend all of the meetings between Gill Lindsay and Andrew Fitchie. I only personally had a few meetings with Andrew Fitchie, notably on the CEC guarantee and other documents and also in relation to contractual disputes between TIE and BSC. If you add all that together it certainly constituted a fairly low level of involvement by CEC Legal in the context of the undoubted overall legal input to the project by DLA. Equally it could not be said to be no involvement as mentioned by Andrew Fitchie.

221. I wouldn't have welcomed more involvement for CEC Legal (those persons below Gill Lindsay). I think, at the time, there was a deliberate and considered approach taken by the Legal Team about roles (whether we liked them or not). The approach was that DLA were there to advise TIE given that the contract was between TIE and BSC. More involvement by CEC Legal would have muddied the waters with regards to the contract negotiations or the drafting of the contracts. Too much had been done by the time we began to be involved in looking at risk etc. It's easy in hindsight to look back and say *"we might have made a*

difference". Yes, we possibly could have. However, from a risk point of view, I still adhere to the recommended position that putting in place independent legal advice for CEC on the contract would have been the best option, and in the best interests of the Council. It would have been preferable to have had reactive independent legal advice rather than proactive CEC legal team involvement.

222. If CEC Legal had been allowed to get closer to contract negotiations I think it would have helped with us gaining access to more information and better allowed us to assist and advise the Council of its risks and liabilities. TIE did not, to my recollection, welcome the role of CEC Legal. This extended sometimes even wider e.g. representation or involvement in the Council through Finance and engineers. I can only speak from what I experienced, namely that there was more than a hint of resentment by certain people within TIE of the role that CEC Legal were performing. CEC Legal was perceived to be asking awkward questions whilst attempting to best represent the Council's interests. It came to a point where the Chief Executive of the Council insisted that more people from CEC were embedded in TIE's offices. There was also the nomination of aTram Monitoring Officer (Marshall Poulton) so that there was somebody on CEC's behalf permanently based in TIE's offices. At a certain point, Nick Smith moved from the Council's Legal Offices to be based within TIE's offices. One view is that this was to create a closer working relationship through embedding engineers and Finance and legal people in TIE's offices. Another view is that it was probably done to keep an eye on TIE and allowing CEC to get more information.

223. I refer to a note dated 17 November 2010 by Alistair Maclean setting out Mr Jeffrey's concerns and found at **CEC00013342**. The first time I saw this note was in my preparation for the Inquiry. I, and members of the B Team, occasionally speculated on TIE's Bonus Scheme and how that may have been structured in relation to their performance in closing a deal. However, we had no sight or knowledge of the Bonus Scheme. There was a general suspicion, throughout my involvement in the project, that TIE were reluctant to be fully transparent with CEC. Beyond these comments I had no awareness of the

matters in that note. I am not aware of what was done by CEC in response to the note. I had no prior knowledge of the meeting or of the note.

224. I did not read any of the adjudication decisions issued in late 2009 and during 2010 in relation to tram dispute. I recall hearing that some of the decisions were in favour of INFRACO, contrary to the earlier optimism expressed by TIE. That information probably came from Nick Smith. There was not so much a formal "briefing" me. He would have been just letting me know. We would regularly meet at internal Legal managers' meetings and he would bring me up to date. It did not surprise me that INFRACO were successful on the adjudications given my limited knowledge of the contract.

225. I played no part in the preparation for the mediation and/or the mediation talks. I did not attend the mediation. I was not aware of the terms of the agreement reached at Mar Hall except when the matter became public knowledge.

226. As to my views on why the total cost of the tram project, including, in particular, the cost of the INFRACO works ended up costing so much more, for a reduced line, than the estimate contained in the December 2007 financial business case, I think probably first of all, it was because of the unsatisfactory nature of the contract suite both in terms of the SDS and INFRACO mismatch and the main contract. I also felt that TIE's lack of experience in tram projects played a part. The company itself was a new creation and as a corporate body had no previous experience of delivering a significant public transport project. In particular I did not believe that TIE possessed adequate project management skills. This was a matter that I drew to the attention of my Director, Jim Inch, on 15 June 2009 **CEC00908380**. I don't believe TIE understood the governance of CEC, their relationship with the Council; nor did they properly understand or take account of the different roles performed by the Council. The Council was the promoter and authorised undertaker. It was the Planning Authority and it was the Roads and Bridges Authority. It was also a funder through planning contributions, the owner of TIE and guarantor of its obligations.

GOVERNANCE

227. I had no role in setting up TIE or TEL nor in the Council's appointment of Councillors to sit on these companies as Directors. I understand that colleague(s) in another section of the Council's Legal Division undertook the relevant work required to incorporate and establish the respective companies. I recall having a role in drafting a report on behalf of Jim Inch the Director of Corporate Services dealing with the setting up of the Council's Tram Subcommittee. I worked with Nick Smith when he took the lead on drafting the TIE Operating Agreement and the TEL Operating Agreement. He liaised closely with me on the drafting, although I recall he took the lead in receiving instructions usually from the Director of City Development and occasionally the Director of Finance.

228. I regularly attended the Legal Affairs Group which tended to meet fortnightly or weekly as required. I regularly attended the Chief Executive's Internal Planning Group. I attended the irregular or occasional meetings of the Council's Tram Subcommittee.

229. TIE was responsible for the delivery of a tram network that was fit for operational purpose, on time and on budget. When I wrote my email of 15 June 2009 addressed to my Director, Jim Inch, under reference **CEC00908380**, I was of the view that the governance arrangements for the tram project were inadequate and required to be strengthened. An issue of significant concern related to TIE's project management skills or lack thereof. This was a shortcoming also identified and commented upon by external auditors in 2007. City Development had expressed concerns about the quality of some work which had been passed by TIE as satisfactory, when it was clearly falling short of the standards expected by the Council as Roads Authority. I indicated to Jim Inch that the Council had no teeth in its control of TIE. This had always been understood from the early days. I concluded by saying I would be happy to discuss with Jim Inch whilst we still had the opportunity to make the desirable and, some may say, essential governance changes to best protect the public purse and the Council's reputation. I had earlier indicated that it was inconceivable the Council would sue TIE nor was it

likely to wind up TIE or divest TIE of the project management and appoint another company.

230. I considered the roles and responsibilities of each of the parties involved (as they were initially conceived) in delivering governance on the project as being sufficiently clear. In theory, it looked as though it would work. In reality, as it transpired over the months and years, it didn't match up to that.

THE COUNCIL

231. As far as I'm aware members, including the Council Leader, the Finance and Transport Convenors, Group Leaders and individual members, were advised of developments in relation to the tram project through reports to full Council and, possibly through the Transportation Infrastructure and Environment Committee of the Council. Latterly the Tram Subcommittee was established. It may have been the case that private briefings were given by the Chief Executive and/or Director of City Development to the Council Leader, Convenors and group Leaders. I am not in a position to say whether members were always updated on significant developments relating to the tram project including, in particular, the problems that arose and the estimates of the cost of completing the project since my role and involvement in the tram project diminished in 2008/09. Reports on the cost of completing the project would be into 2010/11 where I certainly didn't have any involvement. It would have been Nick Smith who was the lead CEC legal officer at that juncture.

232. TIE were particularly keen to err on the side of commercial confidentiality even to the extent, sometimes, of keeping information from the Council officials. Whilst CEC officials had regard to the commercial confidentiality dimension, they were the ones who had a direct relationship with, and owed professional duties to the elected members. As a professional Legal Adviser to the Council, I was always mindful of trying to furnish members with as much information as possible to assist in their decision-making. During the period 2007/08 when I was extensively involved in the tram project and assisting with the drafting of reports, I believe

members were in a position to take informed decisions in relation to the tram project. This view is formed on the basis of the information that was provided by TIE at the time. TIE were the main repository of the information. They determined how much information was given to Council officials. On the strength of that we reported to Council. For my part, I tried to ensure, as a relatively junior official albeit with a significant role in the tram project, I could provide Council Officials/elected members with as much information, or as much relevant information, as I could to assist them in making decisions. Whether it ultimately transpired that we officers had enough information from TIE is another matter altogether. I do accept that there was one occasion, referred to earlier in this statement at paragraphs 185/6, in respect of the report to the Council meeting of 1 May 2008, that a decision was taken in a client department to not provide full disclosure of facts and changes in material circumstances to elected members. That was contrary to my professional approach and accordingly I did not agree with it. On this occasion I am therefore unable to say that members would have been fully informed before taking a decision in preparation for award of the contract.

233. After many years of working in the Council one never really knew how much the Councillors read the papers that were given to them. I don't mean that in any critical way, they had an awful lot of information to digest, albeit this was one of the most significant projects the Council was involved in at that period of time. At full Council meetings all sorts of other business in relation to the wide range of functions was considered and resolved. I know I had to filter information but in so doing I tried to ensure that they had enough relevant information to make a decision. Whether it was good or bad news, I felt they had to have it. However, there was no sense in drowning them with detail. That said, they certainly had to have enough information to reach a considered view. I can say quite honestly that I did not keep information back from them if I thought that they should have it.

TIE

234. CEC exercised oversight and control over TIE principally through the operating agreement and the appointment of a senior City Development official as the Tram Monitoring Officer. The governance structures were not as robust as the CEC Legal Team had wanted when the operating agreements were first drafted. In my view too much was conceded by the Council to TIE under pressure from the latter to Council Directors. I also believe it was too much of a "one family" and trusting approach by senior Council officials. Team B had to endure the day to day difficulties and frustrations of working with TIE. The overall result is that TIE were not sufficiently held to account in the way a more arm's length consultancy firm might have been.

235. I did have concerns at various stages about the performance of TIE mostly as an organisation rather than individual Board members or employees. For the most part TIE officers who interfaced with the B Team, were good to work with and the relationship was excellent. My view is that we clearly worked together in the best interests of the project. Higher up within TIE, I felt there was a resentment of CEC officials, particularly in relation to legal officers. It was as if we were asking too difficult questions and prying into their business when all we were doing was looking after the Council's interests and the public purse. Much of this was a subjective feeling without any documentary support. However, I would point to David Mackay's email of 15 October 2007 at **CEC01653317** which was one example of how TIE viewed Council officers

236. Re the means by which the Council's senior officers received information and updates from TIE, some senior City Development officers, predominantly engineers, were seconded to and worked at TIE's offices. They were therefore in a much closer working relationship and technical information was undoubtedly freely shared. An example of an individual who had a close working relationship with TIE was the Tram Monitoring Officer. Two Directors, namely from Finance and City Development, also sat on the Tram Project Board and would receive Board papers from TIE and TEL regularly.

237. From time to time I did have concerns about TIE's reporting to the Council, particularly when information was not fully, or accurately, reported. This mostly happened in relation to the progression of INFRACO to financial close. We regularly had to chase TIE for updated QRA reports. It was very difficult to check or validate information and reports from TIE because they were often the sole source of information and they had control over the release of that information. The Council had little basis to challenge what was submitted. I do not believe external advisors were ever instructed by CEC to check TIE's information and reports.

238. I obviously had concerns in my email of 28 September 2008 (**CEC01069112**) that there had been a number of departures from the agreed governance by TIE. I refer to the paper from City Development and Finance (**CEC01070103**). The paper dealt with this in more detail and posed questions for Directors in CEC about how to resolve the concerns. Both the Supplementary Paper dated 18 July 2007 (**CEC01567396**) and my email dated 8 August 2007 (**CEC01680636**) precede the concerns expressed in September 2008. I believe the unidentified paper of 18 July 2007 may have been drafted by me. Taking that paper first, and I'm not sure which Council officers received it, I looked at the options. Option 1 was clearly not taken forward. Option 2 was partially implemented in the sense that TIE progressed the project but ultimately without a robust monitoring by the Council of TIE's activities. Option 3, the Council ultimately set up a Tram Subcommittee, rather than the full committee; it did not meet regularly, it did not replace the Tram Project Board so in the end TIE officials ended up reporting to, effectively, their own Board on the Council's project.

239. I could not state definitively how Council officers and members exercised oversight and control over the TIE Bonus Scheme. I have a recollection of being made aware that there was, within TIE, a remuneration subcommittee. I don't know if the Council Directors or Councillors sat on it as Directors. I raised the issue of TIE bonus with Jim Inch in my email of 15 June 2009 (**CEC00908380**). I mentioned there was no visibility of the scheme. I state *"we do not know how it operates and what milestones trigger payment of bonus".* Clause 2.25, of the

operating agreement, stated TIE should confirm to the Tram Monitoring Officer that bonuses are linked to project milestones. I suspect that Council officers and members weren't aware of the sums paid in bonuses to TIE staff each year, including the sums paid to individual members of staff and the criteria in respect of which bonuses were paid. I have nothing, however, to base that on. No doubt at year end TIE would have been obliged to report their annual accounts to the Council's Director of Finance and total salaries would likely be mentioned there.

240. My main concern was that the Bonus Scheme was not visible at that time. Beyond that I had concerns that it may not have been operated in the best interests of the Council as opposed to the best interests of TIE. In effect, it could, potentially give rise to the conflict of interest on the part of TIE staff. I can only speak for the B Team and say that there was occasionally talk of remuneration and bonuses to TIE staff. It was known that some TIE staff who had previously worked for the Council had received significant salary increases when they joined TIE. This was obviously hearsay. It is, however, safe to say that Council engineering staff worked closely with TIE, worked just as hard as TIE counterparts and received poorer rewards. I did not see, however, that affecting the working relationship between TIE and CEC.

241. The lack of transparency of any incentivisation created a suspicion on the motivations of TIE employees. I would have preferred any sort of bonus scheme to be aligned with achieving the Council's objectives of delivering the Tram project on time and on budget. The Council's objectives were not necessarily fully supported and met at all times by TIE's objectives. I suspect that TIE setting up their own Bonus Scheme, without reference to the Council, was not an ideal situation. There could have been a conflict of interest as to the milestones that TIE were looking to achieve, at certain points, when compared to the milestones that CEC were looking to achieve. Had there been transparency any doubts about that could have been resolved. I think the lack of transparency was another example of the erosion of trust between TIE and CEC. There was a general reluctance on TIE's part to be fully transparent.

THE TRAM PROJECT BOARD

242. To my understanding, the Tram Project Board was set up by TIE and TEL to act as the overseeing body in their governance structure. It appeared to be a formal subcommittee of the TEL Board with full delegated authority to execute the project in line with the proposed remit set out in Appendix 1 of the TIE Close Report. It had full delegated authority to take the actions needed to deliver the project to the agreed standards of cost, programme and quality within the authority delegated to the TEL Board.

243. I do not recall having any particular concerns at any time in relation to individual members of the Tram Project Board. I did have concerns, which were expressed in my email of 26 September 2007 found at **CEC01561555,** which was addressed to Rebecca Andrew of Finance. At that time I thought the Tram Project Board was trying to change governance arrangements without Council approval. I described it as "*the tail trying to wag the dog*". The delivery of the tram project then was a TIE obligation and not for the Tram Project Board. I thought any such delegation could weaken the accountability of TIE to the Council.

244. Following the delegation of powers from the TIE and TEL boards, I considered there was not much left for the main company boards post-financial close. The TEL Board had overall responsibility for delivery of an integrated tram and bus network for Edinburgh on behalf of CEC. TIE had the responsibility for management of the delivery of the tram infrastructure, compliance with CEC, compliance with the TIE operating agreement, statutory responsibilities and matters relating to health and safety.

245. In my email dated 26 September 2007 and found at **CEC01561555** I expressed certain concerns relating to the lack of accountability of the Tram Project Board to CEC, that TIE were responsible for the delivery of the tram project and were accountable to CEC and that the proposal that the Tram Project Board set up various committees ran the risk of further weakening the accountability of TIE to CEC. I felt that this proposal was further distancing the responsibility of the tram

project from the corporate body of TIE. In other words, introducing another unnecessary link in the chain of responsibility. TIE had the contractual duty to deliver to CEC through the operating agreement, not the Tram Project Board. All of this, in my view, went against the principles of governance and accountability agreed at a recent Council meeting. I note that Rebecca Andrew forwarded my comments to her Director, Donald McGougan, the same day as I copied Gill Lindsay into it. I don't know whether my concerns were shared by others including CEC senior officers. The report to Council three months later in December 2007 (**CEC02083448**), picked up governance issues at Section 4 and indicated *"there will require to be a seamless delegation of authority from the Council through TEL to the Tram Project Board to ensure proper governance and accountability and the efficient delivery of the project. For that to be completed TEL will need to take a decision at Board level resolving to further delegate its powers from the Council onto the Tram Project Board".* The Council was also asked to authorise, through TIE, that this company had a firm delegation of appropriate powers to engage with the Tram Project Board.

246. I am not aware of when the Tram Project Board was formally constituted as a committee of TEL. I have reviewed the papers sent to me by the Inquiry and I have been unable to find the date. Re the powers and duties formally delegated to the Tram Project Board, by which body or organisation and when, reference is made in the Council report of December 2007. In paragraph 4.1 it states *"On 23 August 2007, the Chief Executive reported to Council that the role of the Tram Project Board required to be formalised".* That document I do not believe forms part of the papers provided to me. I have accessed that on the Council's website. At paragraph 13, it was clear that a Tram Project Board had already been established and I quote *"The role of the Tram Project Board requires to be considered afresh. This Board, one of the requirements previously set by Transport Scotland, exists to take forward the project although it is not itself a legal entity. It also has no direct delegated authority from Council to take decisions regarding the project".* In summary, before that no formal duties and powers had been delegated by the Council to the Tram Project Board. It seemed

to be an internal mechanism set up by TIE and TEL delegating such powers as they saw fit.

TEL

247. TEL was created and incorporated by the Council to deliver an integrated tram and bus network for Edinburgh on behalf of the Council. Its remit and responsibilities were to prepare for the operation of the integrated tram and bus network, including oversight of the delivery of the tram infrastructure. CEC's majority ownership of Lothian Buses was to be transferred to TEL. I had no concerns about individual members of the TEL Board nor really about the company because I had very little dealings with its officers throughout the tram project.

248. In my email to Gill Lindsay dated 18 July 2007 and found at **CEC01567395** I state that I and Alan Squair of CEC were of the view that the paper dealing with the factual background to existing governance arrangements among the Council, TIE, TEL and Lothian Buses, did not fully address relevant issues which were important for the future delivery of the tram project. We provided Gill Lindsay with a supplementary paper (**CEC01567396**). The paper provided three options to be considered and discussed at the very highest levels within the Council. I understood from Gill Lindsay's response of 18 July 2007 that we were being told to just do it, to complete the paper to whatever state it may be in and that the Chief Executive needed it urgently. I felt that the issue and the paper needed further consideration to address the concerns that we had raised on a wide range of issues. I do not know whether Gill Lindsay sent the supplementary paper further up the hierarchy of Council officials. I have very little understanding or awareness of what happened to it. Occasionally, I recall, we were maybe copied in to emails from Gill to other people but, by and large, the practice was we didn't know what happened vis a vis any further transmission to Director of Finance, Director of City Development or indeed our own Director, Jim Inch or the Chief Executive. I probably came to expect that I was not to be involved. CEC was a hierarchical organisation. Perhaps there wasn't a broad expectation once we had

done our part and sent concerns to the line manager that we would necessarily be copied in. As it happened, or it seemed to have transpired, we weren't copied. We just came to accept that that was the way it was.

249. I refer to an email dated 18 December 2007 to me and others from Andrew Fitchie found at **CEC01400372**. Andrew Fitchie addressed the issue of the nature of the relationship between TIE and CEC. I do have a vague recollection of this email. I can't remember why there was an insistence in the operating agreement that no relationship of agency was being created. Nick Smith may have a clearer recollection. I believe that TIE was indeed, to all intents purposes, CEC's agent although in other respects, for example, with BBS and other parties, it was a disclosed principal in its various contractual relationships.

250. I refer to an email from Nick Smith dated 10 January 2008 and found at **CEC01394985**. I am copied into the email. Nick Smith notes that TIE are highly resistant to the minimal oversight of the Bonus Scheme that was requested. I agreed with Nick Smith's statement that TIE were highly resistant to the minimal oversight of their bonus arrangements and benchmarks. I fully supported Nick Smith's drafting, and his intentions, vis a vis bonus arrangements. TIE were wholly funded by the public purse and even the most basic level of visibility was entirely reasonable and justified. At the end of the day CEC had to be satisfied that all money spent by TIE was in the best interests of and provided value for the public purse.

251. In an email from me to Gill Lindsay dated 25 April 2008 and found at (**CEC01247764**) I note that the agreement with SP Distribution Ltd was not in accordance with the protocol set up with DLA as it has the Council as one of three parties. The protocol was that DLA be asked to provide the standard letter to Gill Lindsay confirming from whom they have taken instructions to best protect the Council's interests; that in their view the Council's best interests have been thus far, and will continue to be, served by the terms of this agreement. It also provided for a summary of any obligations incumbent on the Council and making a

recommendation that the Council now sign the agreement; and that DLA have a duty of care in favour of the Council.

252. In my email dated 4 June 2008 and found at **CEC01247981** I note that TIE purported to act on behalf of CEC without any instructions. This is the one agreement I do remember, with Scottish Power Distribution Ltd. There may have been other similar agreements but I can't recall the names of the parties.

253. I refer to the summary of the high level meeting between myself, Nick Smith and Andrew Fitchie of DLA Piper on 2 July 2009 found at **CEC00679269**. It notes that there is likely fault on both sides with regard to the causes of delay etc. to date. The note does not actually give details of the disputes that were then live between TIE and BSC in July 2009. I, therefore, think that the reference in the note was a general apportionment of blame between TIE and BSC. Some of the issues related to the delay in design with SDS and the extension and delay to the programme. There was the general view that BSC were keen to maximise claims. This was probably around the time of the major disagreement on the Princes Street access.

OTHER

254. Throughout the course of my involvement with the Tram Project I maintained a handwritten note of all meetings I attended in a series of blue Counsel's notebooks. This was my record as opposed to an official record. Over the period I recall there were at least five such Tram specific notebooks. I left these notebooks along with all other hard copy Tram Project papers with the Council when my employment ceased in 2011. I believe that these notes would have been of assistance to this Inquiry. Unfortunately the notebooks have not been traced by the Council.

I confirm that the facts to which I attest in this witness statement, consisting of this and the preceding 120 pages are within my direct knowledge and are true. Where they are based on information provided to me by others, I confirm that they are true to the best of my knowledge, information and belief.

Witness signature....

Date of signing.............7th November 2016....