

Edinburgh Tram Inquiry Office Use Only

Witness Name: *Donald McGougan*

Date: *29/3/17*

THE EDINBURGH TRAM INQUIRY

Witness Statement of Donald McGougan

Statement taken by William Brian on 9 and 10 March 2016 (in the presence of Ranald Macpherson, Solicitor, Clyde & Co), by Drew Fox on 30 March (in the presence of Ranald Macpherson, Solicitor, Clyde & Co) and on 10 August 2016 (in the presence of Kate Donachie, Solicitor, Clyde & Co).

My full name is Donald McGougan OBE, CPFA. My contact details are known to the Inquiry.

I should note at the outset that my statement concerns a period covering many years prior to, during and after the construction phase of the Edinburgh Tram Project. I retired from my post with City of Edinburgh Council in June 2011. I have done my best to answer the questions put relying on memory as well as the many documents I have been shown in preparation for this exercise. The statement of course follows the pattern of the questions that I was asked and should be viewed in that light.

Statement:

INTRODUCTION

1. I am a Member of the Chartered Institute of Public Finance and Accountancy. I started as a trainee accountant for Midlothian County Council in May 1971. In May 1975 I became a Professional Assistant with the City of Edinburgh District Council. In January 1977 I moved to Falkirk District Council as a Senior Accountant. I subsequently was promoted to Principal Accountant. Following that I became the Depute Director of Finance at Falkirk District Council. In May 1987 I became Depute Director of Finance at City of Edinburgh District Council.

In March 1995 I became Acting Director of Finance. In July 1995 I became Director of Finance for the City of Edinburgh Council (CEC) until my retirement in June 2011.

2. I had a number of key responsibilities during my time as Director of Finance. My responsibilities included membership of the Council Management Team, helping develop strategy and delivering the authority's strategic objectives. I also headed the Finance function across the authority and was responsible for the leadership of over 600 staff in the Finance Department. I provided financial advice and guidance to elected members (including at Council and Committees) and officials in all departments of the authority. I was responsible for the collection of income due to the authority including council tax, non-domestic rates and all miscellaneous income amounting to over £400m per annum. I was in charge of the administration of Housing Benefits and Council Tax benefits to over 40,000 claimants. I had stewardship of assets and was in charge of the keeping of proper financial records and the preparation of financial strategy, budgets and annual accounts. I was responsible for the Procurement and Payment of suppliers and the Payroll function for 17,000 staff and over 20,000 pensioners. I was responsible for the administration and investment of the Lothian Pension Fund with a value of over £3b. I was responsible for the Internal Audit and Treasury Management functions of the Council. I was Treasurer of the Lothian and Borders Police Board, Lothian and Borders Fire Board, Lothian Valuation Board and the Forth Bridge Joint Board. I had overall financial responsibility for these bodies, as well as the Council. Taking revenue and capital together, net expenditure of all these bodies amounted to around £1.5b per annum. I have provided the Inquiry with a copy of the CIPFA paper "*The Role of The Chief Financial Officer in local Government*" for further information (**WED00000011**). This document further outlines my role and responsibilities.

3. As CEC's Director of Finance I was, over a period of years, one of a number of senior officers involved in the tram project. Part of my responsibility in this respect was to assist with establishing the proper governance and oversight of the Council's wholly owned company, TIE. In particular, my role included review of the Business Case and capital and revenue funding projections. The capital

expenditure aspect of this work was undertaken in conjunction with TIE and technical colleagues and with reference to independent consultant reports. Revenue projections were undertaken in conjunction with Lothian Buses staff alongside consultants' reports as and when appropriate also, again, in conjunction with TIE.

4. My direct involvement in the project increased from mid-2006 when I started attending the Tram Project Board (The TPB). In December 2007 I was appointed as a member of the TPB by CEC. I had an on-going role in supporting the project's Senior Responsible Officer (the Director of City Development) in reporting to the Council. I was, laterally, responsible for financial contingency planning to meet the costs of the overrun (once that became apparent), the submission of grant claims to Transport Scotland (Transport Scotland) and the keeping of proper accounting records for the project.

INITIAL PROPOSALS (2000 – 2006)

THE NEW TRANSPORT INITIATIVE AND THE CREATION OF TIE

5. The paper entitled '*New Transport Initiative – Next Steps*' dated 18 October 2001 (USB00000228) was produced by Andrew Holmes, Director of City Development. It sought the Council's approval to submit an application in principle to the Scottish Government for funding for the Council's New Transport Initiative. The document entitled '*New Transport Initiative: Framework for Delivery*' dated 2 May 2002 (USB00000232) was an update which included a letter from the then Scottish Executive Minister, Wendy Alexander supporting private sector involvement. The New Transport Initiative was much more wide-ranging than the Tram project. It included proposals for the introduction of Road User Charging. This became the subject of significant political focus. The initiative also included delivery of a number of other projects which were then at an outline stage.
6. In relation to TIE, the intention was to establish a new approach to procurement and the delivery of proposals and projects. The concept was that TIE would take

projects right through the construction and delivery stages and have responsibility for the operation of these projects. We needed partnership with the Scottish Government as the scale of the proposals contained within the New Transport Initiative were beyond the resources, experiences and skill sets within the CEC. Local Government had suffered from a transfer of functions and reductions in staffing and management levels over many years. This was in common with most other public bodies. The Minister from the Scottish Government (then Executive) was very clear that the Initiative should be seen as being delivered by the private sector. There was a perception that stakeholders would have increased confidence in the Initiative if there was private sector direction as well as involvement. Having the off balance sheet company gave potential advantages in terms of flexibility for staffing levels and skill sets going forward. The company would have the ability to bring in specialist staff under contracts and remuneration levels that wouldn't sit comfortably within CEC's existing staffing structures. There were no consequences, advantages or disadvantages for CEC (or Transport Scotland as far as I know) finances as a result of TIE being an off balance sheet company. TIE's accounts required to be brought in to the CEC Group Accounts each year.

7. There were difficulties in certain areas at that time which created the perception that local government could not deliver on large scale projects. A particular example was the North Lanarkshire Direct Labour Organisation. This Building Works arm of North Lanarkshire Council experienced a series of issues relating to the execution of works where a number of individuals were being paid huge amounts of money in overtime. There were other problems. They failed to make the surplus they were required to make under legislation, a problem which attracted adverse press comment and public concern. The Minister appeared to be of the view that this was pertinent to the way local authorities should operate going forward. My view was that Edinburgh Council certainly didn't have the resource base to take the New Transport Initiative through to fruition. We needed another solution to assist us in doing that.
8. CEC was set up in 1996. It had limited experience of planning and delivering major transport infrastructure projects. With former authorities there had been a

history of over 50 years of major transport projects coming forward but not being brought to fruition. An example of this was the motorway that was supposed to be built right through the south side and round the back of the Meadows. Another example was the proposal for a light rail network and tunnels coming in from the south side corridor. Neither of these were delivered. CEC's experience in transport infrastructure at the time was in road maintenance and road improvement, although former Regional Officials would have had involvement with the Edinburgh By-pass and Western Approach Road construction.

9. The Council did have experience in other infrastructure projects. We had undertaken PFI projects for schools (which totalled about £400 million), the construction of the Edinburgh International Conference Centre (and its extension) and various Flood Prevention Works. There was also the construction of the new Council HQ and the moving out of a number of buildings across the city. However, these projects were not directly comparable with the range of projects contained in the New Transport Initiative.
10. It was CEC's view at that time that we needed some delivery mechanism outwith normal Council activity. That view was heavily influenced by the Scottish Government. They were the ones who ultimately directed that we create the off balance sheet company As a condition of approval of the Initiative.
11. Control of the company was through TIE's Board. The members were appointed by the Council. Initially the Board had three elected members and four private sector people. There was a Shareholder's Agreement and a company Monitoring Officer. There was a requirement for TIE to follow the Codes of Corporate Governance that were in place at that time. There was also a requirement to submit an Annual Business Plan to the Council for approval. This Plan was to cover activity not just for the Tram Project but for all the projects TIE would be involved in.
12. The strategy was for TIE to be flexible and adaptable over the life of the Transport Initiative. This included the projects within it such as Road User Charging. It was made clear that they were initially to be involved in

procurement. They would then move on to implementation and they would be potentially involved in the operation of the projects once they had been completed. That was the logic behind having a private company which could employ people on fixed term and flexible contracts on commercial terms. The intention was that TIE would change its shape as it went forward. Clearly there would have been little point in having tram operational staff employed by TIE at this stage. The whole philosophy behind TIE was to allow them to evolve and move from a procurement company to one responsible for the delivery and operation of projects.

13. The document entitled '*INFRACO Procurement*' dated 8 April 2004 (CEC01853647) is a report produced by TIE's Infrastructure Procurement Group (IPG). It notes that TIE was essentially a procuring body rather than a major project management organisation at that stage. TIE was intended to evolve. Even at that time there appeared to be a comprehensive approach to procurement strategy and the allocation of risk. There is an indication of the early intention to transfer design and construction risk wherever possible.
14. In the beginning a separate company was set up at the behest of the Scottish Executive (Government) in light of the numerous wide-ranging proposals intended to be procured, delivered and operated within the scope of the New Transport Initiative. In relation to the specific question asked around of consideration of instructing an external body as project manager that could potentially have been considered at a later stage for the Tram Project. By then given the strategy established and the development of the proposals for the project there was felt to be a requirement to carry knowledge and experience from the procurement process and the contract negotiations into the management of the project and I am unaware of any serious consideration being given at contract commencement to the appointment of an external project manager.

INITIAL ESTIMATES FOR THE TRAM PROJECT

15. My direct involvement with the Tram Project increased after the summer of 2006. I wasn't personally involved to any great extent around the time of the July 2001 feasibility study entitled '*Feasibility Study for a North Edinburgh Rapid Transit Solution*' (CEC01916700), the September 2002 TIE report, "*Integrated Transport Initiative for Edinburgh and South East Scotland, A vision for Edinburgh*" (CEC01623145), the January 2003 Arup Transport Planning report, "*Edinburgh LRT Masterplan Feasibility Study*" (CEC01190799) the 2003 Preliminary Financial Case (TRS00000016) or the September 2004 update of the Preliminary Financial Case and the updated PFC for Line 2 (CEC00642799).

16. I suspect that Finance staff would have been involved, in liaison with engineering, technical and City Development staff, with the basis of the calculations and how they had been made up. The costs were drawn from studies by reputable firms of consultant engineers with relevant experience. They were reviewed and benchmarked by TIE, City Development and the Scottish Government. By 2004, the Tram Bills were in Parliament for scrutiny. There was Finance involvement in the evolution of cost estimates, however, I didn't have direct personal involvement at that stage.

17. The project was marked against the Scottish Transport Appraisal Guidance (STAG). STAG provides national standards allowing economic appraisal between projects. It effectively allows ranking and prioritisation of projects on a national scale with a base assumption that investment could only be justified for a Benefits Cost Ratio (BCR) greater than one.

18. Project development was also referenced against the Treasury's Green Book. The Green Book provides that practical examples of past projects should be taken into account. It also provides the need to contain or to include Optimism Bias (particularly in the early stages of project development). I was aware of the theory and the purpose of ensuring that the appraisal process was as robust as possible. I note that the Treasury's Green Book concluded that Optimism Bias had to be properly applied. It was, at the time, CEC policy that major

infrastructure projects should take account of Optimism Bias And project development should be consistent with the Green Book.

19. I was not concerned at that time about the varying estimates for the proposed tram network due to the preliminary nature of the project and the fact that there was no funding in place for the project at that stage. The proposals remained dependent upon Road User Charging or grant funding from the Scottish Government. The project still had to go through a number of tests and iterations, including scrutiny in Parliament and by TIE, CEC and Transport Scotland/Transport Scotland. The bulk of the changes and costs at that time were related to construction inflation. Construction inflation was and still is a fairly well understood concept.
20. There were high quality, industry experienced consultant engineers involved in producing the estimates. Transport Scotland were satisfied to the extent that Iain Gray, the Minister, allocated £375m of funding in March 2003.

THE OCTOBER 2004 ARUP REVIEW

21. I do not remember reading the 2004 Arup review (**CEC01799560**), or the TIE response (**CEC01705043**), although I may have read the executive summaries. I note now that the Arup review said the estimates were reasonable and robust given the stage of the development of the project. The review was undertaken immediately after the notification of funding. The purpose of the review was to give information to the Scottish Parliament to further review the project. The Scottish Parliament ultimately approved the Bills and they became Acts. Reading it now, one thing I would draw out is that Arup are highlighting the revenue risk related to fare box income. All the way through this project the Council were very concerned about the Revenue risk As well as the capital costs.
22. A BCR at 1:21 did not represent a particularly strong case but the Scottish Government had announced funding for the project based on that. The Scottish Government must have considered that it was strong enough to allocate funding. I don't think there was anything at that stage for CEC to be concerned about

regarding the BCR. Even with hindsight, I do not consider the Arup review can be described as damaging.

THE 2005 ROAD CHARGING REFERENDUM

23. The September 2002 TIE report entitled '*Integrated Transport Initiative for Edinburgh and South East Scotland*' (CEC01623145) noted that the financial strategy for the New Transport Initiative required revenue funding from Road User Charging. It noted that that income was critical to the completion of the New Transport Initiative and construction of a tram network. Given the result of the referendum there was a realisation then that there had to be rationalisation in relation to the proposals for a tram network. Tramline 3 was effectively deferred. From that date onwards CEC with TIE reviewed options around tramline 1 and tramline 2. Proposals emerged that could be developed and delivered within the level of previously announced Scottish Government grant (at 2003 prices).

THE MAY 2005 DRAFT INTERIM OUTLINE BUSINESS CASE

24. I would have read the May 2005 Draft Interim Outline Business Case (CEC01875336) at the time. From re-reading the document now, I note that at that stage judgement was reserved on the preferred financing routes. Private Finance was still an option at that stage. Finance and City Development officials had been involved in the evolution of the document. My understanding about the risks were that risk management was primarily a matter for TIE who were required to manage the risks as the project developed and that adequate financial provision for risk would be required at each iteration of the Business Case. The revenue side was a risk that clearly was going to sit with CEC i.e. fare box risk.

2006 REPORT Transport Scotland TO COUNCIL AND DRAFT FINAL BUSINESS CASE

25. The 2006 report to Council and Draft Final Business Case (CEC02083547) considered that a line from Edinburgh Airport to Leith Waterfront would give the

greatest benefit. During earlier considerations, the West Edinburgh area had been identified at Scottish Government level as a critical area of economic development for the whole country. There was therefore now a bigger focus on West Edinburgh. It also has to be remembered that the Council were going to take on the revenue fare box risk. There was therefore a significant emphasis on the financial sustainability of the project once it had been completed. These two factors contributed to the focus shifting slightly to Leith Waterfront to the Airport as the favoured priority route rather than the Granton proposal. That said, it was still hoped to possibly complete the Roseburn link within the overall funding envelope.

26. From a financial viewpoint I had no issues regarding the proposal to proceed on an incremental basis and thought that was the most prudent way of proceeding. It gave us a level of headroom within the funding envelope above the estimated costs and the recommended levels of the Optimism Bias. Restricting the scope gave me comfort rather than concern.
27. I think it was important for CEC that their contribution would comprise only such amounts as could reasonably be expected to be funded from future tram related development and receipts. This was as opposed to the contribution coming from general funds or from borrowing to be funded by Council Tax. The expectations of CEC initially had been that 100% of funding would come from the Scottish Government. There was then a shift in expectations. This was important as the Council's capital resources were stretched. It was important that the tram wasn't seen to be impacting on projects that had already been approved / were expected to go ahead within the Council's overall capital programme.
28. There was a joint report to CEC on 21 December 2006 (**CEC02083466**). The Director of City Development and I sought members' approval of the draft Final Business Case for the Edinburgh tram network (**CEC01821403**). There was an increase in cost to £592 million. Clearly we wouldn't have been happy to see an increase in capital cost but the increase was of the order of 4%. The estimated cost had been extrapolated from detailed preliminary designs, benchmarked against other schemes and reconciled with a study that had been independently

commissioned by Transport Scotland. Factors such as utilities and vehicle prices were now based on tender returns. There was a lot more security about the cost despite the fact that they had increased by 4% at this stage. The report indicates that there was a 31% high confidence in project costs. 67% of the costs were still medium confidence. Although you would never want to see the cost estimates increase, it was a fact that the costs were, or at least should have been, more accurate because they were based on actual prices and tender returns.

29. I note that the BCR of phase 1a was 1:1. CEC viewed the revenue risk, in relation to the fare box revenue, and sustainability of the project as being just as important as the capital costs. CEC possibly viewed revenue risk and sustainability as more important than the BCR. BCR had to be looked at to justify the expenditure on a national basis for the grant funding. A BCR of 1:1 was above the threshold and, therefore, CEC were content with the BCR at that stage.
30. I thought, at the time, that the most significant risks affecting the timely completion of the project within budget were the advance utility works, changes to project scope / specification and the obtaining of consents and approvals.
31. The control of the project capital costs partly depended on TIE expeditiously progressing the utility works. These works could not, however, commence in advance of Government grant approval. The release of monies by Government in relation to the grant was delayed by the review undertaken by the Auditor General post-election in 2007. It was TIE's responsibility to progress the utility works subject to the grant approval. CEC and TIE had agreed, in principle, to no changes in scope or specification. That was critically important. Consent and Approvals were to be in CEC hands once the designs were supplied by the design company and the contractor. That meant that CEC needed to gear up in the 'Planning and Roads' sections to ensure it could turn the approvals round within the statutory time period allowed. At this stage, critically, it was assumed that full design risk would be novated to the contractor. CEC accepted at this stage that revenue or fare box risk was going to be an on-going issue for them.

Basically, the programme was to be managed by TIE. CEC and TIE had an agreement that there would be no changes to scope. TIE and 'Planning and Roads' were to work together to ensure that the consents and approval process was taken forward.

32. I note my undated letter to Mrs Polson (TRS00010181). It replies to her letter of 11 December 2006. I refer to having carefully reviewed the draft Final Business Case (presented to Council in December 2006) (CEC01821403) and its Optimism Bias assumptions. The letter which was issued to Mrs Polson, is not signed, dated and doesn't include a reference indicating who drafted the letter on my behalf in the Department. That is not in accordance with departmental procedures. I am not sure how that happened. I don't have any memory of the letter going out to Mrs Polson in fact. Every letter that went out in my name should have been signed on my behalf by someone or was signed by me. All such letters should also have a reference on it indicating who had drafted the letter on my behalf.
33. The draft Final Business Case and the Final Business Case were both subject to review by Council officers from Finance and City Development. They were also subject to review by officers from Transport Scotland. In addition to that, the Audit Scotland Review 2007 concluded that TIE had a well-developed process for dealing with risk management. I think that OGC were still involved in reviewing the project at this time.
34. In response to a number of questions posed I have reread the Green Book. The Green Book Guidance indicates that assumptions related to Optimism Bias should reduce as the project progresses and more costs and specific risks are identified explicitly. The Guidance further states "*thus reducing the need for the more general Optimism Bias provisions*". This can be found at page 30, box 12 of the Green Book at paragraph 5.65. If this was not the case on this project then it would have indicated serious issues. If Optimism Bias is not coming down with specific risk provisions being made to replace it then would have indicated that there were difficulties. It furthermore illustrates that differing elements can, and should, attract different elements of risk and Optimism Bias.

This was applied by this stage in the project in, for example, different considerations for the tram vehicles and for the infrastructure works. Specific risks were identified and allowed for at Final Business Case stage together with elements of unspecified general contingency equivalent to Optimism Bias. As detailed in the example from the Green Book on page 30, box 12, these were consolidated within the average 12% figure for risk allowances. The available funding from the Government, Transport Scotland and the Council constituted a further financial headroom of 9% at Final Business Case stage and 6% at Contract Close.

35. By that stage (i.e. late 2006) risk and Optimism Bias had been consolidated into the figures that we had shown. That's reflected in the response to Mrs Polson. The Optimism Bias and the provision for risk were consolidated by the time of the Final Business Case. The general contingency part of the total risk allowance is equivalent to Optimism Bias. No allowance was required for Optimism Bias in addition to the 12% risk allowance. I am not aware of who reached agreement on that between TIE and Transport Scotland And I do not recall being involved in any discussion on this issue with myself or anyone else from CEC at that time. I was aware of it to the extent of its detail in the text of the Final Business Case but I also note that, based on the Final Business Case, Transport Scotland agreed to grant funding of £500m for the project. If Transport Scotland felt that it didn't include properly for Optimism Bias, then that would be a case for serious concern.
36. There were adjustments to the risk allowance as part of the contract close process. As the project progressed, the risk register was reviewed and updated. Clearly this was carried out based on TIE's assessment of legal advice regarding the terms and conditions of the contract. Much later there were subsequent revisions to the risk allowance because of the contractual dispute and the fact that matters were still to be fully determined legally.

THE PROCUREMENT STRATEGY

37. I had no personal involvement in the Procurement Strategy. There would have been some input from Finance and some from City Development. The intention was to 'de-risk' the infrastructure contract and produce a firm fixed price with substantially all of the construction risk being transferred to the private sector.
38. The separation of contracts for each of the works (compared to the conventional design and build contract) had been studied by a group which included TIE and Partnerships UK (PUK). Transport Scotland, with their experience from past projects, suggested that a design and build contract would result in the contractor building in significant sums for risk. I think the basis for this was the NOA reports on post-projects but the detailed paper on Procurement Strategy should assist. A design and build contract was therefore seen as not being advantageous to the project-at that stage.
39. I can't recall what my understanding was in late 2006 of the extent to which design would be completed and statutory consents and approvals would be obtained at the time the infrastructure contract was entered into. The strategy was certainly that design risk should pass to the contractor and that the utility works shouldn't interfere with the infrastructure contract. At that particular point in time the utilities contract hadn't started. In answer to your detailed question I don't think I can be definitive about what my understanding was at a point in time or date but this matter is dealt with extensively later in this statement.

DESIGN

40. There was a significant delay in progressing design and obtaining necessary statutory approvals and consents. This was due to non-performance by Parsons Brinckerhoff (PB). As I understood it, the contracts provided for payments based on milestones achieved. That was felt, originally, to be a sufficient incentive. However, I think PB judged that the payments they would receive would be less than the cost of them developing the design and bringing it to fruition.

Withholding payment, although it seemed to be an adequate sanction when the contract was drawn up, proved not to be as effective as had been expected.

41. It was reported that there were continuing efforts to improve matters through meetings with PB. TIE were trying to address the delay. There was a visit to America by representatives of TIE to talk to PB's Chief Executive. The meeting was at the very highest levels but it didn't seem to have been productive.
42. It was clear that the delayed designs made it more difficult to encourage the contractor to accept the design risk as part of the infrastructure contract. It was also clear that CEC would need to efficiently organise their process in terms of processing the designs for approval once they had been received from PB or the contractor.
43. The delay in the designs was discussed regularly at the TPB. We searched for ways to improve PB's performance. The intention of the Final Business Case was still clearly to transfer the design risk to the contractor. The approvals process was always understood to be part of the Council's responsibility.

UTILITIES

44. Utilities was another timeline issue. When Alfred McAlpine (AMIS) were appointed, in October 2006, there were no reported delays. However, 18 months or two years later there were considerable delays in carrying out the Utility Diversion Works. The delays weren't evident at the time of the appointment of the contractor. The diversion of the utilities was reported as being on time and on budget at the time we entered into the infrastructure contract. However over 18 months to two years significant delays arose in relation to the diversion works.
45. My understanding of the causes of such delays was that it was a combination of factors. Factors included poor contract performance and poor records from local

authority sources and the utilities companies and latterly concerns arose over contract management.

46. There was a lack of co-operation from utility companies in relation to betterment issues. Previous legislation had been framed to allow the public sale of the most profitable utility companies. The terms of the legislation allowed them to not cooperate fully with the works. Latterly concerns emerged that TIE had not supervised the contract properly. It was after the infrastructure contract was closed that such concerns emerged. TIE reported at the time of contract acceptance that utilities were on time and on budget.
47. The effect of the delay in undertaking utility works was a major factor throughout the life of the infrastructure contract. The infrastructure contract started off on Leith Walk. This is where the difficulties with utilities were greatest. This poses the question "*why was the area with least utilities (Gogar out to the airport) one of the last sections that the contractor actually decided to start work on?*" I think there's a question there for the infrastructure contractor as to how they responded to the utility delays. There is a question as to whether they could have managed the programme of work differently. I understand that the infrastructure contract gave the flexibility to the contractor in an attempt to reduce delays and maximise progress. This however, subsequently, allowed them to manage things to their own advantage.
48. With respect to your specific question regarding the covenant requested for the Utilities contract, TIE was a limited company with very limited assets. The resources for the project were coming mainly from the Scottish Government via CEC. It wasn't a surprise that the contractor would be looking for a covenant from CEC to stand behind TIE's obligations. I don't have any memory of the circumstances about legal input or the signing of the covenant. Who signed the covenant should be a matter of record.. If I signed it my signature will be on it.
49. There was an e-mail (CEC01730251) from Rebecca Andrew dated 16 March 2007 regarding the order that the utilities works were being carried out. The report on the Final Business Case stated that utilities works for 1b would be

required in case it went ahead. However, the draft Outline Business Case in May 2005 clearly stated the design was to focus on Ocean Terminal to Haymarket via Princes Street. If the utility works for the Roseburn Link were further advanced than the section from Ocean Terminal to Haymarket via Princes Street then those utilities works shouldn't have been given a higher priority. Clearly a decision had been made that it had to be taken forward but not at the expense of the main section of the route. I have no recollection of the programme being changed.

THE INFRASTRUCTURE CONTRACT

2007

50. There is a very important general point here with regards to the Infrastructure contract and the example e-mail dated 7 February 2007 from Rebecca Andrew (TIE00087781). In her email she says that Transport Scotland have some concerns in respect of the updated estimated infrastructure capital costs and the lack of evidence from cost assumptions. At the time between the December 2007 report and Financial Close that was one of a number of pertinent issues that required to be resolved. As you move through a project of this nature there are always a number of issues of concern that are dealt with through email exchanges and meetings between the parties. I would have been copied into hundreds, maybe thousands, of these sort of emails over the course of the project. I would try and read all of them on a 'skim reading basis' but I wouldn't necessarily personally become involved with every issue and iteration given I had other significant and important responsibilities in relation to the Council and the Joint Boards.
51. I would have expected the relevant parties to identify and raise issues in order that they could be resolved through agreed structures. If an issue for CEC wasn't resolved and there were material issues then it would be escalated. It would then either come to me and/or Director of City Development as a briefing note or it would go before the TPB. Transport Scotland were still heavily involved at this stage. As far as Transport Scotland concerns are concerned, I

would just simply make the point that we got to a stage beyond where they were happy to sign off on the £500m grant award. I had to assume that the issues being raised by Transport Scotland were being dealt with by the relevant personnel otherwise they would be escalated. I would always be concerned that capital costs should be as accurate and as well developed as they possibly could.

52. I think the Inquiry will know as well as I just how many documents were involved. I had to take a reasonable and realistic approach to the number of issues I would become personally involved in. It could be two days before I got to some of the emails sent to me. By that time the problem might have been solved by the responsible parties.
53. I note the e-mail from Colin MacKenzie (**CEC01730130**) dated 27 February 2007 where he is looking for written instructions to commence drafting an agreement with TIE to protect the Council's interests. We developed a governance structure for TIE that focussed on an Operating Agreement rather than a contract. TIE was the Council's company. We owned it. The model relied on TIE's interests and the Council's interests being 100% aligned. TIE were the company with the responsibility for delivering the project. They were entering into the contracts. They were taking legal advice from DLA. They were acting on behalf of the CEC and operating within a model that had been established years before.
54. In an e-mail dated 22 March 2007 from Rebecca Andrew (**CEC01558752**) she notes that TIE had budgeted for the backfilling of various CEC staff. This included two solicitors for CEC Legal Services. CEC Legal Services were intended to secure extra resources at no additional cost to the general Council budget. CEC Legal Services' role in the project was to help to review the process and deal with matters relating to notices and the transfer of land etc. Their input was required to enable the project to proceed. The issue of backfilling staff must have been resolved since it's clear in the later document that they had employed two people to backfill Colin MacKenzie and Nick Smith's positions to allow them to work on the tram project. I can't remember whether it was the Council Solicitor

or Director of Corporate Services with whom the issue was raised. In any event the matter clearly did get resolved.

55. I note the e-mail dated 13 April 2007 from Rebecca Andrew (**CEC01559060**) which attaches a spread sheet (**CEC01559061**). Transport Scotland comment in this document on the Final Business Case. This is a general response and was a regular part of the process between all the parties concerned. This is comment as part of the briefing process before going to the TPB. Generally, there was a requirement to ensure satisfactory progress was being made in the lead up to the infrastructure Contract Close. There were hundreds of emails of this nature. I don't remember this specific email and any specific action that followed it. It is commentary on all the issues that Transport Scotland and TIE were involved in at that time. At the end of the day Transport Scotland released grant of £500m. You have to assume that, therefore, that a resolution was reached in terms of all of the relevant issues.
56. I refer to the letter from Malcolm Reed to Tom Aitchison (**CEC01666269**) regarding capping the grant for the tram project at £500 million, the highlight report to the IPG (**CEC01566861**) and the document from Councillor MacKenzie (**CEC01556572**) seeking information regarding contingency planning in the event of an overrun. Following the capping of the grant CEC asked DLA to undertake that they owed a Duty of Care to the Council. The contract wasn't finalised at this time and was still in development. We formalised processes with TIE in terms of their advice and certification. At that time it was still my opinion that TIE's interests were 100% aligned with the interests of the Council and at that time I did not have any doubt that they were. That was TIE's purpose. We had headroom within the funding agreement in relation to the cost projections compared to the £545m that had been agreed in total. I would certainly have had a role, with the Senior Responsible Officer, to ensure the affordability of the programme. CEC regularly reviewed the Council's financial position in overall terms on a risk-based approach. Provision for contingency was not made on a project by project basis. Rather, in accordance with established practice, provision for contingency was made in relation to the Council's overall finance position on a risk-based approach. There was a high level of confidence that the

tram project could be delivered within the estimates. The headroom within the total funding available provided further security in relation to that.

57. In response to the detailed question of CEC engaging separate legal advisors it was my understanding that a Duty of Care from DLA would be sufficient for CEC purposes given the alignment of interests between TIE and CEC. Contract negotiations were still underway at that time. If CEC had brought in another party of legal advisors it would have been a further complication. It would have become a three-way process. TIE continued to have the responsibility for the contract but CEC negotiated this Duty of Care with DLA. This would have been formulated following a collective discussion with Council officers.
58. I am referred to an email dated 31 August 2007 from Rebecca Andrew (CEC01566895). I note she raises the question of CEC procuring consultants to analyse and quantify the risks and the tram business case in order to provide some comfort on the work carried out by TIE and its advisors. I can't remember anything about this specific e-mail but do recall that no such consultants were eventually appointed.
59. I was asked by Colin MacKenzie, in an e-mail dated 14 September 2007 and found at (CEC01567628), to meet with Andrew Fitchie of DLA in relation to INFRACO and TRAMCO contract terms and risk. I did meet with Andrew Fitchie on a number of occasions before we entered into the INFRACO contract. I can't remember if we met in response to this particular e-mail or what was discussed in this particular meeting. CEC did get verbal assurance from DLA as to the position around contract negotiations over time.
60. I don't think I was at the joint meeting of the TIE board, TPB and Legal Affairs Committee (CEC01567628) on 15 October 2007. I think I sent my apologies. My understanding of the possible increase in cost regarding design was that they were not just for the preliminary designs but also the detailed designs. PB's design work was not complete. My concern was whether we would be able to get to contractual close on the right terms in light of the difficulties we were having with the design.

**CEC01567628
should be
CEC01357124**

61. I don't remember the e-mail on 19 October 2007 from Rebecca Andrew (CEC01399632) regarding critical issues including the MUDFA works being behind programme and the risk of change after Financial Close. Within the agreed structures I didn't personally attend the Legal Affairs Group. I understood that the OGC had given a green rating to the project which still required the issues identified to be addressed through a properly managed Action Plan. In October 2007 TIE were migrating from a procurement focussed organisation and developing their contract management capabilities. The issues raised were being discussed between TIE and CEC as shown in the correspondence. As outlined elsewhere a decision had now been taken to prioritise line 1a and utility diversion planning should have reflected this.
62. The initial stages of the joint report to Council on 25 October 2007 (CEC02083538) would have been discussed within the Council. It perhaps would have been discussed at the IPG. It would have at least been discussed between myself and Andrew Holmes. We would have identified, in broad strategic terms, the areas that we would expect the report to consider and we would have been in conversation with TIE about the issues that would require to be submitted to the Council. That discussion would have taken place at a strategic level. The drafting of the report would have started in City Development. They were the lead department for the Council. There would have been input from Legal and Finance staff. Versions would be circulated for comment. There would have been a Version Control Process. In terms of Finance, it would be Rebecca Andrew and / or Alan Coyle who would be involved at this stage. There would have been a number of versions developed internally before the report was shared with TIE. If there were any strategic decisions on content that needed escalated then either myself, the City Solicitor or Andrew Holmes would be asked to take those decisions. The draft report would then be shared with TIE. I am not sure but I think Stewart McGarrity, who was TIE's Finance Director, and Graeme Bissett would most often have been involved with input from the TIE side. There would be reiterations at that stage. Any issues of principle from TIE would be referred to myself, the City Solicitor or Andrew Holmes for guidance. I would see a later draft with my staff indicating to

me any key issues that they would like to raise or points of contention. They would want to hear my views before the report was finalised. I don't know how Andrew Holmes undertook his review of the draft. He might have been more hands on at an earlier stage. He might have operated in similar fashion to myself. The process I have outlined applied to all the major milestone reports that went to Council, not just this report. Occasionally I would be required to have a one to one discussion with Andrew Holmes, the City Solicitor, Graeme Bissett or Stewart McGarrity if matters couldn't be resolved and agreed at the operational level of staff. That's not an unusual process for complex Council reports that involve a number of departments. Clearly TIE wouldn't be involved if it was a Council issue only. This Version Control and iterative process was not uncommon in terms of producing final reports. Clearly there were always sensitivities over language in reports that people may have differing views on. There were also fundamental lines of principle that couldn't possibly be crossed. Those had to be included in the report. During this overall process of submitting reports to Council on the project on one occasion we didn't finalise wording through the iterative process. There was a meeting that I remember being held in the Council offices. Representatives of City Development Legal and Finance were present along with representation from TIE. We discussed the final wording of the report. I can't remember if that was to do with this report or one of the other reports. Generally the discussions were about points of detail and sensitivity of language.

63. The Final Business Case dated 3 October 2007 (CEC01649235) included the statement that it was still the intention to pass the design risk to the contractor. I've re-read the report. I think by this time we had received the Auditor General's report in relation to the Tram Project. That report had indicated that procedures were in place to actively manage risks associated with the tram project. It also indicated that TIE Ltd had implemented a clear procurement strategy which aimed to minimise risk and deliver a successful project outcome. We'd also had, by that stage, the Office of Government Commerce (OGC) review that concluded that TIE risk management was well developed and represented best practice. It concluded that the current risk contingency was sufficient. There are key points in the report to Council on 25 October 2007 (CEC02083538) that I wish want to

draw attention to. Paragraph 3.22 indicates the design position. There is a clear indication that the project wasn't at the final design stage in October. Paragraph 3.27 goes on to say *"it's anticipated that the SDS and TRAMCO contracts will be novated to the provider of the infrastructure works. This means that significant elements of the responsibility for design and vehicle provision and the risks associated are transferred to the private sector"*. That is consistent with the longstanding procurement strategy. Although the designs weren't completed, the indication was that the tenders were based on firm rates and prices from the INFRACO and TRAMCO tender returns. The risk associated with approvals and consents, would remain with the Council once the designs were finalised. Paragraph 4.3 said that the infrastructure costs were also based on fixed price and rates received from the recommended Infraco bidder but this might move slightly prior to close as further design work was required to define more fully the scope of works and allow a firm price to be negotiated. There was another risk allowance brought in for that. There was also an indication at that time that there were potential savings to be made through value engineering. It was very clear in the report that the intention was still for design risk to be transferred to the contractor and for a fixed price to be achieved as far as possible prior Contract Close.

64. The costs had been benchmarked against other schemes in the UK and Ireland. There was the Quantified Risk Assessment (QRA) assessment of risk. The assessment was a highly regarded technical process both by OGC and Audit Scotland. There was a £49 million risk allowance plus £47 million headroom within the funding limit. In addition to that we were still proposing a phased approach to the project. The report to Council highlighted that, in the worst case scenario, there were funds available in City Growth, capital programme, capital receipts and the TEL Business Plan that could be used for a further contingency. Paragraph 4.27 refers to risk management. Significant risk still lay with the public sector. Given the cap on Government funding, the risks potentially impacted directly on the Council as a funder of last resort. The DLA position is set out at paragraph 4.30. Work was still to be done by TIE's lawyers on design and technical information readiness. The Final Business Case provided a reasonable though qualified platform. It set out the work required to be done to

get to fully defined contractual commitments prior to contract commercial close. In Appendix 3 of the report to Council, at paragraph 5.3, it's noted that design and related matters were yet to be finalised and the aim was still to get a fixed price by December. All of this helps explain why I consider that the provisions in the report to the Council at that time were appropriate.

65. I have no recollection of the presentation on capital costs to members by Andrew Holmes, Willie Gallagher and Neil Renilson, (CEC02083536).
66. November to February is what we termed the budget season for CEC, the police service, the fire service, the valuation joint boards and FETA. Invariably to put things in context that was my busiest time of the year. There were other issues that were of considerable importance to the Council over and above the tram project. It is important to state that I had significant other responsibilities which I was involved in at that time. The e-mail dated 3 December 2007 from Alan Coyle (CEC01397538) attached a briefing note (CEC01397539), which was discussed at the IPG on 11 December 2007 and formed part of the highlight report to the IPG (CEC01398245) and the Action Note (CEC01391159), is pertinent. The briefing notes drew together a number of outstanding issues which indicated that we were not in a position to recommend Contract Close to the Council at that time (December 2007) which had been the intention in the previous timetable. In fact I think, prior to that, the indicative timetable had been October 2007. Given these outstanding issues the position we had now reached meant that we could not recommend Contractual Close to Council at 20 December. The note for the IPG stated that the individuals who would be drafting the Council report were the same people who were preparing the list of issues. They were looking for guidance. The minute states Duncan Fraser would need to provide a clear timeline to see how they could be resolved by the Monday, if possible, to allow that report to go to the Council. At that point we might consider a basic report plus a subsequent supplementary. The aim was to meet the circulation deadlines and press TIE to achieve a resolution of the issues of concern. It was agreed to have a meeting with Willie Gallagher at high level. I can't remember whether such a meeting was held at that time. Basically, this was about resolving all that we could in the timescales required. It was clear

that we would not be in a position in the report to Council to recommend Financial Close at that stage. The shape and content of the planned report would, therefore, would require to be amended to reflect the position as it now stood.

67. Willie Gallagher was on the TPB and there were a number of meetings with him outwith the TPB over the course of the project. I had a number of meetings with Willie Gallagher and other TIE Executives and Andrew Holmes over the period. The subsequent report to Council on 20 December 2007 discussed below (CEC02083448) made clear that the Council sat behind TIE and ultimately carried all the contractual responsibilities. It noted that a guarantee was needed. Section 8 of that report set out on-going matters where work was continuing to ensure an acceptable outcome for the Council prior to Financial Close and allowed for all the risks that were remaining with the Council. My views on the matters set out in the briefing note attached to Alan Coyle's e-mail of 3 December 2007 were quite critical and it meant the project couldn't proceed to Contractual Close at that time. Basically my position was that if issues had been closed out then there was no point in detailing each issue which had been resolved. However, the Council had to be aware of the risks that were remaining in the project as we went forward. The final recommendation in the report to Council was to give delegated authority to the Council's Chief Executive to agree to contract closure once all the issues had been bottomed out.
68. The report to Council on 20 December 2007 therefore, ultimately, became a kind of holding report that recommended that powers be granted to the Chief Executive in relation to approving Contract Close. Ultimately the Chief Executive didn't feel comfortable with that level of delegation and I supported him on that. Prior to Contractual Close we came back to the elected members in May 2008.
69. The risks that were still outstanding were included in the December report to Council. If there was a plan to resolve something with TIE then we wouldn't take the detail of each issue to the elected members until it had been resolved one way or another. The point is that there were outstanding issues which would

require resolution prior Contractual Close. The report detailed the risks that were still outstanding at that stage of the project.

70. I have no recollection of the meeting of the TPB held on 7 December 2007 (CEC01526422) regarding the late delivery of design on the MUDFA programme. Although I note from the minutes that TIE confirmed there was no impact on price at that time.
71. The e-mail from Duncan Fraser on 14 December 2007 (CEC01397774) referring to a presentation by TIE the previous day, asking certain questions about the Quantified Risk Allowance and querying the provision made for the likely change and scope given the incomplete outstanding design approvals and consents is a good example of the on-going correspondence in the run up to contractual close. At this time I would be getting nearly 150 emails a day. 30 or 40 of them might have had tram content in them. Princes Street closure was the Council's responsibility. This is one of a number of emails which formed part of the on-going correspondence in the run up to the financial close. It doesn't mean that we needed a decision at Director level. Staff were pursuing the issues with TIE.
72. I was updated, as required, of discussions at the Legal Affairs Group by members of Finance staff who attended. I don't remember receiving minutes of the group on 17 December 2007 (CEC01501051). I don't remember being advised of the discussions at the meeting on 19 December 2007.
73. My understanding of the discussions at Wiesbaden between 17 and 20 December 2007 was that an agreement had been reached on the principle of the transfer of design risk. This was only on the overall principle. It was not an agreement on the detailed contractual provisions. There was an update provided to the TPB about Wiesbaden on 19 December 2007.
74. My understanding of the firm price element mentioned in the e-mail from Duncan Fraser on 18 December 2007 (CEC01397825) and attached note entitled 'TPB Critical Issues' (CEC01397826) was that it was an improvement on the position we had before. I understood the approvals risk. I understood it to be an area of

activity that was under Council control. Once we'd received the designs from PB there was a statutory time period that Planning and Roads had to approve the design. The risk was that CEC weren't geared up for that and that we didn't have enough resources. This meant there could be potential delays and I had always understood why that risk would rest with the Council. It was the Council's responsibility to process the approvals. I don't specifically remember any discussion about this at the TPB on that date.

75. Generally I have looked through the minutes of the TPB on 19 December 2007 (CEC01483731). I can speak from the notes of the meeting rather than from personal memory. Wiesbaden was presented as a critical breakthrough by TIE. My understanding from the minutes is that the consortium had agreed in principle to take on the design development risk. The slides presented state, inter alia, "*BBS taking detailed design development risk*" and "*Design development risk transferred to Infracore from this point on*". It further states "*there would be no need for detailed measurement of provisional items and provisional sums were now firm*". Wiesbaden was presented as a major step forward. From the table presented (CEC01526422 – 10) I assumed figures didn't include for detailed design risk on the basis it had been passed to the contractor. Risk contingencies were in the QRA and held separately.
76. On 20 December 2007 Andrew Holmes and I presented a joint report to Council (CEC02083448) seeking members' approval on the Final Business Case version 2 (). The evolution of that report was along the same lines as the report to Council on 25 October 2007 in relation to the Final Business Case version 1 (see paragraph 62 of my statement). There was discussion at the IPG about what was to be included in the report.
77. I note the e-mail dated 29 November 2007 (CEC01383999) Stewart McGarrity sent a copy of the draft report (CEC01384000) containing comments by himself and Miriam Thorne. The version of the draft report in existence at that stage notes that a further contingency of £25m was recommended to cater for design changes (para 4.3). An Appendix on Risks noted that designs were not complete and that "*if the designs are built into the contract at contract close and the*

decision is made to change them at a later date, this will lead to additional costs and potential delay" (para 5). As explained previously and later I did not necessarily take a view on each iteration or comment received on the draft report. The Appendix also notes that if designs required to be reworked to obtain planning approval then, again, a variation order would be required at additional cost and delay (para 6). I note the email dated 30 November 2007 from Duncan Fraser to Rebecca Andrew (CEC01384035). Duncan states "*I have compressed the report as requested by Andrew [Holmes] to show what can be done. However I still have concerns about the completeness of information that informs the members decisions*". In the compressed report (CEC01384036) the reference to an additional contingency of £25m in relation to design changes had been deleted but the Appendix on Risks remained. I note the e-mail dated 6 December 2007 (CEC01397621) where Alan Coyle sent a draft of the report (CEC01397622). He states "*for TPB circulation*" following comments by Donald McGougan. The draft states that "*A Supplementary Report may be issued for the 20 December 2007 Full Council setting out the latest negotiated position with the INFRACO contractor (BBS)*" (para 5.5). The Appendix on Risks remained in the draft report. I note the email dated 12 December 2007 (CEC01397706) where Alan Coyle sent Duncan Fraser the most recent update of the draft report (CEC01397707). The Appendix on Risks remained in the draft report. I note the email dated 13 December 2007 (CEC01397719) where Alan Coyle circulated a further draft of the report (CEC01397720). The reference to the possibility of providing Council with a Supplementary Report had been deleted as had the Appendix on Risks.

78. There were a large number of iterations to this report. I was involved in discussions at the start i.e. saying what should be covered in strategic terms. After that, when we went through to further drafts, I was involved as required. My role was at times as a potential arbitrator resolving issues where departments couldn't agree or TIE had a different view about how to express things. There would be a lot of emails and correspondence about this report circulating that I might have been copied in on. However, I would wait until the issues crystallised before I got involved i.e. in terms of "*this is something we*

can't resolve and either you or Andrew Holmes needs to make a decision about it".

79. I note that at one stage we were talking about a supplementary report to the Council. This was because we were hoping, at one stage, that we would be able to recommend contractual close to the Council in December 2007. We went past that stage because there were still too many things to be resolved between TIE and the preferred bidder. That was a fundamental reason the report changed because we weren't now going to the Council with an idea of finalising contractual commitment. It became a recommendation that the Chief Executive be given delegated authority, however, he ultimately didn't think that that was appropriate given there were so many issues still to be resolved four months later. That is why the issue came back to the Council in May 2008.
80. At that stage the Business Plan was still saying that design risk would be transferred, as far as possible, to the contractor. The amount that was to be included in the risk allowance and the contract price were still issues that were not resolved with the contractor at that stage. I am therefore not surprised that there were changes in relation to some of the content of the report. It wouldn't be unusual for changes to be made. We had a template for Council reports that put a limit on their size e.g. it limited the number of appendices and issues like that. The size issue wasn't rigorously enforced (and it wouldn't have been appropriate for a report as significant as the tram report to be constrained by it), however, that kind of ethos was there in the background too. The report and the appendices with the Business Plan were long enough to easily breach the Council template.
81. The contract conditions and the part which discussed the amount of design risk passing, or not passing, to the contractor were months away from resolution. I think it is more important to the Inquiry how that was dealt with in May than in December. It has to be remembered that there was agreement we couldn't recommend Financial Close at that stage anyway.

82. As outlined earlier every single Council report of a complex nature involved the toing and froing between departments about the exact content. There was discussion about the sensitivity of language and various other issues. This, of course, was done without crossing any lines or making inappropriate changes. With this report, there would be no amendments or input from elected members at all before it was considered at Council.
83. For the avoidance of doubt, I was not the person who was in control of the Version Control of this report and the amendments to it. I was, certainly, one of two Council officers signing it off at the end. I was used as a point of reference where there were disputes between Council departments or issues with TIE where there was a differing view about how things were to be expressed. I have no memory of all of the many specific drafting alterations which were made and, almost certainly, probably wasn't even aware of all the changes which were made as a result of drafting discussions.
84. The email from Gill Lindsay to Alan Coyle on 14 December 2007 (CEC01397758) and the email from Colin MacKenzie on 10 December 2007 (CEC01400215) attaching a draft report (CEC01400216) show that it was an iterative process. There were numerous versions of the report as noted above. This was normal practice for complex reports between departments. It would be unusual that two people in the same division, never mind the same department, were working on different versions of the report at the same time. That was unusual but it wasn't unique. There was a Version Control process and everyone should have been working on the most up-to-date version. I would say that the final report did deal with the risks adequately. It outlined that further work was required before going to contractual close.
85. The qualifications about price and the statement that the Chief Executive required to be satisfied in the joint report to Council (CEC02083448) were there because not all the issues surrounding diligence on the contracts had been completed. In particular, these were the issues that had been raised at the IPG in December. Those issues meant that we weren't in a position to recommend contractual close. The draft contract documentation between TIE and BBS was

not complete. I understood it was still consistent with the Final Business Case and the information that was detailed to the TPB on 19 December 2007. I understood then that the Council would be taking on the risk of granting consents and approvals within the statutory period once CEC had received the proper information.

86. I understood from the Final Business Case, version 2, dated 7 December 2007 (CEC01395434) that it was a fixed price contract with the contractor taking the bulk of the design development risk. The client paid a risk premium for the transfer of those risks. I understood that the risks being paid for may not arise. Following contract close, INFRACO would be responsible for the provision of the correct information in the correct format then the planning and roads departments or divisions would have the responsibility for granting and processing consents and approvals within the statutory period. The public sector would also be responsible for any costs and delay arising from utility works i.e. from adverse ground conditions. Risks arising from TIE's management of the contract and revenue risks associated with the running of the trams would remain with the Council. The risks were diminishing because all the tenders had been returned and post-tender discussions were continuing. MUDFA had started and was being portrayed by TIE as being on time and on budget. From reviewing the Final Business Case version 2, I note the focus on capital costs, rather than on the revenue risks and the sustainability of this project. To my mind and in the view of the Council the revenue position was at least as much of an issue as the capital costs and took up significant officer time.

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87. During this time TIE, as advised by DLA, were in prolonged and detailed negotiations with BBS. There was no direct Council input into the negotiations but TIE and DLA were clear that the Council's objective was to maximise the transfer of risk to the contractor. TIE and DLA understood that the contract terms would require to deal adequately with the complex area of design development risk. TIE were obliged to act in the Council's best interests by the Operating Agreement. They were further obliged to act in the Council's best

interests by their Memorandum and Articles. The whole reason for their existence was to act in the best interests of the Council. DLA owed a Duty of Care to the Council. TIE was fully resourced and appropriate governance arrangements had been put in place. The Council did not have sufficient resources to shadow TIE executives or duplicate their efforts.

88. Council staff were in touch with TIE on an on-going daily basis. During the negotiation period the detailed position on many issues were subject to change. There was, as a result, a high volume of email traffic between Council officers, different departments and with the representatives of TIE. The Inquiry will be aware of the volume of documents in circulation at this time. The period of negotiation coincided with a critically important and busy time for me in my wider Council role. The Council and joint boards' revenue and capital budgets were being finalised in January and February 2008. There was no practical purpose for me personally to be involved in the details of the negotiations. In any case, there was no practical realistic or reasonable way for me to have been involved. At that time I would generally receive almost 150 emails per day. It was not unusual for 30 or 40 of those to relate to the tram project. Milestones and critical issues were, however, reported to the IPG and TPB. Internal briefing and debriefing sessions were held regularly with Council staff both before and after TPB and were subject to meetings between TIE and Council staff.
89. Clearly the issue of design development risk was critically important and complex. The Council wished to avoid accepting risk beyond the risk outlined in the Final Business Case. However, there was, as outlined in that Business Case an acceptance that we had to accept risk with regards to the Council responsibilities relating to the consents and approvals process. TIE and DLA claimed to have constructed through the contract suite (in particular through the Employer's Requirements) mechanisms which minimised the risk to the Council. 95% of the prices in the contracts were described as fixed with the remainder being covered by provisional sums. There was, however, a further risk premium introduced for the overlapping period of design, development and construction. Post-contract Close, and after significant difficulties had emerged, a number of different QCs took different views on the content and precise meaning of the

contract documentation. As Director of Finance I was not qualified or in a position to take a legal view on the contract documentation. I relied on the assurances from TIE and DLA and also, to a lesser extent, on the internal legal view that the Council's interests had been adequately protected.

90. At the time of report to the IPG on 18 January 2008 (**CEC01398148**) TIE were still in negotiation with BBS. The reason for requesting a list of exclusions from the INFRACO contract with a value against each item in percentage terms was to provide clarity for the Council. There had been previous reports that showed 67% of the sums were fixed and 30% were still provisional sums. The aim at that time was to maximise fixed costs and get to the 97% percentage presented to the TPB in December. In line with the provisions of the Final Business Case, BBS were being asked, through the negotiations, to assume the design development risk. BBS, therefore, were undertaking their own due diligence on the design process to determine their position on that issue. The intention at that time was to pass the design risk to BBS. BBS required that Prior and Technical Approvals be secured from the Council timeously. It was unrealistic to attempt to pass risk surrounding delays by the planning authority or the roads authority in relation to the processing of approvals. It was understood that this risk would be left with the public sector. That was made clear in the Final Business Case in December 2007. The Council was required to ensure that we were geared up in terms of resources to deliver the Approvals once the proper information had been submitted.

91. The minutes of the joint meeting of the TPB, TIE Board and TEL board on 23 January 2008 (**CEC01246826**) note that a number of concerns remained in relation to the prior and technical Approvals. This was in reference to the previous list that was considered at the IPG in relation to exclusions from the INFRACO contract. The Council, at this juncture, was still seeking full clarity on what was to be included in the INFRACO contract. TIE did not provide, according to the minutes, an indication of material price or programme changes. They state that the MUDFA utility works were on the programme and on budget.

92. With reference to the table found in appendix 1 to the report to the IPG on 30 January 2008 (CEC01246994), I can't specifically remember what my view was at that time. Clearly a number of deliverables were coded red. I would have been amazed in these circumstances, if we'd been able to close the contract on 9 February 2008 as was potentially being considered. Contract Close ultimately ran through to May. Looking at it then and now there was no way these could have been cleared by 9 February. I can't remember any discussions about this document or the deliverables at that specific meeting on that specific day.
93. Colin MacKenzie advised Susan Clark in his email dated 7 February 2008 (CEC01508412) that there was a serious debate regarding consents and risk. I was aware there were a number of debates surrounding this key issue in terms of getting to Contract Close. There was a lot of discussion on the topic. I wasn't included in this item of correspondence. However, it was inevitable in my view that the Council would be left with the element of risk associated with the consents and approvals process. A risk allowance had been introduced against that. At that time officials were all of the opinion that further delays beyond a reasonably short period of time would result in re-procurement of the project. Such a delay would have led to additional costs for the project and, almost certainly, given the political environment, project cancellation.
94. The Rutland Square agreement (CEC00205642) was a critical agreement that moved the programme for the project out by three months. Those three months gave the parties further time to reach a satisfactory conclusion of the negotiations and the detail of the contract. It was a significant step in the process of moving towards Contractual Close. It provided a set of conditions relating to progress towards Close and allowed CAF to be brought into the consortium i.e. it enabled the novation of TRAMCO into INFRACO.
95. A joint meeting of the TPB and the TEL Board took place on 13 February 2008 (CEC01246825). The emerging area of risk surrounding the overlapping of the design and construction processes was introduced into the report to Council in May 2008. I asked whether it was possible to completely buy out design risk. At this time the strategy was still to transfer as much of the design risk as possible.

Clearly this reporting indicated that completely buying out all of the design risk would be difficult. According to TIE it wasn't possible. I understood that the main part of the design risk at this stage was still to be passed to the consortium. I understood that neither of the tendering parties had been prepared to accept 100% of that risk. The December Final Business Case (which was finalised after the bids had been received) indicated that it was still the intention to pass over the bulk of the design risk to the consortium. At this stage BBS were still undertaking due diligence on the design risk. My understanding was that it was still the intention that as much as possible design risk would be transferred to the consortium and that negotiations were continuing. The risk being passed to the Council, at that time, was restricted to the consents and approvals process. I can't remember specifically the extent to which the INFRACO price included a contingency for design issues at that point in time.

96. I have no recollection of seeing the 18 February 2008 (BBS produced) Design Due Diligence Summary Report (DLA00006338). I was aware that the design was incomplete. I was aware, at some stage of the process, that there was 40% outstanding. I couldn't say exactly at what point I became aware of that figure.
97. I note that by email dated 22 February 2008 Graeme Bissett sent Andrew Holmes and others (but not me) a paper on "*SDS – Delivery Consent Risk Management*" (CEC01474244). I was not included in the circulation of that document and I cannot recollect seeing this paper at that time. I have read this paper following the Inquiry sending it to me. I note it represents a best estimate of what an outcome is expected to be. It states that the position was still subject to negotiations and change in the run-up to financial close. I comment on my developing understanding during the period approaching financial close of the risks arising from the overlapping design and construction period and of who bore the risks later on in my statement. Likewise, I comment on my understanding of the "*process*" and "*set of contractual terms*" that would enable TIE and CEC to manage the risks arising from the overlapping design and construction period, my understanding of the contingency allowed for risks arising from design, approvals and consents and TIE/CEC's option that the risk

contingency could be retained or traded for a cash sum and full risk transfer to BBS.

98. A meeting took place on 28 February 2008 between TIE, myself, Andrew Holmes, Gill Lindsay and Alan Coyle. I note that this meeting is referred to in an email of that date from Graeme Bissett (CEC01546728). I cannot recall what was discussed at that particular meeting. That meeting was held about eight years ago. I would assume that we discussed at the meeting the issues that Graeme Bissett has included in his email to his TIE colleagues. That said, I do not have any specific recollection of the meeting. I note the matters listed by Graeme in his email. I note the four bullet points underneath the title "*budget*". I note the last bullet point states that "*overall we believe that the existing £498m budget remains within reach if it is accepted that the balance between calculated cost and risk contingency will change and that some areas will be controlled post-Close rather than negotiated into the ground now.*" At that stage, the clear objective of the negotiations, which were on-going, was to reach an agreement on contract terms. CEC's and TIE's objective in the negotiation was to ensure that as much as risk as possible was passed to the contractor. Where that was not achievable, or where the terms of such a transfer were not considered financially advantageous, the provisions for risk in the project budget required to be reviewed. There was a trade-off between transfer of risk and risk provision. In such cases, as well as provision for risk in the final estimates for the project, risk mitigation measures were required. These provisions and measures were required to ensure that, post-close, project cost control was not compromised.
99. I note that the Highlight Report for the IPG dated 29 February 2008 (CEC01246993) gave an update in relation to Planning Prior Approvals and Technical Approvals. The Highlight Report included a draft Report on Terms of Financial Close dated 21 January 2008 (the "Close Report"). The draft was to be updated to reflect current negotiations. I note that the draft Close Report stated at page 5 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*". I note that the draft Close Report also noted at page 31 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". The draft Close Report was, by definition, a draft. The document required to be updated in the light of the negotiations that were then underway. I note section 10 of the report which is entitled "Risk assessment of in-process and provisional arrangements" (page 38). This section sets out that it was clearly understood that TIE and CEC had a role in the process for the granting of approvals, consents and for traffic regulation orders once the required information was supplied by SDS. It is further clear that the intention that the requirement for providing the information would become BBS's subsequent to the responsibility for SDS being novated to the contractor. I understood "Normal design development to meet the employer's requirements" as meaning the evolution of the design-to-construction stage. The exclusion of changes re "design principle, shape, form and outline specification" became an issue which, during the dispute, became a significant area of legal contention and dispute. The interpretation of that aspect featured in a number of dispute resolution procedures. At that time, that phrase was portrayed to cover potential stakeholder design changes e.g. changes to the route or changes to the number or the design of tram stops.

100. There was quite a debate surrounding the shape and form of the tram stops. I recall that that issue was something that was on-going in the planning department and with specific interests and the public in Edinburgh. There was pressure, for example, to have more than one tram stop in Princes Street. If CEC, or any of the stakeholders, had made a change, such as repositioning the tram stops, then that would have come under the wording which related to changes to shape, form and design. As I understood it, that would have constituted a change over and above normal design development. It would have constituted a stakeholder-driven change to the Employer's Requirements.

101. The Consents and Approvals process, up to that time, had not been a smooth process. Progress was reported regularly to the IPG. There were a number of difficulties with the process. The main difficulty was the design contractor and

their inability to bring forward the information in the proper shape and fashion. Part of CEC's responsibility was to make sure that TIE and CEC were working with the designers to make sure they knew what CEC's requirements were in terms of planning and traffic regulation terms before undertook the design work. There were arrangements put in place to make sure that people were all working together. CEC looked at the resources that we had in place to deal with our end of the process. There was a statutory period for approval once the proper information had been submitted to CEC by the designers. CEC had to make sure we had enough sufficient resources and staff to deal with the process timeously. The workload associated with the tram project was very significant in several areas of City Development. The interface between TIE and CEC surrounding approvals and consents was discussed at the IPG. It was in reality a three way interface i.e. between TIE, CEC and SDS.

102. I note that by email dated 3 March 2008 (CEC01506052) TIE provided CEC with a breakdown of the Quantified Risk Allowance (QRA) (CEC01506053). The QRA was not something that came to me directly. I recall that there were a number of iterations of the QRA. Those iterations were on-going throughout the process. I did not necessarily take a continuous interest in the QRA while it was still a moving picture. There was a close liaison between TIE and CEC in relation to the on-going development of the QRA. That liaison was between officers from Finance and City Development and TIE. It would have been Rebecca Andrew or Alan Coyle from Finance who were involved in that process. I cannot say for certain but it would likely have been Duncan Fraser and Andy Conway in City Development who would have also been involved. I personally did not look at the QRA throughout all its iterations. At this particular stage negotiations were still underway surrounding the transfer of risk and the attempt to try and minimise the risk passing to the public sector. Where transfer was not wholly possible TIE were required to develop risk mitigation measures and review provision for risk. I was not involved in each iteration of the QRA as negotiations continued.

103. I note that on 6 March 2008 Gill Lindsay sent an email to Jim Inch (but not to me) with an update (CEC01407509). I did not receive or see this email.

Negotiations were continuing at this stage. They were yet to be concluded. CEC's objective in that negotiation was to minimise the level of risk passing to the public sector. That objective was very clearly understood by TIE. I have looked at this email further to the Inquiry providing it to me. My interpretation of this email is that it is in relation to the issue of how far the Chief Executive of CEC's delegation from the December Council was still relevant in terms of the position then being proposed for the financial close in March. In any event financial close did not happen in March and the Chief Executive determined, in the light of changed circumstances, not to act under his refreshed delegated authority. He instead asked for further Council and Committee approval for Contract Close. I would not say that the substantive issues set out in this email was SDS novation and risk contingency but I would reiterate that I did not receive it at that time..

104. By email dated 10 March (CEC01393819) Graeme Bissett sent to me and others drafts of the Close Report (CEC01393820), DLA Risk Matrix (CEC01393821), DLA letter to CEC (CEC01393822) and DLA Report on Infracore Contract Suite (CEC01393823). The email notes that while, generally, the documents were in final form, negotiations on a range of issues continued. I note that 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"*. My understanding at this stage was that the pricing schedule was intended to provide for delivery of the project in terms of the agreed scope. That scope was set out in the detailed Employer Requirements with the contractor accepting the risk for normal design development between BDDI and Issued for Construction (IFC) drawings. This clearly later became an area of subsequent significant dispute. The only material change to risk transfer from the previous position was in relation to the position regarding programme delay which could arise from an overlap between the design and construction programmes. That risk was subject to a specific provision of £3.3 million. The risk was intended to be mitigated through TIE overseeing a management programme with SDS and BBS in relation to design submissions. There was further a provision in the risk allowance of £6.7 million for general programme delay. There was also an

anticipated funding headroom within the overall grant and funding position based on the cost estimates at that time.

105. I note that on 11 March 2008 Colin Mackenzie sent an email to Graeme Bissett (which I was copied in to) listing the crucial points outstanding in advance of a meeting between CEC and TIE that day (CEC01393838). I have no recollection of attending the meeting on 11 March 2008. It could be reasonable to assume, that the issues detailed in the email would be those that would have been covered in that meeting.

106. I note that by email dated 11 March 2008 (CEC01490289) Alan Coyle 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)"*. I note that by email dated 11 March 2008 Alan Coyle sent an email giving an update on negotiations following a briefing with TIE (CEC01407769). Mr Coyle's email notes 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 "*. I note that by email dated later on 11 March 2007 (CEC01544518) where Duncan Fraser advised TIE that CEC required a statement confirming the elements of the SDS designs that were being re-designed by BBS. The working assumption to date had 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"*. This correspondence reflects the ongoing nature of the negotiations and the interaction between TIE, who were directly involved in the negotiations, and CEC staff, who were being updated regularly on progress regarding some of the key issues. My understanding was, as I have detailed in earlier in my statement, that liability would sit with BBS for any changes to SDS designs that had already been approved.

107. I note that a progress report was provided to the proposed meeting of the TPB on 12 March 2008 (CEC01246825). That report noted: *"SDS submissions to*

CEC for their approvals are now timed such that, in some cases, construction is programmed to commence before approval has been completed" (page 12); *"Design. The delivery of design to meet the construction schedules for various structures is causing concern and detailed reviews and discussions are underway with SDS, CEC and BBS to provide solutions"* (page 19). I understood the position to be that TIE, and its engineering section, were going to explore ways in which this situation could be resolved. My understanding of the position at this stage is as is quoted at pages 12 and 19 of the report.

108. I note that on 12 March 2008 Willie Gallagher sent a letter to Tom Aitchison confirming TIE's view that it was now appropriate to issue the Intention to Award letters (ITA) (CEC01399076). I note that Mr Gallagher's letter noted that the TPB 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. I note, however, that Mr Gallagher's letter did not state that the Infraco price was fixed or address the other matters in Alan Coyle's email dated 11 March (CEC01490289). I do not think Mr Gallagher's letter does clearly answer the points raised in Alan Coyle's email. I would note that we did not proceed to issue the ITA at that time. At that stage CEC did not think that it was appropriate to issue the ITA. This letter is one of a number of iterations at that time. At this stage, CEC were not ready to agree that the terms and conditions were appropriate to finalise the contract.

109. I note that a joint meeting of the TPB and TIE Board took place on 13 March 2008 (CEC00114831). The minutes noted Willie Gallagher as having explained that *"the position with BBS was settled in terms of price, programme and scope for Employer's Requirements, however two key items were awaiting resolution: a) Network Rail issue on the cap on economic losses; and b) SDS novation"*. There was an increase of Infraco price of approximately £10m, from £498m to £508m. The buy-out of the risk of SDS non-performance was considered good value for money. Key items in the risk allowance included significant sums for programme delays, unforeseen delivery issues, design and consents issues and MUDFA related issues. 95% of the combined Infraco / Tramco price was firm and the remainder had been reviewed by both TIE and BBS for adequacy. |

note the Boards expressed the desire to stress the achievements of the proposed deal in all communications, including the fact of fixed pricing. I cannot be sure whether it was at this particular point in time but, in general, the position on price and risk provisions being reported by TIE had been understood for some time. The only difference was that a further £3.3 million had been included for programme delays as a result of the SDS novation discussions. TIE and DLA had indicated that a high proportion of the cost was to be covered by the fixed price, lump sum nature of the contract with provisional sums for particular locations and an adequate risk allowance against other issues put in place. That was my understanding of the general position in pricing at around that time. I cannot say whether this was my understanding at this particular date but I can say that this was my overall general understanding.

110. I note that on 13 March 2008, Tom Aitchison appears to have been given an update by me, Andrew Holmes and Gill Lindsay (CEC01386276). I do not recall this meeting but I would assume that we covered the discussions of the TPB / TIE Board. I assume the meeting would have been undertaken to provide the Chief Executive with an update on all the outstanding issues in the project.
111. A full meeting of the Council took place on 13 March 2008. I note that from an analysis of the agenda (CEC02083387) and minutes (CEC02083388) 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 (CEC01246993, para 3.1). A report to Council needs to be completed and circulated seven days in advance of a meeting. I have talked earlier about reports being circulated around a number of people on an iterative basis. Here, the timetable would give a circulation date of 6 March. The position on financial close was still a moving picture at that date. A firm report to the Council would not have been possible in the timescale. Given we were not in a position to close the contract there was no purpose in reporting to the Council on 13 March 2008.
112. I note that on Friday 14 March 2008 (at 3:39 pm) an email was sent to Alan Coyle (CEC01386275) attaching a Note that had been approved by Gill Lindsay

(CEC01386276). The Note, to be signed by me, Andrew Holmes and Gill Lindsay confirmed that it was appropriate for Tom Aitchison to authorise TIE to immediately issue a ITA of the Infraco contract to BBS. I understood CEC Legal Services to have drafted this document. I have no idea if anyone from TIE or DLA assisted them in drafting this document. Again my understanding was that Infraco were responsible for normal design development from BDDI to IFC and that the public sector were obliged to take on risk beyond an agreed cap associated with the potential delays to construction which might arise from any non-performance by SDS in terms of submission of the appropriate documents for approvals and TROs. Delays in providing approvals and consents had always been a risk, from the very first business case, that would be retained by the public sector. There were risk mitigation factors put in place. We did look at the resource levels within the relevant divisions in CEC. We identified finance to enable more resources to be applied to that process and to ensure that it was not an issue from CEC's perspective.

113. I did not see or seek the version of the Infraco pricing schedule 4 in existence at that stage. That schedule was part of an extremely complex suite of legal documents. CEC were relying on advice from TIE and DLA. TIE and DLA were directly involved in the longstanding negotiations. They were both required to act in CEC's interests. CEC Legal were involved in reviewing the contract and I relied on them to a lesser extent because of their issue of resources. TIE and DLA had specific industry and commercial expertise. I was conscious that CEC Legal were looking at the documentation. I understood that they were looking at it and asking questions of TIE and DLA.

114. I understood, at that time, that CEC were not talking on liability for normal design development. CEC solely took on liability for the costs arising from construction delays due to SDS non-performance. Even that was beyond an agreed financial cap. The first £1 million, as it turned out, was the responsibility of BBS. Anything after that would be passed to the public sector. In summary, there was a cap being negotiated for BBS's liability. Thereafter risk passed to the public sector for construction delays due to SDS non-performance.

115. It was always clearly understood that CEC would have to fulfil its obligations timeously in respect of the approvals process. That area had always been a public sector risk. The new public sector risk was the one that had been introduced as part of the negotiations.
116. I note the email dated Monday 17 March 2008 sent to Jim Inch (CEC01407951). I was not copied into this email correspondence. I note that Gill Lindsay advised that following a detailed meeting with all relevant officers in the morning of Friday 14 March, all issues then known to CEC were closed in preparation for signing by CEC's officers of the note to the Chief Executive. Around 3.30 pm on Friday 14 March TIE advised that there was a shift in BBS's position around liability and indemnity (i.e. in relation to BBS's refusal to accept liability for uninsured third party losses / claims) (CEC01399116). I cannot recall being involved in any detailed discussion surrounding BBS's refusal to accept liability for uninsured third party losses / claims. Other people clearly were dealing with this issue. From memory I was not involved in trying to resolve or deal with this particular issue.
117. Speaking generally, I think everyone at CEC and TIE were unhappy about what appeared to be a constantly shifting position from BBS in the negotiations. That, in itself, is not unique in major projects as you move towards financial close. It is not unusual for parties to identify and raise last-minute issues in an attempt to extract further contractual or financial advantage.
118. On 18 March 2008 (at 3.13 pm) (CEC01390847) Gill Lindsay sent an updated authorising letter Andrew Holmes and I for their consideration and signature (CEC01390848). I note that a new paragraph had been added on the issue of indemnities but there were no other changes. I note that by email dated 19 March 2007 (CEC01408044) Gill Lindsay advised Jim Inch that agreement had been reached with BBS on liability for uninsured consequential loss arising from third party claims and that *"Andrew, Donald and I have now signed of [sic] for Tom who confirmed the Intention to Award may be released by TIE, following a discussion with the Leader and Councillor Buchanan"*. I certainly signed a letter of this nature. It will be a matter of record whether I signed this particular version

of this letter on this particular date. I cannot be sure whether I signed this particular version. There may have been a number of iterations of this letter. Clearly there were at least two.

119. At the time of signature of the final version of the authorising letter (and following the receipt of advice from TIE and DLA) I was of the view that the price and risks were sufficiently clear and fixed at that time to make it appropriate to issue an ITA in respect of the Infraco contract.
120. I cannot comment specifically on what my understanding was on a particular day of how the Infraco pricing schedule reflected the risks being borne by each party in relation to incomplete and outstanding design approvals and consent. In general, my understanding formed throughout the six months leading to financial close was that Infraco were responsible for normal design development from BDDI to IFC and that the public sector were obliged to take on risk beyond an agreed cap associated with the potential delays to construction which might arise from any non-performance by SDS in terms of submission of the appropriate documents for approvals and TROs. I did not see or seek the version of schedule 4 in existence at this stage or any stage.
121. I note that there was an IPG meeting on 19 March 2008. I note that there is an Action Note in respect of the meeting (CEC01391254). I cannot recall what was discussed in a specific meeting some eight years ago. However, I think it would be reasonable to assume we discussed the issues that are contained in the Action Note.
122. By email dated 21 March 2008 (CEC01491920) 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"*. My understanding at this stage as to whether the Infraco Pricing Schedule had been agreed or was the subject of further negotiations is set out in the email from Willie Gallagher. He states that *"I think a great deal remains to be complete prior to contractual close"*. In other words, the whole issue was subject to due diligence. We had not finally

concluded at that stage. I have already outlined my general understanding of which party would bear the risks and liabilities arising from incomplete and outstanding design, approvals and consents and how that was, or would be reflected in the Infracore price and pricing schedule.

123. Schedule 4 was part of an extremely complex suite of legal documents and in this respect CEC were entitled to rely on advice from TIE and DLA who were directly involved in the longstanding negotiations. They were required to act in the CEC's interests. Our legal section was looking at the framework of the contract. In relation to all the detailed provisions of the contract, it was the responsibility of TIE acting in CEC's interests to ensure that the contract was fireproof.
124. I note that by email dated 31 March 2008 (CEC01493317), David Leslie (Development Management Manager, Planning, CEC) sent a letter to Willie Gallagher (CEC01493318) expressing certain concerns in relation to prior approvals. I note that on 3 April 2008 Duncan Fraser sent a letter to Willie Gallagher setting out similar concerns held by the Transport Department relating to Technical Approvals and Quality Control Issues (CEC01493639). I was not aware of this correspondence. That said, the issues set out in these letters had been discussed at the IPG. The issues were to be addressed through risk mitigation measures to be delivered by TIE and resource-planning measures to be addressed by City Development. Mitigating these risks within the Council was City Development's role. Finance helped identify financial sources to enable them to put more resources in place but , ultimately, mitigating the risks was City Development's responsibility.
125. I did not see the letter between David Leslie and Willie Gallagher so I cannot speak to that particular letter. Speaking generally, quality risk associated with SDS was understood to lie with BBS. There were also risk mitigation measures to be put in place. TIE and CEC identified areas of the construction that were on a critical path. CEC worked with SDS to ensure that they had as much knowledge as possible in advance of design as to what would be acceptable to the planning and roads authorities. CEC did this to avoid SDS needlessly

spending time on designs that were going to have to be reworked. There was a management plan put in place between TIE and City Development to work with the designer to try and ensure that delays were minimised. Delays in the construction process arising from any such difficulties were part of a capped liability for BBS. This meant that, if the issue was not properly managed, there was a potential financial risk to the public sector if there were further delays. There were detailed proposals put in place to mitigate that risk. Those proposals were included in the Close Report. It was all about close liaison between the contractor, the designer, TIE and City Development. We further had in place a specific risk provision in the final figures against such delays. There was also a risk provision for general delays. On top of this there was financial headroom within the total amount of resources available for the project.

126. I was not personally involved in the process of quantifying this risk. CEC, TIE and the contractor had a draft works programme. TIE looked at areas and structures that were on critical paths. They looked at what had to be addressed and the priority order. TIE were managing that process. They made assumptions about what would be the impact. The QRA process employed had been given awards. It had been approved by Audit Scotland, Transport Scotland and the OGC. There was a very detailed process for looking at risks.
127. I was never involved in the detailed calculations for risk provision. The QRA process was owned by TIE. I recall that there were risk workshops held at TIE involving CEC staff from City Development and Finance. Revised provisions and mitigation responsibilities would come out of the workshops. The QRA was reported to the IPG. More importantly, it was also discussed at the TPB, the TIE Board and amongst the TIE executive team.
128. I would be speculating if I were to comment on who specifically quantified the risks themselves on the tram project. Speaking generally about Council projects, it is the engineering or technical staff who calculate the extent of provisions which are required. The accountant's role would be to question the basis of the calculation and to make sure, once the calculation had been done, that the appropriate provision was sitting in the risk allowance that had been allocated to

the project. I expect the base calculations and assessments were being done by the people who had negotiated the contract and were managing the contract within TIE. As outlined above the Risk Management process had been commended by a number of independent bodies.

129. I note that by email dated 11 April 2008 Colin Mackenzie raised a difficulty that had arisen with the *"Russell Road Bridge: Prior Approval"*. He raised the question of whether the sum allowed in the QRA for SDS delay (£3m) was sufficient. The email was forwarded to me (CEC01401109). My understanding now is that this would be an example of something that could cause difficulty in relation to delays to the construction period from the overlap between design and construction. I do not have any specific recollection of any discussions about this email or the email thread. I note that the email indicates that this was to be discussed at the Legal Affairs Group (LAG) on the Monday. I certainly did not attend that meeting. The email correspondence also says that if there was not a satisfactory resolution at the LAG it should be escalated within the Council. I have no recollection of it being escalated within the Council. I have no recollection of anyone saying to me *"That was discussed at the LAG and it is all resolved"*. I have no recollection of consideration being given to delaying signing the Infracore contract until these concerns were resolved.

130. I note that a report provided to the IPG on 16 April 2008 (CEC01246992) 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. I note here was concern that prior approvals may require to be revisited if there were substantial changes in design. It was noted *"There is potential for the approvals to cause a delay to the construction programme"*. This concern is the same concern reflected in David Leslie's letter dated 31 March 2008 to Willie Gallagher (CEC01493318). There was a risk management plan in place. Examination had been undertaken into which areas were on the critical path. The estimated cost of delays in these areas was £2 million. We knew there was a specific risk provision of £3.3 million at that stage. That was the position we were in at that particular time. At this stage, TIE had a choice about agreeing to delay the programme until the planning approval process was concluded or

31 March 2008
should be
28 March 2008

letting BBS commence construction areas on the critical path (where planning said they were non-contentious). There were a number of technical areas that City Development and TIE were dealing with. Finance would not necessary have had a view on these areas.

131. I refer to section 7.2 on page 6 document report provided to the IPG on 16 April 2008 (CEC01246992). That section states *"Additional staff being brought in to carry out the necessary work"*. Extra staff were brought in to be charged to the tram project in 2007/08 and 2008/09. Further resources, therefore, were provided to City Development. This was done to mitigate the risk surrounding the Consent and Approvals process.

132. I note the report provided for the IPG on 16 April 2008 attached (as appendix 1) an update of the table entitled *"Critical Contractual Decision to enable Chief Executive to use delegated powers to approve tie to sign the contract with BBS"*. I note 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"*. This became a critical area of contention. It relates to the responsibility for movement from the base date design to final design for construction. TIE were adamant that normal design development to construction stage to deliver the Employers Requirements was the responsibility of the contractor. Legal advice at the time of financial close (and subsequently throughout the period of dispute) supported that position. Clearly the contractors formed a fundamentally different view. They were able to secure senior legal opinion in support of their own view. TIE's legal opinion was strongly of the view that movement from base date design to construction design was the responsibility of the contractor.

133. As outlined previously I cannot comment on my specific understanding of the version of design that formed the basis for the Infraco price and how the pricing provisions in the Infraco contract addressed any variation from that version of the design on the particular date quoted of 16 April 2008. My understanding at

financial close was that, whatever version had been used as base date design, responsibility for movement from that version to issue for construction was the responsibility of BBS. I cannot comment on my specific understanding on a particular day of whether agreement had been reached between TIE and BBS in relation to which party would bear the risks and liabilities arising from incomplete and outstanding design approvals and consents and how that was or would be reflected in the Infraco price and pricing schedule. As stated earlier, I cannot comment specifically on what my understanding was on particular days of how the Infraco pricing schedule reflected the risks being borne by each party in relation to incomplete and outstanding design approvals and consent. In general, my understanding throughout the six months leading to financial close was that Infraco were responsible for normal design development from BDDI to IFC and that the public sector were obliged to take on risk beyond an agreed cap associated with the potential delays to construction which might arise from any non-performance by SDS in terms of submission of the appropriate documents for approvals and TROs. I did not see or seek the version of schedule 4 in existence on this day or at any stage.

134. I note that the Action Note (CEC01228374) produced following the IPG on 16 April 2008 noted, under Communications Plan, *"Key lines/ 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"*. I further note that the Action Plan, under Infraco, noted *"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 ..."* A significant part of the risk provision had been reduced as a result of contract-close negotiations. A further risk had been introduced regarding potential SDS delays relating to prior approvals overlapping with the construction period. This was to be referenced in the Council report. In other words, although elements of risk had been closed out, a new risk had been introduced. As previously stated Council resources were augmented to ensure approvals could be processed within the statutory timescales.

135. I note that by email dated 28 April 2008 (CEC01312358) Graeme Bissett circulated an updated draft of the Close Report (CEC01312359) and other documents. The updated draft Close Report notes there had been an increase in the base cost of Infraco of £17.8m compared to the Final Business Case. That increase was as a result of *“substantially achieving the level of risk transfer to the private sector anticipated by the procurement strategy”*; and 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”* (page 4). I understood elements of the risk allowance from final business case to financial close had been closed out and therefore the risk allowance was reduced. That was offset by an increase in risk provision of £9.9 million. That provision took cognisance of the updated QRA. In other words, although there had been reductions in risk provision related to certain matters, other risks such as the risk of delays from the SDS issue had been introduced. There is a table at the bottom of section 2.1 on page 5 of the draft of the Close Report which shows this. This table shows that £17.8 million came out in relation to Infraco risks but another £9.9 million came back in because of re-analysis as TIE moved through the negotiation process. As stated earlier, I cannot comment specifically on what my understanding was on a particular day of how the Infraco pricing schedule reflected the risks being borne by each party in relation to incomplete and outstanding design approvals and consent. In general, my understanding throughout the six months leading to financial close was that Infraco were responsible for normal design development from BDDI to IFC and that the public sector were obliged to take on risk beyond an agreed cap associated with the potential delays to construction which might arise from any non-performance by SDS in terms of submission of the appropriate documents for approvals and TROs. Again I did not see or seek the version of schedule 4 in existence on this particular day or at any stage.

136. I note Graeme Bissett's email of 28 April 2008 attached a letter dated 28 April 2008 from DLA to CEC and TIE (CEC01312368), a DLA/TIE Risk Matrix as at 22 April 2008 (CEC01312367) and a Report on Infraco Contract Suite (CEC01312363). The Report on Infraco Contract Suite noted - 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" (page 4); Programme, "Following contract signature, it is expected that BBS will seek a Notified Departure on Programme due to SDS delay in design production" (page 4); and 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 (page 8). One of the four documents attached to Graeme's email is 112 pages in length. I am not sure how many pages were attached in total. It is important to remember that CEC was not undertaking the negotiations directly. Although CEC were guaranteeing the position of TIE, TIE had a direct responsibility to CEC in their company objectives. That was part of the reason why they were set up. On top of this DLA owed a Duty of Care to CEC. I believed DLA and indeed TIE had an obligation to identify any material issues to CEC arising from the negotiations and changes to assumptions in the business case. I am not suggesting CEC relied on that entirely, I am just trying to highlight what was going on at the time between the parties.

137. There was obviously feedback to CEC through their involvement on the TIE Board, the TPB, the TPB subcommittees and various other meetings. A governance model had been put in place. TIE was a private sector company responsible for the procurement, negotiation and the delivery of the project. Clearly, the interface where we are talking about documents of this magnitude, definitely became an issue. As far as I was concerned, TIE had been properly resourced and proper standards of governance had been put in place.

138. CEC were not in a position to shadow TIE. CEC could not duplicate TIE's activities and responsibilities. CEC relied on the advice of TIE and the legal advice of DLA when attempting to understand the complexities of the Financial Close negotiations and the proposed finalised contract position..
139. The DLA letter dated 28 April 2008 to CEC and TIE (**CEC01312368**) states at para 1.1 on page 2 *"No issues have arisen since we last reported which have resulted in an alteration of consequence to risk balance. As they stand, the terms and conditions represent a clear reflection of the positions which have been negotiated by TIE and are competent to protect and enforce these positions."* CEC took comfort from that statement. CEC also took comfort from what is stated in para 1.2. The Employer's Requirements had been signed off and incorporated into the contract documents. As I understood it, this became part of TIE's legal argument throughout the dispute process.
140. Paragraph 5 sets out DLA's advice on risk and comments on the management of notified departures. As stated earlier in my statement, risk mitigation measures had been put in place in relation to this. A specific risk provision was introduced by TIE in response to this issue. The notified departure that DLA refers to in their letter is in relation to the accommodation a new construction programme in the event of SDS delays. There was expected a notified departure in relation to past SDS delays. I was aware there were mitigation measures in place to try to reduce the chance of any further notified departures of that nature. I understood that associated costs for notified departures would be contained within a specific provision placed in the risk allowance. There was a previous figure that had been outlined following a review of the critical path and where construction delays might arise. There was an estimated cost of £2 million set aside for the areas that were on a critical path or were most likely to cause difficulty. I expected those areas to be contained within the overall £3.3 million specific risk provision. There was a general provision for delays. That provision came to £6.7m. There was further headroom within the total resources available for the project within the government grant and Council contribution.

141. I note at page 8 of *"The Report on Infraco Contract Suite"* (CEC01312363) a *"bonus pot of £1,000,000"* to incentivise the production of design is discussed. Although the bonus was a reward for poor performance we were where we were. It was important that we attempted to mitigate the risk of that non-performance going forward. If we hadn't tried to do that then it could have had a further consequence in terms of the construction programme. The bonus pot was to help mitigate against further delays by SDS which could delay completion of the project. It was critically important that that non-performance was rectified going forward. I did not take a view on that incentivisation proposal. It was TIE's responsibility to negotiate a deal that would make sure we could deliver the project within the overall resources, available.

142. I note that on 30 April 2008 (at 14:41 hours) Colin Mackenzie sent an email to Gill Lindsay. He states *"You may know this already, but BBS have increased the price by a significant amount. Urgent discussions underway at TIE this afternoon. Wonder how this leaves the report to Council tomorrow!"* (CEC01241689). It was not accurate, at this stage, to say BBS had increased the price by any specific amount. At this stage, BBS were seeking a further increase in price to finally settle the contract. The email later on in the chain dated 1 May at 09:49 from Colin Mackenzie to Gill Lindsay and Nick Smith indicates that the increase had not been agreed between BBS and TIE. He states *"I am advised that the suggested price increase is confidential; that it is not a done deal with BBS; and that there will be further negotiations over the weekend between tie and BBS."* I shall comment on my understanding of the reason for the increase later on in my statement.

143. Speaking more generally (and not solely in relation to Colin Mackenzie's email exchange above), BBS introducing matters at the last minute in an attempt to secure something more, either contractually or financially, was not considered professional behaviour. It was a cause of intense frustration. That sort of conduct from a contractor is not unique in closing major public sector contracts. It is not unusual for parties to seek to do that. That said, the conduct was not something that anyone at TIE or CEC was comfortable with.

144. The meeting of Council on 1 May 2008 was provided with a report dated 23 April 2008 by Tom Aitchison (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: (1) 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; (2) 95% of the combined Tramco and Infraco costs were fixed with the remainder being provisional sums which Tie had confirmed as adequate; and (3) *“As a result of the overlapping period of design and construction a new risk area has emerged which has been the subject of extensive and difficult negotiation. TIE Ltd advise that the outcome is the best deal that is currently available to themselves and the Council. Both TIE Ltd and the Council have worked and will continue to work diligently to examine and reduce this risk in practical terms”* (para 3.10). There was not an increase in price at that time. The contractor was seeking an increase in price. Negotiations were underway in relation to their submission. At this stage, there was not an agreed increase in price.

145. With regards to my own particular understanding at this stage of the risk and liabilities that had been retained by the public sector in relation to design approvals and consents, I have already stated that I cannot comment specifically on what my understanding was on a particular day of how the Infraco pricing schedule reflected the risks being borne by each party in relation to incomplete and outstanding design approvals and consent. In general, my understanding throughout the six months leading to financial close was that Infraco were responsible for normal design development from BDD1 to IFC and that the public sector were obliged to take on risk beyond an agreed cap associated with the potential delays to construction which might arise from any non-performance by SDS in terms of submission of the appropriate documents for approvals and TROs. I did not see or seek the version of schedule 4 in existence on this particular day. I considered that the risk retained by the public sector in relation to design approvals and consents was consistent with the statement that there

had been a crystallisation of the risk transfer as described in the final business case.

146. Provisional sums were included in respect of three specific areas where the design had not been able to be progressed. This was done because the proposals for these areas were not developed enough yet from memory the three specific areas were Picardy Place, the Forth Ports area and possibly Murrayfield. We knew third parties were going to redevelop those areas. We did not yet have the final detail for these schemes. This meant we could not commission detailed design for the tram network in those areas. Provisional sums were specifically set aside for these three areas. TIE confirmed that the provisional sums included in the contract were adequate to cover whatever emerged from these redevelopment proposals.
147. There was a new risk area that had emerged as a result of the overlapping period of design and construction. This was the risk that there might be delays to construction arising from poor or non-performance by SDS. BBS were to bear that risk up to a cap of £1 million. Over and above that cap the risk fell to the public sector. As I have said before, CEC increased staff resources in the sections involved in the consents and approval process. On top of this, TIE and CEC worked with BBS and SDS through pre-submission discussions to ensure improved submissions. Areas and structures on the critical construction path were identified for prioritisation. SDS were to be incentivised by a bonus pot of £1 million to encourage timely delivery plans. I did not see or seek a version of the Infraco pricing schedule 4 in existence at this stage.
148. By email dated Friday 9 May 2008 Gill Lindsay (Council Solicitor) provided and David Anderson (Director of City Development) and me with an update (CEC01231125). My understanding was that this email was in response to the latest submission from BBS. A further negotiated position was due to be reached. That position lead to further costs. Those costs did not constitute, by any means, the full additional amount that BBS had been seeking. BBS had requested an increase. Ultimately, they did not achieve the sum that they had

asked for. They had asked for a figure and negotiations had taken place. A further commercial agreement was reached at a later stage.

149. I note that on 7 May 2008 Rebecca Andrew sent Gill Lindsay an email (CEC01222074) attaching a draft report by the Chief Executive for the meeting of CEC's Policy and Strategy Committee on 13 May 2008 (CEC01222075). The report advised of a further increase in cost (from £508m to £517.2m) and sought approval for the Chief Executive to instruct TIE to enter into the relevant contracts. Gill Lindsay's response the same day noted, "*Appropriate forum re Committee choice was discussed today with Council Secretary and Jim Inch*" (CEC01248981). I note that by email dated 8 May 2008 Stan Cunningham, Committee Services Manager, advised that the current plan for tabling the report meant that "*it may be the first time that many of the members are aware of this matter. This is not satisfactory ...*" (CEC01248988). A meeting was scheduled for the Policy and Strategy Committee to discuss the increase. Were we to call a special Council meeting then that would have further delayed financial close. The Council had given the Chief Executive a delegated authority. The price had moved. The Chief Executive still felt that he would prefer the comfort of a Council committee decision in relation to the final act. To call a further full meeting of the Council would have delayed the process. It would have possibly provided a further time window for BBS to come forward with yet another proposal. A further delay may have allowed another member of the consortium to adopt similar tactics. It was considered important at that stage, given the history of the negotiations, to try to get to Close once this further agreement had been reached.

150. Speaking generally, it is not necessarily the case that you need to call a full Council meeting where you were trying to impart information or secure approval from Council members. Sometimes Committees would consider issues rather than the full Council. There is a governance scheme written within the Council describing which subjects have delegated authority. There is delegated authority for a range of chief officers in a number of areas. Areas of delegated authority are also set out for the committees and subcommittees of the Council. It is the case that a full Council meeting can deal with anything, however, there is a clear

scheme of delegated authority within the Council's financial regulations and the governance documents. Tram project information had been going to the full Council because of the significance of the project. However, there was nothing I can recall in the scheme of governance that meant the Policy and Strategy Committee did not have delegated authority to deal with tram issues such as those to be considered on 13 May 2008.

151. It would be erroneous to suggest that every time you needed input, or to pass information across, you had to call a full Council meeting. If it was a case of just passing information this could be done through members' briefings. Those briefings were not constituted as meetings of the Council or any of its committees. There were a lot of briefing meetings around about the tram and other proposals over the course of the project. There was a Council Scheme of Governance. It was within the scheme of governance that the Policy and Strategy Committee had the proper authority to amend previous Council meeting decisions to reflect a difference in price. To put things into context, less than 5% of Council decisions go to a full Council meeting.

152. I do not specifically recollect providing advice to senior Council officers in relation to this particular issue. I do know that there were briefings of Council members prior to the committee meeting. Stan Cunningham's concern that this might be the first time they had heard about the movement in price was mitigated by the fact that briefing meetings were taking place before the committee met. Members were being briefed prior to the committee actually meeting. Committee meetings may have had the press present. An informal briefing of members would not have been attended by members of the press.

153. I note that the minutes of the meeting of the TPB on 7 May 2008 (CEC00080738) noted: "... DJM [David Mackay] added that BBS could have simply signed the contract and added additional claims later" (para 2.4); "AF [Andrew Fitchie] added that BB were extremely nervous about the state of design. However, this should reduce as the contract progresses and the risk of using it as a lever in a claim will reduce ..." (para 2.5). I think if you read paragraphs 2.4 and 2.5 of the minute together they indicate that the TIE view, at

that stage, was that the contract was robust. BB's last-minute push for additional sums was perhaps related to the risk of taking on responsibility for design development (in light of SDS's past performance). *The Financial Close Process and Record of Recent Events* dated 12 May 2008 (CEC01338847) indicates that Bilfinger Berger had made veiled threats that if their final request for additional sums was not met then a claim would follow. That perhaps explains the David Mackay comment that, in the final negotiations, there was a veiled threat from BBS that if we did not move towards them on price, then they would be a claims-dominant organisation. That is what I understood from Mr Mackay's comments. I was not party to hearing those comments directly from BB. I do note the comment in the Close Report that there were veiled threats. I was in attendance at the TPB when David Mackay made those comments. I attended the TPB as regularly as I could although I was not at them all.

154. I note that on 8 May 2008 Graeme Bissett, TIE, circulated an email (CEC01294645) attaching a document, "*Financial Close Process and Record of Recent Events*" (CEC01294646), the Executive Summary of which had been drafted to facilitate inclusion in the Council's report to the Policy and Strategy Committee). Mr Bissett's email of 8 May 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*". Delaying reporting to members until negotiations were complete and the contractual terms were finalised would have resulted in further delay. It would have provided a further time window for consortium members, particularly BBS, to potentially raise additional issues and cause further difficulties. It was felt that the contractual terms had been finalised on previous occasions and that agreements thereafter been breached by BBS. A deadline for financial close was regarded as essential to bringing an end to this type of BBS behaviour. Having reached agreement again with BBS, the intention was to try and close on those terms as quickly as possible. We did not want to go to a full Council meeting because that would cause delay and open up the window for potential further claims by BBS.

155. An email dated 9 May 2008 from Willie Gallagher noted that contract signature was agreed for 2 pm on Tuesday 13 May 2008 (CEC01231125). I consider that sufficient time was allowed for members of the Policy and Strategy Committee at their meeting on 13 May 2008 to consider whether approval should be given for the contracts to be entered into. If needed, the proposed 2:00pm time would have been put back to allow the Committee adequate time to consider the matter properly. There was no question of putting a deadline on discussion time at the Committee to meet a 2:00pm signing time. The email chain dated ending 8 May 2008 (CEC01248988) indicates that there were going to be briefings of members before the Policy and Strategy Committee. That would have helped the committee members deal with the process in the time that they felt they needed. There was no question of the 2:00pm deadline being set in stone. If the committee had wanted to carry on discussing this for another three days the signing process would have been put back.
156. It would be erroneous to assume that this was the first time that the Committee were being informed of the issues that were on-going because there were briefings. Just for clarity, all members of the Policy and Strategy Committee were members of the Council as well. They had sat through previous reports on the project. The project was not new to them. This was a final change. The member would all have been briefed. They would all have been at the Council meetings the previous week or ten days before. They would all have been prepared to discuss the issue.
157. On 12 May 2008 (at 18:49 hours) Graeme Bissett circulated an email (CEC01338846) attaching a final set of TIE's internal approval documents. The *Financial Close Process and Record of Recent Events* dated 12 May 2008 (clean copy CEC01338847, tracked changed copy CEC01338848) notes 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" (page 4). At this time, officials were in continuous contact with TIE and receiving feedback on the progress or otherwise

of the negotiations. In the timescale available, the Close Report documents would have been reviewed in relation to changes to the previous drafts. We would have been looking at changes, in particular the changes further to the last issue that had come up in the negotiations. I have no recollection of briefing councillors before the Committee meeting, but I almost certainly would have been involved.

158. From recollection, the documents attached to Graeme Bisset's email were not made available to members at the meeting. I recall TIE officials were present at the meeting (and at the earlier briefings) so that they could explain matters and answer questions from members. I cannot remember the specific detail of individual briefings because there were a number of briefings with members over the period of the project. I am reasonable confident TIE representatives were present at the Policy and Strategy Committee meeting. One of those representatives might well have been David Mackay.

159. My understanding of of the *Financial Close Process and Record of Recent Events* where it states "*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*" (page 4) is that this is what came out of the request for the further payment of £9 million. My understanding was that this was the veiled threat I discussed earlier. It was an attempt by BBS to extract final concessions on price from TIE. As I have said earlier, risk mitigation measures in relation to programme delay were put in place. The incentivisation bonus for SDS was designed to be another factor to mitigate the risk. I note the underlined sentence in the *Financial Close Process and Record of Recent Events* found at paragraph 1 on page 5 (CEC01338847) states "*The attempt by Bilfinger Berger to devise the design process in a manner which would have created delay was also successfully rebuffed.*" I think that this was all part of what had been described as a veiled threat. The movement from the Council meeting on 1 May to the committee meeting on 13 May was at the very forefront of the committee's mind. The members of the committee would have been briefed on that emerging issues in that intermittent period.

160. On 13 May 2008 (at 07:49 hours) Gill Lindsay sent to David Anderson and I an email (CEC01222437) attaching a short draft report (CEC01222438) for all three to sign to provide comfort to the Chief Executive as he closed the deal following the Policy and Strategy Committee. The report was signed that day (CEC01244245). Gill's email of 13 May indicates she drafted the report. The purpose of the report was not to fully and properly set out the risks to CEC arising from the Infraco contract. The purpose of the report was to deal with the implications of the late increase in price following the Council report. It was also to consider the procurement challenge issues that might have arisen from such a further payment. The report is restricted to those issues. I would not say that the purpose of that draft note was to consider the risks to CEC arising from the Infraco contract. The risks had been set out in previous reports to the Council, the Close Report, the related documents that were there and the written and verbal briefings CEC had had from TIE over the course of the project development negotiations. There was further the QRA statements. I would not have expected the CEC Chief Executive to drill down into the detail of all of that, however, all of that back documentation was on record.

161. Project risks were considered to be set out in the reports that were submitted to Council. I would have been involved in discussions surrounding those risks at the IPG. There were discussions about risk at the IPG (which the Chief Executive chaired). There would have been briefings between myself, the director of City Development and the Chief Executive over the course of the project's development. The purpose of Gill Lindsay's report was to deal with the final issue of the movement in the contract price and the procurement issue that potentially might arise.

162. I did not see, or seek, the version of the Infraco Pricing Schedule (Schedule 4) in existence at that stage.

163. On 13 May 2008 Tom Aitchison submitted a report to the Council's Policy and Strategy Committee (USB00000357). The report advised that the estimated capital cost for phase 1a was now £512m and that, in return for the increase in

price, TIE had secured a range of improvements to the contract terms and risk profile (para 2.11, 2.7 and 2.9). The committee authorised the Chief Executive to instruct TIE to enter into the contracts (CEC01222172). I had been involved in drafting this report and had signed the report discussed in paragraph 161 above (CEC01222438).

164. My understanding of the last minute increase in price was that it was last-minute brinkmanship from BBS. They claimed the increase related partly to additional costs arising from their supply chain and partly as a result of their concern that phase 1(b) might not go ahead. I understood BBS were claiming they had allocated some of their pre-mobilisation costs to 1(b) on the understanding that it was very likely to go ahead.

165. The purpose of this report (USB00000357) was not to reflect the risks and liabilities to the Council arising from incomplete and outstanding design approvals and consents. The report's purpose was simply to advise the committee of the changed commercial position following the Council report on 1 May i.e. the position regarding the new risk about the overlapping period of construction and approvals was contained in a Council report on 1 May. Members of the Council were advised of the risks and liabilities to the Council arising from incomplete and outstanding design approvals and consents through previous reports to the Council.

166. I note that a meeting of the TPB was held on 13 May 2008. I note that it was attended by David Mackay, Willie Gallagher and Neil Renilson. During the meeting, news was received that approval had been given by CEC's Policy and Strategy Committee for CEC's Chief Executive to authorise TIE to sign the contracts. The minutes of the meeting (CEC00080738) noted that "*A Financial Close paper had been circulated to members outlining the recent changes to price and risk profile and summarising the final position*". I was not in attendance at this Board meeting. I would imagine that the paper (i.e. the "*Financial Close paper*") was the *Report on Terms of Financial Close (Close Report)* noted above. I cannot say that for certain because I was not at the meeting. I would have still been at the Policy and Strategy Committee meeting.

13 May 2008
should be
7 May 2008

The Infraco contract suite was duly signed on 13 and 14 May 2008. I note that on 14 May 2008 Alan Coyle sent an email (CEC01238381) circulating a Tram Briefing Note (CEC01238382). Again my understanding at financial close was that Infraco were responsible for normal design development from BDDI to IFC and that the public sector were obliged to take on risk beyond an agreed cap associated with the potential delays to construction which might arise from any non-performance by SDS in terms of submission of the appropriate documents for approvals and TROs. I did not see or seek the version of schedule 4 in existence on this particular day or any stage. I considered that the risk retained by the public sector in relation to design approvals and consents was consistent with the statement that there had been a crystallisation of the risk transfer as described in the Final Business Case.

167. I understood the sum allowed for risks in the QRA included a specific provision of £3.3m plus a potential call on the general provision of £6.7m for delays to the construction programme.
168. My understanding at that stage was that the costs arising from normal design development from BDDI to IFC were the responsibility of the contractor. As detailed previously, this became a significant area of contention between the parties, which was never fully resolved despite consideration during the dispute resolution procedures and extensive legal advice from a number of very senior advisors on both sides.
169. My understanding at this stage, as I can best remember, is that a notified departure was anticipated in relation to a revised construction programme resulting from SDS design drawings. I have already discussed earlier on in my statement what I understood the matter or matters any such notified departures likely related to. TIE advised that the costs for these notified departures could be contained within the risk allowance provisions.
170. I do not have any comment on what my understanding at that time was of why the "*Base Date Design Information*" was defined in para 2.3 of Infraco Schedule 4 as meaning "*the design information drawings issued to Infraco up to and*

including 25th November 2007 listed in Appendix H and yet Appendix H did not contain any list of drawings and, instead, simply stated *"All of the Drawings available to Infracore up to and including 25th November 2007"*. I do not have any information to offer in relation to this.

MAY 2008 ONWARDS

173. I note the Highlight Report to the IPG on 11 June 2008 found at (CEC01246990).

It states 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 found at (CEC01354778). By email dated 9 July 2008 to Alan Coyle, Stewart McGarrity queried the significance of these requests. I don't really have any great recollection of what deliverables were outstanding, how material those deliverables were or how the issue was resolved. I know that, from reading the documents sent to me by the Inquiry, Stewart McGarrity later queried the materiality of this issue but I'm not sure whether it was a material issue or not. I don't have any recollection of how the issue was resolved.

**CEC01354778
should be
CEC01236707
E-mail dated 9
July 2008 doc ID:
CEC01354778**

174. I attended most of the IPG meetings. The relevant minutes of the IPG would indicate whether I attended an actual meeting.

175. I refer to the joint report to the first meeting of the Council's Tram Subcommittee drafted by myself and David Anderson dated 16 June 2008 and found at (TRS00017180). The report notes that the increase in costs to £512m had resulted in transferring further risks to the private sector. There would be a decision at Council level of the issues that needed to be dealt with in the report. The report would be drafted by officials in City Development, Finance and / or Legal working together. It would probably be City Development at this stage of the project, who would be the ones who would produce the first draft. It would then, on an iterative basis, be shared across relevant Council departments until there was a Council draft. This draft would then be shared with TIE and comments would be taken on board. There would be a Version Control exercise resulting in there being numerous versions of the report as it evolved. I and

Dave Anderson would see later copies of the report. At that stage we would have a chance to have input. This would be where maybe different Council departments wanted to give different emphasis to different matters or TIE wanted to suggest a change that Council officials weren't comfortable with. This process applied across the suite of the reports all the way through the project.

176. From the Finance Department's perspective, colleagues would have provided input before I saw the draft. It would be Rebecca Andrew or Alan Coyle depending on the timing of the report. They would have input at the start of the process and on an on-going basis. During that time they might come to me and say "*we've this issue, what kind of line should we take?*" However, it was generally the case that I would see a later draft.

177. By this time I was signing off the reports with David Anderson. You'll see at the end of the reports a contact officer. That normally was an officer in City Development and/or an officer in Finance. These were the people that, with others, were involved in the detail of the preparation of the report. Once the draft report had been finalised it would be sent on to Dave Anderson and me for sign off. Clearly, at this stage, it means that we were happy with and took responsibility for the content of the reports.

178. I note from the joint report to the Tram sub-committee (TRS00017180) that the estimated cost had increased. This wasn't the first notification to Council of an increase in cost. The increase in cost to £512m was included in the report of 12 May 2008 which gave authority to sign the contracts. The contract price increased because a number of cost pressures had been identified by the contractor prior to contract close. The transfer of further risk to the private sector is detailed at paragraph 2.10. The report notes the contract was closed on improved terms and eliminate risk claims for works underway, capping roads reinstatement costs' exposures and road-related elongation.

179. As outlined earlier it's not unusual, at preferred bidder stage and moving towards contractual close, for the preferred bidder to introduce elements they are looking for as an addition to in the contract price. TIE, on behalf of the Council, were at

that stage trying to push back on a wide range of issues. They were trying to settle at the best price with optimum transfer of risk. The detail of that was subject to negotiation over about a four or five month period. CEC weren't involved in the detail of the day to day and week to week negotiations. CEC were reviewing the position that was arrived at on price and contract conditions. Paramount amongst those conditions was the transfer of risk. CEC were interested in the risk register as it evolved. There should be correspondence to TIE and records of meetings where I repeatedly said that I would prefer a realistic price that could be achievable throughout the delivery of the contract rather than a price which was looser and open to additional expenditure and unexpected claims during the contract. I recall that there was internal Council documentation that shows that too including an email sent by the Council Solicitor which restates my view.. I was trying to get TIE to achieve, on behalf of the Council, as near to a fixed price as possible. That, in essence, is what TIE maintained they had achieved when they came back to ask for contractual close.

2009

180. In relation to the Princes Street dispute, I considered the root cause as being the concern the contractor had about the ground conditions, and in particular, the identification of very significant underground chambers that had been discovered below the roadway. The contractor's second issue was that they hadn't been given unfettered access to the site because the Council wished to keep a bus lane open along Princes Street. This was against the initial terms of the contract. The contract determined that the contractor would get unfettered access to the site. I think you would need to place this dispute into the context of the wider areas of dispute. This included the contractors' lack of mobilisation, the emerging lack of agreement over the contract conditions in relation to the responsibility for the costs of design change and the utility work standards and timescales. Princes Street gave the contractors significant leverage because of its prominence and importance to the City. In my view, the contractor was able to use Princes Street to gain leverage in terms of other areas of the works across the whole project. There were difficulties across large parts of the route

by this time. The contractor knew that Princes Street was a difficult area for the Council and TIE to deal with.

181. I was a member of the TPB. Every month we spent considerable time discussing the dispute. There were also other briefings between TIE and Council officials and members.

182. I note the report to IPG on 25 March 2009 t (CEC00892626). It discusses the contractual dispute between TIE and BBS and considers various options. At this stage I understood that the main INFRACO risk was the commercial dispute between TIE and the consortium. This was leading to lack of mobilisation, delays to the project and potentially significant additional costs. At the centre of that commercial dispute was the lack of agreement over the contract (i.e. the detailed contract conditions) and whose responsibility it was for the cost of the movement from the base date design to the final design for the construction. That appeared to be the core of the dispute. There were other INFRACO risks arising from the delays to the MUDFA. The scope of the MUDFA works was much greater than had been specified in the contract. This was because of the poor records being held by the utility companies, poor Council historical records and also poor contractor performance. MUDFA was further impacted because the funding was delayed following the Scottish Government review in the summer of 2007. The MUDFA contractor hadn't started as early as they should have. Then again, the INFRACO works hadn't started in accordance with earlier timescales and there should have been a sufficient gap to allow their completion before Infraco came on site.

183. The design dispute, was at the heart of the subsequent contractual difficulties and related to differing interpretations by the parties as to the contract conditions entered into at Contract Close. I trust that the Inquiry will be able to establish what exactly that dispute was. I came to my understanding of the main on-going INFRACO dispute issues mainly through the TPB and briefings from TIE and their legal advisors.

184. I note Colin Mackenzie's email dated 7 April 2009 (CEC00900404). He makes certain observations on the dispute between TIE and BBS. I wasn't included in the circulation list of the email so I wouldn't have seen the email at the time. I didn't have any views on the email because I didn't see it. Reading it now I can see that Colin says that there was no legal input from the Council in terms of developing the contract. He says there had been no reference to the Council. That's not fully correct because the records show that the Council were involved, to an extent, in terms of the contract conditions before the contract was concluded. I would accept that the Council had limited input. We made a judgement that there was legal advice coming to TIE from DLA. We further obtained a Duty of Care from DLA to the Council. That was the main legal advice that we relied on in terms of the contract conditions before contract close. Colin refers to it being premature to financially close. That is a matter of judgement depending on what view you take of the contract conditions and is an easier matter to take view on with hindsight. There is no doubt at all that at Financial Close, if we had decided to wait for all the designs to be finished, the prior approvals to be granted, every other detail to be put in place, then that would have entailed a re-procurement. That would have led to further delay, further cost increases and, in my view, would have led to the cancellation of the project. At that stage, the Government and Transport Scotland were already concerned that the project hadn't started and that their budget profile was being damaged. Given further significant delay expenditure Transport Scotland had planned to incur on grant-aid would be deferred to future years leading to an under-spend in 2010 on their planned budget. There's little doubt that the project would have been cancelled if that path had been taken. That's not to say that that would have been the wrong path it's just that that would have been the consequence.

185. I note the email from Colin MacKenzie to Alan Coyle and others dated 9 April 2009 (CEC00900404). I am not copied into the email. It attaches a report on the dispute between BBS and TIE prepared by both Colin MacKenzie and Nick Smith (CEC00900405). The report notes that there were presently 350 notified departures in process. The note sets out that the disputes could be grouped into a number of different categories, including who had responsibility for the design

management and evolution. It notes that BBS take the view that all changes to design were TIE's responsibility. The report notes "*the main problem here stems from the fact that design was not complete at financial close*". I can't be completely sure that I saw the report at the time. From reviewing the report in preparation for the Inquiry, the substantive point is the fact that the design was not completed at financial close. Everybody knew that design was not completed at financial close. DLA and TIE gave assurances to the Council that they were protected in terms of the contract conditions from the evolution of design from November 2007 Base Date.

186. By email dated 28 April 2009 Stewart McGarrity (CEC00892971) provided a range of estimates for the INFRACO work for phase 1a, namely a lowest estimate of £533.3m, a medium estimate £559.8m and the highest estimate of £572.5m, all including risk allowances. How the estimates and risk allowances were arrived at is set out in the email and accompanying paper (CEC00892972) and spread sheet (CEC00892973). The first estimate was the base case assumption. The second estimate allowed a higher risk to give an 80% probability of achievement. The risk matrix showed this at Contract Close. The third estimate was what TIE, at that stage, saw as the worst case scenario. The estimates had been arrived at through a process within TIE. The process involved their engineering staff, commercial staff and their risk management staff. The Council further gained exposure to how the estimates had been built up through officials who were co-located at TIE. I would have been briefed on all of these figures in terms of how they were arrived at, what they included and what they possibly didn't include. I was less confident at this stage about the estimates than I had been about the estimates at contractual close - this was a year on. At this point we had seen contractual behaviour, we'd seen the delays, we'd seen what was happening on Princes Street and we'd seen poor performance.

187. My lack of confidence on the figures was primarily a result of the scale of the disputes that had emerged. The disputes were causing time delays. One of the key things was how to get the contractor to actually undertake the work even on the basis of arguing / arbitrating on the cost later. It was proving difficult within

the contract mechanisms to get the consortium to actually undertake the work. The contractor was able to open works in high profile areas of the City on the route and then find Changes or issues that would enable them to walk off site. They were required, after walking off, to submit a Notice of Departure and an estimate for the Change. However, if they didn't submit an estimate for the Change or submitted an extremely high cost estimate then TIE couldn't approve it and we were faced with a delay.

188. The relationship between the Council and TIE was that it had been agreed that CEC shouldn't be duplicating TIE's activities. We couldn't do TIE's job for them. They had a budget of £6m or £7m a year for TIE's own costs to deliver this project. The Council had an oversight of what TIE were doing and how they went about it. TIE would have been expected to take the Council through the figures at various stages and that did happen. City Development and Finance staff would have been trying to satisfy themselves that the basis on which the figures had been produced was reasonable. However, by this time, given the scale of the disputes with the contractor, there was no way anyone could produce an estimate that you could put a really high level of confidence on. TIE had to make assumptions that the contractor might want to apply themselves to actually building the tram line. CEC weren't spending £6m annually of our own money to duplicate what TIE were supposed to be doing. We were trying to understand what they had done and whether it was reasonable or not. I wasn't confident about the estimates by this time. I don't know how any organisation could have produced solid figures given the position the project was in.

189. Again, why would you spend £6m or £7m annually on TIE and have the Council come along and do exactly the same things? Why would you have the Council using their own legal advice, their own engineering experts, their own commercial experts, their own dispute experts? Why would you do that? If you did that you would effectively be closing down TIE and taking over the project. If you did that you would then need to find the resources from outwith the Council on a contractual consultancy basis and lose the historical project knowledge held within TIE. If you didn't do that then you would look to the organisation that had been set up for this purpose (after being asked to set it up by the Government).

TIE had proper standards of governance, a Board of Directors that was hugely qualified in the industry and many people recruited from the private sector who were being paid substantial amounts of money to get this right. For example the Director of Finance at TIE was being paid a significant salary. Even if I had wanted to, due to my other responsibilities I was not in a position to duplicate every single detail of his job for him. Duplicating the work of TIE wasn't a rational way to proceed.

190. I note the report dated 30 April 2009 providing the Council with an update on the tram project from the Directors of City Development and Finance (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 notes that this represented no further risk transfer to the public sector. At that stage demonstrable cost didn't represent a further risk transfer to the public sector because the risk related to ground conditions had always been a public sector risk. That was understood and reported to the Council at the time that the contract was entered into. The risk relating to ground conditions was being crystallised at this point. The public sector were trying to meet that risk by agreeing to Princes Street being done under demonstrable cost. We were agreeing that because of the prominence of Princes Street, the impact on businesses and the fact that the traffic was adversely impacted in the City Centre. I understood demonstrable cost to be the contractor carrying out the work based on agreed rates for work and time. The time element became critical because of demonstrable cost. We therefore needed a very close inspection regime by TIE when the contractor was carrying out these works. This was to be undertaken to make sure that the contractor carried out the work efficiently and in the most time effective manner. Ultimately, this resulted in a cost increase. The amount in the contract for Princes Street was about £2m. Ultimately the cost rose to £11m. The Council wasn't satisfied with the supervision of the works by TIE but they were even less happy with the way the contractor went about carrying out the works in Princes Street. It took the contractor much longer than it should have done to lay that length of track. At the end of it the works weren't even properly executed. That gave us a difficulty later on when the contractor had to go back to redo the works.

191. The report detailed the crystallisation of risk which was always with the public sector. It didn't say that this didn't mean a cost increase. At the stage of writing the report the works hadn't been carried out. We didn't know whether there would be a cost increase or whether the contractor would be able to do the work for the £2m set aside under the contract. You would need an engineer to answer whether it was reasonable to assume the contractor should have ultimately been able to undertake the work for under £2m taking into account the length and nature of track and the ground conditions to be encountered.
192. At this stage commercial confidentiality was a significant element in terms of what we were reporting to Council. If, for example, we had thought it was going to cost £11m and we had said that in the Council report it would have been an invitation to the contractor to submit a subsequent claim for a higher figure. We were careful not to put an expected cost in for demonstrable cost execution in Princes Street. The members and everyone else knew we had been fighting to get a better deal on Princes Street. Demonstrable cost was a compromise simply to try and get the contractor to do the work. To put a figure on it in a Council report would have been irresponsible in commercial terms.
193. I wasn't concerned about the public seeing our actual projections on cost. I was concerned about the contractors seeing them. If they had seen them then that would be their base for all their arguments in the dispute. If we acknowledged a new estimate above the price set out in the contract then that would become the contractor's new base. That was our perception of what their behaviour would be.
194. I note the email dated 23 June 2009 (CEC00859951) where David Anderson expressed frustration at TIE not producing a revised programme and budget which had been promised since November. I note that by email dated 23 July 2009 (CEC00666481) Mr Anderson stated that TIE's best case estimate had moved from £534m to £560m without adequate explanation (which figure was greater than the available budget) and he was now "*very anxious about the reliability of the information we are getting from TIE*". Given the nature of the dispute and the contractor behaviour, we were now in a situation where giving a

revised programme and budget was extremely difficult. Having said that, I also had concerns about the information coming from TIE by this time. These concerns had grown over time. I am not sure on the timeline around when and how great my concerns were but my concerns really started after the beginning of problems with the supervision of the works on MUDFA utilities and on Princes Street. On Princes Street the Council were offering extra inspectors to help TIE to make sure that the contractor was working expeditiously. However, TIE chose to do it on their own. I don't think Princes Street was supervised properly by TIE and CEC incurred extra cost as a result. By the summer of 2009 there was concern across the Council about some of the information that was coming from TIE. However, I would say again that it was very difficult for TIE to provide definitive information because so many key issues were still subject to the legal dispute.

195. I note the highlight report to the IPG on 27 July 2009 (CEC00688908) which included a table discussing what members should be advised 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 notes TIE as admitting that 40-80% of changes and delay were down to them. This table shows the complexity and the scale of the difficulties that the Council were encountering at that time. It's an illustration that extensive discussion was on-going about what the core issues were. I am not sure who prepared that table. I don't have a distinct recollection of this particular table or this particular IPG meeting. I am not sure of the source or the accuracy of the comments about 40-80% of the delays being down to TIE. Point 14 of the report indicates that TIE are not entirely blame free. There is quite a difference between "*not entirely blame free*" and "40-80%". I am not too sure where we were on that spectrum. I don't really recall the detailed discussion at the IPG. I can say that, all the way through the dispute, my view was that we should give Council members as much information as possible subject to commercial confidentiality considerations. That was sometimes very difficult. We were wrestling with the issue of commercial confidentiality and trying to ensure that we didn't give succour to the contractor in the middle of their dispute with TIE.

196. I note the email dated 13 August 2009 (CEC00788086) where Richard Jeffrey advises that BBS were not prepared to start work in Shandwick Place (due to start at the end of August) unless all remaining on-street works were changed to a cost-plus arrangement. I note the internal email dated 17 August 2009 from John Ramsay of Transport Scotland (TRS00017116) which notes that TIE/CEC had revised their overall cost estimates as, in February 2009, an estimated range of £528m to £546m, and, in August 2009, an estimated range £561m to £601m. My understanding was that there was, at that time, still a fundamental difference on the terms of the contract i.e. who would pay for the cost of evolution of the design from base date design to design for construction. The difference had led to delays which were costing money. A 'cost plus' basis would have virtually given, in light of what had happened in Princes Street, a blank cheque to the contractor. 'Cost plus' was worse than demonstrable cost. That would have meant that we were not in a position to put any estimates of cost on the completion of the line. The dates would be uncertain as well. To be fair to the contractor, utilities were an issue for Shandwick Place then and still were when we got to mediation a year later. TIE were really struggling with trying to get the contractor to execute the works under the proposal that we would take the cost of those works and the responsibility of the apportionment of the responsibility for them to arbitration or mediation later. The contractors were simply refusing to undertake the works. They were taking sometimes six to eight months to provide estimates for works related to specifically agreed changes. TIE then had to check those estimates. The estimates were invariably much higher than TIE thought were reasonable. Then the whole thing would go back to arbitration / dispute resolution. That would take another six months. The time delays were, by now, becoming very difficult. TIE's legal advisors were focussing on ways to try and force the contractor to carry out the works and have an argument later about the value of those works and the apportionment of costs.

197. I cannot now remember why I wished to discuss the matter with Transport Scotland after the meeting of the Council on 20 August 2009 (as noted in John Ramsay's email found at (TRS00017116). I would only be able to speculate on

why that was the case. I recall meeting with Transport Scotland quarterly but I don't remember the specific discussion that is related to this trail of emails.

198. I note the report provided to the Council on 20 August 2009 by the Directors of City Development and Finance (CEC00823532). The report states that "*TIE had taken extensive advice and was "confident" on its position on the key matters in dispute. However, it was unreasonable to expect that all adjudication outcomes would be awarded in TIE's favour*". This report was drafted in similar fashion to the others over the course of the project. There are contact officer details at the bottom of the report. The report didn't state that CEC officials were confident of TIE's position on the key matters. If you read Section 3.11 it reads "*TIE has taken extensive legal and technical advice including Counsel's opinion and is confident of its position on the key matters in dispute*". This indicates that TIE was confident of its position. The report then added "*however, given the nature of the process and the complexity of certain issues, it is unreasonable to expect that all adjudication outcomes will be lodged in favour of TIE and it would also be open to the BBS Consortium to use the contract formally to pursue their objectives*". This shows that the Directors of Finance and City Development did not say that they were confident of TIE's position. At 3.12 we say "*it will be very difficult to deliver the full scope of phase 1a within the available project envelope of £545m. Until the key issues are resolved through the contractual and legal process, it will not be possible to forecast accurately a revised budget outturn. Council officers and TIE Ltd are preparing contingency plans and reviewing programme delivery options*".

199. Commercial confidentiality was an issue at this stage. There were parallel briefing sessions being held by this time with political groups prior to the Council meetings. During these briefings we would say a little more. It was thought that any figures we put into a Council report would constitute a revised base for the contractor to argue up from. The minute of that meeting is interesting because the Council members decided that, at that stage, they were firmly behind TIE and they would encourage their pursuance of their actions. That was going beyond the recommendations, I have to say, but it is of interest. Dave Anderson and myself signed the report off and took responsibility for the content. Most of

the work in framing the report would have been undertaken by Alan Coyle, who was in Finance, and Andy Conway, who was in City Development.

200. I note Alan Coyle's email dated 25 September 2009 (CEC00680446). He notes that the quality of TIE's submission on curtailment of the scope of the tram project left a lot to be desired and was no more detailed than a report received in March (CEC00680447). At this stage, there were increasing concerns about the information coming from TIE. In re-reading this report, it is clear that TIE have provided indicative costs only in relation to curtailment of the scope. We expected more by this stage. Alan Coyle and I, at this time, were discussing regularly the flow of information back and forward from TIE, the emerging costs and considerations. Alan's tenacity, ability and professionalism were immense and served the Council very well over this period. The Council in August had said (1) they were firmly behind TIE and (2) they wished the tram to go from the airport to Newhaven. By that time it was maybe optimistic to think the tram would go to Newhaven but perhaps because of this, TIE didn't feel that they needed to put a lot of effort into the business of curtailing the scope to a shorter tramline. I am not sure on this point. CEC, were however disappointed with the indicative nature of the costs that we received.

201. We had regular meetings with the Council Chief Executive, the Chief Executive of TIE and the chair of TIE about the flow of information. The point was made that the Council was trying to not fetter TIE and leave them free to get on with their commercial activity in relation to the contractual behaviour. However, there was certain information we needed to get as accurately as possible. Costs for a curtailed line was a key issue for us at that stage. There were arenas where the issue could have been raised e.g. the TPB. However, there were a lot of people attending the meetings of the TPB. Commercial confidentiality concerns extended to that arena as well.

202. In my view no one was in any better position to review the accuracy of the figures than Alan Coyle and myself with support from City Development. We could have called in a team of accountants or engineers to investigate the

figures but that would have added to the cost. I don't know whether it would have been a productive process.

203. In terms of the Operating Agreement the Tram Monitoring Officer, Marshall Poulton (who was also Head of Transport), had the responsibility to make sure that TIE were acting properly in the Council's interests and that they responded with information. In theory, in terms of the Operating Agreement, that would have been the responsibility of the Tram Monitoring Officer. However, in reality I probably had more influence with TIE than the Tram Monitoring Officer. The only persons who had more influence were possibly the Senior Responsible Officer, Dave Anderson, and our own Chief Executive. When we had issues to raise, Tom Aitchison, Dave Anderson and I would have met with Richard Jeffrey and David Mackay.

204. I note the email dated 22 December 2009 by Alan Coyle (TIE00281255) which includes in the thread an email dated 21 December 2009 from John Ramsay of Transport Scotland. John Ramsay notes that Transport Scotland had already advised Ministers of a circa £600m outturn based on TIE and CEC's advice and further noted "*However Richard Jeffrey has made it clear to Bill [Reeve] that it clear [sic] would be 'substantially more'*". In mid-October 2009 I went into hospital for a hip replacement. I came back to work early to mid-December 2009. I was back at work by this time but catching up on Council estimates, budgets and other major issues. I would have been back in the office by the time of this email thread. We were now in the midst of a major contractual dispute. Differing QCs' opinions were coming in from all sides. That carried on right through to the end of December 2010. In December 2009 we had incomplete information and had no contractually agreed programme. We had not agreed a way of conducting the on-street works. We had no basis for reviewing the outturn costs. We were prioritising concerns about the effect of delays and cost increases and a mechanism for resolving the disputes before working through the final cost of the project. I note from Dave Anderson's email of 21 December 2009 (CEC00583506) that Richard Jeffrey had said that this was a worst case scenario. That is very different from what John Ramsay is

saying. I don't know why John Ramsay wrote that email but I would probably err on the side of Richard Jeffrey's position than John Ramsay's.

205. At this point we had no programme and no agreement on what the basis of charge was going to be for works that were conducted on-street. We had seen the contractor behaviour over a period of 18 months and were still wrestling with how we could force the contractor to do the works and then arbitrate or go through dispute resolution on who was responsible to pay for the works / what the value of the works should be. I don't think anyone could have been confident about the final costs because there was a war of attrition going on by this time. Who was to know what the contractor would have charged, eventually, if we had gone to a cost plus arrangement for on-street works? That would have been the only way that we could have got a programme for completion out of the contractor by then. Even if we had gone down that route, the contractor's past behaviour had indicated that any agreement would have been so heavily caveated from their viewpoint that it would just have moved the dispute on, in my view, to a higher threshold.

2010

206. I note the email dated 14 January 2010 (**CEC00450935**) where Richard Jeffrey notes that in December "the Board" wholeheartedly endorsed a strategy of becoming more commercially aggressive in relation to the dispute with BBS. This goes back to August 2009 where the Council indicated their on-going determination, in full support for TIE's efforts, to continue to protect the public purse from the effect of undue programme delay and any unwarranted financial claims not provided for in the contract. The Council supported, at that stage, the utilisation of the clearly documented Dispute Resolution Procedure. They saw it as being the most appropriate vehicle for resolution of outstanding commercial issues. The Council's position in August had indicated that they were behind TIE in that regard. "The Board" stated in the email would be the TPB. I note the email states that the Board wholeheartedly endorsed the strategy. The reasons behind the strategy were numerous but one factor was that over time every other avenue to get the contractor to behave responsibly, or reasonably, had not borne

fruit. Many new Consortium Executives had appeared on the scene and indicated they were willing to take a more reasonable approach but, ultimately, there had been no marked improvement (or any improvement) in contractor behaviour or their performance being delivered in terms of building the tramline. It was, therefore, critical to develop the proposals and to bring matters to a conclusion as quickly as possible. Legal opinion had been taken from Senior Counsel and the strategy had been developed in conjunction with industry experienced consultants and non-Executive TIE Board members who had significant commercial experience. I was in agreement with the strategy at that stage. I felt that past efforts to agree a more reasonable approach with the contractor, although they had been worth trying, had only served to result in further delays and frustration.

207. There were many people involved with the Tram Project that I had a lot of respect for. The strategy was arrived at following consideration of the past difficulties. It reflected the Council's position following the August meeting. Very senior expert legal, engineering and commercial advice had been taken. All other alternative strategies were considered. Indeed, many had been trialled over the preceding months. The point is that there were commercial and legal experts indicating that there was a prospect of success. The alternative would have been an on-street agreement with the contractor. Given their past behaviour, that would essentially be asking the contractor to build the tramline to whatever timescales and whatever costs they felt correct. That wouldn't have been a sensible alternative for the Council. I felt I had enough understanding, informed by technical and legal opinion, to say that this was our best course of action at that stage.

208. I note the email dated 22 January 2010 (CEC00473835) where Alan Coyle noted that David Anderson and I had endorsed the intention to seek an independent legal view of the "contractual outs" within the contract and noted a need for CEC to be more proactive "where the Council are doing their own thinking rather than rather than waiting for a briefing from TIE". There was less confidence in TIE at this point. They hadn't been able to find the golden key to unlock the contract and to get the project progressed. As time went on this became more and more

critical. The Council now had fresh legal insight through the appointment of Alastair Maclean which, together with the frustrations from the lack of progress over the whole of 2009 and most of 2008, meant that we were therefore in a better position to look at all possible avenues. Alan Coyle and I were meeting very regularly on project issues. We had established throughout the whole process, by consensus, common views on how matters could best be progressed from the financial perspective for the Council. In general terms, by this stage, we weren't solely relying on TIE briefings. We still had a very large project delivery organisation working in our interests. We previously thought that we could rely fully on TIE's legal advice but by this time we felt it was appropriate to get a further review.

209. City Development engineers were not duplicating the work of TIE. As we reviewed issues with TIE's Finance Officers and risk management people, City Development Officers were reviewing matters with TIE engineers and risk management staff. A lot of the TIE capability came from outside consultants. Estimated costs for the project were undertaken by a firm of engineering consultants that TIE had engaged. There was, previously, another independent firm that Transport Scotland had engaged. CEC didn't have a huge engineering capacity that was capable of undertaking the tram project. If we had, TIE might not have been there although previously the Scottish Executive (now Government) were insistent on private sector involvement. It is important to realise the kind of relationship and the resource base of the two organisations. We probably had two or three City Development people who were 100% involved in the tram project. I don't know how many people TIE had by this time but clearly very significantly more..

210. In May 2008 we had been expecting a tram to be built within a certain time period. What we had seen since then was a very substantial lack of progress in terms of delivering the project by the contractor. TIE were certainly themselves getting more than one legal opinion. We knew TIE had embarked on a number of initiatives to try and bring matters to a head and bring resolution to the disputes around the project. None of them, by that stage, had really had any measure of success. The Council wanted to have a legal view themselves as a

result of the fact that TIE had undertaken a number of things and they hadn't resulted in any marked improvement.

211. By this time we also didn't feel TIE had done a great job supervising the works in Princes Street or MUDFA. I was asking questions regularly of the TPB where I was told we were going to get an answer the following month and advised that they weren't necessarily critical to delivery of the project. It was around issues like recovery of the betterment monies from the MUDFA contractors. Month after month we got the same story.

212. The big frustration was not getting the tram project built. It was TIE's job to deliver that and they found themselves in the middle of a very complex and messy legal dispute. It was mainly a legal issue by this stage so the Council took the decision to go for further legal advice rather than further engineering or financial advice. The heart of the problem was the contractual conditions and how the design development was priced in the contract.

213. I note the record of the meeting of 9 and 10 February 2009 between Steven Bell, Stewart McGarrity and representatives of BBS to discuss the dispute (TIE00089656). It was circulated within TIE. This email was sent on 25 January 2010. The record of the meeting is a note of a meeting that had been held almost a year before. That's quite important in the context of the trail. I take this note to be a suggestion that if we had spent another £50-£80m we would have got a tramline to Newhaven. I think it is perhaps important to register that this is a meeting that took place in February 2009. I think I understood this meeting to be one of a series of meetings to try to progress BBS mobilisation and works on the project. It was to get BBS to actually start work in a serious fashion. I was aware of the £50-£80m claims but that was at that date. I think it is self-evident that that figure would have increased many fold if we had paid them £50-£80m for their claims at that stage before they had even seriously mobilised to build the tramline. I think, given that it was February 2009, it certainly wouldn't have been advantageous to have agreed to pay £50-£80m at that time. It would almost certainly have led to more claims and more disputes. At that time, before we had seriously started work on the tram, any payment would have increased

significantly over the course of the delivery period. The £50-£80m would have just been for the contractor's initial claims.

214. I note the email dated 4 March 2010 (CEC00474750) Alan Coyle sent to me and David Anderson attaching the Directors' Briefing Note (CEC00474751). The Director's Briefing Note sets out the estimated cost of the three options that formed part of "Operation Pitchfork". The estimated cost of completing the works appears to have been between £644m and £673m. At this stage there had been a lot of work and effort put into compiling the estimates but they remained very much estimates. They couldn't be firm estimates because there still remained a high element of risk with regards to the future contractual behaviour of BBS. CEC officials were clear that if we were going to go back to the Council and the Scottish Government with an increase in cost then the risk element had to be taken out of that as far as possible. That was the position we thought we had reached at Contractual Close so I recognise the irony in some of that. Now that we were in the midst of a major commercial dispute we had to be as certain as we could possibly be that it was a fixed Guaranteed Maximum Price that was going to be taken back to the Council and the Scottish Government for consideration.

215. The first option set out in the Directors' Briefing Note (CEC00474751) was termination of the INFRACO contract with or without cancellation of the tram project. The second option was BBS complete part of the project to St Andrew Square/York Place and TIE procure the remainder on an incremental basis. The third option was grinding it out, completing the works and resolving all of the disputes under the existing contract. At that time my view was that we needed further legal advice to make a decision on the preferred option and to carry on with trying to reach a resolution with BBS. When I say take further advice on the legal issues, I mean that by then the key legal issue for me was whether there was a method within the contract that we could force BBS to undertake the work before undertaking dispute resolution on the value of that work after it had been undertaken, and the division of responsibility about who should pay what. The reason that we were carrying on with the legal battle was to find a way within the contract provisions to get the tram built.

We already had evidence from dispute resolution that the BBS estimates were very high in relation to what was ultimately agreed. If we could bring further legal issues to conclusion we might then be in a position to produce a programme. If we could estimate the time it would take to build the tram, given that BBS were under an obligation to complete the works, we could estimate what the fallout would be in terms of who was going to have to pay for what and also the value. There would be a range of costs that were capable of being assessed. When we didn't have a time or a programme it was more problematic.

216. I note the letter dated 8 March 2010 (CEC00548728) where Richard Walker of BBS wrote to CEC officials providing BBS's perspective of the dispute, expressing concerns as to TIE's interpretation of the contract, handling of the dispute and advising that it was likely that additional costs were in excess of £100m. My view at the time was that this was a kind of public exposition of what I already understood to be the consortium's position. There was nothing new in the letter. The parties were in total disagreement about the provisions of the contract and had been almost since the contract had been signed. The content of the letter was not consistent with the consortium's behaviour. I could cite a number of examples but I think the clearest one is that he regards the Princes Street works as having been successfully completed. By any measure, the Princes Street works undertaken by the consortium were a disaster. They had to, eventually, go back at their own cost to redo them. To suggest that that's highly successful is the clearest indication of where I didn't think the letter was consistent with the consortium's behaviour. There were other provisions in the contract that allowed the consortium to programme works in a way that suited them. This is why TIE were finding it difficult to force them to do particular works. It was felt that that was the way best value could be achieved when the contract was being drafted. It has to be asked why, when BBS were having difficulties with the MUDFA works, they were not focussing on works at the depot or the part of the line from the depot to the airport where there were no known utilities? There were a large number of questions that could have been asked of BBS and were being asked of the consortium. Richard Walker's letter really didn't deal with any of that.

217. I note the email dated 11 March 2010 and found at (CEC00461504) where Tom Aitchison advised that Donald Anderson, former Council Leader, had texted him (on behalf of BBS) to advise that he had read the three adjudication decisions for himself and that "TIE have unequivocally lost each one". Tom suggests that I might meet up with Mr Anderson to see if some of the issues could be resolved. I note that the adjudication decisions available at that time were the decisions dated 16 November 2009 by Mr Hunter in respect of the Gogarburn Bridge (CEC00479432), the decision regarding Carrick Knowe Bridge (CEC00479431) and the decision dated 4 January 2010 by Mr Wilson in respect of the Russell Road Retaining Wall Two (CEC00034842). I saw the adjudication decisions at the time.

218. There was a subgroup or a subcommittee of the TPB that was meeting regarding Dispute Resolution Procedures. It decided which issues to take to Dispute Resolution and considered the outcomes. I was on that group but I remember not being able to go to all, even most, of the meetings of the group. There was a huge amount of time and effort required on this area and I had other responsibilities within the Council. In the early stages there were discussions that the group had when the Dispute Adjudications were released. As an accountant, I was reading them with the assistance of engineers and lawyers who were within that group and, given the nature of the process, was, obviously, relying on their advice. The early issues that were taken through the process by TIE were related to engineering. That informed the strategy about taking specific issues to Dispute Resolution. There was a decision taken to try and select a certain issue that would have resonance in wider areas of the contract. This would potentially save us taking a huge number of issues through Dispute Resolution. This was done in the hope that that would inform an accommodation between the parties as we went forward.

219. There were also specific areas of the project that were critical for the Council and for TIE because of their location. The first two decisions were in relation to Gogarburn and Carrick Knowe. There is no doubt that these were both disappointing outcomes for TIE. They certainly exposed the differing legal interpretations relating to the pricing function at the heart of the contract.

The first two adjudications were really based on an interpretation of the legal provisions of the contract by an engineer. Mr Hunter was not a lawyer. He wasn't legally qualified, albeit he was experienced in construction disputes. Reading paragraph 7.28 to 7.31 of the first decision, it still seems to me that the adjudicator makes big assumptions based on the fact that he could not personally understand the purpose of Schedule Part 4 in the contract conditions. He seems to have invested it with huge importance. However, he recognised that BBS were responsible for evolution of limited design through the preliminary stages to construction. He found that the purpose of Schedule 4 was key to the whole dispute. What he outlined in 7.30 and 7.31, to my mind, is a very big jump from the facts that were made available to him. At 7.29 he says "*Having considered the point of law long and hard my finding is that one has to give proper credence to design evolution available on BDDI that most pricing assumptions were included in the first place. We didn't know why they were there and if they needed to meet the design to the employers' requirements come what may for the agreed price, there would be no requirement for any pricing assumptions in the respondent parties*". That ignores the fact that issues could arise related to ground conditions and design which resulted from change in specification of form. TIE's view was that the pricing conditions were there if the Council or TIE wanted to change the form of the tramline or the specification. Mr Hunter seems not to consider that. He then says that Base Date Design Information (BDDI), was the starting point for assessment of notified departures and not the employers' requirements.

220. TIE was taking legal advice at a very senior level saying that the conclusion by Mr Hunter was flawed. If the contract was only pricing BDDI, why did we have three or four months of complex legal negotiations to get a bespoke contract that provided for re-pricing of the work? Why have the words "shape, form and specification"?

221. In hindsight and following reviewing the adjudication decisions a question is raised in my mind as someone who is not legally qualified. Why was the contract price increased at contract close if the contractor was not accepting significant elements of the design risk? That's not considered in the

adjudication. What Mr Hunter thought should or might have happened, in my mind, was not what did happen. Paragraph 7.20 doesn't reflect the intense negotiations and the complex drafting around the area included in the contract which dealt with the requirement to transfer risk to the contractor. The general point is that legal experts were advising TIE. I was party to receipt of that advice. The advice was that Mr Hunter's conclusions were legally flawed.

222. Although there was a disappointing outcome for TIE on the first two adjudications, the legal advice was very firm that these decisions were based on flawed assumptions. We were also advised that the full real argument on what the contract actually provided for, had still to be determined.

223. I refer to paragraph 65 of the Russell Road decision (CEC00034842). Mr Wilson was the adjudicator. From memory he did have a legal background. He gives a different view on the legal issues. There is more focus in the Russell Road decision on the legal issues. His findings are different from Hunter. He comes to different conclusions. He says clearly at paragraph 65 "*I do not agree that on a proper construction, the construction works price can be construed as being solely the works shown on the BDDI or any similar alternative construction*". I think that is a different interpretation from Mr Hunter, although I am not a lawyer. At paragraph 81 he takes a definition from TIE's advisor proceeded by a sentence from BBS's advisor. This part consolidates the two expert views. Mr Wilson mainly found in favour of TIE based on the submission by the TIE advisor. Interestingly at paragraph 100 he finds that something has gone wrong with the language in Section 34.11 of the contract. He says "*a literal reading of some part must be redundant to give it meaning*". He found it didn't make sense either way but, in terms of the legal principles, found mainly for TIE. He later on took a very broad view of the definition of "*amendment of design principle, shape, form and/or specification*" shown in BDDI's drawings. This was very unhelpful for TIE. On the one hand it was an encouraging finding for TIE in relation to the legal principles. On the other hand his interpretation of the sub-clause was very broad. That swung it back towards the contractors. Mr Wilson's decision was definitely a mixed conclusion. He did, however, subsequently reduce the estimated cost of the change significantly in TIE's favour.

224. Mr Wilson clearly outlines that he is leaving further issues for legal clarification. The legal view here was that there were still issues to be resolved. In hindsight, this was the most damaging part of the decision. He says "*neither adjudication gave TIE any leverage in the critical issues of enforcing timescales on the contractor to agree changes and submit reasonable estimates and get the work done with the allocation of cost to be agreed on later*". Even if TIE was agreeing it was a TIE change and it was their responsibility to pay for it, the contractor could still take months and months to submit an estimate which would inevitably be excessive by any standards. I think, the adjudication decisions demonstrated that the estimates would still be subject to negotiation, mediation and a further dispute resolution. The result meant that the whole process could take about 1½ years to get a change process. Clearly the contractor was using the detailed provisions of the contract to obstruct the construction on the tram network. The Council and TIE didn't get any leverage from the decisions in terms of contractor behaviour or time delays. That was my assessment of the extent to which the adjudication decisions favoured TIE and BBS.

225. I was involved with getting the legal feedback on the decisions at the time but my comment is based on a re-read. As an accountant reading the decisions that's my assessment of them. I cannot remember why a decision was taken not to challenge the decisions from the adjudications. I would be speculating if made any comment on that.

226. I was conscious that there may be further disputes further down the line. There were other issues that were being looked at which could be taken into dispute resolution. There were issues that were felt could be potentially more fruitful should they be taken to dispute resolution. It was felt that appealing the three decisions wouldn't have necessarily given a full determination of the legal complexities. We had taken three issues through three adjudications and they had been determined. They weren't great determinations on all fronts but at least they enabled those bits of the project to move forward.

227. I ultimately didn't meet with Donald Anderson. The Council had already agreed to stand behind and work through TIE. This was done to avoid difficulties which

might occur through creating a second point of negotiation. Richard Walker's letter was an attempt to try and draw CEC directly into this. Donald Anderson was a paid lobbyist for BBS. It is doubtful, in my mind, that it was proper for him to attempt to make use of his previous connections from his time as leader of the Council. I thought that was unethical.

228. On 21 April 2010 a meeting took place in Carlisle between TIE and BBS where both parties agreed to investigate a way forward whereby a line would be built to St Andrew Square for a Guaranteed Maximum Price and a new completion date. I was aware the discussions were taking place to attempt to reach such an agreement with the contractor. I wasn't directly involved in the discussions. The discussions were there to investigate a solution which included a line to be built for a Guaranteed Maximum Price. That was the remit. I was consistently saying at the TPB and other meetings that, if we were going to take this back for the Council and the Scottish Government to perhaps find more money, it had to be on the basis that there was minimal / preferably no risk to the public sector. I had no involvement in the actual meeting itself.

229. Further Adjudication decisions were issued (1) on 18 May 2010 (by Mr Hunter, re Tower Bridge) (CEC00373726) and (CEC00325885), (2) on 24 May 2010 (by TG Coutts QC, re Section 7A-Track Drainage) (TIE00231893) and (3) on 4 June and 16 July 2010 (by R Howie QC, re Delays Resulting from Incomplete MUDFA Works) (CEC00375600) and (CEC00310163). I saw the adjudication decisions except for the R Howie one. I have to say I have got no recollection of reading the Howie decision. I did, generally, try to find the time to read the adjudication decisions. For some of them I was in this group at the TIE offices. However, by no means did I attend all the meetings of that group. I would make the point that I was reading them as an accountant and not as an engineer or a lawyer. I was obviously paying attention to the engineers and the lawyers who were also involved in the process. They were giving advice to TIE and CEC representatives.

230. I think that the decisions represented a mixture of outcomes and findings on differing issues. Some of the decisions were more pertinent than others to the

key legal issues of the dispute. The first two by Mr Hunter, (CEC00373726) and (CEC00325885), were heavily in TIE's favour and showed clearly the on-going contractor behaviour in the formulation of estimates and the lack of proposals for mitigation of the works. Tower Bridge, I think, was accepted as a departure by TIE so it wasn't founding on a critical legal issue of what was payable and what was not. The issue was with the costs for Tower Bridge. The contractor took over nine months to supply the estimate. There were technical issues in there about how and when the drawings were provided round about the data room. The key thing, from that decision was that INFRACO was seeking a sum of almost £470k. TIE were suggesting that there was actually a saving of £384k. The adjudicator found there should be saving of £261k. So there was a difference of £730k plus between the estimate as submitted by INFRACO and what the adjudicator found in relation to the costs. That to me illustrates that it would have been reckless behaviour for TIE to accept the estimates as being provided by INFRACO. Inevitably, however, the adjudication process led to more delays for the project.

231. T G Coutts QC decision in relation to the track drainage (TIE00231893) was restricted to that particular issue and not the contract as a whole. He found that the contract was deficient in overall terms because it provided no specific means of resolving the difficulty. On page 5 of the decision he says "*for the avoidance of doubt normal development in completion of designs means evolution of design through the stages of preliminary to construction stage and excludes changes of design, principle, shape and form and outline specification*". On page 6 he says that design must encompass more than BDDI drawings. That is different from Hunter and it was in favour of TIE's principal argument. However, it didn't address the full range of issues at the heart of the legal dispute in terms of the particular issues under "conclusion". I think that was a change in the shape and form of something so he actually found, in that particular issue, more in favour of the consortium but in the broader issue he gave TIE some areas of legal comfort.

232. MUDFA was the Howie decision (CEC00375600) and (CEC00310163). I don't recall reading these decisions. From reading them now, it reads as if this was

TIE's attempt to improve contractor behaviour in relation to the timely submission of estimates to enable the project to move forward. The decision is legally complex and, frankly, a bit beyond my knowledge of legal matters but, in the first instance, there were two issues. He found one in favour of TIE and he went on to consider the other one. On the latter one he found generally in favour of the contractor. On the issue of delivering an estimate and being required to show costs and possible mitigation, he decided that he couldn't decide then. That was bound up with the actual claim. It is not a straightforward decision in my view. It is very complex in terms of the legal considerations. He came back in July and there were four sections to his findings. He found one time delay in favour of INFRACO, 154 days, and the other three he found in favour of TIE. That may be because the one he found was sufficient. I really do not know the detail. I do not have much recollection of this decision.

233. In summary, Howie found that the lack of a proper estimate from the contractor did not preclude the contractor being granted an extension of time so that wasn't in TIE's favour. That didn't mean that they didn't have to grant them an extension of time because they hadn't submitted a proper estimate so that was disappointing. When it came to considering the four extensions of time, he only granted one to the contractor. Again, though that didn't help TIE. It forced the contractor to submit estimates within the period allowed for in the contract and get on with the work. That aspect was disappointing in some respects certainly.

234. I note the report by the Directors of City Development and Finance providing an update to the Council on 24 June 2010 (**CEC02083184**). The report was drafted through a similar process as I have mentioned before. A draft would have been circulated to all the relevant departments, amendments adapted through version control, it would be circulated to TIE for input and revision before being signed off by the Director of City Development and myself. I note that at paragraph 2.5 the report states "*the continued application of dispute resolution procedures, audit-based verification of aspects of BSC's contract management, in preparation for potential litigation, (a) detailed legal investigations and the matters under dispute and (b) Senior Counsel's opinion on critical issues*". At paragraph 2.6 it acknowledges that "*the formal adjudications under the DRP*

have produced mixed results". It then goes on to say *"the advice received has reinforced TIE's interpretation of the contractual position"*. When we talk about the *"advice received"* that is the detailed legal investigation on the matters under dispute and Senior Counsel's opinion on the critical issues. We do say that we go into more detail at 3.5 and 3.12. Paragraph 3.5 deals with the adjudications and indicates some of the savings that had been achieved through that. At paragraph 3.12 it details the split of what has been found and finishes off with the sentence *"The outcome of the DRPs, in terms of the legal principles, remains finely balanced and subject to debate"*. In relation to your specific question, therefore, it is clear that is different from the totality of the DRPs, it is how they relate to the legal principles at the centre of the dispute.

235. I note the report suggested a contingency of 10% above the approved funding of £545m. That figure has to be put in the context of other sections of the report. Paragraph 3.58 indicates that *"there remains significant commercial uncertainty, it is clearly not possible to provide a robust estimate for the full cost of phase 1a... as a result of all the factors included in the report, it is now considered prudent for the Council to plan for the further 10% over the currently approved funding of £545m, on the understanding that further potential risks have been identified beyond this level."* I would argue that it was prudent for the Council to work on that figure. The dictionary definition of prudence is *"acting with and showing care and thought for the future"*. We were in the midst of an on-going commercial dispute with the contractor at this stage. It would have been reckless to suggest, in a Council report that is in the public domain, that a higher figure might be affordable for the Council. We were saying to the public that potential risks had been identified beyond that level. At paragraphs 3.60 and 3.61 we put a little meat on the bones about how that might happen in terms of provision. It was to be contained within the long-term financial plan and the TEL business case. That is highlighted at 3.64 and 3.65. We were looking at incremental delivery and perhaps changing the scope. We were suggesting that the tram wouldn't go all the way to Newhaven and that contingency funding of up to £600m was required. In terms of the specific question you have posed, therefore, I remain of the view that the figure was prudent.

236. I don't think members were informed of the detail of the consequences for the Council if TIE's interpretation of the main provisions in the contract, including, in particular, the INFRACO Pricing Schedule, was incorrect per se. Briefings, by this time, were taking place with the elected members regularly. I think they were almost weekly with group leaders. It was self-evident that if TIE was wrong on its interpretation of the INFRACO Pricing Schedule then a bad situation would become worse. We were indicating that commercial negotiations were continuing and that termination may be an option. I don't think anyone was in any doubt that if TIE's interpretation was not correct then there would be significant financial difficulty.

237. I think I had involvement with representatives from TIE at two meetings with the Cabinet Secretary, John Swinney, one of which took place on 28 July 2010. I cannot recall all of what was discussed at either of them. There would have certainly been an update on the dispute with the contractors and information presented about TIE's legal advice and the options available to TIE and the Council. There would be some discussion about the grant expenditure profiles for Transport Scotland. The tram project was a very large slice of Transport Scotland's annual budget. Transport Scotland correctly wanted to know how much would actually be spent in which financial year. We would have had a discussion about the Council meetings and the potential different political positions of the Groups within the Council. We would have discussed what the Council view might be and the need to protect the public purse to ensure that, at the end of this process, we did have an asset that could be held for the public good (rather than just the total sums of money spent for no result). This may not be an exhaustive list of what was discussed at these meetings but that is the type of things that we were talking about from my recollection.

238. I note that, as part of Project Carlisle, BBS produced figures to TIE which were considered to be unacceptably high. The figures were summarised in para 12.2 of TIE's mediation statement (**BFB00053300**). I note that BBS appeared to have offered, on 29 July 2010, to complete a line from the Airport to East Princes Street (plus Newhaven Enabling Works) for the price of £443.3m plus 5.8 million euros. I note that by email dated 4 August 2010 (**CEC00242787**) Richard Jeffrey

sets out a proposed strategy going forward. I had absolutely zero confidence that this was in fact a Guaranteed Maximum Price from BBS. The exclusions that were part of the BBS offer indicated that that was not going to be the end of the story and this sum represented a higher base figure which would later be subject to further increase.

239. With regards to Mr Jeffrey's email dated 4 August 2010 (**CEC00242787**), this was to do with escalating the dispute and taking it to a further level with remedial termination notices. This approach was formulated after taking advice from Richard Keen QC. The key issue here was, as Dave Anderson says in his reply, getting the contractor to execute the works and then to argue about the costs and the apportionment of the cost later. The legal advice from Richard Keen was positive on this point at that stage. My views were that I would have been in support of that strategy at that time. Dave and I would have probably talked before we responded. All the previous negotiations had been unfruitful, we had had a succession of new executives from BBS promising more conciliatory behaviour but no change in the behaviour materialised. There was no indication that they would be prepared to accept any proportion of the risk. The TPB had been pushing for an escalation to try and bring matters to a head subject to the receipt of proper legal advice and this was the next stage in the process.

240. I note the memorandum dated 11 August 2010 (**CEC00013622**) where Dave Anderson sets out his view that following a recent adjudication decision where TIE had lost the argument in relation to their interpretation of clause 80.13 of the INFRACO contract (i.e. that they were entitled to instruct BBS to carry out work without a price having been agreed in advance) he was now "deeply concerned" about the project. That adjudication resulted in a critical decision. It was a key issue i.e. forcing BBS to do the work and then argue about the cost later. To be fair to TIE they had received positive legal advice from both DLA and McGrigors and possibly Richard Keen. However, ultimately TIE had lost that argument. I think the adjudication Dave Anderson is referring to was the Lord Devaird decision. Dave was right to be deeply concerned about the project. I was as well and we both had been for some time. That decision probably only left us with termination as a potential option to improve contractor behaviour to save

the project. That could only have been done on a proper basis and that would take us into another legal minefield as we moved forward. In autumn, about this time, CEC appointed Shepherd and Wedderburn to provide advice to CEC and TIE with regards to the process of termination. I received a copy of that advice in December 2010. At that time the TIE QC and the CEC QC were still recommending the contract be enforced until grounds for termination could be established as a result of failure to perform the works. That was generally with the hope that TIE would be in the strongest possible position for mediation or a negotiated settlement. This decision (the adjudication) represented a major setback.

241. I note the email dated 18 August 2010 where Alan Coyle noted that he had met with Dennis Murray regarding TIE's counter proposal for Project Carlisle (CEC00013665). The "headline numbers" set out there are £567m for the Airport to York Place and £644m from the Airport to Newhaven. I note the record of the meeting which took place on 20 August 2010 where CEC officials met with TIE representatives to consider TIE's Project Carlisle Counter Offer (CEC00032056). The record of the meeting noted a range of costs of between £539m-£588m for the Airport to St Andrew Square and a range of between £75m-£100m from St Andrew Square to Newhaven, giving a total range of costs, from the Airport to Newhaven, of £614m-£693m. It is noted in the record that this was essentially a re-pricing exercise for the completed design (which was thought to be approximately 90% complete) with the intention of giving TIE certainty that all of the pricing assumptions in schedule 4 of the INFRACO contract would no longer exist. It is further noted that BB were likely to be feeling very exposed as a result of "the SDS/BB 'collusion' agreement". Again, in terms of the offer and the counter-offer, in my view there were still too many exclusions and conditions in the offer from BBS. It excluded the on-street civils from Haymarket to Princes Street and any utility risks over £50k. Their offer was still a good distance away from what we were searching for which was a fixed price i.e. the Guaranteed Maximum Price. Interestingly, at this stage, Steven Bell was saying that he thought the design was 90% complete. You would have thought by that time there was clarity on the design even though it was BBS's responsibility by then. That would have had to have been considered too. If that

area was left open i.e. the design wasn't fully complete and fully approved, and BBS then adopted the same behaviour that they had adopted throughout the whole project then there was a concern that they would opt for what was termed as "full depth reconstruction" on the on-street works. Those works would entail going down to a much deeper level than a normal tramline might have been expected to because of underground conditions. This is what happened in Princes Street. In my assessment that had taken the Princes Street costs from £2m to £11m. There was a danger that that would happen along the rest of the trackway as well.

242. Alan Coyle, from the Council, was meeting with Dennis Murray and further meetings were proposed with Stewart McGarrity at that stage. I would have expected that Alan would have had City Development engineering or transport colleagues with him. It is not clear from the papers that that was actually happening. The figures were being reviewed with Alan Coyle and hopefully with City Development colleagues, although I cannot be sure about that.

243. I have only got a vague recollection about the SDS/BB collusion agreement. I think there was a document suggesting that they had been colluding in terms of the design, the delay of the design and the way the design was produced for the commercial advantage of both companies. Somehow it had come to TIE's attention that such a document existed. TIE did ask us later on when the Council were meeting with BBS to ask them if there was such an agreement in place, however, I don't think we did.

244. I note the record of the Quarterly Review with Transport Scotland dated 24 September 2010 (TRS00011378). It notes that "*the Council confirmed that they would find it very difficult to recommend any VFM [presumably, value for money] decision to agree a £600m option to St Andrews Square/York Place*". There is a difference between value for money and affordability. I think, this was more about affordability than value for money. Part of the discussions at that time about the need for possible additional finance being available were centred round the possibility that Transport Scotland may assist if additional expenditure was required. The Council's formal position was that contingency funding was

being examined and had, in fact, been put in place up to £600m. However, our position with Transport Scotland was relating to costs beyond that sum. We would be looking for some assistance from them, perhaps, or from Government in relation to possibly extra grant. If that proved difficult then we were looking at potentially a TIF scheme. I can't remember now what TIF is an acronym for. The principles behind TIF were that if infrastructure works were carried out in a particular area that led to growth in economic development then the extra business rate generated from within that area could be used to fund the infrastructure works. We were investigating that principle. I recall it was felt that that could work with the proposed St James Centre reconstruction as well. I think the £600m comment was really to try and encourage Transport Scotland to think about ways in which they might help if the eventual cost was more than that. In summary, CEC were saying that we could fund £600m at that stage but to go beyond that we might need some form of assistance or some further funding mechanism approval. By this time value for money wasn't the primary issue. The issue was to get the project completed at an affordable price that would give us an asset capable of generating revenue in future years.

245. On 7 October 2010 I had involvement in a further meeting with Mr Swinney. The meeting was certainly to provide an update on the dispute. I remember discussing the importance of securing an asset at the end of the project. There was a discussion, again, about the members' position in the Council and how they might react to different scenarios. The focus of the meeting was really about how we could reach a solution that protected the public purse as far as possible, secured an asset and delivered a working tram. This was the second meeting I attended with Mr Swinney. At one of the meetings I was at it was Richard Jeffrey, David Mackay and myself. Those could have been the attendees at both meetings but I am not 100% sure. Transport Scotland were at both meetings. I think the Infrastructure Minister, Alex Neill, was at one. My recollection of the attendees at both meetings is a bit vague.

246. It is suggested to me that in October 2010 TIE and CEC explored terminating the INFRACO contract and that a special planning forum ("War Room") was established. I note the email sent to me from Alistair Maclean dated 13 October

2010 (CEC00012760). He states that the special planning forum was for CEC and not TIE and that "TIE should come along to help us where we need them but not take control!". I think issues were clearly becoming more difficult between the Council and TIE at this time. I cannot remember responding to Alistair's memo. Alastair and I were in touch very regularly on all the issues. To me it was more still a question of working together. We would certainly have required TIE's full involvement in terms of the preparation and their knowledge. However, I would agree with Alistair's main point. It was not for TIE to take control of this at this point. The Council had to play a bigger role because of the scale of difficulties surround the project.

247. TIE had tried a number of initiatives after taking extensive legal advice from senior sources. It was clear, however, that these initiatives were not getting the tram built. The position of relying on TIE, as, arguably, we should have been able to do, was becoming more difficult as delays grew and difficulties did not diminish.

248. I note the letter dated 13 October 2010 where BBS wrote directly to Councillors giving their views on the dispute (TIE00301406). My view of the letter was that it was at best a partial view of the dispute and that parts of it were fictional. The letter points that project work was not proceeding as a result of TIE not approving costs in advance. It does not deal with the issue of "how TIE could possibly approve costs of works in advance of them being carried out if INFRACO were taking eight or nine months to submit their grossly inflated estimates and many many more months to agree realistic sums through the DRP?"

249. David Anderson and I provided a refreshed Business Case for the tram project, focussing on a line from Edinburgh Airport to St Andrew Square, by joint report to Council on 14 October 2010 (CEC02083124). We outlined that the contingency planning work undertaken by the Council and TIE had identified funding options which could address project costs of up to £600m. We state at paragraph 3.1 "Due to the current uncertainty of contractual negotiations, it is not possible to provide an update at this time on the ultimate capital costs of the

project.” We further note at paragraph 2.50 that “The overall outcome of the DRPs, in terms of legal principles, remains finely balanced and subject to debate between the parties.”

250. At this time there was on-going intensive activity within the Council and TIE in relation to the project. Council officials and TIE were grappling with engineering issues, legal issues and funding issues. In CEC officials we were also dealing with our own other significant responsibilities. When it came to the text in the report, although I signed it off, I was relying on legal advice from the Council’s legal staff and TIE’s legal advisors. A significant part of the report deals with the financial sustainability of a tramline from the Airport to York Place and that would have been direct focus in preparing the report. The statement on DRPs and legal principles was based on the view of TIE legal advisors and internal legal views.

251. There are issues in the report about contingency funding and the revenue implications of the shorter route to St Andrew Square or York Place. These were the main issues that we were trying to bottom out in Finance in the run up to the report in October. Following consideration Council then asked for further information on this aspect of the report. The Council, at that time, wanted further information on that element. The big concern was whether a tram that only ran to St Andrew Square and York Place would, in fact, wash its face in revenue terms. That was ultimately a critical issue for that Council report.

252. Commercial confidentiality was more important than ever at this time. TIE remained in negotiations with the contractor. These discussion may have been mainly in relation to trying to reach an agreement on a shortened route But it was very difficult to give a cost before the outcome of the commercial negotiations. The costs were dependent on the outcome of what could be agreed between TIE, the Council and the contractor. We were meeting regularly with Councillors at this time and updating them with briefings. There were briefings to all the political groups before the Council meetings. We started weekly briefings with the Group Leaders about the beginning of October and at these meetings we were able to give them some supplementary information. I could not honestly

say I remember how much detail they were given regarding the likely costs, how the outcome would turn on different scenarios and different solutions that might be arrived at. It would be wrong for me to say the Councillors were getting all the potential commercial information in private briefings because I don't think that was the case. We were able to give them a bit more than was being put into public documents though.

253. I note the Highlight Report to the meeting of the IPG on 27 October 2010 (CEC00012896). It notes certain matters under Lessons Learned (para 6). I refer to the list that is set out under paragraph 6. I note the bottom bullet point talks about "*a robust operating agreement between TIE and CEC*". An Operating Agreement was in existence between CEC and TIE. It is my view that the terms of that Operating Agreement were not material to the project outcome. The issue for me was more aligning the funding arrangements for the project as closely as possible with responsibility for delivery and risk management relating to the project. This aspect was undertaken one and, arguably, two-steps removed. For major transport infrastructure projects of national significance, these responsibilities, in my opinion, could in the future sit with Transport Scotland. It may be an advantage in future for the body providing the funding to be more closely aligned with the body responsible for project delivery and risk management.

254. The second big issue for me is in relation to completion of the design prior to procurement on a fixed project scope. The original intention for this project was clearly for the design to be completed, as far as possible, prior to contract close. For reasons that are now well documented that did not happen. Equally the utility works should have commenced earlier and improved arrangements were required in relation to the scoping and project management of such works. This will remain a critical issue for future similar projects. For this project, if contract close had been delayed until design and utility works had been completed this would have resulted in, at the very least, a re-procurement exercise causing further delay, potential extra costs and, very probably, project cancellation. In my view, the procurement strategy was generally sound but foundered on poor

execution of the design contract and the problems with utility works, to a lesser extent.

255. Transport Scotland partially withdrew following the election in May 2007. Transport Scotland were clearly involved with the signing off of the Final Business Case but at Contract Close they were not directly part of the arrangements. Ultimately, Transport Scotland became two steps removed from the actual delivery of the project and the risk management, once the project had started. In my view, for future, major infrastructure projects of national significance, which this was, there could be a model closer to that of the Borders Railway. There I understand Transport Scotland delivered the project as well as funding it.

256. I note one of the Lessons Learned on the list refers to ensuring all consents, approvals and third party agreements are in place. I think that would be desirable in terms of a project such as this but it should be a risk that is capable of being measured and managed. I would not have said that that was essential particularly if design had been fully completed prior to Contract Close.

257. I note the mention of third party agreements in the Lessons Learned list. Third party agreements potentially cover a large range of organisations. That definition would have covered any third party agreement which had the capability of causing a variation to the contract once the contract had started. The major third parties that may have been causing issue with varying the contract as a result of their own developments were Forth Ports, the Airport and businesses around Picardy Place (this was because of the proposals for redevelopment of the St James Centre). We estimated that the third party agreements were about 3% of the contract value at the time of contract close.

258. Ensuring competent legal advice is in place is a given. On this particular contract DLA were engaged by TIE. They had a Duty of Care to the Council. Their previous portfolio and track record in infrastructure projects was, as I understand it, second to none. We finished up with a contract that very senior legal people and adjudicators in the dispute resolution were saying later that they

didn't know what it meant. The fact that it didn't make sense suggests to me that the legal advice from DLA was deficient.

259. I don't feel that an audit of the bonus arrangements was critical to the project going forward. I would suggest, that the base remuneration for executives was at least as important if not more important than bonus arrangements. I understand that in the private sector bonus arrangements, as long as they are properly constructed and tied to project milestones, would be standard practice and can be helpful in securing successful project delivery. I don't feel that that is a critical lesson learned for future projects. Some people became consumed by the issue of TIE bonuses because they were being paid bonuses for a project that was clearly not being delivered. There are a number of questions that arise out of that. However, I am not sure it was a critical issue. In summary, I am suggesting that in the private sector bonuses are standard practice. It doesn't make any sense to me to look at the bonus arrangements and not look at the remuneration in totality. If people are wanting to argue that TIE executives were paid too much then you would need to look at their base salary, their conditions and their bonus arrangements altogether.

260. There is, however, separately a question about bonus arrangements and whether that meant that TIE executives were incentivised to do things which were not in the interests of the Council. For me that would be a governance issue for TIE. That for me is not a particular criticism of having a bonus scheme itself.

261. I have been asked about the email dated 11 November 2010 by Tom Aitchison to David Anderson (CEC00037011) expressing certain concerns about the support being provided by the City Development Department. I think this email is an indication of the difficulties that all CEC officers were experiencing in managing the pressures arising from the tram project alongside their other responsibilities. As far as I understand it Dave was appointed as Director of City Development, at least partly, to give greater focus to economic development in the city. The City Development department were responsible for transport, economic development, planning and a few other areas. Economic development

became even more vital to the City in the light of the financial downturn of 2008. Dave was also, however, the Senior Responsible Officer in the CEC for the tram project. That meant that he needed to balance his time and his department's resources accordingly. Dave's assertion that he was working 60 hours a week at that time doesn't surprise me in any way shape or form.

262. I honestly cannot remember the meeting I attended with Jenny Dawe, Tom Aitchison and John Swinney on 16 November 2010. I think I might have been present at the a meeting. From recollection of meetings generally with Mr Swinney there would likely have been a discussion at that time about mediation. The timing of the meeting would tie-in with that. At these meetings Mr Swinney was interested to hear generally how the legal disputes were progressing, how the matters were going to be resolved, how we would get an asset at the end of the process and what the position was in the Council with different political groups. That was the usual agenda but I think we would have probably talked about the mediation also. That said, I have no specific recollection of this particular meeting.

263. I refer to the note dated 17 November 2010 found at (CEC00013342) where Alistair Maclean sets out Richard Jeffrey's concerns. Richard had spoken to me about certain serious concerns he had in relation to events at the time the INFRACO contract was entered into. My advice was for him to raise the matter with Alastair Maclean. I was very concerned by the information disclosed, particularly the suggestion that Directors or employees of TIE had not acted in the best interests of the company and CEC. I was also concerned about the suggestion that a senior advisor from DLA was paid a thank you bonus into a personal bank account. That is a very serious allegation. I wasn't at that time, and am still not, aware,of any evidence that supports that allegation. There is discussion within the correspondence about the concerns being raised with the Council's Monitoring Officer. At that stage, and at that time, I was managing a significant number of pressures and had other priorities. I was happy that legal colleagues were taking this matter forward. I am not sure how it was ultimately resolved. If it had been followed through it would have been followed through with the monitoring officer who , at that time, was Jim Inch.

264. I note the emails dated 22 and 30 November 2010 where Alastair Maclean expressed certain concerns about TIE and the legal advice received by TIE (CEC00013411) and (CEC00014282). I had been closely engaged for a period of months with Alastair Maclean on the issues surrounding the tram project. During that time I had formed huge respect for his legal abilities and the clarity of his strategic thinking. He was of substantial support to me personally in trying to achieve the best possible resolution to the situation the Council found itself in. Hopefully, I was able to reciprocate his assistance, to some extent. By this time TIE had undertaken a significant number of strategies and initiatives. However, for a number of reasons there was still no prospect of improved contractor behaviour or clarity as to how we could get the project built for an affordable price. TIE's legal advice was from McGrigors and Richard Keen at that stage. The individuals I met from McGrigors appeared, to me, to be very able. It was absolutely imperative to bring issues to a conclusion in the best way possible and in the Council's interests. I was, therefore, happy to support Alastair in almost all respects. The timing of mediation clearly needed further discussion and consideration. Alastair was suggesting that it should be put off until they did more legal diligence. By that time a lot of people, including probably myself, felt that there had been enough legal diligence and that we needed to try another route. That said, I was, generally, in support of his views.

265. I note the report to the meeting of the IPG on 17 November 2010 found at (CEC00010632) The report notes that a range of cost estimates for the different scenarios were being produced. The draft estimate for Project Carlisle varied between TIE's estimate of £662.6m and BBS's estimate of £821.1m. These estimates were for the full scheme. The report notes that the cost estimates, as they stood, indicated that delivery of the project to St Andrew Square could be delivered for £545m-£600m. I note from the text in the IPG report that the draft costs at that stage were subject to further input from TIE's commercial and engineering teams. Alan Coyle would have been involved in checking these figures with support from colleagues in City Development. Alan would normally take me through the figures after he had been through them with TIE prior to an IPG or a TPB meeting. By that stage there were weekly cost meetings. There was considered to be a robust challenge process including TIE and CEC

engineers. At that stage everything that TIE was producing was checked on a weekly basis at a formally constituted meeting.

266. An exploratory meeting took place on or about 3 December 2010 between representatives of CEC and BB (CEC02084346). I was present at that meeting. Also in attendance was Alastair Maclean, the note taker and Richard Walker from the Consortium. I think that someone else was due to be there but their plane couldn't take off from somewhere in England because of weather issues. BB had requested the meeting and, after discussion with TIE, it had been agreed that we would meet with them on the condition that CEC would make it clear that they would be in listening mode only. We were reluctant to open up a second forum for negotiation with BBS. I would prefer to call them BBS because the tram vehicle contractor wasn't part of the dispute. Alastair and I agreed in advance of that meeting that he would do the talking on behalf of CEC given the legal sensitivity surrounding the project and because I had been more involved with TIE over the history of the project. Alastair was intending to portray himself as an honest broker in listening terms. Richard Walker repeated the points from his previous letter to Councillors. He brought a series of large scale maps which he showed us and put out on a huge table. The maps were about 20 feet long. It was slightly bizarre but they were marked up with all the points where contract difficulties had occurred. That meant, in reality, they were marked up with numerous marks on the tramlines. It was a slightly strange meeting. As was agreed with Alastair in advance, I didn't do very much talking. I do recall asking Richard Walker what the additional sums agreed in the run up to contract close as payable to BBS were for if it was not for taking an element of design risk. I didn't get a satisfactory answer to that question. Really that was, from memory, my only intervention at the meeting. Of particular concern to me was the whole area of who was taking responsibility for design risk. I had been advised that BBS had been granted additional sums at contract close to take on an element of the design risk. That was why I asked the question. I don't remember who the note taker was. It was someone external to the Council. We wanted to be shown to be non-partisan so a professional note taker was brought in.

267. A meeting did take place where Councillor Dawe and BBS were present. The CEC Chief Executive and I were also there. There were two reps from BBS. One was from Bilfinger Berger and the other from Siemens. I can't remember their names. They were people that I hadn't met before. That wouldn't be a surprise because it was TIE that was meeting with the consortium over the period before this meeting took place. The meeting was mainly a courtesy meeting with Councillor Dawe explaining how important the tram was to the city. The message from the consortium was that they really wished to build the tram and help the city in its efforts. They indicated that TIE's actions were making it very difficult for them to undertake their obligations under the contract. I think this meeting was held as a prelude to mediation. I don't think there were any notes taken at that meeting.

268. I note the email dated 17 December 2010 (**TIE00891350**) where Richard Jeffrey asks about the current status of CEC approvals and consents. He states "*to get a fixed price we need a fixed design, and this includes approvals*". The design, at this point was still not fully complete. The last update I received was the previous meeting with Steven Bell where he thought the design was 90% complete. That was a few months earlier. That figure wasn't definitive. It was TIE's job to liaise with BBS who were responsible for the design. Consents and approvals were regularly reported to the IPG, although the agendas for the Council at the IPG were crowded out in November and December by bigger issues e.g. the legal issues, the move to potential contract termination and mediation. I have tried from the documentation provided by the Inquiry to go in and check on two or three of the IPGs but the figures for the level of complete designs weren't there. The IPGs are certainly a matter of record. I know City Development were responsible for delivering the approvals but they could only do that once they got the necessary input from BBS.

269. On 16 December 2010, Tom Aitchison provided the Council with an update on the refreshed business case (**CEC01891570**). Section 2.3 of the report makes clear this is a more detailed account of the Business Case refreshed as at October 2010 with further information focussing on the revenue implications of a tramline finishing at St Andrew Square. The capital position on the Business

Case was not updated between October and December 2010. The report notes that a line from the airport to St Andrew Square was capable of being delivered within the current funding commitment of £545m. I note that at the meeting in October an amendment was passed to request a review of the business case by a specialist public transport consultancy that had no previous involvement with the Edinburgh tram project. What came to the Council on 16 December 2010 was a more detailed account of the refreshed Business Case. The refreshed Business Case presented to the Council on 25 October 2011 had had the then estimated capital cost in it, which was £545m. It also had information about the revenue implications of the line only going to St Andrew Square or York Place. That was the area of concern that the Council were addressing when they asked in October for the report to be brought back with more information. They asked for the October report to be brought back because, in presenting the October report, CEC officials intimated there was commercial sensitivity about revenue figures because of the impact on Lothian Buses commercial position. If you track the reports through you can see that the Council, in October, expressed concern at the withholding of commercially sensitive information on the revenue side of the Business Case and that a more detailed account of the updated Business Case should be made available to all members at the Council meeting in December. Members did ultimately gain access to the full update for scrutiny, however, this was subject to a written undertaking that they would keep key figures confidential. There was no update to the August capital figures for constructing the tramline between October and December. The October Business Case came back solely to give members further access to commercial information about the revenue figures. The members were concerned that if we spent over £500m on the line to St Andrew Square tram operations may not generate revenue surpluses. They were quite sceptical about the report in October that indicated that such operations would provide a revenue surplus so they called for more access to information on that aspect of the report.

270. The IPG report in November clearly had a range for St Andrew Square at £545m to £600m. These estimates could have been incorporated in the December report but CEC were now at the stage of just having agreed to go into the mediation process with the contractor. To expose a higher figure to the

Consortium as our base figure before going into mediation was not considered helpful in relation to that process.

271. In December CEC wouldn't be confident that the line from the airport to St Andrew Square could be delivered within the funding commitment £545m. At this stage we couldn't be very confident about any of the figures because there was no agreed programme, there was no agreed resolution to the commercial issues and there was no indication of changed behaviour from the contractor. Apart from anything else the £545m figure was from three or four months previously. Even with that figure, we could not have had a great degree of confidence because of the position the project was in.

272. I have been asked if the additional borrowing for the Tram Project can properly be described as Prudential Borrowing. The increased borrowing for the tram project beyond the £25m already borrowed to meet the Council's contribution of £45m was required to complete an asset which was considered capable of generating future revenue surpluses. The extra borrowing was therefore certainly prudent. The alternative would have been not completing the project and having no capital asset where all expenditure to that point, which had been chargeable to capital account, would have no value and would then be chargeable to revenue. It would have to be written off in one year to revenue. There was also the possibility that, if we didn't partially complete the project and retain an asset, the Scottish Government could ask for the grant to be repaid. That would have resulted in something like, by that time, nearly £500m, (certainly over £400m), being charged to revenue in one year for the Council. That was far beyond any resources reserved for contingency planning that could be identified at that time. The increased borrowing was very much the lesser of two evils. By this stage our previously identified contingency planning and Treasury Management savings had already been realised. We had identified further savings that were capable of future realisation because of downward movements in long term interest rates. The stability of long term interest rates indicated that the affordability of the additional borrowing was comfortably within the Council's means. This was obviously not something that we would have wanted to put into the public domain or disclosed to BBS before the mediation.

273. I think members requested an independent review by a specialist consultancy, with no previous involvement with the tram project, because they were concerned about the revenue implications of a tram line which only went to the centre of the city rather than Newhaven. They were also concerned about the impact on Lothian Buses. Lothian Buses is a company very close to the heart of all the Council members in Edinburgh (at least it was when I was there). Lothian Buses pay revenue dividends to the Council and to their other shareholders every year. This was a further independent review that was requested. The members didn't want a further report from consultants who had already been involved at earlier stages in the project estimating what the revenue flows were. They wanted someone new to come in with a completely fresh look to give them additional comfort that the tram, if it only ran to St Andrew Square/York Place, would provide revenue surpluses. They further wanted comfort that the tram would not be a drain on the finances of Lothian Buses.

274. I note that on 18 December 2010 CEC approved an emergency motion proposed by Jenny Dawe to instruct the Chief Executive of the Council to continue to make preparations with TIE and BBS for mediation or other dispute resolution processes. I am not sure it would be a Council motion because we had had a Council meeting on the 16 December and it would have been very unusual to have another one on the 18th. It might have been a committee of the Council. I recall that on 16 December, as part of their consideration of the overall tram report, the Council agreed to note the steps taken to take forward the mediation proposals. They noted that there were steps being taken to go to mediation. Noting something in Council terms is not particularly positive. I can only speculate as to the reasons as to why it was noted. Councillor Dawe would know why she put up a further motion two days after the Council had agreed a motion. It may be that she saw that there was a need to show she was solidly behind the principle of mediation and that she wanted the dispute to be brought to an end. For me, the decision the Council had taken in November made that clear. It would really be for Councillor Dawe to clarify why she felt she wanted to put that further motion forward.

275. From information supplied to me by the Inquiry a meeting appears to have taken place on 20 December 2010 between Richard Jeffrey, Nigel Robson, Richard Walker, Michael Flynn and Richard Garner. Nigel Robson was the mediation expert TIE had recruited to help with the process. He was guiding TIE and CEC through the process and providing advice as to how to prepare for the mediation. The purpose of the meeting was to prepare the ground for the mediation. There were things to do e.g. agreeing who the mediator would be and issues like that. I am speculating that this was the purpose of the meeting.

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276. I note that on 24 February 2011 parties exchanged their mediation statements. TIE's mediation statement is found at (BFB00053300) and BBS's mediation statement is found at BFB00053260). I note that by email dated 25 February 2011 (TIE00670627) Gregor Roberts sent slides incorporating parties' respective figures, setting out differing estimates to build a line from the airport to South St Andrew Square (TIE00670628). TIE's total estimate for a line from the airport to St Andrew Square was £638.2m. The figures provided by BBS appear to have produced a total estimate of £760.3m. On the first slide the second column entitled '*tie View £m*' is the TIE estimate. That would have been subject, as I have detailed earlier, to a checking agreement with CEC Finance and engineering staff. By that time TIE, finance, commercial and engineering staff were attending weekly meetings that CEC were running with regards to cost projections. Gregor Roberts was acting up because by then Stewart McGarrity the, Finance Director had left TIE. The first column comes to the £638.2m. The second column is the total costs, including BBS's estimates of cost to them, and the third column is simply the BBS costs. The second column entitled '*BBS Offer £m*', in addition to the BBS costs, includes for the costs of running TIE, land, fees associated with the project. The third column also entitled '*BBS Offer £m*' would only be the tram vehicles and the tram infrastructure. The second and third columns were provided by BBS. The first column, as I have said, was provided by TIE. You can see from one column to another if you look across where differences arise. So there is £29.9m there for 'non-BBS Project Costs'. That might be the TIE costs. There is also a figure for 'Mediation and

Professional Fees'. You could go through each of these figures and see where the second column is different from the third column. That would show you the project costs which are not being paid to the consortium. There is £236m at the top that has been spent to date and that was for a range of activity already undertaken.

277. In summary, the TIE figures had been assembled by TIE Finance, engineering and commercial staff but checked and validated by Council Finance and engineering staff. The other two columns were simply the figures supplied by BBS. The third column is the figures supplied by BBS, the second column is taking the figures supplied by BBS and adding to it all the other costs that had already been incurred.

278. I note the email dated 26 February 2011 and found at (TIE00109264) where Gregor Roberts sets out his views on the "PPP" (Project Phoenix Proposal). I note that his initial thoughts were that this was "*a very high price to have so many exclusions*". I agreed completely with the view that Mr Roberts had come to on the offer. There were still too many exclusions to recommend that to the Council and/or to the Scottish Government. It still wasn't the type of offer that was required. The price was £120m more than the price which TIE and the Council officials had thought to be reasonable. This was too big a gap. More importantly, there were too many exclusions. The project would still have been exposed to the type of behaviour that it had been exposed to throughout its life.

279. In the run up to the mediation at Mar Hall in March 2011 both TIE and CEC were taking further legal and commercial advice. TIE had engaged experts in mediation for further advice. By this time we were not confident of the legal position regarding forcing BBS to complete the works. We recognised that legal termination on proper grounds would be a long and complex process. Also by this time, just to set things in context, CEC, the Scottish Government and, most important of all, the people of Edinburgh were growing increasingly impatient with the lack of progress on the project. There were a series of joint meetings at all levels between CEC, TIE and commercial, legal and mediation advisors. Some of these happened during normal working hours. There were certainly

meetings at weekends as well. I was part of those meetings together with the Chief Executive of the Council, the Director of City Development, Alastair Maclean and other Council officials. In addition to that, the Council Chief Executive was sounding out group leaders, senior Civil Servants and Ministers on the possible outcomes. I was in discussion with Transport Scotland officials prior to, during and after the mediation in relation to the funding issues that might emerge. Affordability was a big part of our preparations. I was part of the Council team that were trying to get the best possible solution for the people of Edinburgh. We had the TIE estimates and the BBS estimates that are set out in Gregor Roberts slides. These were the estimates and the gap, in financial terms and in terms of the conditions, that we were looking to reconcile.

280. The main objective for CEC going into the mediation was really to get a tram line completed to St Andrew Square or York Place whilst protecting the public purse as far as possible. We also wanted to realise a revenue earning asset for a price which was affordable whilst at the same time exposing the Council to minimum further financial risk. The process wasn't just to get another price. It was also to try and minimise the risk of future adverse contractor behaviour and lack of performance.

281. The fall back was to proceed through legal termination which would be complex and fraught with risk and difficulty. By that time, the remedial termination notices were not having much of an impact and CEC's legal advice was that TIE probably hadn't served them in the best way they possibly could have. Legal termination would have been the position of last resort. It is difficult to see what other possibilities there were at that stage.

282. The mediation talks took place between 8 and 12 March 2011. The consortium were represented, CEC were represented, TIE were represented, Transport Scotland were represented and the mediator was there. There were about 60 people at the mediation. The persons present will be a matter of record. From CEC's perspective, Sue Bruce, the Chief Executive, led the team. In the team were myself, Dave Anderson, Director of City Development, Alastair Maclean, Head of Legal Services, Richie Somerville (Dave Anderson's business

manager), Alan Coyle, Finance Officer media staff, PR staff and support officials from City Development. The opening statements were in a banqueting hall. There were two opposing tables. There weren't enough seats at either of them and we were sitting about 50 yards apart. There must have been 30 there from each side. TIE were heavily represented as well.

283. The mediation commenced with opening presentations. Then there were a number of different meetings over different issues. These were to try and find as much common ground as possible. Following that there was a progression towards commercial discussions. Leading from the CEC/TIE point of view were Sue Bruce, as the Council's Chief Executive, the Chair of TIE, Vic Emery and Nigel Robson, Mediation Advisor, and Transport Scotland. We had a four person frontline team. The Chief Executive of TIE was not part of that frontline team which surprised some people. TIE were represented by their Chair. Things came closer to fruition through a BBS cost proposal which gave an indication, at least, that they may might be prepared to settle on conditions that were of reduced risk to the Council and to TIE going forward. That cost proposal was then subject to detailed scrutiny at a meeting where the Principals were present. The Principals, were those persons that I have mentioned earlier from the public sector side, Steven Bell (who was the TIE Project Director), Dennis Murray (from the commercial side of TIE), Alan Coyle from the CEC. They met with the BBS staff together with the mediator. Then we were in an iterative process to try and reach agreement on costs and conditions.

284. I have to say that TIE and the CEC's interests, were damaged by the fact that BBS were able to demonstrate that there was a continuing presence of un-diverted utilities in Shandwick Place. Those utilities should have been diverted 18 months before. That was very damaging. it meant that the Consortium weren't prepared to take away all risk from the public sector for that section of the tramway from Haymarket to Princes Street.

285. My involvement was mostly in terms of discussion on the outcome of meetings. Each side had separate meeting rooms in Mar Hall. The proposals, as they emerged, came back for discussion. I was part of these secondary discussions.

My role was to advise on the total costs. The total costs were dependant on the BBS costs, the conditions, the programme, the time that we still had to pay for contract supervision and all the other overheads. All of this informed the total picture that we were going to be taking back to Council and the Government.

286. I remember we had to temper our position over the mediation on risk transfer because of the continuing presence of the utilities. We did not go in with a formally constituted initial offer so we didn't need to change our position in relation to that. However, we did have to change our position in relation to accepting some on-going risk due to the presence of utilities in Shandwick Place.

287. The outcome of the mediation was a full Guaranteed Maximum Price for all sections of the tramline to Haymarket and an agreement to work together to develop a satisfactory proposal for the Haymarket to the St Andrew Square section. BBS also agreed to bear the costs for redoing the works in Princes Street which were flawed. There was also agreement on a new method of managing the relationship and the contract going forward.

288. I note the spreadsheet (TIE00355168) attached to the email from Tony Rush dated 9 March 2010 (TIE00355167). It states a proposed figure of £731m. This spreadsheet shows the TIE view in the left hand column (low) and the TIE view in the second column (high). I am not sure where the £731m comes from. It's an adaptation of the TIE view, obviously, but looking at the figures now I get it to £706m (so there is £25m missing from that). This spreadsheet was drafted in preparation for the mediation. It is an evolution of the Project Phoenix spreadsheet. BBS are still at £760m and TIE have suddenly gone to £639m. Tony Rush had a different way of arriving at his number. This didn't impact materially on the mediation. This was not a document we were returning to during the mediation process. At the end of the day Steven Bell, Dennis Murray and Alan Coyle were able to knock very significant sums off the BBS figures at the mediation. But that didn't mean it still wasn't a very significant sum that we were left with in terms of what CEC had to pay to get the line to St Andrew Square/York Place.

**Tony Rush should
be Alan Coyle
9 March 2010
should be
9 March 2011**

289. I note the slides/diagrams entitled "Decision Tree Factors" (TIE00672796) which were produced during the week of the mediation. I note the email dated 15 March 2011 (TIE00672795) which provides evidence for this. Dave Anderson's Business Manager, Ritchie Somerville, brought these slides with him. This was an attempt to pull together all the factors that would impact on the decision to be reached over the course of the mediation. There is a large number of slides, it is not just one or two. I think it would be unfair to vest these slides with too much importance in relation to how the mediation progressed. Vic Emery's background was in shipbuilding. They had a more straightforward way of operation rather than going through the science of decision tree factors. It served a purpose as a checklist to make sure that we weren't missing something major. It contained a proposed revised governance structure for the project. That was useful in terms of developing future arrangements with the Consortium. That bit of it was probably very useful. Much of the information in the slide was in our minds in any case.
290. Certain principles were agreed at the mediation (CEC02084685). The Heads of Terms (also in CEC02084685) were agreed subsequently. I can't remember the exact date. They were certainly not agreed at the mediation, it was a few weeks after when they were agreed.
291. The agreement was reached on the basis of the works being divided between off-street works (in relation to which price was fully agreed) and on-street works (in relation to which a price would be agreed) because that was the only basis that we were able to reach an agreement with the consortium. BBS were able to demonstrate that there were still undiverted utilities present in Shandwick Place. That meant that they were obdurate in terms of accepting the risk relating to the diversion of these utilities. Arguably, they were quite correct in this as the diversion of the utilities was supposed to have been resolved many months before.
292. With regard to the price of £362.5m for the off-street works and the target sum of £39m for the on-street works - my understanding is that the £39m was a target sum which was a further sum payable to BBS in relation to the Haymarket to St

Andrew Square section. Monies already paid to BBS were included in the £362.5m but that would have included sums for on-street and off-street works paid previously.

293. After the mediation the Heads of Terms had to be agreed alongside the governance structures for the project going forward. The parties agreed that they required to undertake further work on the target sum for the risk transfer associated with Haymarket to Princes Street / St Andrew Square element. There was a bit of work to be done around ensuring there was detailed design. There was also a requirement to cost the work and refine the scope and programming for that particular area of the work. This was the area which was the most contentious. Both sides, as well, had to take the principles, which had been provisionally agreed, back for endorsement by their stakeholders e.g. as Council officials we weren't authorised to conclude the deal with BBS there, we needed to report that back to the Council. The consortium needed to report the proposals back to their corporate HQs.

294. The Council were first advised of the agreement reached at Mar Hall when the Chief Executive briefed the Council leader and the Group leaders. To be honest I can't remember if I was involved personally at that time. I don't think I was but I couldn't be definitive about that. Certainly that would be the first notification to the Council of what had been agreed at Mar Hall.

295. I note that on 16 May 2011, the Council were given an update by the Director of City Development (**CEC01914650**). I am not sure of the date when Heads of Terms were agreed. There were things that had to happen very quickly e.g. setting a programme for the remedial works in Princes Street. The contractors, as part of the agreement, had agreed to carry on with works in a number of areas that had been under dispute. I think, that became Minute of Variation 4 to the contract. These were the only things that we reported to the Council in May. We were hoping to take a full report to Council at the end of June (that is, in fact, what ultimately transpired). There were still issues outstanding in May regarding the whole agreement about price, scope and programming, design consents and related matters. We also had to review the Business Case as had

been requested in December. We were taking to the Council in May the issues that the Council needed to make a decision on there and then to make sure progress on the project was not delayed. We wanted to get as full a picture as possible before we could take the overall position back to the Council. We knew it was going to be a very difficult report for the Council to deal with. We didn't want to go back with a less than fully developed proposal. That's why we asked the Councillors to be patient and wait for the full picture. We were also at that stage still in discussion with Transport Scotland and the Government on some of the funding issues and following-up whether we could get some assistance in relation to that. The fact that it was a proposal for incremental delivery (we were only going to York Place now) meant that we needed a formal variation to the contract. Technically the Council were seeking to vary the contract as a result of not having enough money for the full line. The legal conditions surrounding that variation hadn't been agreed at the time of the May report. We wanted that legally tied-up before we brought the proposal to Council.

296. It was important to ensure the report was properly formulated and the end of June date allowed us to do that. Officials required to tie up a lot of issues so that the wording of the conditions to the variation were formally agreed. We wanted the scope, and all other issues, to be formally agreed with the contractor before the Council was asked to make the decision whether the line only went to York Place or not. As it turned out the debate wasn't about that, it was about whether we should only go to Haymarket or not.

297. At a meeting between myself, Sue Bruce, Mr Swinney and Mr Neill held on 21 June 2011 we discussed the outcome of the mediation. It was really a bit of a heads up for the Ministers in terms of the Council report and how things were being viewed within the Council. It was, again, agreed there was a requirement to complete at least part of the project and have some kind of asset at the end of it. We were also looking for feedback on what the position was with the Scottish Government grant. We didn't want to be in breach of the conditions of the grant. I think we got an indication that the Scottish Government wouldn't be seeking to add to the difficulties of the Council by asking for repayment of the grant.

298. We advised the Council on 30 June 2011 of the options for the tram project in a report by the Director of City Development (CEC02044271). The report recommended that the Council complete the line from the airport to St Andrew Square/York place at an estimated cost of between £725m and £773m, depending on the risk allowance. The estimated cost in the Final Business Case was not as much as £545m, it was £508m. It was an extremely regrettable outcome that the cost had risen by so much. But by this stage, it was essential that we finished up with some kind of asset that was capable of generating revenue surpluses for the future. The whole issue turned on the contract conditions, the inability to force the contractor to carry out works and the lack of clarity about which party was responsible for the costs arising from the November 2007 design to final design.
299. The Council's increased contribution from £45m in the Final Business Case to between £225m and £273m was again, an extremely regrettable outcome. Although that was affordable the extra contribution represented opportunity costs in relation to other Council services. Resources now being deployed on the tram project could have been deployed elsewhere.
300. We were able to fund the Council's increased contribution through headroom in the long-term financial plan and revenue surpluses from the TEL business plan plus further prudential borrowing by the Council. That was all detailed in the August 2011 report.
301. The project was now in a position where the Benefits Cost Ratio (BCR) was less than one. If we had been in that position at the appraisal stage the project probably would not have been granted national funding. In terms of the further investment that was being proposed in June 2011 stage and the August report, the STAG appraisal guidance indicates that you should ignore sunk costs to determine if the further investment was required or represented a good investment (para 3.61 of the report). The further investment, at that time, for completing the line to York Place was something like £185m. Although the overall project would finish with something less than one in terms of BCR the extra money to be invested resulted in a proposed marginal BCR of 2.21. That

showed that the final investment in relation to the additional expenditure required to deliver an asset was justified. However, overall, the project in BCR terms would not be regarded as value for money. I am not aware whether the Council has gone back and measured all the project benefits in the Business Case (eg projected benefits from reductions in pollution) now that the costs are all known and tram operations are underway.

302. On 25 August 2011 the Council were given a further update (TRS00011725). The report notes that Faithful and Gould had worked with Council officers in validating the base budget for the proposed works. Faithful and Gould were appointed after my retirement on 30 June. I am assuming that Faithful and Gould were instructed to provide additional evaluation of the risks associated with the section from Haymarket to York Place because it says that in the report. By this time Council members were understandably very risk averse. They wanted, again, someone who hadn't been involved in preparing any of the costs at any stage of the process to come back with an assessment of the future risk.
303. Prudential Borrowing was introduced in 2004 by the Scottish Government. Prior to that the total borrowing that a Council could undertake was capped. When the Prudential borrowing regime was brought in there was a Code of Practice put in place. That Code of Practice meant that Councils would be able to borrow further sums (for capital purposes only) as long as they were affordable and as long as they were undertaken in terms of the Code. Councils have never been able to borrow for revenue purposes (unlike national Governments in London and now in Holyrood). The Code provided for the calculation of Prudential Indicators or ratios which required to be considered before further borrowing was authorised. For example the debt charges that the Council would be liable to pay over a period of time as a percentage of their total net expenditure; or the debt charges expressed as an impact of the Council Tax for a particular area. There was also a requirement to set borrowing within a Longer Term Financial Plan. That was to make sure the borrowing was affordable but also to make sure it sat within and contributed to the strategic objectives of the Council. Prudential Borrowing opened up a lot of opportunities for Councils. A good example is office rationalisation. In Edinburgh we gave up maybe four or five

different offices and consolidated the staff. Doing this enabled us to make staff savings which enabled us to use those savings to pay debt charges for the costs of new offices. Another bonus was that we didn't need to pay on-going rent for the offices that we vacated. Another example for Edinburgh was the Council Headquarters. The property was constructed for the Council on a leasehold basis. Under the Prudential Borrowing regime we were able to buy out the lease and make significant savings of over £10m a year on the previous rental costs..

304. In basic terms, if the Council could save £1m or find a £1m of revenue resources, that would allow the Council to secure (at interest rates pertaining at that time) over £15m of capital. So £15m of revenue multiplied up secures about £225m of capital. These revenue costs represent annual capital and interest repayments. The £15.3m revenue charge contained in the August 2011 report represented the capital and the interest repayments over a, possibly, 30 year period for infrastructure.

305. The cost of the additional borrowing wouldn't be shown in the 2010/11 Council accounts because such costs are only shown in the Accounts after they have been incurred. The capital expenditure for the tram works would be incurred in 2011/12 and 2012/13 and would have been shown in the capital account for those years. The revenue costs depend on the level of actual interest rates at the time the funds are borrowed. All borrowing costs across all Council activity are charged through a loans pool and they are spread out over the accounts of the Council in relation to all the past Council projects that have not yet been fully written off and thus retain a level of outstanding debt. There will be a figure in the Council revenue account that represents the borrowing cost and the revenue costs of the tram project over an agreed period of years (probably 30).

306. I retired from the Council on 30 June 2011 at the conclusion of the Council meeting (which was about 11.15 pm). It was a planned retirement. I had given the Chief Executive notice two or three years before that I had planned to go when I was 60. I was 60 in the December of 2010 and I would have had 40 years Local Government service. I would have had 40 years' service by the summer of 2011. That was when I was planning to go. I had given advance

notice because the Chief Executive was a very similar age, as was the Director of Corporate Services. I felt there may be an issue for the Council in terms of three senior officials potentially, leaving at the same time. It wasn't a huge issue, it was just something that had to be managed. I was planning to leave in the May, but given what happened with the mediation and the fact that we were reporting back to the Council in the June, I discussed the matter with Sue Bruce and we agreed that I would stay on until the date of the June Council meeting on the tram.

COSTS, FUNDING AND ACCOUNTING

307. For Local Authority Accounts there was and is a legal framework and regulations that are issued by the Government. There is a document called LASAP (Local Authority Statement of Accounting Practice). CEC were also covered by accounting regulations, Standard Statements of Accounting Practice and overseen by a formal audit through Audit Scotland. Local authorities are required to account for revenue expenditure on an accruals basis. This means that you take into account expenditure for services provided during the period of the financial year even though they might have been paid later e.g. to suppliers. The Accounts were prepared on an accruals basis to ensure the expenditure and income reflected the activity during that time period. There was a limit on the amount that authorities could spend on capital which was set by the Government. As mentioned previously this was replaced in 2004 with a different regime of capital grants and the Prudential Framework.

308. I was the Officer in terms of Section 95 of the Local Government Act 1973. That section indicates that local authorities should make arrangements for the proper administration of their financial affairs and shall ensure that one of their officers has responsibility for their administration of those affairs. There is a guidance paper which sets out the role of the Chief Financial Officer in Local Government. I have supplied a copy of that to the Inquiry (WED00000011). It contains five principles. Principle 3 states that the Chief Financial Officer "*must lead the promotion and delivery by the whole authority of good financial management so that public money is safeguarded at all times and used appropriately,*

economically, efficiently and effectively". In other words the role involved leading the whole authority. I am asked in the question whether I had the "ultimate responsibility" for such matters. I saw my responsibility as a leadership role, dependent on support from others at many levels of the Council. .

309. In relation to the specific question posed I have been asked if I had difficulties with this responsibility in relation to the Tram Project. There were challenges relating to this responsibility with every aspect of the job of Finance Director.. This was the case both before and after the Tram Project started and TIE was created. In such a large and diverse organisation as the Council one person is not expected to do everything him or herself. You work with colleagues, partner organisations, council companies (like TIE) and the Government. You aim to promote staff development, systems development, risk management, Treasury management and long term financial plans. Council companies brought benefits to the Council and to the City of Edinburgh but they also created tensions in terms of the relationships. I was satisfied that TIE was properly resourced and had the correct governance arrangements put in place when it was established and throughout its existence. The governance arrangements were reviewed and changed over time to ensure that TIE could properly fulfil their obligations to the Council. TIE did not add in any material way to the responsibilities and difficulties involved in my job although, clearly, the project disputes were extremely complex and took up increasing amounts of my time.

310. TIE were required to submit monthly financial returns to the Council. The Council claimed 91% of those sums from Transport Scotland who acted for the Scottish Government in the process. Projected financial profiles were submitted in advance to Transport Scotland. Transport Scotland were provided with the estimates for the year and the period for the construction of the tram project. They were provided with this information in order to assist them with resource planning and expenditure profiling. Discussions were further held with Transport Scotland at the quarterly reviews about the profile of expenditure that we were expecting. CEC accounted for capital expenditure on the project in the year in which the capital expenditure was incurred. This was accounted for in each set of annual accounts. The expenditure would be offset by entries against capital

income i.e. the 91% we had received back from the Scottish Government through Transport Scotland.

311. Technically, the conditions of the grant had to be satisfied at the time of approval and acceptance of the grant. At that time we were not in breach of any conditions. As time went on then the eventual outcome of the project was not in line with the initial grant conditions. Examples of this were the Benefits Cost Ratio being greater than 1 and that we should build a tram from the airport to Ocean Terminal. Ultimately, these conditions didn't apply after the actual formal approval of the grant. There were provisions that may have allowed the Government to claim the grant back from the Council because we were in breach. However, the position was resolved after holding discussions with the Scottish Government and Transport Scotland. Those discussions took place during the mediation process and beyond.

312. There was detail contained in the December 2007 Business Case which showed the estimated capital cost of phase 1a as £498 million. That figure was based on consultant engineering reports, benchmarking and TIE input based on actual tender returns and prices. There was also the Cyril Sweett independent costing that was undertaken on behalf of Transport Scotland. Outside reviews described TIE as having a well-developed risk management process. Additional sums were added for land, TIE costs, costs of Council staff and legal fees. This was all detailed in the papers. I understand that the papers are in the public domain.

313. CEC reviewed the Business Cases and the estimates for capital and for revenue implications to ensure, as far as possible, that the process for arriving at the costs had been properly undertaken and was robust. CEC didn't seek to duplicate TIE effort. CEC didn't appoint our own consultant engineers because it was considered that TIE interests were 100% aligned with Council. It is also worth noting that, in any course, Transport Scotland had commissioned an independent view of the engineering estimates and there were independent reviews of the project arrangements by the Auditor General and the OGC.

314. The Council contribution of £45 million was set out in a report in January 2006 (CEC02083547). This was subsequently reviewed twice by consultants and was confirmed to be realistic and achievable. The detail for this is set out in the January 2006 report. There was cash worth £2.5 million, land worth £6.5 million, developers' contributions worth something in nature of £10.2 million, developers' contribution of land worth £7.9 million, capital receipts (again from developments) worth £5 million and developer gains and other capital receipts worth £12.9 million.

315. The profile of CEC's contribution changed over time. This was due to a number of variables. One was that the economic conditions post-2008 meant that the land in the Council's ownership was worth less. The economic conditions also meant that there was less likelihood of developer contributions. That said, ultimately we were allowed to anticipate developers' contributions for a period of 10 years from the construction of the tramline and borrow against that. £17.6 million had been achieved by June 2011. By the time that I left the Council it was still considered possible to reach the £45m over that 10 year period to come. An example of a development that might be asked to make a contribution at that time was the proposed renovation of the St James Centre. That development is only just happening now. I don't know whether they were required to make any contribution or not.

316. Headroom in the Council's long term Financial Plan arose from the opportunity to re-finance previous debt that had been incurred by the Council. That was due to be fully repaid over future periods. We were able, because of reduced interest rates, to replace the previous debt carrying higher levels of interest with borrowing at more competitive rates. That provided the headroom in the Long Term Financial Plan. In 2011 there was the prospect of Scottish Government grant changes since the way in which revenue grants for councils were calculated were also being reviewed. The change in the Scottish Government national revenue grant arrangement for local authorities was very favourable to both Aberdeen and to Edinburgh. In short, the proposal was to build in a floor to ensure that every council would get at least 85% of the average revenue grant for the whole of Scotland per head of population. Edinburgh traditionally got a

low grant per head because 25% of the pupils in the secondary sector in Edinburgh were education in private schools. CEC therefore didn't get the money to educate those pupils under the previous grant system which meant that our grant was relatively low. The surpluses that were to arise from the running of the tram were also to be reinvested into paying for the shortfall on the capital side. There were discussions with the Scottish Futures Trust to see if they could assist but I don't think that those discussions came to anything. It was also hoped at that stage that the excess trams could be sold but I understand that subsequently proved not to be possible. In summary, a combination of the headroom created through borrowing cost savings and the additional Scottish Government grant supplemented our Long Term Financial Plan. The revenue resources were converted into capital through the workings of the Prudential Framework.

317. As outlined earlier and in relation to the specific questions around accounting for the project the capital expenditure in total terms would be shown on the capital account as expenditure net of any income from Government grant. The Council borrowed for the additional resource required and would incur debt charges on the £231m additional borrowing. The cost of that amounts to approximately £15m per annum in revenue terms. Those costs would be shown in the loans fund accounts and then allocated out over the different services of the Council and find its way back to City Development account as a revenue charge. It would only be included as loan charges in the revenue account once the borrowing had been undertaken.

318. The costs as forecast, including £17m in promoting the Parliamentary Bills, at that time were reported to Council in the December 2007 Final Business Case (CEC00373384).

ANNUAL ACCOUNTS

319. I have been asked to outline how income and expenditure related to the Tram project and TIE are included in the Council accounts for 2008/09. Income and expenditure for the Tram Project and TIE are in various sections of the account

for 2008/09. Costs of the project up to 31 March 2009 were charged to the capital expenditure account and offset by capital income from Government grant. *Revenue expenditure* on TIE is zero. That is because all TIE costs were already re-charged to the tram project and classified as capital.

320. *Contingent liabilities*. This wording in the accounts was agreed with the external auditor, Audit Scotland. By this time, there was at the very least a possibility that there would be a further financial impact on the Council thus creating a contingent liability. There was correspondence with one member of the public who was insisting that it should be a provision. We agreed the correct accounting treatment with Audit Scotland at that time so I was comfortable with that.

321. The CEC Accounts for 2009/10 mention slippage. This was the term used when actual expenditure on a capital project turned out less than that had been previously budgeted for that project in that year. The capital controls in the budget were on the absolute total of the spend i.e. a global sum. This constituted the amount receivable from capital grants from the Scottish Government plus any sums from the Prudential Framework, if CEC decided that in advance, and also any capital receipts that we generated within the year. That global sum was the control total for capital expenditure for the authority. The tram was outwith that arrangement and the grant for the tram was ring fenced. The expenditure was separate in every way. However, for the Accounts project costs were consolidated and included in a way that any other project would have been. So in 2009/10, because of the economic downturn in 2008, the capital receipts that the Council were able to generate were much less than previously estimated. This was partly because assets we did sell were lower in value than they would have been but more so because the Council decided not to sell assets at the bottom of the downturn. To stay within these overall reduced limits, expenditure had to be constrained on all the other projects for the Council e.g. the capital expenditure for schools, libraries and sport centres had to stay within or below that which had previously been budgeted. Within any 12 month period in Local Government estimated expenditure and actual capital expenditure on individual projects rarely matches. CEC reviewed all capital

projects on a monthly basis throughout the year. This review identified that projects weren't spending up to budget. The Council said to Directors where that was the case was don't try and accelerate projects to bring them back to budget, it would suit the Council in overall terms if they could keep that slippage to match the reduction in the estimate for capital receipts. The slippage in the tram project didn't contribute. It didn't contribute to that issue because it was ring-fenced out with these arrangements.

322. In terms of the CEC's annual accounts for 2010/11 showing an estimated pension deficit for TIE of £4.632m any such sum should have been charged to the project once it had actually materialised. Clearly this would not have been anticipated in the 2007 Business Case.

323. TIE's annual accounts were approved by the TIE Board and they were subject to external audit. They were then consolidated into the CEC Group Account by the Council and were approved as part of that by a Council meeting. Council members were involved in approving TIE's accounts to the extent that a number of Council members were members of the TIE Board. They were actually approving accounts as members of the TIE Board and not as members of the Council. All members of the Council got 104 pages of the CEC Annual Accounts to approve at a Council meeting. Technically they approved the TIE accounts as part of the Council Group Accounts.

324. A discussion paper in 2008 entitled CEC Resources and Funding, (CEC01053743) described recharging of salaries. To explain how this worked, if staff members remained employed by CEC then there would be no change to their remuneration. If they were seconded to TIE then TIE would be responsible for their remuneration. If they were employed by TIE, after being employed by the Council, then TIE would be responsible for their remuneration.

325. In each of these different situations costs were re-charged to TIE. Council staff working on the tram project were working in a number of different areas. If they were working for the Council in terms of the exercise to review the Business Cases then they weren't re-charged to TIE (as that was the Council activity). If

they were still employed by the Council but they were working on the actual capital construction project, then they would have been re-charged to TIE. Legal staff had a number of tasks to do. Because of this there was a re-charge to TIE for the costs of those staff. That money was used to recruit two other solicitors so that certain solicitors could work on aspects related to the capital project. If the individual was adding value to the capital project then they should have been chargeable to TIE. Estimated costs for all such re-charges would have been included in the cost of the project and the Business Cases.

326. I am unable to answer any questions on particular entries in TIE's annual accounts. They should be directed to the former TIE Director of Finance.

TIE

GENERAL

327. I regarded TIE as a well-resourced organisation with strong governance arrangements and a Board and Executives with proven capability and experience. I was satisfied with the qualifications and experience of their Director of Finance. That was something that we looked at from my viewpoint. I was aware during the pre-contract stage there was turnover in the position of Project Director. However, given the nature of the role and the fact that some of the Project Directors still had their families in England it was perhaps understandable. It is also worth stating that some TIE staff were specialists in procurement and as a result, when TIE moved past the procurement period, they inevitably moved on.

328. As outlined above unease did arise in relation to TIE's management of the MUDFA works and also, particularly, in and around the site supervision on Princes Street subsequent to the revised commercial agreement. The contractor only agreed to go into Princes Street on a demonstrable cost basis. Because of that we required intensive site supervision to make sure that the contractor was working effectively. Clearly Princes Street was it was not a success given the way the contractor carried out the works and the subsequent cost. During the latter stages of the Dispute Resolution process, when we were beginning to see

the different legal opinions coming from Counsel, CEC officials lost confidence the ability of TIE to take the project through to conclusion. However, by that time a large part of the damage had been done.

329. I don't think it's appropriate for me to comment about individual employees at TIE. I can say that, at the start of the process, I was confident that they were of a capability and quality that could provide the Council with comfort that the project could deliver successfully.

330. There was an Annual Business Plan for TIE which was reviewed through the company Monitoring Officer (an officer in City Development) and subsequently reported to Council. TIE shared information and updates through meetings, joint working with officers (some officers were co-located in TIE's offices), monthly progress reports (which were also submitted to Transport Scotland), meetings of the TPB, sub-committees and convened ad hoc meetings. TIE personnel were also involved in joint briefing with Council members during all stages of the project.

331. I had no doubts about TIE's reporting to the Council prior to Contract Close. These doubts started to emerge really in relation to the progress on the utility works and supervision of the Princes Street works. Much of the information provided by TIE was based on information from consultant engineers and independent legal advisors.. TIE commissioned the work on behalf of the Council. A lot of the base information came from those type of firms e.g. Arup, Cyril Sweett, DTZ Pineda. The revenue fare box income input came from the JRC Modelling and Lothian Buses staff. The information was validated through those companies and bodies. City Development staff would further look at the information and provide their input. There were also Council reviews of the Business Case. We benchmarked the information against other schemes. There was also an external audit of TIE's accounts, Transport Scotland quarterly reviews, the Audit Scotland review, the OGC Gateway reviews, the Parliamentary review (Parliament spent 2¼ years looking at the project before the Bills became an Act) and we had numerous legal and external cost consultants undertaking strategic and operational reviews. CEC also took

comfort that Transport Scotland had reviewed the scheme and had agreed to recommend to the Minister that they make the grant approval of £375m. That was then indexed up to £500m. There were a lot of external and independent reviews throughout the life of the project.

332. The TIE Business Plan for 2004 and 2005 (CEC02083576) was based on TIE assisting with Road User Charging, West Edinburgh Busway Scheme, tramlines 1, 2 and 3, Ingliston Park and Ride and the Edinburgh Airport Rail Link (EARL). TIE were responsible for the travel ticket scheme providing a travel ticket throughout the SESTRAN area. TIE also worked with Transport Scotland and Clackmannanshire Council to project manage the delivery of the Stirling-Alloa-Kinross railway (SAK) and Fife Council and others to develop proposals for across Forth passenger ferry. Most of these projects had fallen off the agenda by the time we came to the nitty gritty of the tram project. The Business Plan reflected that workload. The company was well resourced. I am not aware of any other Council project that had the same level of resources allocated in relation to workloads. It was initially foreseen that TIE would be involved in the planning, procurement, delivery and the operations of these projects and anticipated their role would evolve as projects were rolled out.

333. TIE were also involved with the Forth Road Bridge in terms of their electronic tolling. That was later cancelled because the Scottish Government abolished the tolls after FETA had spent considerable sums of money developing the proposal.

334. I cannot recollect any real consideration being given by the Council to winding up TIE. It had previously been indicated by the OGC that the people who were running the project should be those involved in the procurement since they had more detailed knowledge. That was the reason for TIE continuing to see the project through. It also has to be said that, at the time, Council resources were extremely limited. The pay comparability had also become even more significant. CEC were in the midst of defending hundreds, if not thousands, of equal pay claims from elements of the workforce that were predominantly female. To begin to bring the consultant engineers at TIE into direct employment

with the Council would have been highly difficult in relation to existing CEC salary structures and may have exacerbated our difficulties in this respect.

335. There is a question as to whether we had enough resource at the Council to work with an external team of project managers instead of through TIE. I would have had doubts about that if it had been put to me. We knew that we were entering into a very complex contract in a very complex scheme. TIE was well resourced and had been involved throughout the history of the project. Taking the project in-house would have resulted in some very different risks. Given the core of the dispute related to legal issues at the heart of the contract it is arguable whether a different project management model would have resulted in a better outcome.

336. It could perhaps be said that TIE was a different organisation under a different Chief Executive at the time there were concerns raised about the project management of SAK. TIE's response to these claims was that TIE had been unfairly allocated the blame for that project. At that time, I had no concerns about TIE's ability to manage the Edinburgh Tram Project. They were a different body by that time.

337. TIE produced a primary risk register which they shared with the Council. External reviews indicated that TIE was probably at the leading edge of risk management for project delivery at that time. TIE's approach to risk management was commented upon favourably by both Audit Scotland and the OGC. The register was fit for purpose.

338. The register was a key input into the Business Plan and the estimates of the overall costs of the project. It was looked on as part of the Business Plan reviews. Council officers were involved with monthly reviews of the risk register.

339. The risks identified in the risk register were properly allocated as somebody's responsibility i.e. allocated for mitigation or closing out the risk etc. Some of the risks had to be carried. For those we held a financial sum against them. It was recognised that some of the risks required to be carried. Holding a financial sum

against them was dependent on the element of risk and the assessment of what could be done to minimise it or mitigate that risk.

340. The responsibilities for each risk were allocated. Progress should have been reviewed by TIE executives. There was reporting on the risks to the TPB as well. Mostly it was TIE people who were responsible for taking steps to avoid or reduce the risks. However, the approvals risk lay with the Council.

341. More generally the wholly owned local authority companies were capable of providing a greater focus on limited and specific specialist areas. They were able to have commercial freedom in relation to the recruitment and retention of staff where the Council might have had issues because of market rates and scarce resources. No doubt tensions did arise where company and Council interests were perceived to be different. Managing these conflicts was an onerous task for some of the companies. An example of where tensions occurred is when CEC required to raise resources to meet the single status or equal pay claims. CEC were trying to ensure that one of our companies released the property assets they held for disposal. The company felt that that it wasn't the best time and in their interest to release the assets. However, the Council needed the dividend. All of these issues had to be managed.

342. With regards to commenting on CEC's control of TIE when compared to other wholly owned Council companies: Lothian Buses had statutory differences in terms of how it was set up because it was introduced under legislation that the Conservative Government had introduced in the 70s and 80s. There were no local authority officers / members on the Board of Lothian Buses. That was a difference to TIE. In general, however, all the other Council companies generally initially had a mixture of private sector and local authority officers / members on the Board. Later it became the position that officers shouldn't be on the Boards and at that point it became just private sector and elected members. Members sometimes had a conflict of interest because often they had legally to act in the interests of the company (rather than the Council). We did have some difficulty managing that issue. CEC really tried to look at each company's framework and each company individually to see what was the best balance between the private

and the Council representatives on each of their Boards. Edinburgh Leisure, for example, required to have an independent chair and a non-Council majority of Directors because they were claiming rates relief, VAT relief and had charitable status. However, other companies, like the Edinburgh International Conference Centre (EICC), did have a Council majority. TIE was one of the simpler frameworks. That said, they had very strong independent Board members with robust governance arrangements. I am not certain but I believe that there was a majority of private sector Directors on the Board. We required all Council companies to adopt the Governance Code to ensure proper governance eg the Cadbury Report. The companies required to have the proper set up of committees, remuneration committees and audit committees etc. There were a set of requirements for all of the companies with individual tailoring where required for specific purposes.

343. There were a limited number of issues surrounding TIE operating alone when compared to other companies owned by the Council. TIE operated as part of a joint venture in conjunction with TEL. Also, the position of TIE was that they had no assets to borrow money against. No party would have lent TIE money to build a tram. The PFI option had been discounted because of the levels of risk to fare box income. An example of another option was the Gyle development. The Council provided the land and the private sector provided the development cash. That wasn't the case with TIE.

344. Some joint ventures worked well e.g. the EDI Group Ltd who were a property development company which the Council owned. The Council entered into a number of joint ventures with them. Some of them did not work so well. This was partly because of the changing economic environment. Because of this, the Gyle model was not capable of being adapted to build a tram.

BONUS PAYMENTS

345. The Report to Council dated 26 June 2003 (CEC02083550) noted that a performance related bonus scheme had been introduced for TIE staff. The scheme was primarily a matter for the Remuneration Committee and the Board

of TIE. From the Council's viewpoint, it was created because of commercial considerations, linked to the ability to recruit / retain staff with key skills / abilities and allow incentivisation of performance. I don't think the bonus scheme applied to staff seconded from the Council. It wouldn't have applied to the consultants and consulting firms which were brought in. I don't recall the detail of how the bonus scheme operated.

346. There was an Operating Agreement between the Council and TIE (CEC00478603). That did not mention bonuses. Supervision and oversight of payment of bonuses went through the company Monitoring Officer and through the approval of the annual Business Plan which was submitted to Council in June 2003. Control was an issue for the TIE Board and their Remuneration Committee.

347. I was aware that there was a bonus scheme. The figure for a particular year was included in TIE's Business Plan. It showed that there was an increase in staff costs of £68,000 for 2003/04. I was aware of the figures in total terms. I was not aware of the scheme's detailed operation i.e. what was paid to individuals.

348. I understood the requirement for bonus schemes was to take into account recruitment, retention and incentivisation issues. TIE were competing with the private sector for people with particular skill sets and so they had to likewise offer packages which included an incentivisation of performance element. Generally, I understood there was to be a clear requirement to link bonuses with clearly defined and challenging performance targets. The detail of that was for TIE to determine. The Council set out basic pay grades for the Chair and Chief Executive. Below that the pay of all the other executives in the company was a matter for TIE to properly determine. TIE could, if they wanted, consult with the Council on these issues but it really was a matter for them. It was a different marketplace. I recall the TIE Finance Director had a salary which was higher than mine. This wasn't an issue that I was concerned about. Latterly within the Council we attempted to review bonus schemes across all the companies. The commercial considerations varied from company to company. The statutory positions varied too e.g. as I mentioned earlier Lothian Buses was in a different

position. At official level there was consultation with the companies in an attempt to gain a more standardised approach to bonus schemes. This was possibly in an effort to exercise more control. I don't remember that piece of work ever being brought to fruition. CEC's internal HR resource was heavily stretched at that time because of the issue in relation to equal pay claims.

349. I didn't have any issues in relation to the bonus scheme at the time. In hindsight, there might have been the possibility for individuals to have had conflicts of interest, however, I'm clear that TIE, as an organisation, were required to act in the interests of the Council. That should have been at the heart of their performance targets and their control of the bonus scheme. TIE as an organisation, to my mind, had an obligation to make sure that individuals were paid bonuses in a manner that aligned with the Council's interests.

350. In a report to Council dated 29 April 2004 (CEC02083576) Andrew Holmes reported that TIE proposed several efficiency savings including a reduction in the budgeted staff bonus level. As part of the overall budget constraints, all areas of Council expenditure and the Council family were asked to examine their activities in order to find efficiency savings. That included all the companies who were in receipt of Council grant. We were also consulting with the companies that weren't in receipt of a Council grant and reviewing for bigger dividend returns. This was simply to assist with contributing to the overall financial reductions that the Council were facing. I don't think there was anything specific to TIE in this regard. There wasn't a specific concern about TIE. We were simply looking across the whole Council to identify savings that wouldn't impact on service levels. The process was undertaken to help the Council's overall financial position. I can't remember if there was a reduction in the TIE bonuses. If TIE proposed this then I think it would have been agreed. The TIE Business Plan was approved every year at Council. It would have been possible to track the total amount of bonuses planned for each year and I've no recollection of whether this was a one off or not.

351. I note the Operating Agreement dated 12 May 2008 (CEC01315172) and the emails from Nick Smith dated 19 November and 10 December (CEC00013392)

providing his commentary of December 2007. Nick Smith's emails came during the run up to May 2008. I was under significant work pressures across a whole range of issues. I didn't get involved in the detail of the operating agreements or the detail of the governance arrangements. I relied on colleagues within the Council to make sure this was addressed properly. I am not sure that I read the December commentary. I was content with the final draft of the Operating Agreement which was submitted to Council. I don't think I was involved in the detailed discussions that led up to that.

352. I was content that in the final draft TIE Incentivisation Agreements were aligned with appropriate project milestones. I'm not sure who ultimately decided it was sufficient for the operating agreement to contain the requirement. However, I do think Council Members approved the final draft.

353. I note the tram governance report dated 23 October 2008 prepared by Alan Coyle (CEC01053689). This report set out the governance arrangements. It states that the TIE Board would retain its audit and remuneration committees and that membership was restricted to non-Executive Directors. I would agree with the comments in the report that we required the Council companies to adopt a high standard of corporate governance. That certainly is in the codes that were in operation at that time. This identified an issue that needed to be resolved. It should have been picked up before the Business Plan was approved by Council.

354. I note the email dated 26 May 2009 (CEC00880015) where David Mackay advised Tom Aitchison of proposed bonus payments to TIE staff and the email dated 16 July 2009 (CEC00665646) where David Anderson circulated a second draft of a proposed report to Council on 20 August 2009. I note that the draft report (CEC00665647) included a section dealing with proposed new bonus arrangements to give the Council "*proper oversight and control of any bonus payments*". I note the letter dated 20 July 2009 (TIE00317803) where David Mackay raises certain concerns in relation to the draft report to Council and the email correspondence from David MacKay requesting that the whole section on pay and performance be deleted from the report (CEC00823532). I note that the

Mackay should
be Anderson
CEC00823532
should be
CEC00698019

final version to the report to Council dated 20 August 2009 (CEC00823532) did not include reference to bonus payments to TIE staff. I have no idea why the reference to bonus payments to TIE staff was deleted from the final version. On the topic of whether it was appropriate to pay the bonuses, I think there were contractual commitments in place. I could see hypothetical circumstances where the project would be in significant difficulties and TIE staff could be incentivised to get us out of that difficulty. Incentivisation through bonuses made sense in this regard. It wouldn't make sense to pay bonus payments to people for non-performance. If individuals weren't achieving the milestones indicated in the bonus scheme then they shouldn't be getting bonus payments.

355. I refer to the email dated 30 April 2010 from Nick Smith (CEC00245931). He notes that under the TEL operating agreement the question of bonuses for TIE staff required to be agreed by the TEL Board through its Remuneration Committee. I do not recall when and why the requirements in that email were introduced.

356. A new regulation was brought in that meant, for CEC's annual accounts for 2010/11, there was a requirement to include a remuneration report. We were required to present information on the remuneration of senior elected members and senior officers within the Council alongside the most senior employees within each of the Council's subsidiary companies.

GOVERNANCE

GENERAL

357. I would say that TIE were set up with high standards of internal governance. They were well resourced. They had high quality executives and independent non-executive Board members. TIE's governance structures / TIE itself was reviewed continuously over this period. The Council, Transport Scotland, Parliament and Audit Scotland were all satisfied with TIE's structure and governance arrangements. Initially TIE were working in partnership with Transport Scotland. Later on in the project they were working together with TEL.

TEL was required as part of the integration of future tram and bus operations. They were also required to assist with the revenue projections and risk management associated with the business plan. The creation of TEL could be said to have added a layer of complexity to the governance arrangements. Significant resource needed to be devoted to the on-going review and development of governance arrangements through the life of the project. This was done to ensure that the organisations could work together in the best interests of the Council. Transport Scotland's role in the project changed in May 2007.

358. The roles and responsibilities of TIE and TEL were clearly set out. Inevitably there was a degree of overlap of roles. Ultimately the governance arrangements in my view resulted in too many people sitting round a table for decision-making. There were conflicts of interest that arose. Audit Scotland pointed that out in their second review. There was an issue of commercial confidentiality. This affected elected members and perhaps some officials. Elected members were put in a position where they were privy to confidential information that they couldn't share with their own political colleagues. They were put in the position where they couldn't even share information with their own political group leaders.

359. It is true that people were sitting on more than one board. I was on the TPB. As part of my responsibilities on that Board I was trying to safeguard the Council's interest but I was also working to ensure that the project was delivered. In the vast majority of instances there wasn't a conflict of interest. However, there were issues surrounding traffic management arrangements and the impacts on the local community. There were tensions between getting the project completed expeditiously and the perceived wider interests of the residents of Edinburgh. There were therefore conflicts between the wider interests of the residents of Edinburgh and the narrower interests of the project as a whole. The Tram Monitoring Officer's role was to supervise TIE and make sure that they were working properly. He was also there to take an active part in discussions about how we could move the project forward. There was a commonality of interest 99% of the time. Inevitably there were some conflicts at the edges.

360. I think the governance structures allowed CEC officials and members' a proper oversight of the project. TIE's core purpose was the control and delivery of the project on behalf of CEC. If CEC sought to control the project then the purpose of TIE would be redundant.

361. TIE was the body responsible for ensuring that the tram project was delivered on time and within budget. That's why they were set up. That goes for not just that project but for the whole of the NTI i.e. all the projects within it. TIE latterly effectively became a one project company. The governance structures were, of course, examined by Audit Scotland in the summer of 2007. That audit was instructed by the new Scottish Government.

CEC

362. The Council ensured that TIE was properly resourced and that TIE had appropriate internal governance arrangements. The Operating Agreements set out TIE's obligations to the Council. The Council reviewed the TIE Annual Business Plans and the Project Business Case at each milestone. There was continuous engagement with TIE and its legal advisors both pre and post contract close. The Council was represented on the TPB and the TIE Board. The Council undertook reviews of the scrutiny reports from the OGC, Audit Scotland and Transport Scotland with Cyrill Sweett. The Council was involved in promoting the scheme through the Parliamentary approval process for a period of some 2½ years. That process resulted in the Parliamentary Acts. There was a formal process of audit and approval of TIE's accounts by an independent external auditor each year. This was also undertaken by the TIE Board. There was on-going oversight of TIE through mechanisms set out in the formally agreed Operating Agreements. This was delivered through the Company Monitoring Officer and, subsequently, the Tram Monitoring Officer. This was designed to ensure that public money was safeguarded, properly accounted for and used economically, efficiently, effectively and ethically.

363. The Council reviewed TIE's arrangements for managing risk. The Council satisfied itself with TIE's approach. TIE was subsequently commended for their

risk management processes both by the OGC and by Audit Scotland. In addition to that, Council staff were involved in risk workshops and Council staff participated in the QRA risk review on a monthly basis. The TPB also reviewed the risk register monthly. Risk was fully considered as part of the Business Case approval and the Council reports relating to that. When the project was underway the reputational and potential financial risk from the tram project was very close to the top, if not top, of the Council's risk register. Council officers and others worked tirelessly to try and minimise risk and the impact of the disputes that were underway with the contractor.

CEC OFFICERS

364. The Senior Responsible Officer involved in the project management was the Director of City Development. There was a change of Director of City Development around about the contract close period. The Company Monitoring Officer and the Tram Monitoring Officer varied. However, they were always officers within the City Development Department. There were a number of other senior officers closely involved with the project including myself. Those senior officers were drawn, primarily, from City Development, Finance and Legal Services. I was particularly involved with each of the Directors of City Development during the reviews of the Business Cases from December 2007 onwards.

365. I can't remember the actual terms of reference for the Chief Executive's IPG. Initially there were a lot of Council activities that were affected by the tram project e.g. street maintenance activity, parades and events, traffic management issues etc. Part of the remit of the IPG was to try and co-ordinate the Council's response to the fact that we were building a tramline through the City. Later, the IPG's remit became wider. There were discussions about what strategic issues should be covered in terms of Council reports, the progress of the project and actions CEC need to take. There were internal discussions with Council officers at the IPG in the run up to contract close, and throughout the contract, about the issues that were alive at that time, what the Council's view on the issues should be and how the Council should respond to those issues

366. I refer to Mark Turley's email dated 15 June 2010 (CEC00241274). Mark became involved in the IPG because his department was responsible for the local environments and neighbourhood management. His people were doing a lot of work to ameliorate the issues that had been raised by residents and businesses along the tram route. I clearly recognised that Mark didn't have the information that was available to people at the TPB. I sympathised completely with the points he made in his email. He felt he wasn't able to contribute to the work of the group. The conundrum we had is explained by Mark when he says *"if we are serious that the IPG is responsible for budget management then why have we got TIE, why have a dog and bark"*. That certainly strikes a chord with me. I could understand where Mark was coming from. He didn't feel he was able to contribute fully to the group. It is clear that the group were struggling to have any kind of major influence on the progress of the project since that role was the primary responsibility of TIE.

CEC MEMBERS

367. Initially the members were informed through formal reports to Council. The members who were on the TIE Board would get their information via that source. There were members represented on the TEL board and certainly on the TPB. The lead member would be the lead member for Transport. I'm not sure what arrangements the Director of City Development had for briefing the lead member in relation to the tram project. Regular briefings were held with all political groups by Council officers and TIE personnel in advance of the formal consideration of reports at Council meetings. As the difficulties increased with the contractor and the dispute worsened, regular briefings with group leaders and transport spokespersons of all groups were initiated by the Chief Executive of the Council. TIE and Council officers were involved with those briefings. From memory these might even have been held weekly or fortnightly at the height of the dispute and the difficulties. I'm not sure on what basis the Director of City Development briefed the Transport Convener. I would imagine the Chief Executive would have briefed the Council Leader. He met with the Council leader on a two weekly basis for a general business meeting. There would have been a line of communication there. As we got further on with the issues I

briefed the Finance Convener on what the potential financial implications might be.

368. There was an issue with commercial confidentiality and providing information to members. We wanted to provide members with as much information as we possibly could. There were, however, intensive negotiations going on. It was important that we didn't prejudice those in the favour of the contractor and against TIE. TIE, after all, were trying to act on CEC's behalf. Members were updated, as far as possible, of significant developments in the project. Costs for completing the project were subject to volatility and were dependent upon the legal resolution of major issues. Because of this it was difficult to accurately calculate costs at all stages of the process. The issue of commercial confidentiality was real and very significant. Regular and frequent private briefing sessions were brought in for group leaders and transport spokespersons. This was undertaken to help overcome some of the issues around commercial confidentiality. Those were the meetings I refer to earlier that the Council Chief Executive had set up. We could say more in a private meeting than we could in a Council report or in a wider forum. For the later reports, which occurred after the mediation exercise, we established a private data room to allow members access to the detailed information behind the recommendations to the Council. Members gained access to the Council officers who were involved in the day-to-day activity through that i.e. the key Council staff who'd been involved in the project and in the drafting of reports. Members were asked to sign a declaration of confidentiality on an individual basis before they were allowed access to the data room. I think members found that very beneficial.

369. The report to Council dated 20 September 2007 by Tom Aitchison (CEC02083455) discussed revised governance arrangements including the formation of the tram subcommittee. However, that subcommittee was never able to fulfil the remit envisaged due to the route that the project took and the overriding need for commercial confidentiality during the dispute process.

370. In the tram governance report dated 23 October 2008 (CEC01053689) Alan Coyle picked up all the issues in the Operating Agreement which were agreed in May. He tried to make sure that the recommendations were properly implemented. It's perhaps surprising that it was someone from the Finance Department who was leading that work. I would have expected Legal or City Development to do it. I don't think that the issues detailed had a critical impact on the outcome of the Tram Project.

THE TRAM PROJECT BOARD

371. The reason the TPB was created is a matter of record. I would suggest that the September 2007 report from the Chief Executive to the Council outlined why it was created in general terms. It was to improve the governance of the tram project. In particular, it was formed to oversee the physical construction of the tramline by INFRACO. It was also there to prepare for operations and all the issues that had to be dealt with regarding the integration of future bus and tram operations once the project was completed. The powers of the TPB, who it reported to and how things changed are all tracked in official Council documents.

372. My worry regarding the TPB at the time was that there were too many people around the table. This resulted in a disparate agenda. The TPB was trying to ensure delivery of the project but was taken into a lot of other areas e.g. legal issues, public relations, public concerns, traffic management. All of these factors became part of the project. They were an important part of the project for the people of Edinburgh, however, their inclusion resulted in a very disparate agenda. It resulted in meetings being extended meetings so there was time to cover all of the issues. In my view, there were too many stakeholders for optimum project governance.

373. The TPB had responsibility for the management, execution and delivery of the project. However, at strategic level, TIE were also responsible for delivering the project on the ground. TIE of course were well represented at the TPB.

374. I honestly cannot recall fully the remaining role and responsibilities of the TIE and TEL Boards were after the formation of the TPB. These will be a matter of record. TIE and TEL retained responsibility for the proper governance of their own organisations e.g. issues such as executive remuneration. Important issues about the impact on businesses, the construction Code of Practice, trying to organise some kind of relief for business holders, promoting the City Centre while all these works were going on, dealing with the impact on Lothian Buses, the disputes and difficulties with contractors... there were a significant number of issues that had to be addressed whilst retaining a very clear focus on project delivery.

375. I remember my views on Colin MacKenzie's email of 26 September 2007 (CEC01561555) where he set out his concerns about lack of accountability of the TPB to CEC. My issue was the wide ranging agenda at the TPB. The only practical, logical and sensible solution was to set up subcommittees. Colin clearly thought that putting in place a detailed Operating Agreement would make a difference to the delivery of the project. The TEL involvement in the project was to ensure, partly, that project decisions were taken with sustainability in mind. TEL were there also to ensure that the future revenue operations were sustainable. There could also have been tensions between delivering the actual tram line quickly and delivering the tram line at less cost. If changes were going to have a significant impact e.g. on the journey run times or the attractiveness of tram stops all of these things, then these issues needed to be looked at together. That was part of the reason for TEL representation on the TPB. The TPB was perhaps difficult to manage in some respects but I believe the benefits outweighed the downsides. The subcommittees to me were essential, particularly with regards to the commercial confidentiality issue.

376. It wasn't unknown for comments to be made at the TPB and then fresh stories followed in the press. This was because of the very large number of people in the room. There was no dilution of TIE's obligations to the Council for the delivery of the project as a result of the setting up of the subcommittees. I felt that Colin's concerns were, perhaps, misplaced.

377. I note the joint report to Council dated 20 December 2007 (CEC02083448). Andrew Holmes and I sought approval for the proposed new governance arrangements. I can't remember when the TPB was formally constituted as a committee of TEL. I would have expected this to have been done relatively soon after the Council decision. I guess that can be checked as a matter of record. I would say the same for the specific powers and duties formally delegated to the TPB. I have no detailed recollection around this area.

TEL

378. TEL was created to ensure the integration of future tram and bus operations. It was key to delivering the revenue side of the business case. This was critical for the Council. It was one of the main lessons learned from other UK projects that having a lack awareness of the impact on the local transport industry could be very damaging in the long-term. The role, remit, the powers and the reporting of TEL are all a matter of record. My only concern was that TEL's existence resulted in more parties being involved. However, this was more than offset by the fact that TEL increased our confidence with preparing for operations. The Lothian Buses staff on the TEL board, in particular, provided us with the specialised knowledge of the fare box issues needed to review the revenue side of the business case.

379. The Council was a 91% shareholder in Lothian Buses and has ultimately gone on to have a 100% interest in Edinburgh Trams. It made complete sense for these organisations to be operating together in the best interests of the citizens of Edinburgh and the Council. It was far better to have this situation than having both organisations at loggerheads. A corporate structure allowing both companies to come together ensured that the services were integrated. That was the purpose of TEL. Previously at that time Transdev were the preferred operator for the tram. I don't think that gave Lothian Buses any serious concerns although it might have been different if it had been First Group that was the preferred operator. This is because, at that time, Lothian Buses and First Group were in direct competition in the Lothians area. Transdev, as I understood it, were able to co-operate with Lothian Buses. It was intended that they would co-

operate through the TEL structure. I think things became simpler when Transdev withdrew. I think Transdev recognised that it was logical that the major bus operator in the area and the tram operator should be totally integrated.

TRANSPORT SCOTLAND

380. Transport Scotland's role in the governance of the project changed from a partnership role to solely a funder role. Before and after their role changed they received monthly reports and held quarterly review meetings with TIE and Council staff. Laterally, they weren't engaged in the decision-making first hand.
381. I think, with benefit of hindsight, I could say that their changed role may well have had an impact on the delivery of the project. Given their experience of major transport infrastructure projects, I think it's at least possible that they could have made a significant contribution at contract close. They certainly could have made a contribution through the dispute resolution process.
382. Transport Scotland's changed role did not lead to less scrutiny of the estimates provided. They commissioned the Cyrill Sweett review of the capital costs. They presumably took sufficient comfort from that because, ultimately, they recommended to the Minister that the Government should issue the a grant letter confirming that £500m would be allocated to the project. I don't think there was less scrutiny of the estimates and I don't think that there was less scrutiny of the information. CEC did scrutinise the information provided by TIE. There wasn't less scrutiny of the information because Transport Scotland had access to any information that they wanted. As indicated they received monthly and quarterly reports. Following Transport Scotland's changed role they weren't actively engaged on a continuous basis. Their role became more that they were reviewing what the position was rather than being actively involved in determining the position.
383. As I understand it, Transport Scotland received monthly reports. CEC/TIE held quarterly review meetings with Transport Scotland. Full information and likely cost of completing the project was difficult to estimate at various times due to the

nature of the dispute. The dispute meant that cost estimates were dependant on the outcomes or differing legal interpretations of the contract terms. Reports were made available to Transport Scotland of the issues as the dispute was on-going. Commercial confidentiality might have impacted a bit on what was going to be said to Transport Scotland. There wasn't, necessarily, concern about individuals in Transport Scotland. However, we were concerned that they may be reporting back into other forums. There was the potential for difficulties there. From memory, we were trying to be as open as we could be with Transport Scotland.

384. One key thing for Transport Scotland was the phasing of the expenditure. Transport Scotland were constrained by an annual budget. The tram project formed a very significant part of the overall transport budget for Scotland. The lack of progress and lack of expenditure was a major concern for Transport Scotland. It affected their management of their overall budget. Transport Scotland wanted to make the best use of their budget in the period of time that the budget was available to them.

PARTNERSHIPS UK

Partnerships UK (PUK) were very closely involved in the early stages. They were involved in the Procurement Strategy Group. They helped formulate the procurement strategy. Their goal, as I understood it, was to advise when we were discussing issues relating to a potential PFI or PPP model. When the scale of the revenue risk became clear it was decided that the project shouldn't go down the PFI or PPP route. Because of this PUK no longer had a role in the project. I don't think they would have had a big role in the governance arrangements anyway.

OGC GATEWAY REVIEW

385. I note that in May 2006, an OGC Review was carried out on the tram project. The report of the review (**CEC01793454**) was delivered to the Chief Executive of Transport Scotland on 25 May 2006. I did see a copy of the readiness report at

the time. I don't think that at that stage I could say that I had any serious concerns. I was aware that on receipt of the review TIE put in place an action plan to make sure that the recommendations in the review were addressed and there was time to do that.

386. I did see a copy of the report following the second OGC review that was carried out in September 2006 (CEC01629382). The client was still Transport Scotland but CEC certainly saw the report which was delivered to TIE and Council representatives. Again, it did not cause serious concerns. I noted that the majority of recommendations from the previous report had been fully achieved with a few being partially achieved. The definition of Amber is that the project should go forward with action and recommendations to be carried out before the next review of the project. TIE were now acting effectively as a project delivery and control organisation. On that basis, an action plan was prepared and TIE made sure that they undertook all the recommendations.

387. I did see the report following the third OGC Review carried out in October 2007 (CEC01562064). That report resulted in a Green rating i.e. the project is on target to succeed provided that the recommendations are acted upon. By this time the client was the Chief Executive of the City of Edinburgh Council because Transport Scotland had been withdrawn from direct active involvement. That review confirmed that all the actions from the previous review had been fully, or substantially, addressed. We took comfort from that. At that stage, the design was held to be 65% completed. We were entering a challenging period over the next three months. Over those months issues included preferred bidder due diligence and contract novations, formal funding to be evidenced, MUDFA and mobilisation works with a typed programme for planning and technical approvals. There are issues in there that latterly caused difficulties but the overall review was Green. The project was on target to succeed provided the recommendations were acted upon. Interestingly enough, the OGC make a comment that the change of Transport Scotland to a funder only basis was a positive change. I am not sure if I was surprised at the time because there were always tensions between TIE and Transport Scotland. I am certainly surprised reading it now. OGC also make comments that TIE's arrangements for risk management were

impressive but they recommend that actions be taken at senior management level to follow these risks through. Two or three of their recommendations were subject to urgency. I think those were dealt with urgently. The TPB took responsibility for the recommendations and made sure they were followed through.

CONSEQUENCES

388. An important consequence of the failure to deliver the tram project within time and within budget has been damage to the reputation of the Council and perhaps to local government generally. There has also been a continuation of traffic congestion on Leith Walk and potentially impact on the development of the general Leith and Waterfront areas. There was disruption to residents and businesses over a long time period. At the end of the day the disruption in some areas has provided no benefit to the residents and businesses.

389. To ameliorate some of this impact CEC ran an Open for Business Campaign. This included promotion campaigns for business in areas affected by the works. CEC Finance worked with the Assessor to secure partial rates relief for businesses. The neighbourhood action teams in Services for Communities Department also worked with neighbourhoods to try and ameliorate some of the damage caused by the works. I retired before the work was completed. I understand it was concluded at an additional cost of around £230m above the agreed funding limit and that was funded through the Prudential Framework. That financial impact on the Council translates into the order of £15m per annum in terms of interest and debt repayment over a 30 year period. Opportunities were clearly lost because those funds could have been spent on other services. £15m amounts to about 1% of the Council's annual gross revenue budget so it represents a relatively small proportion of the total budget. There are however a number of services where £15m would have made a significant difference. Alternatively, if the project hadn't overspent we could have used that financial headroom for other capital projects. £230m capital, for example, could provide two new secondary schools. That's an example of the opportunity cost in capital terms..

MISCELLANEOUS / FINAL THOUGHTS

390. I would also like to suggest some additions in supplement to the Lessons Learned list discussed above. I feel that given the long-term nature of infrastructure projects, there has to be a requirement to further develop a national infrastructure plan and secure all parties' support for the content of that plan as far as is possible. I understand that a non-political Infrastructure Commission has been set up in England and a similar body for Scotland could perhaps be considered.
391. Linked to this there should be greater transparency relating to Ministerial grant announcements and, perhaps, a prescription on such announcements for a period of 12 months prior to national elections. This would be significantly longer than the current period of purdah.
392. This project was initially to be funded through the Road User Charging Scheme. When that foundered, on the basis of the referendum in Edinburgh, the tram project was only kept alive by the announcement of Scottish Government grant of, at that time, £375m. That was later index linked up to £500m. That initial grant was announced in March 2003. I was not asked for any input into that process by Transport Scotland or the Government and I wasn't sure on what basis the Government had made that decision.
393. Bespoke contracts, in my view, proved to be a mistake. The procurement strategy appeared sound but, at the very least, last minute amendments to the detailed contract conditions were misunderstood by the parties involved. An example of this was that TIE were not able to force Infracore to do the work Pending later arbitration on quantum and apportionment of costs due to a clause in the contract which TIE inserted into the contract at a very late stage in the process for their own protection. The insertion of the clause meant that the contractor was able to open up and then desert works in key areas of the city e.g. Princes Street and Haymarket. A benefit of not using the bespoke contract would have been that the particular clause, for example, wouldn't have been inserted. Both parties may have had more confidence as well because under

standard contracts differences would have been easier and quicker to resolve as there would be proven paths e.g. in terms of standard contracts for arbitration and mediation. The routes would have been clearer and shorter. Even if the responsibility for the design changes had all been found to rest with TIE, we would have got to the end of that process very much quicker. There would have been less delay and less cost under a standard contract. Taking the two together I would say that using bespoke contracts were not helpful given the legal advice TIE received.

394. One of the lessons learned, I believe, is that for such projects more scrutiny is not necessarily the answer. The lesson is not that we need more scrutiny. I doubt if there have been many projects with as much scrutiny as the tram project. This project went into Parliament for a period of 27 months where it was scrutinised in before Bills were enacted. The project was scrutinised by Transport Scotland. It was scrutinised by CEC through the reports that they considered. There were the OGC gateway reviews. There were Auditor General reports. There were numerous legal reviews. The project had a number additional consultants added to review issues where there was a lack of confidence in the original answers. There were the Business Case reviews undertaken by Transport Scotland and CEC officials. There was also the grant approval process that the project had to go through. I can't imagine that anyone else who would have scrutinised or examined the project would have come up with a different result to what actually happened

395. I would just like to put on record that the questions posed to me to assist in my statement relate, self-evidently, to events which occurred many years ago. I have spent as much time as I could considering the papers and reflecting on my own recollections in order to assist the Inquiry.

396. I also want it to be placed on record that, although I was closely involved with the project and allocated significant parts of my time to the project, I also carried a great many other significant responsibilities in relation to the Council and to a number of Joint Boards. Where possible I have offered comments on the documents and reports which have been made available to me. However, my

recollection of the exact details at particular times is not sufficiently clear for me to provide definitive answers to many of the questions that have been posed.

I confirm that the facts to which I attest in this witness statement, consisting of this and the preceding 151 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... 20th March 2017...

Supplementary Questions for Donald McGougan

1. A City of Edinburgh Council (CEC) document dated 4 March 2008, "Summary of company secretaries, company liaison officers and company monitoring officers" (**CEC01392168**) notes (at page 3) that the liaison officer of Tie and TEL was "to be advised". Can you advise the Inquiry as to the identity of the company liaison officer for each of TIE and TEL at that time and if the officer changed, the identity of their successors in that role?

2. In May 2008 CEC entered into an Operating Agreement with TEL (**CEC01315173**). The May 2008 CEC/TEL Operating Agreement does not refer to a Tram Monitoring Officer but provides (at paragraph 3.5) that "The Council will appoint a Company Monitoring Officer. The first Company Monitoring Officer will be the Director of City Development or the Director of Finance". Can you advise the Inquiry who was the Company Monitoring Officer for TEL in terms of the May 2008 CEC/TEL Operating Agreement?

3. In December 2009 a new Operating Agreement was entered into between CEC and TEL (**CEC00645838**), which referred to a Tram Monitoring Officer, which was defined as "the Council officer nominated by the Council to monitor TEL in relation to the project". Paragraph 3.5 of the new Operating Agreement provided that "The Council will appoint a Tram Monitoring Officer. The Tram Monitoring Officer will be the Director of City Development or the Director of Finance or their nominee". Can you advise the Inquiry who was the Tram Monitoring Officer (and, therefore, the TEL monitoring officer) in terms of the December 2009 CEC/TEL Operating Agreement?

The Inquiry understands Mr Poulton's position to be that he was not monitoring officer for TEL and, indeed, was given a clear instruction by David Anderson that he was not to monitor TEL. Is Mr Poulton correct on these matters? Do you have any further comments?

Answers provided by Donald McGougan via email on 25 January 2018

1. I cannot from memory advise the Inquiry with confidence on this matter. I note that there is a suggestion in the document that the appointed Liaison Officer be Jim Grieve who was a senior officer in the Transport Division of the Department of City Development but I could not be certain that this was the arrangement which was put in place. I also note from this document that at that time (March 2008) the tie and TEL company monitoring officer was the Director of City Development .

2. From memory I cannot be definitive on this matter but I have absolutely no recollection of being appointed as company monitoring of TEL at any time in my capacity as Director of Finance.

3. I am confident that in December 2009 the Tram Monitoring Officer was Marshall Poulton and the terms of this Operating Agreement indicate that he would have responsibility for monitoring TEL in relation to the project. I have no recollection or knowledge of any instruction from Mr Anderson to Mr Poulton that he was not to

monitor TEL. I regret that I cannot be of any further assistance to the Inquiry in this matter.