

THE EDINBURGH TRAM INQUIRY
Witness Statement of Richard Benjamin Jeffrey

Statement:

Introduction

My full name is Richard Benjamin Jeffrey and I am 51 years of age. My contact details are known to the Inquiry. I currently the owner and director of my own limited companies. My role in the tram project was as Chief Executive of Transport Initiatives Edinburgh (TIE) from April 2009 to June 2011. I have supplied my full CV for the Inquiry.

Involvement with the tram project prior to joining TIE

1. I worked for Babcock and Brown Limited between 2007 and 2009. In 2008 I made a proposal for Babcock and Brown to purchase the infrastructure and rolling stock for the Edinburgh Tram line 1a; construct (or fund the construction of) any or all of lines 1b, 2 and 3; and then to maintain the infrastructure and rolling stock for an agreed sum. This is outlined in an email (**CEC01236963**) that I sent to the City of Edinburgh Council (CEC) on 2 June 2008. This would therefore have been some form of build, operate, transfer (BOT) project. Babcock and Brown would take on construction risk, and either operate trams for a fee or lease back to CEC. This was a fairly standard model for privately financed infrastructure projects. However this proposal never became anything other than a suggestion.
2. I had previously worked for BAA plc as Managing Director of Edinburgh Airport Limited between 2001 and 2007. BAA opposed the tram stop location at the Airport. At the time, BAA tried to negotiate with TIE to get details of the location, design and various other information needed for approval. However none of that information was forthcoming. As a result the Airport could not agree because the information was not there to form an agreement. Because there was a timetable for the Parliamentary process BAA's only option was to put in an objection to the project. This resulted in a last minute agreement between the airport and TIE.

First Impressions and Overview

3. My first impression when arriving at TIE as Chief Executive was that this was a difficult project with a number of problems already in existence. In general, my impressions of the senior personnel I worked with at TIE were positive. Generally TIE was a strong team. There were however some tensions between TIE staff and some of the CEC staff who had been seconded to TIE.
4. The only TIE personnel brought in by me was Mandy Haeburn Little. Mandy replaced the existing PR Director. Her job was advertised; there were several people interviewed. At a later stage in the project, I also brought in Tony Rush

as a specialist construction disputes advisor on a consultancy basis. He was brought in on the recommendation of Brandon Nolan at McGrigors, for his particular skillset. Nigel Robson was brought in right at the very end of my time and assisted with the mediation at Mar Hall, again on a consultancy basis.

5. A principal frustration with the project was that there was no completed design for the infrastructure works early in the process, especially by the time the contract was let. The design was not complete until late 2010/early 2011, four to five years after it should have been.
6. Another problem was the Infraco contract, which was a bespoke contract with difficult and ambiguous terms.
7. The politics were also frustrating, with a number of public political announcements and a high level of critical comment. A complex, controversial, difficult, major infrastructure project requires a high degree of cross-party political consensus or support.
8. A further problem was that the governance and structure with the various parties involved (for example TIE, TEL and CEC) created "too many cooks" and a lack of clarity. TIE was also unsure of its core purpose and identity, and whether it should operate as a private sector organisation or a state sector body. The heart of the challenge I faced as the incoming Chief Executive was to make the best of the situation in the face of these existing problems. Many of these problems were "baked in" to the project by the time I got there.
9. The Tram Project Board (TPB) Papers (**CEC00739552**, page 5) for the meeting on 29 July 2009 summarise the 5 strategic themes which I thought needed to be considered after my first three months in the post. The minutes in those papers set out my thinking at that time. There was an incomplete design, poor performance by System Design Services (SDS) and a lack of certainty around cost and programme. I said that I was not going to make any public statements about cost and programme until I could be certain about the credibility of the statements, because what had dogged this project and many similar projects was estimates which turn out to be wrong, and the subsequent loss of credibility. I was clear the project was not on cost and not on programme and I couldn't predict cost and programme outcomes until I had clarity and certainty - that's what I said to the public and to the politicians. There were also complex disputes in relation to the issue of changes from the Base Date Design Information (BDDI) to Issued For Construction (IFC) drawings and on the question of whether design risk had been transferred to the contractors. I do not think anyone had clarity on that, due to the ambiguous nature of the contract.
10. At that meeting, I said there was little purpose in looking back. My view looking back was only ever that "*I would not start from here*".

11. I should point out that the Inquiry team has asked a large number of questions of me and in so doing have directed me to several hundred documents for comment. The extent to which this statement lacks structure is a result of responding to the questions in the order in which they were asked. The original wording of this statement was drafted by the Inquiry team following the answers which I provided to them some months earlier. I have endeavoured to correct any errors and clarify any ambiguities arising from that earlier draft in the time allowed to me. Documents referred to in this statement are invariably those which the Inquiry team provided to me and upon which I have been asked to comment. In some cases these documents run to hundreds of pages and I do not have the resources to analyse these documents in detail. In other cases I have been directed only to certain pages of documents without reference to the surrounding context. Whilst I have endeavoured to offer answers and comment upon these documents as best as I am able, generally speaking I have not seen any documentation connected to the project since my departure in 2011. In preparing my answers, I have not been able to access any material other than those documents selected by the Inquiry team. In many instances I am unable to meaningfully expand upon any comments which I am recorded as having made during my time on the project, or to offer any greater insight than what is already contained in detailed papers which were compiled at the time. I have also been asked about a number of TIE documents or reports which were not authored by me and upon which I have been unable to recall detail. In general where I have been asked such questions, the author of the report would be better placed to answer than I am.
12. **CEC00985828** and **CEC00985829** is an email to me from DLA dated 28 May 2009, with an attached note by DLA on the termination of the agreement with Transdev. I did not think this was a contentious issue as there were natural breaks in the contract with Transdev. I do not recall any problems as such. The Transdev contract was terminated because I thought there would be cost and efficiency benefits by removing one party from the complex structure of the project.

Relationship with CEC

Sharing Information and Oversight

13. An email I sent to Tom Aitchison dated 1 May 2009 (**CEC00973619**) refers to possible difficulties with the management of information. There was a constant leak of information. Some was possibly from individuals within TIE, some from CEC, some from Transport Scotland (TS), and some from Councillors. The point was that there was a substantial amount of money at stake in a sensitive commercial negotiation and having bits of our strategy leaked into the public domain for the other parties to see was unhelpful. On the other side of course there is an obligation to keep CEC and funders informed of what's going on, so there was a constant tension in the management of the information flow. There were some understandable tensions between CEC and TIE, though personally I did not feel any of those - I felt that I maintained good relationships. The tensions insofar as they existed were

based in part around TIE being a separate entity from CEC but funded and owned by CEC. This meant that TIE staff were not bound by structures and grades in the way that CEC staff were. It also did not help that the project was not going well and there were those in CEC who thought that this was TIE's fault. The point I was making earlier about clarity of purpose and governance also contributed to this. I would say that it is different from a contract in the private sector because in the private sector the client is not also the owner and there is generally a clear relationship between parties defined by a service or supply contract rather than a shareholder agreement. The working relationship between CEC and TIE did not have that and lacked delineation.

14. **CEC00622351** is an email sent to me, Steven Bell and Stewart McGarrity by Alan Coyle of CEC on 3 December 2009. Alan Coyle indicated to us in that email that the CEC executive had decided not to report to the full Council at that time regarding the "supplemental agreement". I do not recall the email, but I take it this was to do with the costs related to the Princes Street Supplemental Agreement (PSSA), which was an unresolved claim for about £3 million. The full Council meets in public and the press attend. Broadcasting unresolved commercial issues in a public environment would be likely to compromise our negotiating position. The important distinction to bear in mind is between the Council's executive, who were kept fully informed by TIE throughout my time on the Project, and the full Council. Generally the decision regarding what information would be given to the full Council would be made by CEC's Executive officers and not by TIE.

15. **CEC00476665** is a letter from David Anderson, Director of City Development at CEC, to me dated 1 April 2010. The letter indicated that he wished Marshall Poulton, the Tram Monitoring Officer, to work in the TIE offices. I did not have a problem with that at all. I had a good relationship with Marshall Poulton, whom I trusted with confidential information and I was content to have Marshall seconded into the team. Alan Coyle was also embedded into the team and did a good job.

16. **CEC00762204** is an email which I sent to Dave Anderson on 27 July 2009 in which I commented on concerns I had surrounding a draft report for CEC and some 'bad vibes' my team were picking up on from CEC about TIE's handling of the project. This was a senior internal level email. It is self-explanatory as is the response from David Anderson sent on the same day (**CEC00762204**). I had a good working relationship with Dave Anderson.

17. **CEC00098063** is an email sent to me by Nick Smith at CEC on 27 August 2010. I spoke to David Anderson about Nick Smith's email being unhelpful and symptomatic of CEC input lacking focus. My subsequent email to Andrew Fitchie is self-explanatory.

18. **TIE00081667** is a letter I wrote to David Anderson on 17 January 2011 in response to a letter dated 20 December 2010 (**CEC01927382**) relating to the Project Resolution Report. These documents are self-explanatory and I do not detect that David was unhappy.

Reporting to Councillors

19. **CEC00756617** and **CEC00756618** are emails from Graeme Bissett to various recipients dated 11 and 12 August 2009, attaching a marked-up draft of the Report to CEC on Governance Arrangements. These indicate the role he and others at TIE were playing in finalising the terms of the report to the Council. The reports that went to full Council were compiled and edited by CEC. TIE were often given the opportunity to comment at the time. Ultimately, however, the Council officers were responsible for the content. TIE had no editorial control. Graeme Bissett's intention here will have been to protect TIE's commercial position.

20. I have been directed to further emails which I exchanged with Graeme Bissett on 30 April 2010 (**CEC00301528**) 6 May 2010 (**CEC00266883**), and 2 June 2010 (**CEC00442574**). These show TIE's involvement in the preparation of reports to full meetings of the Council. I have also been directed to the email from Donald Anderson to Tom Aitchison and others of 18 June 2010 (**CEC00410825**) which referred to concerns from the contractors in relation to the reports to Council. These reports were Council officer reports. It was up to them to decide what or what not to include. The contractor had seen a public document and was unhappy with the content. That is what Donald Anderson's email of 18 June concerned. A response was sent to Donald Anderson by Donald McGougan on 21 June 2010 (**CEC00410825**). This indicated that the contractor was watching everything going out into the public domain and reinforced the need for TIE to be careful with what did go out into the public domain.

21. **CEC00098854** is an email from me dated 29 September 2010. This set out the content of proposed party briefings for the politicians. This had to be done carefully because confidential information often leaked. It would have been naïve to expect the contents to be kept confidential. Councillors were briefed on a regular basis, both cross-party, and individual party briefings. Most of the time, the SNP did not attend. I do not know why. I gave separate briefings to Tom Buchanan, an SNP councillor, on numerous occasions.

22. It would have been helpful to have had guidelines on the management of information on this project, directing which information ought to go to politicians and which ought to be kept confidential, for reasons of commercial sensitivity.

Reporting Concerns

23. I have been directed to a document Alastair Maclean wrote on 17 November 2010 headed 'Trams: issues within TIE' (**CEC00013342**). In order to address certain continuing concerns, I appointed Anderson Strathern solicitors to provide advice on them. I told only a few people about this: Alastair Maclean, as Head of City Legal and the Chairman of TIE, Brian Cox and a couple of TIE non-board Executives. Alastair Maclean's document must have been written based on his recollection of what I had told him.

24. I asked Anderson Strathern three questions: 1) were there grounds for TIE to take action against DLA for advice they gave TIE in the run up to the contract signature, 2) was there evidence that TIE misled or misreported the issues on the

contract to CEC at the time of the contract signature and 3) was payment of bonuses to TIE staff following conclusion of the contract legal and appropriate.

25. A helpful report was provided by Anderson Strathern. However I have been advised by the Inquiry team that CEC Recovery Limited (formerly TIE) have asserted legal privilege in relation to this report, and accordingly I am unable to discuss it.

Relationship with Transport Scotland (TS) and Ministers

26. TIE maintained regular contact with TS and the Scottish Ministers. There were diarised meetings, ad hoc meetings, telephone conversations, dinners: basically, frequent, open-line communications. As with CEC, there were some people within Transport Scotland in whom I had more confidence in their ability to maintain the confidentiality of information supplied to them than others. TIE did not under-report or misreport information to Ministers. Written records only give part of the picture and do not show the richness or depth of the flow of communications between TS, Ministers and TIE, much of which happened in telephone conversations and meetings. I kept file notes for most of these meetings on the hard drive of my computer. I no longer have access to them.

27. The TS people I dealt with were Ainslie McLaughlin, Bill Reeve and David Middleton, who was Head of TS. The government ministers I dealt with were Stewart Stevenson and John Swinney.

28. The relationship was a reasonable one at the time. I was not involved in any discussions concerning the role of TS. I do have an opinion, however, that it is unhelpful to have a project of this nature where the Government's main transport agency is disengaged.

29. I have been directed to an email from John Ramsay to Alan Coyle dated 21 December 2009 (page 2, **CEC00583506**). The issue here was not dissimilar to the one we had with the junior members of CEC, who at times had taken little bits of information out of context and gone off to talk to others about them. That was deleterious to communication and clarity. I cannot comment on whether or not there was a more fundamental issue regarding TS not being kept informed. That would be a question for TS, not for me. Such concerns were never expressed to me.

Disputes over Drawings

30. The Papers for my first Tram Project Board (TPB) meeting in May 2009 refer to a dispute over changes from BDDI drawings to IFC drawings (**CEC00633071**, page 9). This was a significant difficulty arising under the contract. It concerned pricing. A set of drawings existed at the time of contracting and became known as the Base Date Design Information (BDDI). At the risk of over-simplifying a complicated dispute, the contractors' argument was that they had priced the BDDI and accordingly that any subsequent changes ought to be classed as extras. This was disputed by TIE. The potential consequences for the parties were material. The 'constructive discussions' on this issue which are referred to in these papers relate to meetings of the Project Management Panel which I did not attend.

31. This same TPB report (**CEC00633071**, page 16) also refers to the works being based on a design "*which may have been altered*". This may be a reference to the BDDI to IFC issue. It was recognised as a risk in the risk register. The author, Steven Bell or possibly the specialist risk/insurance manager Mark Hamill would be better placed to comment.

32. The whole issue was a central part of the dispute between TIE and the contractor. Considerable legal advice was taken from several law firms and Richard Keen QC. The issue was played out many times in individual disputes.

33. The TPB Reports for July 2009 (**CEC00843272**, page 44) and August 2009 (**CEC00739552**, page 46) also refer to the design issue. There were many reasons why the design would change, for example to gain third-party approvals. Another example would be that the contractor might change design to make it easier for them to build: the system designed by Siemens might require the design to be changed to incorporate specifics of the Siemens system. Another reason the design changed was that the design was not finished in the first place.

34. Another example is that under the Railway and Other Guided Systems regulations (ROGS), the design needs to have the approval of The ICP (Independent Competent Person) who must satisfy themselves that the systems are safe ones to operate. The ICP cannot sign off until they have a completed design as a starting point and therefore there may be design changes required to satisfy the ICP.

35. In some cases design changes will have occurred because the original design was flawed and/or inaccurate. We had a design management team headed up by Tony Glazebrook who was the design manager. He would be better placed to address this subject.

36. In many cases the contractor would issue an Infracore Notice of TIE Change (INTC) to say that the design had changed, resulting in an extra cost. To evaluate any such claim we needed to understand why the design had changed. In many cases, the contractor could not explain why the design had changed. BSC would not start work until the costs of changes were agreed and this was a major cause of delay to the works.

37. The TPB Report for July 2009 (**CEC00843272**, page 78) shows a chart with Sensitivity Analysis of the Edinburgh Tram Network Quantative Risk Analysis. I am unable to elaborate on this document, which was authored by Mark Hamill and Steven Bell.

38. The TPB Report for November 2009 (**CEC00681328**, page 28) contains a risk table in which entry 1077 relates to the BDDI to IFC risk. I am unable to comment upon this entry due to the limited information available to me.

39. The TPB report for January 2010 (**CEC00473005**, page 47) refers to the Gogarburn and Carricknowe DRPs where the adjudicator found in favour of BSC. The adjudication decisions should speak for themselves and I am unable to provide any additional insight or interpretation.

40. The same January report also refers to the Russell Road adjudication being reported in the following period (**CEC00473005**, page 47). I cannot recall why this was. . There is however a more general point. For every monthly Board meeting we gave a Power Point Presentation (PPP) which included all salient facts. It was the principal method by which the Board was kept informed. I have been directed to page 47 of the January Report, but because I could not confirm every Board member would read to page 47 at a meeting, we pulled all the key points out of the reports for the PPP. I may have added more that was not in the papers so those PPP would greatly assist the Inquiry. They should exist for every Board meeting.

41. **CEC00491090** & **CEC00491091** comprise an email from Stewart McGarrity to Dennis Murray, Steven Bell and Susan Clark and copied to me, sent on 18 January 2010, with an attached spreadsheet. I don't know whether all these design changes were categorised because as I have said, the contractor was not always able to explain why the design had changed.

Programme

42. The Papers for the TPB report from May 2009 (**CEC00633071**, page 11) refer to the possibility of slippage being made up with improved productivity. The Papers for the report to TS from May 2010 (**CEC00245907**, page 35) note that although 82.6% of Infracore works should have been done, only 16.1% had been completed. Subsequent monthly reports continued to record a degree of slippage. We had no certainty on the cost of the programme because of the contractual disputes. The papers needed to be read in conjunction with the minutes of the meetings. There were various conversations which went on around the content of these reports and various caveats which are minuted in the meetings. Progress was constantly the subject of discussion. There is a risk of misinterpretation caused by selective reading of certain parts of certain reports – there was no false optimism in relation to the prospects of programme recovery.

43. The TPB report for July 2010 (**CEC00244400**, page 47) formally recognised that programme recovery was not possible. This was not saying anything new. It was a formal record of what had been said at previous meetings. I had said publicly from the start that the project was not running to programme but declined to commit to a new programme date until I had some certainty.

44. The minutes of the TPB meeting held on 2 June 2010 and the report for 30 June 2010 (**CEC00223543**, page 7 and page 24) refer to independent expert reviews. Susan Clark, the Programme Director, was responsible for dealing with them and will be able to comment.

45. In the TPB report from May 2011 (**TIE00897056**, page 15) there is a note on delay attributed to the issue of IFC drawings. Any question on this report should be referred to the report's author, Steven Bell.

Reports to the Tram Project Board (TPB) & Transport Scotland (TS)

46. The TPB Report dated 6 May 2009 (**CEC00633071**, page 34) refers to prior approvals progressing well despite the well documented problems with design. You need to take these reports in the right context. The people being briefed by these reports were steeped in the project on a daily basis and you would not necessarily get an accurate picture seven years later reading these in isolation. I was not the author of the reports and am unable to answer specific detailed questions on their content. Steven Bell would be better placed to answer any such questions as he wrote the reports.

47. The same report (**CEC00633071**, page 32) contains an overlap between the Project Director's report and sections 2-7 which went to TS. This arrangement was already in place before I arrived at TIE. TS wanted the reports in a particular format. It was not the case that different information was being shared. If TS had sat on the Board it would have avoided the need for separate reports and would have prevented any risk of miscommunication or misunderstanding.

48. There was a degree of repetition in the reports from one month to the next, however the reports were augmented by the Power Point Presentations and all the other discussions which went on around the reports. I think a single report for all for all audiences, or better still; a single governing body for all interested parties would have been preferable.

MUDFA (Multi Utility Diversion Framework Agreement)

49. A number of unknown assets were discovered beneath the ground on this project. There will always be an element of the unknown, particularly in an old city centre like Edinburgh. Time spent on reconnaissance is never time wasted.

50. The TPB reports from 6 May and 8 July 2009 (**CEC00633071**, page 57 and **CEC00983221**, page 48) record risks of unknown utilities and refer to trial investigations to check this. The MUDFA works should have been completed by then but the investigations were on-going because the works were not complete. In some areas we were finding a much higher instance of unexpected underground utilities (or a higher density of underground utilities) so it was prudent to carry out further investigations in these areas. This incurred further costs and further delays.

51. The TPB report of 29 July 2009 (**CEC00843272**, page 12) notes "*poor productivity and performance levels can be attributed in part to underground obstructions and technical issues*". Some of the poor productivity was partly contributed to by Carillion who had a loss of interest in the project. More detail could be obtained from Frank McFadden, Steve Bell or, possibly, Jim McEwan.

52. Regarding the betterment of utilities and arrangements to obtain payment, Frank McFadden or Steve Bell would be better able to provide detail. I have been directed to the references to this in the TPB minutes for the 29 July 2009 meeting (**CEC00739552**, page 7) and the 21 October 2009 meeting (**CEC00681328**, page 7). I do know it was not contentious. I do not know about the summary statements

referred to in the July minutes or if they were prepared, but the TPB was always kept informed.

53. A letter Carillion sent me (**TIE00030886**), dated 8 July 2009, referred to the gap between sums claimed and sums paid. I do not specifically recall this, but generally I would push these things down to Steven Bell to resolve and they would only come back to me if they were unresolvable. Ultimately we reached a commercial settlement with Carillion which was not particularly contentious and it was exactly in line with what one would expect to happen at the end of a major contract like this.

54. With reference to the August Project Director's Report (**CEC00739552**, page 14) I have been asked to comment on a "big jump" in the MUDFA works which should have been completed in section 1a. This question should be referred to Steve Bell as I am unable to comment.

55. I have been asked about the MUDFA figures in the TPB reports for September 2009 (**CEC00848256**, page 14) and December 2009 (**CEC00416111**, page 8). I am unable to provide any comment on the specifics on these figures. I am aware that some of the Carillion works were taken over by Clancy Docwra and I do know that contract was awarded through a competitive process, and that I was kept informed. Steven Bell would be better placed to answer any specific questions in relation to these issues.

56. Similarly, the TS report for January 2010 showed a drop in cumulative works done for section 1c (**CEC00473005**, page 50). The cause of this is a question for Steve Bell, as I was not involved in this level of detail.

57. The TPB Minutes for 14 April 2010 (**CEC00420346**, page 6) report that 4.5km of the 18.5km Phase 1a route was affected by on-going utilities works. Again, I do not have the detailed knowledge and cannot recall specifics. Steve Bell should be able to answer.

TPB Minutes
should be TPB
Papers

58. The TPB Minutes for 15 May 2010 (**CEC00245907**, page 6) note that the volume of works was 49,000 metres of diversions as opposed to the expected 27,000 metres. I cannot recall specifics regarding the increase in cost but it will be a matter of record. Again, Steve Bell would be better placed to answer.

TPB Minutes for
15 May should be
TPB Papers for
5 May

59. The TPB Minutes for 15 May 2010 (**CEC00245907**, page 6) make reference to the New Engineering Contract (NEC) that was re-let to Clancy Docwra and Farrans. I had previously worked with NEC contracts. In my experience, use of standard form contracts is beneficial.

TPB Minutes for
15 May should be
TPB Papers for
5 May

60. The TPB Minutes for 15 May 2010 refer to a progress report provided by Susan Clark (**CEC00245907**, page 7). The content of this was exactly what is recorded in the minutes. It was a progress report on each of the contractual areas in which TIE were currently engaged. The relevant information is all there in the report and I cannot offer any further comment.

TPB Minutes for
15 May should be
TPB Papers for
5 May

61. The TPB Minutes for 30 June 2010 (**CEC00223543**, page 8) note that a contract was to be let for works in Baltic Street. I cannot be certain, but I believe this was awarded at this stage to cover works that were not covered under other contracts. What we did try to do when we re-let the MUDFA works was to break it into small manageable packages and remove any areas with potential for contentious issue.

62. I would have taken an oversight of the finalisation of the Carillion account and the discussions held in September 2009. I have been directed to the email I received on the subject from Stephen Kennedy dated 20 September 2010 (**CEC00128536**) and the reply I then sent on 22 September 2010 (**CEC00134071**). These were the normal commercial negotiations one would expect that accompany the closing of any contract. The final account was settled without any unusual level of difficulty.

63. There is a paper on Betterment/Deferment dated 13 April 2011 within the TPB report of April 2011 (**TIE00897066**, page 40). This paper is self-explanatory. There is an assessment of the utility work and associated costs and a management update including executive level.

Removal of Work from Carillion

64. An email from Thomas Caldwell to Graeme Barclay of 5 March 2009 (**CEC00956515**, page 2) identified that the payment terms under MUDFA were such that Carillion were probably making a loss. Removing the work from Carillion was not about trying to get a better price; it was about getting work finished in a timely manner. Also, as I have already noted, Carillion did not seem to want to be there. The TPB Minutes for 29 July 2009 (**CEC00843272**, page 6) refer to the Farrans contract being for a sum less than that budgeted for with Carillion. I am unable to comment on this.

65. In the paper for the TPB on utility strategy to completion, dated 6 May 2009 (**CEC00633071**, page 26), the summary suggests that performance, quality and cost were the problems with Carillion. We did have concerns with all three areas and we had concerns over Carillion's commitment to the contract. My recollection is limited. Steven Bell, Frank McFadden and Jim McEwan would be better placed to provide detail. There was some sort of corporate restructuring going on at Carillion and their guys on site were left unsupported. There wasn't corporate focus, the guys on the ground weren't committed and it was a contract they didn't want to be in and ultimately that's why they were reasonably happy to agree a settlement to go.

66. Jim McEwan sent an email to me on 28 July 2009 (**CEC00762213** and **CEC00762214**) which referred to a desire to replace Carillion entirely. As there might have been half-finished pieces of work, however, it made no sense to take them off entirely at that time.

67. The TPB Minutes dated 21 October 2009 made reference to 98% of the Carillion works being complete, having taken back section 7 and section 1 (**CEC00681328**, page 7). Steven Bell, Frank McFadden or Jim McEwan may be able to provide comment on this, I cannot.

68. The TPB report for May 2009 states that the intention was that works at the two ends of the line would be handed on (**CEC00633071**, page 29). Later, however, works in the city centre were also handed on. Once again I have a limited recollection of this, but the change in approach was because we were getting much better cooperation from the other contractors than we were from Carillion.

69. The removal of works from the original MUDFA contract and the transfer of the works were all achieved through negotiations. They were taken over by Keir Construction, Farrans and Clancy Docwra. I have been asked, but do not know, what actual work was given to Keir Construction in May 2009, as that was not my level of detail.

Designs

70. By the time I joined, design had been novated over to the contractor. I am therefore unable to comment on design in any detail, particularly in relation to the early stages of the process. I think Tony Glazebrook would be a good starting point for comment on the design process stages.

71. My recollection is that we used all levers possible to progress the design. We used design audits, design management panels and we tried to clear blockages with third party approvals. By and large these were not effective. I thought we had tried everything that was available to us. Ultimately the failure to progress the design became the subject of an Under-performance Warning Notice (UWN) and, subsequently to that, a Remediable Termination Notice (RTN). Other than terminating the contract that was as far as we could take it.

72. It is possible and not uncommon to take a partially-completed design and to novate it to a contractor, but if you are going to do this you need to structure the whole procurement process with that in mind, from the beginning. You would also attach a level of financial risk to reflect the fact that design was not complete. It is my understanding that the original procurement strategy was to complete design before awarding the contract. Clearly in this case that did not happen.

73. The TPB report of May 2009 (**CEC00633071**, page 18) refers to poor SDS performance being recognised as a risk. Steven Bell will be able to provide greater detail.

74. It has been suggested to me that nearly all the TPB reports to TS refer to the fact that the reasons for design slippage were reviewed and recorded each week. This was to keep people informed. I have already mentioned what action we took and what was done with the information. RTNs were only issued when we were well into 2010. This was because, first of all, we were getting assurances that design was almost complete, which is recorded in the minutes, and, secondly, because the use of an RTN is a nuclear-type option.

75. In the TPB Minutes for 6 May 2009 (**CEC01021587**, page 7) Steve Bell is recorded as having said that some of the SDS design was delayed by TIE and some by redesign. By referring to TIE here I think it is intended to be a collective term to cover any delays caused by "the client", and that could be anything from late

approvals from CEC, or inability to get approvals from third parties, etcetera. In other words, any issues that are not the fault of the designer or the contractor. I do recall a meeting with SDS which was at their instigation. The purpose of it was to advise me that CEC had caused delays previously. We put in place task forces to try to speed up third party or CEC approvals.

76. The TPB report for August 2009 (**CEC00739552**) refers to a lack of improved design performance. I believe we used every lever that was available to us.

77. The TPB report for September 2009 (**CEC00848256**, page 13) noted that slippage had been addressed and that TIE was implementing opportunities to mitigate the impacts of slippage. I think that meant that the fact the design had been delayed meant that it had been incorporated into the recalibration of the programme.

78. The TPB report of January 2010 (**CEC00473005**, page 12) and the TPB report of May 2010 (**CEC00245907**, page 15) stated that there was no evidence of better management of SDS by BSC. Steps were being taken to bring forward the design on time and to the correct standard, we used all the levers possible as I have said.

79. In the TPB Minutes for 10 March 2010 (**CEC00420346**, page 6), it was noted that TIE had audited BB's performance. I do not recall the outcome of this but I presume that a written report was produced. Tony Glazebrook would be better placed to give good insight into all of this. The paragraph under the heading of "*design*" in the Minutes is concerned with the increase to the scope of design. The reasons for this were not something TIE was aware of. So the fact that has happened is recorded, but the reasons for it happening are not.

80. The TPB report for June 2010 (**CEC00261936**, page 31) notes that of the 233 IFC drawings only 155 had been issued. I believe it is correct that there was a new design programme almost every month. This made it impossible to predict cost and programme.

81. In the TPB report for October 2010 (**CEC00014055**, page 23) approval was sought for an additional payment to SDS for "Extended Construction and Design Support". My recollection of this is limited. The Extended Construction and Design Support Contract was there to pay the designers for design changes that might occur as a result of, for example, unforeseen ground changes. It was not for compensation or paying them for speeding up or for doing something they should have done in the first place.

82. TIE discovered that there was a separate "side agreement" between SDS and one or more members of the consortium. We only became aware of this by accident from an email sent in error by Simon Nesbitt of BB to Colin Neill of TIE. I understand that the effect of this agreement was for BB or BSC to pay SDS for changes provided that those changes could be attributed to the client. I have not seen this agreement

Costs

83. The TPB report for May 2009 was the report for my first such meeting. I have little recollection of it. I am aware that reference was made to an approved cost estimate of £512 million and an unapproved increase in the Anticipated Final Cost to £527.1 million to reflect risk (**CEC00633071**, page 14). I do not know why there were approved and unapproved figures, or what the purpose of them was. Stewart McGarrity or Steven Bell would know. I do not think it is particularly significant.

84. The TPB Minutes for 6 May 2009 record me as saying that I wanted to manage the message surrounding unapproved forecasts. (**CEC01021587**, page 8). This was because I did not want all sorts of numbers being bandied around until we had a degree of certainty on them. Very early on in the process I made a very clear statement saying that we were not on programme or on budget and that we wouldn't commit to a budget or a programme until we had certainty. It was not possible to have certainty because of the absence of a complete design and the contractual disputes, which in turn meant that we could not have an agreed cost or programme.

85. **CEC00766443** and **CEC00766444** is an email from Stewart McGarrity to me dated 3 July 2009 with attached paper reviewing costs. The paper identified costs greater than £545 million. I do not recall this paper specifically. It could have been me that requested it. We continually carried out scenario planning exercises which looked at a whole range of potential financial outcomes. It was shared with the TPB and CEC officers but not, to my recollection, with Councillors. This was for reasons of confidentiality, because we feared that if we started putting bigger numbers into the public domain it would simply be a new target for contractors to aim at. It would also be another set of numbers which could be classified as another missed target. Potential financial outcomes like that should not be put into the public domain unless you have a high degree of confidence that they are deliverable. The paper does not include provision for the Princes Street Supplementary Agreement (PSSA), as this was relatively new.

86. The paper (**CEC00766444**) refers to a cost estimate of £553.6 million given in a briefing note to CEC officers in April 2009. This was probably to the CEC Finance Team. It was part of the open and transparent relationship we had with CEC. I am unable to say what this estimate did and did not take into account.

87. The paper also makes reference to design change at the railway corridor. I think this relates to a conversation with Network Rail and it was the section from Haymarket to Carrick Knowe, which runs alongside the section at Haymarket. It was a dispute as to whether the changes were required or not. Ron Macaulay, who was head of Network Rail at the time, was concerned that changes in the design of the railway corridor were being attributed to Network Rail and he was keen to stress to me that they were not requested by Network Rail. I think this is an area we never got to the bottom of why the design changed, but it did change and develop. These were "off street" works.

88. **TRS00017211** is an email which I sent to Bill Reeve on 2 October 2009 in which I mentioned that it was "not impossible" for the project to be completed within the £545 million envelope. To me this wording suggested a low degree of probability and a high degree of unlikelihood.

89. The TPB report for August 2009 (**CEC00739552**, page 56) noted that it was unlikely that the project could be completed for £545 million. I am also aware of the emails between Alasdair Sim and Andrew Conway from 15 and 27 July 2009 (**TIE00763898** and **CEC00659192**) in which it is suggested that I had said there was no way the project could be completed for £545 million at the earlier July TPB meeting. This was not recorded in the minutes. My view at the time was that the minutes were an accurate record of what was said and we were supported in that by Alan Coyle and Donald McGougan of CEC, who were present at the meeting. TIE were still in a position where we could not accurately predict cost and we were reaching a stage where £545 million was not achievable. TIE could give no realistic alternative on any level of probability because there was no agreed design, no agreed programme and no agreed interpretation of the contract. The phrase I have used in the past is the project was 'at large'.

90. There was no Anticipated Final Cost (AFC) because TIE at that time could not predict a final cost. All we could do was report actual costs against original estimates. Providing information in that way still gave the TPB and TS a way of tracking actual costs.

91. In my email of 21 August 2009 (**TIE00033483**) to David Mackay I suggested a number of cost outcomes, all greater than £545 million. This was in relation to setting of company objectives for the purposes of bonus calculations so we were looking at what range of possible outcomes might constitute different levels of performance within the team.

92. **CEC00782838** is an email exchange between me and Stewart McGarrity on 21 August 2009 (**CEC00782838**). At this stage I was under increasing pressure to come out with numbers other than "*it is not £545 million*" so I came out with a strategy to reflect what I knew regarding costs. So there is the cost of the things we knew, which was £524 million plus some allowance for what we did not know, the imponderables, which is given as X. Hence £524+X.

93. A report from Deloitte dated August 2009 was emailed to me by Stewart McGarrity on 9 September 2009 (**CEC00743889** and **CEC00743890**). This referred to the absence of an agreed programme, which meant there was no baseline programme. This obviously affected reporting of progress. You cannot report your progress to a destination if you do not know your destination. We had no end date so it did affect reporting. Progress could be measured against the original programme but this would be meaningless.

94. The summary of the CEC report by David Anderson entitled 'Review of Truncation Options' (**CEC00475737**) refers to a council meeting of 30 August 2009 at which a report was considered on the progress of the project. It is noted it would be difficult to deliver the project within the £545 million available. I do not recall if I

was involved specifically in preparing this document, but David Anderson would have consulted or discussed it with us. These reports were all edited by CEC officers.

95. The Fourth Quarterly Project Review of 13 November 2009 (**CEC00475412**) made reference to a project cost estimated to be in the range £600 million to £620 million. I met Stewart Stevenson in January 2010 and described the midpoint as £610-£620 million. These figures were based on the scenario exercises we were carrying out. We would look at a range of possible outcomes .

96. I am aware that Stewart McGarrity headed up a process to update cost estimates in December 2009. My email of 7 December 2009 (**CEC00552087**) approved this. I assume it was completed. The outcome would be a series of scenarios giving a range of figures. There was no certainty surrounding any of those particular scenarios.

97. The TPB Minutes for 14 April 2010 (**CEC00245907**, page 9) refer to an increase in the project budget to £530 million. I think the project budget was increased to reflect the fact it could not be delivered for £512 million, but it was still in the original funding envelope of £545 million. It would be increased to take into account known risks and insofar as those risks were not included in the original risk allowance. Details of how the risk was drawn down could be answered by Mark Hamill, Steven Bell and Stewart McGarrity. The same minutes also noted that the total budget for the tram included up-front costs including obtaining legislation (**CEC00245907**, page 10). We always talked about total project cost.

98. The TPB report for June 2010 included a letter from David Mackay to Marshall Poulton, the Tram Monitoring Officer, explaining that the contract could not be completed within the funding envelope of £545 million (**CEC00223543**, page 11). My recollection is that Marshall Poulton had become nervous as he had an element of personal exposure in the absence of this letter. The letter did not contain any revelations and simply emphasised what others were already aware of. He may have participated in the decision taken to instruct the sending of the letter. I do not recall.

99. The TPB report for September 2010 (**CEC00013818**, page 48) refers to CEC examining contingency plans for provision of additional funding of 10% above the approved project funding. I do not know why it was 10%. The same part of the report also noted that a risk had been added to the risk register regarding the affordability of the project. I think the risk was in everybody's mind already. It just was not recorded in the "at risk" register.

100. The TPB report for October 2010 (**CEC00014055**, page 31) refers to a "financial metric" and gives percentages of completion. I believe it is saying that the infraco works were 25% complete at that time but the project as a whole was 70% complete; this should however be checked with the report's author, Steven Bell .

101. The TPB Minutes for 13 April 2011 recorded discussion about the funding position (**TIE00897056**, page 9). The issue here was simply one of authority flows and delegated authorities. My recollection is that TIE got its authority from the TEL Board who got theirs from CEC. I think the concern was the TPB could not legally permit expenditure beyond £545 million unless it had authority to do so. Therefore

the TPB needed increased authority from the TEL Board who, in turn, needed increased authority from CEC.

102. The TPB report for March 2010 (**TIE00894384**, page 17) refers to a detailed cost and forecast briefing that was presented to TS on 18 January 2010. The TPB report for April 2010 (**CEC00420346**, page 18) also refers to an update briefing which was provided in March 2010. I do not know with certainty who gave the briefings. It may have been me. Steven Bell would have been there. My recollection is that the briefings focussed on cash flow. Around this time TS had a particular concern over reporting. It was not in relation to the final outturn cost of the project, it was more of a cash flow issue for them because it was getting towards the end of their financial year and the tram was two thirds of their cash flow. Because they were a government department, any money they did not spend that year was lost. TS were not getting any more or any different information than the TPB.

103. **CEC00556759** is an email from Stewart McGarrity to me dated 11 March 2010, in which he referred to BSC being paid 20% of the contract price up front. As I was not involved in the project at the time of contract close I am unable to comment.

104. An email from Andrew Fitchie to me dated 2 September 2010 (**CEC00212352**) was concerned with the cost of litigation in the event of termination. My reaction to the top end figure that was quoted was that it was a very large number. I did not get any cross-check for this figure. I was just trying to get a rough idea of the possibilities.

Risks

105. In relation to the risk and budget control procedure I can say that the whole risk management process had already been set up when I arrived. It was managed by Mark Hamill who reported to Susan Clark who reported to Steven Bell. Outputs were obtained from Quantitative Risk Analysis (QRA), on which Mark Hamill was the specialist.

106. It may be worth repeating that we had no completed design and no completed programme. There was a contract on which there was no consensus and therefore no agreed final cost. The difficult issues with the project were the design and the contract, not the risk management process.

107. The TPB report for May 2009 referred to £15.1 million of the risk allowance having been used (**CEC00633071**, pages 14 and 46). I am not able to explain how this reconciles with the Report on Change Control Update found on page 22 of the same report. The same is true of the TPB report for July 2009 (**CEC00843272**, page 14). Steven Bell, who authored the reports, should be able to answer.

108. The TPB report for September 2009 (**CEC00848256**, page 19) refers to costs being taken out of base costs and added back to the risk provision. Steven Bell or Mark Hamill would be best placed to explain this. What I can say on making allowances is that because the design was not complete we could not put a figure on anticipated changes and then imply a level of certainty that did not exist. We did not

know how many changes there would be, the scale of the changes, the cost of changes or who would be responsible for the costs.

109. The TPB report for July 2009 (**CEC00843272**, page 45) refers to one of the risks being the unreasonable behaviour of BSC commercial management and the need to have estimates scrutinised. The claims that were settled were settled at around 50% of the initial claim on average, indicating that their estimates were routinely inflated. I do not think however that this scrutiny had much effect on the approach of BSC. Another problem was that the SDS contractor did not deliver prior and technical approval consents in line with the programme and that the risk treatment strategies did not remedy that.

110. The TPB report for November 2009 (**CEC00681328**, pages 18, 40 and 61) showed nearly all risk provision as having been exhausted with Infracore works 10% complete. This was a cause for concern. There was no estimate of drawdown in relation to the BDDI to IFC issue included in this. This was because it was unquantifiable at that time and there was no complete design, contract, or programme.

111. The TPB report for February 2010 (**CEC00474418**, page 15) reported that the QRA in place at Financial Close was reviewed and amended in Period 9 08/09. Further reviews were subsequently carried out. The revised range of numbers was used to inform the overall budget. I have no detailed knowledge on the numbers in this report and I would not expect to be involved in this level of detail as CEO. Steve Bell or Mark Hamill will know.

112. It has been suggested to me that the risk register which was contained in the TPB reports may have been largely the same each month. I would not agree that this made the risk registers redundant. They may have remained the same because the risks had not changed. It may be that they were the only options we had. I have mentioned earlier what strategies we deployed to try and manage the risks, and the effectiveness or otherwise of those strategies. It is simply a record of those.

113. Regarding the Risk Register in the TPB report for June 2010 (**CEC00223543**, page 22) and the treatment strategies for the BDDI to IFC issue, I am unable to comment. Steven Bell and Mark Hamill could explain them.

114. An email from Stewart McGarrity to me dated 11 March 2010 noted that base costs for Phase 1a works were £639.9 million at that time (**CEC00556759**). This appears to be part of a PowerPoint presentation given to the TPB, which was also attached to the email (**CEC00556760**). It would have been discussed but not circulated for reasons of confidentiality. It may also have been discussed with TS.

115. The TPB report for March 2010 (**TIE00894384**, page 56) discussed refreshing the risk based approach to the calculation of the project risk allowance. I cannot comment on this. The report's author, Steven Bell, should be able to answer.

Financial Commercial and Legal (FCL) Sub Committee

116. The TPB report for July 2009 (**CEC00843272**, page 32) refers to the establishment of the FCL to oversee the resolution of disputed issues. There was no dispute between TIE, TEL or the TPB, or the various sub-committees of the TPB, as they were all largely composed of the same people. The establishment of the FCL was just an administrative process which meant you did not need to have the full Board together to get decisions; it was streamlined decision-making. Disputes were delegated to it because it was administratively expedient to do so.

117. The same part of the July 2009 TPB report also refers to a document entitled 'Resolution Strategy' which was to be presented for approval at the 29 July 2009 meeting. I have been directed to a document entitled Infraco Resolution Strategy from July 2009 (**CEC00750538**). I do not know whether this is the same document. All I can say about the Infraco Resolution Strategy document is that the challenge team were set up to challenge our own internal documents before they were put into the Dispute Resolution Process (DRP). Steven Bell or Dennis Murray would be better placed to explain the resolution strategy.

Strategic Options

118. The TPB Minutes for 3 June 2009 (**CEC00983221**, page 7) refer to developing strategies.

119. We looked at many options. I cannot recall clearly which options we were looking at at this point, but I imagine that the strategic options at this stage were to terminate the contract, reduce the scope of contract, postpone the works under the contract or to carry on as we were.

120. I think that the strategic options had already been the subject of discussion. This was where we used the PowerPoint presentations to the Board, which I have already mentioned. It is also worth noting the sensitive nature of this work, that was why we used the PowerPoint presentations at TPB meetings and did not necessarily always circulate papers before or after the meetings. Any paper on strategic options would have been presented to the TPB. The presentation would have been done by me.

121. The Minutes of the TPB Meeting for 8 July 2009 record me as having summarised the works that had been done (**CEC00843272**, page 7). I cannot add anything beyond what is recorded in those minutes. I should note however that where there is reference to mediation, there were several different mediations. At the end of June 2009 we brought in CEDR (Centre for Effective Dispute Resolution). We had a week of mediation over a range of issues. This process is not to be confused with other mediations which took place at different times.

122. There were many conversations that took place with TPB members individually and collectively outside the TPB meetings. Members were always aware in advance. Surprising board members at a meeting is not a good strategy. I always kept the TPB apprised. Discussing the strategic options took much of our time at these meetings. The July 2009 TPB concluded that using the DRP was the best

course of action. I do not now recall the specific discussions but all issues were debated at these meetings. The meetings were chaired by David Mackay. The general tone was open, with people having an opportunity to say what they wanted and asking questions.

123. The TPB Minutes for 29 July 2009 (**CEC00739552**, page 8) record discussions with the consortium members in relation to TIE adopting the more formal contractual route (that is, the DRP) to deal with the outstanding commercial issues. My recollection is that this meeting was with Richard Walker of BB and Michael Flynn from Siemens. I do not remember the tone of those particular meetings or their response, but in general meetings were professional. The same part of the minutes refers to BB being willing to work under instruction. This was under Clause 80.15 of the contract which allowed TIE to instruct the consortium to continue with works where there was a dispute.

124. I outlined the pros and cons of the formal contractual approach to the TPB at the time, but I do not now recall specifically what I said. The preparatory work referred to in the minutes would have been done around the areas of dispute we wanted to take formally to the DRP. It is also worth noting that the same Minutes (**CEC00739552**, page 5) state that Andrew Fitchie and Stewart Jordan from DLA were both in attendance. The issues we took to DRP were the ones we considered to have maximum impact. Steve Bell, the senior TIE team, DLA and I were all involved. I had also instructed independent legal advice from McGrigors. DLA would prepare papers for DRP and McGrigors would challenge them. I do not now recall the detail of the advice that was received from DLA but it would have been in writing and therefore should be available.

125. It is also noted in the minutes that the DRP process need not play out to conclusion. What is meant by this is that the DRP process, once started, does not need to go right through to the end, in that an agreement can be reached at any time. That is the process set out in the contract. We only put arguments to the adjudicator if there was no agreement at an earlier stage. The agreement we would be looking for would be on a case by case basis.

126. The Minutes for 29 July 2009 record it being noted that instructed work arising from approved changes could proceed under the terms of the contract whilst the DRP process was in motion (**CEC00739552**, page 10). This is self-explanatory; instructed work can proceed whilst other matters are in DRP. This is in terms of Clause 80.15.

127. I cannot recall the specific briefing that was given on the implications of the TPB decision to proceed with the DRP (**CEC00739552**, page 10). The PowerPoint presentations for the Board meetings were used to talk TS and CEC through the issues. CEC were well represented at the Board meetings. The minutes record that TIE had "strong and full Council support". It is also worth noting from the report at the end of August 2009 that a clear risk was laid out relating to cost and delay. The report states that we took Counsel's opinion (**CEC00739552**, page 13). There were lots of warning signs, and we were saying "This is in trouble now".

128. Whenever a tram paper was presented to the full Council I would always brief the Councillors and often the Council's Chief Executive or Finance Director or City Development Director, sometimes all three, would attend these meetings. I would use the TPB PowerPoint presentations to brief the Councillors and I would not generally leave a copy for the reasons previously mentioned about the leaking of confidential information. The 20 August 2009 Council meeting was quite a pivotal moment and had significant media coverage. It also triggered a conversation with Dr Keysberg which resulted in him inviting me over to see them in Germany.

129. The PD report accepted that not all the arguments would go in TIE's favour ("it is unreasonable to expect that adjudication outcomes will be awarded in favour of TIE"). Consideration was given to all possible adjudication outcomes and consequences they would have for the project.

Governance

130. The Agenda for the TPB meeting on 23 September 2009 (**CEC00848256**, page 4) refers to governance as an issue to be discussed. I do not know if the papers were distributed separately but it may have all been covered under the PowerPoint presentation. Graham Bissett was in charge of the governance issue. There is reference to cross-party briefings in the minutes for 26 August 2009 in these papers. Generally I did the briefings to the politicians. This is not related to the question of governance.

131. The Minutes for the TPB Meeting on 18 November 2009 (**CEC00416111**, page 9) refer to new governance structures. Most of this related to the situation once the tram was up and running. The idea was that TEL would become the overarching body for transport in Edinburgh.

132. The Funders Operating Group (FOG) was set up in June 2010, as was noted in the 'Project Pitchfork – Phase 2' Report, dated 17 September 2010 at paragraph 9.1 (**CEC00088220**, page 42). The FOG was composed of TS and CEC personnel. It was primarily established in response to the very real possibility that we would exceed the approved funding.

133. I have been directed to an email from me to Tom Aitchison and Alastair Maclean sent on 10 November 2010 (**CEC00013212**), in which I discussed the appropriate forum in which to make decisions over termination. This was necessary to avoid putting information out into the public domain which might harm our negotiating position. This email was sent in light of a forthcoming Council meeting in December 2010. I was expressing my concerns about publicly exploring the risks associated with the termination of the contract. A public paper could have prejudiced our position.

Infraco Works

General

134. I cannot comment on the detail of "on street" work which was carried out. There was no substantial on street work carried out other than under the Princes Street Supplementary Agreement (PSSA).

135. The PSSA had been signed and work had begun in Princes Street when I started. I was not involved in the agreement, made on 3 June 2009, with BSC to incorporate a fixed percentage allowance for Changes to cover Preliminaries, which is described in the Mediation Position Paper, (**CEC00951714**, pages 26 and 27). I was aware of this, but not involved. I believe it was to avoid an issue which had been causing delay in relation to agreement of changes.

May 2009

136. The TPB, TIE and TEL Board meetings were chaired by David Mackay. They were generally well attended, and everyone always sat in the same place which can make it difficult to distinguish one meeting from another when attempting to recollect details of any one meeting in particular. The key issues were distilled into a PowerPoint presentation. There was discussion outside of the meetings to avoid surprises. Meetings were never particularly contentious. I did not feel there was any dissent or disagreement over the direction the Board was taking. I think the Board members were well informed. They were accessible and I had conversations regularly if they wanted more detail on anything.

137. I have been directed to an email from Stewart McGarrity to me and others circulated on 2 February 2010, which contained as attachments various strategic papers. (**CEC00491575 to 83**). These were actually re-circulations of papers which relate to March 2009, and relate to the strategic options which I described earlier.

138. One of the documents attached to Stewart McGarrity's email was the report on Strategic Options (**CEC00491577**). I do not recall exactly when I was first made aware of this report, but I was clearly aware before 2010, on the basis that this formed part of the discussion with the TPB in July 2009. The DRP was endorsed by the TPB, but was not the way you would choose to run a contract if there had been another option. We had tried more constructive approaches, which had not worked, and had sought to compromise with the PSSA. That was not working out as we had hoped either. Therefore, I felt the DRP campaign was the least bad option available at the time. It achieved a significant saving when compared to the value of the claims the contractors were submitting. I do not think we made any particular errors in that process.

139. The objective of the DRPs was not to remove BB but that was an option we had given serious consideration to. We had discussions with Siemens in which we discussed them taking over the role of BB, but none of those discussions came to anything.

140. The TPB report for May 2009 (**CEC00633071**, page 13) noted that work had to be deferred on Leith Walk because MUDFA works were not finished. Consideration was given to the effect that this might have on Infracore works and the ability to maintain or to recover the programme, but I do not recall any detail.

141. The TS report for May 2009 (**CEC00633071**, page 37) referred to BSC having completed only 3% of the work instead of the planned 45%. This was clearly an issue which needed to be addressed. The impact could be mitigated rather than remedied, and this would be through a number of methods. Primarily, there was an effort to get MUDFA works finished as quickly as possible, to re-phase works while MUDFA was not an issue, and to then to rely on the contractor who had an obligation to mitigate delays. MUDFA was a real problem. That was why we ultimately took Carillion off the job. However, I do not believe it was the dominant problem. The dominant problems were the lack of a complete approved design and the contractual dispute. The combination of those two issues resulted in BSC's refusal to undertake on-street works without a supplemental agreement. If we had had a completed and approved design, an unambiguous contract and willing contractor, then the MUDFA delays would have been resolvable.

142. The same report for May 2009 (**CEC00633071** page 36), noted that work was continuing on Princes Street, Edinburgh Park Bridge, Gogarburn Bridge and the new access road at Verity House. Princes Street was obviously under the PSSA; the rest were off-street structures. There was a great deal of concern in relation to BSC's not undertaking any on-street works, on the back of the PSSA. This concern was heightened by statements like "*this contract allows us to hold you to ransom*", which was said by Dr Keysberg in a meeting with me in July (see below).

143. The TPB Minutes for 6 May 2009 (**CEC01021587**, page 7, point 3.9) make reference to a meeting I had with John Swinney and Stewart Stevenson. I think this would have been my first meeting with the ministers, though I had other meetings with them subsequently. I made file notes on most of these meetings. It would be helpful if the file notes could be found. I saved these on my computer at TIE. Any hard copies would have been in the document safe. I think that by this time I had already done a press interview where I publicly stated the project was not on programme and not on budget. I also recall that despite great pressure generally to come up with a new cost and date, I refused to do so until I had some certainty that forecasts were deliverable. The ministers were neither helpful nor unhelpful. They were not overtly seeking to exert any influence or control. TS were fully aware of all relevant issues and they would have briefed the Ministers. I never got the impression that anything I said to the Ministers was a surprise.

June 2009

144. **CEC00781406** is an email from me to Dr Keysberg and Dr Schnependahl, which I sent on 18 June 2009, ahead of my meeting with them. This email is self-explanatory and I cannot add anything to its content.

145. A mediation with BSC took place at the end of June 2009 which was chaired by CEDR. A number of items were discussed and I cannot remember each specific item. The mediation was largely unsuccessful in achieving any form of breakthrough.

July 2009

146. The TPB Minutes for 8 July 2009 (**CEC00843272**, page 7) record that I summarised progress and also record that the Project Management Panel put in place as part of the PSSA was not a success. This was said simply because the PMP had failed to resolve the core outstanding issues.

147. The 8 July Minutes also record that I had met with Dr Keysberg and Dr Schneppendahl on 6 July 2009 (**CEC00843272**, page 7). I had two meetings with them: one before and one after mediation. The July 2009 meeting was the first real test after the PSSA, to see if they were prepared to do on-street work without an on-street supplementary agreement (OSSA). It became increasingly clear that they were not prepared to do so. Shandwick Place was the first real test of that, as it was the next on-street site where work was due to start and never did. We were never completely happy with OSSAs, it was never a sensible way of finishing the project.

148. There were some important things said at the 6 July meeting which became recurring themes during my time on the project. I cannot specifically recall everything that was said at each meeting. However I do recall that Dr Keysberg said to me that *"If you want to get to America you don't buy a bicycle"*. He also said *"This contract will never get a tram built"* and *"This is a great contract for us. It allows us to hold you to ransom"*. He also said *"You are behaving dishonourably"*. I asked what he meant by that and he said it was about *"The gentleman's agreement they had between themselves and Willie Gallagher"*. I am aware of an email from me to Steven Bell, Anthony Rush and Dennis Murray dated 13 January 2010 where I referred to these comments (**CEC00586393**). I had assumed these comments amounted to a negotiating position. I was two to three months into the job and was at my first meeting with the principals from BBS. I assumed that they were setting out the strength of their argument. I listened, took notes and made a mental note to follow up on these issues. At this stage they were steeped in the project and I was new in the door. They had come over from Germany. I do not know if they had other meetings during their trip to Edinburgh. After this, I had a better understanding of their position. During the meeting I raised my concerns over the management of the construction site, particularly Princes Street, where I felt the works were untidy, unsafe and unmanaged. There was not even signage on the sites with their company name.

149. Following the 6 July meeting I contacted Willie Gallagher (with whom I otherwise had no contact) about the alleged gentlemen's agreement. He dismissed it as nonsense. I checked with other TIE and DLA team members but no one had any knowledge of this agreement. I find it incredible that any party would proceed on a project of this value on the basis of a gentleman's agreement in any event. I was greatly concerned by their comments at this meeting. I later spoke to Anderson Strathern about my concerns.

150. Month by month the slippage on the Infraco works increased. I am aware that this was referred to in the TPB reports for May 2009 (**CEC00633071**, page 37), 8 July 2009 (**CEC00983221**, page 30) and again on 29 July (**CEC00843272**, page 58). This was all down to the lack of a completed and approved design and an ambiguous contract, and, to a certain extent, the MUDFA delays.151. An Advice

Note from DLA dated 3 July 2009 (**CEC00783315**) referred to consideration being given to reducing the scope of works. This was one of the strategic options we said we would look at. It was discussed at TPB meetings and formed part of the on-going research TIE were doing. I think we were talking about removing all on-street works from the consortium so that they would just complete from the airport to Haymarket, or at least removing the civil engineering elements of the on-street works.

152. The TPB Minutes for 29 July 2009 (**CEC00739552**, page 7) refer to a hold up of Infracore works due to commercial issues arising from design changes. The changes were as a result of the design not being complete. The question for us was what had caused the changes and who was to bear the financial and programme responsibility for those changes. That was the central issue in the commercial dispute.

153. An email which I sent to David Mackay on 31 July 2009 (**CEC00667242**) followed a meeting I had with Martin Foerder. It was also sent to Dave Anderson and Tom Aitchison at CEC, and Bill Reeve (Head of TS) so that the important parties were all aware of the situation. I had been in post three months. I was being open and honest with everybody about the difficulty we were facing. This is related to my earlier comments about Dr Keysberg and Dr Schneppendahl. I have often asked myself if at this point in my tenure I could have embarked on a different course of action that would have led to a better outcome. I conclude that there was no better course of action available to me at that time, given that Princes Street was dug up and shut to traffic and there had been no hint of any compromise from the consortium, who were using phrases like *"agree with us or litigate"*.

August 2009

154. A letter dated 6 August 2009 (**TIE00088884**) from BSC to TIE indicated that BSC would not work on Shandwick Place without a supplementary agreement, which was entirely consistent with what they had said in previous meetings. I therefore do not know if this letter was specifically discussed at the TPB, but I told the TPB about it by email sent to the TPB members dated 14 August 2009 (**CEC00788090**).

155. Consideration was given to invoking contractual remedies for failure to perform, but not to RTNs at this stage.

156. This was all brought to the attention of the TPB and they were aware it was an evolving situation. It was more formally brought to their attention by my email of 14 August 2009 because BSC's letter of 6 August was the first time they had put it in writing.

157. The TPB report for August 2009 (**CEC00739552**, page 13) referred to the reasons for contract delays and also made reference to BSC still having failed to submit preparatory paperwork. BSC were required to submit various elements of preparatory paperwork, for example copies of the sub-contracts and method statements, before we were able to issue them with a permit to work.

158. The costs section of the same August 2009 report stated that TIE might not have sufficient contractual leverage to instruct the commencement of works (**CEC00739552**, page 18). The principal issue related to clause 80 and the interaction between sub-clauses 80.20, 80.15 and 80.14 which caused a grey area. An unambiguous obligation on the contractor to continue works was missing from the contract.
159. In the TPB minutes for 26 August 2009 (**CEC00848256**, page 5) I am recorded as referring to a great deal of intensive work in relation to the DRP. This refers to the preparation of position papers, and to instructing McGrigors, who carried out an independent review of these. There is also reference to cross-party briefings, which were carried out by me, normally with senior CEC officers in attendance; these would cover everything to do with the project and not merely this issue.
160. In the same August minutes (**CEC00848256**, page 6) Steven Bell is recorded as reporting that progress remained "*slower than desirable*" for the Infraco works. I agree that it was slower than desirable. Expanding on this, I do not think anybody involved on the project was under any illusions about the scale of the challenges the project was facing. All of our documents and correspondence were explicit about the scale of these challenges. The minutes (**CEC00848256**, page 7) also refer to formal and informal discussions that took place with BSC. I do not recall the specifics of these discussions. Richard Walker, Michael Flynn and Martin Foerder were involved for the consortium, myself and Steven Bell for TIE. The meetings were sometimes robust but always professional, despite the contractual differences.

September 2009

161. The TPB report for September (**CEC00848256**, page 33) notes that because matters had entered DRP, TIE could instruct BSC to progress the works. This concerned the use of Clause 80. Work was to be done on a demonstrable cost basis and the final bill sorted at a later stage. This approach was considered and discussed at the TPB.
162. The same report (**CEC00848256**, page 32) includes reference to the appointment of direct BSC resources and the final appointment of package contractors as two of the causes of delay. They were some of the issues causing delay though the report also lists six others. CEC and TS were briefed through mechanisms other than just this report, so they were aware of the issues.
163. The report for September 2009 (**CEC00848256**, page 33) refers to six disputes with BSC. I do not know how many Infraco Notices of TIE Change (INTCs) had been issued under the contract by that time. We did monthly tables for INTCs and that information was presented at the PowerPoint presentations. I do not remember exactly how many would be attributable to the BDDI to IFC issue. The TPB and TS were informed of the INTCs

164. TIE implemented a challenge process for disputes prior to referral to the DRP. The DRP process involved us preparing positional papers. This was done by the TIE team and DLA. The challenge process involved bringing in McGrigors and other members of the TIE team who had not been involved in the preparation of the papers to challenge and test them before actual referral to the DRP.
165. The TPB Minutes for 23 September 2009 (**CEC00842029**, page 6) record that I provided a summary following discussions with senior consortium representatives. I do not recall these specific discussions. It was at about this time that I went to Germany to meet BB so it could be referring to that meeting in Germany. It was there I met David Darcy and we discussed unresolved issues on the project.
166. The same TPB Minutes for 23 September 2009 (**CEC00842029**, page 8) referred to the issue of supplementary agreements for on-street works being considered for DRP. I cannot recall what the exact contractual dispute was. There were a number of disputes under the PSSA.

October 2009

167. The TPB reports for October and November 2009 (**CEC00842029** and **CEC00681328**, page 6) both refer to the meetings I had with David Darcy. David Darcy's appointment made a positive difference to the project. I briefed the TPB and CEC on what I called the "*Darcy effect*". His position was that BSC should not be holding us to ransom, that they should be getting on with the job and sorting out the contractual disputes in parallel. This was the kind of attitude that I was used to working with and I recall briefing CEC at the end of 2009 that we expected work to start after the Christmas/New Year break. This optimism did not last however. In early 2010 I had a positive discussion with David Darcy on the Friday, and on the Monday he came in with a completely different attitude and it was back to the old BSC attitude which dated from before his arrival. I do not know what happened to change his attitude.
168. A Position Paper was prepared by DLA and dated 16 October 2009 in relation to the dispute over the Baird Drive retaining wall, which was emailed to me on 16 October together with Position Papers in relation to the A8 Underpass and Tower Bridge Structure (**CEC00757235**, **CEC00757234**, **CEC00757236** and **CEC00757237**). TIE's general argument was that in order to qualify as a Notified Departure, BSC had to show that the evolution of the design exceeded normal design development. This went to the heart of the interpretation of the interpretation of the contract. TIE's position was that those changes that were normal design development would not qualify as notified departures. These positional papers were extensive papers compiled with care and precision and they are all self-explanatory. Any attempt by me to summarise them, seven years later, will only add confusion rather than clarity.

169. The TPB Minutes for 21 October 2009 (**CEC00681328**, page 9) refer to Infraco refusing to carry out on-street works without a supplemental agreement.
170. The principal argument from the contractor for refusing to adhere to the contract in relation to on-street works was that they wanted to be certain that they would be paid what they felt was justified, and because there was a dispute over how the contract worked, an OSSA would give clarity. This was the subject of consultation with our lawyers.
171. The same minutes for 21 October 2009 state that there had been no on-street works due to a lack of agreement, suitable sub-contractor arrangements and completion of final design assurance checks. All of these issues contributed to the problem. That having been said, David Darcy was involved at that time and there was a more positive attitude.
172. At the same October meeting, I am recorded in the minutes as having outlined my strategy and tactics to take discussions forward with BSC (**CEC00681328**, page 9). What we were trying to do, as the minutes note, was come up with an acceptable form of wording for an OSSA and at the same time continue with DRPs and press for complete design. I thought it was the best strategy to pursue at the time.
173. I do not recall what agreements were reached in relation to the Haymarket Viaduct, MUDFA Revision 8 and EOT1 as referred to in the November 2009 TPB report (**CEC00681328**, pages 13 and 34). Steven Bell, who was the report's author, may know. Conclusion of these agreements did not unblock the stalemate.

November 2009

174. I have been directed to the description of the Infraco works given in the November 2009 TPB report (**CEC00681328**, pages 15 and 37). Looked at in isolation, this only paints a partial picture. However, taking into account all other information flowing from TIE to TS at the time, TS did have a full picture of what was going on. The TPB meetings lasted all morning, with an audience that was steeped in the project.
175. I have also been directed to the Infraco progress tables in the November and December 2009 reports (**CEC00681328**, page 40 and **CEC00416111**, page 52) and the January, February and March 2010 reports (**CEC00473005**, page 53, **CEC00474418**, page 33 and **TIE00894384**, page 34). These all contain a level of detail I cannot provide comment on. The report's author, Steven Bell, would be better placed to comment.
176. The Carrick Knowe and Gogarburn Bridge adjudication decisions were given in November 2009 and were emailed to me by Steven Bell on 19 November (**CEC00781432**, **CEC00781433** to **36**). These were disappointing. I emailed Steven Bell and others on 19 November 2009 (**CEC00757402**), asking for someone to prepare a case in defence of the adjudicator to prepare us for our

own defence. If there was a paper prepared it was probably by McGrigors. The general discussion we had concerned whether or not we should challenge the adjudication. The decision on balance was not to challenge because it would not have been a good use of time or money. I do not recall the email from Nick Smith to me dated 30 March 2010 (**CEC00356396**, page 2) asking for the reasons behind our decision not to challenge. By March 2010 life had moved on.

177. I have been directed to the emails (**CEC00781833**) from Graeme Bissett and David Mackay to me and others dated 23 and 24 November 2009 concerning the adjudication. I do not know what I can add to the emails as they give a good summary. The mood was that the adjudications were disappointing but it was not time to raise the white flag. I have also been directed to a second exchange of emails between me, David Mackay, Graeme Bissett, Steven Bell and Stewart McGarrity dated 1 and 2 December 2009 (**CEC00585019**). These were sent on the back of a meeting between Michael Flynn and me. Graeme responded to my assessment with a self-explanatory and helpful email.
178. My understanding is that the exercise proposed by Graeme Bissett in his email of 1 December was carried out (**CEC00585019**). The problem was that if every BDDI to IFC change is the responsibility of the client, but you do not yet have a completed design, you cannot estimate how many changes there are going to be or their extent.
179. I have been directed to an email from Steven Bell to Andrew Fitchie, attaching a brief to DLA dated 7 December 2009 (**CEC00655900** and **CEC00655901**). The brief requested a "crystal-clear" paper from DLA addressing key issues. We did obtain this later. The email from Andrew Fitchie to Steven Bell and attached 'Summary of Legal Interpretation' (**CEC00651407** and **CEC00651408**) dated 9 December 2009 was, I think, the reply from Andrew Fitchie. It was a complex issue. What we had was legal advice from DLA who told us that TIE's interpretation was correct. This was unsurprising as TIE's view was largely informed by DLA. We had one, possibly two, adjudications that clearly did not reach the same conclusion as TIE and DLA and we had McGrigors saying that the adjudicator was not, necessarily, wrong. We therefore had conflicting legal positions.
180. It has been suggested to me that the essence of the argument was that DLA and TIE were arguing that the price was for all works to meet the Employer's Requirements (ERs) whereas BSC were arguing that while there was an obligation to carry out works (to meet the ERs) the price only covered works if they were contained in the BDDI. That is a fair summary of that element of the dispute. As a general comment, I would say that these were complex adjudications and I cannot properly summarise them seven years later.
181. I have been directed to the Adjudicator's conclusions in his decision in the Russell Road adjudication of 4 January 2010 (**CEC00567896**, paragraph 65). After this, we had two adjudications both capable of dispute and/or interpretation. They were not consistent with each other and that lack of certainty and/or clarity either way was what caused the prolongation of the

deadlock. We were obviously disappointed with the adjudications as they did not give the results we wanted or expected.

182. An email from Susan Clark to me from 12 March 2010 (**CEC00619994**) referred to the Wilson adjudication, and the parties agreeing that the Hunter decisions would not be binding. None of the adjudications was binding other than on the specific circumstances to which they applied. Each new adjudicator could approach each one afresh and not be bound by previous decisions.
183. In the TPB Minutes for 18 November 2009 (**CEC00416111**, page 7) I am recorded as having reported the outcome of the Carrick Knowe and Gogarburn Bridge Adjudications. The Minutes correctly record that it was reiterated at the meeting that it was too early in the process for either party to establish precedence, and that it was agreed that the strategic direction then current should continue. It would be an over-simplistic view to say that TIE's interpretation was rejected and that BSC had won. I do not know if any review of the risk allowances was carried out. If one conceded the whole point you would have an open-ended risk.
184. The same November Minutes record that negotiations were still on-going for an OSSA (**CEC00416111**, page 7). They also record that the intention was that payment would be made on a demonstrable cost basis. This had not worked well with the PSSA. TIE were not happy with the cost outcome. Work was done to evaluate the cost implications of changing the basis of payment by Stewart McGarrity and Dennis Murray. The resulting information was shared internally and with CEC officers.

December 2009

185. A paper entitled 'TPB Risk Report' was prepared by Mark Hamill for the TPB meeting on 16 December 2009 (**CEC00416111**, page 23). This noted that the Adjudicator had preferred BSC's case and that this was under review by TIE and our advisers. This paper deals with the issues I have already commented on.
186. Tony Rush started work on the project in December 2009. The project had a council (the Peer Review Group), made up of four independent experts. I cannot recall who they were: Susan Clark would know. They were brought in every six months to review the project. One review took place in mid-2009 and another late in 2009. They were of the opinion that the project was involved in an "old-fashioned" construction dispute. Their advice was to secure the services of someone with the particular skillset to deal with these circumstances. Recognising that no one had those particular attributes within TIE, Brandon Nolan of McGrigors introduced me to Tony Rush. He was a good fit, an independent consultant and he reported directly to me.
187. In an early email that I sent to Tony Rush dated 18 December 2009 (**CEC00656335**) I indicated that I had tried to reach a deal with BB, where, if an estimate in respect of a change could not be agreed, BSC would carry out

the work and would be entitled to be paid on a demonstrable cost basis. I do not know how much this would have cost as it was not costed. It was merely an exploratory proposal.

188. On 3 December 2009 I emailed principals within TIE advising that BB were refusing to work on Shandwick Place without an amendment to the contract (**CEC00585352**). This is a significant email. I had been in post nine months and although Princes Street was nearing completion, it had been at considerable expense. We had a commercially aggressive contractor and a weak contract. There was no certainty on cost, programme or effectiveness of the contract and the shareholders were "wobbly" and impatient. There were several occasions where it might have been better to stop and change direction. This was the first such occasion on my watch and I could not let it pass without exploring the options. Those options were to carry on as we were or negotiate an exit. This ultimately all led to the formation of Project Pitchfork.
189. The TPB report for December 2009 (**CEC00416111**, page 14) noted that work had been instructed by TIE under a clause 80.15 notice. I do not know and cannot work out if that was the same work which had been noted in earlier reports and minutes. The same report makes reference to "senior intervention discussions". I do not know who was involved in these discussions, though it would have been Susan Clark and Steven Bell on our side. It is stated that BB agreed that work would be carried out at certain locations following these discussions. I do not know what the basis was upon which BB agreed to carry out these works. I am also not aware whether any of these locations involved on-street works.
190. The same part of the report (**CEC00416111**, page 14) makes reference to an expectation that budget and programming implications becoming increasingly clear. We hoped that the outcome of the DRP would clarify the situation by giving certainty on the interpretation of the contract.
191. It has been noted that the same December report did not mention the outcome in relation to Carrick Knowe and Gogarburn (**CEC00416111**, page 46). I do not know exactly when the report was written. In any case these reports were not the only mechanism through which CEC and TS received information.
192. The TPB Minutes for 16 December 2009 (**CEC00473005**, page 6) record that despite earlier positive indications, the BSC attitude had hardened and on the ground, production remained poor. It was not feasible to achieve the desired opening for revenue services date. I had told people six months previously that this date would not be achieved. It was not possible to hold BSC to the agreement they had signed because the agreement was weak and ambiguous. This was the heart of the issue. Under Clause 80, BSC's argument was that they could hold us to ransom and not be in breach of the contract. The Minutes record that "*necessary additional and robust steps*" were to be taken in the short term in order "*to target and enforce the full range of commercial mechanisms available within the Contract*". This was not an

instruction to hold BSC as being in breach; the Board meant that we should continue to use the contract to try to enforce performance.

January 2010

193. I sent an email on 7 January 2010 to David Mackay, Graeme Bissett, Tony Rush and Steven Bell (**TIE00285142**). This was sent because nothing had come of the promises of a new start with David Darcy. He was being less proactive and forthcoming than he had been previously. At this point we were discussing the prospect of ceasing our relationship with the contractor. It is a good email summarising the situation at that time. It is explaining the background to the Chairman's letter, which I have not been given sight of, but should therefore be read in conjunction with that. In December we offered an extension of time as a goodwill gesture. The Board said that if they reneged we would withdraw that extension.
194. It has been pointed out to me that in the TPB report for January 2010 (**CEC00473005**, page 13/14) MUDFA and Infracore issues were reported in the same section. This is because MUDFA had an impact on Infracore for the core works.
195. The same January report contained an overall report on 'progress' (**CEC00473005**, page 46). There were various internal emails and documents that described the state of the project at the end of 2009. I cannot accurately describe the state of the project at that time without reading them all. What is recorded in the January report reflected the situation to some extent.
196. I am asked about an entry in the TPB Minutes for 13 January 2010 meeting regarding the adjudications (**CEC00474418**, page 7). The adjudications did not set a precedent and it was not the case that TIE had been unsuccessful in all of the adjudications. The contractors had been awarded less than they had claimed. The Minutes record my saying that the adjudication decisions are not legally binding, which is correct. I am also recorded as having detailed a "*proposed commercial strategy*". This was Project Pitchfork. It was a two-pronged strategy: firstly to find a way of terminating the contract and secondly to find a way to reduce the scope of the project. These became known later individually as Project Notice and Project Carlisle.
197. **CEC00450935** is an email sent by me to Donald McGougan, Dave Anderson and Marshall Poulton on 14 January 2010. The purpose of this was to provide them with an update following the Board meeting. The email is self-explanatory. The elements of the campaign and what I hoped to achieve are all contained in the email. Matters were brought to a head by the decision at the TPB meeting in March. There were concerns expressed by all of us about the lack of certainty on cost, lack of progress and similar matters. My email to the TIE team on 13 January 2010, in light of the TPB decision, set out what had to be done (**CEC00550672**). This email was probably used as the agenda for the emergency TIE executive meeting the following day.

198. **CEC00475065** is an email from me to Tom Aitchison, Donald McGougan and Dave Anderson dated 21 January 2010. This referred to a meeting I was to have with Stewart Stevenson the following Monday. The purpose was to keep party leaders and the Minister up to speed. I do not know who requested the meeting. These meetings were normally at the request of the Ministers. I do not recall the outcome.
199. Stewart McGarrity sent an email to me, Graeme Bissett, Steven Bell, Alastair Richards and Susan Clark on 22 January 2010 (**CEC00554138**) which dealt with the concern that we were approaching the funding limit of £545 million. CEC were well aware of this. Formal notification was not given to them because we did not have a more certain number to give. They were formally advised in March 2010. It is also important to read Graeme Bissett's response in this email chain.
200. On 26 January 2010 I emailed Anthony Rush, Andrew Fitchie and Brandon Nolan (**CEC00551040**). The email referred to raising an action to clarify the interpretation of Schedule 4 as soon as possible. The argument Brandon Nolan had started was based on the decision in *Chartbrook v Persimmon*, in which the contract was commercially absurd and could therefore be re-written. Brandon Nolan ultimately concluded we did not have a sufficiently strong argument. No proceedings were brought.
201. I have been asked to comment on the issue of whether the BB supply chain was in place, and have been directed to an email dated 27 January, from Andrew Fitchie to Tony Rush (**CEC00551070**, page 2). It is my recollection that the consortium was slow putting in place subcontracts and that most of the subcontractors were working on letters of intent rather than proper subcontracts throughout my time there.

February 2010

202. The TPB report for February 2010 referred to on-going works (**CEC00474418**, page 11). I do not know specifically which of these were being done under the contract as opposed to under instruction or supplementary agreement. It is safe to assume however that none of the works referred to were on-street.
203. The same February report (**CEC00474418**, page 15) noted that TIE were referring all key issues to DRP. The decision went through the FCL Committee and the TPB. The desired impact was to achieve clarity of contractual interpretation. It was designed to try and speed things up as once an issue was referred into the DRP, we could instruct work under Clause 80.
204. A letter was sent to me by BB dated 3 February 2010 (**CEC00655626**). In this letter BB denied that they had taken the position that all BDDI to IFC variances were Notified Departures. BB were asking TIE to reconsider their position in light of the adjudicator's decisions. The letter basically said "*you are wrong, we are right, agree with us or we will litigate*". BB had taken that approach all along, and so I did not see this as the offer of an olive branch by

them and I did not see this as any opportunity to see if an agreement might be reached.

205. I have been directed to an email I sent on 11 February 2010 (**CEC00560882**) to David Anderson, Donald McGougan and Marshall Poulton in which I indicated an intention to put together a case that BB was in breach of contract and to terminate the Infraco contract. The email is self-explanatory. TS were briefed on the issue. This strategy was formulated by the team and approved by the TPB at the end of 2009 as part of Project Pitchfork. This workstream later became known as Project Notice.
206. I emailed David Mackay in relation to bonuses and remuneration (**CEC00617183**) on 11 February 2010. This bonus scheme was in place when I got there. The bonus assessments were annual, and so this would have been my first one. There was no rationale for awarding bonuses or pay rises at that time given the circumstances of the project. In my view, there were lots of people working hard under difficult circumstances but, despite that, the public and political perceptions meant it would be inappropriate to award bonuses or pay rises.
207. The TPB reports for February 2010 (**CEC00474418**, page 27 and 31), March 2010 (**TIE00894384**, page 14, 27 and 31) and April 2010 (**CEC00420346**, page 13, 14, 31 and 35) all referred to "a lack of agreement on programme going forward". There was no agreed programme, there still was not a completed design and there was no agreed commercial interpretation of the contract. The Carrick Knowe and Gogarburn decisions were still under review because the possibility of reviewing them still remained open to us. We were not clear as we had conflicting advice from different legal teams and the situation was still evolving. The commercial strategy was constantly under review. The Strategic review referred to on pages 29 of the TPB Reports for February and March was Project Pitchfork which I have already described.
208. The TPB Minutes for 10 February 2010 (**TIE00894384**, page 7) recorded that the works remained "slow and behind programme". This was correct. The same February Minutes reiterated the fact there was to be a report on strategy for the March meeting (**TIE00894384**, page 8). There was a Power Point format presentation at that meeting. All TPB members at the time would have received it. I cannot recall any details of the meeting beyond what has been recorded in the Minutes. My recollection was there was a consensus to pursue Project Pitchfork.
209. On 26 February 2010, Andrew Fitchie emailed me attaching a report on the termination of the Infraco Contract by Dundas & Wilson, which was addressed to CEC (**CEC00551306** to **CEC00551310**). The report concluded there was no right to terminate in the absence of an Infraco default. CEC were concerned that wrongful termination of the contract would have a significant downside and they needed their own independent advice, and therefore instructed Dundas & Wilson. I do not recall exactly who I would have discussed the report with, although almost certainly I would have done so with Alistair McLean. I would never have expected to be able to terminate the contract in the absence of an Infraco default.

March 2010

210. I sent an email to Steven Bell, Stewart McGarrity, Dennis Murray, Mandy Haeburn-Little, Andrew Fitchie and Susan Clark on 19 March 2010 attaching a summary of the Infraco Contract (**CEC00549779** and **CEC00549780**). The summary was an internal document and was my script for the private briefings I gave. There were increasing noises from all quarters about TIE's suitability and competence to be in charge of the project so I was trying to explain to more and more people in clear and concise terms to give them as accurate a picture as possible about the situation.
211. The minutes from a meeting with CEC which took place on 16 March 2010 (**CEC00475671**) recorded TIE being clear that they would not seek to challenge adjudication decisions. There was a report from McGrigors, (**CEC00618945**) and counsel was lukewarm on the prospects. The decision not to challenge was taken reasonably soon after each adjudication but kept under review. Alistair McLean was also nervous about challenge, since you would need to show that the decision by the adjudicator was absurd.
212. DLA identified that if any design alteration was a Notified Departure, it would be open to BSC to permit SDS to redesign works to TIE's prejudice. This was at the heart of the contractual disagreement. The side agreement that was in place between SDS and the consortium was important here. We built it into our approach to the DRP once we became aware of it. It also made it important to understand what had led to any changes in design.
213. The letter sent to me from BSC dated 3 March 2010 (**CEC00648426**) was a reply to a letter I had written, in which I had referred to the OSSA as something proposed by Infraco. They disagreed with this. It was always my understanding that they wanted the OSSA. The issue here was one of detail. The principle of the OSSA was not what is being raised: it was the content of it. If the effect of the OSSA was to re-write the fundamental terms of the contract to such an extent that it rendered it a different contract, this could potentially have breached EU procurement rules. My recollection is that the OSSA which BSC proposed was effectively a cost plus contract and, as such, did not offer best value. I do not know whether the procurement law issue was raised earlier, but in any event it is not until you see the context and effect that you can assess such a thing. I would expect that DLA were engaged in drafting the agreement.
214. On 1 March 2010 I was copied into an email (**CEC00548226**) from Tony Rush to Andrew Fitchie and Brandon Nolan with a report on design liability attached. This document appears to be comprehensive and self explanatory and I cannot add anything to it.
215. An email sent by Joanne Glover of DLA on 1 March 2010 to Tony Rush and Torquil Murray was copied to me, attaching DLA copies of earlier advice including a paper on the liability of SDS (**CEC00548315** to **CEC00548321**). The email was the result of Tony Rush looking into the issue of design and being brought up to speed. Following an email exchange, Andrew Fitchie

offered various papers to Tony Rush that had previously been produced by DLA. I do not recall these documents. I did receive them on 1 March 2010 but I do not recall whether I had seen them prior to that. Some of the documents are from before I started at TIE.

216. The summary paper on SDS Liability for delay and poor quality attached to the 1 March email (**CEC00548316**) was dated 9 April 2009. This was before I started. Many of these papers were simply recirculating advice which had previously been given. I was aware of concerns about the on-going performance of the SDS provider. To a certain extent it was an historic issue as the SDS provider was no longer contracted to TIE. The issue of whether the SDS provider was entitled to an extension of time relates, I assume, to when SDS were contracted to TIE, before my time. Following novation TIE had little direct control over SDS, though we did try to manage their performance via the infraco contract
217. Also attached to the 1 March email was DLA's advice note of 25 June 2009 (**CEC00548318**). This noted that the time for performance of SDS obligations was tied to the Consents Programme, Design Delivery Programme and Master Programme. I do not know how the SDS performance compared against these benchmarks. I do not know if the programmes were revised, although I imagine that they were. Generally my understanding is that the SDS performance was poor. In relation to contractual remedies my recollection is that we did everything we could under the contract to force BSC to manage SDS, including issuing an RTN. I do not recall specifically what my involvement was in obtaining or considering the terms of advice.
218. In general, I would note that despite TIE's best efforts we could not get a better performance out of SDS. This became worse after novation when they were sub-contracted to BSC. TIE tried to coax a better performance out of the designer. We did not have sight of the side agreement between the designers and the consortium members.
219. The Report on Four Key Questions dated 13 December 2009 (**CEC00548321**) was another document attached to the email of 1 March from DLA. I note that the Report concluded that PB's performance had prejudiced the tendering exercise and running of the contract and that PB should bear responsibility for this. There was no discussion with me as to how this liability could be reconciled with the novation agreement which TIE had required PB to sign. In relation to the adjudications, DLA maintained the position they were right and the Adjudicator was wrong. We considered this DLA advice, along with our own reading of adjudication decisions, and the advice of McGrigors and the CEC Legal Department. TIE decided not to challenge the adjudications having taken all of that into account.
220. I do not recall any specific meetings to discuss any of this advice in relation to the adjudications. I had many meetings with lawyers: often three or four a day. We would have met to discuss this. It would have been with Tony Rush, Andrew Fitchie, the TIE team and possibly McGrigors.

221. A further Note relating to interpretation of Pricing Assumptions from 1 March 2010 (**CEC00618945**), prepared by McGrigors, is entirely self-explanatory. It concerned the problems with challenging the adjudication decisions – the prospects were low, there would be considerable time and effort involved, and it ultimately was not going to improve progress. This was a significant document influencing our decision not to challenge.
222. The DLA Report on Six Key Questions dated 16 January 2010 was attached to Joanne Glover's email of 1 March (**CEC00548320**). I do not know when or to whom the paper was first circulated because it was a draft only. In more general terms, I think this was prepared after the first adjudication which had cast doubts on DLA's interpretation of the contract. The second of the six questions in the report concerned failures to mitigate the effect of delay and clause 60.9 (**CEC00548320**, pages 3-4). This question is self-explanatory. There were many factors causing delays. The challenge was to pick through them to ascertain the contribution of each factor to the overall delay situation.
223. The advice in this report would have been taken into account in the granting of any extension of time. For example, where there was a delay to the project that TIE believed was the responsibility of Infracore, then TIE would not be obliged to offer an extension of time to cover that delay. The dates are important in this document and it is necessary to clarify when it was produced and circulated.
224. On 25 February 2010, prior to the March TPB meeting, I circulated an email (**CEC00587084**) to the TPB setting out objectives. My intention was that the TPB should consider the three options I was setting out. Once again the document is self-explanatory. It set out three options: termination of the whole Infracore contract; BSC completing part of the works followed by a BB exit whilst we negotiated completion with Siemens; and BSC completing the project.
225. I have been directed to the TPB report for March 2010 (**TIE00894384**, page 12) which indicates that the consortium were referring a further matter to DRP. This was not of particular concern. It was an expected action.
226. It has been pointed out to me that the number of INTCs that had accumulated were not mentioned in the PD reports or reports to TS. This, however, did not mean that they were considered to be unimportant. They were included in the Power Point presentations given to the TPB and to TS.
227. The Risk Register contained in the March 2010 TPB report (**TIE00894384**, page 23) refers to a new treatment strategy for the BDDI to IFC issue, headed "*contract interpretation and technical expert witness work*". This is an extract from the Primary Risk Register and, as such, Steven Bell or Mark Hamill, who were the authors, would be able to comment upon it.
228. The same report refers to one of the factors affecting progress as being the diversion of utilities (**TIE00894384**, page 49). This was one of the factors but it was not the main factor. It is almost impossible to say to what extent utilities were holding up progress, because there were so many factors causing delay.

It would not be easy to try and decipher which were actual delays and which were smokescreens or red herrings. It is my contention, however, that the principal cause of the delay at this point in the process was lack of a complete design.

229. In the TPB Minutes for 10 March 2010 (**CEC00420346** page 5) I am recorded as having referred to briefing John Swinney and Stewart Stevenson. I met both of them on many occasions but I do not recall this specific meeting. I will have made a file note of the meeting as will Dave Mackay. Generally the ministers took the role of impartial interested parties. I have no specific recollection, but I expect that I briefed them on the proposed approach to the TPB as set out in my email of 25 February 2010 (**CEC00587084**).
230. I have not previously seen the minutes of the 5th Quarterly Review held on 4 March 2010 (**TRS00011100**, first item) which record that the Ministers had ongoing concerns regarding contractual disputes. A full briefing was given to TS which even includes a note of the 523 INTCs. I am not sure who specifically expressed the concerns which are noted in the minutes. In May 2009 I had told the Ministers that we were not on time and not on budget and that there was no ability to predict an outcome. The fact that they were concerned in March 2010 is therefore not a surprise to me as I had briefed them as to my concerns. It would be a surprise if they were not concerned at this stage.
231. **CEC00548728** is a letter dated 8 March 2010 that BSC wrote to CEC Officers and Cllr Mackenzie, setting out their version of events. This letter sought to portray BSC in the best possible light and TIE in the worst possible light, but it was not a full and accurate picture at any level. I am aware of Andrew Fitchie's draft response which was attached to an email sent from Tony Rush to me, Andrew Fitchie, Graeme Bissett, David Mackay and Steven Bell on 11 April 2010 (**CEC00321073** and **CEC00321074**). I do not know if this was actually sent. This exchange was symptomatic of a poor relationship.
232. The TPB Minutes for 10 March 2010 (**CEC00420346**, page 7) record that negotiation of a new OSSA was not to be pursued, in part, because of concerns about procurement law. However I do not believe the principal reason for this decision was procurement law. I think that this was a side issue. The principal objection I had to the proposed OSSA was that what they were proposing was a cost plus arrangement which left all the risk with the client and, in absence of a completed design, provided no certainty. I do not recall what TIE's counter proposal was. The general principle was that we wanted a fixed price for the delivery of the Employer's Requirements.
233. The Minutes also recorded that a new strategy was approved by the TPB. I think that at this point the strategy became Project Pitchfork: that is the three-pronged strategy as detailed in the email sent to the Board members in February 2010 (**CEC00587084**). I cannot add any more without access to the Pitchfork documents. Part of the strategy to reach an agreement with BSC was something called "Siemens 33 Initiative", which was about taking 33 key

issues and looking to get them resolved. David Mackay's interaction with Kenneth Reid was also part of that strategy.

234. The TPB report for April 2010 provides a statement of the reasons for delay in Infracore (**CEC00420346**, page 12). I cannot comment on whether or not this statement was accurate and complete. The report's author was Steven Bell and he should be able to answer.

April 2010

235. It has been pointed out to me that the TPB Report for April 2010 listed the adjudicator's decisions for Gogarburn, Carrick Knowe and Russell Road as still being under review (**CEC00420346**, page 32). I am not sure why this was the case. It may be that the part of the report in question had not been updated, or it might have been because a final decision had not been made not to challenge.
236. On 19 April 2010 I sent an email to Jenny Dawe, Iain Whyte, Steve Cardownie, Steve Burgess and Andrew Burns (**TRS00010706**). This was a summary of the project after I had been in office for a year. It is a self-explanatory email. It was circulated widely. It was a realistic assessment of where the project was at that time. It set out the complexity of the situation and demonstrated my openness with all key parties. From my subsequent email to Bill Reeve sent on 21 April, I did not expect it to remain confidential, given the circulation (**TRS00010706**).
237. BSC sent a letter to Tom Aitchison dated 1 April 2010 (**CEC00356310**) setting out their views in relation to contract work. The BSC letter refers to a letter from Tom Aitchison of 24 March. Tom Aitchison's letter (**CEC00463707**) appears to be self explanatory. The BSC letter contains positioning and assertions. It is indicative of a poor relationship.
238. A letter sent by TIE to BSC dated 1 April 2010 (**CEC00570730**) was written to address the issues of concern raised in BSC's previous letters. The letter is self-explanatory.
239. The TPB Minutes for 14 April 2010 (**CEC00245907**, page 7) record that I summarised the next steps in terms of activities, governance and timescales. This was an update on the Project Pitchfork strategy which I have already described. The same Minutes refer to material on the DRP which was to be provided within the CEC tram paper to be submitted on 27 May 2010 (**CEC00245907**, page 8). It has been pointed out to me that the CEC Notice of Meeting, Agenda and Minutes for 27 May (**CEC02083211** and **CEC02083212**) have no reference to the tram project or the DRP process. I do not know why this was the case. That is a question for the Council officers.
240. An email from Tony Rush to Andrew Fitchie was copied to me and David Mackay on 16 April 2010 (**CEC00445284**). I cannot add anything to the email. The email makes reference to two separate claims under the PSSA, being £13 million and £8 million as against an original estimate of £2.8 million. It

would be necessary to look back into the claims documentation to establish if those figures are correct. We would not issue a permit to commence work for on street works unless there was an agreement, as we did not want BSC closing roads, causing disruption and then stopping because there was a dispute as they had done on Princes Street. The reference in the email to Donald Anderson doing damage, I presume, is to do with Donald Anderson being an ex-leader of CEC who was now working as a consultant for the consortium. The email exchange between me and Tony Rush on 21 April 2010 (**CEC00444028**) was an update on Project Carlisle. It was a fairly extensive exchange of emails and I cannot elaborate beyond what is contained in the emails themselves. What we had hoped for was to reach an agreement in Project Carlisle. Michael Flynn was in day-to-day charge of Siemens part of the project. We were using him as an avenue to talk to the consortium.

241. I received a letter dated 23 April 2010 from Richard Walker (**CEC00299894**). This was a reply to a letter I had sent to BSC, which I do not have access to. I noted and filed his reply but I did not react to it.
242. The TPB Minutes for 14 April 2010 (**CEC00245907**, page 7) record that an instruction was given to BSC in March and April 2010 to commence work on all disputed areas. I do not know exactly when this decision was taken but it would have been prior to 19 March 2010. Susan Clark will know more. Had this been implemented, the cost consequences would have depended entirely on how the disputes were resolved. BSC would come across what they thought was a change and TIE would ask them to progress work whilst we argued about whether or not it was a change, who was to pay for it and how much it would cost.

May 2010

243. The TPB report for May 2010 (**CEC00245907**, pages 18 and 19) stated that work could not start on-street, where sites were available, as BSC had failed to satisfy their contractual obligations. I believe this was a reference to the failure to produce method statements, failure to have signed contracts and failure to produce completed design. I am aware that elsewhere it was stated that BSC were refusing to work on-street without a new agreement. These two elements – refusal to work without a new agreement and failure to satisfy contractual obligations – were separate reasons for work not progressing.
244. An email exchange between Steven Bell, Tony Rush and me on 5-6 May 2010 and a further exchange between me and Tony Rush on 10-11 May 2010 (**CEC00374010** and **CEC00335685**) did indicate tensions but this is unsurprising given the difficulties which were being experienced. It was a stressful situation, but nothing out of the ordinary. There was nothing unusual about either of those email exchanges.
245. The letter I sent to Richard Walker on 10 May 2010 (**CEC00307113**) on Project Carlisle confirmed the understanding between TIE and BSC. The letter was actually drafted by Tony Rush and sent by me. It was written in Tony's

style. It purported to state an agreed position between TIE and BSC, so that all BSC had to do was to sign to agree to the position. This was Tony's tactic to push things on.

246. Ed Kitzman joined the BSC team in May 2010. I had few interactions with Ed, who interacted more with Tony Rush, principally regarding the negotiation of Project Carlisle.
247. I provided a precognition (**CEC00335838**) in relation to a possible defamation action. The facts covered in the precognition had earlier been the subject of an email I sent to Steven Bell, Tony Rush and Dennis Murray dated 13 January 2010 (**CEC00586393**). In both the precognition and the email, I noted that on 6 July 2009, my second meeting with Dr Keysberg, he used the phrase *"this is a great contract for us; it allows us to hold the client to ransom"*. I was approached by Richard Walker or David Darcy shortly before I gave the precognition, saying that I needed to stop using that phrase. I was told that it had been used by Dr Keysberg to David Darcy (see point 9 of the precognition) and Darcy had corrected Keysberg, by saying that it was actually a terrible contract as it was placing BSC in conflict with their client. I then took steps, having had a warning about possible defamation, to give the precognition while the issues were fresh in my mind.
248. The drafting of the contracts was unsatisfactory and that is borne out by events. I do not think that TIE were powerless, we just did not have sufficient power to enforce progress of the works.
249. In an email to Alan Coyle and Andy Conway dated 25 May 2010 (**CEC00374576**, page 2), John Ramsay of TS suggested that the monthly reports to TS were just repeated month to month. The relevant email in this exchange was the email subsequently sent by Stuart McGarrity to me on 26 April (**CEC00374576**, page 1). Stewart McGarrity set out that the TS reports were being produced in the format prescribed by TS and with the content prescribed by TS. The email sets out clearly the different levels at which TS were being briefed, as agreed to prevent the leak of confidential information into the public domain. I replied to this email stating that we should reply to John Ramsay in robust terms (**CEC00374576**, page 1). I was simply outlining what Stewart McGarrity had said, as his email covered it all. There was a subsequent email from Alan Coyle to me, Stewart McGarrity and Steven Bell dated 26 May 2010 in which Alan Coyle complained about John Ramsay's intervention (**CEC00374576**, page 1).

June 2010

250. I was sent an email by Andrew Fitchie on 9 June 2010 (**CEC00336251**) regarding Tony Rush. Tony Rush was an advisor to TIE and I used him to front discussions with the consortium on Project Carlisle. He had a reasonably free hand. He worked closely with Andrew Fitchie. They did not always see eye to eye, but everyone was working under tension at that time. I emailed the whole team on 18 June 2010 (**CEC00440581**), noting that I had received complaints about a lack of teamwork, engagement and trust. This was nothing

significant. It was just the sort of tensions that you would expect from a team working under pressure.

251. The TPB report for June 2010 (**CEC00261936**, page 30) referred to the Gogarburn and Carrick Knowe decisions. I think that the reference 'Decision Made – Complete' meant the table had been updated to reflect the decision having been made not to challenge the adjudicator's decision. I have also been directed to Lord Dervaird's decision in relation to the Murrayfield underpass dated 7 August 2010, and his comments that TIE had accepted in their position paper that the design amendments constituted a Notified Departure (**CEC00034602**, page 2, para 7). The nature of the changes between these cases (Murrayfield versus Gogarburn/Carrick Knowe) were different. It could be that deciding not to challenge was a tactical decision or that advice from McGrigors and previous adjudications had led TIE to believe that DLA's advice was not watertight. I do not specifically recall.
252. In the TPB Minutes for 2 June 2010 (**CEC00223543**, page 6) I am recorded as referring to the two options that were being worked on in relation to contractual matters with BSC. This was Project Pitchfork. The first prong of Pitchfork was Project Notice (which became Project Separation) and the second prong was Project Carlisle. The third prong was simply to carry on. Project Separation was envisaged as an agreed 'mature divorce', rather than unilateral termination. Project Carlisle was the subject of detailed discussions between Tony Rush and Ed Kitzman. I had had separate conversations with Michael Flynn of Siemens and Richard Walker of BB regarding the mature divorce. The concerns raised by the TPB about BB's behaviour (**CEC00223543**, page 7) were nothing new.
253. The TPB report for 30 June (**CEC00223543**, page 13) refers to a "twinned track" approach to Infraco. This is simply a reference to Project Pitchfork. The outcome of the adjudications is listed on the same page. This appears to be accurate to me, but I am not in a position to verify the figures given. There were suggestions that TIE was losing all of the adjudications, so this was a useful summary of the financial outcome of the DRPs to counter that.
254. In the same report (**CEC00223543**, page 15) there is reference to Councillor Gordon Mackenzie calling for the termination of the BB contract. Gordon McKenzie sat on the TPB. I do not recall if he raised this matter at TPB meetings, but he may have done so. His statement did not cause any particular problems.
255. The same report listed causes for the problems with the Infraco contract (**CEC00223543**, page 26). This list was not inaccurate. It repeated factors found in earlier reports. There were a number of reasons for factors to be repeated. The situation was evolving and reports were produced to a format prescribed by TS. The same list appeared in the TPB report for July 2010 (**CEC00244400**, page 29) with an additional reference to BSC not providing further information as to programme. All of the factors listed in these papers contributed to the problems.

256. The TPB Minutes for 30 June 2010 (**CEC00244400**, page 7) record discussion of further details of the twin track approach. However there was no prospect of termination at that time, because we were only just starting out on evolving this strategy.
257. It has also been pointed out to me that the same Minutes do not refer to proceeding by way of RTNs, and nor do the papers for the 30 June meeting (**CEC00244400** and **CEC00223543**). RTNs were an integral part of the approach. I am not sure why they are not mentioned in these particular documents. This may perhaps have been an effort not to disclose our strategy in a document that might leak. I do not recall to what extent the issue was discussed but it would have been in great detail. In relation to Project Notice/Separation (the 'mature divorce'), I had discussions with Richard Walker as to the scale of any settlement that would be mutually agreeable with BSC. In relation to Project Carlisle, that was a separate set of negotiations. We obviously did not discuss with BSC the strategy of unilateral termination.
258. If Project Carlisle had failed and agreement for Project Separation was not forthcoming we would have had to unilaterally terminate the contract.
259. The TPB Minutes for 28 July 2010 (**CEC00013703**, page 7) note that advice had been taken on the merits of the RTN. As the minutes refer to Senior Counsel, this would have been Richard Keen QC.
260. I met with John Swinney on 21 June 2010. I have been directed to emails sent by me before the meeting to Andrew Fitchie and Tony Rush on 14 June and by me after the meeting to Donald McGougan and David Mackay on 22 June 2010 (**CEC00302039** and **CEC00263295**). I do not have a great recollection of the meeting other than what is stated in the emails. I note that I have written "Minister does not have a better plan". I think he was expressing his frustrations at the on-going situation.
261. A letter from me to Richard Walker of BSC dated 22 June 2010 (**CEC00303004**) was actually drafted by Tony Rush and signed by me. It was a lengthy letter that would have taken days to compile. Its tone is reflective of the progress Tony felt that he was making on Project Carlisle. A reply was sent to me by Richard Walker on 29 June 2010 (**TIE00683178**). This was just part of all the on-going discussions on Project Carlisle.
262. I have been directed to the instructions to Richard Keen QC on behalf of TIE and CEC dated 23 June 2010 (**CEC00207813**). I do not think I saw these at the time, but it was done with my knowledge. I note the comment about an agreement between BSC and PB working in such a way that BSC could claim more from TIE (**CEC00207813**, page 8). This was a reference to the side agreement that existed between one or more members of the BSC consortium and SDS, referred to previously. We were aware that the agreement existed but despite many attempts to get the consortium to disclose it we never saw it.

July 2010

263. The DLA notes and executive summary of the consultation with Richard Keen on 8 July dated 20 June and 15 July 2010 (**CEC00207817** and **CEC00207818**) are documents I am not familiar with. I was not at the meeting. The practical effect of them was to inform a strategy to inform RTNs.
264. I met John Swinney and Stewart Stevenson on 28 July 2010 with David Mackay and Donald McGougan. The purpose of the meeting was to keep them informed and to discuss Project Notice, Project Carlisle and the Gogar Interchange. I do not recall their approach specifically for that meeting but they were generally very impartial. They were neither helpful nor unhelpful. They did not seek to exert influence over me at the meetings. I am aware of a reference to a further meeting with the same parties to take place on 26 August in the TPB Minutes for 25 August 2010 (**CEC00013818**, page 8). This was similar and was simply to keep them updated. I have also been directed to an email exchange between Katherine Hart and David Middleton dated 22 and 26 July 2010 (**TRS00010850**). These show that John Swinney had views on timing. His concern was principally the Gogar Interchange because he did not want the Gogar Interchange to be delayed by, or play second fiddle to, the tram project.
265. In an email exchange between Tony Rush, Andrew Fitchie and me dated 29 July 2010, Tony Rush referred to comments by John Swinney (**CEC00437687**, page 2). I do not recall this, but it is self-explanatory and I do not have anything that I can add.
266. A TS email (**TRS00010867**) dated 5 August 2010 stated that John Swinney wanted David Middleton and Stewart Stevenson MSP to be involved in "regular dialogue" with me, which they were. At this point we had received BSC's letter on Project Carlisle which we considered unacceptable in terms of price and risk transfer. At the time I did not know that CEC were ultimately going to agree a higher price. I believed that the price offered was not justifiable.
267. An email from Tony Rush to Andrew Fitchie was copied to me, David Mackay and Jim Molyneux on 10 August 2010 (**CEC00216187**). It was an update reporting a good day of discussions, but no particular breakthrough. It was no more than a useful update.
268. Tony Rush sent an email to Andrew Fitchie on 29 July 2010, which was copied to me, David Mackay, Jim Molyneux and William Mowatt (**CEC00337645**). This contained figures for the consortium's proposed Guaranteed Maximum Price for Project Carlisle. It was a useful summary of an unacceptable offer. I did not have a problem with being copied in rather than being the recipient, it made no difference to me.
269. I sent an email to David Anderson on 4 August 2010 (**CEC00242787**). This provided a project update and the strategy going forwards, particularly regarding RTNs, and is self-explanatory. The full Guaranteed Maximum Price

Proposal was sent to me by Martin Foerder in a letter dated 29 July 2010 (**CEC00183918** and **CEC00183919**). The proposal referred to the proposed price for the works to Haymarket. The price was high because it was an attempt to reach a commercial settlement. The costs were inflated from the original contract price because of the delays and all the alleged changes and all of the other matters which I have already described.

August 2010

270. On 9 August 2010 TIE received the decision from Lord Dervaird in which he found against TIE on the issue of ability to instruct Infracore to proceed with works. It was disappointing and another area in which the contract had proved to be ineffective. TIE were then left to continue with Project Carlisle and Project Separation. An email from Julie Smith to me and David Mackay sent on 9 August 2010 confirmed that the first RTNs and Underperformance Warning Notices (UWNs) (**CEC00378691**) had been sent on that day. I sent an email to David Anderson on the same day to confirm that this had been done (**CEC00242889**). The notices were not a reaction to the outcome in the adjudication.
271. An email dated 15 August 2010 from Tony Rush to Andrew Fitchie was copied to David Mackay, me, Jim Molyneux, Joanne Glover and Steven Bell, attaching an explanatory note and PowerPoint presentation prepared by Tony on the Project Carlisle counter offer (**CEC00183602**, **CEC00183606** and **CEC00183607**). There is a detailed explanation as to how TIE arrived at its counter-proposal and a PowerPoint presentation with basic information explaining how TIE produced its counter-offer. There is nothing more I can add to these documents.
272. CEC and TIE analysed individual elements and took advice from our lawyers, quantity surveyors and advisors to arrive at the figures for the counter offer to BSC. On 20 August 2010 I sent an email to Tony Rush, Steven Bell, Andrew Fitchie, David Mackay, Alastair Richards and Stewart McGarrity attaching a PowerPoint Presentation which I planned to give to the Council to explain the intended Carlisle counter offer (**CEC00219231** and **CEC00219235**). The PowerPoint presentation is self-explanatory. I presented the proposed counter offer at a meeting with the council on 20 August 2010. The minutes of this meeting (**CEC00032056**) are self-explanatory. I received an email from Joanne Glover on 24 August which was also sent to Steven Bell and David Mackay, to which was attached the final counter offer documents (**CEC00221163** to **CEC00221167**). The relevant details are all in the documents themselves.
273. The TPB Minutes for 24 August 2010 (**CEC00013818**, page 7) show a change in the title of Workstream A from 'Termination' to 'Contract Administration'. I am not sure why this was the case. I do not think there is any significance attached to it. The TPB report for September (**CEC00013818**, page 15) noted that it was unlikely that we would launch any more DRP referrals at that time. I would not say that the report was saying that there would be no more referrals

24 August 2010
should be
25 August 2010

at all. The reason for there being no more referrals at this time was because so much else was going on with work streams A and B.

274. The TPB report for September 2010 refers to the Contractual Strategy (**CEC00013818**, page 28). This is a clear statement and I have nothing to add. TIE adopted an assertive approach to management of the contract.
275. On 26 August 2010 I met with John Swinney. The briefing note prepared for John Swinney (**TRS00010871**) refers to me not being optimistic about being able to close the gap on the GMP. I was not optimistic because TIE and BSC were a long way apart on the numbers. This was all in the briefing note to the Minister which included the figure which it would cost to keep the project running. I have been directed to the email I sent to Tony Rush, Steven Bell, David Mackay and Andrew Fitchie on 26 August 2010 (**CEC00098017**), following the meeting with John Swinney, which mentioned that he was supportive. I recall that he was as interested in certainty as he was in price. He was not critical and was not of the opinion that we should be doing anything differently.
276. We obtained advice from Richard Keen QC on 19 August 2010 on the decision by Lord Dervaird in relation to Murrayfield. I have been directed to a draft Note of the consultation prepared by McGrigors and dated 20 August 2010 (**CEC00098393**) which records his advice that it was not a 'knock-out blow' and that the chances of success in relation to the clause 80.13 issue were diminished but that the clause 34.1 argument was untouched. By this point in the process every avenue that we had sought to pursue had proved to be ineffective in one way or another. This really only left us with Project Carlisle and Project Separation as options.

September 2010

277. On 8 September 2010 I sent an email to David Middleton (**CEC00020825**) which provided an update on developments with BB and Siemens. The email is self-explanatory and is another example of me keeping TS informed of matters. I cannot add anything to what was said.
278. I sent an email to Stewart McGarrity and Mark Hamill on 8 September 2010 (**CEC00182435**). This was prepared so we could consider the option of termination at Haymarket and re-procurement of the remainder of the project, and assess the potential costs. I believe that all the figures used in the email came from my internal team.
279. Letters were sent on 7 September 2010 by David Mackay to Joachim Enenkel and Andreas Goss (**CEC00157664** and **CEC00157665**) and by me to Ed Kitzman (**CEC00157666**). These were an attempt to get the consortium members to speak with one voice on Project Carlisle. The letters were drafted by Tony Rush.
280. The TPB Minutes for 22 September 2010 (**CEC00014055**, page 7) note that I presented a summary of the current status of the strategic work streams to the

board. I cannot recall what I said. I have no better notes or recollection than what is in the minutes.

281. From early September 2010 the negotiations with BSC were with Ed Kitzman. He was brought in by BB to head Project Carlisle. I do not know what his job title was.
282. The letter sent by BSC to Steven Bell dated 11 September 2010 (**CEC00218042**) contained a modified Project Carlisle proposal. I presume that this was a response to our counter-offer. The BSC proposal had too much uncertainty and the cost was too high and so it was rejected. By this point it was clear that Project Carlisle was becoming a less realistic possibility.
283. I sent an email to David Darcy on 16 September (**CEC00175933**). This was a reconciliation of the BSC counter-offer with TIE's offer. It was a detailed message and is self-explanatory.
284. An email was sent by Andrew Fitchie to Richard Keen dated 29 September 2010 (**CEC00130462**), relating to obtaining an opinion on aspects of the RTNs and the Infraco Contract. I was not directly involved with this.
285. A paper summarising options for Project Pitchfork (**CEC00088220**) was produced by Susan Clark. It was produced to record the evolution of Project Pitchfork. I was involved with this and it was frequently updated. I am aware of an earlier version dated 12 March 2010 (**CEC00142766**). I cannot comment on the accuracy of their contents all these years later. Susan Clark as the author would be best placed to speak to the detail.
286. **CEC00044575** is letter sent to me by Martin Foerder dated 17 September 2010. This was a reply to a letter sent from TIE to BSC enclosing RTNs relating to design and Project Pitchfork. An investigation into design was carried out: I think it was by Tony Glazebrook. I do not recall when or to whom the completed investigation was sent.
287. I am aware of a letter from Martin Foerder to Steven Bell dated 17 September 2010 (**CEC00207396**). This related to the dispute under the PSSA. There were many disputes on Princes Street and I am unable to comment on the detail. Steven Bell would be better placed to explain.

October 2010

288. The TPB report for October 2010 (**CEC00014055**, page 17) referred to BB intending to '*ramp down construction works at various locations*'. I am not sure of the reason for this. I do not recall any justification for it but it was not unexpected.
289. It has been pointed out to me that the same TPB report (**CEC00014055**) does not refer to meetings that had taken place between TS and BSC. I am not sure why any such meetings were not referred to in this report. It may be that

they were not discussed at the Board meeting and that the Board was unaware of them.

290. The motivation for TIE serving notices on BSC as referred to in **CEC00014055** was to create the possibility of terminating the contract whilst seeking to simultaneously increase pressure and therefore improve our negotiating position. I am unable to comment on the scenarios discussed by the Board at the October meeting as they are not further detailed and I do not now recall (**CEC00014175**, page 7).
291. We considered all of the responses received from BSC in response to the RTNs and UWNs we had issued, and would either move to termination or to seek to discuss a 'mature divorce'. The TIE strategy was not particularly affected. I have been directed to the letter from BSC to Steven Bell dated 22 September 2010 (**CEC00218747**). This was simply a re-statement by BSC of their position.
292. It was about this time in September 2010 that Sue Bruce, the incoming Chief Executive of CEC, became involved. I have seen the briefing paper that was prepared for her and which was attached to an email from me to Mandy Haeburn-Little dated 23 September 2010 (**TIE00296898** and **TIE00296899**). I think that the briefing paper is a good summary of where the project was at that point, and cannot add anything further at this stage.
293. I am aware of an email from David Anderson dated 23 September 2010 to Nick Smith, Donald McGougan and Marshall Poulton (**CEC00013884**). The email describes a telephone conversation between me and David Anderson which concerned possible termination and setting out a timetable. Termination seemed to be becoming an inevitability at this point. I would say that this was, generally, the view of the TPB at that time. This seems to be reflected in David Anderson's email, which also refers to the TPB's views.
294. Andrew Fitchie sent an email dated 29 September 2010 (**CEC00207815**) which referred to further advice from Richard Keen QC. This was to call the Performance Bond and issue a Clause 37.1 instruction for the removal of defective works. I do not recall quite what happened next.
295. Steven Bell wrote to Martin Foerder on 7 October 2010 (**CEC00111299**) to reject the rectification plan submitted by BSC in response to the RTNs. This was not a decision that TIE were determined to reach regardless of what had been submitted by BSC. I have also been directed to three letters which Steven Bell sent to Martin Foerder on the same day (7 October 2010) which invoked the Clause 80.20 procedure (**CEC00037545**, **CEC00037546** and **CEC00037547**). This was done in an attempt to progress the works.
296. On 8 October 2010 I emailed Tony Rush, David Mackay and Steven Bell (**CEC00099403**). I described a call from Richard Walker to me in which he had told me that BB wanted to leave the consortium. The email is self-explanatory. I was encouraged by the call but ultimately it came to nothing.

297. BSC responded to the RTNs by arguing that they were defective, in a letter from Martin Foerder to Steven Bell dated 12 October 2010 (**CEC00086983**). This was all part of the on-going evolution of the dispute.
298. On 13 October 2010, I emailed CEC officers setting out a plan of the steps to termination (**CEC00012737**, page 2). On 29 October I emailed Tony Rush setting out three tasks relating to termination (**CEC00100708**, pages 2-3). I did think at that point in the process that it increasingly appeared that the only option would be termination.
299. A letter sent by Martin Foerder to Steven Bell on 29 October 2010 (**CEC00079219**) set out a "robust" defence of their position in relation to Project Carlisle and stated that BSC would not bear any part of the costs of the project. Steven Bell subsequently wrote to Martin Foerder in a letter dated 3 November 2010 (**TIE00079854**). That letter was drafted by Tony Rush.

November 2010

300. In November 2010 David McKay resigned as Chairman of TIE. The project was at a difficult juncture. I understood David's reasons for standing down when he did but it was not exactly helpful to me. The reference to personnel changes in my presentation to Sue Bruce on 5 November (**CEC00040807**, page 20) was not particularly in relation to the chairman.
301. There was a further consultation with Richard Keen QC on 4 November 2010. A summary of the consultation was produced by McGrigors and dated 5 November 2010 (**CEC00101459**). This was a consultation on the consequences of termination. The purpose was to understand the risks associated with that approach.
302. The PowerPoint Presentation I gave to Sue Bruce on 5 November 2010 (**CEC00040807**) was an update on where we were, how we got there and where we were going next. The slides included a reference to the '*alleged gentleman's agreement*' (**CEC00040807**, page 5). I sent an email to Steven Bell, Stewart McGarrity, Dennis Murray, Mandy Haeburn-Little, Andrew Fitchie and Susan Clark on 19 March 2010 attaching a summary of the Infraco Contract (**CEC00549779** and **CEC00549780**) which referred to the same '*gentleman's agreement*'. I was first aware of it in July 2009 when I first met Dr Keysberg as I have already discussed - Keysberg alleged that they had a "gentleman's agreement" with Willie Gallagher, the effect of which was that TIE was fully aware of the shortcomings of the contract before it was signed and that the gentleman's agreement was that TIE would honour the understanding that this was never a price for the whole tram. The phrase "we'll never get a tram built" was also a phrase they used in that meeting. The later phrase from Richard Walker was that it was only ever the price for a three wheeled car.
303. The presentation referred to the number of INTCs issued (**CEC00040807**, page 6). This number cannot be compared with what would happen in a normal contract, as this was not a normal contract. The whole mechanism

was unusual. There were too many INTCs. I cannot now say how many of the INTCs related to claims that the design changed from BDDI, though a record existed at the time.

304. The presentation gave my assessment on governance (**CEC00040807**, page 11). This was my assessment of the situation of these bodies for Sue Bruce as the incoming chief executive. I said that TIE was damaged and had no future; TEL had been slow to get off the ground and had no clear role; and Lothian Buses were still sitting on the fence with regard to the whole concept of TEL.
305. The presentation listed key causes (**CEC00040807**, page 14). These were in no particular order. One cause was the lack of political unity (**CEC00040807**, page 15). The SNP had made their opposition well known. This was used by anyone with an axe to grind. There were lots of examples of the project being used as a political football; ultimately, it became a political orphan. There were also instances of information leaking.
306. I set out to Sue Bruce that another cause was poor management in the early stages (**CEC00040807**, page 16), particularly of the design. TIE's consultation style early in the project alienated some parties. There was speculation that there were perverse incentives on people to get the contract signed. There was further speculation as to whether there was political pressure to sign the contract.
307. The procurement strategy which was used was wrong, in my personal view (**CEC00040807**, page 18). I do not think that the procurement needed to be done as a whole. The procurement could have been done in sections, which was the preferred strategy of most cities I spoke to. It was also done with only two bidders.
308. A further issue was TIE's culture (**CEC00040807**, page 20). There was uncertainty as to whether it was a public or a private-sector organisation and how it should behave. The underlying issue was that because TIE did not have private shareholders and did not earn its own money, it did not live or die on the basis of its financial performance as a private sector organisation would. I think that this led to a degree of confusion as to the objectives of the organisation. This in turn meant that it was harder to retain key people, so there was an excessive use of contract staff and a high turnover of senior personnel, at least in the early stages. I was the fourth CEO. TIE did not have a clear organisational model. Governance was confused with no clarity and too many reporting lines. To a degree the antagonistic relationship that existed between TIE and CEC did not help either. These were all issues which I inherited.
309. The final slide of the presentation was entitled 'RJ' (**CEC00040807**, page 22). This was my own assessment of where I had got to and was a discussion for Sue Bruce about my position. Effectively, I was offering her the chance to say if she was not happy with me continuing to run the project. Earlier in the presentation, I had said that TIE *"needs nursing to a new place"*

(**CEC00040807**, page 11). I was clear with Sue that TIE did not have a long-term future. I used the analogy of bad banks. If I were on the board of a parent company thinking of their subsidiary company, I would consider putting all bad news in a subsidiary (in this case TIE) and would get rid of it. But I said that needed to be done with respect and dignity for the people who had worked very hard and who were not necessarily in this position for any fault of their own. I would describe it as a frank and open discussion.

310. The TPB Minutes for 17 November 2010 (**TIE00896978**, page 7) recorded that TIE were continuing to administer the Infraco contract assertively and that CEC were taking independent legal advice. I am recorded as advising that the situation was '*dynamic and fluid*' with work on-going. By this I meant that TIE did not have a settled position. We did not have agreement on Project Carlisle. The minutes also record a suggestion of a TPB meeting to be attended by Richard Keen QC. I think that this meeting did not actually happen because of the proposal of mediation detailed below.
311. I wrote a letter to Alastair McLean on 22 November 2010 (**CEC00147861**) regarding a proposed mediation. I would need to see my letter to Infraco dated 17 November 2010 which is referred to. I do not recall when mediation first became a possibility. I believe that the drive for mediation came from CEC. I do not know if there were meetings between CEC and Infraco without TIE being present. As we got closer to a decision day on termination and the risks become more immediate, everybody's confidence that termination was the right option became tested. I have no way of knowing what other discussions were going on.
312. In the email I sent to Alastair Maclean, Tom Aitchison and Donald McGougan on 24 November 2010 (**CEC00013441**) I noted that termination of the contract was no longer the preferred way forward. It is fair to say that around that time, CEC took control of the process and TIE's role was diminished. I think it was partly brought about by a second opinion CEC got from an English QC, Nicholas Dennys.
313. In the same email, I accepted that TIE had not done everything as well as it might have been done (**CEC00013441**). The areas in which I felt we could have done better are covered in the presentation to Sue Bruce that I have described (**CEC00040807**). So far as I can recall, I did not receive a reply to my email from Alastair Maclean on what could have been done better.
314. I sent an email to Jeremy Balfour on 24 November 2010 (**CEC00014240**) in which I discussed the possibility of termination. Termination was not a foregone conclusion and my email was a warning not to assume that it would happen. It was a response to Jeremy Balfour's comments that he had heard from a friend who was a lawyer that TIE were going to terminate. I was just putting people straight about incorrect assumptions.
315. I received a note of the outcome of CEC's consultation with Nicholas Dennys (**CEC00013502**) from Alastair MacLean. I responded by email to Alastair MacLean dated 30 November 2010 (**CEC00013537**). I did not share Nicholas

Dennys' views on credibility, the state of mind of Infraco or the timing of the mediation because I believed there was evidence to support an alternative credible view. I do not recall CEC's reaction to my comments.

316. In November 2010 TIE received advice from Richard Keen QC in relation to the RTNs which had already been served. The notices had been drafted by a combination of Tony Rush, McGrigors and DLA. The closer we got to the prospect of termination, the risks of doing so got more real and people became more focussed on these risks.

December 2010

317. Richard Keen provided an Opinion dated 1 December 2010 on three of the RTNs (**TIE00683941**, page 7, paragraph 10) in which he stated that it would not be safe to proceed with termination on the basis of these RTNs. This was frustrating, given that we had taken legal and technical advice on the drafting of the RTNs. No matter what we tried we did not appear to have a clear mechanism for resolving the issues. All it did was to increase the frustration.
318. On 2 December 2010, Brandon Nolan emailed a draft of advice from McGrigors regarding the termination of the Infraco contract to me, Steven Bell and Tony Rush (**TIE00683962** and **TIE00683963**). McGrigors were by this stage given a higher level of work around the overall strategy to resolve the contractual impasse. DLA were still used to give advice on the detail. McGrigors role was increased because to a certain extent I had lost confidence in DLA. I believe that McGrigors were advising TIE first and then subsequently CEC. There was no issue of divided loyalties because, as far as I was concerned, TIE's and CEC's interests were aligned. McGrigors concluded that if BSC did not accept the termination notice, protracted proceedings would result which would prevent work from proceeding without BSC cooperation (**TIE00683963**, page 26). This was frustrating for the whole project and the contract. I was frustrated as I had believed sufficient work had been done in drafting the RTNs to establish their validity before they were issued. The same part of their report referred to starting a detailed forensic investigation into whether there had been an Infraco Default. McGrigors were saying that sufficient examination had not been done up to that point and so it had to be started at that stage.
319. Alastair Maclean sent a letter to me dated 6 December 2010 (**TIE00668156**). I do not remember a specific conversation that led to the letter. He refers to a letter which I had sent to him 22 November 2010 (**CEC00147861**). Alastair Maclean's letter needs to be read in the context that mediation was widely being talked about. Alastair MacLean stated in his letter that CEC's preferred option was to move to mediation on a "short-form" basis, with a view to both sides walking away from the Infraco contract. That was also my preferred option. In response to the letter, I set up a strategy meeting for advisors for Donald McGougan and Alastair to attend.

320. The TPB report for December 2010 (**TIE00896978**, page 16) referred to the outcome of the adjudication in relation to Landfill Tax. I do not have a great recollection of this beyond what is stated in the report.
321. The same TPB Minutes for 15 December 2010 (**TIE00897052**, page 8) also recorded that I had approached BSC regarding mediation and that BSC had responded positively. This was, as the minutes state, prompted by an instruction from the TPB on 17 November 2010. I do not know what was said by the Scottish Ministers or TS in relation to this. Following the positive BSC response, TIE discussed and developed things further in conjunction with CEC.
322. An earlier opinion from Richard Keen QC dated 22 September 2010 which was emailed to me by Anne Houston on the same date (**CEC00034597** and **CEC00034598**) on Infraco instructions, TIE changes and notified departures. This had no direct effect on the strategy pursued in December.
323. An email from Gregor Roberts was sent to me, Steven Bell, Dennis Murray, Susan Clark, Alan Coyle and Alastair Richards dated 22 December 2010 (**TIE00108837** and **TIE00108838**). This appears to be a reconciliation between BSC's Project Carlisle offer and TIE's internal estimates. After 6 years, I cannot add any further comment or insight.

January 2011

324. It has been suggested that there are inconsistencies in the statements of BSC progress contained in the TPB report for January 2011 (**TIE00897052** page 16 & 18). I cannot see any inconsistencies and would describe this as a false comparison.
325. In the TPB report for January 2011 (**TIE00897052**, page 32) there is reference to progress being hampered by adverse weather. This is not a contradiction of the earlier statement that there had been a cessation of works across the site. Not all work had stopped. There was only cessation in certain areas.
326. The same section of the January report (**TIE00897052**, page 33) listed three areas (contractual obligations not met to allow works to start on street; design slippage since novation to Infraco; consortium integrated design programme) in which the relationship with BSC was suffering. Insofar as three bullet points can summarise a complex situation, this is generally accurate.
327. The TPB Minutes for 12 January 2011 (**TIE00897058**, page 12) record that I updated the board on the draft Audit Scotland report. I do not recall the detail of that report. The Minutes record that it was agreed that I would write to Audit Scotland to clarify certain points. I do not recall what these points were but I do not believe they were major. It is my understanding that it is normal for a body such as TIE to comment on the report in the way in which we did.
328. Gregor Roberts sent an email to me and Steven Bell on 28 January 2011, attaching a spreadsheet and commentary on an out-of-court settlement

(**TIE00109041**, **TIE00109042** and **TIE00109043**). The spreadsheet is looking at a number of different scenarios and there is an explanatory note which explains the content of the spreadsheet. They are self-explanatory and I cannot expand any further. The purpose of this was to inform decisions moving forward. We referred to these as "deckchair" figures, simply because the striped colour charts here resembled a deckchair. The attachments were compiled by the financial team in conjunction with the commercial team and advisors.

February 2011

329. I sent an email to Vic Emery and others on 16 February 2011, attaching a number of slides which I had prepared and which I presented to Vic Emery when he started in February 2011 (**TIE00106390** and **TIE00106391**). The presentation looked at the financial implications of Project Carlisle. It was an attempt to explain our current financial position with a view to informing the upcoming mediation. An updated version of the figures was emailed to Alan Coyle and Donald McGougan and copied to me by Gregor Roberts on 25 February 2011 (**TIE00670627** and **TIE00670628**). I do not recall the changes between the sets of slides.
330. The TPB Minutes for 9 February 2011 (**TIE00897064**, pages 6-7) record further discussions on mediation. Vic Emery is recorded in the minutes as having stated that a formal action plan would be prepared by TIE. This related to an action plan for the Audit Scotland report (**TIE00897064**, page 7, paragraph 2.2) and was not connected with the discussion on mediation.
331. An email sent to me and others on 4 February 2011 by Simona Williamson of McGrigors, attaching a joint opinion by Richard Keen QC and Roisin Higgins in respect of the Infraco contract and INTC 536 (**TIE00095606** and **TIE00095607**). I do not recall and cannot add anything to what is in this lengthy opinion. My recollection is that it was all connected to delays and Extensions of Time.

March 2011

332. Alastair Richards sent me an email on 1 March 2011 and a subsequent email on 2 March attaching a spreadsheet detailing a risk assessment (**TIE00354986** and **TIE00354987**). In the emails and spreadsheet, Alastair Richards appeared to be concerned that BSC were not taking any greater risk or providing any greater certainty. The attachment was a summary of his lengthy email.
333. On 5 March 2011 Alan Coyle sent an email to me and others, (**TIE00355077**) providing revised deckchair figures for the route to St Andrew Square. This reflected the revised opinions on the range of the risks. I am not sure where the base figures came from. There appears to have been an attachment to the email, but I have not been provided with a copy.

334. Gregor Roberts sent an email sent to me and others on 18 February 2011 attaching a note on the accounting treatment of Initial Milestones. (**TIE00109202** and **TIE00109203**). This related to advance payments. I do not believe that advance payments were considered in any of the mediations. I believe that the references to advance payments are what the contract calls "milestone payments". For example, there was a milestone payment of £30m which was to be paid on the establishment of the worksite. It meant that the contractor was always in a cash positive position. Any question as to the reasons for payments being set up in this way would have to be directed to those involved in the negotiation of the contract.

Defective Works

335. **CEC00441829** is a Report on the Condition of the Track Constructed in Princes Street by Tony Rush dated 16 June 2010 (**CEC00441829**). The problem with which the report was concerned was that the road had started to break up within months of it being laid. The standard of the work was poor. It all had to be re-done.

Mediation

336. I sent an email to Steven Bell dated 27 May 2009 (**TIE00033088**), in which I suggested mediation as an option. This was shortly after I joined the company and was due to the fact there was a complex contractual dispute in April / May 2009 between TIE and the consortium which needed to be resolved.

337. There were a number of mediations which took place on this project. The TPB Minutes for 6 May 2009 record that there was to be mediation with BSC from 27 May to 1 June 2009 (**CEC01021587**, page 6, point 3.6). Mediation progressed into the end of June and start of July (as referred to in **TIE00033277**). The mediation was largely unsuccessful in reaching any agreed position and so issues remained unresolved.

338. I have been directed to the position papers for the June 2009 mediation (**CEC00951714**) and can comment on the following aspects referred to in the papers:

- The papers made reference to further Supplementary Agreements for on-street works (**CEC00951714**, page 2). TIE were prepared to enter into these provided that we were given the cost/risk balance that we needed.
- The position papers made reference to the issue of misalignment (**CEC00951714**, page 94). I believe that this issue remained unresolved.
- The position papers made reference to the BDDI to IFC issue (**CEC00951714**, page 102). It was TIE's understanding that to apply Infracore's interpretation of the contract, at that time, would have led to a commercially absurd result. It would have been impossible to have any cost or programme certainty.
- The Carrick Knowe Bridge, Gogarburn Bridge and Russell Road retaining wall disputes were put into separate adjudications which took place subsequent to this mediation.

339. A letter from BSC to Steven Bell dated 8 July 2009 (**TIE00666105**) refers to mediation ending without any satisfactory resolution. I would agree it was not a success. I am not sure if mediation actually did take us much further forward. By the end of mediation the main issues were the same as we had at the start, as set out in the position papers. My view on BSC's proposal was that it was simply a re-statement of their position and was unacceptable.
340. The TPB Report for July 2009 states that TS were briefed in details on the outcome of the mediation (**CEC00843272**, page 10). This was done for this and all of the mediations and was done to keep them informed. I do not recall who initiated the briefing on this occasion.
341. I prepared a draft email dated 22 November 2010 to send to the CEO of the Council which I circulated to Mandy Haeburn-Little and Tony Rush (**TIE00304261**). This described the lead up to the mediation proposal which was made in late 2010. I received a letter from BSC dated 2 December 2010 (**TIE00079999**) regarding prospective mediation. I have already covered all of this material above in the chronological section on Infracore works. I have nothing more to add to my previous comments.
342. During the preparation work for the mediations TIE had a wide range of technical and legal advisors. I believe that CEC also took their own advice. We shared the advice we received with them. However, I do not know if they shared everything with us.
343. My draft email dated 22 November 2010 already referred to (**TIE00304261**) might suggest I was unhappy with CEC, but it was just a personal letting off of steam. The emergency motion in the Council around that time had created pressure on my team and unnecessary press coverage. Given that the subject field is titled '*angry draft for discussion*', I presume this was never actually sent. The principal concern was about a blurring on the roles and responsibilities.
344. On 14 January 2011 I circulated an email to Brandon Nolan, Tony Rush, Nigel Robson, David Anderson and Steven Bell (**TIE00684546**). This referred to my meeting with Richard Walker of BB in January, in which mediation was discussed. I have nothing further to add to what is in that email.
345. The TPB Minutes for 12 January 2011 (**TIE00897058**, page 7) record a discussion over potential outcomes from mediation. The objective was, through discussion, to have some certainty and an end to the dispute. We required certainty around price and delivery and best value for the public purse. I am aware that the Minutes also record discussion over the governance procedure to be used. There was, in the end, no proper governance procedure around the mediation because it was led by CEC. The TPB and the TEL Board were largely ignored.
346. In December 2010 I had circulated an email to Donald McGougan, Alastair Maclean and David Anderson (**TIE00105840**) in which I stated that my view was that we should mediate on Project Carlisle and, if that failed, we should

look at an agreed termination route. By January 2011 my view had changed as the numbers were too far apart. Over the course of time I realised we were not going to reach an agreement on Project Carlisle.

347. An email exchange from 17-18 February 2011 between Nigel Robson, Gregor Roberts and Tony Rush, which was copied to me (**TIE00106431**) referred to adjusted figures for Project Phoenix and Project Separation. We used internal resources and external advisors to produce the TIE figures. CEC had Alan Coyle embedded within TIE so they did not need to produce their own numbers.
348. TIE's Mediation Statement dated 24 February 2011 (**BFB00053300**) was prepared by McGrigors because by that stage both CEC and TIE had greater confidence in McGrigors than they had in DLA.
349. The letter sent by Martin Foerder to Steven Bell dated 24 February 2011 (**BFB00053258**) contained BSC's proposal for Project Phoenix in advance of the mediation. I note the price proposed was £449m (**BFB00053258**, page 5). I cannot explain this. I believe that the cost increase was unjustified. The reaction to the proposal by TIE and CEC was that it did not provide cost certainty and that the costs were too high. I cannot explain the detail of the breakdown. This was BSC's offer immediately prior to the mediation and so, effectively, it was their opening statement. Nigel Robson sent an email to me and Steven Bell dated 25 February 2011 (**TIE00685852**, page 5), setting out his thoughts on the proposal. I replied by email to Vic Emery, Steven Bell, Nigel Robson, Brandon Nolan, Colin Smith, Tony Rush, Donald McGougan, David Anderson and Alastair Maclean on 1 March 2011 (**TIE00685894**). This set out what we could not agree to. That was my view then and it has never changed. I still think that the price was too high.
350. I have been asked about the Minute of a meeting of the Tram Project Board of 12 January 2011 (**TIE00897058**) and a note contained in that minute (page 7) to the effect the individual responsibilities of directors of TEL and TIE were discussed. I am also asked about the same minute having recorded that Brian Cox had been tasked with writing to CEC to express concern as to existing governance arrangements (page 12). Generally the role that CEC were now adopting effectively cut across the existing governance arrangements.
351. The TPB Minutes for 9 February 2011 (**TIE00897064**, page 6) referred to internal planning sessions for mediation. I do not recall who attended these, but key TIE and CEC advisors would have been present. I do not recall what documentation was produced for use at them.
352. Mike Shane was the mediator in March 2011. McGrigors found him and all parties were in agreement with his appointment. There were a large number of attendees at the mediation sessions, from all parties. This will surely be documented: I cannot recall everyone who attended. There was an initial full meeting with everybody in attendance at which CEC and BSC each made opening statements. Then there were a series of smaller meetings which were by invitation only.

353. TIE took no active part in the mediation. It was conducted largely by Sue Bruce, Vic Emery and Ainslie McLaughlin of TS. I was not aware of BSC's demands, as I was not involved. I am not sure if issues were considered together or individually, what order they were considered in or who chose the order.
354. Sue Bruce and Vic Emery would go off to the meetings with BSC and the mediator and then periodically they would report back to a separate room where TIE and other advisers were present. They would then explain where they had got to, people would express opinions, and they would go back to their meetings. There was little or no discussion on price or design or transfer of risk in the anteroom where I was. However, I do recall one specific instance where I strongly expressed my view that the price was unjustifiable to which Sue Bruce replied *"This is about more than money"*. I replied *"if that's the case then I can't help you: that is not a judgement I can make"*.
355. An email from Alastair Maclean was circulated to me, Vic Emery and Steven Bell on 13 April 2011, with an attached additional clause to be incorporated within Minute of Variation 4 (**CEC01927645** and **CEC01927652**). This referred to the agreements that were concluded as a result of the Mar Hall Mediation: Minute of Variation 4 and 5 (MoV4 and MoV5). I was not involved with this. It was led by CEC working directly with McGrigors. I do not know what difficulties there were in securing agreements and cannot explain what the benefits and/or burdens were to CEC or TIE. CEC would have a better idea. I am not sure who took the lead on negotiating and drafting the agreements.
356. A report dated 20 April 2011 from Steven Bell (**TIE00687724**) set out the advice that had been provided by TIE to CEC in relation to the negotiation of MoV4. I have no reason to disagree with the narrative within the report. I do not know when MoV4 was signed. Payment was made prior to signature, but that was a decision CEC took against the advice of TIE. This was a point of contention between TIE and CEC.
357. Gregor Roberts sent me an email on 10 May 2011 (**TIE00109614**) in which he expressed his concerns at a payment that was made to the Infracore in relation to MoV4. His concerns were consistent with mine and the rest of the TIE team which was that there was no legal basis for making these payments.
358. I do not know what the Memorandums of Understanding are in relation to MoV4 or why were they required. CEC will know.
359. In the TPB Minutes for 11 May 2011 (**TIE00896987**, pages 3-4) Kenneth Hogg is recorded as having expressed his concerns in relation to the mediation agreements. He had highlighted that in the absence of new governance arrangements, existing governance arrangements should have been used, but that the existing ones had been ignored. Off the back of that he, Brian Cox and others resigned, the same week that I did. I viewed it as a serious matter.

360. On 7 April 2011 I sent an email (**TIE00686573**) to Vic Emery in which I expressed my concerns about the role CEC were now playing, in particular Colin Smith, who was brought in by Sue Bruce. My concerns are all set out in the email.
361. On 27 April 2011 I sent another email (**TIE00686805**) to Vic Emery where I set out some matters which I hoped to discuss prior to a meeting with Sue Bruce. I noted in the email that the deal done at Mar Hall was a judgment by Vic, Sue Bruce and Ainslie McLaughlin as to what was a reasonable price to resolve the impasse. I do not know what role Ainslie McLaughlin played in the deal. In the email, I made reference to the need for an audit trail. This was prompted by CEC wanting to make payments and a concern that these decisions were not being properly scrutinised under existing governance arrangements. This is the same issue that arose in the email exchange I had with Gregor Roberts on 10 May 2011, prompted by his email to me in relation to governance concerns which I have already discussed (**TIE00107170** which was sent in reply to **TIE00109614**).

Gogar Station/Interchange

362. The Gogar Station and Interchange project was a separate project funded by TS, but TS did want us to incorporate it as part of the overall tram project. The funding was over and above what was paid for the trams. TIE's role was to try to accommodate it. I do not recall when it was instructed. There was no significant impact on the tram project as a result of Gogar Station compared to everything else that was going on.

Legal Advice

363. I received an email from Andrew Fitchie on 3 December 2009 (**TIE00034122**). I think this was in response to some of the adjudications. Generally, it was about the contract proving to be ineffective. DLA did make some changes but I remained unhappy, which is why we brought in McGrigors.
364. **CEC00114229** is an email exchange between Gavin Henderson, the TIE Media Officer, Stewart McGarrity and me, from 15 and 16 November 2010. This concerned the appointment of DLA. It was a response to a request from a Councillor.
365. On 24 January 2011 I attended a meeting at DLA to discuss the contract and the problems that had arisen. I was not told anything about why the Infraco Contract had come to be signed in the terms it was at that meeting. There is a DLA File Note of the meeting dated 24 January 2011 (**DLA00006406**) which shows what was discussed and who was present.

Bonuses

366. I was entitled to a bonus of 50% of base salary as TIE Chief Executive, but I did not take any bonus.

367. An email dated from 26 May 2009, from David Mackay to Tom Aitchison, forwards an email which had been sent by David Mackay to Brian Cox (**CEC00880015**, page 3) and which refers to a reduction in bonus payments of 75% due to cost overruns and delays. During my time at TIE I did not pay any bonuses other than those I was contracted to pay. I believe that this applied to only one person who I believe was contracted to receive a bonus payment.
368. Gordon Rae sent me an email on 31 August 2009 attaching a recommendation for HR and leadership development support and a paper for the TIE executive committee on the performance incentive scheme (**CEC00821393**, **CEC00821394** and **CEC00821395**). These were all part of the on-going work I was doing to bring some rigour and objectivity into the HR processes at TIE, including to bonuses. Gordon Rae was a freelance HR director.
369. George Bramhill sent an email to me on 18 September 2009 attaching a paper and a presentation for the Remuneration Committee on bonus proposals (**CEC00821645**, **CEC00821646** and **CEC00821647**). These were much the same kind of thing as in the earlier email from Gordon Rae. George Bramhill was also an HR consultant. Much of these discussions were overtaken by events.
370. I sent an email to Steven Bell, Stewart McGarrity, Alastair Richards, Susan Clark and Mandy Haeburn-Little attaching a note of bonus scheme consultation queries and feedback (**CEC00792651** and **CEC00792655**). I also received an email and attached note on the deferred scheme policy from Claire Logan on 11 November 2009 (**CEC00822144** and **CEC00822145**); and another email on 19 November 2009 (**CEC00781423**). These all related to the bonus schemes. They were documents for my management team to give them the script to follow when rolling out the new bonus scheme. Claire Logan's email of 11 November was a message to our HR lawyers to check the legality of changes we were proposing to the bonus scheme.
371. In June 2010 I had to advise TIE employees that there would be no bonus payments for 2009/2010. I wanted to change the scheme to introduce rigour, but as the situation continued to deteriorate, no bonuses were payable.

Complaints

372. An email from Michael Blake to Gil Clelland, Steve Beattie and Mike Mann dated 25 August 2009, attached a copy of a letter from me which was being distributed to the businesses on Leith Walk (**CEC00836138**). In relation to complaints from businesses and our subsequent communications, such as the email of 25 August, I do not think that the communication system was an issue. There was good communication. The issue was that the impact on the smaller business was greatly under-estimated by the project. This was further exaggerated by the delays and disputes. The underlying messages, the level of disruption and then the methodology that was used were more of a problem than the communications.

Consequences

- 373. I cannot comment on what the consequences were of the Tram line finishing at St Andrew Square and there being no Phase 1b. That is a question for TEL.
- 374. When I started in May 2009 I came in knowing that there was a problem to be resolved. As it turned out, the problem was more complex and intractable than I had imagined.
- 375. If you had asked me before I had started whether I would have been happy with the outcome which was finally achieved, I would say no. It cost a lot more, took a lot longer and delivered a lot less. The question is, as the situation emerged and evolved whether I think that we could have done things differently to achieve a better outcome. I do not think so. That is not to say that there were not other possible courses of action that could have been taken. The question is whether they would have led to a better outcome, which I do not think they would have. However the deal that was done at Mar Hall was not a good deal compared to where we were in January 2011.
- 376. I finished on 6 June 2011 after tendering my resignation. I had been put in a position where I felt undermined, excluded and side-lined and so could no longer effectively do my job. I could not effectively continue on a project when I did not support the deal that had been done at Mar Hall.

I confirm that the facts to which I attest in this witness statement, consisting of this and the preceding 60 pages, where they are within my direct knowledge are true. Where they are based on information provided to me by others, I confirm that they are true to the best of my knowledge, information and belief.

Witness signature..... 

Date of signing..... 26/5/17

STATEMENT OF RICHARD JEFFREY – ERRATA

In the Introduction, in the second line, insert the word "am" before "currently".

In paragraph 77, in the fourth line, delete the words "meant that it".

In paragraph 126, in the fourth line, delete the word "other" and substitute "the".

In paragraph 186, in the second line, delete the words "council (the" and delete the closing parenthesis after the word "Group".

In paragraph 195, in the fifth line, delete the word "situation" and substitute "situation".

In paragraph 243, in the fourth line, delete the word "contracts" and substitute "subcontracts".

In paragraph 258, in the first line after the word "Carlisle", insert the words "negotiations to agree a price for a reduced scope". In the second line, delete the words "unilaterally terminate" and substitute "build a case for unilateral termination of".

In paragraph 263, in the last line, delete the second appearance of the word "inform" and substitute "issue".