

David (Dave) Anderson

Dave Anderson (DA) was the Director of City Development within the City of Edinburgh Council ("CEC"), from March 2008 to December 2012. He was a Non-Executive Director of Transport Initiatives Edinburgh Ltd ("TIE") (10 August 2011 to 27 November 2012), a Non-Executive Director of TEL (18 December 2009 to 27 November 2012), a member of the Tram Project Board from around April 2008 and attended meetings of the Tram Internal planning group (IPG) from around 11 June 2008. When CEC began to supervise TIE's project management of the contract, this was done under the direction of Dave Anderson (with the assistance of Marshall Poulton, the Tram Monitoring Officer) and he was involved with the 2011 Mar Hall mediation.

Prior to taking up the post with CEC, he was Senior Director of Operations at Scottish Enterprise for Edinburgh & Lothian. He should be asked for a full CV, setting out his vocational qualifications and experience.

This Note is structured as follows:

- Introduction
- The Trams Project – Overview
- The Infrastructure Contract - 2008
- 2009
- 2010
- 2011
- Project Management, Governance and Contractors
- Consequences
- Final Comments

INTRODUCTION

1. Prior to joining CEC, and by way of overview:

a) What were your main qualifications and vocational experience?

I have an honours degree in modern history and a Master's in Education. I started my career in 1978 as a Management Trainee in the Department of Employment Group. I progressed to programme management and policy roles in UK vocational training policy then joined Scottish Enterprise in 1990 when the Training Agency merged with the SDA. I became Chief Executive of Dunbartonshire Enterprise in 1998 then Senior Director of Operations for Scottish Enterprise, Edinburgh and Lothians in 2006, prior to my appointment as Director of City Development at the City of Edinburgh Council between March 2008 and November 2012.

I set up my own consulting business in January 2013 specialising in urban regeneration and have worked on long term assignments for Cheshire West and Chester Council developing the Northgate Shopping Centre project and Hartlepool Borough Council developing plans for the regeneration of the waterfront. I have also undertaken assignments for Peel Ports, Skanska and the Scottish Leaders Forum and I act as the non-Executive Chairman of Frontline Management Consultants. In May 2017 I took up an interim management assignment as Corporate Director of Growth Regeneration for Wycombe District Council overseeing the Council's Planning, Housing, Major Projects, Community and Environmental Services.

b) What was your experience in major infrastructure projects, including tram and light rail systems, prior to your involvement with the Edinburgh Trams Project?

My primary experience lay in regeneration. As CEO of Dunbartonshire Enterprise I held the chief accountable officer role and client side responsibility for the Loch Lomond Shores development and oversaw the creation of Clydebank Rebuilt the Urban Regeneration Company responsible for redeveloping the Clydebank riverside. In Edinburgh with Scottish Enterprise I was responsible for supervising the development of the Edinburgh Bio Quarter and the funding of project such as the new stands for the Edinburgh Military Tattoo and the Edinburgh Informatics Centre.

Aside from the tram while with the City Council I was responsible for projects including the renovation of the Royal Commonwealth Pool, the refurbishment of the Usher Hall and the £80m extension of the EICC to create exhibition space and new office development. I was also Chairman for three years of Strathclyde European Partnership the body responsible for oversight of European Structural Funds in the West of Scotland. I had no prior experience of tram or light rail projects.

c) What was your experience in utilities diversions, design and procurement matters?

Aside from a brief spell working as a labourer on utility diversions during a

student vacation job in Cambridgeshire in 1975 I had no experience of utility diversions. My prior experience of design was restricted to commissioning area based masterplans to support urban regeneration. I had limited experience of large scale procurement prior to my role with CEC. Procurement legislation went through significant changes in the period from 1998 when Loch Lomond Shores was commissioned to 2008 when I became involved with the Edinburgh tram project. I regularly procured consultants in the course of my work with Scottish Enterprise to carry out feasibility studies and prepare business cases but these were relatively modest sums and did not require full OJEU procurement processes.

2. In respect of your employment with CEC:

- a) **Between what dates did you work for CEC? What was your job title? What were your main duties and responsibilities? What were your main duties and responsibilities in respect of the Tram Project? Did these change over time (and, if so, when, in what way and why)?**

10th March 2008 to 30th November 2012. Director of City Development. I have forwarded my CV and the full recruitment pack describing my role to you separately. My primary role in relation to the tram project aside from oversight of tie ltd concerned keeping the city moving during the civils work and communicating with the local business community about the various stages of construction activity. I liaised closely with the Festivals team to prepare contingency plans for key Festival venues to be accessible during the course of the Edinburgh Festival and Winter Festivals. I was a member of the tram project Board and tram IPG and reported to the Chief Executive of CEC on progress and problems being experienced by tie ltd in their role as the delivery agent and client representative for the project. I had responsibility for transport strategy and policy and was the principal officer within the Council responsible for making the strategic case for the project and the longer term development of a tram network to cope with the growing demands on Edinburgh's road network from population growth and private car usage.

My role in the project changed following the tram mediation. After mediation I was restricted largely to dealing with the closure of tie ltd and transfer of key staff and to managing relationships with the business community on the impact of tram works including the problems of delays to construction in Shandwick Place and the West End. I also stepped in to fill non-Executive Director roles in Tie ltd and TEL when Richard Jeffrey resigned in May 2011. This move was primarily to ensure that the corporate governance related matters in both companies could be managed. From March 2011 onwards all key decisions about the project were made by Mrs Sue Bruce, Mr Vic Emery, Mr Colin Smith and Mr Alastair MacLean and were driven by the revised project governance arrangements put in place following mediation. I assisted in drawing up these arrangements but had little influence on the key decisions made during and subsequent to the mediation.

- b) **To whom did you report and who reported to you?**

I reported to the Council's Chief Executive – Mr Tom Aitchison to Dec 2010 and Mrs Sue Bruce from January 2011 onwards. Marshall Poulton Head of Service for Transport reported to me on tram and all other transport matters. There were also three other Heads of Service who reported directly to me: Greg Ward (Economic Development); Bill Ness (Corporate Property and Contingency Planning); and John Bury (Planning). There were around 750 staff in the Department and a small admin team of 3.5fte managing the business of the Department. I reported into 7 Council Committees as well as the Tram Project Board and IPG.

c) What Tram Project committees and or boards did you attend? What was the role of these committees and boards and what was your role?

I attended the tram project board at which tie provided a monthly update to members on progress (or the lack of); problems; financial and legal matters; construction health and safety management; marketing, communications and Press and PR issues. The role of the Board was to oversee all matters affecting the tram programme, cost and scope within the parameters agreed by the Council. I attended ex-officio as one of two Council Directors on the Project Board (Donald McGougan being the other). Other Council Officers attended the Board to provide advice notably Alan Coyle on financial matters (supporting Donald and myself) and Marshall Poulton (on transport and engineering matters). My role on the TPB was to provide the same kind of challenge, support and scrutiny that any good non-Executive Director would provide in seeking to hold tie Ltd to account. Each political party also had a representative on the TPB (although the SNP never took up their role and the Green Party rarely attended).

I also supported the elected members with necessary technical advice to fulfil their roles on the TPB and offered my views about how any proposals made by tie Ltd might be received by the Council and the city's business community. I acted as the key point of liaison between tie Ltd and the elected members. As a result of the fraught politics around the project most briefing sessions took place informally at party group level because of concerns about fracturing the political Administration (Lib Dem/SNP) which was divided in relation to support for the project.

I also attended the tram IPG which was convened by the Council's Chief Executive to ensure a corporate overview of all matters relating to the project. This group was also attended by the Director of Finance, The Director of Corporate Governance, the Head of Transport, Head of Legal plus several officers seconded from the Council to work in tie's office on aspects of the project – Alan Coyle, Duncan Fraser, Andy Conway. I attended the tram sub-committee which met extremely infrequently because of the above mentioned political concerns about the Administration being perceived to be divided in their positions with regard to the project. This committee was supposed to provide all elected members with the opportunity to scrutinise the project: in practice they relied heavily on information from their respective representatives on the TPB and from internal party group briefings arranged by the Chief Executive and delivered by myself, Marshall Poulton and Donald

THE TRAM PROJECT - OVERVIEW

Initial Proposals

Procurement

3. In relation to the procurement strategy for the tram project:

- a) **What was your understanding of the main elements and objectives of the procurement strategy for the tram project?**

The procurement strategy for the tram project pre-dated my appointment to the role of Director of City Development. I was aware that the design work, utilities diversions, supply of tram vehicles, civil construction work and power systems had been procured as separate elements and that DLA had been procured to provide legal advice to Tie Ltd. In all public procurement best value considerations apply. The size of the contract will have certainly required it to be advertising publicly through the Official Journal of the European Union. From the Council's perspective, it is clear from the report of the Chief Executive to Council in May 2008 that cost certainty was an important consideration.

- b) **How important was it to obtain a fixed price for the Infraco contract?**

It clearly was important to achieve a range with a maximum price ceiling but it would have been extremely difficult to achieve a fixed price, lump sum contract given the scale and complexity of the project and the fact that design was incomplete at financial close. There were over 40,000 design drawings and the aim to deliver an integrated design in a complex city environment in which there were so many unknown issues such as sub ground conditions was clearly always going to be a challenge. There was a quantified risk allowance of £49m at preferred bidder stage revised downwards by tie ltd to £32m at financial close in May 2008.

- c) **Did the procurement strategy or objectives change in any way (and, if so, when and why)?**

Prior to my arrival I am aware that the infraco consortium (Bilfinger Berger, Siemens, CAF) was formed jointly to deliver the infraco contract. I do not know the background to this decision but clearly all three parties were required to deliver key elements of the project that would work as a coherent and properly integrated system and the formation of infraco provided a mechanism for ensuring joint responsibility for this. The utilities diversion procurement approach changed when - following slow progress in the aftermath of the acquisition of the original contractor Alfred McAlpine by Carillion - the pace of the work was unsatisfactory and tie ltd took the decision to procure contractors to complete key sections of the utility diversions. These contracts were awarded to Clancy Docwra and Farrans.

- d) **In the event, do you consider that the aims of the procurement strategy were met (and, if not, why not)?**

If the aims of the contract were to deliver best value, price certainty and achieve a quality end product– that would deliver an operational tram system for Edinburgh - then the first two objectives were clearly not achieved. The third objective was only partially achieved because of the truncation of the route at Picardy Place rather than the delivery of the original project scope that specified a route Newhaven.

Design

4. **In relation to the design for the tram project, and by way of overview:**

- a) **It would be helpful if you could explain the different roles and responsibilities of CEC in relation to design i.e. when acting as client and when acting as statutory approvals authority?**

In terms of project governance I would describe the Council's role as project sponsor rather than client body. Tie Ltd was the delivery agent/client's representative and the contract with Infracore (BSC) was with Tie Ltd and not with the Council. The key statutory responsibilities with regard to design were the need for the tram system to conform with planning regulations (requiring planning compliant designs); building regulations e.g. the need for structures such as the tram depot to achieve the necessary building warrants; and the need for the tram to conform with the relevant roads and highways regulations. These were the main statutory approvals required by the tram project. The role of Council Officers was to ensure a compliant design that conformed to the relevant legislation. There was a wider, non-statutory aspect to design which concerned how the tram fitted into the city environment; in particular the section of track through the World Heritage site. Planners did from time to time exercise their judgment and discretion to ensure that suitable quality materials were used. In my experience they were always thorough in ensuring that structures that required permission were properly scrutinised.

- b) **What were the different types of statutory approvals and consents that were required for the tram project? What processes and procedures, in general, required to be followed to obtain such approvals and consents? How did that work in practice?**

In relation to planning, building control and roads and highways consents designated Council Officers dealt with the tram project and liaised with staff of tie ltd to ensure that consents were expedited properly. There was also a process of prior approvals that was intended to expedite planning clearance and avoid programme delays. The processes and procedures did not differ materially from any other major construction requiring Council consent: the key difference was that individual Council officers were assigned to the tram project as dedicated case officers. There were some initial delays in clearing approvals and a process was subsequently put in place to streamline the approval of designs.

- c) **In producing the design, the wishes and requirements of a number of different stakeholders required to be addressed (e.g. TIE, CEC, the statutory utility companies (SUCs), Network Rail, Forth Ports and BAA etc). Which body or organisation do you consider was primarily responsible for managing and obtaining the views and agreement of the different stakeholders?**

From an operational perspective responsibility for this work lay with tie Ltd. However, some Council Officers were seconded to assist tie Ltd to manage key relationships. Where issues arose through differences of opinion there was scope for escalation within the Council that would require me as Director to intervene and seek agreement with third parties on specific issues such as the location of the airport tram stop.

- d) **Which body or organisation do you consider was primarily responsible for ensuring that the design work proceeded on a timetable that would not disrupt the main infrastructure programme?**

Following novation of SDS and responsibility for completion of design to Infracore in 2008 they were responsible for managing the production of the necessary designs by SDS to enable the project to proceed on the required timetable insofar as the detailed design development process was concerned. However, tie Ltd was responsible for providing the necessary information to ensure designs could be produced. As delivery agent for the project tie Ltd had the primary role in expediting and managing the design approvals process once designs had been produced by SDS. Significant disputes arose over what constituted ongoing design development and what BSC took to be client instructed design change.

- e) **What role did you understand TIE to have in relation to design and/or approval of design and/or provision of information for design?**

Tie Ltd acted as the client body for the contract; they were required to specify the client's requirements; provide the necessary information to allow designs to be drawn up; ensure that the contractors understood what needed to be designed and ensure that the designs supplied conformed to the required specification and adhered to the necessary requirements of Planning, Highways regulations, building standards and other statutory criteria e.g. Network Rail's requirements for the construction of structures next to the Edinburgh – Glasgow rail line.

We also understand that there were difficulties and delays in progressing and completing the design for the tram project.

- f) **What was your understanding of the main difficulties in carrying out the design work and the main reasons for these difficulties?**

I wasn't involved in the detail of the design management process. At the outset of the project there were still sections of the track where tie Ltd had not

yet issued the necessary information to allow SDS to produce designs. There was also a poor understanding amongst some tie staff about structures that would require planning approval. There were also problems regarding the capacity of SDS to provide designs to specification and the apparent absence of an integrated management process within SDS. Designers were based in various offices around the UK and abroad. There were communication failures and occasions when the drawings did not work together properly failing for example to take account of the relationship between the proposed designs and existing structures in the city environment.

g) What steps were taken to address these difficulties?

The Chief Executive and Chairman of tie Ltd regularly pressed Infraco for resolution of the difficulties with SDS and steps were taken to effect improvements to the speed and quality of design information. A streamlined design approvals process was agreed. In relation to the statutory approvals process the Council ensured that officer resource was deployed so as to minimise any delays once designs had been completed. I intervened to ensure that Planning Officers were focused on expediting approvals and recognised the importance of minimising delays in planning clearance.

h) Were these steps successful (and, if not, why not)?

It appeared to take a long time for SDS to resource up properly and produce timely designs that met the required specification. At times it appeared that improvements were being made but then the process would regress at a later stage. In some instances, tie Ltd needed to instruct client changes to the design specification e.g. where through investigation it became apparent that ground conditions were unsuitable for a particular structure and reinforcement was required e.g. through the use of piling. Following the mediation process there was a noticeable improvement in Infraco's rate of successful submission of satisfactory design work due in part to more effective joint working and the co-location of key staff.

When the responsibility for managing design was novated by tie Ltd to Infraco at financial close insufficient attention appears to have been paid to providing incentives for success and penalties for failure in relation to design completion. Delay in producing satisfactory designs meant that BSC took longer to complete the project. Client instructed changes meant they could benefit from notified departures and extension of time claims. At times this seemed to me to be the equivalent of being in a taxi with the meter running while the driver decides what route he wishes to take.

Where cases were drawn to my attention about Council staff being the cause of any delay e.g. Planning Officers not prioritising tram work or appearing to be pedantic in reviewing planning submissions I intervened, either through discussions with the officers concerned or through the regular meetings I held with the respective Heads of Service responsible for Planning, Transport and Building Control. I am confident that over time there was a much smoother and more effective approach at least to the statutory approvals process.

- i) **To what extent, if at all, do you consider that the actions, or inaction, of the different parties and stakeholders, including CEC, resulted in delay in progressing and completing the design for the tram project?**

The Edinburgh tram project required over 40,000 design drawings to be prepared, checked and approved. From the information that I received the bulk of the cause of delay lay with SDS not completing satisfactory designs for which instructions and information had been issued by tie ltd. In some instances there may have been short term bottlenecks, due to management and staff resourcing issues within tie ltd. These were not, in my view, the main cause of delays.

There were concerns on the part of planning officers about the design and materials initially proposed for the Princes Street tram stops and for the section through Edinburgh Park. In my view the Planning Case Officer wished to ensure that the final product fitted well into Edinburgh's urban landscape environment. I don't believe that a failure to expedite statutory consents on the part of the Council was a major reason for the delay in completion of the necessary design work but it may have had programme and cost implications in some instances and there were still some approvals outstanding as late as April 2011.

5. **Almost all the reports to Transport Scotland (TS) note that reasons for design slippage are being reviewed and recorded each week (see for example [CEC00983221], page 27).**

- a) **What was the point in stating this every time? What was done with the information? Do you agree that it did not appear to be making any difference?**

The reason for reviewing and recording reasons for design slippage each week was to provide a clear audit trail throughout the project and ensure that the causes of specific delays were recorded. I would agree that despite the recording system the fundamental problems around the management of the SDS design work by BSC Infracore were never fully resolved. We witnessed short term improvements followed by subsequent delays.

- b) **When it was apparent that the review and monitoring was not working, why was nothing else tried? Why were Remedial Termination Notices (RTNs) in respect of design issued only well into 2010?**

I suspect that this was in part due to the fact that tie's new Chief Executive only came into post in late spring 2009 and wanted a period of time to get to know the key issues and build a relationship with the Infracore consortium. BSC had also appointed Martin Foerder as Project Director (I can't recall the exact timing). There was perhaps a view that with two capable and committed individuals representing the client and contractor it would be possible to resolve the design problems without resort to RTNs. With the benefit of mature hindsight the lack of effective management of design ought to have been escalated formally to the use of RTNs at an earlier stage.

6. The issue regarding the movement between the "Base Date Design Information" (BDDI) and the "Issued for Construction" (IFC) drawings came to the fore after the contract was signed.

a) To what extent was there a requirement to change designs after the contract was awarded – either to get approvals or because it was determined that there was a problem with the initial designs?

There was a range of problems with design that lay at the heart of delays to the project. First, at financial close some of the Base Date Design Information was either incomplete or the information that designs were based upon was partial and needed to be altered in the course of detailed design development as the project moved into construction e.g. to take account of the interface with other structures or due to sub ground conditions.

Second, key staff in TIE had a rail industry background and perhaps were not fully familiar with planning and highway regulations; third there were some changes to design requested by Planning Officers to ensure that the tram infrastructure fitted well into Edinburgh's distinctive urban landscape: this latter category was a small contributor to the overall changes.

The vast bulk involved changes that inevitably occur in the course of detailed design development as major construction projects proceed. They were perceived by tie ltd to lie with Infracore and their management of SDS. However, the wording of schedule part 4 part left open significant grey areas about what constituted client instructed changes to design and what could reasonably be regarded as part of the ongoing process of detailed design development.

b) Other than BDDI to IFC issues what other design changes were required after contract close?

In my role directing a Council Department of 750 staff and with a very wide range of operational responsibilities for service delivery I only became aware of major design changes either through my attendance at TPB or through individual discussions with Richard Jeffrey, Steven Bell or Marshall Poulton. These tended to be about major changes with a significant time and cost impact on the programme such as the design and location of the airport tram stop; the need for a retaining wall at Russell Road and the design of Murrayfield Tram stop. In some instances changes were also required following consultation with third party stakeholders such as Edinburgh Airport or Forth Ports. The design of the retaining wall at Haymarket Station required to be changed after mediation; this was due to the interface with the station which was going through a major renovation programme in 2011/12. Similar changes needed to be made to accommodate the planned Gogarburn Intermodal rail station (Edinburgh Gateway).

Utilities

7. TIE entered into the MUDFA contract in October 2006. Utilities diversion works commenced in July 2007 and were due to be completed by the end of 2008, prior to the commencement of the main infrastructure works. By way of overview:

a) What role (if any) did CEC have in relation to the utilities diversion works?

The bulk of the MUDFA works and the contract with Alfred McAlpine (subsequently taken over by Carillion) pre-dated my arrival in post. CEC's principal role was to make its own information on utility locations available to the contractor and to act as a conduit for securing information on utility locations from the companies responsible for water, sewerage, gas, electricity and telecommunications. CEC also had a role in ensuring that works were completed to a satisfactory standard ensuring for example that cables were buried to the required depth and drainage connections properly tied in to the drainage system.

b) Prior to the utilities works being undertaken, what investigations took place (including by whom and when) to identify the utilities that would require to be diverted?

I am not familiar with the details of the works completed prior to my appointment in post (March 2008). I do not know the extent to which ground penetrating radar surveys or trial pits were carried out in the on street sections of the route. However, it quickly became clear that there were gaps in the collective knowledge about the utilities infrastructure along the tram route. There were a number of trial pits dug along Princes Street prior to the PSSA to clarify the depth and location of utilities. Similarly, following mediation, GPR surveys and trial pits were instructed in the stretch from Shandwick Place to Haymarket.

c) Who did you understand to have responsibility for obtaining information from the utilities companies and obtaining their agreement to the works and for co-ordinating that information to inform design?

Tie Ltd with support from Council Transport and Highways staff.

d) Who did you understand to be responsible for ensuring that the utility works proceeded on a timetable that would not disrupt the main infrastructure programme?

Tie Ltd with support from the Council and a route for escalation to the Council in the event that utility companies were unresponsive.

There were difficulties and delays in progressing and completing the utilities diversion works.

e) What was your understanding of the main difficulties in carrying out the

utilities works and the main reasons for these difficulties? What role if any was played by provision of designs for these works?

There were myriad difficulties: utility records were incomplete or inaccurate; unexpected subterranean structures and void spaces were uncovered; in some cases customised design solutions were needed to ensure that pipes could connect up without interfering with other utilities; in other cases pipework was found to be in bad condition requiring wholesale replacement. In some places, utilities were packed so closely together that diversions required the coordination of work across several utility companies at one time. I don't know the detail of the role played by design: only that some assumptions required to be revisited once the nature and location of utilities had been uncovered. In one particularly problematic case I recall the same section of Leith Walk had to be opened up on three separate occasions before the final solution to diversions could be delivered.

f) What steps were taken to address these difficulties?

A lot of utility diversion work took place prior to my arrival in post. The approach taken while I was in post was to focus on the areas that were programmed as sites for tram construction work and to support tie ltd as required if utility companies were responding too slowly. Utility delays were not, in my view, the fundamental cause of programme delay. Large sections of the route had been opened up and utilities had been cleared but Infracore were very slow to mobilise resources to get on with construction.

g) Were these steps successful (and, if not, why not)?

Where there was a need to engage with utility companies solutions were always found. However, utility companies had their own objectives. They were not focused on the successful delivery of the Edinburgh Tram Project and sometimes their own interests and priorities would mean a delay before the solutions could be implemented. In France utilities are part of the public realm and Mayors can instruct companies to divert them: in the UK we rely largely upon persuasion to achieve cooperation.

h) Prior to your joining CEC, there was a suggestion that the utilities design and utilities works for phase 1b (the Roseburn link) were, at least initially, carried out before the utilities design and utilities works for phase 1a (i.e. the line from the Airport to Leith Waterfront). As far as you are aware, was this the case that, and, if so, why?

I honestly don't know. I was aware that some sections of the proposed line 1b were off street and may have followed part of the guided busway route so it may have been that diversion work on this line was easy to do at an early stage. I know from my early meetings with Willie Gallagher that he was sanguine about the possibility of progressing from the delivery of line 1a straight on to line 1b.

8. On 22 March 2010 [CEC00471472] you provided a report to the Tram Sub-

Committee to advise them on progress to date with the MUDFA contract. Your report notes that *“the original scope of the utilities works was based upon the information received from individual utility companies, who owned and maintained their apparatus, along with surveys undertaken by TIE. However as the works has progressed and the actual size, location and extent of the existing underground equipment was confirmed, this has required additional unforeseen works to be complete[d] in many locations”*.

a) What is your understanding as to why the prior investigations did not uncover the actual size, location and extent of the existing underground equipment?

There is a limit to what prior investigations can achieve. Ground penetrating radar surveys (GPR) can identify the line followed by utilities but not necessarily their depth or condition, or whether there are conflicts in the path of the utilities that would make diversions difficult to deliver. GPR can also identify void spaces such as cellars but without eliciting whether these may need to be filled in or capped off or are structurally sound enough to work around. To uncover the actual size location and extent of utilities one would have needed to conduct GPR surveys and dug trial pits along the entire route of the tram line. This would not have been practical from a traffic management viewpoint. It would have also been expensive and time consuming. I suspect that my predecessors most likely took the view that utility work arounds could best be managed in real time as the diversions got underway. In a city such as Edinburgh with a major legacy of Victorian era and earlier utility infrastructure the problems uncovered were often complex and challenging ones to deal with.

b) Your report notes that the amount of the utilities works undertaken represents a significant betterment to the infrastructure in Edinburgh, as many of the diverted pipes and cables were very old and were in need of replacement. Did the scope of the utilities works increase as a result of the betterment works?

No: the basic principle was new for old. In some cases there may have been variations to the length of pipe required to allow pipes to be diverted or drainage arrangements to work properly but there was no wider scope increase that I am aware of. However, some utility companies took the opportunity of the opened sites to install additional pipes and cables at their expense.

c) Did utilities companies contribute to the cost of this work to the extent that had been estimated?

At the point in time when I left my post in 2012 the outstanding claims for betterment were still being pursued. I was not involved in setting the original estimates but from my recollection of contemporaneous financial reports the amounts reclaimed for betterment were falling short of the estimates. I would doubt if the original estimates of utility contributions were achieved given the amounts that had been retrieved when I left the Council.

Risk

9. In general,

- a) **Who did you understand to be responsible for managing and monitoring risk?**

Tie Ltd acted as client body and managed risk for the project using a detailed operational risk register that was prepared by Steven Bell and updated at meetings of the Tram Project Board. In addition, the Tram Project was registered as a risk on the Council's corporate risk register for both financial and reputational reasons.

- b) **Did the risk management approach differ from other contracts on which you have worked and, if so, in what ways?**

Only at the margins. The tie Ltd register focussed on construction, financial and programme related risks and placed a heavy emphasis on health and safety both of the workforce and the general public. In my previous experience a wider range of risks including stakeholder impacts and public reputational issues featured more prominently as risks.

- c) **What risks were identified as requiring management and how were they managed?**

The risk register covered a range of risks including design, utilities, health and safety, legal and compliance issues. The project risk register was managed and updated by Steven Bell and shared with the tram project board periodically.

- d) **Do you consider that risk management was effective and can you give the reasons for your view?**

I don't believe there were any serious shortcomings in the management of construction related risks but the register perhaps needed to take a wider view of planning related risks and impact on the city itself.

- e) **In this project, what was done when it became apparent that a risk would be realised and how did that compare with other projects?**

Risks were mitigated where action could be taken to do so; tolerated if the impact on the programme or budget was relatively minor; or escalated for discussion with the Council or 3rd parties in cases where it involved 3rd parties e.g. Network Rail. In my experience of other projects a similar approach has been taken with steps taken to manage, avoid or mitigate risks where possible; tolerate those where mitigation may not be possible and deal with the consequences if risks do crystallise by ensuring a sufficient contingency reserve in the programme budget. I don't believe there was a major difference in the risk management approach. What was different was the scale and complexity of the project especially as construction sites had

been opened up across several sections of the city.

- f) **Did you have a role in relation to evaluation and management of risk during the project? If so, what was your role?**

Only through my attendance as member of the TPB and the opportunity to comment and make assessments when the risk register was discussed at Board level. I also had a role in reporting back to the Council when it appeared that risks were likely to crystallise that would impact upon the delivery of the programme or have other financial or reputational impacts for the Council.

- g) **How were the risks evaluated and by whom? By whom was the qualitative risk assessment (QRA) produced and what was done with the output? What allowances in terms of time and money were made to reflect risk as it emerged?**

As client body the risks and associated QRA were produced by tie Ltd which was responsible for managing the delivery of the project. My understanding is that Steven Bell held the key responsibility for producing, updating and reporting on risk to the Chief Executive of tie Ltd and the TPB and that he would liaise primarily with Stewart McGarrity on the financial impacts of risks as they emerged.

The Infrastructure Contract

2008 (to May)

- 10 **We understand that Andrew Holmes resigned as Director of City Development on or about 1 April 2008, at which point you took up the position.**

- a) **Did Andrew Holmes leave any “hand-over” notes or have a “hand-over” discussion with you in relation to the Tram Project?**

I overlapped with Andrew for one week. During that week he was pre-occupied with tying up a lot of loose ends and helping the Chief Executive prepare for taking the tram sign off report to Council on 1st May. I was left in the charge of John Jenkins – Andrew’s Business Manager - and Sheena Raeburn - his PA, who arranged for me to meet and receive briefings from my new colleagues and get set up as a Council employee with various pieces of information. IT user security passwords, ID badges etc. As a result of Andrew’s limited availability that week we ended up only having one handover meeting. This lasted perhaps two hours and covered a wide range of live issues within the Department. I believe we may have had at most a half hour on the tram project, the gist of which was that the contract was on track. Andrew also briefed me about some of the ‘politics’ within the Council concerning the project notably the split in opinion within the ruling coalition Administration about the tram and the resistance to the tram in some quarters within Lothian Buses.

- b) **What were your initial impressions of the Tram Project when you became Director of City Development? Did you have any concerns?**

From a transport policy viewpoint I thought it was an appropriate way of dealing with the mobility needs of a growing city population in a sustainable way and also reducing on street carbon emissions. At the original budget I didn't question the project from a value for money viewpoint but I clearly realised the project represented a huge amount of capital investment. Willie Gallagher and Andrew Holmes in their briefings had not given me any cause for concern about the contract or readiness for delivery. Neil Renilson had expressed concerns about the potential impact of the project on the profitability of Lothian Buses. In my first few months in my new post I was pre-occupied with a raft of other issues: learning the job; building a new management team and getting to grips with the ways of the Council and its myriad structures, committees and processes. Nothing in the briefing that I received had given me any undue cause for concern.

- c) **Were you made aware of the concerns set out in the Briefing Note [CEC01397539] sent by Alan Coyle's email dated 3 December 2007 [CEC01397538] and discussed at the IPG in December 2007?**

No The Briefing Note was prepared 4 months before I took up post. I was not a member of the IPG in December 2007.

- 11 **On or about 7 February 2008 TIE and BBS entered into the "Rutland Square" Agreement [CEC00205642].**

- a) **What was your understanding of the need for and purpose of that agreement?**

The agreement pre-dated my arrival in post. I was not aware of the history of the procurement process or the logic that led to the conclusion that such an agreement represented the best way forward; nor what other options may have been considered.

- b) **The Rutland Square Agreement [CEC01284179] noted a construction price of £222,062,426, subject to certain exclusions, provisional sums, assumptions and conditions. What was your understanding of the extent to which the price in the agreement of £222,062,426 was fixed and firm (and the extent to which that price was subject to exclusions, provisional sums, assumptions and conditions)?**

I never saw the Rutland Square agreement and only became aware of the provisions of schedule part 4 when disputes began to emerge and I became familiar with discussions around the TPB table. I took my cue from the Council's Financial Close report of 1st of May 2008 in which the Chief Executive of the Council stated that 95% of the combined Tramco and infraco costs were fixed with the remainder being provisional sums which tie Ltd had confirmed as being adequate.

12 On 18 February 2008 BSC produced a Design Due Diligence Summary Report, based on design information received by BBS by 14 December 2007 [CEC01449100]. That document raised various concerns about design, including that *"more than 40% of the detailed design information"* had not been issued to BBS.

a) **Did you see that document?**

No

b) **On your appointment as Director of City Development, to what extent were you aware that design was incomplete, and how did you understand incomplete design would be dealt with in the Infraco price and in the risk allowance?**

I was not aware that BSC claimed more than 40% of the detailed design information had not been issued to them. I had no direct dealings with BSC in the early months following my appointment and very limited dealings other than with Martin Foerder who was not appointed until much later.

13 By e-mail dated 11 April 2008 Colin Mackenzie raised a difficulty that had arisen with the "Russell Road Bridge: Prior Approval" and which raised the question whether the sum allowed in the QRA for SDS delay (£3m) was sufficient (the e-mail was forwarded to you) [CEC01401109]].

a) **What was your understanding of the matters raised in that e-mail thread?**

I cannot recall reading this e mail. I was away for a short break in April and may have been dealt with by my PA or by Business Manager in my absence. I find it difficult to believe that had I received it I would not have taken action. In general, I read all my e mails and respond to all those that require a response or specific action from me.

The implications of tie ltd not having secured planning permission for the structures required at Russell Road Bridge were clearly significant both in terms of potential programme delay, pressures on budget and the adequacy of the QRA. Unlike Andy Conway and Alan Coyle who had been embedded in Tie ltd for some time and were clearly seeing evidence of shortcomings in communication I was 4 weeks into a new job in which I had no prior experience to suggest that the Russell Road Bridge concerns formed part of a pattern of unsatisfactory performance on the part of tie ltd.

b) **Did these matters cause you any concerns and, if so, what did you do as result of any such concerns?**

I don't believe that I personally opened this e mail or saw it but given the wide circulation of officers involved it is inconceivable that the other Council Directors and the Chief Executive were not advised of the issue prior to the drafting of the Financial Close and Contract award report. In relation to that report the Council's Chief Executive Tom Aitchison made it clear to me that my

predecessor Andrew Holmes would focus on getting the report completed before he left post because Tom – correctly in my view – thought it would be unrealistic to expect me to pick up on the fine details of the project in time for the report to be drafted and sent out to Council Elected Members. Reports required to be sent to elected members a full week in advance of Council Meetings and first drafts were generally prepared 3 or 4 weeks in advance. I am confident that I played no part in the drafting of the Contract Award recommendation of 1 May.

c) Was any consideration given to delaying signing the Infraco contract until these concerns were resolved?

I don't know. The matter was handled by my predecessor and by the Council Chief Executive. I can't recall attending the Legal Affairs Committee that is referred to in Andy Conway's e mail. However, if I did I would almost certainly have relied upon the counsel of those who were already fully familiar with the project.

14 By e-mail dated 15 April 2008 [CEC01245223] Alan Coyle of City Development forwarded Nick Smith , Gill Lindsay and Colin Mackenzie an e-mail of the same date by Stewart McGarrity attaching Schedule 4 of the Infraco contract [CEC01245224] and a cost analysis spread sheet [CEC01245225].

a) Did Alan Coyle (or other CEC officials) provide you with a copy of Schedule 4 of the Infraco contract or the cost analysis spread sheet?

No: that consultation appears to have taken place exclusively between officers in finance and legal services.

b) When did you first become aware of Schedule 4?

I only recall becoming aware of schedule 4 once I started to attend the Tram Project Board and points of dispute began to arise. I had never met any of the signatories to schedule 4 some of whom appear to have moved on following the conclusion of this agreement.

c) What, if any, discussion was there within CEC of the meaning and effect of Schedule 4?

Clearly there was some discussion within legal and finance to begin with but the involvement of City Development staff including Marshall Poulton, and myself only took place once its meaning began to be tested by the disputes that arose.

d) Did TIE or DLA discuss the meaning and effect of Schedule 4 with CEC?

I can recall Andrew Fitchie of DLA attending the TPB on several occasions to provide legal advice on aspects of interpretation. Each political party was represented on the TPB though the SNP never took up its place and the Green Party was rarely in attendance. However, I have no recollection of

there being any briefing arranged for CEC officials of the meaning and effect of Schedule 4.

e) **What was your understanding of the purpose and effect of the various Pricing Assumptions in Schedule 4?**

To clarify what was and was not included in the contract price and the basis upon which assumptions about pricing had been made. Infraco sought to ensure the design was based on those drawings provided by SDS which were based upon the base date design information supplied to them by tie ltd. The designs could be modified in the course of the standards design development process or through value engineering. However they would be invalidated if they required to be amended in scope as a result of third party agreements (except where provisional sums had already been agreed). They would also be invalidated in cases where amendments were required as a result of the decisions of any approval body. In practice this means that there remained a lot of scope within the contract for Infraco to seek extra payment for design related changes and there was substantial scope for Infraco to leverage the contract to their financial advantage.

15 On 16 April 2008, officials in City Development were copied into an email that Andy Conway had sent to Susan Clark, asking whether TIE had "*undertaken an exercise to determine the extent and cost of changes that will be required since the design freeze in November?*"[CEC01247686].

a) **Did officials in City Development make you aware, at this stage, that any changes in design after the 'design freeze' of 25th November 2007, might result in additional costs?**

Not that I can recall. However, again I took my cue from the contract close report which showed that there was a QRA of £32m on a construction contract valued at £245m which seemed to be a reasonable contingency budget. Willie Gallagher of Tie ltd was also very confident of bringing the project in under budget and was lobbying for a balance of the contingency to be used to complete the business case for line 1b. Andy Conway was a relatively junior Council Officer and I can't recall meeting him in my first few weeks in post. Marshall Poulton joined the Council as Head of Transport in April 2008 and it was only once he was in post that I began to be introduced to the transport staff assigned to tie ltd including Andy Conway and Duncan Fraser.

16 A report provided to the IPG on 16 April 2008 [CEC01246992] noted that the Planning and Roads Departments had written to TIE recording their concerns about the delay and quality of submissions for approvals and consents. There was concern that prior approvals may require to be revisited if there were substantial changes in design. It was noted, "***There is potential for the approvals to cause a delay to the construction programme***" (original emphasis). See letter dated 31 March 2008 from David Leslie, CEC, to TIE [CEC01493318] and letter dated 3 April 2008 from Duncan Fraser, CEC, to TIE [CEC01493639].

31 March 2008
should be
28 March 2008

- a) **Did the issues relating to prior approvals noted in the report and letters from CEC to TIE cause you any concerns and, if so, what, if anything did you do in response to these concerns?**

As Director I was responsible for the letter that David Leslie sent and would almost certainly have sanctioned it. It is unlikely that David Leslie would have sent a letter to the Chief Executive of Tie Ltd without my prior agreement. I recall speaking with David with regard to his concerns about the ability of the Planning Service to gear up for a surge of prior approvals over the summer months and the need to free up the staff resources necessary to deal with this.

- b) **What was your understanding of how the issues relating to prior approvals noted in the report could affect the Infraco programme and price?**

I understood that failure to clear prior approvals because of problems within tie ltd could have significantly impacted the programme and price. These issues were in play when Andrew Holmes and Tom Aitchison were drafting the Council report of 1st May 2008.

- c) **What was your understanding of how the issues relating to prior approvals were addressed in the Infraco pricing schedule?**

I understood that any changes required to prior approvals could potentially give rise to being notified departures and could be treated as a tie instructed change request giving rise to a claim by BSC.

- 17 The report provided for the IPG on 16 April 2008 attached (as appendix 1) an update of the table, "Critical Contractual Decision to enable Chief Executive to use delegated powers to approve tie to sign the contract with BBS".

Para 7.4 of the table stated, "*What design version was the BBS contract priced against and what changes have subsequently taken place*", to which there was a response, "*Report by TIE on the Infraco Contract states in section 'Design Expectations of the Infraco' that V26 updated from V22 of the SDS design has been used for Price and Programme – Schedule 4 on pricing received from TIE*". We understand that version 26 of the design programme reflected the design available as at November 2007.

- a) **What was your understanding of the above matters?**

My understanding was that the design had been frozen to enable the parties to conclude agreements on substantive issues and that, in order to cope with some unknown and incomplete design and third party issues certain pricing assumptions had been agreed between the parties. I was not aware of schedule part 4. I took some assurance both from Willie Gallagher's confidence in the programme budget and the fact that a contingency reserve of £32m as QRA was notified in the Council report of May 2008 as being in place to allow for future risks and uncertainties.

- b) **What was your understanding of the version of design that formed the basis for the Infraco price and how the pricing provisions in the Infraco**

contract addressed any variation from that version of the design?

My understanding is that the price was based upon the design as frozen at November 2007. However, I did not come to any full understanding of the details of this until I started to attend the TPB and the first disputes began to emerge.

- c) What was your understanding, at that stage, of whether agreement had been reached between TIE and BBS in relation to which party would bear the risks and liabilities arising from incomplete and outstanding design, approvals and consents and how that was, or would be reflected in the Infraco price and pricing schedule?**

At that stage (April 2008) I had not seen schedule part 4; nor can I recall being briefed upon tie's view of its implications. In normal circumstances I would have expected any concerns about this to be escalated to me via the Head of Service responsible for transport. However, Marshall Poulton was new in post in April 2008 and had no prior knowledge of the project. I can't recall Gill Lindsay as Chief Solicitor raising any concerns with me about schedule 4.

- d) Did you see, or seek, the version of the Infraco Pricing Schedule (Schedule 4) in existence at that stage?**

No. I took my guidance from the fact that the Chief Executive was sufficiently content with the state of readiness of the project to seek Council approval in May 2008 for contracts to be entered into; it took some time for me to become aware of the existence of Schedule part 4. I did press tie ltd for a copy of the contract and all pricing assumptions in 2009. Initially, I was told that the legal documents ran to thousands of pages. Eventually I received a copy on CD Rom; this was shortly before Alastair MacLean's appointment as Head of Legal Services. I passed the CD rom to Alastair and asked him for his considered view on any deficiencies in the contract that would be of concern in relation to tie's position and therefore could have implications for the programme and budget.

- 18 On 22 April 2008 Alan Coyle sent you and other CEC officers an email containing the Tram Council report, noting that there had been some minor changes in wording, however, a main change was in relation to paragraph 3.10 relating to SDS risk [CEC01228603].

- a) What was your understanding, at this stage, of which party would bear the risks and liabilities arising from incomplete and outstanding design and how that would be reflected in the Infraco price?**

At this stage I was 5 weeks into my new role absorbing briefing on the work of 750 Council Staff and helping with the induction of two new Heads of Service – Marshall Poulton and Greg Ward. I noted that Jim Inch who had responsibility for legal services was content with the draft report and took my guidance from Tom Aitchison's explicit direction that the preparation of the tram report would be seen through by Andrew. It is fair to say therefore that at

this stage I was not familiar in any detail with the specific risks and liabilities arising from incomplete and outstanding design, nor the impact on Infraco price.

19 You were copied in on an email from Willie Gallagher sent on 23 April 2008 [CEC01228509] stating that there were "*only a few outstanding discussions to finalise the INFRACO Contract and TramCo and SDS Novations*" and noting that "*the intention was to issue the final contracts to all parties to commence a 7 day due diligence process....with signature no later than noon on Wed April 30th*".

a) **What was your understanding of the outstanding matters in relation to the INFRACO contract, TramCo contract and SDS Novation at this stage? Had you received briefing on this?**

I had a very limited understanding of the detail at that stage. I was not at all aware of the outstanding matters in relation to the Infraco and Tramco contracts. I have some recollection of being told about the novation of design to SDS but I can't recall the precise timing of becoming aware of this. I suspect it was later on when I began to get a firmer understanding of the arrangements.

20 By e-mail dated 28 April 2008 [CEC01312358] Graeme Bissett circulated an updated draft of the Close Report [CEC01312359] and other documents. The updated draft Close Report noted:

(1) there had been an increase in the base cost of Infraco of £17.8m compared to the Final Business Case, which increase was as a result of "substantially achieving the level of risk transfer to the private sector anticipated by the procurement strategy".

(2) the increase of £17.8m approximated closely to "the allowance which was made in the FBC for procurement stage risks i.e. the increase in Base Costs which might have been expected to achieve the level of price certainty and risk transfer which has been achieved" (p4).

a) **Did these passages reflect your understanding of matters at the time?**

I am not sure that I saw the e mail of 28 April. It does not appear to have been sent to my Council e mail address which was Dave.Anderson@Edinburgh.gov.uk; I didn't know who Graeme Bissett was. I had only met with Willie Gallagher and Neil Renilson during my initial induction to the Council and was unfamiliar with the staff and Directors of tie until I took up my position on the Tram Project Board.

b) **To what extent were these passages consistent with your understanding at the time of the risks and liabilities retained by the public sector in respect of outstanding and incomplete design, approvals and consents?**

To reiterate, I was not briefed on the detail of these issues in April 2008.

21 You and others were sent an email by Graeme Bissett dated 28 April 2008

[CEC01312358] attaching a Report on the Infraco Contract Suite [CEC01312363]. The Report noted:

- Price, *"A number of core pricing and programming assumptions have been agreed as the basis for the Contract Price. If these do not hold, Infraco is entitled to a price and programme variation known as "Notified Departure" (p4)*
- Programme, *"Following contract signature, it is expected that BBS will seek a Notified Departure on Programme due to SDS delay in design production" (p4)*

a) **What was your understanding of the provisions noted above? Do you think that the price for and the scope of the Infraco Works provided for in the contract, could have been made clearer?**

I am not sure that Graeme Bissett's e mail reached me because it appears to have been sent to an incorrect e mail address. However, upon reading it now I would tend to agree that its meaning could have been made clearer.

b) **At this time, what Notified Departures did you expect following contract signature?**

In April 2008 I was unaware of the detail of schedule part 4 and the criteria that would trigger notified departures; it was not a term I had encountered in my previous experience.

c) **At this time what did you understand to be the likely cost of these Notified Departures?**

No – for the reasons explained above.

d) **How did you understand that had that been allowed for in the risk allowance?**

I had no understanding of how the risk allowance had been arrived at. My understanding of the project at that point was primarily informed by the terms of the Council report which indicated that the QRA had been reduced from £49m to £32m between December 2007 and April 2008 and that the base cost had risen from £449m to £476m in that period with additional items in the base cost now based on firm prices rather than provisional sums and the closure of unspecified procurement risks. On that basis I understood the logic of the move to reduce the QRA to £32m. The Council report made no reference to Notified Departures and their likely cost but it seemed reasonable to assume that these would be fully containable within the QRA.

e) **What were your views on giving the SDS provider (Parsons Brinckerhoff) a "bonus pot of £1,000,000" to incentivise the production of design?**

I had no knowledge of this proposal and was unaware of its existence. I can understand the logic of arrangements being set up to incentivise the completion of design because of its critical impact on the programme. I have witnessed the use of incentive and penalty clauses in public contracts

elsewhere. They can be effective but do not guarantee successful delivery or performance.

f) Were elected members advised in detail on these matters in advance of the contract closure?

All matters in relation to the contract closure report were dealt with by Tom Aitchison, Jim Inch, Andrew Holmes and Donald McGougan. I had no role and nor did Marshall Poulton who only took up post in April 2008.

g) Was clarification of any of these issues sought by CEC officials?

I don't know.

22 A Report to Council by Tom Aitchison on 1 May 2008 [CEC00906940] sought refreshment of the delegated powers previously given to the Chief Executive to authorise TIE to enter the contracts with the INFRACO and Tramco bidders. The report noted:

(1) the cost of the project had increased from £498m to £508m (comprising a base cost of £476m and a revised QRA of £32m), which increase was noted to be largely due to the firming up of provisional prices to fixed sums, currency fluctuations and the *“crystallisation of the risk transfer to the private sector as described in the FBC”* (para 3.5).

(2) 95% of the combined Tramco and INFRACO costs were fixed with the remainder being provisional sums which Tie had confirmed as adequate;

(3) *“As a result of the overlapping period of design and construction a new risk area has emerged which has been the subject of extensive and difficult negotiation. TIE Ltd advise that the outcome is the best deal that is currently available to themselves and the Council. Both TIE Ltd and the Council have worked and will continue to work diligently to examine and reduce this risk in practical terms”* (para 3.10).

a) What was your understanding of (1) the “new risk area” that had emerged as a result of the overlapping period of design and construction, (2) the “outcome” that had been arrived at in respect of that risk and (3) the steps that would be taken by TIE and CEC to reduce the new risk area?

My understanding then was that the overlapping of design and construction meant it was possible that some construction works could be delayed if design work was not completed on time. I noted that the Council report stated CEC had received written advice from tie ltd that the proposed approach is the best deal that is currently available to themselves and the Council; that they will continue to work diligently to examine and reduce this risk in practical terms and that they (tie ltd) were satisfied that £32m is an adequate level of risk allowance. I was not at that point aware of the 'outcome' that had been arrived at. I have been involved in other projects before and subsequently

where not all aspects of design were complete before the appointment of construction contractors (e.g. Loch Lomond Shores and Chester Bus Interchange). It is not an ideal position to be in. However, my experience is that with a considerate contractor approach and genuine collaboration to achieve the project outcomes it can work successfully. I had expected that tie and Infraco would work together flexibly to deliver those parts of the route where the designs had been fully completed and would prioritise the completion of the outstanding designs and approvals. At that stage I had no understanding of the risk of the missing designs being treated by BSC as client instructed changes.

- b) The report provided no explanation of pricing Schedule 4, despite this Schedule having been provided to CEC legal on 15 April.

Was the purpose and likely effect of Schedule 4 ever fully explained to members (and if not, why not)? Were members ever addressed on the risk or likelihood of notified departures and the effect of that on cost and budget? Do you consider that the report to the Council presented an accurate picture to members?

I don't know. I had no involvement whatsoever in producing the May 1st report. If the explanation of the schedule 4 pricing assumptions had been provided to CEC Legal on 15th April it is highly likely that the report would have already existed in draft at that point. The effect of schedule 4 could have been explained in an amended version of the report as there was still time for the report to be amended at that point. Without the inclusion of an explanation of schedule 4 the report presented an incomplete picture to members and was therefore not wholly accurate.

- 23 By email to John Ramsay dated 2 May 2008 [CEC01222014] you noted that you looked forward to addressing any points that Mr Swinney may care, at any time, to raise about the programme.

- a) **What discussions, if any, did you have with TS and/or with Mr Swinney around that time? Did TS and/or Mr Swinney raise any concerns with you and/or with CEC in relation to the Tram Project? Did Mr Swinney raise any concerns about the programme at that time?**

I can't recall ever having met with or discussed any concerns about the tram project with Mr Swinney at that point or subsequently. The only occasions when I met with Mr Swinney were those on which he fulfilled the role of chair of the Edinburgh BioQuarter group on which I sat. The Council was responsible for completing the Braid Burn flood defence works for which I was responsible and these works were necessary to allow the BioQuarter to proceed. I may have had a very brief exchange on the tram project with Mr Swinney at one of these meetings but at that stage I was not sufficiently up to speed with the details of the project's contractual arrangements to be in a position to have a discussion of any substance. I had known Mr Swinney from my previous role as Senior Director of Operations with Scottish Enterprise. I was simply informing John Ramsay that if Mr Swinney wished to

have a meeting to discuss any points of concern about the tram then I would be delighted to meet him in his role as the responsible Minister within the Scottish Government.

24 On 3 May 2008 [CEC01231125] Willie Gallagher sent yourself, certain Councillors and Kenneth Hogg an email noting that Bilfinger Berger would not honour their finally agreed price, and required an additional £12m.

a) What was your understanding of why Bilfinger Berger required an additional £12m?

I am not fully clear on this. It was very early on in my involvement with the project. I recall there being a claim for abortive costs if line 1b were not to proceed.

b) Willie Gallagher notes that he called an emergency meeting of the Tram Project Board on Wed pm, and informed them of the issue. Graeme Bissett's official note of this emergency Tram Project Board meeting on the afternoon of Wednesday 30 April 2008 records that you were in attendance [page 1 of TIE00359939]. Did you agree with the series of actions agreed?

This was the first meeting of the TPB that I had attended. I was not familiar with the background to the issues and was very much guided by those who had been involved in the details of the negotiations. I had no developed understanding of the background but I felt that if BB were to suffer abortive costs that it was not unreasonable that there should be some form of compensation.

c) What was your understanding of why TIE were investigating the implications of bringing back Tramlines and removing BB from the Consortium (likely to cost 6 month delay)?

My understanding is that this was the result of the aggressive stance being taken by BB.

d) By email to yourself and Donald MacGougan dated 9 May [CEC01231125], Gill Lindsay noted that DLA may not be inclined to commit to a view TIE would withstand a legal challenge on procurement if they removed BB from Consortium.

Was a legal advice ever received on this point? By whom was the decision *not* to remove BB from the Consortium taken, and why? What were your views?

As far as I am aware no third party legal opinion was sought. Jim Inch was responsible for corporate legal affairs and held the budget for procuring external legal advice. A judgment may have been taken on the basis of the risk of a procurement challenge and the likely impact that a successful challenge would have had on the project programme. With hindsight, the Council should have sought legal opinion separate from tie but I did not

consider that was my decision to make.

25 By e-mail dated Friday 9 May 2008 Gill Lindsay gave yourself and Donald McGougan an update [CEC01231125].

a) **What was your understanding of the subject matter, and outcome, of the negotiations between TIE and BBS that week?**

That an agreement had been reached relating to potential abortive costs if line 1b were not to proceed and on apportionment of liability for certain potential risks. However, at this stage I was not yet aware of the details in the tie risk register. I had not been at a TPB meeting when it was on the agenda.

26 On 9 May Willie Gallagher noted by email to yourself and other senior CEC officials that he would be in contact with Germany himself to agree a final position on price [CEC01338100].

a) **What were your views when you received this email?**

I was surprised that there was such last minute manoeuvring on price by BB given that the Council report had been approved only 8 days previously. I was concerned about the behaviour of BB; it was contrary to the principle of 'no surprises' which, in my experience, is critical to effective collaboration between client and contractor.

b) **At this stage, what was your understanding of the extent to which a final fixed price for the contract had been agreed?**

I was still at that stage under the impression that 95% of the combined Tramco and Infraco costs were fixed with the remainder being provisional sums confirmed by tie ltd as adequate and there being a QRA of £32m confirmed by tie ltd as being an adequate level of risk allowance. However, the immediate request for an additional £12m by BB significantly undermined my confidence in the agreement.

c) **Did Mr Gallagher update you on the final position on price following his discussions?**

I can't recall a specific meeting or written communication from Willie Gallagher on this. Graeme Bissett subsequently sent a precis of events that recorded the background to the issues raised by BB's which included supply chain pressures, the impact of fluctuations in currency and the firming up of some provisional sum cost items to fixed sums. My understanding was that the negotiations meant a further £4.86m in price plus a fee of £3.2m for demobilisation payments if line 1b were not to go ahead.

27 On 12 May 2008 (at 18.49 hours) Graeme Bissett sent an e-mail to you and others attaching a final set of TIE's internal approval documents [CEC01338846]. The Financial Close Process and Record of Recent Events dated 12 May 2008 (clean copy [CEC01338847]; tracked changes [CEC01338848]) noted that a response was received from BBS on 7 May 2008 which proposed a payment of

£9m to BBS and "Further examination of the contract terms surrounding the design management process, which although unclear pointed to an extended design and consent programme with potentially material adverse consequences for the construction programme" (p4).

a) **What was your understanding of that matter?**

I was unfamiliar with the contract terms and the background to the difficulties that had apparently occurred previously with PB which had led to the novation to SDS. By this stage into my new role I was receiving an average of over 100 e mails per day, many with document attachments and typically attending between 4 and 8 meetings each day. It is possible that I did not grasp the potential significance of an extended design and consent programme or took the view that programmes can be accelerated if there is will on both sides to do so.

b) This email was sent the evening before the meeting of the Policy and Strategy Committee on 13 May 2008 at which members' final approval was sought to enter the contracts. **Did senior CEC officials and members have sufficient time to consider this matter before members approved award of the contracts?**

No

28 On 13 May 2008 you, Mr McGougan and Ms Lindsay provided a memorandum to the Chief Executive of CEC confirming that it was appropriate to support TIE's recommendation to proceed to financial close [CEC01244245].

a) **What was the purpose of the memorandum? Who had suggested or requested that it be provided?**

Presumably to demonstrate to elected members that senior officers representing finance, legal and transport were content to support TIE's recommendation. The request would almost certainly have come from the Chief Executive, advised by the Director of Corporate Services so that the project audit trail could demonstrate appropriate project governance processes had been followed.

b) **To what extent were you able to come to your own view on whether it was appropriate to proceed to financial close and to what extent were you reliant on the advice of others (and, if the latter, which others)?**

It was impossible for me to have reached a definitive view on such a major project given the complexities of the procurement process and such an uneasy political background (given divisions within the Council Administration and at Holyrood). While I was with Scottish Enterprise I had been lobbied to support the project and its economic benefits. It is fair say that on a strategic level I was positively pre-disposed to support the case for trams in Edinburgh. However, I didn't have the necessary time or information to reach a clear view on whether it was appropriate to proceed to financial close. I therefore relied

heavily upon the advice I had received from Willie Gallagher and senior Council colleagues specifically Tom Aitchison, Jim Inch, Gill Lindsay and Donald McGougan.

- 29 On 13 May 2008 the Council's Policy and Strategy Committee considered a report by the Council's Chief Executive seeking to refresh the delegated powers given to the Chief Executive to instruct TIE to enter into the INFRACO and TramCo contracts [CEC01246115].

The report advised that the estimated capital cost for phase 1a was now £512.2 million. The report stated that *"Offsetting the increase in cost is a range of negotiated improvements in favour of TIE and the Council in order to reduce the risk of programme delays and minimise exposure to additional cost pressures, as well as better contractual positions"*.

- a) Why was approval sought from that committee rather than a full meeting of the Council? Did you consider that to be appropriate?**

On 13th May I was 8 weeks in to my first role working for a Council and I was insufficiently familiar with the criteria that would guide reports being taken to the P&S Committee as opposed to full Council. However, the minute of the meeting suggests that the report was referred to Policy and Strategy by the Council meeting of 1st May under 'standing order 22' due to the material change in commercial circumstances. In the sense that the Council Convenor made the decision to refer the report to P&S - and Council had considered the May 1 report to which this was an update - I do not think it was necessarily inappropriate. The alternative presumably would have been a further delay of one month or a specially convened meeting of Council.

- b) Did you attend the meeting of the committee? If so, what discussion took place of the Tram Project? Approximately how long did that discussion last?**

I don't think I attended the meeting. I believe it may have clashed with the meeting of the TPB that day.

- c) We understand at the beginning of the meeting, Jenny Dawe was appointed the new convenor of the committee. What was your understanding of why that was done?**

As Leader of the Administration I understood that Councillor Dawe wished to fill the key convenorship dealing with policy and strategy matters.

- d) To what extent were you involved in drafting the report to Committee?**

Not at all. The report was prepared by the Chief Executive it appears with input from Duncan Fraser (Transport) and Rebecca Andrew (Finance).

- e) What are your views on the statement noted above? Do you agree with it? If so, what do you consider were the "improvements" and "better**

contractual positions” that reduced the risk of programme delays and minimised exposure to additional costs?

The statement appears to reflect the points made by Willie Gallagher in his e mail. Aside from the fact that some provisional sums had now been agreed as firm costs it is not clear to me that there were improvements or better contractual positions.

- f) Following approval of award of contracts by the Policy and Strategy Committee of 13th of May, yourself, Gill Lindsay and Donald McGougan advised and confirmed that, taking into account all the circumstances, you considered it appropriate to support and agree with TIE’s recommendation to the Chief Executive that there is now an imminent financial close to this project [CEC01222438]. **On what basis were you satisfied that the contracts should be entered into? Did you have any remaining concerns?**

I was satisfied on the basis that Council colleagues in legal and finance were content having weighed up the various risks (and notwithstanding the possibility of a procurement challenge from the under bidder Tramlines) that proceeding to financial close was a better option than the likely alternative of a further delay and fresh procurement exercise. At this stage I was not properly aware of the pricing assumptions within schedule part 4. However I was concerned about the behaviour of BB and didn’t feel it augured well for the future partnership approach upon which the contract was supposed to be based.

In my experience it is essential to ensure trusting relationships between client and contractor from the outset of any major capital project. I didn’t like the idea that the Council appeared to be getting bounced in to approving a deal but I was also aware that a lengthy period had passed since BB had been identified as preferred bidder.

- g) An e-mail dated 9 May 2008 from Willie Gallagher noted that contract signature was agreed for 2 pm on Tuesday 13 May 2008 [CEC01231125]. **Do you consider that that allowed members of the Policy and Strategy Committee at their meeting on 13 May sufficient time to consider whether approval should be given for the contracts to be entered into?**

The key politicians involved Cllrs Wheeler, Mackenzie from the Administration and Cllrs Jackson and Henderson from the opposition party groups were kept fully apprised of the evolving situation by tie and the Council’s Chief Executive who would also have briefed the Leader Cllr Dawe and Deputy Cllr Cardownie. All P&S members also had the opportunity to discuss the Council report of 1 May. As a general rule Council reports were sent out fully one week in advance of the relevant committee meeting. If the changes had simply been a matter of an adjustment to reflect the shift from provisional sums to fixed costs with a clear one off deal to reflect currency fluctuations etc. then (given their existing background knowledge of the issues) four days may have been enough time. However, in view of the new uncertainties highlighted in Graeme Bissett’s note it would have been advisable to complete a fresh options appraisal covering all the cost changes and outstanding risks so that

Councillors could reach a more fully informed view.

- 30 You attended a meeting of the Tram Project Board on 13 May 2008 ([CEC00080738] at page 9) with Willie Gallagher, Steven Bell, David MacKay, Neil Renilson and Alastair Richards. During the meeting, news was received that approval had been given by CEC's Policy and Strategy Committee for CEC's Chief Executive to authorise TIE to sign the contracts. The Approvals Committee (comprising Mr Gallagher, Mr Mackay and Mr Renilson) approved signature of the Infraco contract (as recorded in a separate minute, CEC00079774, at page 3).

It was noted (page 9, para 4.3) that "Following a discussion on the consequences on price and programme of delaying a decision, the TPB approved the completion of the SDS novation".

- a) **What did you understand to be the consequences on price and programme of delaying a decision on the completion of the SDS novation?**

At that stage my understanding was that any further delay could run the risk of the open for revenue service date being compromised; construction inflation increasing costs and the programme as a whole moving out of synch.

- b) **Who did you understand bore the risk for SDS delay in design production following novation?**

At that stage I was still unaware of the impact of schedule 4 part 1 and believed that Infraco bore the risk for SDS delay in design production excepting where tie had issued client instructed changes.

- c) **Who did you understand would be responsible for managing the design process after novation and for ensuring that all outstanding design (and all outstanding statutory approvals and consents) was completed/obtained on time?**

At that stage I believed managing the design process this was the responsibility of BSC working closely with tie to ensure the necessary information was available to allow designs to be prepared.

- d) **What responsibility and powers, if any, did TIE retain after novation in relation to managing the design process and ensuring that all outstanding design (and all outstanding statutory approvals and consents) was completed/obtained on time?**

I am not clear on this point. I never saw the novation agreement.

- 31 On 13 May 2008, parties signed the Kingdom agreement [WED00000023].

- a) It would be helpful if you could explain your understanding of the need for, purpose and effect of that agreement?

The agreement was put in place to give effect to the deal struck by tie following the issues raised by BB in April prior to financial close. Its purpose was to provide clarity on the conditions upon which tie would make any additional payments. The extra £4.8m agreed by tie was linked to Infraco achieving certain sectional completion milestones; compensating BBS for abortive procurement costs if line 1b were not to proceed and ensuring that the other claims made by BBS were taken off the table as a result of this agreement.

- 32 You were copied into an email from Willie Gallagher sent around midnight on 14 May 2008 [CEC01352318] stating *"We have all the Tram Documentation signed with CAF including the documentation enabling them to join the InfraCo Consortium. Making progress on InfraCo and SDS Novation. Delayed due to late delivery of schedules by SDS and BB lawyers wishing to proof read every schedule. Clarification session with SDS will complete tonight. Commence again tomorrow morning at 8am, intent is to close all contracts by 12noon. No one is raising any red flags to this being achievable."*

a) What were your views on receiving this email?

It did not surprise me that the lawyers were going through the final set of agreements with a fine toothcomb. In my experience extended legal sessions are not uncharacteristic of the latter stages of major capital construction projects where the commercial stakes are high. I was encouraged by Willie's view that it would be possible to conclude all contracts by 12 noon the following day.

b) Did you have any concerns in relation to whether TIE were scrutinising the contract to the same extent as the consortium? Were you satisfied that the DLA report on the Infraco suite provided sufficient comfort on the risks to CEC [CEC01246502]?

I cannot recall seeing the DLA report and had never met Andrew Fitchie at that stage. Gill Lindsay the Council's Chief solicitor was managing all the legal documentation and Alan Coyle was reporting on financial matters to Donald McGougan. I took some comfort from the fact that DLA were representing tie ltd but I was not involved at all in the legal exchanges that informed the arrangements agreed at financial close and therefore not in a position to make a judgment on the level of scrutiny provided by DLA.

- 33 Infraco contract close took place on 14 and 15 May 2008, as part of which a number of contracts were signed, including the Infraco contract [CEC00036952] and novation of the SDS contract to BSC.

By way of overview, what was your understanding of the following matters at contract close:

a) The difficulties that had been experienced with design, the extent to

which these difficulties had been resolved, the extent to which detailed design was complete (and all necessary statutory approvals and consents had been obtained), the extent to which these matters were outstanding and when the detailed design would be completed (and all approvals and consents obtained)?

I had very little understanding of the difficulties experienced with design. Willie Gallagher had advised me that the designs were not fully complete and that responsibility for completion of the design work was to be novated to SDS and managed by Infraco. I never saw the contract documentation between Tie and BBS.

- b) **The difficulties that had been experienced with the utilities works, the extent to which these difficulties had been resolved, the extent to which utilities diversions were complete and the extent to which these works were outstanding and when these works would be completed?**

In May 2008 I was unaware of the difficulties that had been experienced with the utilities works. I was aware that works were still ongoing in parts of the city such as Leith Walk but Willie Gallagher assured me that the civils programme would be arranged so as to ensure that utility diversions did not hold up the programme.

- c) **The likely effect on the Infraco works and contract (and the cost of the tram project) if the outstanding design (and approvals and consents) and outstanding utilities diversion works were not completed within the anticipated timescale?**

In May 2008 I had no developed understanding of the relationship between these elements of the programme. I hadn't previously attended a TPB and my understanding of the project in May was limited to one short briefing session with Andrew Holmes and a meeting with Willie Gallagher and Neil Renilson. The impression I received from these briefing sessions was that the project was in good shape and Willie felt it could be delivered without recourse to the full risk pot. In my experience to date design costs were typically 10% of construction project costs. It was explained that risk for ongoing design development lay with Infraco. The fact that the design was incomplete didn't cause me major alarm. I was familiar with the RIBA Design work stages and had experience of other projects where design development work continued beyond financial close. However, the clear impression from tie at that stage was design costs would only increase if tie instructed changes.

- d) **The provision made in the risk allowance for the above matters?**

I was guided by the view that others with a better informed understanding of the project had taken the view that £32m was an adequate risk pot given that the Council Chief Executive's report of 1st May stated that 95% of the combined tramco and Infraco costs were fixed. In normal circumstances with a design developed to RIA stage 3 I would have expected a contingency budget

B

of 10% - 15% to have been adequate over and above the capital project costs.

e) To what extent did TIE and/or DLA discuss the above matters with CEC/ The Tram Project Board?

I cannot recall any detailed discussion of these issues at the TPB. My recollection is that DLA were only introduced to make a contribution at the TPB once issues of interpretation of the contract clauses began to emerge.

34 The pricing provisions of the Infraco contract were set out in Schedule 4 [USB00000032].

a) What was your understanding of the extent to which the Construction Works Price of £238,607,664 was a fixed price?

I was not shown Schedule part 4 in May 2008 and was unaware of its existence. I could not therefore make a judgment on it at the point of contract close.

b) What did you understand to be the main exclusions, provisional sums, assumptions and conditions?

I had no developed understanding at contract close of these exclusions. The TPB was my first meeting about the project and I can't recall there being any detailed discussion about the terms of the contract. The concerns seemed to be more about getting the deal concluded.

c) In what circumstances did you consider that the price was likely to change?

At that point I assumed that only genuine contingencies such as difficulty sub ground conditions, extreme adverse weather or similar external unknown variables would impact upon the price or any major client instructed changes.

35 In relation to the Value Engineering deductions shown in Appendix A of Schedule 4 of the Infraco contract [USB00000032]:

a) What was your understanding of what would happen if the VE savings were not achieved?

As ^{fore}stated previously I had no knowledge of Schedule 4 and was unaware there of the assumptions upon which VE savings were to be made. VE savings are a normal feature of large contracts and if I had been aware of the proposals I would have interrogated the assumptions being made.

b) What were your views as to whether the VE savings were likely to be achieved?

I was unaware of the proposed VE savings at contract close.

- c) **In the event, were these Value Engineering savings achieved (and, if not, why not)?**

This is a level of detail that I never got into. I was not chairing the TPB nor managing the detail of the project. I was largely pre-occupied with managing a large and complex Council Department during the challenging aftermath of the 2007/08 financial crisis. The Scottish Executive had tasked Tie Ltd as the body responsible for delivering the tram. The advertised job profile did not feature the supervision of the tram contract as a key part of my role as Director of City Development. There were over 55 staff employed by tie ltd to deliver the project. I assumed that the staff employed by tie ltd were subject matter experts in construction project management and were certainly better placed than me to make judgments on VE and related matters. My primary focus was on ensuring that progress against programme and budget could be reported to the Council and that issues were identified and resolved.

- 36 Schedule 4 of the Infraco contract [USB00000032] contained a number of Pricing Assumptions.

At the time of Infraco contract close:

- a) **What did you understand to be the purpose and effect of the Pricing Assumptions in Schedule 4?**

At the time of Infraco contract close I was unaware of the pricing assumptions in schedule part 4. I was not shown any of the contract documentation.

- b) **What did you consider were the main Pricing Assumptions that were likely to change and result in Notified Departures and why?**

At the time of Infraco contract close I was unaware of the pricing assumptions in schedule part 4.

- c) **Approximately how many Notified Departures did you consider were likely to arise?**

At the time of Infraco contract close I was unaware of the pricing assumptions in schedule 4 but my expectation was that notified departures would only arise in the context of major client instructed design changes to form and structure.

- d) **What did you consider to be the likely total value of the Notified Departures?**

Given that design typically accounts for around 10% of project costs and I was told that Infraco were to be responsible for ongoing design development I didn't expect there to be a major increase in the project costs from notified departures and certainly not to the extent that the contingency budget would be under pressure.

- e) **To what extent were the above matters discussed with CEC/ the Tram Project Board by TIE and/or DLA? Do you consider that you had a good**

understanding of these matters (and if not, why not)?

I have no recollection of these matters being discussed with CEC or the TPB by TIE and /or DLA until a considerable time later (at least 12 months) when it became clear that the respective parties had a different view of key clauses within the contract; specifically the operation of schedule part 4 and the pricing assumptions therein.

37 Pricing Assumption 3.4 of Schedule 4 [USB00000032] dealt with design development.

a) What was your understanding of the meaning of that Pricing Assumption, including which party bore the risk that development, or change, of design from the base date of 25 November 2007 would result in a contract change/Notified Departure?

At the time of Infraco contract close I was unaware of schedule 4 and the provisions it contained with regard to design development or change.

38 Schedule 4 defined the "Base Date Design Information" as *"the design information drawings issued to Infraco up to and including 25th November 2007 listed in Appendix H to this Schedule Part 4"*.

Appendix H of Schedule 4, however, did not list any drawings and, instead, simply stated that the BDDI was *"All of the Drawings available to Infraco up to and including 25th November 2007"*.

a) Are you aware why Appendix H of Schedule 4 did not list the drawings comprising the BDDI?

No All the discussions around schedule 4 seem to have pre-dated my arrival. I was never briefed on the details or implications. My Chief Executive's report to Council in May had stated that 95% of the project costs were now fixed.

b) Did that cause any problems at a later stage (and, if so, what problems arose and how were they resolved)?

It clearly did but at TPB we never received briefing on the details. The views consistently expressed by tie staff – principally Willie Gallagher and Steven Bell – was that Infraco were responsible for managing the design process following novation to SDS and bore the risks associated with ongoing design development.

2008 (June to December)

General questions re dispute

39 Following contract close, a major dispute arose between TIE and BSC in relation to the interpretation and application of the Infraco contract and Schedule 4. By way of overview:

a) When (and how) did you first become aware of the dispute?

I can recall David Mackay as Chair of TPB highlighting that there were still some outstanding issues in relation to the interpretation of the contract from around late autumn 2008 but the first I really became aware of the extent of the dispute between the parties was as the Princes Street stand-off emerged in early 2009.

b) What was your understanding of the main matters in dispute and the main causes of the dispute?

The main issues I recall concerned the treatment by Infraco of some design works as client instructed changes whereas tie considered the vast majority of such changes as just a normal part of the design development process which they believed Infraco had accepted the responsibility for following novation. There were also concerns expressed by Infraco about delays in the diversion of utilities and sub ground conditions.

40 In total, approximately 738 Infraco Notices of TIE Change (INTCs) were notified by BSC between Infraco contract close and Mar Hall in March 2011. By way of overview:

a) Were you surprised by the number of INTCs?

Yes

b) What do you consider were the main INTCs in terms of value and importance?

I am afraid that I cannot recall the details. I do remember that there were issues with the need for additional engineering works such as the need for piling at Russell Road to ensure the structural integrity of the retaining wall; the design of Murrayfield tram stop; additional works on Princes Street to alleviate problems with ground conditions and extra structural work next to the Network Rail assets but over 7 years on from the programme I struggle to recall the precise detail and impact of individual INTCs. Steven Bell occasionally highlighted cases at TPB but the main thrust of his updates was that the vast majority of INTCs were invalid and would be challenged.

41 How would you describe the initial implementation of the Infraco works? What were the problems? What was the cause of the problems? How did the mobilisation proceed? Did you at any stage become alarmed by the lack of progress? If so, when and what triggered it?

The initial mobilisation period was very slow. Infraco did not appear to have a fully equipped management team in place for some time or a capable Project Manager. They did not appear to have a sub-contractor supply chain in place. As I recall from discussions at TPB they were concerned about how currency fluctuations had impacted on their ability to secure sub-contractors within their original pricing assumptions. It was significant in my view that this period

coincided with the global financial crisis (Lehmann Bros collapse September 15th 2008) which had a serious impact on the construction sector with a number of suppliers experiencing major financial problems due to highly leveraged, debt financed development in the preceding years. I missed a number of TPB meetings in the autumn of 2008 because of clashes with other Council commitments.

I began to be concerned about mobilisation when there was still little physical evidence of civil construction work along the route in the mid-autumn of 2008 and when Willie Gallagher's report to TPB articulated his concerns about the slow pace of mobilisation and apparent lack of traction with Infraco and specifically with BB and difficulties in securing sub-contractors.

- 42 **It is clear that as the contract got under way there were still ongoing delays in designs, consents and MUDFA. What was the approach of TIE/TPB to this? Did that cause you any concerns (and, if so, what did you do as a result)?**

There was some disquiet that Infraco was not sufficiently progressing design work following the novation of SDS. There was also a concern that no one within Infraco was gripping the project and taking responsibility for solving some of the design issues. Infraco ultimately agreed to bring in Martin Foerder as an experienced Project Director and gave assurances to tie Ltd in response to the problems experienced in the first year of the project. At the TPB we were advised that Carillion had taken over the responsibility for MUDFA following their acquisition of Alfred McAlpine in 2008 were progressing the MUDFA works. However, the utility diversions made slower progress than forecast in the programme. This was due in part to problems with inaccurate and missing records; the condition of some utilities especially Victorian era gas and water pipes and the poor installation of some existing utilities. There were emerging concerns about Carillion's commitment to MUDFA. I recall asking what utilities records were held by the Council and asking Marshall Poulton to assist Steven Bell's team in tie with the progress of the MUDFA works. I also became aware of delays with certain planning consents and intervened to ensure that the Planning Service was resourced up to deal with expediting the necessary consents.

- 43 We understand that a mobilisation payment of £45.2 million was made by TIE to BSC.

- a) **It would be helpful if you could explain when the payment was made and the purpose of the payment?**

I had no involvement in signing off any of the payments made by tie Ltd to BSC. I can recall the TPB being informed that a mobilisation payment was being made to enable Infraco to set up their site compound, put in place forward orders to suppliers of steel rails and overhead line equipment and other necessary materials and to get their sub-contractor supply chain in place.

- b) Are you aware of how the payment was accounted for in the final settlement between TIE/CEC and BSC?

No I had left the Council by that time.

Detailed questions re dispute

- 44 On 16 June 2008, you were copied in on an email from Duncan Fraser to Marshall Poulton noting that the prioritisation list from TIE (based on the V31 programme) may not match the programme that BBS wished to work to. He further noted that the argument that any changes BBS make is their liability is correct under contract law yet unlikely to work that simply in practice.
[CEC01234715].

- a) What were your views on these matters at this time?

Receiving over 100 e mails each day in my role as Director of City Development on a wide range of matters affecting the city I generally left e mails into which I was a copy recipient rather than the addressee for the addressee to respond to. However, I can recall having meetings with Duncan and Marshall around that time to discuss the concerns that tie ltd and had different views on the programme.

BSC

- b) Did this matter cause you any concern at this time?

Not especially as in any major construction project there can be a difference of opinion between client and contractor about the most efficient sequencing of work. However, it was an early sign of differences emerging between tie's view of the programme and those of BBS. Neither Willie Gallagher or Steven Bell were signalling concerns about this.

- 45 Your report to the Tram-Subcommittee on the 16th of June 2008 [TRS00017180] noted that the " *the contracts are now concluded and signed. The final terms differ from those anticipated in the Chief executive's report to the Council on 1 May 2008 in that the estimated capital cost for phase 1a now stands at 512m with a further contingent payment of £3.2m due, if phase 1b is not built. The figure is well within the available funding £545m.*"

- a) Did you have any concerns, at that stage, that the estimated capital cost of phase 1a might exceed the available funding £545m? When, and why, did you first become concerned that the cost of the project may exceed the budget?

No

This report would have been drafted in early June. I had received reassuring messages about the programme and budget from tie ltd and senior Council colleagues in the period from March to May that I had occupied the post. In normal circumstances I would have relied upon the Head of Service for Transport to brief me on key issues of concern. However, Marshall Poulton

who filled that role had only taken up post in April. At that point Willie Gallagher remained highly confident about delivering the project within budget to the extent that he was briefing politicians at Holyrood with a view to using some of the contingency budget (QRA) that he believed would not be needed, in order to fund the completion of line 1C.

46 You attended a meeting of the Tram Project Board dated 2 July 2008 [USB00000005].

a) **Why was membership of the TPB to be reduced (June Minutes, item 12.1)?**

I didn't attend the TPB of 4 June and therefore my understanding is exactly as stated in the meeting minute i.e. that David Mackay wanted to have a smaller, more focussed TPB in the wake of contract close.

b) **From reading the PD Report (page 12) what was your understanding of the position in relation to design and whether it was running to time?**

It was evident that design was behind schedule due to delays on the part of tie, BBS and the Council. The absolute numbers did not seem hugely significant to me. I offered to work with Marshall to ensure that any delays due to resourcing bottlenecks within the Council were resolved as quickly as possible although this was quite challenging as the Planning Service was coping with a high level of major projects at the height of the property boom.

c) **The first report of Infraco progress once the contract was signed was that it was disappointing (page 12). What was your and the Board's reaction to this?**

The Board was disappointed but reassured that matters had been escalated to the Infraco Board and that workshops had been set in progress to address the issues behind the delays.

d) **Was there concern at the TPB about the slippage in design and MUDFA and the effect it might have on Infraco?**

the Not serious concern at that early stage. There was a presumption that along 23km route it would be possible to operate a degree of flexibility in delivering the programme and that, provided the critical path of the programme was not reliant upon the completion of specific designs, then periods of delay could be managed. It was evident that MUDFA was proving to be more challenging than expected but there were no insuperable problems. It was clear that further delay could compromise the open for revenue service date. Construction inflation was also concern in July 2008. However, that became less of a concern following the recession when most of BSC's sub-contractors were appointed.

e) **How did risk drawdowns such as that in the papers at page 32 'work'?**

Risk drawdowns were left to the judgment of Steven Bell as Programme Director. He took a considered view on risk and potential mitigation measures. Where risk could not be mitigated or removed then he would initiate draw down.

f) Was there any real chance that approval for drawdown would be withheld?

No I think the TPB had sufficient confidence in Steven's judgment and knowledge of the construction and related risks to allow him to make the necessary decisions. That is not to say that he didn't face scrutiny or questions seeking further detail on individual risks.

g) What did you understand would happen in that situation?

I am not clear that there were specific protocols that would deal with a situation where the TPB disagreed with decisions on risk made by the Programme Director but given the remit of the TPB I would have expected the Chair to initiate a review of the decision following an investigation into how the risk in question had arisen and been managed by the PD.

47 You were provided with the papers of the Tram Project Board on 27 August 2008 [CEC01053601]. The papers contained the minutes of the meeting of the Tram Project Board in July in which it is noted that Willie Gallagher recorded his concern on MUDFA progress and INFRACO mobilisation and progress (item 2.1).

a) What were the main problems and concerns at that time?

I did not attend the 27 August meeting so I cannot comment on the nuance of the discussion. However, it was clear that slow mobilisation, MUDFA delays, poor reinstatement of pavements following MUDFA work, further design slippage, Carillion quality procedures, compensation for the loss of the Haymarket car park, Infraco prices for public realm work and the loss of time on the programme were live issues at the time.

b) How were they to be addressed?

I did not attend the meeting. The minutes do not make it clear what specific actions were to be taken on each of these issues.

c) Were these efforts successful (and, if not, why not)?

Some of these issues were dealt with by remedial action e.g. reinstatement of pavements. However, slow mobilisation by Infraco, delays in completing design work and the pace of MUDFA completion remained problematic.

48 In July 2008 a Peer Review was carried out on the tram project [CEC01327777]. The review team's report noted in respect of the MUDFA works that "the fact that the completion date remains uncertain (works 60% complete) will have an increasing impact on the Infraco works." In relation to design, it was noted that

design was incomplete at novation and that TIE and BSC considered that the risk for design development lay with the other.

a) Did you see the report? Did it cause you concern?

I am almost 100% certain that I didn't see this report. If I had it would have caused me real concerns. I don't know any of the authors of the report other than Peter Strachan who I met later through the TPB.

b) Why were the matters noted above not identified, and addressed, prior to financial close?

I don't know. I was in post as Director for 8 weeks before financial close and the tram was one of wide range of responsibilities I had to get up to speed on in that period. The issues referred to in the peer group report relate to the position as it stood prior to my involvement.

49 You attended a meeting of the Tram Project Board on the 27th of August 2008 the minutes for which can be found at [CEC01053637](pg 5).

a) What were the main problems and concerns at that time?

Slow mobilisation by Infraco continued to be a real concern and ongoing delays in design remained a problem. Work through a design and consents task force was beginning to effect improvements but tie ltd reported increasing concerns that BSC were failing properly to manage ~~BSC~~ SDS.

b) How were they to be addressed?

At this stage tie ltd was increasingly escalating their concerns to senior personnel within the companies that made up Infraco.

c) Were these efforts successful (and, if not, why not)?

On a practical level the design and consents task force following the appointment of dedicated Council Officers to expedite design approvals was beginning to work but it could only work where designs had been produced and SDS were failing to produce compliant designs.

50 On 25 September 2008 Duncan Fraser sent yourself and other CEC officials an email noting that it could be anticipated that TIE would have to engage on extensive compensation events discussions with their contractors [CEC01057495].

25 September
should be
28 August

a) What was your understanding of these matters and did this cause you concern?

You are incorrect in stating that I was a recipient of this e mail; I was not. Had I been aware that there were potential compensation events and that – in the view of the Council Solicitor – tie had been avoiding discussion of the

implications by cancelling 3 meetings of the legal affairs committee then I would have been very concerned.

- 51 You attended a meeting of the Legal Affairs Committee on 29 September 2008 at which an overview of InfraCo and MUDFA progress was discussed, with focus on legal aspects, possible disputes etc.
[CEC01075887].

a) What conclusions were drawn from that meeting and what action points were agreed?

I recall that there was continuing concern about the delay of MUDFA works and the poor quality of some of the reinstatement works. The Council called for improved monitoring by tie ltd of these works and I subsequently discussed with Marshall Poulton how the Council's Transport staff could monitor the quality of the MUDFA works more closely. The LA committee also discussed how best to manage the issue of fixing tram overhead lines to privately owned buildings; this was a particular issue in relation to listed buildings within the World Heritage Site. Finally we discussed the need for speedy execution of TROs to enable temporary traffic diversion arrangements to be managed during tram construction works.

- 52 You attended were provided with the papers for a meeting of the Tram Project Board on the 22nd of October 2008. The papers provided the minutes for the previous meeting on the 24th of September, which you were unable to attend
[CEC01210242] (page 5).

a) What were the main problems and concerns at that time?

Ongoing design slippages following novation; ongoing delays in mobilisation by Infraco and a sense that they hadn't got the management resources in place to address the implementation of programme satisfactorily. There was a specific problem with traffic management following closure of the Mound and delays in Scottish Water consents. There was progress in some areas: a detailed programme had been agreed for the first time with Infraco (albeit for only the following 4 months) and relationships with Carillion were improving following the appointment of a new Programme Manager on their side.

b) How were they to be addressed?

By continued escalation of tie's concerns about slow mobilisation and design delays to senior staff within Infraco. By a lessons learned review on the Mound TM arrangements. There was also discussion of how the programme might be recovered through productivity improvements taking on board good practice from a recent tram scheme in Germany. Discussions were also held about CEC adopting a flexible approach in relation to the Christmas embargo that restricted work in the city centre during the pre-Christmas peak shopping period.

c) Were these efforts successful (and, if not, why not)?

The practical steps agreed between tie ltd and the Council on TM issues worked effectively but the core problems of slow mobilisation by Infracore and delays in design completion never really improved despite assurances that they would.

53 The minutes of a meeting of the Legal Affairs Group on 27 October 2008 [CEC01166757] noted that there was a “point of principle” between TIE and BBS in relation to the base date design information. You were unable to attend this meeting.

a) At what point did you become aware that there was a “point of principle” between TIE and BBS in relation to the base date design information?

I can't be entirely sure about this but I believe I would have either been informed at my next meeting with Duncan Fraser and Marshall Poulton or at the next TPB I attended.

54 On 11 December 2008 you were copied into an email from Alan Coyle to Ian Whyte in which he stated that the contract was fixed prices so long as scope and programme did not change. He further noted that there had been changes in the design and programme but that the impact of these changes on the price was not yet known [CEC01054035].

a) Did this concern you?

As I recall I had a meeting with Alan to clarify this. It did signal the potential for additional claims but it was not clear how significant these might be or whether this point of principle might affect the available programme budget. It was unclear whether the design changes could be accommodated within the overall funding budget including the QRA.

b) Did you seek clarification on this point? What was your understanding of what was meant by a change to “scope” or “programme”? Can you give examples?

Yes through discussion with Alan and others. My understanding of scope changes falls into two broad categories: 1 where the client changes the specified outputs e.g. in terms of design form, quantum or structure or materials to be used; and 2 where technical constraints such as sub ground problems or structural or other constraints only discovered when the programme is in progress mean that a change needs to be made to design to provide a solution to such problems.

A programme change in my experience can mean either a change in the sequence of work affecting individual programme elements or a deliberate acceleration or delay in the programme as a whole (with or without any change in sequencing) impacting upon the completion date.

c) Were members of the Council informed of these matters?

Elected Members were informed of problems through the TPB and advised by tie ltd that efforts were to be made to recover programme slippage through various productivity improvements.

55 You attended a meeting of the Tram Project Board on the 17th of December [CEC01162774].

a) What were the main problems and concerns at that time?

Continuing unsatisfactory progress with design and delays on programme against both the contract and the agreed 4 month programme. Some new issues had come up: there was debate within the Council about the location of the West End tram stop; this had arisen through Sir Terry Farrell's intervention (the City Design Champion). He argued that the stop would work more effectively if it was closer to Shandwick Place. Tie Ltd wanted to minimise any scope changes that would add costs and time delays to the programme. There was also discussion about the proposed blockade of Princes Street. The business community were resisting the total closure of the street.

b) How were they to be addressed?

A solution was found to the Princes street blockade by retaining one lane open for bus traffic. The Head of BBS in the UK had agreed a solution in principle to resolving design changes and Steven Bell was hopeful of a positive resolution. Against Sir Terry Farrell's wishes I advised that the impact of relocating and redesigning the West End tram stop would be too great in terms of programme and budget to merit making such a change. We agreed that a new second stop towards the west end of Princes Street would be an option that could be pursued separately as an independent project if patterns of demand utilisation warranted it once the tramway had been completed.

c) Were these efforts successful (and, if not, why not)?

The efforts to make good on the design and construction delays were not successful due in my view to inadequate engagement by Infracore at a senior level. The Princes Street arrangements prolonged the work on Princes Street. *may* It may have helped retailers who were feeling the impact of the 2008 financial crisis by protecting footfall to some extent but it did not help the programme and added cost pressures to the budget.

2009

Princes Street dispute

56 A dispute arose between TIE and BBS prior to the planned commencement of works on Princes Street in February 2009.

By e-mail dated 26 February 2009 [CEC00858138] Alan Coyle attached a short note [CEC00858139] of some points to "set the scene" for a discussion on the Council's requirements from TIE relating to the contractual dispute. He considered

there was currently a "vacuum of knowledge" from the Council's perspective.

The dispute was resolved by parties entering into the Princes Street Agreement [CEC00302099] (we understand that an initial draft of the agreement was agreed on 20 March 2009, to allow work to commence on 23 March, and that the final version of the agreement was signed on 30 May 2009).

a) When (and how) were you first aware that there was a dispute in relation to the works at Princes Street?

My first recollection of the dispute was reading in the Scotsman that there was a dispute and that BSC was seeking an extra £50 - £80m to complete the overall programme.

b) What was your understanding of the basis, and underlying cause(s), of the Princes Street dispute?

My understanding is that there were problems with ground conditions partly due to the made ground around the Mound and that the utilities there were especially complex.

c) What was your understanding of why BSC refused to start work on Princes Street?

I had understood it to be due to the fact that utilities had not been diverted and that additional digging was required in some areas to provide a solid base for the track formation.

d) What were your views on the Princes Street agreement?

My views were that it seemed to be a pragmatic solution on the part of both parties to overcoming specific problems identified in an area where ground conditions were unusually difficult. The agreement was positioned as a one off and the hourly rates set out did not seem excessive. I was aware that David Mackay had been pressing Infracore on a number of points where progress had been unsatisfactory. The PSSA demonstrated that they were taking a reasonable approach to working collaboratively to solve problems as the terms of the contract required both parties to do.

57 On 12 February 2009, you sent Councillor Wheeler and Marshall Poulton, in strict confidence, a copy of a letter from David Mackay to Dr Keysberg [CEC00900092] [CEC00900093].

a) For what purpose did you provide Councillor Phil Wheeler and Marshall Poulton with this letter?

Councillor Wheeler was the Transport Convener within the Council Administration. He had expressed his concerns to me about the claims being made in the press by Infracore with regard to Princes Street. I told him matters were being dealt with directly through conversations that David Mackay was

having with Infraco (as agreed with Tom Aitchison) and that David had sent a copy of his letter to Dr Keysberg to CEC and TS. I agreed to forward a copy of the letter to Councillor Wheeler. I copied Marshall Poulton in because he was directly involved in overseeing CEC staff seconded to tie ltd and he reported directly to Councillor Wheeler on transport matters. I did not want Marshall to be blindsided on the action that was being taken to address the concerns in question.

- b) What were your views on David Mackay's statement that INFRACO were not providing TIE with evidence to support that there had been a contract variation?**

This had been a recurring theme in Steven Bell's reports to the TPB and it was evident that staff within tie ltd firmly held the view that some of the issues that Infraco regarded as contract variations fell within what tie regarded as ongoing design development that ought to have been delivered by Infraco within the terms of the contract as tie believed it to operate. I thought it was entirely reasonable to ask for any notification of change to be backed up with an estimate showing the additional work to be done. I have enormous respect for David Mackay. On the evidence presented I believed that tie were justified in making that statement.

- c) What were your views on David MacKay's assertion that the quality of the estimates that had been provided were very poor and significantly exaggerated the INFRACO's entitlement?**

Steven Bell had shown examples of the estimates provided by INFRACO where the quality and detail was very poor. I am not a Transport Engineer or Quantity Surveyor. I would not consider myself qualified to comment on whether costs were significantly exaggerated. I relied upon tie's judgment that this was the case. However, instinctively I sensed that Infraco had made a low bid to win the tram contract; had been affected by currency fluctuations and the recession and was now trying to leverage every opportunity they could to secure additional value from the contract.

- d) What was done to ensure that the INFRACO provided competent evidence to support that there had been a contract variation and a competent estimate of what this variation would cost?**

This was dealt with through discussions that David Mackay led directly with Infraco and which ultimately produced the PSSA. David briefed Tom Aitchison directly on the points agreed through the PSSA. I had no involvement in the discussion or terms of the PSSA and was updated with other senior CEC officials through David's attendance at the Tram Internal Planning Group.

- e) What were your views on David MacKay's further assertions that:**

the INFRACO did not yet have its key supply chain contractors under a formal contract

There was little visible evidence of management of the SDS contractor

There was little evidence of the demonstration of system integration activities or compliance with the design review obligations.

I agreed with his assertions on all three points.

f) What was done in response?

These matters were dealt with by David Mackay in the context of discussions with Dr Keysberg around the time of the PSSA.

g) We note that David Mackay copied the letter to TS. What was TS's response to this letter?

I don't know. I can't recall being party to any response. I cannot recall it being referred to by TS officials in our subsequent quarterly progress meeting with them.

58 On 18 February 2009 [CEC00867153] you were sent an email by David MacKay outlining Infraco's position that there was no obligation to accept a TIE instruction to commence work in Princes Street?

a) What were your views on this matter?

It was confirmation for me that Bilfinger Berger was not working within the spirit of cooperation that the opening clauses of the contract provided for. They appeared to be making excuses for not progressing with work expeditiously. The Council faced pressures from local businesses and Lothian Buses to keep a lane of Princes Street open but there was more than sufficient space to access the site and carry out the necessary work albeit using a revised methodology. Infraco appeared still to be experiencing problems with sub-contractor mobilisation in February 2009.

b) What was done in response to this email? Did CEC consider seeking independent legal advice on whether there was an obligation on Infraco to accept a tie instruction to commence work in Princes Street? If not, why not?

I was not party to the e mail exchange between Gill Lindsay and Jim Inch. As Director of Corporate Resources Jim held the budget for external legal services. Jim was party to discussions within the Tram Internal Planning Group on the Princes Street dispute. At this point in the programme I do not believe there was any real concern at senior officer level within the Council that the external legal advice received by tie ltd and the Council from DLA was inadequate.

c) Did DLA have all the information they required to advise on this? Gill Lindsay's email to Jim Inch indicates that they did not [CEC00693609]?

I didn't see the exchange between Gill Lindsay and Jim Inch. I do not know what Gill's specific concerns were at this point in relation to any concerns that

DLA may have expressed to her about a shortage of information from tie that would enable DLA to advise on breach

59 You were sent an email on 19 February 2009 noting that there had been a change of approach from BB [CEC00867402].

a) **Did you agree there had been a change of approach from BB, and if so, in what way [CEC00966780]?**

I had been made aware by Graeme of BB's project losses in Norway and the fact that currency fluctuations were not moving in their favour in relation to Edinburgh. I had formed the view that BB had pitched a low bid to win the work and give them a platform for future tram and light rail contracts in the UK. Graeme Bissett's analysis of their accounts provided some evidence that would suggest BB adopting more cautious approach to project risk especially given the wafer thin margins on their civils business. They had been slow initially to engage and mobilise but there were glimmers of hope for improvement around October 2008. However, there appeared to be a distinct hardening of their position by February 2009 and an unwillingness to accept any construction risk.

b) **Did your opinion in that regard change at any time (and, if so, when and why)?**

No I believe that BB in particular continued to exhibit a risk averse approach until they got what they wanted ultimately at mediation.

60 You attended a joint meeting of the Tram Project Board and TIE Board on 11 March 2009 (the minutes can be found in [CEC00888781] at page 6).

A paper by Stewart McGarrity, "Infraco Options Analysis" [CEC00933931] noted (at page 3) that the budget of £545 million was likely to be exceeded in the event of any of the following, namely: significant further delays to construction; re-procurement of the civil works; if TIE did not prevail in their contractual position with regard to Infraco responsibility for design evolution or the consortium's failure to commence work where dynamic management of the programme would have allowed; or in the event that a cost plus basis was agreed to settle the contractual disputes and programme.

The paper suggested that a "safety valve" of £30 million was required.

The scope options included truncation of the Phase 1a scope i.e. delivering a shorter tram line.

Slides for the meeting noted the same issues as previously noted in relation to Infraco Progress but that works were ongoing at Gogarburn, Edinburgh Park Viaduct, Carrick Knowe Viaduct, Verity House access road, Princes Street and Leith Walk ([CEC00933351] at page 8).

a) **When did you first consider (i) that it was unlikely that Phase 1a would be built within the budget of £545 million and (ii) that truncation of the**

tram line may be necessary? When were these matters first reported to CEC and elected members?

I did not attend the 11 March TPB meeting. My apologies were tendered and are noted. However I did attend the 24th March meeting. All those members who attended the TPB of 11 March or were copied in to the reports (i.e. the transport spokespeople for all groups) would have been advised on 11th March. Almost immediately thereafter there would have been a briefing for the Council Leader whose guidance would have been sought on how best to alert elected members of the likelihood that the programme could no longer be delivered within the approved budget. My recollection is that there was a round of briefings for each of the political parties that dealt with the cause of the Princes Street dispute and likely cost implications.

- 61 The Report to Council dated 12 March 2009 [CEC02083751] appears to be the first report to the Council to refer to contractual difficulties between TIE and BSC. The Report noted that while works were due to start in Princes Street in February 2009, it had been apparent in the preceding days that they might not start as intended. The statement made by the Council at the time made reference to the contractors wishing to impose unacceptable conditions in order to start the works (however, these conditions are not identified). In the report Tom Aitchison merely stated that *"members will appreciate that I am restricted in what I can say while commercially confidential negotiations are taking place"*. He stated that TIE was maintaining an approach to what was agreed *"after tough negotiation before the contract was signed"*.

The report stated that a *"fixed price"* contract had been entered into for the delivery of the tram project and that prior to financial close TIE had agreed an additional sum with BBS which had *"cemented the risk allocation position"* agreed by the parties.

- a) What was your understanding of these matters? Did you still consider the contract to have been a fixed price contract?**

The handling of the Princes Street dispute was dealt with between David Mackay and Tom Aitchison and the Council report was drafted by Jim Inch. I had no involvement in that report which related to legal and governance matters concerning the future operation of an integrated bus and tram network. It seems likely that the report was drafted before Stewart McGarrity's report to TPB highlighted what he believed to be the likely extent of the project running over budget. I think Jim's use of the term fixed price contract was inaccurate because even the Chief Executive's original report of 1st May 2008 recommending that the Council should authorise him to instruct tie ltd to enter the contracts referred to 95% of the costs being fixed with the remainder being provisional sums. Moreover it was clear by now that the legal interpretation surrounding changes was in serious dispute between the principal parties to the contract.

- b) Did your understanding in that regard change at any time (and, if so, when and why)?**

There was a dawning realisation on my part that the cost of changes (and differences in interpretation of who bore responsibility); the consequences of delays in design completion, slow mobilisation by Infraco and unsatisfactory progress on MUDFA works was cumulatively putting pressure on the programme budget. Tie Ltd remained positive, certainly to the end of 2008, that programme recovery was possible and there had been positive engagement on scope for introducing productivity measures. However, when the Princes Street dispute arose it became very clear that the programme budget was now at risk. However it required Stewart McGarritty's report to enable the forecast overspend to be estimated.

c) Did you have any concerns, at any stage, as to whether these matters had been properly reported to members of the Council (whether before or after you became Director of City Development)?

I can't properly comment on the period before I took up post. I was slightly surprised that the Chief Executive's report of May 1st 2008 was quite so short given the scale of the proposed investment but I assumed that there would have been a detailed appraisal of the business case and key risks, cost and benefits underpinning this. After I took up post I was uneasy about the fact that the tram project was a political football between the SNP members of the Administration and the other political groups. There seemed to be a reluctance on the part of the Leader and Chief Executive to use the tram sub-committee and full Council to discuss the problems that were being experienced with the project. However, there was a danger that information would have been used to narrow political advantage and that there may have been some playing to the gallery. The commercial aspects of the dispute were highly sensitive and there were occasions where information appeared to have been leaked to the press that was certainly not in the best interests of the project. That said every party was represented on the TPB and the reports of the TPB gave an accurate picture of the unfolding issues.

62 The slides for the joint Tram Project and Tie Board meeting on the 24th of March 2009, entitled "*the Princes Street dispute - the way forward*" [CEC00934643] noted that the proposed supplementary agreement would be restricted to Princes Street only (4% by volume of route, 3.7% by direct cost value) on a demonstrable costs basis, with no change in construction and cost above tendered formation level and no significant change in allocation of risks / liabilities as anticipated in the Infraco Contract.

a) What was your understanding of these matters?

My understanding is that the PSSA was put in place to deal with a series of underground risks and obstructions that were discovered to be greater than anticipated on the Princes Street section of the tram route. There was to be no increase in the original construction proposals and no increase in cost for the above ground works but there would be provision for additional works to deal with sub ground obstructions to be undertaken on a demonstrable cost

basis at the agreed rates. The agreement was proposed by tie as a way of unblocking the very public dispute that had occurred in relation to Princes Street and dealing with the risk aversion exhibited by BBS at that time. It was argued to be pragmatic way of testing the commitment of Infraco to engage properly in the delivery of the programme.

- b) What was your understanding of the cost implications of the supplemental agreement at this stage? Did you consider that that was likely to result in the cost of the Princes Street works being greater than the sum allowed for these works in the Infraco price?**

I understood there would be cost implications. Tie Ltd argued that there remained sufficient headroom in the funds available to deal with this challenging section of the route coming in over the original price through use of the QRA and achieving cost savings elsewhere. Given that Princes Street represented only 3.7% of the route by value I believed at that time that the risk of an overspend on this section was a lesser evil than the implications of a continuing delay to the programme through any further protracted dispute. However, I did not have a full understanding of the implications of the PSSA for the final cost out-turn. I had expected the additional costs to be low single figure millions at worst.

- c) To what extent were the Council consulted on the discussion to enter the Princes Street agreement?**

The key politicians and political groups were consulted throughout but only briefed once David Mackay had firmed up the terms of the Agreement. The Agreement was not to my recollection discussed at full Council.

63 A report to IPG on 25 March 2009 [CEC00892626] discussed the contractual dispute between TIE and BBS and considered various options

- a) What was your understanding at that stage of the “main Infraco risks” noted in the report and why they had arisen?**

A continuing lack of progress on design changes preventing progress; lack of visibility on design changes from November 2007; failure of SDS to supply drawings to tie ltd; continuing delays to MUDFA and consequent budget pressures; unresolved third party risks specifically with regard to Network Rail. These risks arose because of a failure to complete the design and deal with utilities before financial close; a lack of agreed understanding between the parties on the meaning of clauses in the contract and the increasingly risk averse position adopted by Infraco and specifically BB.

64 By e-mail dated 9 April 2009 [CEC00900404] Colin Mackenzie and Nick Smith prepared a report on the dispute between BBS and TIE [CEC00900405]. The report noted that there were presently 350 Notified Departures in process. The disputes could be grouped into a number of different categories, including who had responsibility for design management and evolution. BBS were taking the view that all changes to design were TIE’s responsibility. The report noted, “The

main problem here stems from the fact that design was not complete at Financial Close”.

a) What were your views on the matters set out in the report?

Although I did not see either of these reports at the time they confirm that the fact the design was still incomplete at financial close left scope for any designs produced thereafter to be considered as TIE instructed changes. I had discussed the strategic options set out in the IPG report of 25th March with Marshall Poulton and was clear that if the legal interpretation made by Infracore was valid then the project was now in a very difficult place.

65 You attended a meeting of the Tram Project Board on the 15th of April 2009 [CEC00888781]. The papers for this meeting contained the minutes of the 11th of March TPB, in which it is noted that David Mackay was due to meet John Swinney and Stewart Stevenson on 17 March.

a) Was the outcome of that meeting discussed?

Yes

The papers for also contain the minutes for the TPB meeting on the 24th of March which you attended. At item 1.4 Steven Bell stressed that the Supplemental Agreement for Princes Street would not increase liability to TIE, compared to that previously, and that there would be no material difference in the way costs would have been agreed.

b) Was that, in your view, a correct analysis?

Not completely. Under the terms of the original contract there would have been costs involved in dealing with unexpected structures or obstacles that would have had to be resolved. My understanding is that what the PSSA did was to articulate a specific way of dealing with this on a demonstrable costs basis. There were also costs associated with keeping a running lane open for buses.

At 1.8 it is noted that the PSSA would allow work to be completed in the first week of November, as originally anticipated. “However, there would be no guarantee that this will be the case if there is a compensation event (same basis as the original contract)”.

c) Did you and other members of the TPB understand how the PSSA was to work? What were the benefits of the PSSA?

Not in sufficient detail. The way David Mackay explained it was that it would allow the Princes Street tram works to be expedited more speedily. There was growing political pressure and concern from the business community at this time about the impact of delay in particular in the run up to the peak Christmas shopping period when retailers took around 18% of their annual turnover.

At 1.11 Stuart McGarrity outlined the available headroom in the funding envelope. At 1.12 Stuart McGarrity essentially said that this headroom only existed as long as there were no further disruption or delays.

- d) **What were your views on whether there was likely to be further disruption and delays? Given what had been happening with the project and its current situation, were the Board now worried that the project would not be delivered within budget? To what extent was this discussed by the TPB? What were your views?**

I think it was fairly clear by this stage that with BB claiming they would want another £50 to £80m to complete the project; the cost of programme delays to date and continuing delays on design work that the project budget was now at serious risk. There was some continuing optimism within the TPB that the project could still be brought in close to budget and a sense that the PSSA and productivity improvements adopted from best practice in Germany, allied to some value engineering works, could help recover the situation.

- 66 By e-mail dated 28 April 2009 [CEC00892971] Stewart McGarrity provided a range of estimates for the Infracore works for phase 1a, (namely, a lowest estimate of £533.3m, a medium estimate of £559.8m and a highest estimate of £572.5m, all including risk allowances) (see also the paper [CEC00892972] and the spread sheet [CEC00892973]).

- a) **Did you understand how these estimates, and risk allowances, had been arrived at?**

Not in detail but I knew that Marshall Poulton and Andy Conway's transport engineering experience and Alan Coyle's accountancy experience had been drawn upon in producing the estimates and I was content that these Council officers had visibility of how the estimates and risks allowances had been arrived at.

- b) **How confident were you, at that stage, that these estimates, and risk allowances, were accurate?**

At that point in time I was confident that the estimates were reasonable and that the best, medium and worst case scenarios were prudent. Stuart McGarrity took the TPB through how he had prepared the scenarios and did so with the calm assessment of a Finance Director who appeared to be on top of his brief.

- 67 On 30 April 2009 the Council were given an update by yourself and Donald McGougan that an agreement had been entered into in respect of the Princes Street dispute, to allow the works to be carried out on demonstrable cost [CEC02083772]. The Princes Street Agreement was signed on 29 May 2009 [CEC00302099].

- a) **What involvement, if any, did you or other senior CEC officers have in the negotiation and conclusion of the Princes Street Supplemental**

Agreement?

I had no involvement in its negotiation or conclusion. At this stage the dispute had escalated politically and David Mackay was dealing directly with Tom Aitchison and briefing him on the negotiations with Infracore. David did attend meetings of the Council's IPG on perhaps two occasions around this time to brief those in attendance on the outstanding issues, his approach to dealing with BB and the solution that was ultimately arrived at to allow work to recommence on Princes Street.

- b) **To what extent were elected members consulted on the decision to enter the Princes Street agreement before the agreement was signed?**

David Mackay certainly briefed the Leader and the Transport Convener on the proposed deal and given that it was a coalition administration key SNP members would also have been briefed. As I recall Donald McGougan and myself did a round of individual briefings on the proposed agreement to the various party political groups. Members on the TPB would also have been consulted. The overwhelming political desire at this stage was simply to secure a solution that would allow the works to proceed as quickly as possible and overcome the damage being done to the city and the Council's reputation.

- c) Your report provided that the PSSA would "*allow progression of Princes Street infrastructure works on demonstrable cost. This allows the contractor to be paid on this basis, for Princes Street works only, should they discover unforeseen ground conditions. This represents no further transfer of risk to the public sector.*" **What was your understanding of these matters at the time?**

My understanding was that if unanticipated underground voids or structures were encountered then BB would get on with the necessary additional work and charge tie for the additional costs incurred at the hourly rates agreed in the schedule.

- d) **Did your understanding in that regard change at any time (and, if so, when and why)?**

Yes I began to realise that if getting on with the work also required revisions to design then tie would be on the hook for necessary design changes.

- e) **Do you consider that TIE were open and transparent when reporting to the Council on the Princes Street dispute and, in general, in relation to the dispute with BSC?**

Not as open and transparent as they should have been. There was a growing wariness in tie about sensitive commercial matters getting in to the hands of politicians who might then brief the press potentially undermining tie's position in negotiations. I feel tie continued to portray the situation as being due solely to an exceptionally aggressive commercial stance being adopted by Infracore (BB in particular) and that we were not getting the full picture about weaknesses in the contractual position and delays in design that were

attributable to tie. BB were taking an aggressive commercial stance and with the city dug up in various locations and the media having a field day they were in a position to leverage the situation to their commercial advantage. However, I do not believe that the Council was getting the full information it needed at that stage.

68 The minutes of the Tram Project Board meeting held on 6 May 2009 [CEC01021587], (page 6, para 3.5) noted that *“the BSC strategy to date has been not to accept any risk”*.

It was also noted (page 7, para 4.3), *“DMcG [Donald McGougan] queried the status of the design and where it was being held up. Steven Bell replied that there are two elements outstanding, the SDS design (some of which has been delayed by tie, some of which is delayed due to re-design) and the Siemens detailed design. He noted that there is no issue with CEC processing approvals”*.

Slides for the meeting [CEC01026346], pages 10-13) noted that 341 INTCs had been received from BSC and that 27 Change Orders had been issued by TIE.

Under Utilities, it was noted (page 19) that overall, 73.1% of all diversions were complete, that Carillion had made an application for delay and disruption and that a strategy had been developed to close down MUDFA contract by the end of July and transfer the remaining diversions.

a) While you were not present at the meeting on the 6th of May, it would be helpful if you could explain the above passage in the minutes relating to design i.e. in what sections was design incomplete, why had the SDS design been delayed by TIE or required re-design, what were the problems, if any, with the Siemens detailed design and was it the case that none of the delay at that stage was due to CEC (whether in processing approvals of otherwise)?

As you have indicated I was not present at the meeting. I can't recall precisely which sections of design remained incomplete at that stage and to what extent the delays were attributable to blockages in tie or a lack of effective design integration within SDS or effective supervision of SDS by Infraco. I do recall some designs having to be reworked to be acceptable from a planning viewpoint. Some designs would also have required alteration because of sub ground conditions e.g. the need to introduce piling to support certain structures.

b) What was the basis of Carillion's application for delay and disruption?

I can't recall the detail of this. The Council was not a party to the contract between tie and Carillion. I was not handling claims merely being advised at TPB that certain claims had been lodged and assured that where necessary legal advice would be taken on their legitimacy and that they would be negotiated down to the minimum achievable level.

c) Why had a strategy been developed to close down the MUDFA contract by the end of July and transfer the remaining diversions to another utilities contractor?

My recollection is that Richard Jeffrey and Steven Bell were frustrated that tie were not getting the necessary traction with Carillion who had bought out Alfred McApline. I believe The MUDFA contract was novated to Carillion as part of their acquisition but it appeared they did not see it as a high corporate priority. I was not consulted on tie's decision but I understand they wanted to ensure the remaining MUDFA works could be accelerated so as to minimise the scope of Infraco to make claims for time delays in the programme.

- d) **As far as you are aware, was this the first time that the issue of INTC's had been explained to the Tram Project Board? If so, why had it not been explained earlier?**

I believe it was. I don't know why tie chose not to brief its Board members previously. There are almost always claims of this nature in a large construction project but I would surmise that tie's management felt the number had now reached a level that was of sufficient scale and significance as to warrant escalation to the TPB. Richard Jeffrey had also taken up post around this time and my sense was that he was beginning to get a proper grip on the details of the programme. I found his approach to be refreshingly open and direct.

- e) **Given that the MUDFA works in the "off street" sections from Haymarket to Gogar appear to have been largely complete by this time, what was your understanding as to why BSC did not progress and complete the Infraco works in the off-street section?**

This genuinely confounded the members of the TPB. My recollection is that even at this late stage they had not fully mobilised their supply chain but the TPB was mystified why they were not starting work on the off street sections given that they were now clear of utilities.

- 69 On the 9th of June 2009 [CEC00683529], you reported to the Policy and Strategy Committee on detailed proposals for mitigation measures and a communications plan around Tram construction works in Princes Street during the period leading up to Christmas 2009.

The committee decided to approve the mitigation measures later that day [CEC00683530] and asked that you as the Director of City Development report to future meetings of the Tram Sub-committee with a "lessons learned" exercise, details about the progress of tram construction works and the financial implications of the mitigation measures. You reported to the Tram Sub-committee on the progress of the tram construction works in Princes Street and the financial implications of the mitigation measures on 10 August 2009 [CEC00663480] and on 22 March 2010 [CEC01891482].

- a) **Did you produce any further reports on these matters, including the "lessons learned" exercise?**

The tram sub-committee rarely met because of political concerns about the different views between the majority party in the administration (Lib Dem) and

the SNP being played out in public. The mitigation measures were successful in minimising disruption to the public and allowing the Edinburgh Festivals to proceed without undue difficulty despite Princes Street being a construction site. My team worked very closely with the business community including the Chamber and key affected retailers over a period of almost two years. We put out regular communications to all stakeholders about where works were planned and what steps were being taken to mitigate problems including access and egress routes to shops, diversion routes for pedestrians, and temporary signage. We set up the Open for Business programme run by tie which also supported events such as the west end festival with a view to sustaining footfall in key destinations during the programme. We held regular sessions with elected members on the lessons learned from each stage of the mitigation measures and brought local businesses in to workshop sessions with the Leader and other key members so that the politicians could hear what types of support they felt they needed to minimise the impact of the works on their business. The costs of mitigation were accounted for through tie's open for business budget which was reported on a monthly basis to the TPB. Periodic newsletters were sent to all stakeholders including all elected members and lessons learned from the earliest of the construction and diversion works were communicated to members in powerpoint presentations. I can't recall producing a separate report on lessons learned. In the circumstances, which left large tracts of the city as construction sites without visible signs of progress for the best part of two years mitigation generally worked well. The key exceptions were early on in stretches of Leith Walk where MUDFA works saw some areas dug up more than once and in Shandwick Place where footfall was badly affected and the local poster shop mounted a vigorous campaign against the project, tie and the Council.

70 By e-mail dated 23 June 2009 [CEC00859951] you expressed frustration at TIE not producing a revised programme and budget, which had been promised since November.

By e-mail dated 23 July 2009 you noted that TIE's best case estimate had moved from £534m to £560m without adequate explanation (which figure was greater than the available budget) and you were now *"very anxious about the reliability of the information we are getting from TIE"*.

a) What were your concerns about the reliability of the information being provided by TIE? What was done in response to these concerns? Were your concerns adequately addressed or did they remain?

When we received the funding scenarios from Stewart McGarrity in April 2009 I was still fairly sanguine on the basis of assurances I had received from tie that the project could be delivered close to budget. However, there was insufficient information to be able to make a firm judgment on this and a growing sense that tie were not being as open as we would expect them to be with Council Officers such as Andy Conway and Alan Coyle who were embedded in tie's operation to support the project and oversee progress. There was now visible signs of work on Princes Street but also rising evidence of INTCs and EoT claims and I had grown increasingly concerned that Council

Officers were not receiving the information they needed to determine the likely out-turn cost with any degree of accuracy. Once Richard Jeffrey had taken up post and got up to speed with the details of the project and the weaknesses in aspects of tie's contractual position I felt we started to get a much more forthright and realistic view of the status of the project.

- 71 A joint meeting of the Tram Project Board and the TIE Board took place on 8 July 2009. The minutes [CEC00843272], (page 6) note, under Project Delivery (Utilities), that 77% of utilities diversions were now complete, that Carillion works continued to be slower than programmed, with justification in some areas, and in others down to poor performance, and that BT and SGN works were progressing on or ahead of schedule.

The section 7 contract (Gogar to Edinburgh Airport) had now been awarded to Farrans who were now on site and on programme (it being noted that the cost of these tendered works was less than that budgeted for Carillion).

A tender was out for the utilities works in section 1a (Newhaven to Foot of the Walk), parts 3 and 4.

The slides for this meeting set out (pages 10 and 11) the preferred option of a Formal Contractual Approach and the options of reducing BSC's scope, ending the Infraco contract and other scope options (i.e. truncation)[CEC00783725].

- a) **While you were not in attendance at this meeting, to what extent do you consider that the slippage in the MUDFA works at this time was justified and to what extent was it down to poor performance (and by whom)?**

In relation to MUDFA works the most historic parts of the city proved in general to be the most difficult to deal with. There is no doubt that there were challenges from time to time such as the discovery of around 200 skeletons from a presumed smallpox outbreak in a mass grave next to a retaining wall at Constitution Street and there were delays in getting private utilities to respond in sufficient time where diversion work needed their supervision and sign off. That said Carillion took much longer to complete the programmed works than might reasonably have been expected of a committed contractor and their performance was shown in sharp relief by the progress made once Farrans and Clancy Docwra were engaged. My Head of Transport also had concerns during the Princes Street utility diversions that tie's supervision of the works was initially lacking e.g. failing to pick up deficiencies in drainage connections being satisfactorily tied in to gullies.

- b) **Given that the MUDFA works were initially due to be completed by the end of 2008, what is your understanding as to why BT and SGN works were still being undertaken in July 2009? A**

I am not fully familiar with the details here but I know that some of the works were delayed because major replacement of as pipes became necessary and there were also irregular shaped pipes that needed to be custom made to navigate a path around other utilities. BT had a major programme of fibre installation under its Open reach division underway and major demands were

being placed to install broadband in other locations which it may have given priority to for commercial reasons.

- c) **What were your views around that time on the best option for TIE to follow in relation to the Infraco dispute and completing the works and the prospects of that option being successful?**

In the summer of 2009 I remained hopeful given the head of steam Infraco had now built up on Princes Street and other sites that tie should continue work with them to complete the scheme; use the influence of Siemens and Caf on to moderate the behaviour of BB and use the adjudication process to resolve any outstanding issues. I thought that any parting of the ways other than by mutual agreement would become extremely difficult and could create huge legal liabilities; fundamental uncertainty about the future of the Project and at least two years of delay and disruption while new procurement exercise was carried out. Given the experience of the Leeds tram project - aborted after £40m of expenditure - I feared that the project would struggle to recover if we chose any path other than trying to make it work. I did consider and discuss with Richard probably in the autumn of 2009 the option to allow BB to take their role to an agreed point of partial completion and then introduce a new civils partner. Whilst that was superficially appealing it would have given rise to questions of who would be liable for any defects and or risks of failure in systems integration in future.

- d) Andy Conway of City Development noted that there was no mention of Richard Jeffrey's statement that 'there is no way we'll be able to build the tram for £545m' in the minutes and he queried whether this had been deliberately omitted from the minutes

[TIE00763898]. Do you consider that board members being provided with the whole picture?

Those members who attended the TPB on behalf of their party groups were very well aware of Richard's views. There was perhaps a concern that for these views to have been recorded in the minute it could have leaked and been unhelpful given the delicate state of negotiations with BSC. It is fair to say that members were not being given a blow by blow account but the TPB did cover the main changes in the programme and budget.

- e) **In general, did you have any concerns as to whether the minutes fully and accurately recorded what was discussed at meetings of the TPB?**

The minutes were not as comprehensive a record of discussions as I would have expected given the sums of public money in question. They were certainly briefer and more anodyne than the discussion of the key issues that took place around the TPB table. On occasions I got frustrated that key points made by Board Members would be omitted, glossed over or recorded in a rather blander or more neutral way. Action points were not always followed up in a disciplined manner. It was evident that when it came to recording any figure that could be commercially sensitive there was a sensitivity about it

becoming a hostage to fortune in future negotiations with Infraco. That said, I do not believe there was any attempt to mislead Board Members about the status of the project and once Richard Jeffrey took over as CEO the Board certainly received an open account of the challenges the project was facing.

72 On 13 July 2009 [CEC00679402] you were sent a letter by David Mackay on which your colleague Andy Conway commented "*so much for the one team approach*".

a) **What were your views on David MacKay's letter and Mr Conway's comment?**

I think that David's response was legitimate. I had been pressing for progress to be made on both the tie and TEL business plans: the latter relating to the ongoing revenue and operating costs of an integrated tram and bus network once operational in two years' time. The letter to David was probably drafted by Marshall Poulton or Andy Conway but signed by me. David was wary about exposing any information on tie's position that might leak publicly and undermine tie's position in negotiations with Infraco. Andy was getting increasingly frustrated being embedded in tie's office. He may have felt he was being denied information that he needed to do his job properly in reporting to elected members. I suspect he felt that he was being ignored by senior tie staff at this time and I can understand his frustration. Ultimately I think David's judgment on this was correct, particularly as Infraco had recently appointed PPS with former Council leader Donald Anderson to manage their PR and communications.

73 You attended a meeting with Group Leaders on the 14th of July 2009, a note of which can be found at [CEC00794963].

a) Were preferred DRPs presented to the next Board on the 29th July?

I can't recall this. I am not sure if it refers to the tie Board or TPB. Either way I believe the relevant minutes would record the discussion.

b) **The need for total confidentiality AND political unity as opposed to unnecessary "politicking" was re-emphasised. What were the problems being encountered in this regard? How was it thought that Senior Political briefings would provide a solution?**

I think Tom took the view that the more senior politicians would have a better grasp of how high the stakes were and how difficult it would be if internal squabbling over the project were to break out especially in an open public Council or Committee meeting. There was an element of 'told you so' and playing to the gallery by certain SNP members and it really wasn't helpful that the Council as sponsor for the project was experiencing internal divisions. Information had previously leaked following political briefings and was being used by the press in ways that were also unhelpful to resolving the problems

that were being experienced. It didn't help that Donald Anderson the former Council Leader was now providing PR advice to BSC.

- c) **It was noted that the mantra of £50-80m and perhaps £100m was still being repeated but as ever, without detail. What action was taken to remedy this?**

This was being handled through discussions at the Chief Executive and Chairman level at a senior level with Infraco. The TPB was being told that BSC had been asked for detailed estimates. At a local level Martin Foerder and his team were being pressed on why such sums were needed given that it was only just one year on from financial close. My sense was that Tom Aitchison was reluctant for the Council to step in directly to what was a contract dispute between tie and Infraco.

- d) **It was noted that Gill Lindsay would be available to give greater support. Had there been a lack of support until that point, and, if so, why?**

The Council's legal services team was extremely stretched and there was a lack of framework agreements and available budget to draw in external resources. Gill herself seemed to be under considerable pressure and from my wider role dealing with the development community in the city it had seemed to take a long time to get things through legal. There were significant budget pressures on the Service and Jim Inch controlled the budget tightly so there were often delays in getting things done. The fact that Legal Services were at that time tucked away in the bowels of the city chambers didn't help communications. The only positive experience I had of dealing with legal services in the early stages of the project was when Nick Smith was involved. He was very helpful in dealing with issues at Picardy Place where we were trying to resolve issues with Henderson Global around the proposals for the St. James Centre and satisfy the concerns of the Catholic Church about the design of the proposed gyratory and location for a replacement for the Thistle Hotel.

- e) **Did you have any concerns, at any stage, in relation to Ms Lindsay's input?**

Gill was personable but I was never confident in her advice and her notes of meetings were often rather cryptic. She appeared to rely heavily on the opinion of DLA. She didn't seem to have the authority or gravitas that I would have expected in a Chief Solicitor. It was only when Alistair MacLean came on board that Legal Services seemed to get properly resourced up to do the job that was required given the large volume of legal work the Council was dealing with, not only on the tram project but other major capital projects such as the Usher Hall and Royal Commonwealth Pool refurbishments.

74 You were to attend a meeting with TIE on the 15th of July 2009 to obtain information to support the drafting of the Council Report for 20 August. **The agenda noted that information sought to be obtained**

included[CEC00661672]:

The April and July base case figures (money already spent, committed, fixed elements (that cannot shift), balance including risk)

- An overall view of assumptions made in April and how they had changed in the July numbers.
- A review of the Strategic Options, particularly with regard to curtailment and the option on what could be achieved for the funding available (including an adequate risk allowance).
- TIE's view of what could happen over the next two months and what these events could mean for the rest of the project.
- An estimate of the costs of aborting the project, what assumptions would be made to get to this view in the event of TIE instigating this or if there was a fundamental breach by BSC.
- A judgement as to what assets CEC would be left with, including any infrastructure.
- A storybook from January 2009 until now, detailing how things came to be in this position despite previously confirming that 95% of costs were fixed.

a) **What were your views on these matters?**

I believed the information was essential if the Council was to be given an accurate report on the status of the project and the likely implications of specific courses of action.

b) **Was the information requested provided?**

The information supplied by tie was only partially completed by the reporting deadline of the Council meeting. Work was set in train on all points but the cost based information remained highly uncertain because of tie's continuing disputes with Infracore.

75 On the 16th of July you circulated a second draft of the proposed tram update report to August Council for consideration and comment [CEC00795031]. Gregor Roberts of TIE was of the view that the report was a little too explicit with regards to TIE's general strategy and commercial position and would require some changes including:

- Removal of comments that the project was 'unlikely to be delivered within the funding envelope' from the report
- Removal of comments that the council were assessing the robustness of the £45m contribution.
- Removal of termination / strategic truncation options.
- Removal of comments on the Council's funding mechanism (through prudential).
- Removal of comments re bonus payments under the new governance section.
- Removal of comments implying that TIE was not managing this project, to deliver the project within budget, in-line with CEC expectations.

By letter dated the 20th of July 2009 [TIE00317803], David Mackay notes that the “the general tone of the report not only disturbed him but would leave TIE largely impotent as far as negotiations with Infracore and Carillion were concerned”.

- a) **What were your views on these comments, including whether removal of this information from the report, would affect elected member’s ability to make informed decisions?**

I felt I was between a rock and a hard place. There was a need to give members the fullest possible picture of the worst case scenario but at the same time considerable pressure from tie not to release information into the public domain that would undermine their negotiations with Infracore. It would have been possible to have included the financial details in a part b report for sensitive commercial information exempt from FOI but there was serious concern about any figures revealed being leaked. Senior members of the Administration were fully briefed about where things stood as were the Party representatives on the TPB. However, there was rising concern from David Mackay and Richard Jeffrey about information leaking and the details of the dispute being played out in the press.

- b) The extent to which the above matters should be addressed in the Report to the Council appears to have been discussed by the IPG [CEC00661668].

What was the outcome of those discussions?

The IPG had a full discussion about the range of options set out in the report and key elected members were briefed about where the project then stood and the options available to the Council as summarised in CEC00661668. The outcome of the discussions was set out in the report jointly prepared by myself and Donald McGougan that was Council agenda item 8.3(a) on 20th August 2009. This report signalled that because of the lack of an agreed commercial programme it would now be ‘very difficult’ to deliver the full scope of Phase 1 a within the £545m funding envelope and that a contingency planning process would be set in train involving Transport Scotland and other key stakeholders. It was also agreed that the Council should endorse the contractual steps being taken by tie to achieve greater cost and programme certainty. DTZ had been commissioned to check the realism of the Council’s funding strategy including anticipated capital receipts. TEL’s passenger forecasts were also reviewed and updated in light of the recession.

- c) On the 6th of August you noted that you had taken on board Tom Aitchison’s comments on the draft status report [CEC00659597]. You noted that the current draft steered the right course between openness and transparency without compromising TIE’s commercial interests. In hindsight do you consider that the correct balance was struck? **We note, for example, Steve Renwick’s view that the report ultimately did not go far enough to protect the Council’s interests [CEC00684468]?**

I didn’t see Steve Renwick’s comments at the time: that note seems to have been a closed loop within legal services and there are no specific points in the

note about what forms of protection he had in mind. With hindsight given the cost eventually agreed at mediation the Council's funding might well have been better served by a decision at that point to terminate or agree truncation and introduce a new civils partner. Had this not been a Council report then it would have been possible to develop these options more fully. It is arguable that this should have been done in a confidential annex. However, the political concern was to keep things tight and hope that application of the contractual levers tie felt believed they had in their locker would allow matters to be restored to a semblance of normality and some certainty to be achieved on out-turn costs.

- d) **What were your views on the concerns of Gordon Mackenzie (and Jenny Dawe) in relation to the way in which the budgetary information was being presented in the report, as stated in his email dated 11th of August 2009 [CEC00668482]. Were councillors aware that the project was likely to go over budget?**

Councillors Mackenzie and Dawe were very much aware that the project was likely to go over budget. Councillor Mackenzie's point on the first draft of the Council report prepared by Alan Coyle (to whom the e mail is addressed) and then subsequently edited by me, is that to give any indicative figure of the eventual out-turn cost was almost meaningless because of the poor quality of the information available from tie and the fact that some many risks were still out there and unquantified. His concern, from a political perspective, was clearly that if the report quoted a new cost estimate to completion it was almost certainly bound to be inaccurate and would create problems if it was subsequently to be revised upwards.

- 76 On the 23rd of July, by email to Councillor Gordon Mackenzie, you noted that while you appreciated his concerns about the potential risks of undermining TIE's commercial position in negotiations, you felt that you had an obligation to report to Council that there must now be concerns that it will not prove possible to deliver the programme within the budget. You stated that "*there is no doubt that, in any subsequent audit review, we will be asked when we became aware of this situation and what actions we took to mitigate the problems that will arise.*" Finally you noted that you were very anxious about the reliability of the information provided by TIE as you had been pressing them to provide a detailed review of budget estimates and programme timetable since last November and they had failed to do this. In the past few months, their best case estimate had moved from £534m to £560m without adequate explanation.

By email later that day you informed Tom Aitchison there had been more slippage with the MUDFA works and that you felt that you had to let the Council have some realistic projections sooner rather than later.

- a) **Was there resistance from senior Council officials and/ or senior members to the release of information to members (and, if so, resistance from whom and why?) Do you consider that the correct balance was struck?**

There was certainly concern about how information should be released and in what Fora. Senior members had been seriously scarred politically by the way the dispute had played out in the press following the Princes Street stand-off of early 2009 and were nervous about bad news. The Chief Executive was trying to balance the need to produce an update report with the need to give tie the support needed in their dispute with Infraco. The 20 August report made it clear that the budget was now under serious threat but didn't give the picture of the extent and range of cost out-turns that could potentially emerge. I can understand why the politicians wanted greater certainty on figures but I felt uncomfortable that a range of cost out-turns was not shared formally beyond the senior elected members at this time. I am not sure the right balance was struck.

By email to David Mackay dated 27 July, you stated "*that the further delays and costs which emerged on the MUDFA programme, undermine trust and confidence to some degree however you intended that CEC and TIE proceed as one family.*"

b) What was Mr Mackay's response to your email?

I am not sure that Mr Mackay responded directly but the use by me of the phrase 'one family' was one that emerged around that time introduced by Richard Jeffrey. I was playing it back to signal to David that whilst I was exasperated by the rate at which new surprises were emerging I would continue to do my best to help tie prevail in its disputes over the contract.

77 A Highlight Report to the IPG on 27 July 2009 [CEC00688908] included a table discussing what members should be advised at the meeting of the Council on 20 August 2009. The table asked whether cost and delay should be reported and, if so, to what extent (p3).

The table also noted TIE as admitting that 40-80% of changes and delay were down to them.

a) What discussion of these matters was there at the meeting?

My recollection is that this IPG meeting discussed what members should be told; what TS and Ministers should be told and by whom. There was also the beginning of discussions about how the Council might afford to complete the project if the costs did exceed £600m e.g. would it be possible to do a sale and lease back on the tram rolling stock and ask TEL to include the lease costs within their operational expenditure. There was criticism about the responses given by tie to information requested by Council Officers and about tie not having been open enough on their responsibility for delays and changes to design.

b) What were your views?

I was on the one hand critical of tie and their lack of openness but supportive of Richard Jeffrey who had in my view got to grips with the project and flushed

out the key issues. Members of the City Development transport team Marshall Poulton and Andy Conway were becoming increasingly frustrated by the approach being taken by certain staff within tie.

c) What was the outcome?

The 20th August report indicated that it would now be very difficult to deliver the project within the £545m funding envelope and said that it was not possible to give a clear indication of the impact of the reported disputes and other issues on the overall funding for the project. It indicated that the outcome of the contractual resolution process would provide greater certainty on cost out-turn and would be reported in due course.

78 You attended a joint meeting of the Tram Project Board and the TIE Board on 29 July 2009. The minutes [CEC00739552], page 7) noted (para 3.3) that the overall completion of the utilities programme was at 80% with full completion scheduled against all areas in November 2009.

Richard Jeffrey presented his quarterly review [CEC00376412] and noted (page 3) the following problems as having been "baked in" from the beginning, namely: risk management strategy; procurement strategy; design/design management; contractor appointment/behaviour; and optimistic estimates.

a) What were your views on these matters?

I believed Richard's analysis was an accurate one.

79 On 13 August 2009 [CEC00679723] Richard Jeffrey of TIE wrote to Councillors/members of the board to inform them about the significant developments in the relationship with BSC and tie, namely that BSC were not happy to start works on Shandwick Place unless this work was undertaken on a cost plus arrangement.

a) What was your understanding of, and views on, that matter?

It was clear that BSC were now seeking to not only extend the terms of the special arrangement agreed for Princes Street but to guarantee their profits and take no risks whatsoever in relation to the next section on Shandwick Place. This represented a fundamental reversal of the position tie had sought to achieve in the contract where they believed the vast bulk of risk had been transferred to BSC. I believed they were holding the city to ransom and that acceding to their proposals would undermine the terms of the procurement process.

BSC

80 By email dated the 13th of August 2009 Graeme Bisset informed you and others that Bilfinger Berger may have under-costed the tram infrastructure contract by £50-£60m.

a) What was your understanding of the issues raised in Mr Bisset's email?

The e mails indicate that through Graham's analysis of special provisions in the Bilfinger Berger accounts BB (not TIE) may have under-costed the pricing of their bid for the tram construction contract; it further suggests that because profit margins in civils construction projects tend to be small the impact of a pricing error on this scale in their bid would be highly material to the profitability of the BB Civils Division.

b) Were members advised of that (and, if not, why not)?

Members of the TPB were informed of Graeme's opinion that the special provisions in the 2009 BB accounts could be taken to imply they had under-priced their bid by £50m - £60m and their attempt to claw this back by an aggressive approach to claims and their apparent avoidance of all risk was a product of this error on the part of BB. This was informed speculation on Graeme's part; it would have been unwise to make a statement about this in the public domain. However, it is possible and perhaps even likely that the special provision in the accounts may have related to the Edinburgh tram project.

81 On 20 August 2009 the Council were provided with an update by means of a report by yourself and Donald McGougan [CEC00738172]. The report stated that TIE had taken extensive advice and was "confident" on its position on the key matters in dispute, however, it was unreasonable to expect that all adjudication outcomes would be awarded in TIE's favour. It was noted that "*it is now considered that it will be very difficult to deliver the full scope of phase 1a within the available project envelope of £545m*". It was not possible to accurately forecast a revised budget.

a) It would be helpful if you could explain how that report was drafted, including which individuals, from which organisations, had an input into drafting the report?

The initial draft of the report would have involved input from two of the Council's embedded staff within tie – Alan Coyle covering the financial information and Andy Conway on transport and engineering matters. It appears that the first draft was circulated within IPG and to senior tie colleagues. I was involved in editing the report to reflect comments made by IPG colleagues on the initial draft and Donald will most likely have edited the sections that relate to programme costs and the modelling that had been done on the TEL Business Plan.

b) Were you "confident" of TIE's position on the key matters in dispute (and, if so, on what basis)?

It was impossible to be completely confident as so many matters were now in dispute and were being referred to different adjudicators: some to legal professionals and others to engineering and technical professionals. I thought it unlikely that TIE would win every case but on the basis of the advice they had taken from DLA and other Advisors and from disputes resolution professionals in the construction industry there appeared to be reasonable

grounds for believing tie's case on specific matters was reasonably strong.

- c) **It appears that members were not provided with a revised cost estimate for the project until almost two years later i.e. summer 2011? Is that correct and, if so, why were members not provided with a revised cost estimate for the project earlier?**

No. Members were briefed in their party groups on the range of cost estimates for the project. However, because the programme was a complex and moving set of parts with so many unknown outcomes and dependencies on the results of adjudication rulings and still no sign of an agreed programme from Infracore it would have been impossible to offer revised cost estimates with any degree of accuracy.

82 You attended the meeting of the Tram Project Board on the 23rd of September 2009 [CEC00848256].

- a) **The Report to TS still notes that it was expected that programme recovery could be achieved in respect of the majority of items (page 57). Was there a reasonable basis for this view? Did you personally remain confident that there could be recovery? If so, why?**

The assessment of the ability to recover the majority of items that had fallen behind was based upon the assessment of tie's Programme Director Steven Bell. In the sense that at this stage around 97% of the utilities had been diverted and the work in laying off street track could be delivered with the rates of productivity achieved on other tram projects there was a basis for asserting that recovery could be achieved in most areas with the necessary skill, willingness, resources and application. However, the willingness to deliver at the required pace was seldom evident. BSC were largely using sub-contractors and with the drying up of construction works elsewhere as the recession kicked in it was evident that the productivity levels were insufficient in autumn 2009.

- b) **In the September 09 Report to TS, there is a statement in relation to design that, "This slippage has been addressed as part of the re-calibration of the programme. Tie is identifying and implementing opportunities to mitigate the impacts of this slippage." How did you understand that slippage had been addressed as part of the re-calibration of the programme?**

My understanding was that the design taskforce was looking at how to prioritise and streamline the production of the outstanding designs and approvals so as to minimise delays to programmed sections of work: in other words to ensure that designs were completed as far as possible for the planned next sections to be undertaken in the programme. The programme was recalibrated by tie taking the last programme they had received from BSC and amending the sectional completion dates to take account of time already lost.

83 In late August 2009 you requested TIE to produce a report on truncation options

[CEC00680162]. By e-mail dated the 25th of September 2009 [CEC00680446] Alan Coyle noted that the quality of TIE's submission [CEC00680447] on curtailment of the scope of the tram project left a lot to be desired and was no more detailed than a report received in March.

- a) **What was your view, at that time, about the quality and reliability of the information being provided by TIE about costs and the options open to CEC?**

I believed that the review of strategic options provided by Stewart McGarrity was helpful in terms of understanding the broad implications of specific courses of action and, in particular, their impact on future revenue projections and on the integrated transport network that the Council was seeking to develop; termination would have involved the writing off of sunk costs of over £400m leaving the city with no assets to show for the investment (other than the upgrading of some of its utility infrastructure). Any line that didn't connect the airport to at least Haymarket would be unviable. I accept Alan's point that cost estimates should have been more detailed but what I was seeking at this stage was information that would enable me to understand the broad implications of specific courses of action. It should be added that at this stage tie had not entered the peak period of the DRP processes where decisions that went against them proved costly.

- 84 An adjudication decision was issued on 13 October 2009 by Robert Howie QC in relation to the Hilton Hotel car park works ([WED00000026], page 10)

Adjudication decisions were issued on 16 November 2009 by Mr Hunter in respect of the Gogarburn Bridge [CEC00479432] and Carrick Knowe Bridge [CEC00479431].

On 4 January 2010 Mr Wilson issued his adjudication decision in relation to the Russell Road Retaining Wall Two [CEC00034842].

- a) **To what extent, if at all, were these adjudications intended to establish principles of wider application, or provide guidance, in relation to the other matters in dispute?**

The purpose of the referrals to adjudication was to resolve both specific disputes and establish key principles that could be applied more widely to expedite progress as the programme proceeded.

- b) **What were your views on these adjudication decisions, including the extent to which they favoured TIE or BSC (both in relation to whether a change had occurred and in relation to the value of that change)?**

It was clear that the decisions favoured BSC in particular the point made at para 7.46 of Lord Howie's adjudication with regard to the interpretation of para 4.3 of schedule 4. Up to this point tie had been very confident in their view that, following design novation, the risks for ongoing design development and associated costs lay with BSC and that BSC held responsibility for managing the design development process. Lord Howie's verdict showed that whilst that

obligation did lie with BSC it did not mean they would do so within the terms of the original contract price and he made clear the circumstances and conditions in which BSC would be able to make additional claims.

c) Did these decisions give you any pause for thought as to whether TIE's strategy, including its understanding of the contract, was correct?

Yes – when Lord Howie's adjudication was reported to the TPB by Richard it was clear that a fundamental premise upon which tie's case had been communicated consistently to the TPB was flawed. It meant that the risks falling to tie were much more significant than had been believed to be the case up to that point in time.

85 In November 2009 Carillion plc completed its work package under the MUDFA contract. TIE appointed Clancy Dowcra and Farrans to complete the remaining utilities works. In December 2009 and January 2010 TIE and Carillion entered into an Exit Agreement.

a) What were your views on these matters?

I can't recall having been consulted about the terms of the Exit Agreement and I am almost 100% certain that I was not. I was aware that tie had chosen to terminate its contract with Carillion due to its dissatisfaction with their performance and commitment to achieving the necessary progress.

b) Did contracting with other utility companies to complete the outstanding utilities works improve matters or did the previous difficulties with the utilities works continue?

There certainly seemed to be much greater traction in moving the utility works forward with the newly appointed contractors in place. However, the problems with unexpected sub ground voids and structures continued to be problematic e.g. a major void space at Haymarket that had been an underground air raid shelter. There were also continuing delays with the response of some of the statutory utilities companies in relation to providing staff and in some cases materials. In general, the pace of work improved significantly.

86 You attended a meeting of the Tram Project Board on 18 November 2009. The minutes ([CEC00416111], page 7) noted that the Board approved the issue by TIE of a Change Order for a settlement of Extension of Time (EOT) 1 of £3.524 million (being 7.6 weeks EOT for the impacts of SDS programme v26 to v31). It was also noted (page 7) that the Board approved the interim award of 9 months relief and 6 months costs in relation to the Programme to Complete (see also, for example, in that regard (i) paper by Susan Clark on Programme Agreement & EOT, [CEC00752774], and (ii) your letter dated 13 November 2009 to Martin Foerder, [DLA00001717]).

There was reference to setting up a sub-committee with delegated authority to enter into an On Street Supplemental Agreement (OSSA), on a demonstrable costs basis (page 7).

Slides for the meeting ([CEC00835831]) gave an update on Infraco progress (page 8) and Utilities progress (page 16).

- a) **It would be helpful if you could explain, in general terms, what EOT 1 was for and why it was settled for that amount?**

Firstly, it was not my letter to Martin Foerder; the letter in question was sent by tie's Programme Director, Steven Bell. My understanding from attendance at the TPB is that the proposed settlement related to the prolongation costs for missed sectional completion dates, where the reasons for missing the dates in question were not due to any fault on the part of BSC. At this point in the project BSC had introduced David Darcy as a principal contact for tie and Richard Jeffrey had reported to TPB that there were positive signs of getting the programme back on track.

- b) **It would be helpful if you also explain what the reference to an interim award of 9 months relief and 6 months costs related to?**

This related to the loss of time in meeting the sectional completion dates and the agreement between tie and BSC as to which party bore responsibility for the delay. There were still some areas of dispute in relation to where responsibility lay and the agreement was described as interim because certain matters required to be clarified and agreed between the parties.

- c) **Was TIE's intention at that stage to enter into an OSSA, on a demonstrable costs basis for the remainder of the on-street works? What were your views on that?**

I can't recall if that was the precise point at which the proposal to enter into an OSSA was first floated by tie. However, in late 2009 there were definite signs of a more pragmatic and realistic approach being taken by both parties (tie and BSC). A large majority of the utilities had been diverted by this stage and whereas an OSSA would open up questions about a departure from the terms of the original procurement it might be argued to have become necessary given the complexity of the diversion work to date and as the only practicable means by which to expedite progress and avert another Princes Street type stand-off. I was unhappy about the prospect but recognised that it appeared to be the only way in which progress could be achieved. I was not yet aware of the costs that had been incurred in relation to the PSSA. At this stage the city was at a peak point of disruption and there was enormous political pressure to get the Princes Street works completed prior to the Christmas embargo. In terms of external pressures on the project a solution that would minimise further delays appeared necessary.

87 You attended a meeting of the Tram Project Board on 18 November 2009.

The minutes ([CEC00416111], page 7) noted that the Board approved the issue by TIE of a Change Order for a settlement of Extension of Time (EOT) 1 of £3.524 million (being 7.6 weeks EOT for the impacts of SDS programme v26 to v31).

It was also noted (page 7) that the Board approved the interim award of 9 months

relief and 6 months costs in relation to the Programme to Complete (see also, for example, in that regard (i) paper by Susan Clark on Programme Agreement & EOT, [CEC00752774], and (ii) Steven Bell's letter dated 13 November 2009 to Martin Foerder, [DLA00001717]).

There was reference to setting up a sub-committee with delegated authority to enter into an On Street Supplemental Agreement (OSSA), on a demonstrable costs basis (page 7).

Slides for the meeting ([CEC00835831]) gave an update on Infraco progress (page 8) and Utilities progress (page 16).

d) It would be helpful if you could explain, in general terms, what EOT 1 was for and why it was settled for that amount?

I had no involvement in the negotiation of EOT 1. It was reported to the TPB that the purpose of the award was to provide BSC relief from liquidated and Ascertained damages in relation to their (BSC's) inability to achieve the open for revenue services date of 6th September 2011 because of delays in the completion of MUDFA works and other failures on tie's part as Employer.

e) It would be helpful if you also explain what the reference to an interim award of 9 months relief and 6 months costs related to? Repeated Question: See answer 86 b

f) Was TIE's intention at that stage to enter into an OSSA, on a demonstrable costs basis for the remainder of the on-street works? What were your views on that, including the extent to which that was consistent with the procurement strategy and obtaining a 'fixed price' infrastructure contract? Repeated Question: See answer 86 C

88 You attended a joint meeting of the Tram Project Board and TIE Board on 16 December 2009. The minutes [CEC00473005] noted (page 6, para 2.1) that agreement had yet to be reached with BSC in relation to a set of On Street Supplemental Agreements for the remaining works from Haymarket to Newhaven and that BSC had indicated that they were not prepared to commence works without these.

It was further noted that *"The Board approved the necessary additional and robust steps to be taken in the short term to target and enforce the full range of commercial mechanisms available within the Contract"*.

a) Do you have any comments on these matters?

Only to state that it had become clear that BSC was now unwilling to take any construction related risk and wanted to see the balance of on street work done on a cost plus basis which was a fundamental change to the contract tie believed had been entered into.

b) What was the commercial strategy discussed and agreed at this

meeting?

There was a discussion in light of BSC's position that tie should be prepared to use the legal and commercial levers available within the contract to compel BSC to adhere to delivery on the terms tie believed had been agreed.

89 By e-mail dated 10 December 2009 [CEC00473732] Nick Smith sent yourself, Jim Inch and Donald McGougan an email expressing concern about the justification for entering into further supplemental agreements in relation to the Infraco contract. You appear to have met with Richard Jeffrey [CEC00473733]

a) **What were your views on points raised in Mr Smith's email?**

My view was that Nick's summary was accurate and that any significant shift from the terms of the original agreement procured through open competition would invalidate the procurement process, unless there was a strong argument to be made that any appointed contractor would have somehow faced the same extenuating circumstances. However, I could not see that there were such circumstances.

90 An e-mail dated 22 December 2009 by Alan Coyle [TIE00281255] included in the thread an e-mail dated 21 December 2009 from John Ramsay of TS which noted that TS had already advised Ministers of a circa £600m outturn based on TIE and CEC's advice and further noted "*However Richard Jeffrey has made it clear to Bill [Reeve] that it clear [sic] would be 'substantially more'*" (see also David Anderson's e-mail dated 21 December 2009 [CEC00583506] setting out his recollection of what had been discussed.

a) **What was your understanding of, and views on, these matters?**

At this point in the project tie were rehearsing a variety of cost out-turn scenarios and considering options for staying within the £545m approved budget. These options included reducing the scope through truncation or phasing of delivery; using the contract to compel BSC to deliver; value engineering to achieve cost reductions. Around £28m of the £30.3m contingency budget had been drawn down at that stage making it almost certain – given the claims in the pipeline – that the budget out-turn would exceed the approved figure of £545m. However, the view at that stage was that it would be possible to contain the project under or just over £600m. I recall Richard Jeffrey quoting a statistic from the Institute of Civil Engineers that the average UK major civil engineering project ends up costing around 13% over budget. It was the received view at the time that the project remained deliverable at an out-turn cost close to this industry norm.

b) **What was your understanding at that time as to the likely total cost of the tram project, including whether it was likely to be "substantially more" than £600m?**

My view at that point in time was that the project could be delivered in a range of £560m to £615m. I did not see how it could cost substantially more than

£600m. The original infraco contract bid price was £245m. The benchmark data from other UK tram projects at that time showed the normative cost of the civils element of constructing tram track was around £13m per kilometre. At that point I couldn't envisage a scenario in which the project would end up costing substantially more than £600m. I was clearly wrong.

2010

91. By e-mail dated 14 January 2010 [CEC00450935] Richard Jeffrey noted that in December "the Board" wholeheartedly endorsed a strategy of becoming more commercially aggressive in relation to the dispute with BSC (see, also, Mr Jeffrey's e-mail of 11 February 2010 [CEC00560882] on the same theme).

a) What were the reasons behind that strategy?

The main reasons were that - despite every reasonable effort having been made by tie to get BSC to deliver progress - the programme was stalling. BSC had still not got some of their sub-contractors in place almost 18 months on from financial close (e.g. Grahams were only brought on to start the Haymarket site around this time). At TPB Richard had given some signs of progress since David Darcy had become the key point of contact for BSC. However, there had been a series of false dawns. Perhaps the most frustrating issue was that BSC had consistently failed to provide a detailed, revised programme. The elected members who had been briefed along the way were becoming understandably concerned and angry about the lack of progress and the impact of the street works on the state of the city and its reputation.

Did you agree with it?

Yes – it seemed that no matter what influence had been brought to bear to achieve a sensible way forward through a negotiated approach BSC had dug their heels in and were unwilling to accept any risk. Richard also provided supporting legal opinion that suggested tie had a case to make in relation to the failure of BSC to manage design and progress the project.

92. On 14 January 2010, an opinion from Richard Keen QC on the interpretation of the INFRACO contract [CEC00356397] was given to TIE, in the course of dispute resolution and provided to members of CEC on 12 April 2010.

The opinion found that TIE did not take full and proper account of the wording which appeared in the last three lines of paragraph 3.4 of Schedule 4 which provided, "*for the avoidance of doubt, normal development and completion of designs means the evolution of design through the stages of preliminary to construction stage and excludes changes of design principle, shape and form and outline specification.*"

The effect of this wording was that "*Changes of design principle, shape and form and outline specification*" constituted "notified departures", entitling the contractor to seek further monies under section 3.2.1 of Schedule 4 of the contract.

a) What were your views on these matters?

It was clear from the opinion given by Ricard Keen QC that tie's views to date that this was a fixed price, lump sum contract with the risk for design development passed to the contractor was not valid in relation to changes of design principle, shape, form and outline specification and that whilst the QC had identified a flaw in the Gogarburn Bridge adjudication of 16 November 2009 the end result was that the contractor could be entitled to further monies because such changes constituted notified departures. This adjudication had profound effects in terms of tie's requirements to pay out on notified departures.

93. By e-mail dated 22 January 2010 [CEC00473835] Alan Coyle noted that yourself and Donald McGougan had endorsed the intention to seek an independent legal view of the "contractual outs" within the contract and noted a need for CEC to be more proactive, "*where the Council are doing their own thinking rather than rather than waiting for a briefing from TIE*".

a) Why did CEC seek an independent legal view of the Infraco contract at that stage? Do you consider that CEC ought to have obtained its own legal advice on the dispute earlier?

With the benefit of hindsight, yes, with regard to the latter question. Until the end of 2009 there had been considerable confidence expressed in tie's senior management and DLA that BSC's views on the contract were incorrect and tie's views would prevail. The Gogarburn Bridge adjudication went against tie and was the first significant signal that tie's position may have been invalid. Even at that stage Richard Jeffrey told the TPB that this was an adjudication made by a civil engineer rather than a lawyer and that whilst it was an obvious reversal it didn't necessarily mean that it was unchallengeable, hence the referral to Richard Keen QC for a legal opinion. The other factor here was that Alastair MacLean was a relatively recent appointment as Head of Legal Services within the Council and at that stage had not yet fully turned his head to the details of key matters in dispute. I had passed a CD rom copy of the contract to Alastair shortly after his arrival in post but as he was getting up to speed on his new role having joined the Council from private practice he was on a pretty steep learning curve as a new Head of Service.

b) What were your views on the comments by Mr Coyle noted above?

As can be seen from the e mail trail he did not copy me into his initial e mail so I learned of his comments through the subsequent one from Alistair MacLean. It had become clear by January 2010 it was clear that the Council's reliance on legal advice procured through tie was no longer prudent. The 'one family' mantra had dominated the efforts to make progress from early summer 2009 and it may have led to a blurring of organisational boundaries. It may have taken Alastair's arrival and perspicacity of thought to help the Council's Management Team discern the need to take independent, third party legal advice.

94. On the 11th of February Richard Jeffrey sent yourself Donald McGougan and Marshal Poulton [CEC00492138] an email noting that "Their [BBS's] approach relies heavily on their interpretation of schedule part 4 ("this was only ever a price for a three wheeled car") and their use (in our view abuse) of Clause 80 ("this contract allows us to hold you to ransom"), and denting their confidence in these two areas is clearly vital. (Siemens have confirmed to me that they think BB's approach on clause 80 is "suicidal, and an argument they can never win"). In addition, we need to bring into play all the other areas of the contract (especially clauses 6, 7, 60 and 73) which set out the whole of their obligations to us."

a) **What were your views on these matters?**

Given the huge political frustration at the continuing lack of progress on construction; the continuing apparent intransigence on the part of BSC to engage within the spirit of cooperation to resolve problems in a reasonable way as set out in the opening clauses of the contract; and given that BSC's 3 wheeled car view of their responsibilities under the contract was not, at that point, accepted by tie (who had referred the matter to Richard Keen QC) I shared Richard's views. Given that BSC were unlikely to undermine their position by committing a major breach – the best option available to tie at that point appeared to be to crank up the pressure and compel BSC to complete the project to the contract price and programme, using contract clauses that enabled tie to apply such pressure.

b) **What were your views on Nick Smith's email to you of 15 February [CEC00450359], in which he stated that the critical Tram Project Board meeting was only 3 weeks away and CEC had very little to go on in terms of legal advice re options?**

It became increasingly clear following the view from D&W that tie's options for securing a change in BSC's behaviour were running very low. To extend Richard Jeffrey's earlier metaphor the Rhino was still moving very slowly but the legal ammunition available to take it down, was very limited and it appeared there were no big guns left. *tie to*

95. A highlight report to the Chief Executive's Internal Planning Group dated 17 February 2010 [TIE00896564] noted that Richard Jeffrey would be meeting on a weekly basis with yourself, Donald McGougan, Alan Coyle and Nick Smith, to update the Council on progress and matters arising.

a) **What was discussed at these weekly meetings? Were you content with the level of information you were given at these meetings? To what extent was information given at these meetings relayed to Councillors?**

The main points discussed concerned the ongoing exchanges and contractual difficulties between tie and BSC; any updates on legal advice received; the outcomes of specific adjudications and the impact of changes on programme costs and timing. There was discussion about keeping elected members and key stakeholders such as TS informed about significant changes. The meetings also addressed how the Council might fund any additional

monies that would be required beyond the previously approved budget of £545m. Senior Administration Councillors were kept informed of all significant developments. The meetings also discussed the timing of a major update report on the status of the project, following the contractually more rigorous position adopted by tie from late 2009 onwards. This culminated in a report to Council on 24 June 2010.

- b) Do you consider that these regular meetings ought to have occurred at an earlier stage e.g. when the dispute first arose? Would that have resulted in more informed decision making on the part of CEC?**

With hindsight there ought to have been more regular meetings between key officers in finance, legal and city development from an earlier stage. It is evident that due to their closer proximity to the workings of tie Alan Coyle and Nick Smith may have picked up signals that all was not well a little sooner than Donald McGougan and myself as we both had highly demanding day jobs within the Council running Departments: in my case with 750 staff and in Donald's at least 400 as well as manging relationships with a raft of Council owned, arms-length companies such as EDI which was in considerable trouble due to the property crash. I did meet Alan Coyle every 6 weeks or so for his view on programme and out-turn cost implications but legal services were never proactively engaged until Alastair MacLean came in and got up to speed. Too much reliance was placed on tie's view of the contract. Had key points of legal interpretation been achieved earlier it would have allowed CEC to take a better informed view of the risks of specific course of action.

96. On the 3rd of March 2010, Richard Jeffrey sent you and other board members an email in advance of the critical Tram Project Board meeting on the 10th of March at which the intention was to evaluate progress of TIE's commercially aggressive strategy [CEC00587084] and consider which of three broad options to proceed with:

3rd of March
should be
25 February

"1) Termination of the whole Infraco contract. Sub options include where and when to terminate, if and how to re-procure the project and different options depending on the grounds for termination and the strength of our legal case.

2)BSC complete part of the works, then, by negotiation, BB exit the project and whe find a way, working with Siemens to complete the project. Sub-options include where and when BB exit, and many different options as to how we complete the works with Siemens.

3)BSC complete the project, different sub options include with or without amendments to the contract."

- a) Did you feel suitably briefed in preparation of the March meeting?**

Although Richard's note summarised the three broad options and he discussed these with me and others in advance of the meeting it was still difficult to get a good understanding of the detail because there were so many outstanding variables and dependencies. I was comforted by the fact that fresh advice on options had been sought from McGrigors. I felt that the information available was sufficient to guide the preferred option but not

enough to understand fully the likely implications of that option in terms of its impact on cost and programme. We had a high level view of the terrain but lacked an ordnance survey map and a compass.

b) At this stage, what option did you favour, and why?

My view was that the preferred option would be to see BB exit the contract by negotiation having completed works on key sections to a logical point where there could be a reasonably clean transition to a new civils partner. However, I wasn't confident that the option would be straightforwardly deliverable.

97. By e-mail dated 4 March 2010 [CEC00474750] Alan Coyle sent yourself and Donald McGougan a Directors' Briefing Note [CEC00474751] setting out the estimated cost of the three options that formed part of "Operation Pitchfork". The estimated cost of completing the works appears to have been between £644m and £673m.

a) What was your view at that time about the reliability of these estimates?

I had no basis to believe they were unreliable. About this time tie had brought in Tony Rush an experienced construction industry professional and he was also casting his eyes over the likely costs. The Richard Keen QC opinion had made it clear that BSC were in a position to claim for notified departures and this clearly had negative connotations for the cost out-turn.

98. By letter dated 8 March 2010 [CEC00548728] Richard Walker of BBS wrote to yourself, Tom Aitchison, Donald McGougan and Councillor Gordon Mackenzie providing BBS's perspective of the dispute, expressing concerns as to TIE's interpretation of the contract and handling of the dispute and advising that it was likely that additional costs were in excess of £100m.

a) What was your view, at this time, on the matters in Mr Walker's letter of 8 March 2010, including the extent to which the Infracore contract was truly a "fixed price" contract and Mr Walker's view on the likely additional costs to complete the works?

I believe Mr Walker's letter was a response to the increasing application by tie of contractual clauses intended to compel BSC to complete the project. His summary of the adjudication outcomes was clear but I do not recognise his description of the behaviour of tie staff. In my mind there was a contractual duty upon BSC to apply reasonable endeavours to overcome problems to progress. I thought his assertion about the slow progress on utility diversions was a smokescreen; there were large tracts of the route in which utilities had been diverted and no work had yet started. A reasonable contractor would in my experience have been willing to flex the programme to commence work in the large number of areas where utilities had been cleared and the large area of off street sections where no utility diversions were needed. His letter made no reference to the delays in expediting design work that, in my view, was where the primary bottlenecks had occurred. The reference to press coverage was valid. However, it was evident that some of the stories that appeared in

the press had not come from leaks or briefing on the part of tie or the Council. The timing of the letter was significant; it was a clear attempt to paint tie as the villains of the piece.

- b) You were to meet with John Swinney at two meetings on the 9th of March and notified Richard Jeffrey that you would let him know that CEC stood 100% behind TIE's position [CEC00475461]. **What was discussed at your meetings with Mr Swinney?**

The first meeting with Mr Swinney concerned the Council's business case for the use of tax incremental finance to unlock the development of infrastructure and support housing growth on Edinburgh Waterfront. We were also together at a separate meeting of the Edinburgh BioQuarter Steering Group where I gave an update on the Council's progress in delivering the Braid Burn Flood defence scheme which my Department was responsible for. The Minister's diary was extremely tight. In the circumstances I was unable to discuss the tram project with him.

99. The Tram Project Board met on 10 March 2010. The minutes of this meeting [CEC00420346] noted (para 2.1) that Richard Jeffrey provided an update and explained the targeted work undertaken in a number of areas, namely, Performance Audits, Design, Programme, On Street Works, Contractual Mechanisms, Relationships and Behaviours, Financial Context and the Way Forward.

After discussion of the strategic options, the Board approved a strategy (see also TIE's Project Pitchfork Report dated 12 March 2010, [BFB00053258]):

BFB00053258
should be
CEC00142766

- a) **While you did not attend this meeting, it would be helpful if you could explain your understanding of the strategy approved by the Board at this meeting? In what way did you understand it to differ from any previous strategy?**

The strategy sought to continue to use contractual levers to assert tie's rights and apply pressure on BSC while at the same time aiming to achieve a resolution on key points in dispute and find a new way of working with BSC. The strategy is summarised in page 8 of the TPB report and might crudely be characterised as hard cop (Project Pitchfork) /soft cop (Project Carlisle).

- b) **What were your views on the chosen strategy?**

It seemed to me at the time to be a logical way forward applying contractual pressure on key points where tie had some leverage (as suggested following advice from McGrigors) while continuing to seek resolution of points in dispute and find a new and better way of working collaboratively with BSC.

- 100 By e-mail dated 11 March 2010 [CEC00461504] Tom Aitchison advised that Donald Anderson, former Council Leader, had texted him (on behalf of BBS) to advise that he had read the three adjudication decisions for himself and that "TIE have unequivocally lost each one".

Jeffrey's

a) Had you read the adjudication decisions?

Not all of them, I had read Richard Keen QC's opinion. However, I relied upon Richard's briefing with regard to the decisions on the other adjudications and their implications.

b) Did Donald Anderson's views give you pause for thought?

Yes, of course. However, I was aware that Donald's company PPS had been hired to provide PR and communications advice to BSC and I so I was also a little sceptical about there being a degree of 'spin' in his assertions.

101. You attended a Tram meeting on the 16th of March 2010 with Nick Smith, Donald McGougan, Richard Jeffrey and Hugh Dunn [CEC00475671].

a) Why was it decided at this meeting not to challenge adjudications?

I can't fully recall this but given the position having been set out clearly in key adjudications and the reasoning given for specific opinions there did not seem to be a compelling case constructed by tie's legal advisers for mounting a successful challenge.

102. You provided an update on the MUDFA works in a report to the Tram Sub-Committee on 22 March 2010 [CEC01891483]. The report stated that 97% of the MUDFA works were complete and that the remaining works would be completed by September 2010. It was noted that the remaining works did not generally require any excavation work to be carried out and should be unlikely to present any significant obstacle to progress of the on-street works.

a) Did the report reflect your understanding of the MUDFA works at that time? Did your understanding of the extent to which the MUDFA works were complete change at any time (and, if so, when and why)?

Andy Conway drafted the report which went in my name as was customary for such reports. It did reflect my understanding at the time and showed that along 97% of the route utilities had been diverted with over 46,000 metres of new ducts and pipes installed (although cabling had yet to be installed in some of the diverted ducts). However, at that point Shandwick Place was one of the locations where utilities had not yet been diverted; it was also to prove one of the most challenging locations. The final account with Carillion was not settled at that point. It should be noted that this was a report on the progress of civil engineering works and not a report on financial matters.

b) We understand that, in fact, considerable utilities works were carried out after the Settlement Agreement in 2011, noted below. If that is correct, did the report to the Tram Sub-committee in March 2010 give an inaccurate impression of the extent to which the utilities works were completed and, if so, why did that occur?

It is true that considerable utilities works were carried out in the Haymarket – Shandwick Place section of the route which formed part of the 3% not

previously diverted. This was one of the most challenging sections of the entire route in terms of tightly packed utilities and problems with sub ground structures and voids. It is probable that although this represented 3% of the route it accounted for more than 3% of the utilities diversion budget. Andy Conway's report which went in my name was not inaccurate: he simply was referring to the length of the route that had been cleared.

- 103 An e-mail dated 26 April 2010 by Stewart McGarrity [CEC00332138] attached a spread sheet [CEC00332139] and noted that, on the face of it, the Airport to Haymarket could be delivered within £545 million, the Airport to York Place might be delivered for £545 million to £570 million (depending very much on the programme and the nature of the commercial settlement with BSC) and that the Airport to the Foot of the Walk might be delivered for £600 million to £630 million (again, very much dependent on the programme).

a) What were your views on these estimates?

In view of the earlier estimates given for the entire project I thought these were optimistic. However, when I challenged this it was explained that the vast bulk of the route from the Airport to Haymarket was off street and indeed some of it ran along the route of a guided bus way which meant these sections would be less expensive to deliver. Given that 97% of the route was now free of utilities when presented with the arguments put by Steven Bell and his colleagues I could understand the logic of their cost assumptions.

- 104 By email from Andy Conway to yourself and others, he noted that John Ramsay was not happy with the decision that, the Tram Project Board would not brief him on TPB issues and instead Richard Jeffrey would speak directly to David Middleton [CEC00276952].

a) What was the reason for this? What were your views? Did you have any concerns, at any stage, in relation to whether TS were kept properly informed about the project, the problems and the range of cost estimates for completing the works?

Richard Jeffrey had previously been angry that the figure of well north of £600m had been communicated to Ministers when that figure was perceived by Richard to exaggerate the worst case scenario. Press interest was particularly acute at this time. My understanding is that Richard wanted to brief David Middleton, the Chief Executive of Transport Scotland, directly on the issues and not through an intermediary. Transport Scotland had withdrawn formally as a direct party to the project at the outset. If John Ramsay had joined the TPB and sought to influence the strategy adopted by tie he might have been construed as being in a Shadow Director role.

- 105 By email to Tom Atchison dated 11 May 2016, [CEC00246138] you noted that you would be at risk of failing in your accounting and reporting responsibilities if you failed to update Council on the key issues, which you specified as follows:

"The reporting of costs on Princes Street. It is fair to say that the costs are much

higher than anyone expected. We are still in disagreement with BSC over these costs, and this may lead to formal dispute, and whilst some of the extra costs are fully explainable, some are not yet. In addition, Princes Street is not yet finished, and I want to avoid setting the precedent whereby we report piecemeal on elements of the project especially when they are not complete or in dispute. I have separately e-mailed Donald a form of words which I believe could replace 10 paragraphs in the paper.

- *Cost of Utility works. We need to be very careful that we fully define exactly what we are talking about when we report the cost of a single element of the project. In this case, we need to be clear that the final cost of all utility works will be greater than that quoted in the paper as currently drafted, as that refers to just the utility works carried out under MUDFA. Finally, as with the above point, the final account with Carillion is not yet settled.*
- *Quoting the £545m plus 10%. I agree that we should now be declaring that the full scope within the funding envelope is now highly unlikely (or whatever phrase we choose), but to quote 10%, heavily qualified by the fact that many unresolved risks still exist, may make us a hostage to fortune, particularly with the main contractual disputes still unresolved."*

a) What were your concerns at that time?

Firstly I didn't specify these italicised remarks as the key issues. It was Richard Jeffrey who did this in his comments on my draft report. This exchange illustrates the dilemma I faced as a public servant in wishing to be open and transparent about costs (which could have been covered in a confidential part b report) while tie remained anxious about being too open for fear of undermining their commercial negotiations.

b) In the event, do you consider that members were kept properly informed of the project, the problems and the range of cost estimates for completing the works?

Senior members were kept well informed through briefings by Richard Jeffrey and a round of party group meetings involving Donald McGougan and myself. The desire to keep commercially sensitive cost information out of the full Council report came from tie and also from senior members of the Administration and the Chief Executive; it was not possible at this stage to provide firm estimates of the upper range of project out-turn costs.

c) Did you have any concerns, at any stage, as to whether members were kept properly informed of these matters?

I was uneasy that we weren't able to give all Council members estimated out-turn costs for the project. I recognised the sensitivity of the commercial situation and the difficulty of providing robust estimates but it seemed clear that the costs were now likely to exceed £600m for the full delivery of the Project as set out in the employers requirements.

106. On 12 May, Richard Jeffrey sent you an email stating that "*the design of the on-*

12 May
should be
12 May 2010

street works has emerged as a major issue, driving a lot of potential cost, delay and disruption.....In parallel with trying to find a sensible way forward, we are also currently conducting an exercise to find out how we got here (as we did with the work around pricing assumption 1 and the Weisbaden agreement)[CEC00261277].

a) What was your understanding of these matters, including the results of TIE's investigation into "how we got here"?

It appeared that a lot had happened between preferred bidder stage and financial close through agreements reached on specific issues between tie and Infraco. These agreements had the effect of changing the way in which the contract worked in practice, ~~and~~ as with the pricing assumptions in schedule part 4 working to tie's disadvantage.

107 Adjudication decisions were issued (1) on 18 May 2010 (by Mr Hunter, re Tower Bridge) [CEC00373726] and [CEC00325885], (2) on 24 May 2010 (by TG Coutts QC, re Section 7A-Track Drainage) [TIE00231893] and (3) on 4 June and 16 July 2010 (by R Howie QC, re Delays Resulting from Incomplete MUDFA Works) [CEC00375600] and [CEC00310163].

a) Did you see, or seek, these decisions?

I didn't see and read all the decisions but I sought discussions with Richard Jeffrey following the TPB at which I was first advised of the adjudication findings so that I could understand the wider implications for the programme.

b) What were your views on these decisions?

It had become evident by this stage that tie's view that the risk for ongoing design development was the responsibility of Infraco was flawed insofar as it only covered the drawings issued as part of the BDDI. It was clear that Infraco could claim for notified departures to a much greater extent than tie had understood to be the case. It was also clear that the ruling of R Howie QC meant on clause 80 meant Infraco were only obliged to get on with work where estimates had first been provided.

c) To what extent did you consider that the decisions favoured TIE or BSC (including in relation to whether there had been a change and the value of any change)?

The decisions clearly favoured BSC and their view of the contract.

d) Did these decisions give you pause for thought as to whether TIE's view of the contract was correct?

Yes: the cumulative impact of adjudication cases from the end of December 2009 to May 2010 undermined my confidence in tie's view of the contract. The fact that certain clauses in schedule part 4 took precedence over the provisions in the main body of the contract combined with Lord Howie's latest ruling on clause 80 made me extremely concerned about tie's contractual

position.

108. The Minutes from a meeting of the Tram Project Board on the 14th of April 2010 [CEC00245907] note that MUDFA works were 94% complete (page 6). Six months earlier in the October minutes they were reported to be 98% complete.

a) What were the main matters around that time?

The earlier reference to 98% completion concerned the scope of the original MUDFA works. In the course of completion of the utilities the scope was extended in some instances due to discussions with utility companies (especially gas and water) who when the condition of their assets were exposed decided to take the opportunity to replace rather than merely divert the existing pipes and ducts. In the event, some 49000 m of pipes and ducts were diverted and this represented 181% of the original specification. I am not completely clear about how the scope of MUDFA was being measured by the tie project team.

What were your views on these matters?

It was a concern that MUDFA works were still not complete: the only upside was that the city would benefit from the replacement and modernisation of its central utilities infrastructure (which in theory at least should mean less frequent road closures due to utility works in the immediate years ahead).

b) Was it correct that the MUDFA works were almost 100% complete at that time? Did that accord with your understanding?

If measured by the length of the tram route this was in my view an accurate statement and accorded with my understanding at the time.

c) Did you have concerns, at any time, as to whether the progress, and difficulties with the MUDFA works were properly reported?

I had concerns that some of the trickier sections of MUDFA were not being presented as case studies to the Board until quite late on in the process. The reporting was at a high level whereas the experience of the city was that some sections of the works were taking an inordinately long time. Although these were not always recorded in the TPB report or minutes they would be referred to orally by Steven Bell when giving his update. At one TPB there was a more detailed presentation on the kind of problems that had been experienced with regard to utility diversions. I don't think it would have been sensible for the TPB to receive a 'hole by hole' account of every MUDFA opening. We were advised about the problem areas. However I agree that the discrepancies in reporting ought have been spotted by the TPB.

109. On the 8th of June 2010, David Mackay, as Chairman of TEL formally notified CEC that the funding envelope of £545 million was likely to be exceeded in order to deliver phase 1a [TIE00084642]

- a) **Why was formal notice given at this time and not earlier (given that it appears to have been known for about one year prior to that that the available funding was likely to be exceeded)? [CEC00244400]?**

The formal notice was a decision for tie to make and represented their judgment that the project would exceed the available budget envelope in all scenarios. In the previous six months tie had exerted a more assertive use of terms of the contract with a view to establishing their view on the interpretation of key clauses. Had these decisions backed up their view on issues such as the risks for ongoing design development then the financial out-turn could have been considerably better. The exact timing of the letter was informed by the Council's request for an update report on the project. This report had been delayed for several months to allow the results of tie's more contractually aggressive strategy to become known.

- b) **In your view, ought formal notice to have been given earlier?**

From a public accounting viewpoint my view is that the possibility of the project exceeding the budget ought to have been communicated formally at an earlier stage probably in late 2009 early 2010 when the balance of probability was that the budget envelope would be exceeded. However, there was deep anxiety within tie and the Council Administration – who had been briefed about the figures informally throughout – as well as the opposition party representatives on the TPB that to declare the budget would be breached would simply play into the hands of BSC: first by "giving them a target to shoot for" and second by opening up a legal question as to whether the city could afford to pay.

110. On 9 June 2010 [TSI00000003] you wrote to TS to notify them that the Council had received formal notification from the TEL board that the full scope of Phase 1a of the project could not be delivered within the budget of £545m and by October 2012.

- a) **Do you consider that Transport Scotland ought to have been formally advised of that earlier?**

Transport Scotland were briefed on the ongoing situation both at the regular meetings Marshall Poulton and myself had with Bill Reeve and John Ramsay and through meetings Richard Jeffrey had with David Middleton. They had known of the risk that the budget envelope could be exceeded for almost a year. It was only once the outcome of adjudications largely favouring Infracore that tie could definitively state formally that the budget would in all possible scenarios exceed the approved £545m budget. Transport Scotland – like the Council – were in a position to have requested a formal view on affordability earlier and the fact that neither party did suggests that both parties were of the view that tie's legal strategy of early 2010 should be allowed to progress so that key points of dispute could be resolved.

- b) **What was Transport Scotland's response?**

My recollection is that matters were quickly escalated to Ministerial level. Shortly thereafter Audit Scotland also became involved.

111. On 24 June 2010 the Council were given an update on the tram project by means of a joint report by yourself and Donald McGougan [CEC00021372]. The report stated that the utility works were now substantially complete (i.e. 96%). The report further stated that *"The essence of the [INFRACO] Agreement was that it provided a lump sum, fixed price for an agreed delivery specification and programme, with appropriate mechanisms, to attribute the financial and time impact of any subsequent changes"* (para 3.3)

It was further noted that *"Whilst there have been disputes on design-related matters ... it is normal in any large construction project for the scope of the project to change in material ways, for a variety of technical and commercial reasons"* (para 3.10) and that *"The outcome of the DRPs, [Dispute Resolution Procedures] in terms of legal principles, remains finely balanced and subject to debate between the parties"* (3.12)

The Report stated that it was "prudent" to plan for a contingency of 10% above the approved funding of £545m because of the current lack of clarity on programme and cost. The Council instructed a refresh of the Business Case.

- a) **What were your views around that time on the extent to which the INFRACO contract was for a "lump sum, fixed price"?**

The intent of the main body of the contract from tie's perspective was that it was a lump sum, fixed price agreement. However, the provisions of schedule part 4 (subsequently tested through the adjudication process) clearly meant that this applied only to the drawings available within the BDDI. The practical effect of tie losing the adjudication clearly invalidated their interpretation of the contract. Reviewing that description now it is clear that although it was tie's intention to enter into a lump sum, fixed price contract the pricing assumptions in Schedule part 4 invalidated this.

- b) **Do you consider that members of the Council were adequately advised and informed, both when the Final Business Case was approved and prior to the INFRACO contract being signed, of the risk or likelihood of the "scope of the project to change in material ways", with a resulting increase in cost?**

I was not working for the Council when the final business case was approved and had no involvement in advising members about it. I came into the Council at the very tail end of discussions relating to the Infraco contract and was advised by the Council's Chief Executive that my predecessor in the role – Andrew Holmes - would continue the work on this as he had been involved in the detail and it would be unrealistic for me to get up to speed quickly given that I had only just taken up post.

- c) **On what basis did you view the outcome of the Dispute Resolution Procedures as "finely balanced"?**

I didn't draft this section of the report. I am not sure who did and what track change amendments may have been made on it. However, the only basis upon which the outcome of DRPs could be said to be finely balanced was that tie had made some progress in reducing the amounts claimed by BSC on specific work items. In terms of adjudication opinions tie was losing the battle. However, tie remained of the view that it was building a case for breach on the basis of failure to manage design and failure to progress works. The description is inaccurate.

- d) **What were your views on whether it was "prudent" to plan for a contingency of 10% above the approved funding of £545m? Did you consider it likely around that time that a line from the Airport to Newhaven could be built for £600m (i.e. £545m plus the 10% contingency)? What was the basis for your views? Ought members to have been advised around that time that there was a significant risk that the actual cost of phase 1a was likely to be much higher? If members were not advised of that, did that affect their ability to take informed decisions in relation to the tram project around that time?**

I think that members were very much aware of the likelihood that the costs would be likely to exceed £600m. The drafting of this report was subject to many comments and changes and the wording eventually arrived at was heavily compromised.

- e) **It appears that, in general, members were given notice of cost overruns and difficulties only after overruns and difficulties had occurred, Do you agree? If so, should members have been advised of these matters at an earlier stage?**

I don't entirely agree with the statement. Insofar as the representation of each political party's transport spokespersons were in attendance every month at the TPB they were getting a 'live play' view of the problems with the project as they unfolded. The same applies to the senior politicians in the Administration notably Councillors Dawe, Cardownie, MacKenzie, Wheeler and Buchanan. However, beyond these elected members I would tend to agree that there was a delay in formally advising Council of the growing problems and a nervousness about doing so on the part of the Administration. There was also a delay at times in tie informing Council Officers about cost related issues.

- f) **Should members, in your view, have been advised at an earlier stage that decisions were being taken as part of the Dispute Resolution Process which showed that significant additional sums were due (and, indeed, that TIE accepted that some additional sums were due)?**

Again it should be noted that all party groups were represented on the TPB through their transport spokespersons and there was no significant delay in reporting the outcome of adjudications to the TPB (the SNP didn't take up their seat on the TPB and the Green Party rarely attended). TPB Board members knew at this stage (June 2010) that the project's contingency budget

was already almost fully committed and that a number of claims on the QRA contingency budget were attributable to DRP decisions that went in favour of Infracore. The dynamics of the project at this stage ^{was} such that it was difficult for tie to provide definitive and reliable figures in likely cost outturns.

112. You attended the meeting of the Tram Project Board on the 30th of June 2010. The minutes [CEC00244400] noted (page 7, para 2.1), under Workstream A (Termination of the contract), that the Board authorised the issue of a Remedial Termination Notice to BSC

It was noted, under Workstream B (whereby BSC completed part of the project and TIE re-procure the remainder on an incremental basis), that intensive negotiations were ongoing with BSC, including in relation to obtaining a Guaranteed Maximum Price (GMP) and programme.

In relation to the works in Section 1A, it was noted (page 11, para 3.4) that Steven Bell recommended that BSC complete the civils related works in Section 1A that were in progress at present (Tower Place Bridge and Lindsay Road Retaining Wall) and that no new sections of works be commenced at this time. The Board ratified the decision that the current ongoing civils works be completed.

a) Do you have any comments on these matters?

I can't recall the details of the discussions at that particular TPB but my views on the need to resolve the outstanding disputes and achieve certainty on cost and programme were made consistently at this time.

- 113 On 4 June and 16 July 2010 R Howie QC issued his decisions in relation to Delays Resulting from Incomplete MUDFA Works) [CEC00375600] and [CEC00310163].

a) Did you see, or seek, these decisions?

No but I discussed their practical effects with Richard Jeffrey to understand their implications for the programme and outturn.

b) What were your views on the decisions?

The arguments set out in R Howie QC's second opinion were quite complex legal ones and I was not familiar with their detail or case law precedents but I realised that the outcome exacerbated the pressures on the budget due to EOT claims.

c) To what extent did you consider the decision favoured TIE or BSC(both in relation to whether there had been a change and in relation to quantum)?

The opinions largely favoured BSC's position

d) To what extent were members informed of these decisions?

Members of the TPB were informed of the decisions at the next TPB and senior Councillors were also informed.

114 By letter dated 29 July 2010 [TIE00885457] Martin Foerder sent BSC's "Project Carlisle 1" proposal [CEC00183919] to TIE.

Under the proposal BSC offered to complete the line from the Airport to the east end of Princes Street for a Guaranteed Maximum Price of £433,290,156 and 5,829,805 euros (less the amounts previously paid), subject to a shortened list of Pricing Assumptions.

BSC's proposal was rejected by TIE by letter dated 24 August 2010 [CEC00221164], in which TIE responded with a counter-proposal of a construction works price (to BSC) for a line from the Airport to Waverley Bridge of £216,492,216, £45,893,997 to CAF, the amount to SDS to be determined and a sum of just under £4,922,418 in respect of Infraco maintenance mobilisation, Tram maintenance mobilisation and Infraco spare parts.

a) To what extent were you / colleagues in City Development, involved in the Project Carlisle proposals and discussions?

There was no involvement of City Development officers in any of the detail of the proposals beyond the initial strategic discussion of Carlisle and Pitchfork at TPB. Richard Jeffrey had brought Tony Rush in to help drive through an agreement. Richard kept me informed as to how the discussions were progressing. I can recall one presentation where I was party to a briefing in tie's offices about project Carlisle given by Richard and Tony Rush.

b) What were your views, in general, on the Project Carlisle 1 proposal and why it did not resolve the dispute?

Ultimately it did not reach a conclusion where the figures arrived at provided a deliverable tram within an acceptable budget. My recollection is that the cost range for achieving a tram to St. Andrew Square was between £630 - £670m and that was considered to be undeliverable.

115 By e-mail dated 1 August 2010 [CEC00473789] Nick Smith sent Alastair Maclean a document, "Tram-Potted History" [CEC00473790].

His e-mail noted "*dissemination of the actual history here could cause serious problems and we definitely don't want to set hares running ... be very careful what info you impart to the politicians as the Directors and TIE have kept them on a restricted info flow*".

1 August 2010
should be 8
January 2010

a) Do you consider that members had been kept on a restricted information flow?

The e mail you refer to is dated 8th January and not 1st August. If Nick's point was that members hadn't received chapter and verse on every aspect of the project I would accept his point and he was correct at that time in asserting

that tie and Council Directors didn't want to set hares running especially as at that stage (January 2010) key aspects in the interpretation of the positions adopted by tie and BSC had yet to be tested through adjudication.

b) Did that apply to events, both before and after Infraco Financial Close?

I think you would need to ask Nick Smith what he meant by restricted information flow. I wasn't involved in any detail before Infraco Financial close. From what I saw in the period from June 2008 to January 2010 the information provided through TPB every month and at key times through informal briefings of senior administration politicians and party groups was reasonably full and factually accurate. What was more opaque was tie's exchanges with BSC.

116. On 7 August 2010 Lord Dervaird issued his adjudication decision in relation to the Murrayfield Underpass Structure including, in particular, whether, under clause 80.13 of the Infraco contract, TIE were entitled to instruct BSC to carry out Notified Departures without a price having been agreed in advance [BFB00053462].

In a Memorandum dated 11 August 2010 [CEC00013622], you set out your view that following a recent adjudication decision in which TIE had lost the argument in relation to their interpretation of clause 80.13 of the Infraco contract (i.e. that they were entitled to instruct BSC to carry out work without a price having been agreed in advance), you were now "deeply concerned" about the project.

a) It would be helpful if you could explain why you were now "deeply concerned" about the project?

Following the setbacks of earlier adjudication decisions tie appeared to have very few contractual levers with which to get BSC moving forward at the required pace. Following Lord Dervaird's ruling that tie could only issue an instruction for BSC to progress specific elements of work if BSC had first provided an estimate it seemed to me that tie had used up what was believed by their advisors to be a potential magic bullet but turned out to be a blank. For me it was the end of the road in terms of tie's endeavours to adopt a more aggressive commercial approach (project pitchfork).

b) To what extent did that adjudication decision cause you concerns for the first time and to what extent had your concerns been building over time?

My concerns had been building over a long period of time. They started with the slow pace of mobilisation on BSC's part and grew with the Princes Street stand-off in February 2009. There was a period where there were some grounds for optimism once Richard Jeffrey got to grips with the project and appeared to be building a positive relationship with David Darcy but then from November 2009 onwards the situation grew steadily worse and despite the injection of fresh legal advice from McGrigors (and also at one point Anderson Strathern) tie clearly ended up in a weakened position following the various rulings that had undermined their view of the contract.

c) How confident were you around that time in the information and advice received TIE and DLA?(see also[CEC00012371])

From the outset I was never wholly confident in the advice given by DLA; it never appeared to be authoritative and was hedged with caveats. By July 2010 any remaining confidence I had in their advice had all but evaporated.

117 Between 9 August and 12 October 2010 TIE served ten Remediable Termination Notices (RTNs) and three Underperformance Warning Notices (UWNs) on BSC. The RTNs and BSC's responses are found at [CEC02084518] to [CEC02084529]. The UWNs are [CEC00378695], [CEC00167342] and [CEC00164758].

In response, BSC both denied that the RTNs constituted valid notices without being referred to dispute resolution first, and, in some cases, also produced Rectification Plans.

a) What were your views on TIE's tactic of serving RTN's?

This was a continuation of the strategy to pursue a commercially aggressive stance using the levers available in the contract and part of tie's attempt to argue that BSC were in breach of their contractual obligations through the cumulative impact of a series of minor breaches. I was certainly of the view that the Princes Street works warranted the issue of an RTN as the surface around the tracks could be seen to be breaking up very shortly after it had been laid and there were a large number of defects that went well beyond snagging items. Tie were clearly keen to articulate the areas of their concern about poor quality work in writing so that if there was ultimately a parting of the ways - and a tie step in - the cost of remedying these defects would be deducted from any negotiated exit of BB from the project.

We understand that in October 2010 CEC took independent legal advice from Shepherd and Wedderburn in relation to possible termination of the Infraco contract (see [CEC00012498]).

b) Why did CEC seek independent legal advice on termination? What were your views on termination?

CEC took independent advice to ensure the Council had a clear understanding of the costs of termination and the range of liabilities that would fall to the Council if the contract were to be terminated. I regarded termination as a last resort. Given the sunk costs at that stage and the mess that termination would be likely to create with ongoing legal actions, damages claims and the need to make good construction sites along the route (even if on a temporary basis until a fresh procurement exercise could be concluded).

118 On 20 August 2010 CEC officials (including yourself) met with TIE representatives to consider TIE's Project Carlisle Counter Offer. A record of the meeting [CEC00032056] noted a range of costs of between £539m-£588m for the Airport to St Andrew Square and a range of between £75m-£100m from St

Andrew Square to Newhaven, giving a total range of costs, from the Airport to Newhaven, of £614m-£693m.

It was noted that this was essentially a re-pricing exercise for the completed design (which was thought to be approximately 90% complete) with the intention of giving TIE certainty and that all of the pricing assumptions in Schedule 4 of the INFRACO contract would no longer exist.

a) What were your views on these estimates? How reliable did you consider them to be?

The figures had been arrived at with substantial input from Tony Rush who had extensive career experience in the civil engineering industry and major project disputes. He exuded confidence that the figures were reliable estimates. A lot of the work that needed to be completed for the phase 1 section concerned off street sections where utilities risks were minimal and traffic management was not necessary. I asked some questions on the proposals and was satisfied with the responses I received.

b) What design did you consider to be incomplete around that time and why?

Around 10% due to a combination of failure on the part of BSC to manage the SDS process, but also to tie and 3rd party approvals.

c) What MUDFA works did you consider to be incomplete around that time and why?

Less than 5%; mainly in the stretch from Haymarket to Shandwick Place.

119. On the 31st of August 2010 [CEC00002041] [CEC00002042] Nick Smith circulated a risk matrix to assist you and other CEC officers to assess the most viable option for the project. It set out the pros and cons of cancelling, continuing or postponing the project.

a) What were your views? What did you consider to be the best option and why?

Of the options set out by Nick Smith my view was that Carlisle represented the best option as - on the basis of tie's legal advice to date – I was not wholly confident about tie proving Infraco were in default.

120. We understand that Alastair MacLean joined CEC around December 2009 as Head of Legal and Administration and that Ms Lindsay continued to be employed by CEC until August 2010.

a) What was your understanding as to Ms Lindsay and Mr MacLean's respective roles, and responsibility for the tram project between January and August 2010?

As far as I could see Ms Lindsay was playing no active role in the tram project at that stage; it is possible she may have been line managing Nick Smith but she certainly wasn't visible. Alastair MacLean did gradually get involved in the project but he was still getting up to speed with his new role in the first half of 2010 and dealing with other priorities including the Council's Alternative Business Models project which involved plans to outsource certain Council services to private sector companies. My recollection is that Alastair began to get involved in the tram project in a significant way from the early autumn of 2010.

b) Did you have any concerns, at any stage, about the advice provided by CEC legal?

I was never wholly confident in the advice offered by Ms Lindsay. Jim Inch kept a tight control of the budget for commissioning external advice and was reluctant to commit money given that DLA were retained by tie. I found Nick Smith to be first class in his grip of key issues. Likewise Alastair MacLean, who demonstrated a very sharp analytical mind once he became involved.

c) What was your understanding as to why Ms Lindsay left CEC around August 2010?

I have no idea. It was not uncommon for staff to leave the Council without any apparent explanation. Her departure preceded a fair number of similar departures from Legal and Administrative services shortly thereafter. The Council was looking to achieve around £25m in savings at this time and Alastair was also seeking to refresh a Service that was perceived to be in need of improvement.

121 By letter dated 11 September 2010 [TIE00667410], BSC submitted its "Project Carlisle 2" proposal to TIE, in which BSC offered to complete the line from the Airport to Haymarket for a Guaranteed Maximum Price of £405,531,217 plus 5,829,805 euros, subject to the previously suggested shortened list of Pricing Assumptions. By letter dated 24 September 2010 [CEC00129943], TIE rejected BSC's proposal. Mr Foerder responded by letter dated 1 October 2010 [CEC00086171].

a) What were your views on that proposal?

I didn't see it.

122. Yourself and other CEC and TIE officials met with Transport Scotland on 24 September 2010 for a "Quarterly Review meeting" under the terms and conditions of the grant agreement. The minutes of the meeting note that the purpose of this particular meeting was to concentrate on negotiations, timing and financial implications [TRS00011378]. In terms of actions required, it was noted that the Council would provide an improved, overall project completion progress metric that would permit a better appreciation of overall progress against current costs.

a) Why was this necessary and was this ultimately provided?

TS believed that the technical, civil engineering project reporting produced by tie wasn't helpful in letting the public know, for example, that 22 of the tram vehicles had been completed; the Depot was 80% constructed. TS were looking for tangible milestones that could be relayed to the public whose primary experience at that point was of the disruption caused mainly by the MUDFA works. Thereafter tie did produce information in more user friendly format drawing upon the communications expertise of Mandy Haeburn-Little.

123 In October 2010 TIE and CEC explored terminating the Infraco contract. A special planning forum ("War Room") was established. On 13 October 2010 Alistair Maclean sent an e-mail to Donald McGougan[CEC00012760] stating that the special planning forum was for CEC and not TIE – *"TIE should come along to help us where we need them but not take control!"*.

a) What were your views on that issue?

Alastair didn't copy the e mail to me so I had no views to offer. Having read it now I think his judgment was sound.

b) Was there a change of approach on the part of CEC around that time to 'taking more control'? If so, why had that happened? Should it have happened earlier?

Project Carlisle had been seen to offer the best route forward but Richard was now preparing a plan b for termination. He was running ahead of Senior Council Officers who could only see political grief and major problems for the city if sites were abandoned and there followed years of potential litigation. BSC's refusal of Tie's Carlisle proposals effectively took tie out of play. The Council now had no option but to step in and take control. With hindsight this should have happened earlier – probably following Lord Dervaird's ruling if not earlier but there appeared to be some positive signs of traction when the Carlisle process initially kicked off.

124 By letter dated 13 October 2010 [TIE00301406] BBS wrote directly to Councillors giving their views on the dispute.

a) What were your views on that letter?

While it was factually consistent in relation to the outcomes of adjudications it described a very different picture to that described by tie. BSC's claim that "we have consistently sought to work in a positive and cooperative manner" did not square with any report that had previously been made by senior staff within tie. It didn't square with the fact that BSC had immediately resourced up with 30 staff pursuing claims but over 2 years in had only just mobilised some of their sub-contractors.

125 By joint report to Council on 14 October 2010 [CEC02083124] Donald McGougan and yourself provided a refreshed Business Case for the tram project, focussing on a line from Edinburgh Airport to St Andrew Square, with a high degree of

certainty of cost and programme certainty.

The report noted that the contingency planning work undertaken by the Council and TIE had identified funding options which could address project costs of up to £600m. It was stated, *“Due to the current uncertainty of contractual negotiations, it is not possible to provide an update at this time on the ultimate capital costs of the project”* (para 3.1).

It was noted that *“The overall outcome of the DRPs, in terms of legal principles, remains finely balanced and subject to debate between the parties”* (para 2.50) The report put forward termination of the contract as one option. It was noted that extensive legal advice had been taken and continued to be taken.

The report did not, however, give an indication of the likely cost, or range of costs, of the different options with the Project Carlisle offers and counter offers, for example, not being referred to.

- a) **We understand that on this occasion Councillors were unhappy with the level of detail provided and required a more detailed update of the Business Case. On what matters did members wish to receive more information? Were Councillors satisfied with the information provided[CEC00066037]?**

My recollection is that members were unhappy that they did not have sufficient information upon which to make informed decisions about options for the future of the project. Work was done by Alan Coyle to update the business case. The fundamental aspects of passenger demand hadn't changed but members wanted more information on likely costs and risks to be able to consider the implications of phasing options e.g. to Haymarket or St. Andrew Square.

- b) **Did the statement that the outcome of the DRPs remained “finely balanced” still accord with your understanding at that time? To what extent, if at all, was the legal advice that had been obtained by the Council and/or TIE in relation to the contractual disputes made accessible to elected members? Were the adjudication decisions made available to members?**

Members were advised that tie had sought further external legal advice and the nature of that advice was shared with senior politicians and party groups in a round of meetings that Richard Jeffrey undertook to brief members on tie's position. With regard to the outcome of the DRPs at that stage BSC had the advantage in terms of several major adjudications. These had in some cases set important precedents with serious cost implications for the programme. Tie had chalked up a number of small wins and managed to reduce the value of individual claims. However, in October 2010 it was inaccurate to describe the position as finely balanced.

- c) **If the adjudication decisions and legal advice were not provided and/or made accessible to members, to what extent did that affect the ability**

of members to come to informed decisions in relation to the tram project?

For those members who were not briefed fully on the adjudication decisions the lack of detail could have had a material effect on their ability to reach informed decisions. However, even if they had received detailed knowledge of each decision there were still so many unknown variables that it would have been difficult to make informed judgments about the best course of action.

- 126 An e-mail dated 11 November 2010 by Tom Aitchison expressed certain concerns to you about the support being provided by the City Development Department [CEC00037011].

a) What was your view on the matters in that e-mail?

I think Tom made a valid criticism although in my view it was a little unfair. I had a number of pre-existing commitments to presentations on city development including one supporting the Council Leader presenting Edinburgh's case at the Scottish Cities Alliance. With hindsight I should have withdrawn from the conference that I attended on innovative infrastructure funding. I had thought it might offer potential solutions for funding the completion of the project. The Council was beginning to explore options such as bond finance or sale and leaseback to secure the necessary funding to complete the project. Much of the work that needed to be done at this time involved Finance rather than transport policy input. I suspect Donald felt he was sharing an unfair amount of the burden and he probably was. I remained active working with TIE and dealing with pressures from the business community especially the West End traders who were feeling a direct impact on their trade due to reduced footfall while the construction works were underway. It was unfortunate that I was away from the office for a total of four days in November. I was involved in several tram related meetings at that time and was also heavily committed to preparations for the Winter Festivals.

- 127 By e-mail dated 13 November 2010 to Tom Aitchison and Jim Inch, Alastair Maclean [CEC00013289] attached a paper setting out certain concerns [CEC00013290], including noting that "*TIE had continued to use DLA as its advisors in relation to the potential termination, but following adverse comment from CEC TIE have engaged McGrigors*" (para 2.5) and "*as you are aware (and as we have seen from some of the adjudications to date) I have real concerns as to the quality of the factual information coming from TIE*" (para 7.3). In e-mails dated 22 and 30 November 2010 Mr Maclean expressed certain concerns about TIE and the legal advice received by TIE (see e.g [CEC00013411],[CEC00014282] and [CEC00012450]).

In an e-mail dated 24 November 2010 to Mr Maclean [CEC00013441], Richard Jeffrey stated, "*if the Council has lost confidence in TIE, then exercise your prerogative to remove TIE from the equation*".

a) What were your views on these matters?

This was the first stage at which Alastair had become actively involved in the details of the project and its legal history. His intervention was welcome. His analysis of the current status of the legal workstream was cogent. I think his criticism of tie having moved their preferred tactics on several occasions over the previous 3 month period was valid. I didn't see all the RTN's and can't make a judgment on how well prepared they were. I believed that tie's move to press for breach on the basis of BSC's failure to manage design and failure to progress the works was a potential route forward and was encouraged that the advice they had sought from Richard Keen QC appeared to back this course of action. However, it was evident that failures within tie were also partly responsible for the problems experienced with design and therefore pursuing this course of action was not without risk.

Richard Jeffrey's statement was self-evidently true i.e. if the Council no longer had trust in tie it should intervene directly. At earlier stages of the project Tom Aitchison had been consistent in stating that the contractual disputes lay between tie and BSC and he therefore guided against direct contact with BSC by the Council.

128 On 16 November 2010 Richard Jeffrey advised Alastair Maclean of certain serious concerns he had in relation to events at the time the Infraco contract was entered into. On 17 November 2010 [CEC00013342] Mr Maclean produced a Note setting out Mr Jeffrey's concerns.

a) Were you aware of Mr Jeffrey's concerns?

Not at that stage. It was only during the preparations for mediation in January – February that Richard advised me of his concerns and that there were suspicions about the negotiations that had taken place between preferred bidder and contract close. Interestingly until I read the attached note CEC00013342 in response to this question I was unaware that Andrew Fitchie had previously been embedded within tie.

b) If so, what were your views?

I was out of the communications loop on this issue in November 2010.

c) What was done in response to Mr Jeffrey's concerns?

I am not aware what action was taken.

129 A report to the meeting of the IPG on 17 November 2010 [CEC00010632] noted that a range of cost estimates for the different scenarios were being produced. The draft estimate for Project Carlisle varied between Tie's estimate of £662.6m and BSC's estimate of £821.1m. These estimates were for the full scheme and the report noted that the cost estimates, as they stood, indicated that delivery of the project to St Andrew Square could be delivered for £545m-£600m.

a) To what extent did you, or other Council officers, have an input into producing, or checking, these figures?

The estimates were produced by tie with input from Gregor Roberts (tie's Head of Finance) and Tony Rush (a consultant). They would have worked with the Councils' Principal Finance Officer, Alan Coyle, who reported to Donald McGougan and had been seconded into tie by the Council. I didn't check the figures but I did attend a meeting organised by Richard Jeffrey at which Tony Rush took me and others through each of the scenarios and explained the assumptions underpinning each one. Tony also gave his views on the BSC figures.

130. On 22 November 2010 [TIE00304261] Richard Jeffrey shared a draft correspondence to the Chief Executive of the Council. In his email he said "*I believe that many of the issues we are dealing with have been baked into this project from the very beginning, the bulk of which were explained in my presentation to Sue Bruce (attended by Dave Anderson and Donald McGougan) on 5th November.*" [CEC00040807]

a) Do you recall the main points made by Mr Jeffrey in his presentation [CEC00040807]?

CEC 00040807 appears to be missing from the documents that I downloaded. My recollection is that the gist of Richard's presentation concerned the fact the design works were incomplete at financial close (a three wheeled car); that the pricing assumptions in Schedule part 4 undermined tie's position and that there appear to have been exchanges and agreements between the preferred bidder stage and contract award that left tie open to further claims.

b) **What were the issues "baked into" the project from the beginning? Did you agree with the points made by Mr Jeffrey?**

The failure to complete the designs; the failure to complete utilities; the exposure to claims arising from the pricing assumptions in schedule 4. Yes I did agree with his key points.

c) **Richard Jeffrey noted that CEC expected to direct the strategy for the mediation and that if CEC wished to take control of the project, or any aspect of it, then he would like this to be formally communicated to the board. Did CEC or TIE ultimately direct the strategy for the mediation (and why)?**

CEC directed the strategy for the mediation. This was a decision taken by the incoming Chief Executive Mrs Bruce. I presume that she consulted the Leader and the new Chairman of TEL Vic Emery before doing so.

131 By letter dated 6 December 2010 [TIE00668156] Alastair Maclean advised Richard Jeffrey that following a meeting that day with Tom Aitchison and Donald McGougan, CEC's preferred strategy (for commercial reasons) was to move to mediation on a short-term basis, ideally with a view to both sides "walking away" from the Infraco contract.

a) What were your views on this strategy?

I understood the need to move to mediation but I would have preferred to give tie a little further time to strengthen their legal position as Richard wished to do. At this stage the project had incurred just under £400m in committed expenditure. I shared Richard's concerns that moving to mediation as a result of political pressure to do so played into BSC's hands.

132 On 16 December 2010 Tom Aitchison provided the Council with an update on the refreshed Business Case [CEC01891570].

The report noted that a line from the Airport to St Andrew Square was capable of being delivered within the current funding commitment of £545m.

At the meeting an amendment was passed by members to request a review of the business case by a specialist public transport consultancy that had no previous involvement with the Edinburgh tram project (see Minutes, [CEC02083128], p22).

a) Did you have any input into drafting the report to Council?

No

b) Why did members wish an independent review by a specialist consultancy with no previous involvement with the tram project? What were your views?

Given the variation in the range of cost estimates produced by tie and BSC I think elected members wished to see an independent third party view. I was not consulted about the choice of the professional services company which produced these figures. I have no doubts about their professionalism as construction industry QS and cost consultants but I did not regard them to be transport infrastructure experts.

133 By e-mail dated 17 December 2010 [TIE00891350] Richard Jeffrey asked about the current status of CEC approvals and consents (and noted "to get a fixed price we need a fixed design, and this includes approvals").

a) What was your understanding at that stage regarding the extent to which design had been completed and all necessary statutory consents and approvals had been obtained?

It appeared that there was backlog of around 6 weeks' work in clearing statutory consents. Just under 20 consents out of 229 had yet to be cleared.

b) Did you share the understanding that it was BSC's responsibility to obtain these approvals, but that BSC were protected from any delays which were down to the approvers (in this case CEC) acting unreasonably?

It was my understanding that BSC were responsible for obtaining statutory consents and providing the necessary information for planning and building warrants, roads and structures and that they were protected in this way.

134 On 20 December 2010 you provided Richard Jeffrey with comments on his Project Resolution Report [CEC01927384].

a) By way of overview, can you confirm what your main concerns were?

In preparation for mediation I was keen that the mistakes made first time around were not repeated. This meant getting the design as complete as possible to minimise any further claims with regard to changes; sorting out the remaining statutory consents; understanding the costs of progressing DRPs (legal fees etc) so as to get a better understanding of the net savings; focusing on the delivery of sections of the programme where work had stopped for a considerable period of time; managing future integration risks (principally the interfaces between the power systems and the tram vehicles); ensuring that future disputes about defects liabilities would be minimised (because tie held comprehensive design information) in the event that the Civils contractor sought to blame construction failure on inadequate design. I also wanted tie to be rather more objective and self-critical going into mediation. Whilst I believed some aspects of BSC's behaviour to be unacceptable tie also had failings and I wanted to see a mature recognition of this.

b) It would be helpful if you could expand upon your comment that there was a lack of visibility in the design process?

I felt that there had been a lack of project grip in relation to design and it was never fully clear where the bottlenecks lay in the production of design detail e.g. to what extent did failure occur due to inadequate specification in the employer's requirements; to what extent were BSC failing to manage SDS; to what extent were the disputes over what constituted a client instructed change clear; to what extent had communications across several different design offices failed; and to what extent were delays in firming up statutory consents or and changes required by third parties part of the problem.

c) In his response to your letter dated 17 January, [TIE00081667], Richard Jeffery noted that "Tie are not provided with any visibility by BSC of the flow of design information between BSC and SDS in order to complete the overall design". He further noted that TIE would not expect to hold detailed design information as " BSC are responsible for providing an assured and integrated design". Finally he stated that "lack of a completed integrated design, is a principal reason that BSC have not been able to progress construction at a number of locations".

Did it concern you in light of the fact that Infracore were treating any change to the drawings as a client change that incurred an additional cost?

Yes it did. Some of the changes appeared clearly to be down to a failure to manage properly the design process that BSC was supposed to be responsible for following novation.

- d) In the third paragraph from bottom of page 3 you note that Scott Wilson, in their "Design Assessment Summary dated November 2010" had noted that "the design process continues after the statutory consents have been given".

Did that cause you any concerns? Did TIE (specifically Steven Bell) inform you what was being done to address these concerns and manage the situation, as you requested?

It did cause concerns that a design approved through a statutory consent might subsequently be changed in a material way that (had the change been known at the time of the consent) might not have been approved or might fail to adhere to specific planning conditions. I did subsequently talk with Steven Bell and he explained how tie was managing the process.

2011

135. The Highlight Report for the meeting of the IPG on 21 January 2011 [CEC01715625] noted that both Nicholas Dennys QC (instructed by CEC) and Richard Keen QC (instructed by TIE) had advised that the best option was to seek to enforce the contract until grounds of termination could be established as a result of a failure to perform the works, which option would also place TIE in the strongest position with regard to any mediation/negotiated settlement. It was unclear to what extent there had been a rigorous approach by TIE to enforcement of the contract pending the Carlisle negotiations and the focus on the termination option.

a) **What was your view on these matters?**

It is difficult for me to reach a clear view on this as I wasn't involved in any way in the day to day administration of the contract. From my perspective it seemed that every time ^{tie} tried to enforce the contract BSC managed to frustrate the process. I am not sure there were sufficient levers in the contract to press the enforcement of the work. With hindsight, tie's strategy of building the case for termination on grounds of breach at the same time as pursuing Carlisle may have been misguided as when it looked as though Carlisle might provide a way forward, tie possibly eased up on pressing the enforcement of the contract.

b) **Were elected members advised of the matters noted above?**

The Members of the Tram PMB were kept apprised and the Council's new Chief Executive, Sue Bruce arranged member briefings on key matters in the run up to the mediation of March 2011.

c) **Who decided that TIE/CEC should nonetheless proceed to mediation at that time and why?**

I am not 100% clear but following the LiB/Dem emergency motion of November 2010 for mediation to be progressed the incoming Chief Executive, Sue Bruce took the decision following consultation with the

Council Leader Jenny Dawe and advice from Alastair MacLean, Head of Legal Services. I am aware that there were discussions with Transport Scotland and Ministers around that time but I do not know what advice or direction may have been given following those discussions. The exact timing of the mediation followed discussions with BSC and was planned around the availability of senior executives and the chosen mediator.

136 On 24 February 2011 BSC provided its "Project Phoenix Proposal" to complete the line from the Airport to Haymarket for a total price of £449,166,366, subject to a shortened list of Pricing Assumptions [BFB00053258].

a) What were your views on that proposal?

It seemed to me that it confirmed BSC's unwillingness to accept any on street risk and to build only to the agreed drawings. Given that their original bid had been £245m for the entire length of the project (23kms to Newhaven) the quoted price of £449m to Haymarket (covering a section that was almost entirely off street and in part followed the guided bus route) the price appeared excessive (certainly when compared with the transport industry benchmark of around £13m per kilometre for laying tram track). I recognised certain structures had changed as a result of design alterations e.g. Murrayfield Tram Stop but it still appeared an excessively high price. It also seemed to be to be flawed to terminate at Haymarket. I didn't have access to the patronage modelling data at that time but common sense told me that most people arriving at the Airport would want to travel into the heart of the city and if the tram went only to Haymarket people would stick with using the bus or take a taxi.

137. On the 1st of March 2011 [TIE00685894] Richard Jeffrey sent you an email in which he stated that TIE could not agree with the following:

- The price:- We can see no justification for this level of price increase. The original Civils/System price was £240m for a depot and 18km, (roughly £13m/km), the new price is £390m for a depot and 11km, (roughly £35m/km), nearly **3 times** as much.
- The fact that the price is based on a set of drawings, not on the employer's requirements:- We need a price (fixed with a very few exceptions) for a tram operating to Haymarket, which meets the employer's requirements, any risk associated with approval or completeness of the drawings is a BSC risk.
- The concept that any change to the drawings is a client change:- we need a definition of client change as **only** those things resulting from a client instructed change in ER's or a limited number of clearly defined client risks, e.g. fossils or antiquities. (please note that whilst our focus has been on the Civils, we must not create a situation where we open a door for Siemens).
- There is no 'time is of the essence' obligation on them
- The proposed changes in the structure of management of the project place far too much control with BSC. Partnership is OK, handing over control is not.

a) What were your views on Mr Jeffrey's comments?

I agreed with Richard's views. Not only did the proposal made by BSC fail to deliver against the employer's requirements it failed to protect tie and the Council and to achieve a Guaranteed Maximum Price. I saw it as an opening gambit and thought it totally unjustifiable. I was also concerned from a procurement perspective about how such a deal could be squared with the requirements of fair and open competitive tendering and the obligation upon the Council to secure best value.

138 Mediation talks were arranged for March 2011. In the run up to mediation:

a) What preparations for the mediation were undertaken by CEC? (see e.g. the report to the IPG on 21 January 2011 [CEC01715625] and the Action Note of that meeting [CEC01715621])?

Drysdale Graham

A number of meetings were held in tie's offices from January to March and attended by Sue Bruce, Vic Emery, Richard Jeffrey, myself, Donald McGougan, Ritchie Somerville (my business manager who took notes) and two lawyers from McGrigors: Brandon Nolan and ???. The meetings focused on the strategy and tactics for mediation; the preparation of Mrs Bruce's opening mediation statement; the venue for mediation and the choice of mediator. The meetings were also a means of bringing Mrs Bruce and Mr Emery up to speed with the history of the project as both had only recently been appointed to their respective positions.

b) What part, if any, did you play in these preparations?

My primary role was to ensure that Mrs Bruce as the Council's newly appointed Chief Executive was brought up to speed with the history of the project and main points that were in dispute between the parties. I also ensured that actions agreed were captured and followed up on.

c) What were the main objectives of the Council going into the mediation? (see e.g. the Project Phoenix Statement dated 24 February 2011 [BFB00053293])

The main objectives were to secure a full settlement of all historic claims in dispute between the parties; to secure a Guaranteed maximum price from the Airport to Haymarket off street section; an agreed date for completion of the section and to secure agreement on the balance of the project to St. Andrew Square: such agreement being in place by September 2011.

139 By email dated the 2nd of March you indicated that you agreed with Vic Emery's comments, that BSC had behaved unacceptably [TIE00685906].

a) What were your views on the "negotiating tactics" employed by the Infraco?

I thought they were appalling. From the outset of the project they seemed to

show more interest in working the contract to secure additional monies through a highly aggressive claims culture than they did in mobilising their resources to get on with delivering the project. I had not experienced such an aggressive approach to claims in any major contract I have worked upon, either before then or since. Their tactics came as no surprise. Each time they were given an inch they tried to take a mile. They may have simply been testing the mettle of the Council's new Chief Executive who was under huge pressure to deliver a deal.

140 Mediation talks took place at Mar Hall between 8 and 12 March 2011. TIE prepared a mediation statement [BFB00053300] as did BBS [CEC01927734]. We understand that a statement "ETN Mediation – Without Prejudice – Mar Hall Agreed Key Points of Principle" was signed by the parties on 10 March 2011 [CEC02084685] (the principles of which were then incorporated into a Heads of Terms document [CEC02084685]).

a) Were you present at the mediation? If so, what role did you play in the mediation and what advice, if any, did you provide?

I was present at the mediation. I didn't take part in any of the negotiation sessions in which the mediator went through the framework of issues to be discussed with the principal parties, except one in which Sue Bruce asked me to take notes of the session. I was present for the opening plenary session

at which Sue Bruce for the Council/ tie and Richard Walker for BSC set out their respective side's statements. I also attended debriefing sessions when Sue and Vic Emery set out the issues discussed and points agreed upon. Sue Bruce used the services of Colin Smith an independent surveyor for advice on the proposals emerging from the mediation discussions. On the final day of mediation I drafted a revised governance model for the conduct of the project post mediation. This was built around the principles of Prince2 guidance and proposed a joint Project Board and agreed independent adjudicator.

a) What discussion, and negotiation, took place between the parties during the mediation? Was there, for example, a series of offers and counter-offers?

I wasn't involved in the discussions and negotiations; neither was Richard Jeffrey. These were led by Mrs Bruce, Mr Emery and Mr Smith all of whom had less than 3 month's experience of the project. In the debriefing sessions they advised the other staff who were there of the points that had been discussed on key issues such as assurances about liability for delivering a fully integrated tram system; where the turn back point would be delivered (York Place); what would be done to store the materials bought for the balance of the line from Picardy Place to Newhaven ensuring the Council had full title to these materials; and what arrangements would be put in place to clarify the extent of utility diversion works on the stretch from Haymarket to Lothian Road.

b) To what extent, if at all, did CEC's position change over the course of the mediation?

It seemed evident that Mrs Bruce and Mr Emery wanted to secure a deal that would see an operational tram system delivered given the realpolitik of the situation. The option to pursue a mature divorce receded. Both parties were keen to secure a settlement.

c) To what extent, if at all, did BBS's position change over the course of the mediation?

Not a lot as far as I could see. The mediation outcome seemed to give almost everything they were looking for.

d) When were the Heads of Terms agreed i.e. were these terms agreed at the mediation or in the weeks and months following the mediation?

Outline Heads of Terms were drawn up at the mediation and firmed up over the next month or so following comment by each side's respective legal advisers.

e) Why was agreement reached on the basis where the works were divided between the off-street works (in relation to which a price was agreed) and the on-street works (in relation to which a price would be agreed)?

This was done because BSC argued they couldn't measure and therefore quantify the level of underground risk associated with the remaining on street section.

f) What were the views of yourself (and other CEC officers) on the outcome of the mediation?

I can't speak for others' views. However, given that just over £400m had been spent on the project at that time and around £540m committed it seemed to be that the price agreed was higher than it should have been possibly by between £50m - £75m given the figures produced following Tony Rush's analysis of Project Carlisle. However, my recollection is that Mr Rush's figures excluded the cost of remediating the tram tracks on Princes Street which BSC agreed to do at their expense as a mark of their commitment to the mediation agreement.

g) What did parties envisage would happen after the mediation to give effect to what had been agreed, and within what timescale?

It was envisaged that Mrs Bruce would brief Council Elected Members and Ministers on the proposed settlement terms and that BSC would seek approval through the Boards of the respective constituent companies. Minutes of Variation were to be drawn up regarding the operation of the

contract. It was also agreed that the Joint Project Board would be set up to oversee progress and that progressing the agreement further would hinge upon a return to normal working by BSC along key areas of the track notably around Haymarket and other high profiles sites. It was agreed that a report on the project would be taken to Council in June 2011 and that dependent on satisfactory progress a further report would be prepared for Council in August with a view to having the full post mediation agreement and governance arrangements in place by September 2011.

h) When, and by what means, were members of the Council first advised of the agreement reached at Mar Hall?

A series of briefing meetings on the outcome was set up shortly after the mediation was concluded and key members were kept informed in the subsequent months with a full report to Council that I prepared for the Council's June 2011 meeting.

141 By email dated 12 May you informed colleagues that elected members wished to see the full details of MOV5 (i.e. the settlement agreement) before holding a formal debate on the issues [BFB00096514].

a) Why did members wish to see full details of Mov5 before holding a formal debate?

In order to ensure that they understood the implications of MOV5 before reaching a decision on the Council report.

142 By email to you dated 13 May [TIE00312857] , Richard Jeffrey noted that a decision had been taken to formally suspend the TPB and replace it with the Joint Project Group and the Joint Project Forum immediately after the TPB on the 8th of June.

a) Why was this decision taken?

It was recognised the contract between tie and BSC had led to numerous conflict situations and that going forward the contract needed to be administered in such a way as to enable the Council to fulfil its role as project sponsor more effectively, rather than relying upon a third party to make decisions on its behalf. The main body of the contract required both parties to work together and solve problems in a constructive manner. This hadn't happened in the nearly three year period since the project commenced. Tie had been set up as a delivery vehicle on the direction of the then Scottish Executive but the balance of funding over the £545m that was needed to complete the project would be coming from the Council; it was appropriate for the Council to step in directly to ensure the Employer's Requirements were delivered within the terms of the settlement agreement and that any new problems that required resolution could be dealt with through the Joint Project Group (at operational level) and referred to the Joint Project Forum if decisions were needed at a strategic level.

143 On 16 May 2011 you gave the Council an update [CEC01914650].

- a) **What were members told about the Mar Hall agreement? Were they advised of the sum agreed for the off-street works and the target price for the on-street works (and, if not, why not)?**

Members received information in the form of a confidential appendix to the June report. They had also received prior briefings on the terms of the settlement agreement. The agreement was split into two parts MOV4 dealt with work that BSC were tasked with progressing immediately where there was no reasonable excuse for not doing so. Members were advised about the target price for MOV5 but told that negotiations on the details of pricing the on street works it involved were still continuing.

- b) **Had members been advised of the outcome of Mar Hall before this meeting of Council? If so, when and how? If not, why not?**

My recollection is that informal briefing sessions were held shortly after Mar Hall to advise elected members of the outcome of the mediation and the proposal to split the agreement to allow immediate works to progress under MOV4 while negotiations on the final details of the on street sections were concluded.

144. In June 2011, McGrigors produced a draft report, "Report on Certain Issues Concerning Edinburgh Tram Project – Options to York Place" [USB00000384]. In June 2011 Atkins produced a report for CEC [CEC02085600]. A further report was produced by Atkins in July 2011 [CEC01914308].

- a) **Why were these reports instructed?**

The reports were instructed by the Chief Executive and overseen in the Council by Alastair MacLean, Nick Smith and Alan Coyle. My understanding is that the McGrigor's report was commissioned to ensure there was an independent legal review concerning the options available to the Council and the costs and potential consequences of its preferred option. The updated report by Atkins was a sense check that from a transport engineering construction perspective the assumptions made by McGrigors in drafting their report were reasonable.

- b) **To what extent did these reports inform CEC's decision making as to which option to follow?**

My view is that there was strong political pressure to complete the project and that the Council's Chief Executive Mrs Bruce and the Chairman of tie/TEL were keen to deliver the tram to St. Andrew Square. I think these reports were commissioned primarily to check that this option was reasonable, relative to the costs and risks associated with other options.

- c) **What were your views, in general, on the reports?**

They were never shared with me. Having read them now my sense is that they are rather high level and don't add a lot of value.

145. On 30 June 2011, you provided a report advising the Council of the options for the tram project [CEC02044271].

It was recommended that the Council complete the line from the Airport to St Andrew Square/York Place, at an estimated cost of between £725m and £773m, depending on the risk allowance.

a) Why had you come to the view that that was the best option?

I was of the view somewhat reluctantly that completing the tram to the city remained a better prospect than the alternative course of action which seemed to be fraught with uncertainty and likely to lead to years of litigation with no end product to show for the millions invested. It was clear that the Council's Chief Executive, the Chairman of TIE and the Council Leader saw the settlement agreement option as the best one. I wrote the report with their views in mind and set out the pros and cons of the main options. Unlike earlier reports which were usually drafted by less senior officers and edited and approved by me the June 2011 report was written almost exclusively by me with input on costs from Alan Coyle.

b) How was that received by members?

I can't recall the details of the debate. There was a bit of 'told you so' from the SNP Group. The Labour and Conservative Groups wanted to minimise further risks by terminating the contract with BSC at Haymarket following completion of the off street works.

146. An e-mail dated 8 July 2011 from Dennis Murray, TIE, sought to explain why Siemens sought to add £14 million to the target On Street price agreed at Mar Hall [TIE00688781].

a) In your email dated 15 July you stated that you did not see the justification for this [TIE00356821]

That is correct.

b) It would be helpful if you could set out your understanding of why Siemens sought to add that sum?

I really have no understanding of why Siemens changed their position. My understanding was that the agreements reached at Mar Hall were intended to have swept up historical claims and I could see no obvious change to the tasks we were paying Siemens to undertake.

c) How was the matter resolved?

I don't know. At this stage Mrs Bruce was using Mr Emery and in particular

Colin Smith to progress the negotiations around MOV5. I don't know how the Siemens claim was dealt with. Mr Smith was reporting directly to Mrs Bruce and Mr Emery at this stage.

d) Were elected members consulted?

I don't know.

147 On 20 August 2011, you sent an email to Sue Bruce, Carol Campbell, Alastair Maclean and Colin Smith noting concern that Infracore were using the same tactics they had in 2007/08 when the period between preferred bidder award and financial close was clearly used to their advantage through devices such as Schedule part 4 to rack up claims [CEC01733343]. You felt that you could not settle the agreement while matters in respect of the design and utilities works were still outstanding. In your email dated 15 July you stated that you did not trust the Infracore to deliver on the employer's requirements.

a) It would be helpful if you could explain your concerns and why you thought that Infracore were using tactics they had used in 2007/08?

My concerns were that points that were understood to have been covered off at mediation appeared to be gradually being unpicked through further conditionality on the part of BSC; e.g. it would have been impossible to provide BSC with exclusive access to sites for utility works for unspecified periods of time given the need for statutory utilities to get access for essential repairs. It seemed to me that they were beginning to undermine the principles agreed at Mar Hall by seeking to add small print details that would work to their advantage but carry risks for the Council. At that time I had recently met with the under-bidders for the original contract who had made an approach following mediation to ask if the Council would be interested in them completing the project. The discussions didn't go terribly far but I got an insight into the period in 2007/08 when BSC were appointed as preferred bidder.

b) What were your views on Alan Coyle's response?

I was surprised by his comments on the design approvals and suggestion that tie had no locus. He hadn't raised this as a concern with me at any point in the previous three years. I accept that it was BSC's responsibility to produce a design that met the ER's but given their failures in managing the design process and progressing it on time it was appropriate that tie ensured the designs BSC produced were fit for purpose and compliant from a planning and transport perspective even although it was for Council Officers to clear the approvals. There were still some drawings outstanding three years after responsibility for design had been novated to BSC and in the period from March to June planning and transport had worked for long hours to ensure that the outstanding approvals were cleared.

c) What steps were taken to address your concerns? Were these steps successful?

I believe concerns were raised by Mrs Bruce in discussions with the BSC principals. The final agreement on MOV5 was documented by Ashursts who were regarded as subject matter experts on tram /light rail projects in an attempt to ensure that CEC had the right kind of advice and wouldn't be undone by conditions tucked away in appendices to the main contract as had happened with the wording and pricing assumptions in Schedule part 4.

148. On 25 August 2011 you gave the council a further update by way of a report [TRS00011725].

The report noted that Faithful and Gould had worked with Council officers in validating the base budget for the proposed works.

There was a requirement for funding of up to £776m for a line from St Andrew Square/York Place (comprising a base budget allowance of £742m plus a provision for risk and contingency of £34m). Additional funding of £231 was required, which would require to be met from Prudential borrowing, at an estimated annual revenue charge of £15.3m over 30 years (which, applying a discount rate, resulted in a present day value of the additional borrowing of £291m). At the Council meeting, members voted in favour of an amendment that a line should be built from the Airport to Haymarket.

- a) Your report noted that further utilities investigations had been carried out which had identified approximately 550 potential utility conflicts. **Why had these investigations not been carried out, and these potential utility conflicts not been identified, at a much earlier stage? Ought they to have been?**

It is a judgment call as to whether or not it would have been advisable to have completed investigations along the entire on street sections of the tram route. My understanding is that trial pits had been conducted in key sections of the city centre. These identified that utilities were tightly packed in much of the city centre. The main implication of this is that contractors would understand they would need to dig out some sections manually. The additional work commissioned by Colin Smith involved a ground penetrating radar (GPR) survey which highlighted around 550 utility conflicts in the section between Haymarket and the Lothian Road end of Princes Street. However, GPR isn't helpful in identifying the depth at which utilities are buried. They produce a 2D image rather like an X Ray. Often it is the case that what appears to be a conflict is not a problem once the street has been opened up. Trial pits can be used to determine the depth at which different utilities are buried and assess whether or not they represent a conflict with the path of the tram track and need to be diverted. Given that the lines and locations of major utilities were known through records held by the utility companies and the Council; in particular gas and water pipes (which are more difficult to divert than electrical and fibre optic cables) it seems likely that the Council chose not to perform GPR surveys because it would have been expensive to do so and would have added limited value. However, given the experience of Princes Street where sub ground structures and voids were a serious problem (including old and redundant utilities not shown on any of the

current records) it was probably prudent to conduct checks along the on street area that was the subject of MOV 5.

- b) We understand that the report to Council included a confidential summary of a report dated 19 August 2011 by Faithful and Gould [CEC02083979]. Were members provided with the report or only a summary of the report? The full report by Faithful and Gould noted, in the Executive Summary, that the current costs for the on-street works for Siemens were “*extremely high and not value for money*” and that the cost of the other on-street works was “*grossly inflated*”? Were you aware of these conclusions? Were members advised of these conclusions? Why did CEC officials, nonetheless, recommend that the settlement agreement be entered into?**

I was not aware of the F&G report at that time; it had been commissioned by Alan Coyle who was taking instruction from Colin Smith at this stage. I had been on holiday in Berlin when this report was being drafted and although it went in my name Alan Coyle was its principal author. During my absence it appeared that a number of decisions had been taken. One of these was to remove tie from any practical involvement in project management and to commission Turner and Townsend from an OGC framework to perform this role; this undermined any authority I had left. The appointment was also questionable from a procurement perspective given that the contract had a value of £7m. I had also spent a considerable amount time in June and July working to manage staff numbers at tie down from around 59 to 30 to ensure that key knowledge was not lost from the project. It was evident that key decisions were being taken without reference to my views. Mrs Bruce had de facto placed Mr Smith in the role of Project Director.

- c) What were members’ views at the meeting on 25 August? Why did members vote to continue the line to Haymarket rather than to St Andrew square?**

Members were concerned about the risks of further cost increases in relation to the on street sections and were specifically concerned that the utility conflicts highlighted would open up further claims by BSC. The Labour and Conservative Groups wanted to see BSC complete the off street works for which a guaranteed maximum price had been agreed during mediation.

149. The Chief Executive provided a report to a special meeting of the Council on 2 September 2011 [CEC01891495]. Following a number of votes, the Council agreed to complete the tram line to St Andrew Square.

- a) Why did the members change their minds and agree to complete the line to St Andrew Square?**

The Chief Executive advised members that Transport Scotland could not support the business case for a tram route that terminated at Haymarket. She had received a letter confirming that the £74m balance of the TS Grant would not be available for a tramway that only went as far as Haymarket.

150. A full and final Settlement Agreement was entered into on 15 September 2011 [BFB00005464] between TIE, CEC and the consortium.

a) What were your views on the Settlement Agreement?

I signed the settlement agreement on behalf of tie as the client's representative and original party to the contract. I had around May 2011 been asked by Mrs Bruce to become a non-Executive Director of tie following the resignation of the Chief Executive Richard Jeffrey and most of the Board members. My reading of the Agreement was that it aimed to mop up the historic disputes amongst the parties; separate out CAF's obligations under the tram supply agreement from those of BB & S; and ensure that liability for producing and integrated working tram system was agreed. At that point in time the schedules to the agreement were still being worked upon. I had not seen any of them. I had concerns about the impact of schedule part 4 in the original contract and was somewhat wary. At this stage all the key decisions were being made by Sue Bruce, Colin Smith, Vic Emery and Alastair MacLean.

b) What did you understand to be the main changes made to the Infraco contract by the Settlement Agreement?

The incorporation of amendments made in schedule part A sections 1 and 2 into the main body of the Infraco contract and the deletion of CAF as a party to the main Infraco contract (in effect a reversal of the position established under MOV1).

c) What risks and liabilities (if any) did you understand to transfer to TIE / CEC under the Settlement Agreement?

Any unresolved disputes pertaining to the prioritised works under MOV4 and disputes, claims or entitlements of 3rd parties.

d) What were your views, in general, on the fact that a reduced line would be built for a significantly increased cost than that envisaged when the Infraco contract was entered into?

I was very unhappy that the economic, social and environmental benefits of the tram wouldn't be delivered; in particular that the benefits would not be felt in Leith given the utilities disruption faced by businesses and residents there. The tram had potential to take 11 bus services off Leith Walk significantly improving the environment for pedestrians and cyclists. I was aware that the final settlement meant the Edinburgh tram system would become the most expensive in the world measured by cost per kilometre and was three times higher than the UK benchmark cost of around £13 per kilometre for the civil

construction works. Given that around 15kms of the 18kms completed were off street works the total cost seemed to be excessively high.

- 151 Following the Mar Hall mediation and the Settlement Agreement, works progressed to complete a tram line from the Airport to York Place, which opened for revenue service on 31 May 2014.

By way of overview:

a) What were the main changes introduced as a result of the Mar Hall mediation and the Settlement Agreement?

The effective removal of tie as client's representative; the formation of new project governance arrangements; the decoupling of CAF from the Infraco contract; the differential treatment of on and off street works; clarity on systems integration and related warranties; the appointment of Colin Smith as an independent adjudicator to ensure speedy resolution of any subsequent disputes and claims; the appointment of Tuher and Townsend to the CEC client side team as project managers and technical advisors; and the appointment of Bob McCafferty one of CEC's most senior transport managers to work as part of the team embedded in BSC's site offices.

b) Do you agree that the project appeared to run reasonably smoothly after the agreement and in line with the revised estimate and programme (c.f. events previously)? If so, why do you consider that was?

Following mediation it was clear that both parties had a huge amount of reputational capital resting on delivering the project within the terms of the agreement. Mrs Bruce brought determined leadership to the Project Group and Turner and Townsend brought their recent experience from tram and light rail projects elsewhere in the UK, most recently Nottingham. The effective removal of tie from the equation meant that there as now a direct relationship between CEC and BSC (BBS/CAF) without the presence of a separate client's representative. The Governance model was a better fit to the project's requirements with the joint project group driving operational delivery and the Board available for escalation of any issues that required strategic decisions. I have no doubt that the fact the contractor was able to see substantial profits to be made from the revised cost envelope and little apparent risk to them improved their behaviour and where they raised disputes there was a mechanism for dealing with these speedily through the role agreed by both sides for Colin Smith to act as an adjudicator.

c) What design and utility works were outstanding? How were these outstanding works addressed? Were they addressed in a different way than they had been addressed prior to Mar Hall?

I can't recall the specific details of the outstanding designs but by embedding Bob McCafferty in the BSC site office there was a speedier route to design clearance than through the procedures hitherto. Bob was able quickly to consult his CEC transport and planning colleagues and Colin Smith oversaw this work and convened weekly meetings to expedite clearance of outstanding matters.

d) What Infraco works were outstanding? How were they addressed? In what way did that differ to events before Mar Hall?

Work was still ongoing on key sections of the tram route notably at Haymarket, Tower Place, Edinburgh Gateway (Gogar intermodal), the Depot Building access bridge, and the Roseburn Junction to Balgreen section. The works were addressed by giving Colin Smith a direct, hands-on role supported by Bob McCafferty and Turner and Townsend to expedite the works and ensure that Infraco progressed them. For over a year prior to the settlement agreement BSC had consistently failed to make progress in accordance with the original programme or to let tie have a reliable updated programme. The fact that the Project Board had been established also meant that where matters needed to be escalated speedy decisions could be made. Before Mar Hall the operational landscape of the project had been cluttered by the individual disputes between tie and BSC and very little progress had been achieved in in 2009/10 relative to the original programme.

General

152. In general:

a) Do you consider that the roles and responsibilities of each of the bodies involved in the delivery and governance of the project was sufficiently clear? Do you have any views on the suggestion that there were too many bodies and organisations involved in the governance of the project?

In my experience the simpler the relationship between client and contractor the more likely it is that the client's requirements will be understood and delivered. If the client requires technical advice and support (and in this case that was certainly the case) then it seems to me to that it would have been better (in the case of the Edinburgh tram) to procure such support through a multi-disciplinary transport engineering company with an established track record and subject matter expert knowledge, than to set up an arms-length company staffed largely by people with no prior experience of delivering tram or light rail projects. The Governance structure was further complicated by the relationship between tie, TEL and Lothian Buses. The latter company saw a direct threat to their operations arising from the tram which made the dynamics of the TPB interesting at times. It seemed to me that an awful lot of power and responsibility had been ceded to a special purpose company - tie - without the Council having terribly much control over their daily operations.

- b) Which body or organisation do you consider was ultimately responsible for ensuring that the contracts and works were properly managed, including managing the interface between the different contracts and works?**

Tie which was set up specifically to act as client's representative and delivery agent for the project and had over 55 staff responsible for managing the delivery of the contracts and works on the ground to ensure they met the terms of the employer's requirements.

- c) Which body or organisation do you consider was ultimately responsible for ensuring that the tram project was delivered on time and within budget?**

The Scottish Government allocated £500m towards the project monitored by their Transport Agency – Transport Scotland. The City of Edinburgh Council allocated £45m towards the project. However, neither of these organisations was a party to the contractual relationship between tie and BSC; it was that contractual relationship and the failure to provide sufficient scrutiny of the terms of the contract and to assess the risks involved that led to the problems which meant the project went over time and budget. The Council was responsible for ensuring the project was delivered on time and within budget but lost the ability to control this when the contract between tie and Infracore was signed.

Tie

153. In general:

- a) How would you describe the relationship between TIE and the Council?**

The working relationship between the management of the two organisations was generally good. There were frustrations on the part of Council staff seconded to tie that tie staff sometimes failed to understand the implications of working in a public sector environment or being subject to political scrutiny. As the project progressed Council staff lost faith in tie because it became clear that several aspects of their understanding of how the contract should operate were undermined as a result of adverse adjudication decisions. There was also a sense that some of the contractors and consultants hired by tie had insufficient accountability and yet were tasked with making some important decisions about elements of the project.

- b) By what means did CEC exercise oversight and control over TIE? Which Council officer was responsible for ensuring that CEC exercised effective oversight and control over TIE?**

There were controls at various levels. Marshall Poulton Head of Transport fulfilled the role of tram monitoring officer; this covered the technical transport engineering aspects of the project ensuring that the work carried out delivered a structurally safe and sound tram system and that the quality of

road reinstatements was satisfactory. Andy Conway and Duncan Fraser were seconded into tie to expedite clearance of planning approvals, third party land agreements and other matters on which tie needed the Council's assistance. They also contributed to reports on the project's operational progress, or lack of. Alan Coyle fulfilled a supervisory role in relation to the financial monitoring and budget aspects of tie reporting back to the Council on expenditure against budget profile. Gill Lindsay was initially responsible for oversight of the legal arrangements both between the Council and tie and tie and BSC.

The Council's Chief Executive Tom Aitchison took responsibility for chairing tram IPG which met monthly and reviewed the progress of the project. Tram IPG included 3 Council Executive Directors, myself (on transport matters), Donald McGougan (Finance) and Jim Inch (Corporate and legal).

I was the Council Officer responsible for ensuring oversight of tie in relation to construction progress; Donald fulfilled the role of oversight on finance and budget monitoring. Donald and myself attended TPB. The Council also had 5 places for elected members on TPB: one for the transport spokesperson of each of the 5 political groups on the Council.

c) By what means did the Council's senior officers and members receive information and updates from TIE?

Information was collated from tie mainly by the officers embedded within the tie team and drawn from reports prepared by tie for TPB and its Board. The pattern of monthly TPB reports was mirrored in the update reports prepared for Tram IPG and there was a considerable amount of overlap in the content of the reports prepared for these meetings. However, Tram IPG would also focus on how the Council was carrying out its role in supporting the project e.g. dealing with any blockages in securing planning consents or resolving third party land agreements. Tram IPG also considered how the project was impacting the city and how the Council could best support the Open for business programme and keep businesses fully informed about the progress of the project. IPG also monitored progress in securing planning consents or resolving third party land agreements. It reviewed how the project was impacting the city and how the Council could best support the Open for business programme and keep businesses fully informed about the progress of the project and the impact of works on the city. It also dealt with traffic management arrangements during the works (TRO's/TTRO's) and with arrangements for keeping the city accessible including during the Edinburgh Festival season and Winter Festivals and live events such as 6 Nations matches at Murrayfield.

d) Did you have any concerns at any stage in relation to TIE's project management of the tram project or the performance of any of TIE's senior personnel or Board members?

I didn't really get much of an opportunity to know Willie Gallagher as he left 9

months after I took up my job. I found him to be enthusiastic and committed but I wasn't in position to make a judgment on his competence. During my first year in the job it took time to get up to speed with the project due to other pressures on my role, notably the impact of the financial crisis on the city and key property projects including sorting out problems in other Council- owned companies such as EDI and Waterfront Edinburgh. I had a lot of respect for David Mackay who stepped into the CE's role temporarily following Willie's departure. However, David tended to deal directly with Tom Aitchison on the initial problems that emerged in the relationship with BSC. Occasionally I felt I was on the back foot being told about proposals after the event. I was involved in the appointment of Richard Jeffrey (along with David Mackay and Cllr Phil Wheeler). I found Richard to be highly professional. He brought a clarity to the company in terms of its purpose and objectives and generally worked well with the Council. With regard to the tie Board members I thought that Graeme Bissett, Neil Scales and Stephen Fox made telling contributions at the TPB.

- e) **Did you have any concerns at any stage in relation to TIE's reporting to CEC (or others)? If so, what were these concerns and what was done to try address them? (In your email to David Mackay dated 29 January 2009 for example [CEC01182690] you note concerns regarding Tie communication issues.)**

29 January
should be
21 January

I didn't have concerns around the general level of management reporting and communications via the TPB. In general these were well structured and thorough. I did have concerns about whether CEC was always getting timely information about the latest state of play in discussions with BSC. This was especially the case when David was Chairman as I think he felt any information passed to CEC would be leaked and could compromise negotiations. The biggest bugbear for myself and Marshall Poulton in the early part of the programme was that tie staff appeared to have little consideration for the impact of tram works on the city's businesses. A major part of my role was external facing managing the interface between the Council and the Business Community. Tie staff working on project management of MUDFA works and overseeing Infracore works did not seem to be well clued up on how to deal with stakeholder management in relation to highways construction works. On one occasion around October 2008 their traffic modelling work was flawed and led to the total gridlock in the city for nearly 3 hours. My e mail to David was a plea for the wider city impacts to be taken into account and plans communicated more effectively in advance. It may be the case that Steven Bell and Susan Clark who came in to the project from the heavy rail industry were unaccustomed to managing projects in live streets. Things improved enormously when tie appointed Mandy Haeburn Little into a senior PR and Communications role.

- f) **Did you consider that TIE had sufficient experience and expertise (both individually and as an organisation) to project manage a complex infrastructure project like the Edinburgh tram project?**

No Tie had been set up initially to explore integrated ticketing arrangements

in Edinburgh. Whilst there were some talented and capable individuals within tie the organisation relied upon too many consultants and contractors without sufficient accountability for their actions or clarification of their roles. Alastair Richards aside few had ever had previous experience of delivering tram or light rail projects. The company did not have the risk appraisal and project management systems expertise that can be found in major multi-disciplinary engineering consultancy firms (e.g. Mott McDonald, Aecom, Atkins, Halcrow). My sense was that the company became more effective and focused following Richard Jeffrey's appointment as Chief Executive. Richard was a Civil Engineer by profession and had fulfilled a client side role as sponsor of major construction projects during his time as the MD of Edinburgh Airport. His experience helped the company move forward and become more effective. However, the dye was already cast.

- g) What were your views on the TIE bonus scheme, including whether it was appropriate that large bonuses were paid to senior TIE employees in addition to their salaries? How did CEC exercise control over bonus payments [CEC00039997]? Which officer in CEC was ultimately responsible for that? Do you consider that CEC exercised sufficient control over TIE bonuses?**

I had no visibility of the tie salary arrangements or bonus scheme. In general all remuneration arrangements with regard to Council arms-length companies were dealt with through Jim Inch as Director of Corporate Resources and Philip Barr Head of HR. I am not opposed in principle to performance related pay. However, it is well documented how the wrong incentives can undermine wider corporate objectives. There was always an undercurrent of suspicion about the remuneration arrangements within tie but even with Richard Jeffrey (where I was part of the appointments panel) I was never told what level of salary he was appointed on or whether his employment contract contained specific bonus clauses.

City of Edinburgh Council	
154.	<p>In general:</p> <p>a) How did CEC officers advise members (including the Council Leader, the Finance and Transport Convenors, Group Leaders and individual members) of important matters relating to the tram project?</p> <p>Through regular one to one meetings with the transport convenor and Leader; through informal discussions around TPB with other transport spokespeople and through periodic presentations to Group Leaders and members.</p> <p>b) Were members always fully updated on significant developments relating to the tram project including, in particular, the problems that arose and the estimates of the cost of completing the project?</p> <p>I would say they were regularly updated on all significant developments as fully as it was possible for Council Officers to do so. However there was</p>

often a gap between tie receiving information that was significant and reporting on the extent and implications of that information. This made it extremely difficult notably during 2009 and 2010 to give members a full picture of anything as the programme was subject to so much conditionality on the outcome of adjudications and QC opinions regarding the interpretation of the contract and despite some false dawns there was no significant progress on construction works and no updated programme for completion of works.

- c) To what extent did the need for confidentiality conflict with the need to keep members informed of matters relating to the tram project and what steps were taken to address that conflict?[CEC00855002] To what extent did that affect the ability of Council members, to take informed decisions in relation to the tram project? What steps were taken to address any such concerns?**

It was evident throughout the project that tie personnel were fearful of information entering the public domain or being open to disclosure via the provisions of FOISA. This in particular applied to any legal advice that tie had taken and to the outcome of adjudications or any other information of a commercially sensitive nature.

- d) Which officer (or officers) in CEC do you consider was ultimately responsible for ensuring that the tram project was delivered on time and within budget?**

If there was a single officer it could be argued that it was me, working in conjunction with the Director of Finance Donald McGougan, the Chief Executive, Tom Aitchison and the tram monitoring officer, Marshall Poulton. However, the governance structure of the project made it virtually impossible for any single officer in the Council to control the management of the project because of the flawed nature of the contract between tie and BSC and the time it took for the interpretation of key points in dispute to be tested through adjudication. My sense is that the Council rushed into the project before it was ready to do so and was not helped by the major split in political opinion about the project both at Holyrood and the Council Chamber. I acknowledge that 8 weeks into my role I was a signatory to a document that advised the project was ready to progress to financial close. I was reliant at that stage upon the advice given to the Council by tie and their legal advisors who were also providing advice to the Council.

- e) Do you consider that members who sat on the Tram Project Board and the Boards of TIE and TEL had sufficient experience and expertise (including of major infrastructure projects) to inform their decisions as members of these boards? Was training provided? Ought it to have been?**

With the exception of Neil Scales who brought experience from Merseyrail I would say that few of the members of the TIE and TEL Boards had experience of delivering major infrastructure projects and certainly not on this

scale or level of complexity. Graeme Bissett and David Mackay brought a lot of commercial and financial experience to the Boards and Stephen Fox had a good grounding in the issues from a public policy perspective. I don't know if elected members received any training prior to their appointment to the TPB. They certainly received training in its broadest sense in the course of their roles through presentations on specific issues. However, I don't recall there being training sessions about the role of non-Executive Directors from a corporate governance and scrutiny perspective. It is certainly my view that the selection and training of members for such Boards is a critical element of effective project governance.

- f) **Do you consider that any conflict of interest, or potential conflict of interest, arose from Councillors being members of both the Council and organisations with responsibilities for delivering the project i.e. TPB, TIE and TEL?**

I don't think there were any personal conflict of interest issues and certainly none that would have meant a Councillor deriving personal monetary advantage from influencing decisions taken in these Fora. However, I think that Councillors may have had difficulty in separating out their obligations as Company Directors to act in the best interest of the company from their Council obligations of securing the best deal for the city. Councillors were only hearing one side of the disputes and that was filtered through the lens of tie staff whereas in their role as councillors they needed to be aware of the other side of the arguments to be able to make the best informed decisions.

- g) **Did you have any concerns, at any stage, in relation to the performance of senior Council officials or members?**

If I can start by being self-critical there were opportunities at stages in the project for me to have made different and possibly better decisions. I should certainly have sought further information before signing the financial close recommendation when it was placed in front of me at an IPG meeting in May 2008. However, 8 weeks into my new role I placed my trust in the diligence that had been carried out by my colleagues. In my first year in post I missed several TPB meetings due to the pressure of other Council Business; this meant it took longer for me to get up to speed than I should have. I ought to have insisted on accompanying David Mackay to negotiations with BSC that led to the PSSA and perhaps offered to step into the tie CE role temporarily when Willie Gallagher left. This would have enabled me to get under the bonnet in tie and make a deeper assessment of the underlying problems in relation to the project e.g. a flawed contract; design delays; utility hold ups. That said, I was not fulfilling the role of Project Director for the client. The time I was able to spend on the project represented perhaps only 5% of my job duties as Director of a complex operational department. It was impossible to be on top of every detail.

I previously expressed my concerns about Gill Lindsay's performance and Jim Inch's reluctance to invest in legal resources to get to the roots of the contractual issues in dispute.

In my previous statement I indicated that Tom Aitchison might have been more active at an earlier stage in the contract by intervening directly with BSC.

I felt Cllr Wheeler was a little out of his depth as Transport Convenor and Cllr MacKenzie was too keen to accept invitations to comment to the media without first seeking briefing; this played into the hands of BSC. Other senior elected members didn't particularly help the project because they put narrow party advantage above the interests of the city. Councillor Cardownie's comment '£545m to replace the 22 bus' was a good soundbite for the press gallery but not helpful to the Council's case. Councillor Dawe was always thoughtful and supportive but as with the Council's Chief Executive her active intervention at an earlier stage might have produced a better outcome for the project.

Tram Project Board

155. In general:

a) What was your understanding of the role, remit and responsibilities of the TPB?

The tram project board was a peculiar hybrid that enabled decisions taken on matters relating to the progress of the project against programme and budget with Elected Members and senior Council Officers alongside the Boards of tie and TEL. TPB acted as a conduit between tie/ TEL and the Council. Its role was to provide oversight of the project and tie's management of it and to enable project risks and opportunities to be discussed particularly as they impacted upon the city and the Council, as well as to guide the future operations of TEL once trams were up and running.

b) What powers and duties were formally delegated to the Tram Project Board? As we understand it, the Tram Project Board had no legal status, and no powers and duties were formally delegated to it until sometime in 2008, when it became a sub-committee of TEL. Did the lack of legal status and formally delegated powers and duties cause you any concerns?

To begin with the lack of legal status and formal powers didn't cause me particular concerns. I viewed the Group rather like a stakeholder board put in place to communicate the project's aims and progress to elected members and to the Council as one of the two key sponsors of the project. However, as events unfolded it became clear to me that the TPB had only limited influence over tie's strategy, management and operations or on key decisions made by tie e.g. to appoint legal advisors or spend money contesting disputes.

c) How were important matters relating to the tram project reported by TIE to the TPB (including by whom and to whom)?

In the main through the TPB report and the Chief Executive's opening

	<p>remarks at each TPB meeting. Powerpoint presentations were regularly used to summarise key issues relating to programme progress and to advise Board Members about the technical and legal advice tie had received on particular issues.</p> <p>d) How were the views and requirements of the TPB fed back to TIE?</p> <p>In general by way of requests from either Council Officers or elected members for specific items to be placed on the agenda for presentation and discussion at subsequent meetings. Occasionally if I felt that there were issues that ought to be dealt with outside of the TPB I would approach Richard Jeffrey and seek a discussion to explore these.</p> <p>e) Given the delegation of powers from the TIE and TEL Boards to the TPB, what was the remaining role and responsibilities of the TIE and TEL Boards in relation to the tram project?</p> <p>My understanding is that much of their time and effort was spent on preparing for the future coming together of tie's operations with those of Lothian Buses as part of an integrated public transport serve for the city; this covered preparing for operations (e.g. tram driver training; future branding, impact on bus routes; and business planning around the passenger and revenue forecasts for the combined operations).</p> <p>f) Did you have any concerns at any stage in relation to the performance of the TPB or any members of the TPB?</p> <p>I felt Cllr Wheeler was not particularly effective in fulfilling his brief as transport convenor. He was subsequently challenged within the Lib Dem Group by Councillor Mackenzie who was more effective as a TPB Board member although I had concerns about his handling of the media.</p> <p>g) Did you have any concerns about the accountability of the Tram Project Board were not accountable to the Council [CEC01561555]?</p> <p>I was not a Council Employee when Colin Mackenzie expressed these views. However, having read his note now for the first time I believe he was right to highlight that it was the tie Board on behalf of the Council that had the obligation to ensure the project was delivered. The creation of the TPB in that sense was a departure from straightforward governance arrangements and potentially compromised both the role of elected members and tie Board members and could arguably create shadow Directorship complications.</p>
TEL	
156.	<p>In general:</p> <p>a) What was your understanding of the role, remit and responsibilities of TEL and how did these change over time?</p>

To develop an integrated transport service for the city that would bring together the bus and tram networks and link with other forms of transport e.g. through Oyster Card type ticketing arrangements with railway operators.

b) How were important matters relating to the tram project reported by TIE to TEL (including by whom and to whom)?

Because of the presence of David Mackay and then Vic Emery as chairs of both companies there was no real need for any separate communication arrangements. However, there were issues between TEL and the Board of Lothian Buses including concerns that LB would be the cash cow needed to support a loss making tram project. I had very little dealings with the interface between these companies. The issues were seen to be corporate governance matters and were dealt with by Jim Inch and then Alastair MacLean, supporting Sue Bruce as Council Chief Executive.

c) How were the views and requirements of TEL fed back to TIE /CEC?

There were discussions about the necessary actions to prepare for future operations between tie and TEL. Alistair Richards managed this workstream insofar as operational readiness was concerned e.g. resourcing the tram depot, preparing the test track and organising driver training. I saw very little of the interface between the two companies.

d) Did you have any concerns at any stage in relation to the performance of TEL or any members or employees of TEL?

I wasn't convinced Neil Renilson was a great advocate of trams despite his excellent track record as CE of Lothian Buses. With regard to Ian Craig and Bill Campbell at Lothian Buses they both made a sound contribution at TPB meetings and in the period I was with the Council 2008 – 2012 Lothian Buses delivered consistently good results.

e) Why was there reluctance on the part of Keith Rimmer, the Head of Transport for City Development for there to be an operating agreement put in place [CEC01565047]? Did this early reluctance affect the effective governance of the project?

I don't know. I have never knowingly met Keith Rimmer and it is the first time that I have seen the project governance structure set out in the attachment to Jenny Drummond's note. The model is familiar to me as I undertook Prince 2 client SRO training during my time with Scottish Enterprise. I can recall Marshall Poulton telling me that Keith Rimmer had left his role in the Council following retirement to work for tie. We may have overlapped for a short period while he was at tie when I took up my post at the Council but I don't know Mr Rimmer can't therefore explain why he was reluctant. This exchange appears to have taken place at least 6 months before I started at CEC.

TRANSPORT SCOTLAND

157. In relation to the Scottish Government (SG) and Transport Scotland (TS):

a) How were important matters relating to the tram project reported by CEC and TIE to SG/TS (including by whom and to whom)?

Donald McGougan/ Alan Coyle plus Marshall Poulton/Andy Conway and myself met with Bill Reeve, John Ramsay and Jerry Morrissey of TS each quarter. We discussed the progress of the programme and the current expenditure position. We also discussed key interfaces with other TS/ Network Rail projects notably Edinburgh Gateway (Gogar inter modal) and the renewal of Haymarket Station. Alan Coyle and Andy Conway were the authors of the quarterly update report and drew upon information from tie and the TPB as required. When the Princes Street stand-off occurred discussions with TS were escalated to direct briefing meetings involving the Chairman and Chief Executive of tie with David Middleton Chief Executive of TS.

b) How were the views and requirements of SG/TS fed back to CEC and TIE?

This generally happened through discussion at the Quarterly meetings. Specific meetings were set up to discuss plans for Edinburgh Gateway (Gogar Intermodal) where Rodger Querns represented TS and similarly with regard to plans for managing the interface between the tram and the upgraded Haymarket Interchange. These were very constructive discussions and we (CEC/ TS) worked well as a team to help deliver these additional projects.

c) Did you have any concerns at any stage in relation to the performance of SG/TS or any ministers or senior officials?

No I found Ainslie McLaughlin to be particularly helpful when he took over the lead role for TS in 2011.

d) What are your views, with the benefit of hindsight, on the decision taken around July 2007 that TS should play a lesser role in the governance of the project?

I wasn't involved at the time but it strikes me as an unwise move. Staffing in CEC's transport service had been cut back over a number of years; tie was a new and unproven Project Management company set up for a different purpose and had no proven track record. TS had a team well versed in commissioning and project managing large civil engineering and transport infrastructure projects (Aberdeen Western By Pass, Queensferry Crossing, M74 Extension). I didn't know the background to the decision but in a small country such as Scotland it seemed very strange that the Government's transport agency was quite so far removed from a project that was receiving £500m in public funding support from the SG.

	<p>e) What regular reporting, and by whom, to TS took place after that change?</p> <p>I only came into my post after the change (please see my answer to Q157 (a)).</p>
158.	<p>On 29 May 2008, you were copied into an email that Alan Coyle had sent to John Ramsay of Transport Scotland, informing him that he could not provide him with a copy of the DLA report on the Infraco Contract Suite, due to it being legally privileged [CEC01372447].</p> <p>a) What were your views on that matter?</p> <p>This happened before I had much knowledge of the project and I am not sure if I had even met Alan Coyle at that stage. My recollection is that my first meeting with him happened later. I didn't know who Andrew Fitchie was or indeed Graeme Bissett so I had little contextual knowledge or understanding. I took this to be an e mail that was not directed to me but that I was copied in (to only the last stages of the mail trail) on a need to know basis. I also took the view that it was for legal services colleagues to consider how the request should be responded to by the Council and whether or not there were legitimate and defensible reasons for withholding any information. It did strike me as unusual because in my 17 year prior career with Scottish Enterprise I can't recall a situation in which withholding information from a Government Agency would ever have been considered and certainly not in a case where the government is the primary funder.</p> <p>b) Were TS provided with all relevant documents, including legal documents, and if not, why not? Should they have been?</p> <p>I don't know. The request wasn't made to me. I would have thought so.</p>
159.	<p>You were copied into an email sent by Rebecca Andrew on 27 August 2008 [CEC01047161] providing an update on the monthly TS meeting and noting continuing unhappiness from John Ramsay (and his managers) with the quality of the information contained in the monthly TS report. It was noted that he intended to raise this at the quarterly high-level meeting between Bill Reeve and Council directors and threatened withholding the element of funding relating to TIE project management costs, if reports did not improve.</p> <p>a) What were your views on the quality of reporting to TS?</p> <p>I don't have a terribly clear memory of this earliest stage of my time in my new role and I can't recall how complete the early reports from tie to TS were. I can remember meeting Bill Reeve and having a productive discussion with him about TS's reporting requirements.</p> <p>b) Did it improve?</p> <p>Yes. Susan Clark changed the format and contents of the report in response</p>

29 May
should be
27 May

	<p>to the criticism levelled by John Ramsay.</p> <p>c) Did there come a time when TS were satisfied with the quality of reporting to them?</p> <p>I don't think they were dissatisfied so much with the format or quality which were not hugely different from other RAG based performance reports on major projects that I have witnessed. Their dissatisfaction stemmed in my view from their inability to advise Ministers with any certainty about the resolution of the disputes and likely out-turn costs.</p>
Contractors	
160.	<p>In relation to the main contractors involved in the tram project:</p> <p>a) Did you have any concerns at any stage in relation to the performance of any of the main contractors, or the senior personnel employed by these contractors?</p> <p>Yes in relation to Bilfinger Berger. From the outset they failed adequately to mobilise resources and secure their supply chain; appeared intent on progressing a very aggressive approach to claims for change and extension of time and did not appear to commit to the notion of joint problem solving articulated in the main body of the contract. My experience of CAF was that they were good partners to deal with and delivered what they were required to. I had very limited direct dealings with Siemens and none with Carillion.</p> <p>b) If so, what were your concerns and what was done to address them?</p> <p>My concerns were also those of the senior staff at tie and the concerns were escalated to the attention of the BB Board. The appointment of Martin Foerder was seen as a means of addressing them but despite initial signs of progress following his arrival performance subsequently regressed. Kevin Russell appeared to be interested primarily in stripping as much meat off the carcass as possible.</p>

CONSEQUENCES

161. By way of overview:

- a) What do you consider were the main consequences and effects (on residents, traders, businesses and developers etc) of the delays in completing the tram project?**

In the short term there was extensive disruption and inconvenience to residents and businesses including a loss of retail footfall. Retailers had already been adversely impacted by the 2008/09 recession. Developers generally delayed their investment plans although the recession was a bigger factor than the delay in completing the tram project. In the case of TIA Henderson they needed time to consult their investors and renew and extend the term of their UK retail fund which was to finance their plans for the

St.James's Centre. The biggest impact on development was around Leith Docks where ambitious plans for mixed use housing led development fell. Again the primary reason for this was the recession. However, land values in Leith would have likely returned more speedily and robustly had the full tram project been delivered.

- b) What steps were taken by the Council by way of mitigation? (see e.g. your report provided to the Policy Strategy Committee on 6 September 2011 [CEC201891386])**

CEC201891386
should be
CEC01891386

Throughout the project I saw my role as Director of City Development being in part about protecting the city as far as possible from the disruption inevitably caused by tram related construction works. Often the city was also beset by other construction works notably utilities replacement and upgrading as well as by major commercial developments set in train during the property boom prior to 2008. My Department's Officers worked closely with businesses such as the Chamber, FSB, West End Traders and major retailers and also with tie to develop the open for Business campaign taking measures as described in that report. Throughout the period from 2008 - 2011 many of my evenings were spent with local businesses explaining the planned tram works and helping to mitigate these by additional directional signage, alternative access routes, support for marketing and events and similar measures. Companies were also directed to the Assessor's office for consideration of Business rates relief. Major logistical plans were necessary to ensure that the Edinburgh Festival and Winter Festival could be delivered and one off occasions such as the State visit of Pope Benedict XV1 to meet HRH the Queen could be managed. The Winter Festivals of 2010 proved to be a particular challenge as Edinburgh was snow bound for almost a full month that December.

- c) What do you consider to be the main continuing consequences and effects of the shortened tram line (i.e. on the parts of the city the tram line was due to, but does not, serve)?**

The economic potential of the stretch from York Place to Newhaven has not been fully realised; the route remains congested and there are continuing concerns about air quality issues in some places. Local residents and businesses have felt the pain of disruption during the utility works without the gain of the benefits from a new tramway. The opportunity to link high density residential populations in these areas to commercial offices and retail workplaces in the city centre and at Edinburgh Park has been lost. The city's reputation has suffered and unlike other cities where a first tram line has led on to the creation of a network (e.g. Manchester, Nottingham, Dublin, Bordeaux) Edinburgh's momentum has stalled.

- d) What do you consider are the main continuing consequences of the cost and time overrun of the tram project?**

The Council faces heavy debt servicing charges for a long period of time. The tram will continue to be sub optimal as a one line tramway and the

patronage benefits of network effects will not be realised. Patronage and revenue forecasts will have suffered relative to what could otherwise have been achieved if the line had been completed to Newhaven. Communities in North Edinburgh will have poorer public transport links than they would have otherwise enjoyed and people in those communities will be less well connected into the heart of the city and its employment, business and leisure opportunities than they would otherwise have been.

FINAL COMMENTS

162. By way of final thoughts:

a) How did your experience of the Edinburgh Trams Project compare with other projects you have worked on (both previously and subsequently)?

In all other major construction projects I have worked on there has been political consensus about the need for investment. There has been a much clearer separation of roles between the elected members (strategy) and the Executive or officers (delivery). Where I have acted as SRO i.e. in the senior role as client side Programme Director it has always been the case that I have led and chaired the Project Boards and have been directly accountable for the decisions made about programme management, risk appraisal and management and deployment of resources. Where I have required technical support e.g. through MPM Capita at Loch Lomond Shores; or Mott MacDonald for the Chester Transport Interchange; or Cyril Sweett for the EICC Extension I have been responsible for specifying the scope and nature of that technical support and ensuring that professionals involved work only to the client's brief. In those projects I have always either fulfilled the role of Chief Executive of the client side organisation or Programme Director with a clear project mandate, proper project inception arrangements; a clear client brief and well-articulated employer's requirements and a contract that is fully understood by all parties. In the case of the Edinburgh Tram Project my induction was poorly structured; there was a fundamental division within the Council Administration; I did not chair any of the groups within the governance infrastructure; and I was not the Programme Director but was managing a wide range of Council Services and reporting in to 7 Council committees. The ETP is singularly the most frustrating and disappointing project I have experienced over the course of a lengthy career in public service and sadly also the largest and most expensive.

b) Do you have any views on what were the main reasons for the failure to deliver the project in the time, within the budget and to the extent projected?

- I suspect that the political desire to keep the project under £500m was an initial contributory factor in an unrealistic contract price;
- There was optimism bias in the time it would take to clear utility diversions (in France local Mayors can instruct companies to remove their utilities from the line of proposed tramways);

- There appears to have been insufficient due diligence done on sub ground conditions prior to the letting of utility diversion works contracts;
- The contract appears to have undergone significant changes from the preferred bidder stage to financial close, not least concerning schedule part 4 and the key pricing assumptions;
- BB may have under-priced the job and realised they were exposed to a higher degree of risk than they anticipated leading to a highly assertive claims culture from the outset;
- BSC were very slow to mobilise their sub- contractor network and put their supply chain in place;
- Tie was not a fit for purpose delivery vehicle and lacked the key staff to manage the project through to successful completion;
- Senior Council officers including myself and Donald McGougan were being asked to oversee a complex £545m capital project on top of already demanding day jobs;
- Communications among tie, BSC and the Council were fragmented partly because of physical separation of office sites but also because there was no formal mechanism for all three parties to come together and resolve problems on a regular basis;
- Tie was over dependent on consultants and contractors with no long term interest in the project;
- At the outset the Council's Planning Service was not sufficiently resourced up to expedite planning approvals in a timely manner;
- The management of design works (first by tie of Parsons Brinckehoff) and then by BSC of SDS was a lamentable failure;
- The decision to push to financial close with a design only 60% complete was misguided;
- The failure adequately to define ongoing design development meaning that all new design was treated as client instructed change was hugely costly;
- The Council (myself included) failed to grip the first signs of major problems the project and weaknesses in tie's interpretation of the contract when the first major signs of problems arose in the Princes Street stand-off of January 2009;
- The Council gave BSC too many opportunities to make additional claims by insisting that site working was restricted during periods of embargo and not giving the contractor a clear unrestricted site;
- 3rd party land agreements and consents were not fully cleared before the project commenced;
- There were significant breaks in senior positions in the Council with a new Director of City Development (myself) and Head of Transport recruited only weeks before the project went live and no clear process for managing the transition. There were similar problems within tie with 3 Chief Executives and 2 Chairman over a three year period;
- There was an over reliance by the Council and tie on legal advice from one source;
- There was no agreed programme produced by BSC despite constant exhortation from tie.

c) Do you have any comments, with the benefit of hindsight, on how these failures might have been avoided?

There was need for a simpler, cleaner governance model from the outset recognising that this was a project that the contractor was delivering for the city. The project should in my view have been delivered and project managed directly by the Scottish Government's transport agency Transport Scotland failing which the Council should directly have delivered it. The 'hotchpot' of relationships concerning the futures of TEL, Lothian Buses was a distraction from the primary immediate objective of delivering a safe, operational tram system on time and within budget. The Council should have brought in subject matter construction law expertise to ensure the contract was as watertight as possible in protecting its interests. The Prince 2 Gateway process should have been more rigorously followed to ensure independent checks at each Gateway stage that the project was ready to progress ultimately to construction delivery. The designs, 3rd party land consents and the utility diversions should have been completed before a construction contract was let. The Council should have spent some time learning lessons from other recent tramway projects before preparing its plans and ensuring lessons learnt were properly incorporated. The investment of £500m should not have been allowed to become a party political football at Holyrood or in the City Chambers.

The Council should have appointed a senior executive with experience of delivering major transport infrastructure projects on a fixed term contract to remain 'client side' and supervise the detailed planning and delivery of the project.

d) Are there any final comments you would like to make that fall within the Inquiry's Terms of Reference and which have not already been covered in your answers to the above questions?

I don't believe so.

I confirm that the facts to which I attest in the answers contained within this document, consisting of this and the preceding 131 pages are within my direct knowledge and are true. Where they are based on information provided to me by others, I confirm that they are true to the best of my knowledge, information and belief.

Witness signature.. 

Date of signing..... 1 - 8 - 17

Edinburgh Tram Inquiry

David Anderson

Corrections to witness statement

Page 32 Q 32b

I say that I hadn't previously met Andrew Fitchie. This may be incorrect as he is likely to have been in attendance at the April Tram Project Board. However, I had had no formal introduction to him or his role at this stage in the project.

Page 46 Q 56 a

I say that my first recollection was Infraco's claim for an extra £50m- £80m was when reading it in the Scotsman. In fact I am certain that David Mackay briefed myself and Tom Aitchison on the dispute and claim a few days in advance of the press coverage. My recollection is of a photograph in the Evening News depicting David Mackay wearing a photo-shopped military helmet: it was a vivid image.

Page 51 Q61 c

In the last line of my answer it should read all parties were represented 'except the SNP'.

Page 56 Q68 a

For the purposes of accuracy some of the delay at any point in time would technically have been due to planning as it can take up to 8 weeks to process planning approvals even when all technical information has been supplied so given that there were some 320 planning applications that required to be approved there would inevitably, at any point in time, have been some in the pipeline awaiting approval.

Page 61 Q72

I refer to Donald Anderson's involvement as a PR Communications Advisor to BSC. I cannot be 100% sure of the date of his appointment to that role and whether he was involved in it at the time of the 2009 Princes Street dispute.

Page 80 Q99

I refer to Project Pitchfork as the other side of Project Carlisle. In fact Pitchfork was the name given to the overarching strategy. Carlisle sought to resolve the disputes and find a new basis for working under an amended contract. The other options were to 'grind it out' using levers in the contract to weaken Infraco's position; terminate either through proving breach or by mutual consent and with the sub option to partially complete the work and then terminate.

P100 Q 131

I say that prior to mediation around £400m of expenditure had been 'committed'. In fact, this should read 'incurred to date'.

Page 104 Q138

The name of the other McGrigor's lawyer who accompanied Brandon Nolan to pre mediation preparations was Drysdale Graham.

Page 114 Q150

This should have read £13m per kilometre.

Page 118 Q 153

Please delete Stephen Fox and substitute Kenneth Hogg (Stephen Fox was a civil servant I had worked with on a previous project). I got the names confused.

David Anderson

2nd December 2017

Supplementary Questions for David Anderson

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

2. Andrew Holmes was the monitoring officer for both Tie and TEL (see **CEC02087101**). Mr Holmes, however, left the Council's employment on or around 1 April 2008. A new Operating Agreement was entered into in May 2008 between CEC and Tie (**CEC01315172**). The new Operating Agreement uses the term Tram Monitoring Officer, which is defined as "the Council officer nominated by the Council to monitor Tie in relation to the project" (with the result that it appears that the Tram Monitoring Officer was also the monitoring officer for TIE). Paragraph 3.5 of the Operating Agreement provides that "The Council will appoint a Tram Monitoring Officer. The first Tram Monitoring Officer will be the Director of City Development or their appointed nominee".

By letter dated 5 January 2009 (**CEC02086935**) you advised Marshall Poulton that "Following an internal governance review it has become apparent that a few outstanding matters need to be formalised" and that "With that in mind, you are hereby appointed as the Tram Monitoring Officer for the tram project on behalf of CEC, in accordance with the operating agreement between the Council and Tie".

(a) Given the terms of paragraph 3.5 of the May 2008 CEC/Tie Operating Agreement, is it the case that you were the Tram Monitoring Officer (and monitoring officer for TIE) between Mr Holmes' retirement in April 2008 and the appointment of Mr Poulton as Tram Monitoring Officer in January 2009?

(b) If you were the Tram Monitoring Officer, were you aware at that time that you held that position?

(c) If you were not the Tram Monitoring Officer at that time, who was? Would you be able to direct the Inquiry towards documentation recording the appointment of that person as your nominee?

3. In May 2008 CEC also entered into an Operating Agreement with TEL (**CEC01315173**). The May 2008 CEC/TEL Operating Agreement does not refer to a Tram Monitoring Officer but provides (at paragraph 3.5) that "The Council will appoint a Company Monitoring Officer. The first Company Monitoring Officer will be the Director of City Development or the Director of Finance".

Can you advise the Inquiry who was the Company Monitoring Officer for TEL in terms of the May 2008 CEC/TEL Operating Agreement?

4. In December 2009 a new Operating Agreement was entered into between CEC and TEL (**CEC00645838**), which referred to a Tram Monitoring Officer, which was

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

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

Supplementary Questions for David Anderson

Supplementary Question 1

Response

I was not quite in post on 4 March, 2008 when the summary of company secretaries, monitoring officers and liaison officers was drawn up. It seems to have been prepared to tighten up governance arrangements relating to a wide range of Council-owned Companies. I don't believe I saw the summary at the time of my appointment. My first recollection of dealing with monitoring officers for individual companies was in the exchange I had with Gerry Baker on 11 April. Gerry explained to me, in his response of 14 April, that arrangements had been put in place to ensure that each arms-length company had a dedicated Monitoring Officer, usually a Manager at or below Head of Service level with a close working relationship with the company in question.

Much of my initial focus - in terms of corporate governance concerns within the Council-owned companies - was on EDI and Waterfront Edinburgh. Both companies were badly affected by the 2008 property downturn. Land values had plummeted and they were left exposed to high levels of debt relative to their asset base. I spent a considerable amount of my time in 2008/09 dealing with the Banks, refinancing the outstanding debts of these companies and saving the land and property assets that they had accumulated so that the Council could benefit from them when economic conditions improved.

Andrew Holmes is likely to have continued 'de facto' as Monitoring Officer for Tie and TEL in the few weeks that remained until his departure. Marshall Poulton took up his post as Head of Service for Transport in April 2008. Jim Grieve was the acting Head of Transport prior to Marshall's appointment but I don't believe he had any involvement as TMO. The Council Review of 2007 had identified a need for revenue savings of £25m across all Services. Marshall's first task following his appointment was to carry out a restructuring exercise within the Transport Service to achieve the necessary savings in his area. Jim Grieve helped him undertake this exercise and Jim then left the Council in the autumn of 2008. Until Marshall's appointment as Tram Monitoring Officer (TMO) in January 2009 - Duncan Fraser, leading on civil engineering matters and Alan Coyle on financial matters were the key monitoring and liaison officers working with tie. Donald McGougan and I relied upon their advice with regard to all tram and tie related issues and any points they felt we should raise when attending the Tram Project Board.

Once Marshall was up to speed in his new role and the Service restructuring exercise had been completed the operating agreement with Tie of May 2008 was reviewed and revised governance arrangements were put in place. Marshall was then formally appointed TMO for Tie from January 2009, reporting on progress each month to the Tram Project Board (TPB). I met informally each month with Marshall and Duncan Fraser to discuss any issues that needed to be reported to the TPB.

Supplementary Question 2

(a) Responses

No, the Tram Monitoring Officer role was not intended to be filled by a Director because of the wide span of responsibilities that Directors had – in my case around 750 staff across 4 major service areas. In the case of the tram project it was also a role that required some transport engineering expertise. My own career background had been in economic development, unlike Andrew Holmes who was a Transport Engineer by profession.

Responsibility for assigning all arms-length Company Monitoring Officer roles fell within the ambit of the Council's Director of Corporate Governance, Jim Inch. The fact that Andrew Holmes had, by default, been identified in March 2008 as filling the role was, I suspect, due to the fact that my appointment was imminent. I have no recollection of being advised of any TMO responsibilities that ever fell to me. However, I was aware that I was the principal adviser within the Council on transportation infrastructure matters and also the company liaison officer insofar as any matters concerning a future integrated bus and tram network were concerned. I therefore met Willie Gallagher of Tie and Neil Renilson of Lothian Buses on several occasions to discuss issues with regard to future transport network operations and how the two companies – tie and Lothian Buses – would come together under the umbrella of TEL. These meetings covered things such as plans for expanding the tram network beyond the scope of line 1a as well as more mundane matters such as the design of the livery for the trams.

(b)

I don't believe that at any point I was fulfilling the role of Tram Monitoring Officer.

(c)

As indicated above Duncan Fraser and Alan Coyle were, de facto, carrying out the functions of this role in the period until the review of autumn 2008 that led to Marshall Poulton's appointment from January 2009. I am afraid that I cannot point you to any documentation to that effect. There were a number of staff roles in transition in the summer of 2008 following the departure of Andrew Holmes as Director, the retirement of the previous Head of Transport, Keith Rimmer who I never met and then the early retirement of Jim Grieve, the acting Head of Transport.

Supplementary Question 3

Response

I was not party to the Operating Agreement with TEL. The agreement was drawn up by the Council's Legal Service and I have no recollection of seeing it. However, it is fair to say that in relation to TEL the principal liaison in respect of matters of Corporate Governance (company reporting etc.) fell to Jim Inch the Council's Corporate Director, while in relation to transport strategy and the development of the future, integrated bus and tram network the lead role fell to me. One of the important points to note is that, at this stage, TEL was little more than a shell company. Its Board Meetings took place immediately after tie Board meetings – and although I didn't attend the TEL Board meetings – my recollection from discussions with David Mackay, Graeme Bissett and

others is that they were rather perfunctory affairs in the early days. In practice, tie and Lothian Buses were the two companies that had substantial staff and budgetary resources that required to be managed and therefore monitored. The role of TEL became more significant from around late 2010 and in particular, post mediation, as there was a need to gear up for operations and for TEL to take responsibility for assets such as the Tram Depot.

Supplementary Question 4

Response

Mr Poulton was the Tram Monitoring Officer from January 2009 onwards but it is correct to say that his focus was entirely on tie. In relation to dealings with TEL as indicated above Jim Inch dealt with the routine corporate governance matters and I dealt with discussions on transport policy matters. In early 2009, these longer-term strategic issues were over-shadowed by the Princes Street stand off and the unfolding contractual disputes between tie and BSC. David Mackay was Chairman and acting Chief Executive of both tie and TEL at this time and his focus was on getting BSC back to work in the belief that they were failing to adhere to the terms of the contract. David briefed Tom Aitchison directly on the here and now issues affecting the tram project and both Marshall and myself were given a clear steer by Tom to support David during this difficult period. The role of monitoring TEL was seen as a low priority at this stage given that the company was not yet fully formed and operational in the way that tie and Lothian Buses were.