

Statement of James Papps

INTRODUCTION

1. a. What were your professional qualifications and vocational experience when you started work on the Edinburgh tram project?
- b. What experience did you have of large infrastructure projects?
- c. During what periods were you involved in the tram project and in what roles?
- d. What was your job title and what did that role involve?
- e. What were your duties and responsibilities?
- f. When and why did you leave the project?
- g. Who did you work with during the periods that you were working on project?
- h. To whom did you report?

Professionally I am a qualified lawyer (barrister). At PUK I had been involved in our work reviewing a range of local authority projects procured through PFI across various sectors. I also had involvement on the London Underground PPP. Prior to PUK I worked in HM Treasury in the team responsible for PPPs.

My involvement with the Tram project dates from soon after PUK started to work with TIE, around 2002. I was an Assistant Director as part of the PUK's small team, with senior support from other colleagues including Martin Buck, Michael Gerrard and James Stewart (to each of whom I reported at different times). The extent of our involvement varied over the next few years and ceased completely after the signing of the Infraco Contract in 2008.

PUK no longer exists and I have no access to old project files. Whilst some of the documents you have sent me have prompted

recollections from our work in Edinburgh, the engagement there was several years ago. Where I cannot recall or cannot be sure of answers to questions I have stated this.

PARTNERSHIPS UK ('PUK')

2. a. What was PUK? What were its aims and objectives?
- b. What was its role in the Edinburgh tram project and between what dates did it carry out that role? When and why did PUK's involvement in the tram project come to an end?
- c. Who brought PUK into the project? Who did PUK work for and report to? Who paid for PUK's services?
- d. To what extent did PUK have power to direct the way that the project should progress rather than simply advise?
- e. Did you consider that PUK's advice was taken seriously and acted on?
- f. Did PUK have any concerns about the project at any stage? If so, were these concerns addressed either by PUK, TIE or any other body?
- g. If PUK had concerns about how the project was progressing what could it do?
- h. What was Martin Buck's role on the project while at PUK?
- i. What was James Stewart's role on the project while at PUK?

PUK was itself a public private partnership (PPP): 51% owned by the private sector, and 49% owned by the public sector (HM Treasury and Scottish Ministers). It was set up with a public sector mission: to work only for the public sector on public private partnerships in the broadest sense (not just PFI, but a range of areas where the public sector was contracting with the private sector for the provision of infrastructure and associated services). PUK's role was seen as unique and we did not compete with, or seek to duplicate the role of private sector advisors. PUK did charge fees, but as an organisation was not seeking to maximise profits. The closest analogy now in Scotland would be with the Scottish Futures Trust (although SFT

is a much larger organisation than PUK's very small Scottish team). PUK was based in London, but always had a presence (and small office) in Scotland (given our shareholding).

PUK's initial involvement was with TIE shortly after TIE was established. At that time the Tram project was just part of the wider Integrated Transport Initiative (ITI) that included congestion charging. I'm not sure precisely how we first got engaged, though think TIE and CEC may have been encouraged to speak to PUK by the Scottish Executive. Michael Howell was the newly appointed Chief Executive of TIE, working with Alex Macaulay from CEC. PUK worked for and were paid by TIE. Initially we prepared a short report for TIE on the ITI. Subsequently our engagement was under the terms of a Development Partnership Agreement, and latterly as a call-off under the Framework Agreement that PUK had in place with the Scottish Executive (see below).

The extent of PUK's (and my) involvement varied over the period 2002 to 2008. I worked with the TIE team that developed the tram operating contract (DPOFA). We were much less involved in the other contracts. Towards the end of the period, our involvement was largely through attendance at the Project Board and sub-committees (in a non-exec role). We never had power to direct the project (despite wording in the DPA – see below). However, the Board roles allowed for an influence, as did our relationship with the Scottish Executive. We did have concerns about the project at various points, some of which appears in the papers you have. Generally these concerns would be listened to by TIE. In particular in early 2006, at the time David Mackay started as Chair of TEL, and Willie Gallagher at TIE, a critical point in the procurements and in the relationships between TIE, TEL and Transport Scotland, we

suggested a 'readiness review' to be carried out by an independent review team (a review that took place in May 2006).

Martin Buck was the senior PUK employee when we first started working with TIE. James Stewart was our senior representative during the final period of our engagement with TIE. Both attended the Project Board or equivalent. James' involvement was limited to attendance at the Board in a non-exec role.

PUK AND TIE – AUGUST 2003

3. **ADS00004** appears to be the Development Partnership Agreement between TIE and PUK dated 29 January 2004 for the Edinburgh Tram Project. Paragraph 1 sets out the purpose and duration of the Development Partnership: *"We agree that PUK and TIE will work together to achieve the successful development and procurement of a public private partnership (PPP) contract for the Project in an efficient and timely manner. PUK and TIE will develop, structure, manage, control and conclude the Procurement as set out in this Development Partnership. We will both contribute to the costs of the Procurement and we will both share in its risks and rewards... The Development Partnership is entered into as of and with effect from 1st August 2003. Unless previously terminated in accordance with the terms set out below, it will continue in being until the Procurement is complete and Contract Close for the Project is achieved."*
- a. Can you confirm that this was the agreement that governed the relationship between TIE and PUK? Was the agreement ever updated or changed?

This looks like the DPA that was the basis of our engagement (there were various drafts). Previously we had worked at risk, and the DPA was subsequently superseded by a support agreement under PUK's Framework with the Scottish Executive (think in summer of 2006).

- b. Can you explain the nature of PUK's relationship with TIE?

The DPA was a standard template agreement that formed the basis for PUK to operate a 'partnership' approach to working with the public sector on major projects/programmes. As a partnership, it was not an arrangement that needed to be tendered to the wider market. Under a DPA, PUK could invest its capital, to pay for project development costs (e.g. advisors' fees) and would work at risk, making a return on successful completion of a procurement. Consequently, the standard template contains language appropriate to joint control and partnership.

- c. Paragraph 3.1 gives PUK a right to attend and participate in the TIE Board meetings. Paragraph 3.3 states that all decisions of the TIE Board in relation to the project are subject to the approval of both TIE and PUK. In light of this, and paragraph 1 noted above, it appears that PUK had a substantial amount of control over the procurement process, would you agree?

CEC and TIE were never comfortable to cede such control, and did not wish PUK to invest capital. Hence the DPA operated more as a support agreement – essentially a contract for advisory support (reflected in the payment arrangements). The provisions mentioned were not how the relationship worked in practice. PUK had influence through presence at Board, but not real control.

- d. In the preamble on page 1 of the agreement it is stated that "*the purpose of the Development Partnership is to combine our individual skills, experience and financial resources to achieve successful, timely, cost-effective and efficient development and procurement processes*". What skills and experience did PUK bring to the project?

PUK as an organisation had a wide range of commercial experience around PPPs and complex procurements. PUK employees were relatively senior, with backgrounds in finance, law, accounting, project management and complex procurement.

- e. Paragraph 4.3 states that "*TIE will contribute its expertise on local transport, light rail projects... to the procurement*". How did PUK satisfy itself that TIE had such expertise?

This was standard wording (in line with 'partnership' nature of DPA).

- f. Was PUK engaged by any other party to the project, such as CEC or Transport Scotland? If so, can you explain the nature and purpose of those engagements?

No.

4. Paragraph 1 of the Development Partnership Agreement referred to above states that "*we agree that PUK and TIE will work together to achieve the successful development and procurement of a public private partnership (PPP)*".

- a. What is a Public Private Partnership, and how does it differ from the contracts finally concluded?

'PPP' is really an umbrella term that covers a range of potential contractual relationships between the public and private sector, from PFI to joint ventures or other contracts.

- b. Given that the contracts finally concluded were not PPP contracts, why did PUK continue to be involved in the project?

The Edinburgh contracts could be seen as PPP in this broad sense (although they were not PFI).

PUK AND THE SCOTTISH MINISTERS – MARCH 2006

5. **ADS00005** bears to be an Agreement between the Scottish Ministers and PUK from March 2006:

a. What was the purpose of this Agreement? Did this Agreement govern the relationship between PUK and the Scottish Ministers in relation to the tram project?

This looks like a Framework Agreement between PUK and Scottish Ministers that enabled Scottish government departments and other Scottish public sector bodies to engage PUK's services ('call-offs') at agreed rates. PUK had such frameworks in place with most Government Departments in England too. It was separate from the engagement with TIE (based on the DPA described above). However, when the DPA finished, TIE, as a Scottish public body, engaged PUK under a call-off using this Framework (in 2006).

b. What services did PUK provide to the Scottish Ministers both generally and in relation to the tram project?

PUK did not provide services to the Scottish Executive in relation to the Tram. The Framework however was the basis on which PUK carried out a range of work for the Scottish Executive in other areas (e.g. schools PPP, health sector, waste sector etc).

- c. Did PUK act on behalf of the Scottish Ministers during the tram project? If so, how did PUK's relationship with the Scottish Ministers sit with its relationship with TIE?

PUK were not acting for the Scottish Executive in relation to Tram. Our engagement was with TIE.

MEMBERSHIP OF BOARDS AND COMMITTEES

6. You sat on the Tram Project Board (TPB) and the joint TPB/Transport Edinburgh Limited (TEL) Board up until at least April 2008 (see, for example, the minutes of the TPB/TEL Board meeting on 9 April 2008 – **CEC00114830**). You also sat on the Design, Procurement and Delivery (DPD) sub-committee.

- a. What was your role, or PUK's role, on each of these Boards and committees?

I wasn't a member of the Tram Project Board, but did attend a number of meetings as substitute for senior PUK representatives (Martin Buck, Michael Gerrard, James Stewart). I was on the DPD sub-committee, which, from memory, reported into the Board and had a narrower remit in relation to some of the contracts and the procurement. PUK was essentially in a 'non-executive' challenge role on the Board and sub-committee.

- b. What was the purpose of the DPD sub-committee?

As above.

- c. Were you, or other members of PUK, members of any other boards or committees? If so, what were they called and what was their purpose? What was your, or PUK's, role on each of those boards or committees?

We were not on any other Tram Boards that I can recall. We did have similar roles at times on the Congestion Charging project, and the Edinburgh Airport Rail Link (EARL).

7. a. What were your views on the quality of TIE's reporting to the TPB or any other Board or sub-committees? Did you consider it was adequate?
- b. What were your views on the quality of the papers presented to the TPB? Did they provide an accurate account of progress every month? Were they clear and comprehensible?
- c. Do you consider that the TPB played the role it was meant to play? Was the TPB sufficiently well informed and experienced enough to scrutinise the work of TIE?
- d. Did you have any concerns, at any stage, in relation to TIE's reporting to the TPB or the ability of the TPB to hold TIE to account?

I only attended some meetings. As far as I recall, TIE's reporting was adequate. It is difficult to know if information is not being reported, but papers were generally clear and comprehensible when I attended.

A REVISED ROLE FOR PUK – JUNE 2006

8. **CEC01828054** (attached to **CEC01828053**) is a letter from Michael Gerrard, Deputy Chief Executive of PUK, to Willie Gallagher of TIE dated 26 June 2006. It outlines the basis of a revised proposal for PUK engagement with TIE in relation to the Edinburgh tram project. PUK suggested the revised engagement would vary or replace the Development Partnership Agreement.
 - a. What gave rise to the proposed new role for PUK with TIE?

There was new management at TIE and TEL and after discussion about the project at that point, and concerns about progress, we had suggested a 'readiness review' as a means of identifying outstanding issues. I think at that point we felt it appropriate to end the DPA arrangement (which had never really operated as a 'partnership' as described above). I wasn't party to all those discussions, but I think TIE wanted PUK to continue in some role, which was the origin of the revised proposal.

- b. Did PUK ever accept this proposed new role?

We did continue in a revised role, which was a call-off under the Scottish Framework (as described above) and replaced the DPA. It was James Stewart attending the Board and myself on the DPD sub-committee, both non-exec roles. TIE did not want the quality assurance role or other services

- c. Were the agreements between PUK and TIE, and between PUK and Transport Scotland, amended to reflect that new role?

As above.

9. Michael Gerrard made a number of recommendations in his letter, referred to in the next question.

- a. What prompted these recommendations? Did TIE accept and implement these recommendations?

As question 8.

10. In his letter (CEC01828054) Michael Gerrard made the following recommendations:

- a. PUK suggested that PUK's Chief Executive, James Stewart, join the new Tram Project Board. The areas in which PUK could add most value at a working level were: business case evaluation; commercial risk assessment and contractual formation; procurement and bidding strategy and bid evaluation frameworks. Was James Stewart appointed to the Project Board? What was James Stewart's role on the Project Board?

James Stewart was on the Board. His role was essentially that of non-executive challenge.

- b. Quality assurance would be best provided through a process of periodic review and challenge, which would be organised by PUK. It was proposed that you become manager of the quality assurance programme. Did this happen? What were the main elements of the proposed quality assurance programme?

This did not happen.

- c. PUK said that the foundation stone of all good project governance is an appropriately constituted and delegated Project Board. The right membership and terms of reference were key enablers of success. Did PUK consider that the TPB was properly constituted with delegated powers? Did PUK consider that the membership of the TPB and its terms of reference were appropriate?

I assume we did, as we (James Stewart) joined the board

- d. We understand, for example, that the TPB had no formal legal basis and was not formally delegated powers and duties until it became a sub-committee of TEL around the middle of 2008. Did that cause you any concern?

Don't recall concern at the time. When I attended the Board certainly seemed to be the decision-making forum for the project.

- e. A dedicated senior post should be created within CEC to champion the interests of the project. Did this happen?

Don't recall.

- f. An immediate priority for the new Project Board should be a review and confirmation of project scope and affordability. Did this happen? What was the outcome of the review? If it did not happen, why not?

Don't recall.

11.CEC01798102 is an email from David Mackay (TEL) to Graeme Bissett (TIE) dated 7 July 2006 containing an email of the same date from Graeme Bissett to Willie Gallagher. It discusses a proposed response to Michael Gerrard's letter above. They accept James Stewart should sit on the Project Board but do not want PUK to organise the review process.

- a. What are your views on the proposed response?
- b. What are your views on the comment that *"we suggest that the independent review process requires further consideration to ensure there is no conflict"*?
- c. What are your views on David Mackay's comment *"in short de minimus! (But politically sound)"*?

The response reflects the level of engagement that TIE wished to have going forward. As mentioned above, TIE did not wish PUK to arrange the assurance. This is understandable if they perceived conflict, though the proposal was only that we would *arrange* reviews (not carry them out) – as we had done with the original 'readiness review'. TIE clearly wanted to keep the PUK role high level only going forward. Given our relationship with the

Scottish Executive, some form of continued role was probably felt appropriate.

PUK INVOLVEMENT IN THE TRAM PROJECT

Procurement

12. 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 main objectives are well summarised in the PIN document from 2005 (CEC01856196). TIE were trying to learn lessons from some of the experiences on previous light rail procurements.

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

The aim was to obtain a fixed price for the Infraco contract, which was important given the funding available to the project.

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

I don't think the broad objectives of the strategy changed, though details evolved.

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

We weren't involved in the later stages of the project, but overall, the aims of the strategy weren't met. The strategy placed considerable demands on TIE to coordinate and manage the suite of contracts. Once issues arose in relation to design and utilities diversions it proved difficult to achieve fully the intended risk transfer to the Infraco. TIE also suffered from changes in key staff and the uncertainties surrounding the complex relationships between TIE, TEL, Lothian Buses, CEC, Transport Scotland and the Scottish Executive.

Design

13. We understand that TIE entered into a Systems Design Services (SDS) contract with Parsons Brinckerhoff in September 2005 and that there were three main stages of design, namely, the Requirements Definition phase (provided by December 2005), Preliminary Design (provided by June 2006) and Detailed Design. We also understand that there were difficulties and delays in progressing and completing the design for the tram project.

By way of overview:

- a. What was your understanding of the main difficulties in carrying out the design work and the main reasons for these difficulties?
- b. What steps were taken to address these difficulties?
- c. Were these steps successful (and, if not, why not)?
- d. 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?

We had little involvement with the Design Contract, so I don't feel able to answer these questions.

Utilities

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

By way of overview:

- a. What was your understanding of the main difficulties in carrying out the utilities works and the main reasons for these difficulties?
- b. What steps were taken to address these difficulties?
- c. Were these steps successful (and, if not, why not)?

We had little involvement with the Utilities Diversions Contract, so I don't feel able to answer these questions. I think there may have been issues around unknown utilities – which I'm afraid is a common problem on city centre projects.

Early Days

15. **TRS00001870** are the minutes of a meeting of TIE Directors that took place on 30 May 2002. At paragraph 9 it was noted that PUK would assist in determining possible financing schemes.

- a. Was PUK providing advice to TIE in relation to several projects, or just the tram project?

When we were first engaged, TIE was looking at the ITI – not just the Tram. We did write a report around financing in relation to the ITI – see above.

- b. What financing scheme did PUK recommend for the tram project? Why did it recommend such a scheme? Was that advice followed?

The report was looking at finance more generally in relation to the ITI, not Tram, and, from memory, covered issues such as opportunities for TIE to borrow, and use of potential revenues from congestion charging and Trams.

- c. What financing scheme did the tram project use? What were the advantages of such a scheme? Did PUK have any concerns about the scheme and, if so, what were they?

The Tram was funded by capital grant – from the Scottish Executive and CEC ('conventional funding'). This would be the usual funding route for projects that do not pursue private finance (PFI).

Assessment of Funding Options by PUK

16. TIE00026176 is an email dated 19 September 2005 from Graeme Bisset to you and others attached to which is a paper entitled '*Edinburgh Tram System Procurement: Assessment of Case for PFI*' (**TIE00026177**). In the introduction it is stated that the final OBC "*will need to include a clear recommendation and detailed plan for the procurement whether conventional or via PFI... it is both TIE's and PUK's view that a preliminary view from the Scottish Executive as to the potential procurement route would be extremely helpful*".

19 September
2005 should be
19 January
2005

- a. At that point in time, what were the key differences, if any, between conventional, PFI, hybrid PFI, and PPP procurement routes? Is one procurement route preferable over another?

'Conventional' procurement is the model (most often used) under which the public sector will pay up front for the design/construction of a building or piece of infrastructure. The term 'conventional' really just refers to the lack of private finance,

as compared with PFI. PFI is the procurement model under which the private sector partner Designs, Builds, Finances and Maintains (or Operates) a building or piece of infrastructure under a long term standard contract (usually around 25 years). The public sector then pays over the length of the contract. 'Hybrid' would be some combination of the two. PPP is less defined, but would often involve long term contracts with finance. 'PFI' is a well-defined model, with a standard contract. The other procurement routes are less well defined.

- b. What procurement route was chosen for the project (e.g. conventional, PFI, PPP)? Why was that route chosen? Can you explain how the chosen procurement route was supposed to work? How did it work in reality?

The Tram was 'conventional' in the sense that there was no private finance. It was not a PFI, or hybrid PFI. The procurement involved a series of contracts, as described in various documents.

- c. Who chose the procurement route for the project?

The procurement route was proposed by TIE and agreed through the various governance processes, and with the Scottish Executive.

- d. Did PUK provide any advice on which procurement route to choose? If so, why did it provide such advice? Who did it provide that advice to? Was that advice taken into account?

At the time there was an established methodology applied by the public sector to decide whether to opt for PFI as opposed to some form of conventional procurement. PUK helped TIE

propose an application of this methodology for discussion with the Scottish Executive i.e. advice on the process.

- e. Would the outcome of the tram project have been different if a different procurement route was used? If so, why?

Very difficult to answer. PFI wasn't appropriate for the multiple contract strategy pursued by TIE.

Development of Procurement Strategy

17. **CEC01856195** is an email dated 28 February 2005 from Clement Walsh of PwC to you and others attaching his proposed draft procurement strategy (**CEC01856196**). It explains the historical difficulties with procurements of light rail transport systems and the proposed solution of splitting the procurement up into different parts.

- a. What was PWC's role in the tram project?

PWC were financial advisors to TIE.

- b. What was the purpose of document **CEC01856196**?

Don't recall precise purpose of this document – it looks like a draft discussion piece on the procurement strategy.

- c. Which individual, body or organisation first proposed the 'separate contract' approach to procurement?

Ian Kendall at TIE was a key driver of the strategy, based on his experience elsewhere of some of the difficulties with previous tram procurements.

d. What were your views on the pros and cons of that strategy?

We understood the aims, in light of some of the previous issues with tram procurement. The process gave greater control to TIE and potentially would provide a clearer framework of risks for the private sector to price. This did however place a greater burden on TIE to manage the process and coordinate the different contracts, which had the potential for risks to revert to TIE in the event of difficulties (e.g. delays on one contract having knock-on effects on others).

e. Were you aware of examples of other major infrastructure projects where that strategy had been successfully implemented?

The process of letting several conventional contracts is used regularly on many projects – but details will vary.

f. What did PUK think of the separate contract procurement method? What were your own views?

See (d).

g. The paper states the purpose of doing the design first was so that the *“bidders will be presented with highly specified designs, with only detailed design being undertaken by the bidders for the infrastructure company”*. Can you explain what is meant by the terms “highly specified designs” and “detailed design”?

There are different levels of design from a technical viewpoint. These may be technical terms.

h. It is noted that “a specific design for the significant utilities diversions” should be produced. What was your understanding of the purpose of that?

Think this refers to fact that a design was required to facilitate the diversion of utilities (need to know where track will run etc.)

- i. When the procurement strategy was devised to what extent was it envisaged that detailed design and the utilities works could be complete: (i) when bids for the infrastructure contract were received; (ii) at Infraco contract close; and (iii) when the infrastructure works commenced?

Think aim was that would be complete by Infraco contract close.

- j. When the procurement strategy was devised, what consideration, if any, was given to the risks that would arise (and how they would be dealt with) in the event that there were delays in completing the design and utilities diversion works?

There was certainly awareness of these risks – as referenced in some of the papers.

18.CEC01865183 contains an email dated 3 March 2005 from Andrew Fitchie (DLA) to Martin Buck, copied to you. Attached to that email is a note prepared by DLA in April 2004 shortly before it was “instructed to lay down tools on procurement strategy work” (**CEC01865184**).

The attached note is entitled ‘Note on the Apportionment of Infrastructure Design Risk and the Appointment of a Design Team by TIE’ (**CEC01865184**). The note contains DLA’s advice on the advantages and disadvantages of novating the design contract to the infrastructure contract and the alternatives to novation. For each option, it explains the risks and which party would bear those risks.

According to Andrew Fitchie’s email, the background to DLA’s note prepared in April 2004 “was that TIE had decided to issue an OJEU notice for a single technical adviser which was at odds with the procurement working group’s thinking as to how the design function would need to be handled and Ian’s

[Kendall] concept of how the major contractual responsibilities would be dovetailed".

- a. What was PUK's role in relation to appointing a design contractor and determining the design contract structure?

We didn't have a role.

- b. Can you recall why the OJEU notice was at odds with thinking on the procurement at the time?

No.

- c. What was Mr Kendall's concept of how the major contractual responsibilities would be dovetailed?

Can't recall exactly.

- d. DLA's advice of April 2004 notes the urgent need to appoint a design team to achieve the infrastructure programme and to facilitate and maintain control of the design process in sensitive design areas, such as Princes Street. Parsons Brinckerhoff were eventually appointed as designers in September 2005. Why was there a delay in appointing contractors? What effect did the delay have on the tram project?

Don't recall.

- e. One of the benefits of novation, as set out in DLA's advice, was that design risk was transferred to the infrastructure contractor. What was PUK's view on novation and design risk?

Think we would have agreed with DLA – novation required for full risk transfer.

- 19.a. What was your understanding of why DLA were instructed to stop work on the Procurement strategy? What was your view of this instruction? What impact did it have on the procurement strategy from April 2004?

Don't recall.

- b. What was your understanding of the SDS contract and its defined stages? What consideration was given to risks that could arise and how they would be addressed?

Don't recall.

20. **CEC01857449** is an email dated 11 March 2005 from you to Ian Kendall, Andrew Fitchie, TIE and PwC regarding the SDS contract. You said *"Hopefully Tuesday's session has given Clement the ammunition to set out all the reasoning behind the approach on this. The other factor which I think will be useful in terms of reassuring SE, TIE board (and Martin) is the degree to which the contract adopts a phased approach to the work... Is this how the contract works? Are there defined stages, with defined priced work packages and cut-off points? And if so, is this something we can describe for purposes of OBC?"*

- a. Can you explain what this email relates to?

Can't recall exactly I'm afraid. Looks like it was part of discussions around approach to SDS contract.

- b. What is meant by giving Clement (PWC) *"the ammunition to set out all the reasoning behind the approach on this"*?

Would guess that Clement was speaking to Scottish Executive on behalf of TIE.

- c. Why was it necessary to seek to reassure the Scottish Executive (SE) and the TIE Board?

Would guess that they needed to agree approach to SDS contract (as a substantial contract).

October 2005

21.CEC01866826 (attachments are **CEC01866824** and **CEC01866825**) is the ETN Prior Information Notice (PIN) Information Memorandum dated October 2005 issued to potential bidders. At page 5 of the Procurement Strategy section it is stated that *"TIE have set out to construct a Procurement Strategy that exploits lessons taken from the issues experienced on recent light rail procurements and addresses the specific circumstances affecting Edinburgh. The resultant structure is a series of contracts which, managed as a suite, will achieve an open and efficient procurement, risk transfer which places key risks on parties best suited to manage and will deliver the scheme in a controlled manner, providing strong value for money."*

- a. What was your role in developing this procurement strategy described?

I was part of general discussions on procurement approach. Ian Kendall was key driver of strategy with advisors providing support.

- b. What was the basis for concluding that the contract structure placed key risks on parties *"best suited to manage them"*? How would that be done?

Specialists doing design, utilities diversions, operations etc.

22. The plan as set out in the PIN (bottom of page 7) was that *"TIE has arrived at a proposed solution where it plans to take a greater degree of control over the process during the "development" phase than the public sector has done under*

classic PFI models. This will result in TIE progressing the overall project sufficiently in advance of seeking bids from Infraco bidders, so that TIE will endeavour to present the private sector with a better platform”.

- a. What would have been done differently under the “*classic PFI model*”?

Under PFI the private sector partner would put together its own consortium which would be responsible for the whole package of works: design, utilities diversions, construction, maintenance /operations, and finance. The consortium would price the whole package, including allowance for the cost of risks associated with different elements.

- b. How were TIE to present the private sector with a better “*platform*”?

TIE would already have progressed designs, utilities diversions, appointed an operator.

November 2005 – Final Version of VFM Assessment Report

23.TRS00000225 is an email dated 4 November 2005 from Ben King to Sandy Rosie (Scottish Executive) attaching an email dated 3 November 2005 from Graeme Dunn (TIE) to Stewart McGarrity (TIE), you and others. Attached to that email is the final version of the Procurement Route VFM Assessment (**TRS00000226**) which recommends that a non-PFI route be pursued.

The paper analyses choices on the basis of ‘VfM Assessment Guidance – Practical Application Note’ with further direction supplied by Financial Partnerships Unit (FPU) in the Scottish Executive. TIE viewed the project procurement as a choice between an ‘enhanced’, TIE designed, conventional procurement process versus a PPP/PFI structure for the main Infraco contract. The paper suggested that there were many similarities between the two procurement methods particularly in terms of risk transfer.

It concluded that *"the 'enhanced' conventional option appears capable of delivering similar levels of contractual risk transfer and potentially better VfM than an 'on Balance Sheet' PPP option with its associated higher cost of capital"*

- a. What were your views on these matters? Did you agree with the procurement model chosen? Did PUK and the Scottish Executive agree with that model?

We were involved in advising on the process of evaluation: as mentioned earlier, there was a standard approach to assessing the comparative VfM of 'conventional' vs PFI procurement. As Tram was a unique project, (e.g, as compared to standard schools procurement) it required a tailored approach to the VfM assessment, which required discussion with the FPU in the Scottish Executive. The overall paper is a good assessment of the various issues.

- b. What was your role in developing this paper?

We helped facilitate the process and helped TIE with its preparation.

- c. Who else was involved in its preparation?

TIE, FPU, TIE's advisors (PWC).

24.TIE00027287 is an email dated 30 November 2005 from Stewart McGaritty to you and others regarding preparation of the Outline Business Case (OBC) procurement section.

The email notes that *"PWC in full consultation with TIE, DLA and PUK will be responsible for delivery of the document which will be a TIE document and may*

be used for several purposes. The most immediately important purpose will be for the "OBC" to be delivered by TIE at the end of February 2006".

The email makes reference to a meeting with PUK that day and to your role, which was to provide a summary of feedback and conclusions from PIN market consultations. It discusses at number 3 et seq:

"3. Risks in relation to MUDFA / Infraco interface and the novation of the SDS and Vehicles contracts to Infraco

4. Detail of MUDFA procurement including strategy, sequencing of diversions, interface with Infraco, programme – all of this complete with a spend profile is needed during the next few weeks to inform the TIE Business Plan.

5. The detail of how a comparable level of risk transfer can be achieved via TIE's procurement / contracting strategy without using a PFI style structure (an expansion on the statements to this effect we have already made in our PFI feasibility study paper). This means mechanisms by which private sector capital can be placed at risk under a non PFI approach eg fixed price tenders, construction milestone payment mechanisms, output / availability based payment mechanisms, bonding and retentions."

a. What was your understanding of, and what were your views, on these matters?

TIE sensibly ran a market consultation. I'd forgotten, but I clearly wrote up part of the feedback from that.

25. TRS00008541 are the papers for the TPB meeting on 19 December 2005. They include the minutes of the previous meeting on 22 November 2005. At p.42 of 70 of the papers there is a report entitled 'Tram Project Funding'.

Under the heading of 'MUDFA, Vehicles and Infraco Procurement Timetable' it is stated that *"The construction timetable must also be clear or bidders will price in slippage risk in an undesirable manner. In particular the terms of the utility*

diversion contractual arrangements and the utility programme must be clear to support the construction tender.”

- a. What was your understanding of, and what were your views, on these matters?

Think it refers to Bidders for the Infraco contract needing to be clear on what would be completed and when under the MUDFA contract.

Procurement Model – DLA Piper Advice – December 2005

- 26.CEC01875138** contains advice from DLA Piper dated January 2006 on the future of the existing DPOFA (Development Partnering and Operating Franchise Agreement – ie the Tram Operator contract) and the associated procurement risks. The advice considered the interface between TIE/TEL.

January 2006
should be
December 8,
2006

The paper provides the following summary at page 3:

I. Removing the commercial and financial core of the DPOFA would create appreciable procurement risk.

II. Proper mitigation of that risk requires careful analysis of what would replace existing obligations and rights.

III. We do not consider it is either prudent or practical to attempt to renegotiate DPOFA financial terms and risk allocation between now and projected Infraco ITN issue in early Q2 2006. This risks destabilising the involvement of Transdev in the Infraco and tram procurements.

IV. The renegotiation of DPOFA will require resource and time. We question if that time is available within the pre-Infraco ITN programme and if it is good use of resource to start the task now...

V. We cannot judge how any negotiation with TETL would run without knowing its objectives

VI. These amendments are necessary for the Infraco and tram vehicle procurements.

VII. Transdev should be receptive to negotiating these issues since they are largely concerned with relief events and necessary closer definition of operator responsibilities.

VIII. No procurement issues arise."

- a. Can you explain the background to his advice provided by DLA? Why were TIE seeking to amend or renegotiate the DPOFA contract at this point?

Think it was TEL who wanted the DPOFA renegotiated. The original DPOFA was designed to give the operator (Transdev) various risks around revenue collection, and controls. TEL had a different view of how operations would work with Lothian buses. DLA were advising on the issues involved in amending DPOFA at that stage.

- b. What was the outcome?

It did get amended.

December 2005 – Draft OBC and Meeting with Potential Infraco Bidders

27.CEC01866516 is an email dated 15 December 2005 from Sharon Fitzgerald to you commenting on previous email from you to Andrew Fitchie and others dated 7 December 2005 regarding the drafting of the procurement chapter of the Outline Business Case (clean version is **CEC01866517**).

Attached to the email is a summary of the Prior Information Notice (PIN) meetings held with six potential Infraco bidders. It was drafted by you and the information was to be included in the procurement chapter of the OBC. At page 2 of the summary it is stated:

"[The potential bidders] generally welcomed the overall approach that TIE had taken in developing the procurement strategy, and recognised the rationale for adopting this approach;

In particular, the de-coupling of tram operations and revenue risk from the infrastructure contract was seen as attractive and an important driver to achieving good VFM bids;

Interviewees also generally understood and supported the rationale for early utilities diversion work;

All saw the benefits of achieving early planning consent on the core network through the SDS Provider, although those with the major in-house design capability (Balfour Beatty and AMEC) were slightly disappointed that significant elements of design would be undertaken prior to Infraco award. However, it was pointed out that not all design would be carried out prior to Infraco award and that there would be an opportunity to vary the scope of the design services at Infraco award if agreed between TIE and the Infraco”.

- a. At this point (December 2005) to what extent was it envisaged that detailed design and the utilities work would be complete when: (i) Infraco bids were received; (ii) at Infraco contract close; and (iii) when the Infraco works commenced?

Can't recall exactly. Think assumption was by (ii) – which is shortly before (iii).

- 28.a. Did PUK assess the various iterations of the tram project business case (e.g. the OBC, DFBC, FBC)? How were PUK's views on these documents communicated to TIE and to the Scottish Ministers?

No – we were working with TIE, so were involved in working on certain aspects (e.g. market feedback, PFI assessment) of OBC.

- b. On whose behalf was PUK assessing TIE's business case? Was it the role of PUK to advise Scottish Ministers or to present the case to Scottish Ministers on behalf of, or alongside, TIE?

We weren't assessing the case. See (a).

January 2006

29. TRS00002092 is an email exchange dated 16 January 2006 between Julian Ware, Ben King, John Ramsay and others regarding concerns you shared with Ben King about TIE rushing to tender for the infrastructure contract without a funding commitment from the Scottish Executive (the design contract was let to Parsons Brinckerhoff in September 2005).

- a. Can you explain the background to these emails?

Can't recall background in any detail I'm afraid.

- b. Can you explain what your concerns were at this point?

I'm guessing that there were still issues to be agreed around funding/affordability for the project.

- c. What was the outcome of the situation described in the emails? Were the OJEU's for the infrastructure contracts issued without "Scottish Executive blessing"? If so, what effect did that have on the procurement process and the project generally?

Can't recall. But the Scottish Executive were part of Board from memory, (although not FPU) so were part of the process.

- d. Was there a delay between the issuing of OJEU's and the Invitation to Tenders? If so, did some bidders lose interest in the tender? What effect did that have on the procurement process?

Don't recall a delay or bidders dropping out.

February 2006 – Development of OBC: Procurement Strategy

30.CEC01855109 contains an email from Rod Cameron (PWC) to Stewart McGarrity (TIE) dated 2 March 2006. Attached to the email is a draft version of the OBC Section 5, which dealt with the Procurement Strategy. In that email Rod Cameron refers to a paper prepared by you on the market consultation process carried out in 2005.

CEC01855110 is a draft of Part 5 of the OBC and deals with the Procurement strategy. It explains the history and the reasons for the current strategy. Page 19 discusses the concept of letting the SDS contract early with subsequent novation to Infraco.

“The primary advantage of this approach is the reduction in overall risk to the project which it facilitates. Development of the design ahead of Infraco ITT creates scope certainty, reduces the lead time between Royal Assent and commencement of operations by up to 2 years and reduces or substantially removes the risks particularly associated with the award of a conventional Design, Construct and Commission Turnkey Contract e.g. planning approvals, traffic regulation orders, Network Rail and other key stakeholder interfaces. In other words the SDS appointment substantially de-risks the Infraco contract. The risk transfer to the SDS is substantial, particularly in relation to approvals and this has been verified by in-house and external consultants and affords TIE control over liability and responsibilities that would not normally be achieved. A reasonable estimate of this risk transfer, particularly if multiplied by Infraco risk margins, would be significant.”

The Infraco will be required to adopt the SDS Provider’s design as at Infraco Contract signature. Variations to this design could be introduced with the agreement of TIE, but at the risk of the Infraco. The novation of the SDS Contract to the Infraco will mean that responsibility for the design and all risks arising are transferred to the private sector system integrator without the normal disadvantage of an increased risk premium which bidders would apply due to uncertainty if they had to carry out the design work post signature.

- a. What was your role in the preparation of the OBC including the procurement provisions?

We didn't have a major role in preparation of OBC – it was TIE and advisors.

- b. What were your views on the provisions noted above?

Sounds accurate – reflects aim with SDS.

- c. What Report did you prepare regarding market consultation? What were its main conclusions and recommendations?

Think this is the section referred to in Q24 above – I wrote up a note of the market sounding in a form that could slot into the OBC.

September and October 2006 – SDS Delays and Impact on Infraco

31.CEC01794546 is a paper on the SDS novation issue dated 18 September 2006 prepared by Geoff Gilbert for the TPB. At the end of the paper it stated that you would be consulted on the recommendation. The paper notes that SDS were unhappy with proposed novation to Infraco, given that there was a clause in their contract that might be used by Infraco to withhold payment.

Infraco bidders had indicated they may be unhappy to use SDS for all design. The recommendation was that a consultation undertaken with Infraco bidders in October 2006 would gain firm commitment on principle of novation and SDS would prioritise the design effort to minimise bidder risk price or risk transfer exclusions (para 6.6).

The Paper further recognised that the interplay between SDS and MUDFA and that this work was critical to the de-risking of Infraco - so therefore SDS needed to provide an early stand-alone team to work on MUDFA.

- a. Were you consulted on this paper? What were your views on these matters?

Don't recall. The recommendations in the paper seem sensible.

- b. At paragraph 6.6 it is noted that that the Infraco bidders would be consulted on the extent of the detailed design work they see as benefiting the tendering and negotiation process. Did that happen?

Don't recall

- c. At paragraphs 7.1 and 7.2 it was said that SDS were also engaged in MUDFA design and that because of pressures on SDS to produce design they should create a dedicated MUDFA design team answerable to TIE. Was a separate MUDFA design team created? If not, why not?

Don't recall

32. The TPB minutes of a meeting on 23 October 2006 (TIE00059601) record concerns about SDS performance presenting a threat to delivery of the Final Business Case due to late return of Infraco bids.

- a. Can you explain what the concerns were at that time?

Don't recall. I wasn't at the Board Meeting.

- b. How did SDS performance affect the bidding process and the programme?

Not sure exactly. Presume that delays in SDS work would have knock-on effect to Infraco tendering given the aim to complete elements of design ahead of Infraco contract.

33. There was a paper to the TPB (**CEC01795186**) dated 28 September 2006 by Geoff Gilbert entitled "Infraco ITN and Tender Process". At the end of the paper it was noted that the paper had been circulated to you and your comments incorporated into the paper. At section 4.0 there is a plan to deliver the tender process. One activity was to *"Prepare and implement the plan for resolving SDS historical issues and for delivering detailed design (including consents) aligned to the programme for negotiation of the final deal with Infraco (4.1.8)"*.

a. What were the historical issues referred to here?

Don't recall.

b. Was a plan prepared and implemented to deal with these issues? Was it successful and, if not, why not?

Don't recall.

34. **CEC01757854** is a powerpoint presentation to the TPB in October 2006. Slides 8 to 10 set out the decision making process and timescale for the tram project.

a. How was this timescale determined and what objectives was it intended to achieve? What were your views on whether that timescale was realistic and achievable?

Don't recall.

November 2006

35.CEC01761606 are the minutes of the DPD meeting of 8 November 2006. You were present at the meeting, which discussed under heading of 'Key Issues and Concerns':

"2.3.1 AH [Andie Harper] reported becoming increasingly concerned regarding SDS performance over the past 4-6 weeks. SDS response to TIE/SDS Senior Executive discussion has been less than adequate. AH noted that currently there was no confidence in their delivery. AH noted that lengthy subsequent discussions had been with Senior SDS staff with regard to their apparent lack of accurate internal reporting had resulted in flagging of concerns in co-ordination, working, resource and management and that currently awaiting response..."

2.3.3 WG requested clarity of alternative arrangements. AH noted that more radical options would dilute the risk transfer achieved.

a. What was your role at this meeting? Why were you there?

I attended DPD Sub-Committee in non-exec role as part of the revised PUK engagement with TIE.

b. It is not apparent from the minutes whether you provided advice or views at that meeting on issues arising? Is this correct?

Don't recall.

c. Do you know what was meant by more radical options?

Don't recall.

d. Were these radical options taken?

Don't recall.

e. Why would they dilute the risk transfer? Risk transfer to what?

Don't recall.

36. Under the heading 'Design (SDS)' the minutes note *"TC (Trudi Craggs) confirmed that MUDFA could commence as planned but that commencement of Infraco street works would be delayed from October 2007 to July 2008. AH confirmed that planned operation of December 2010 would be achieved as critical path depot construction could commence."*

- a. When it became apparent in late 2006 that there were delays in progressing the design what consideration, if any, in your opinion was given to the risks that would arise (in particular, in respect of the infrastructure works) and how these risks would be dealt with?

Don't recall.

37. A report to Council on 21 December 2006 (**CEC02083466**) recommended approval of the Draft Final Business Case (FBC)(**CEC01821403**). The report explained that the estimated capital cost of phase 1a was £500 million (and the estimated cost of phase 1b was £92 million).

The Draft FBC noted that the procurement strategy was intended to *"Transfer design, construction and maintenance performance risks to the private sector ..."* (p16), that *"Following novation of SDS, the design risks pass to Infraco"* (p86), that *"Full design risk passed to Infraco post contract award"* (p95) and that *"The creation of the Infraco contract as a lump sum contract transfers the pricing risk to the private sector"* (p97).

It was noted that *"It is expected that the overall design work to Detailed Design will be 100% complete when the Infraco contract is signed"* (p84) and that risks associated with novation would be mitigated by ... *"Detailed design being largely completed prior to award of the Infraco contract"* (p86).

It was noted that a rigorous Quantitative Risk Allowance had been applied and there was considered to be a 90% chance that costs would come in below the risk-adjusted level and that *“The level of risk allowance so calculated and included in the updated estimate represents 12% of the underlying base cost estimates. This is considered to be a prudent allowance to allow for cost uncertainty at this stage of the project and reflects the evolution of design and the increasing level of certainty and confidence in the costs of Phase 1 as procurement has progressed through 2006”* (paragraph 9.11).

It was further noted that *“TIE has continued to comply with the HM Treasury recommendations for the estimation of potential Optimism Bias and has determined, in consultation with Transport Scotland, that no allowances for Optimism Bias are required in addition to the 12% risk allowance”* (paragraph 9.12); and that *“Optimism Bias has been shown in Mott MacDonald’s Review of Large Public Procurement in the UK, to be eradicated by the current stage of FBC production, in view of greater scheme certainty and mitigation of contributing procurement, project specific, client specific, environmental and external influence areas”* (paragraph 10.44).

- a. Did you have any input into the report to Council or the Draft FBC?

No, don’t think so.

- b. What was your understanding at that time as to the steps that would be taken to achieve the procurement objectives in the Draft FBC noted above?

Don’t recall.

- c. What was your understanding of the extent to which detailed design would be complete (i) when bids were received for the Infraco contract and (ii) when the Infraco contract was signed?

Don't recall exactly. Think assumption was (ii).

- d. Who in TIE determined, in consultation with Transport Scotland, that no allowance for optimism bias was required in addition to the 12% risk allowance? Why was that decision taken? What were your views on whether that was appropriate given the slippage in the procurement programme and the delays and difficulties with design?

Don't know.

Design - SDS

38. The minutes of the DPD sub-committee meeting on 13 September 2006 (CEC01828463), item 2.2 notes key issues and concerns. It is noted that SDS design was now being prioritised and that behaviours were becoming increasingly contractual. You noted that a potentially more radical approach may be necessary.

- a. Can you explain what the problems were with SDS at this point?

Afraid don't recall specifics. SDS performance was a continuing issue.

- b. What effect were the problems having on the project and the programme?

In general terms I think they impacted plans/timetable for Infracore tenders.

- c. What was being done to address the problems?

Don't recall.

- d. What was your suggested 'more radical' approach to SDS?

Don't recall.

39. The minutes of the DPD sub-committee of 16 January 2007 (**CEC01766256**) note, at item 2.4.3, that you had raised questions about the SDS -- Infraco interface and about how the risks regarding design and deliverables from SDS would be viewed by the Infraco bidders.

a. Why did you raise these questions?

Don't recall exactly, but as mentioned elsewhere, SDS work was important to Infraco contract, so issues with that would have knock-on effects.

b. What were your views?

Don't recall. Would have been concerned (as was DPD Sub-Committee).

40. The minutes of the DPD sub-committee for the meeting of 13 February 2007 (**CEC01816066**), at item 2.5, note that you had asked whether the new approach to design and engineering signified a change in risk attitude by TS and CEC and whether the SDS novation would still be required.

a. What was the new approach to design and engineering?

Don't recall.

b. What were your views on whether that signified a change in risk attitude?

Don't recall.

c. Why might SDS novation not be required?

Don't recall.

41. The minutes of the DPD sub-committee meeting on 10 May 2007 (CEC01522629) note, at item 4.4, that you had requested clarity on the impact of delays on costs.

a. What delays were you referring to? How could such delays have an effect on costs?

Don't recall.

b. Did you ever get an adequate answer to your question?

Don't recall.

42. The minutes of a joint TIE Board, TPB, Legal Affairs Committee meeting on 15 October 2007 (CEC01419377) note that the Infraco bidder had been selected.

a. Item 3.3 notes that Geoff Gilbert said that the bidders' pricing was primarily based on preliminary design. Did you have any concerns about whether the Infraco bidders' price might change as detailed design became available?

Don't recall. It would have been a potential area of concern.

b. At item 3.7 you questioned the scale of design issues that were subject to due diligence and whether this could influence the recommendation. Can you explain this? What concerns did you have?

Don't recall.

c. Were the delays and difficulties with design ever resolved to your satisfaction?

Don't recall exactly. It was a continuing area of concern.

43. On 25 July 2008 you sent an email to Stewart McGarrity (TIE) suggesting that an internal audit should be carried out to assess risks transferred and retained by the procurement process (TIE00089194).

a. Why did you suggest this be done?

Looking at the email, I think TIE were having an internal audit, and Stewart had just asked me for comments on the scope of that (this was I think after our engagement had ended). Looking at extent of risk transfer/risks retained would have seemed to me to be a key issue for TIE given their role on Tram going forward.

b. Was such an audit ever carried out?

Don't know.

c. What was your understanding of the risks that had been transferred, and retained, by the procurement process?

Aim of procurement strategy was to transfer key risks associated with design and construction to Infracore (facilitated by other contracts, and novations). However, as noted elsewhere, there had been issues, in particular with SDS.

d. Did you have any concerns about the transfer and retention of certain risks? If so, what were those concerns?

Don't recall exactly. Process with SDS and interaction with Infracore had been an issue during procurement, as referenced in the various minutes.

INFRASTRUCTURE CONTRACT - INFRACO

44.TIE00000719 is an email dated 18 December 2006 from Geoff Gilbert to you in response to an email dated 18 December 2006 from you to Geoff Gilbert regarding the Infraco Evaluation Methodology. In your email you identify concerns as to what had still to be agreed once the preferred bidder was appointed. It also relates to suggested adjustments to the methodology to ensure second bidder can stay in the process and asked:

“In terms of legal evaluation and adherence to procurement strategy, will the methodology allow for some express adjustment (eg financial) to reflect value of risks passed back to TIE (there is some reference to this in 3.2)?”

a. Why did you write this email?

Don't recall exactly. Presumably we had been asked to comment.

b. What concerns did you have and why?

Think the email sets out my suggestions.

c. What were the difficulties you anticipated?

In general terms, bidders would be more likely to accept positions whilst in competition.

d. What action was taken to address these concerns either by you or by others?

Geoff's reply promises to amend the draft, and that DLA would be signing off. Assume that happened.

- e. What were your views on the benefits of ensuring that a second bidder could stay in the process after the preferred bidder had been appointed?

As above, email reflects view that maintaining competition for as long as possible would be likely to be helpful.

- f. How did you consider that could be achieved?

Suggestions are in the email.

- g. What was your understanding of the risks that might be passed back to TIE (and why that might happen)?

Don't recall specifically. In general, as part of a negotiation, bidders may seek to pass back risks.

45. On 25 October 2007 the Council's approval was sought for the Final Business Case, version 1, in respect of phase 1a (Airport to Leith Waterfront). A joint report was provided by Andrew Holmes and Donald McGougan (**CEC02083538**).

The report to Council noted that:

- The SDS had prepared preliminary designs and were currently finalising the detailed designs. (para 3.22)
- *"It is anticipated that the SDS and Tramco contracts will be novated to the provider of the infrastructure works. This means that significant elements of the responsibility for the design and vehicle provision and the risks associated are transferred to the private sector"* (para 3.27);
- The estimated capital cost of phase 1a was £498m; *"There is detailed information behind [the] estimates, which take due allowance for risk contingency and further scope for savings, but a fuller breakdown cannot be provided at this stage for reasons of commercial confidentiality"* (para 4.2).
- *"The infrastructure costs are also based on the fixed prices and rates received from the recommended infrastructure bidder. However, there is scope for this*

cost to move slightly, prior to contract close as further design work is required to define more fully the scope of the works to allow a firm price to be negotiated. There is a risk allowance to take account of these variations. The price also assumes that savings can be made on the proposals through certain Value Engineering innovations proposed by ... TIE and the infrastructure bidder" (para 4.3).

- The estimates included a risk allowance of £49m, which had been calculated based on the perceived cost and likelihood of over 400 risks in the project risk register. A statistical analysis known as Quantified Risk Assessment was carried out at a 90% probability level and had concluded that there was a 90% chance that final costs would be within that risk allowance, which "demonstrates a higher than normal confidence factor for a project of this scale and complexity" (para 4.10).
- It was noted that "The risk contingency is designed to cover additional unforeseen costs, but it is recognised that there is an element of residual risk of costs exceeding current estimates. It should also be notified that the risk contingency does not cover major changes to scope. The scope of such changes will be reviewed after completion of the Tram works and commencement of Tram operations" (para 4.32).
- "Fixed price" and contract details would be reported to the Council in December 2007 before contract close in January 2008. (para 5.3).

The Final Business Case, version 1 (**CEC01649235**) noted:

- "The level of risk allowance so calculated and included in the updated estimate represents 12% of the underlying base cost estimates. This was considered to be a prudent allowance to allow for cost uncertainty at that stage of the project. It reflected the evolution of design and the increasing level of certainty and confidence in the costs of Phase 1 as procurement had progressed through 2006. TIE continued to comply with the HM Treasury recommendations for the estimation of potential OB and had determined, in consultation with TS, that no allowances for OB were required in addition to the 12% risk allowance above" (paragraphs 10.13 and 10.14) (these provisions were essentially the same as the

provisions on risk and optimism bias included in the draft FBC dated November 2006, **CEC01821403**, paras 9.11 and 9.12).

- *“By the time of the DFBC, OB was effectively eradicated, as per the findings explained in the Mott MacDonald Review of Large Public Procurement in the UK. This was in view of greater scheme certainty and the mitigation of factors built into the procurement process, as well as project specific risks and environmental and external risks. Instead of using OB, TS and CEC adopted a very high confidence figure of 90% (P90) in the estimate of risk allowances to cover for specified risk, unspecified risk and OB”* (para 11.43).

a. Did you have any input into drafting the report to Council or FBC, v1?

No.

b. Do you consider that the report to Council fully and accurately reported on the delays in relation to design, approvals and consents and utility works and the risks arising from these delays?

There are references to risks, but difficult for me to comment.

c. What was your understanding of how the Infraco contractor could provide a fixed price, and how design risk could be transferred to the private sector, given the delay in design, approvals and consents (and given the design and TRO milestones noted at page 191 of the FBC whereby, for example, detailed design for phase 1a was not expected to be completed until September 2008)?

Would be based on completed designs, and Infraco views on those and project.

d. What were your views on the paragraphs of the FBC noted above? Did you agree that from late 2006 onwards optimism bias had been effectively eradicated and that it was appropriate to make no further allowance for optimism bias in addition to the risk allowance?

Wasn't involved in FBC process.

46. On 20 December a report was provided to Council (CEC02083448) along with version 2 of the Final Business Case (CEC01395434).

The report to Council noted:

- *"The cost estimates for the project reflect provision for evolution as the detailed design will be completed in the coming months. The design is completed under the Infraco contract from the point of award of that contract through novation of the System Design Services contract with Parsons Brinkerhoff to Infraco"* (para 3.2).
- *" ... Some cost allowance has been made for the risk associated with the detailed design work not being completed, at the time of financial close ..."* (para 8.1).
- The estimate of £498m for phase 1a inclusive of a risk allowance as reported in October 2007 remained valid. The current price estimate was based on a compressed construction programme (para 8.2).
- *"The fundamental approach to the Tram contracts has been to transfer risk to the private sector. This has largely been achieved"* (para 8.10).
- *"Risks retained by the public sector and which therefore bear upon the Council are explained in the Final Business Case section 11. These risks include:*
 - *Agreements with third parties including delays to utility diversions.*
 - *Finalisation of technical and prior approvals.*
 - *The market cannot provide Professional Indemnity Insurance to TIE vis-à-vis a claim by the Council against TIE, because TIE is wholly owned by the Council"* (para 8.13).
- *"There are additional risks such as third party agreements and consents where discussions and negotiations are continuing to reach an acceptable position in respect of allocation of risks"* (para 8.15).
- *"The risk contingency does not cover major changes to scope. It should be noted that the current construction programme is compressed to reduce the length of disruption and provide best value. Changes to the programme could involve significant costs, not currently allowed for in the risk contingency"* (para 8.16).

- It was anticipated that the Notification of Infraco award would be issued on 11 January 2008, the Tramco and Infraco contracts would be awarded on 28 January 2008 and that construction on phase 1a would commence in February 2008 (para 8.19).
- The Conclusions included that, *"The preferred bidder negotiations, in terms of price, scope, design and risk apportionment, give further reassurance that Phase 1a can be completed within the available funding and are consistent with the Final Business Case"* (para 9.2) and that *"The total forecast project cost is consistent with the final business case. TIE is confident that risk contingencies and the final approved design can be accommodated within the funding available"* (para 9.3).
- Authority was sought from members for the award of the Tramco and Infraco contracts by TIE subject to price and terms being consistent with the FBC and subject to the Chief Executive being satisfied that all remaining due diligence was resolved to his satisfaction (paras 1.2 and 10.2).

a. Did you have any input into drafting the report to Council or the FBC?

No

b. What was your understanding of, and views on, the provisions of the report to Council noted above?

Wasn't involved so difficult to comment.

c. What was your understanding at that time of the extent to which the Infraco contract was for a fixed price (and the extent to which, and in what circumstances, the price was liable to change)?

Don't recall.

- d. It was noted that the risk contingency did not cover “major changes to scope”. What was your understanding of “major changes to scope”? Can you give examples?

Don't recall.

- e. Do you consider that the report to Council on 20 December 2007 adequately set out the delays in relation to design, approvals and consents and utility works?

Difficult for me to comment.

- f. Do you consider that the report adequately set out the risks arising from these delays, including the risks arising from these works overlapping with the infrastructure works?

Difficult for me to comment.

47. On 18 February 2008 BSC (Bilfinger-Berger, Siemens & CAF) 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 (Bilfinger-Berger & Siemens).

- a. Were you aware of that report at the time?

No.

- b. What were your views on the matters in the Executive Summary of the report? Did it cause you any concerns?

See answer above.

- c. What discussion was there with within TIE, and with BSC, in relation to which party would bear the risks arising from any development of, or changes to, the design in existence at that time?

Not aware.

- d. Were CEC sent a copy of the report? What discussion was there with CEC of how incomplete design would be dealt with in the Infraco price and in the risk allowance?

Don't know.

General questions regarding Financial Close

48. 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 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 was likely to be completed (and all approvals and consents obtained)?

Don't recall.

- b. The extent to which utilities diversions were complete, the extent to which these works were outstanding and when these works were likely to be completed?

Don't recall.

- 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?

Don't recall.

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

Don't recall.

- e. To what extent did TIE discuss the above matters with CEC?

Don't know.

49. 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?
- b. What did you understand to be the main exclusions, provisional sums, assumptions and conditions?
- c. In what circumstances did you consider that the price was likely to change?

Wasn't closely involved with Infraco contract, so didn't have that level of detailed knowledge.

50. In relation to the Value Engineering (VE) 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?
- b. What were your views as to whether the VE savings were likely to be achieved?
- c. In the event, were these VE savings achieved (and, if not, why not)?

Wasn't closely involved with Infraco contract, so didn't have that level of detailed knowledge.

51. Schedule 4 of the Infraco contract (**USB00000032**) contained a number of Pricing Assumptions.

- a. When did you first become aware of Schedule 4? What did you understand to be the purpose and effect of the Pricing Assumptions?
- b. What did you consider were the main Pricing Assumptions that were likely to change and result in Notified Departures and why?
- c. Approximately how many Notified Departures did you consider were likely to arise?
- d. What did you consider to be the likely total value of the Notified Departures?
- e. To what extent were the above matters discussed with CEC?

Wasn't closely involved with Infraco contract, so didn't have that level of detailed knowledge.

52. 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?

Wasn't closely involved with Infraco contract, so didn't have that level of detailed knowledge.

53. At Infraco contract close the SDS contract was novated from TIE to BSC.

- a. What was your understanding in relation to who 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?

Don't recall exactly. Assume it would be Infraco.

- b. 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?

Don't know.

- c. Do you consider that any problems arose from the fact that (i) changes to, and completion of, design was primarily under the control of BSC (as a result of novation of the SDS contract to BSC) but (ii) changes to design, or delay in completing design, could give rise to a departure from one of the Pricing Assumptions in Schedule 4 of the Infraco contract and, therefore, give rise to a Notified Departure (leading to an increase in the cost of the project)? Was any consideration given by TIE to that potential difficulty prior to SDS Novation?

Don't know the detail here to be able to answer.

General questions regarding the dispute

54. 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?

Don't recall.

- b. What was your understanding of the main matters in dispute and the main reasons for the dispute?

Don't know. We were no longer working with TIE at this point.

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

- a. Were you surprised by the number of INTCs?
b. What do you consider were the main INTCs in terms of value and importance?

Can't really answer – were not involved with project at this point.

PROJECT MANAGEMENT, GOVERNANCE AND MAIN CONTRACTORS

56. What was PUK's input into the project management and governance structures for the tram project?

We didn't have detailed input to project management /governance, but would have seen proposals from time to time, in particular re: governance through Board papers.

57. In relation to TIE:

- a. 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.

- b. Did you have any concerns at any stage in relation to TIE's management of the tram project or the performance of any of TIE's senior personnel or Board members?

General concerns at some points e.g. prior to 'readiness review'.
Changes to personnel and complex relationships between TIE,
CEC, Lothian Buses, TEL did create issues.

- c. Did you have any concerns at any stage in relation to TIE's reporting to CEC (or others)?

Don't recall particular concerns.

- d. Willie Gallagher acted as both Chairman and Chief Executive of TIE? What were your views on that? Did it cause you any concern? Do you consider that it represented good corporate governance practice?

Don't recall particular concerns.

58. In relation to CEC:

- a. How were important matters relating to the tram project reported by TIE to CEC (including by whom and to whom)?

We were not really party to this. CEC were always part of the Boards and Sub-Committees.

- b. How were the views and requirements of CEC fed back to TIE?

We were not really party to this. CEC were always part of the Boards and Sub-Committees.

- c. Did you have any concerns at any stage in relation to the performance of senior CEC officials or councillors?

Don't recall particular concerns.

59. In relation to the Tram Project Board (TPB):

- a. How were important matters relating to the tram project reported by TIE to the TPB (including by whom and to whom)?
- b. How were the views and requirements of the TPB fed back to TIE?
- c. Did you have any concerns at any stage in relation to the performance of the TPB or any members of the TPB?

I wasn't a member of the Board and only attended some meetings. There were progress papers at meetings and TIE executives were present at and reported to the Board.

60. TRS00001959 is entitled TIE Project Progress Report dated 31 August 2005. It reports that:

"On 22nd August the TIE board approved Delegated Authority Rules (DARs) for the Tram project and the composition and remit of the Tram Project Board. The DARs deal with authority delegated from the TIE Board to the Tram Project Board and from the Tram Project Board to the Tram Project Director. These matters require discussion and endorsement by the members of the Tram Project Board at the earliest opportunity.

Significant progress has been made with regard to the design of the processes for dialogue and agreement for the Tram project (between CEC and TIE) which will precede presentation of matters to the Tram Project Board. It is now critical with the impending commencement of SDS that these processes are completed and endorsed by the members of the Tram Project Board."

- a. What was your understanding of these matters, including whether the TPB: (i) was a properly constituted legal entity; and (ii) had powers and duties formally delegated to it?

Can't really answer – not involved in detail here.

61. In relation to TEL:

- a. How were important matters relating to the tram project reported by TIE to TEL (including by whom and to whom)?
- b. How were the views and requirements of TEL fed back to TIE?
- c. Did you have any concerns at any stage in relation to the performance of TEL or any members of TEL?

Unable to answer – we were not really party to this.

62. In relation to the Scottish Government (SG) and Transport Scotland (TS):

- a. How were important matters relating to the tram project reported by TIE to SG/TS (including by whom and to whom)?
- b. How were the views and requirements of SG/TS fed back to TIE?
- c. Did you have any concerns at any stage in relation to the performance of SG/TS or any ministers or senior officials?

We were not really party to this. The Scottish Government were part of the Board and governance in the early part of the project.

- 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?

It flowed I think from SG decision to cap their financial contribution. We weren't involved in later stages, once disputes started with Infracore etc, so difficult to say. One of the issues in the early stages was the number of stakeholders to the project, which complicated the governance.

63.In relation to the inter-action between the different bodies and organisations involved in the project management and governance of the tram project:

- a. How were important matters relating to the tram project reported between these different bodies and how, and by whom, were decisions taken in relation to these matters?
- b. What were your views in relation to the governance arrangements for the tram project including, in particular, the effectiveness of the governance arrangements?
- c. Do you consider that the duties, responsibilities and reporting requirements of the different bodies were sufficiently clear?
- d. Did you have any concerns at any stage in relation to the governance arrangements?

We weren't party to all the reporting. Key parties came together to an extent at the Tram Project Board. However, in general terms, the governance arrangements were complex and subject to a variety of changes through the period of our involvement. Clarity on roles and responsibilities as between TIE, TEL, CEC and SG was an issue at times. We did have general concerns at points, hence partly 'readiness review' suggestion around 2006.

- e. Which body or organisation do you consider was ultimately responsible for ensuring that the tram project was delivered on time and within budget?

TIE, whilst we were involved, though progress obviously very dependent on Infracore once contract signed.

64.In relation to the main contractors involved in the tram project:

- a. What were your views on the performance of each of the main contractors?

Difficult to comment on all contractors – we weren't close to the detail. There were a number of issues with SDS performance, which in turn created problems for the project, in particular given the procurement structure. Not aware of issues with Transdev, and we weren't involved when Infracore in place.

- b. To the extent you had concerns in relation to any of the main contractors, what did TIE do to try and address these concerns? Were these steps successful (and, if not, why not)?

Recall various attempts to resolve issues with SDS, although problems seemed to continue.

65. On 25 October 2006 you sent an email to Bill Reeve regarding governance structures for TS projects (TRS00002949). At the third paragraph you said *"As you know, the poor project governance for Tram was a particular concern for us earlier this year, and a key prompt for the initial Readiness Review. The process to put revised arrangements in place has been protracted at times, but we would agree with you that the new structure represents a significant improvement."*

- a. Can you describe the new structure? When was it implemented?

Can't recall the detail.

- b. Why did the new structure represent a significant improvement?

From memory, there was a move to a single Tram Project Board, which was then intended to be the key decision-taking forum for the project.

FINAL THOUGHTS

66. 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)?

Tram was at the complex end of the spectrum, both in terms of the project itself, the procurement (and contract) structure, and the number of parties involved.

- 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?

Procurement of light rail (trams) in the UK has never been straightforward, and Edinburgh presented particular challenges given the nature of the World Heritage Site. TIE was a new organisation attempting to meet these challenges through a procurement strategy that placed considerable demands on TIE as 'client' in terms of coordinating a number of contracts in order to achieve the desired risk transfer to (ultimately) the Infracore contractor, at the best price. The contract structure meant that issues around performance on earlier contracts, in particularly SDS, had knock-on effects for the structure as a whole and the timetable. TIE also operated within a particularly complex stakeholder environment, and lacked continuity of key personnel.

- c. Do you have any comments, with the benefit of hindsight, on how these failures might have been avoided?

Can only really comment in relation to the period in which we had some involvement (i.e. up to 2008). However, even with hindsight, there are no straightforward answers. The procurement strategy was a considered response to some of the previous issues surrounding light rail procurements, and there were no obviously better alternatives. It is difficult to say whether

a different SDS contractor would have performed better. There was also no alternative, experienced and established delivery body at the time. Even a more experienced delivery body than TIE would have faced similar challenges in terms of the complex stakeholder environment.

- 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?

No

I confirm that the facts to which I attest in the answers contained within this document, consisting of this and the preceding 59 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.....

27 / 3 / 17