

**The Edinburgh Tram Inquiry**  
**Witness Statement of Philip Wheeler**

My full name is Philip Wheeler, normally known as Phil Wheeler. My contact details are known to the Inquiry.

Statement:

**Introduction**

1. I was first elected to the Council at a by-election in October 2001, as a Liberal Democrat Councillor for Corstorphine South Ward. I was the Liberal Democrat Group's transport spokesman between 2003 and 2007. When the Liberal Democrats formed a coalition with the SNP in May 2007, I was appointed Convenor of the Transport, Infrastructure and Environment Committee. In May 2009, I was appointed Convenor of the Council's Finance and Resources Committee. I was a member of the Council's Policy and Strategy Committee. I was a director of TIE from 6 December 2005 to 27 September 2011, a director of TEL from 24 May 2007 to 27 September 2011 and I sat on the Tram Project Board from January 2008 to May 2011. I have supplied a full copy of my CV to the Inquiry. I retired from the Council in May 2012.
2. I am neither a lawyer nor an engineer. I am a chartered banker by profession. I did receive some training on the job from senior colleagues when I first joined the Council.
3. DLA were TIE's legal advisors for the tram project. They ran a course for the non-executive directors of TIE. This was quite early on in the life of the tram project but I cannot say precisely when. It was a one-day course on the role

and responsibilities of non-executive directors. I recall several of us attending. I am not sure what prompted the course being offered. I had some experience of being a Company Director in my private life as well, so I had a vague idea of what it entailed.

4. Initially, the Labour administration was the main proponent of the Tram Project. It came out of their Transport Initiative from the early 2000s. David Begg was the executive member for transport. By the time I joined the Council, Andrew Burns had taken on that role because David Begg had left the Council. There was, however, general cross-party agreement at that stage with variations. I sat as a Lib Dem and the Conservatives also were basically on board. The SNP only had about one member on the Council in those days. After a while, they became critical of the project. I cannot recall at what stage this occurred or who was involved.

## **Reporting**

5. The Senior Executive team led by the Chief Executive (at that time, Tom Aitchison), and supported by various Directors such as Andrew Holmes, Donald McGougan and Jim Inch together with Gill Lindsay (the Council's in-house solicitor), were responsible for advising Councillors of developments relating to the tram project. This included explaining the risks and liabilities of the Council arising from the project. I received briefings from several of them in various permutations, or from the next tier of officers at times depending on how things were going and who was the appropriate person.
6. Issues relating to the project were not discussed separately. The Tram was just an ordinary agenda item on the Council agenda. There was sufficient time at Council meetings to discuss and consider the project. At the full Council meeting the Lord Provost would decide when there had been enough discussion and when to move on.

7. In the Lib Dem group, our practice was not to have a whipping system, but we always had a group meeting in advance of a Council meeting and we went through the agenda and agreed our stance on the different items, either by consensus or, if necessary, with a vote. Discussion would be led by the spokesman for that topic or, when we were in office, the Convenor. Normally, we stuck by these decisions in the meetings but we did not actually have a formal whipping system in the way that some of the other parties did. I cannot comment on what those other parties did in relation to the tram project.
8. When I was shadowing Transport and when I was Convenor I had regular meetings with a variety of officials and fairly senior staff. These meetings were not only with directors, but also people at lower grades who had hands on involvement. They kept me informed of developments with the Tram Project. In the years running up to 2007, the opposition had a monthly meeting with a team of transport officers. This was usually attended by Keith Rimmer (the head of transport) together with two or three of his colleagues.
9. I was on the TIE Board in 2005, before problems first arose. I received the Board papers each time and gleaned information in the discussion at the meetings and also in parallel meetings with Council officials.
10. As a Director of TIE I had a duty of confidentiality, and a duty not to divulge matters that had been discussed in confidence at the Board. I felt hamstrung by this. It sometimes placed me in a difficult position with my colleagues at group meetings, as they wanted me to fill them in on more things than I felt comfortable doing so. I had to try and resolve that with my conscience as to where I drew the line with confidentiality and to what extent I could trust anybody. I have been made aware of a note entitled "Current legal status of tram workstream", which stated that whilst open decision making was necessary politically it might pre-warn Infracore (CEC00013290, page 6, para 15.2.6). This was produced when the dispute broke out. The Council and TIE needed to keep their cards close to their chest. Negotiations could not be conducted with issues being ventilated in the press or in open Council meetings.

11. Group leaders and convenors of the various boards and committees received separate briefings on the project from time to time from TIE or Council officials or sometimes from both TIE and the Council jointly. Different parties had different approaches to this which varied over time. I do not know the extent to which those who were briefed felt able to brief their colleagues in turn.
12. I had to be comfortable with the advice I got, both from the papers for the meetings, and from the discussions and input from the senior officers from TIE and the Council. There were times when I did question them to make sure that I understood what we were talking about. I had to use my own skill and judgement as an individual member of the Board, but this was based on the advice I was getting. Over my six years on the Board, there were many changes, but my main source of advice was the senior officers from both sides. I had regular conversations with all of them. I got to know a lot of them quite well and I knew which ones to trust more than others and which ones I understood more than others. I had the opportunity to ask questions both at the TIE Board, and of TIE people between Board meetings if required. I knew most of their senior staff and could email or telephone them. I did the same with Council officers. Members were only provided with guidance through briefings to assist them in coming to decisions. TIE Board papers tended to run to 100 pages at a time and I only got them a couple of days before the meeting so trying to get through them was quite an ordeal. I had no concerns at that time about the information I was getting. I saw TIE's version of the story in the TIE Board papers, so I could then see how that matched with what we were being told at the Council and I do not remember any major discrepancies.
13. The route was tangential to my ward. Reporting to my constituents was not a great issue: there was not much interest. I included a paragraph in my quarterly newsletter if required. I had a surgery, and constituents sometimes approached me there about the project. This was not usually concerning strategic matters.

14. I had very little understanding of the views of the Tram Project being reported in the media. This was because I was an insider.

## **Initial Proposals (2000-2006)**

### **The New Transport Initiative and the creation of TIE**

15. The new Transport Initiative was adopted early in 2002 when I had only just started as a Councillor. I wasn't much involved in the discussion. I did read the start of it which set out the principal ideas. I think those included the congestion charge that we, as a party, felt was unfair on citizens.
16. The Labour administration at the time had a majority administration. I think it was probably David Bates' idea to create TIE, but he had left the Council by that time and Andrew Burns fronted on it. They wanted to involve external expertise. This was one of the reasons for an arm's-length company with Council representation and business expertise. The Chairman initially was Ewan Brown, who was a merchant banker. Others from industry were involved at that stage. The Council kept a number of seats on the TIE Board for senior officers and for Councillors to exercise control over TIE. The membership changed over the years as the function of TIE changed.
17. In the early stages I did not have a great interest in the formation of TIE because, to begin with, transport wasn't my shadow responsibility. I had only just started and left it to my colleague who shadowed transport.

### **Initial Estimates for the tram network**

18. Various STAG Appraisals and draft Business Cases for a tram network, with different estimates, were produced between 2000 and 2004. This was before I was a member of the TIE board.

19. I am aware that a member of the public, Alison Bourne, emailed every Councillor on 10 December 2003 in relation to the following day's meeting at which Councillors were to approve the lodging of the Tram Bills. Mrs Bourne identified inconsistencies between the cost of the project shown in STAG 2 (£566.7m) and the report to the Council for the 11 December meeting (£473.4m) [CEC02082850, page 3] On 11 December 2003, Mrs Bourne was part of a deputation to the Council meeting on the subject of the route of TL1 and the costs which elected members were being asked to approve that day. Alison Bourne subsequently emailed me (on 1 August 2007) recalling that the deputation had raised concerns that *"the cost of the project ... was being seriously understated and that realistic sources of funding required to be identified"* [CEC01926998, page 2].
20. I had heart surgery in November 2003 and was on sick leave from the Council for some months thereafter and so I cannot recall whether the matters raised by Alison Bourne caused me any concern. I do recollect Mrs Bourne's regular criticisms of the project throughout its life. It was always alleged that she was getting inside information from inside the Council, from people who were not happy with the Tram Project.

### **The October 2004 Arup Review**

21. I have been made aware that in October 2004, Ove Arup and Partners Ltd, on behalf of the Scottish Parliament, produced a review of the Business Case for line 1 [CEC01799560]. I cannot recall anything about this now.

### **The 2005 road charging referendum**

22. In February 2005, following a referendum, the public voted against the introduction of road user charging. This knocked back what was foreseen as being a useful revenue source. It did not stop Labour going ahead with the tram project and I assume, therefore, that they were satisfied about its viability. At this stage the Labour/Lib Dem coalition government in the Scottish Parliament had also agreed to provide some of the funding.

## **The May 2005 Draft Interim Outline Business Case**

23. TIE produced a Draft Interim Outline Business Case dated 30 May 2005 [CEC01875336]. This noted that either line 1 or line 2 were affordable within the Executive funding of £375m but a network of lines 1 and 2 was not affordable (with a shortfall in funding for capital expenditure for both lines 1 and 2 of £206m [CEC01875336, page 14]. I am aware of TIE's response to a letter of 26 October in relation to the review of the Preliminary Financial Case by Arup Scotland dated 12 November 2004. This stated that there was no £220m shortfall [CEC01705043, page 2, para 7]. This appears to contradict the position in the 2005 Draft Outline Business Case. The 2005 Business Case also noted that the 30-month construction programme from July 2007 to meet the operational date for the tram by the end of 2009 was a "*challenging timescale*" [CEC01875336, page 17]. I cannot recall the Draft Interim Outline Business Case, but there was electoral pressure because of the Scottish Parliament and Council elections in May 2007.

## **2006 Reports to Council and Draft Final Business Case**

24. I am aware of a Report to the Council dated 26 January 2006 [CEC02083547]. This made certain recommendations for funding and phasing the tram network given that the total estimate for lines 1 and 2 was £634m and the total available funding was £535m [CEC02083547, page 5]. The figures quoted in the report to the Council were based on those the TIE's Progress Report dated September 2005 [TRS00000209].
25. It was recommended that the first phase should be from the Airport to Leith Waterfront as this was regarded as being the section most likely to be viable [CEC02083547, pages 5-6]. I do not know whether the Scottish Government was involved in this decision. It was thought that this would generate the most income for the scheme by linking the airport with the city centre and then on down to Leith where it was hoped, at that stage, that there would be considerable housing development in the dock area. The need to restrict, or "phase" the scope of the tram network did not cause me any concerns in

relation to the reliability of the initial cost estimates, the affordability of the tram project and TIE's ability to deliver it at that stage.

26. It was an important factor that the Council's contribution would comprise only such amounts as could reasonably be expected to be funded from future tram related development and receipts, rather than from general funds or from Council tax [CEC02083547, page 4]. There was a PR issue to make it appear that the tram would stand on its own feet and not impinge on the rest of the Council's funding. We were aware of the reputation of new tram schemes in other cities and how much economic development had resulted from them. It was felt that the tram would be the trigger and if it did not impinge on the Council's spending, so much the better.
27. By joint report to Council on 21 December 2006 [CEC02083466] the Directors of City Development and Finance sought members' approval of the draft Final Business Case for the Edinburgh Tram Network. The estimated capital cost of phase 1a was £512m if built alone [CEC02083466, page 7, para 4.2]. The report noted that the most significant risks affecting the timeous completion of the project within budget were the advance utility works, changes to project scope or specification, and obtaining consents and approvals. The report stated that to maintain control over costs, enabling works, including utility works, should be authorised to proceed on a timetable that would not disrupt the main infrastructure programme, and negotiations with bidders should continue with a focus on achieving a high proportion of fixed costs in the final contracted capital cost [CEC02083466, pages 11-12]. I was generally in favour of what was set out in the draft Final Business Case. I was one of a Council delegation who went to Dublin in the autumn of 2006 to meet the people who set up the Luas Tram System in Dublin. A key piece of advice I received on that visit, based on their experience, was to get the utility work done in good time. With hindsight we did not allow enough time for it. Once you open up a street in an old city, there are all manner of things which might be found, and that proved to be the case here.



28. The TIE Board had responsibility for the capital costs of the Tram Project. They reported to the Council at regular intervals and I presume also reported to the Scottish Government.
29. With regard to the procurement strategy for the Tram Project, the aims of the procurement strategy, the extent to which design and utility diversions would be complete before the infrastructure works commenced, and the extent to which the infrastructure contract would be a fixed price contract, were each separate issues. It was stressed that MUDFA should be procured separately from the main contract, and so a different contractor was used. In the background there was design work going on. Right from the very start, there were delays on the design side. At one stage, Willie Gallagher went to New York to deal directly with the parent company of the designers because of the delays. Design was a constant issue and features consistently in all of the papers about the Tram Project.
30. The design and utility works were supposed to be finished before the infrastructure works commenced. In practice, insufficient time was allowed for MUDFA to be completed. Issues were also caused by the takeover of the contractor: Carillon took over Alfred McAlpine and there were various changes of key personnel as a result of that takeover. I think there were also problems with some of their sub-contractors doing different streets.
31. The infrastructure contract was to be fixed price. The Council only had a fixed amount of money to play with, so we wanted the contract delivered within that envelope.

### **Events in 2007 to May 2008**

32. A highlight report to the internal planning group dated 20 March 2007 noted that design for the tram system was progressing slowly and TIE had committed to carrying out an organisation and culture review to improve its approach. As part of that review it was noted that six CEC staff would hot-desk at TIE's office to assist with the approvals process [CEC01565481, page

3]. The slow progress of the design was brought to my attention. It was alleged that approval from the council was delaying progress with the design. When designs did actually come through from the design contractors, getting planning consents, and so on, took a while, which is why the Council increased their support for approvals. The team move to TIE's office was an attempt to manage that. The same report notes that Ricky Henderson, Allan Jackson and I were to receive a one to one briefing as tram spokespeople [CEC01565481, page 14]. I cannot recall if this took place.

33. The local government election on 3 May 2007 changed the Council administration from Labour to a Liberal Democrat/SNP coalition. The SNP had made a big thing about opposing the Tram Scheme, as they did not agree to spending money on the capital when we should be spending it on other parts of the country. The other parties were generally in favour of the tram scheme in the run up to the election but it was one of the big friction points between the SNP and the rest of us.
34. The Council accepted that the SNP would not support the tram project and so the Lib Dems, as the biggest party on the Council, had to rely on Labour and the Conservatives. The SNP would either abstain or vote against issues. This had been allowed for in the coalition agreement. It was one of the key issues in the discussions for putting together the coalition. I had just become responsible for transport. I was still keen to proceed with the Tram Project as far as we could with the available funding. I thought we had gone far enough, or a long way along the road to let us get on with it.
35. Following the formation of an SNP administration in the May 2007 election, there was great uncertainty as to whether funding would be confirmed by the new Parliament and Stewart Stevenson, who was the Minister for Transport. After a debate and vote in the Scottish Parliament on the future of the Edinburgh Trams and EARL projects, the Scottish Parliament called on the SNP administration to proceed with the Edinburgh Trams Project within the £500m budget limit set by the previous administration in June 2007. The EARL project (that is, the Airport rail link), which TIE was also managing, was

scrapped. I knew after that debate and after the SNP had been defeated by all the other parties on the trams, that at least the money was still safeguarded. Accordingly, the grant for the trams project from Transport Scotland was capped at £500m.

36. On 20 July 2007 Jim Inch produced a Briefing Paper for the Chief Executive [CEC01566497] in relation to the governance arrangements of TIE. The paper noted that the current governance arrangements for TIE were "complex", that it was *"vital that more rigorous financial and governance controls are put in place by the Council"* and that TS had previously urged the Council to institute more robust monitoring of TIE [CEC01566497, pages 2 and 8]. I may have seen this Briefing Paper, but there was so much going on at that stage that I cannot remember any detail or what my views on the governance arrangements for TIE and the Tram Project were at that time. I cannot recall if the issues in the Briefing Paper were even discussed with me or other members, but they should have been. A Highlight Report to the Chief Executive's Internal Planning Group (IPG) on 30 August 2008 noted that the capping of the grant from TS changed the risk profile for the Council and sought guidance on the procurement of resources necessary to provide a risk assessment and analysis of the Infraco contract for the Council within the available timescales [CEC01566861, pages 8-9, para 8.1]. I am aware of the email sent by Clive Brown to Jim Grieve on 3 July 2007, noting that Gordon Mackenzie, the Finance Convenor, had sought information as to what contingency plan required to be in place in case of a cost overrun [CEC01556572]. I cannot recall what steps were taken by CEC following the changed risk profile to protect its interests, or if any contingency plans were put in place by the Council at that time in case of a cost overrun.
37. I am aware of the minutes of the Council meeting on 23 August 2007 at which Councillors were asked to note the contents of a report on revised tram funding, to note that a revised governance structure was required, to delegate to the Council Solicitor in relation to TIE and TEL operating agreements, to note a review of TIE and TEL leadership roles, to establish a Transport subcommittee for trams, and to note that there would be a further report in

September of that year whilst delegating authority to the Chief Executive meanwhile [CEC01891408, page 31]. No doubt I, as Transport Convenor, proposed this motion, but at this stage I do not know what I said, or any detail about the meeting.

38. A joint meeting of the TIE Board/Tram Project Board/Legal Affairs Committee took place on 15 October 2007 [CEC01357124]. The minute of that meeting record that the boards were advised that the Infracore bids were primarily based on preliminary design [CEC01357124, page 11, para 3.3]. I was aware of the possibility of an increase in cost when the bidders were provided with detailed designs, but I hoped that it would not happen. It could also have been an opportunity for the contractor to come up with a workaround that might be cheaper because things were fluid at that stage until a contract was nailed down.
39. TIE sought the Council's approval for the Final Business Case, Version 1, in respect of phase 1a in a report to the Council dated 25 October 2007 [CEC02083538]. The report advised that the estimated capital cost of phase 1a was £498m and that there was a 90% chance that the final cost of phase 1a would come in below the risk adjusted level. A fixed price and contract details would be reported to the Council in December 2007 before Contract Close. The report also advised that a separate report was being prepared for the Council to set out the result of the tender evaluation and give recommendations as to the preferred bidder for each contract [CEC02083538, pages 10, 16 and 1]. At the meeting of the Council on 25 October 2007, members were given a presentation by Andrew Holmes, Willie Gallagher and Neil Renilson [CEC02083536]. I was largely relieved that we had reached this point. My concern was to get things moving once we could sign off a contract with the preferred bidder, which I got the consent from Council to do. Approval was sought for the Final Business Case when considerable expense had already been incurred on the project. This did not create any issues. TIE had been operating for some time because of the planning and design stages. Expense had therefore already been incurred. Gaining approval with a view to avoiding wasted expenditure was not an issue at that stage. I cannot recall

how and by whom the estimated capital cost for phase 1a of £498m had been arrived at and I have no recollection of the presentation, or if there a report setting out the result of the tender evaluation was provided to the Council. TIE chose BBS as the preferred bidder as it appeared to be the best scheme on offer at the price, and they had proven experience in building tram schemes and other major transport projects worldwide. They were a big player in the industry. We had to follow EU procurement rules, which is why the two German companies with the Spanish tram builder became the consortium.

40. I am now aware of an email dated 3 December 2007 in which Alan Coyle sent a Briefing Note to Andrew Holmes and Donald McGougan [**CEC01397538** and **CEC01397539**]. The Briefing Note set out a number of concerns in relation to the tram project including the appropriateness of the report to Council seeking approval of the Final Business Case [**CEC01397539**, page 7]. I was not aware of this document at the time, or of the concerns it expressed. I cannot say with hindsight what my response or that of other Councillors would have been to the concerns expressed.
41. In an email to Geoff Gilbert dated 14 December 2007 [**CEC01397774**], Duncan Fraser referred to a presentation by TIE the previous day and asked certain questions about the Quantified Risk Allowance (QRA), including querying the provision made for the likely change in scope given the incomplete/outstanding design, approvals and consents. Geoff Gilbert replied on the same day stating that the overall scope of the scheme was now fixed. It was difficult to achieve a fixed price, while there were still so many uncertainties on the design side, and so we had to use our best endeavours to get the costings right. However, there was the intention of novating the design team to the contractors so they could manage them thereafter instead of TIE. I regarded the scope of the scheme to be fixed, insofar as we had a finite amount of cash, and so the aim was to do the best we could within that budget.

42. Between 17 and 20 December 2007 negotiations took place at Wiesbaden, Germany, between representatives of BBS and TIE and on 20 December 2007 an agreement was reached (the Wiesbaden Agreement). The purpose of the discussions at Wiesbaden was to reach a point where the contract could be agreed between the two parties. TIE was represented by a team led by Willie Gallagher, who was then the Executive Chairman, and containing some of his advisors. I was aware of it at the time and I was briefed about it thereafter. We received some feedback just before Christmas. I do not believe that TIE knew that the contract was not fixed price and might result in the Council breaching the terms of the funding agreement with Transport Scotland. My opinion was that the contract was fixed price as far as it could be. I am also aware, as a matter of practice, that change is costly, and that a fixed price at that stage did not allow for the possible changes as things evolved. The Risk Allowance should have been adequate to cover any change, however.
43. On 20 December 2007 Donald McGougan and Andrew Holmes presented a joint report to Council [CEC02083448] seeking members' approval of the Final Business Case, Version 2 (dated 7 December 2007) [CEC01395434] and seeking staged approval of the award by TIE of the contracts, subject to (1) price and terms being consistent with the FBC and (2) the Chief Executive being satisfied that all remaining due diligence was resolved to his satisfaction. The report stated that the estimate for phase 1a of £498m as reported in October 2007 remained valid [CEC02083448, page 5, para 8.2]. I cannot recall having any concerns about the Final Business Case at that stage. I was aware from my time as a Board member of TIE of the issues with the designers and that there were always delays, and so I knew that there was a likelihood of some difficulties arising in that regard. On the other hand, if we were making the contractors responsible for managing the designers thereafter, that was a risk that was being transferred. It was my understanding that the whole purpose of the contract was to novate the design to the contractor and have a fixed price contract. I am not a lawyer and I did not study the contract line by line. It would not have made any sense to me. The advice I got from the lawyers and from the technical people

was that we were ready to go. When voting on the Final Business Case I was satisfied that the aims of the procurement strategy had been met. I was of the opinion that everything was as it should be, which is why I proposed the adoption of the Final Business Case by the Council.

44. The Report to the Council noted that that some allowance had been made for risk associated with the detailed design work not having been completed at the time of Financial Close. It stated that the fundamental approach had been to transfer risk associated with design not having been completed to the private sector, and that this had largely been achieved [CEC02083448, pages 5-6, paras 8.1 and 8.10]. The basic risk was delay from the design team, but added to this was the question of getting clearance from the Council's planning department when design was delivered. The main delay was occurred in getting a plan from the designers in the first place. There were bottlenecks getting clearances at times. The Report was provided by Donald McGougan and Andrew Holmes, but some of their staff would have contributed different paragraphs to the report. I proposed the Report to the Council for adoption and I recall it went through.
45. The Report noted that the risk contingency did not cover major changes to scope and that changes to the programme could involve significant costs that were not currently allowed for in the risk contingency [CEC02083448, page 7, para 8.16]. It did not consider what events might cause changes to the programme, how likely it was that they would arise and what, if anything, was being done to mitigate the risk. There were discussions at the TIE Board about these issues and it was stressed that any change to the plans was likely to be costly, so the aim was to minimise the changes having got the contractors to sign up to a particular scope. It was hammered home to me that if the scope was altered there would be cost consequences. I was aware that there was a possibility that the cost of changes to scope would be borne by CEC and not the contractor, but it depended who triggered the scope change. There was no discussion about postponing the award of the infrastructure contract until the design and utility diversion works were

complete. I felt comfortable approving the Final Business Case in these circumstances.

46. The Report also noted that that some risks were retained by the public sector. These included agreements with third parties including delays to utility diversions, the finalisation of technical and prior approvals and the absence of professional indemnity insurance for TIE [CEC02083448, page 7, para 8.13]. I was concerned about these issues at the time, but I cannot recall what was done to alleviate my concerns. Due diligence was to be carried out to enable the Chief Executive to be satisfied that it was appropriate for TIE to award the infrastructure contract. It was his responsibility. I was satisfied that the conditions in relation to giving approval to TIE to award the contracts had been met based on the advice I received from senior officers of the Council, back filled with the senior officers of TIE.
47. I have been made aware that between January and May 2008 there were a number of increases in the price of the infrastructure contract. I cannot recall the reason for these increases and what these increases covered.
48. The minutes for the Tram Project Board (TPB) meeting on 19 December 2007 record that Stuart McGarrity provided an update on the status of the project cost estimate and the anticipated Infracore contract price [CEC01363703, page 5]. He talked through the figures and was available for questioning, but I cannot recall the details of the figures. The minutes record that he said that the contract was based on the Wiesbaden agreement and that a premium had been included in the contract price to firm up previous provisional sums. This was really to take matters from the informal agreement reached at Wiesbaden to concluding the contract. This shows that BSC had expected a quid pro quo for provisional items, but I cannot recall what was given in return for them assuming design risk.
49. The minutes also record a statement made by Willie Gallagher that that the programme could accommodate up to a 6-month programme delay caused by later design [CEC01363703, page 6, para 5.4]. This was at odds with the



statements made before that design would be just in time with no float. The same part of the minutes also records that Willie Gallagher stated that the risk of delays caused by systems integration would pass to BBS because of Tramco Novation. At that stage we were innocent, and we thought we could rely on BBS to do things on time and expected CAF to be slow. The final result was that we received the trams but had no track to run them on. The minutes record Andrew Holmes seeking more information on the passage of design risk, but I cannot recall if this was supplied to TPB members, including me.

50. I am now aware of a progress report from TIE to Transport Scotland dated 14 January 2008 which reported the agreement for contract price for phase 1a with BBS [CEC01247016, page 3]. The report stated that the agreement was *"essentially fixing the Infracore contract price based on a number of conditions"*. The report stated that key points of this agreement included the effective transfer of design development risk excluding scope changes to BBS and the certain exclusion from the fixed price of items outside the scope of the tram project. I have no particular recollection of this and cannot recollect what the items outside of the scope of the tram project were. These points were covered at TIE Board and Council discussions and the report was passing them on to TS. The risk of design not being produced on time was a major risk to the whole project, but at that time I thought the risk was to the contractor not to TIE.
51. The TPB minutes for 9 January 2008 record that the discussion on risk transfer was continuing with BBS [CEC01015023, page 5, para 1.5]. The Wiesbaden agreement was the basic agreement but negotiations continued until the final contract was signed. That is reasonable in a major contract of this sort. The minutes also refer to an update being delivered by Stewart McGarrity [CEC01015023, page 6, para 3.1]. As the Finance Officer at TIE he delivered verbal briefings. Care was taken not to put things in writing while the contract was still fluid. I cannot recall the details of the update referred to.

52. The Project Director's (PD) Report in the papers for the TPB meeting on 23 January 2008 noted that the agreement with BSC meant that there was an effective transfer of design development risk to BSC [CEC01015023, page 9]. In my mind this meant that the risk was transferred to the contractors. The PD Report also reports the approval of the governance structures for the tram project by the TPB and CEC [CEC01015023, page 10]. This appears to have been done away from a meeting, but I cannot recall if I was involved or if I accepted the whole of the proposal. The PD report also reported slippage in MUDFA works [CEC01015023, page 11]. Slippage affected Infraco and TIE liabilities. City streets would not be available for Infraco to move in in accordance with the timetable. In terms of the contract, slippage would have cost implications for TIE. I cannot recall the stage at which this became a major issue. The problem with MUDFA was that we simply did not know what we would find when the streets were dug up. There was no coding or rating within the Risk Register of the risk remaining after treatment. I do not know why this was the case.
53. The same papers for the 23 January 2008 meeting contained the Report on Terms of Financial Close [CEC01015023, page 35]. I do not recall the TPB having any role in the finalisation of the Close Report. That was largely done by the lawyers. The function of the report was to update the Board on where we were. I satisfied myself that the statements made in the Report were correct, but I did rely on discussions with Willie Gallagher and his senior officers, and with Andrew Fitchie. There were no independent checks of the statements in the Close Report. The Close Report referred to a 'lump sum fixed price basis' for the Infraco contract [CEC01015023, page 39]. The advice which I received from those I regarded as reliable advisors was that this was a figure for the contractors to deliver the job. I cannot recall if there was any discussion at TPB as to the issue of allocation of risk, or what my understanding of the statement that the Infraco price of £216.3m, £219.9m was 'firm costs' [CEC01015023, page 65]. The report stated that the price was based on the employer's requirements, which I was no doubt content with [CEC01015023, page 66]. I cannot now recall details of the QRA and Risk

Allowance but again would have received an explanation that satisfied me [CEC01015023, page 88].

54. I have been made aware that further concerns about the Infraco contract were raised by CEC deputy officials in the lead up to contract closure. The concerns included that there had been a material change from the Final Business Case put to the Council in December 2007, that the price had risen by £10m, that the project timetable was now three months later than predicted, that the risk of approvals and consents had not been taken by the private sector and that there was a residual risk associated with design which, although the Council did not have any figures to assess that risk may be very significant. I do not recall the extent to which, if at all, I was aware of these concerns or if the Council was aware of them.
55. Originally it was intended that with approval in December 2007, the contracts would be signed by the end of January 2008. The TPB papers for 13 February 2008 indicated that matters were still up in the air in February [CEC01246826]. None of the members of the Tram Project Board who were Councillors were provided with the papers for the meeting on 13 February, I do not know why this was. The fact that the contracts had not been signed by the end of January would have been discussed at the TPB in February and I would have been told that the two sides were still discussing the detail of the contract and trying to firm up all the particulars. I know it took a while to get the contracts signed and there was quite a bit of negotiation going on between the lawyers from the two sides as you would expect for a major contract. I cannot recall if the TPB asked for any action to be taken in respect of this. The TPB Minutes for 23 January 2008 record Steven Bell stating that MUDFA was running on time [CEC01246826, page 5, para 4.1]. The PD Report for the 13 February meeting noted that overall MUDFA was running late [CEC01246826, page 12] that the cumulative position was that they were running late. I do not know which of these statements was correct or if anyone raised this conflict. I am aware that the TPB Minutes for 23 January 2008 record that work was still being done on the Infraco Employer's Requirements [CEC01246826, page 6, para 5.2]. I do not know why this was

still being done after contract approval. The minutes also record Willie Gallagher stating that BBS had a different expectation of design completion prior to novation [CEC01246826, page 6, para 5.5]. I do not recall if this was discussed or if this was relevant to BBS' acceptance of design risk.

56. At this time negotiations were underway in relation to Schedule 4 of the agreement. This regulated payment and pricing. I cannot recall what I was told of these negotiations. The PD report in the TPB papers for 13 February 2008 noted that design was once again causing concern [CEC01246826, page 20]. This was probably discussed, but I cannot recall any detail. I imagine the pressure was on the designers. The same papers contained a paper by Susan Clark in relation to the Peer Review Group [CEC01246826, page 30]. I do not know what was done in relation to this, as I had not received those papers.
57. On 18 February 2008 BBS produced a Design Due Diligence Summary Report, based on design information provided to BBS up to 14 December 2007. The document raised various concerns about design, including that "*more than 40% of the detailed design information*" had not been issued to BBS [DLA00006338, page 3]. I probably did not see this report and I do not recall seeing any correspondence from the contractors at that time. I was not aware of the matters within the report. There were still questions about the readiness of the designs. This was before novation was completed, so there was a risk like as with other significant change. I cannot recall if I was aware of the extent to which BBS's price was based on completed detailed design. I do not know how BBS could price for those works in respect of which detailed design was incomplete. They must have put in an allowance or an estimate of what the design costs would be. They could price for what the physical work would be up to an extent until the design crystallised. The issue of incomplete design was reflected in the £49m risk allowance
58. The papers for the Tram Project Board on 12 March 2008 [CEC01246825] indicate that there was still no Contract Close by March. I was disappointed with this. The TPB minutes for 13 February 2008 record Donald McGougan

as having asked if the design risk could be bought out. The response was that neither consortium would accept this [CEC01246825, page 6, para 4.4]. BSC were in the course of taking all the risk. Design risk lay with TIE until such time as the novation was complete, but I cannot recall if this was discussed or if it was reflected in any risk registers. The lawyers were told by the TPB that the risk was to lie with the contractors in the contract. The same minutes record Stuart McGarrity as having stated that there was a risk allowance of approximately £30m relating to £90m of non-firm future costs [CEC01246825, page 6, para 6.1]. I cannot recall if there was any allowance for risk in relation to firm costs or how much of the sum allowed related to MUDFA. The MUDFA works were slipping. TIE's officers involved with MUDFA were keeping pressure on the contractors involved.

59. I am now aware of a letter dated 12 March 2008 from DLA to Gill Lindsay [CEC01347797] in which DLA advised CEC on the Draft Contract Suite. I am now aware that Graeme Bissett of TIE had an input into the drafting of that letter. I was not aware that individuals from TIE had an input into the drafting of letters from DLA to CEC. This was not appropriate. Deputy officers at CEC had previously recommended that the Council seek independent legal advice on the risks arising to the Council in respect of the infrastructure contract. The possibility of the Council seeking independent legal advice was not discussed with me. We left that to the Council's solicitor and her department to satisfy us that the Council was protected.
60. A full meeting of the Council took place on 13 March 2008. The agenda and minutes show that no update was given in relation to the tram project [CEC02083387 and CEC02083388]. This was because negotiations were continuing and there was nothing to report.
61. I have been made aware that on Friday 14 March 2008 an email was sent to Alan Coyle [CEC01386275] attaching a note that had been approved by the Solicitor to the Council, Gill Lindsay [CEC01386276]. The note, to be signed by Donald McGougan, Andrew Holmes and Gill Lindsay confirmed that it was appropriate for Tom Aitchison to authorise TIE immediately to issue a Notice

of Intention to award the Infraco contract to BBS. It was noted that the final contract price was £508m and the risk contingency had been reduced from £49m to £33m. I cannot remember these matters in any detail, but no doubt I was told we had reached that stage in the process. The Council Senior Officers had the authority themselves to go ahead without coming to the Board. The Council, at an earlier meeting, had given Tom Aitchison the authority to sign off once appropriate due diligence had been carried out.

62. I am now aware of an email from Fiona Mable to Willie Gallagher sent on 31 March 2008, attaching a letter dated 28 March 2008 sent by David Leslie, Development Management Manager at CEC to Willie Gallagher [CEC01493317 and CEC01493318], expressing certain concerns in relation to prior approvals for design. I am now also aware that on 3 April 2008 Duncan Fraser sent a letter to Willie Gallagher setting out similar concerns by the Transport Department relating to the Technical Approval process and quality control issues [CEC01493639]. I was not aware of these letters and the concerns noted in the letters and I cannot speak for other members. The Councillors did the strategic things, but the detail was left to the specialists in TIE. I was led to believe the pricing provisions in the Infraco contract to deal with any such difficulties were comprehensive.
63. At the TPB meeting on 9 April 2008 the membership of the TPB was extended. The SNP got a seat on the TPB. Tom Buchanan who was the Economic Development Convenor and the Green Party also got a seat on it at that stage. I cannot recall if this changed the way the TPB worked. By this time there was still no contract close. As ever, I was disappointed, but appreciated that it was complex. There is no record in the minutes of the March meeting [CEC00114831] of the delay in conclusion of the contracts compared to target dates, the measures taken to address this and the costs involved. I cannot recall the reason for this or if this was questioned by TPB members. The TPB minutes for the meeting of 13 March 2008 recorded that the position with BBS was settled in terms of price [CEC00114831, page 5, para 3.2]. I cannot recall if I was advised of the discussions on Schedule 4 or if the issues arising in relation to SDS novation were discussed at the TPB.

64. The same minutes for the 13 March meeting recorded a £10m increase in the project price, and record Stewart McGarrity as having explained some components of the increase [CEC00114831, pages 6-7]. I cannot remember why these arose. The minutes record Willie Gallagher as referring to a buy out of the risk of SDS non-performance [CEC00114831, page 7, para 10.4]. He was referring to a deal being reached to sort out the poor performance of the designers. There is also reference to Stuart McGarrity summarising the key items included in the specified risk allowance [CEC00114831, page 7, para 10.5]. I cannot recall what these items were. The PD report for the TPB meeting on 9 April 2008 summarised the position in relation to negotiations, which I understood to be that progress was being made with the discussions but they had not reached final agreement [CEC00114831, page 10]. It was clear that MUDFA was slipping, but I cannot recall if there was any consideration of whether problems and conflicts would arise. The papers for the 9 April 2008 meeting contained a risk register in a new format [CEC00114831, page 27]. I expect that this was because a new person had taken responsibility for drafting it and it had been decided to include more detail.
65. In an email dated 11 April 2008, the deputy solicitor to the Council, Colin Mackenzie, advised Gill Lindsay of a difficulty that had arisen with the prior approval in relation to Russell Road Bridge which raised the question whether the sum allowed in the Quantified Risk Allowance for SDS delay (£3m) was sufficient. The email noted that matters were close to calling upon the Monitoring Officer to become involved [CEC01401109, page 3]. In an earlier email sent on 10 April 2008 to Andy Conway and Colin Mackenzie in the same thread, Alan Coyle had noted that this was contrary to the risk transfer to the private sector, and that insufficient information had been provided by TIE for CEC to accept the risk on these matters, leading him to ask how many more matters of this type would emerge [CEC01401109, page 4]. I do not recall what extent, if at all, I, or any other Councillors were aware of these concerns. TIE officers carried out the detailed work and would have informed me if they had considered it to be necessary.

66. I am now aware of an email dated 14 April 2008 from Colin Mackenzie to Andy Conway and Alan Coyle, in which he set out certain concerns, noting that in his view it would be prudent and proper to report again to members before financial close was authorised [CEC01256710]. This view was based on the changes which had emerged since December 2007. These emails were concerned with whether Councillors should be involved. I have noticed that in a number of the exchanges between officers the underlying message appears to be not to tell the Councillors or not to worry them. Other Councillors and I were not aware of these concerns.
67. On 15 April 2008 Alan Coyle sent an email to Colin Mackenzie, Gill Lindsay, Steve Sladdin and Nick Smith [CEC01245223], forwarding a copy of Schedule 4 of the Infraco contract [CEC01245224] and a cost analysis spread sheet [CEC01245225]. Gill Lindsay replied to Alan Coyle and Colin Mackenzie on 16 April 2008 [CEC01247679], asking whether it would be appropriate to get a revised statement from TIE confirming that the risk allowance was still sufficient. I was never made aware of or shown Schedule 4. I had no reason to see it. I do not know if officials ever reported to the Council on its contents: this was a matter for their discretion. I do not know if members were advised that the intention and effect of Schedule 4 was that the contractor was entitled to claim for additional payment over and above the final cost estimate of £498m, but I think that this would have been unlikely.
68. I was copied in to 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 that the intention was to issue the final contracts to all parties to commence a seven-day due diligence process. The email stated that confirmation had been requested that all parties were agreed to sign by no later than noon on Wednesday April 30<sup>th</sup>. Other members of the Boards and I were not provided with the final contracts. There was no reason for this to be done as we were not lawyers.



69. I have been made aware that on 30 April 2008 Colin Mackenzie sent an email to Gill Lindsay noting that *"BBS have increased the price by a significant amount. Urgent discussions underway at TIE this afternoon. Wonder how this leaves the report to Council tomorrow!!"* [CEC01241689]. A Report on Financial Close and Notification of Contract Award was presented to the Council by Tom Aitchison on 1 May 2008 [CEC00906940]. This sought refreshment of the delegated powers previously given to Tom Aitchison to authorise TIE to enter the contracts with the Infracore and Tramco bidders [CEC00906940, page 4]. The report noted the increase in price from £498m to £508m and that 95% of the combined Tramco and Infracore were fixed. It also noted that a new risk had emerged owing to the overlapping period of design and construction and that the present outcome, achieved following extensive negotiation, was the best deal available to TIE and the Council. It was noted that steps would be taken to examine and reduce this risk [CEC00906940, paras 2.3, 3.4 and 3.10]. I do not know if other members or I were aware of the recent price increase prior to the meeting on 1 May 2008. I cannot recall whether I was aware of the new risk which the report refers to, or the steps that were taken in relation to it. The report further stated that significant elements of risk had been transferred to the private sector over the course of the negotiations [CEC00906940, page 1, para 2.3]. I did not know of any of these changes. The report to the Council in 2007 had indicated that risk was fully managed. This apparent reduction did not cause me concern as to whether I had been given the full picture regarding risk to the Council. The report provided no explanation of new pricing Schedule 4, despite this having been provided to CEC legal on 15 April. How and whether misunderstandings arose during the negotiations, I do not know. These decisions and this information would have been left to our Executive.
70. On 2 May 2008, Leanne Mabblerly sent an email to me and a number of other Councillors including Jenny Dawe and Maggie Chapman attaching a schedule of utility diversions for Leith Walk. [CEC01230480 and CEC01230481]. The works did not run to schedule because of all the snags that the contractors unearthed as they opened up the street. There was far more of that than any of the utility companies had given us notice to expect.

71. On 3 May 2008 Willie Gallagher sent Councillors Henderson, Jackson, Mackenzie and me an email providing an update in confidence [CEC01231125, page 2] in advance of the TPB meeting the following week. The email noted that TIE had hoped to sign contracts on Friday 1 May, but this had not happened following a meeting at which the MD of BB UK had informed Willie Gallagher that BB would not adhere to the agreed price and required an additional £12m. Willie Gallagher's email described the details as sketchy, but that the increase involved supply chain commitments being broken owing to price inflation. BB were no longer able to deliver the original price. This was the first indication of problems with BB. I was also concerned because this would result in a further delay owing to details not being agreed. Willie Gallagher's email stated that he had asked for the UK MD to be removed and that he had made it clear that he had no authority to pay further sums. An emergency meeting of the TPB was to be scheduled for the Wednesday. I cannot remember if I attended this meeting or if I agreed with the series of actions. TIE was investigating the implications of bringing back Tramlines, the losing bidder, at this stage. This would have been likely to cause a 6-month delay but was an option if the BB relationship broke down. The possibility of Willie Gallagher threatening BB with this was discussed, but I do not think we ever went any great distance with it. Willie Gallagher's email noted that a meeting with the BB Board to try and get as much of the increase off the table as possible was by far the best option for sustaining the project's momentum. Having gone so far with BB it would have been far easier to conclude the negotiations with them, rather than starting again with a new contractor. It made sense. A follow up email from Willie Gallagher to the same recipients on 9 May concluded that contract signature was scheduled to take place on Tuesday 13 May [CEC01231125, page 1]. This did not concern me. I was delighted that we were making progress and we were actually going to get a concluded document. I cannot recall if I updated other members or officials on receipt of this email.
72. The TPB minutes for 9 April 2008 recorded that nearly 30% of the expected MUDFA works were complete [CEC00079902, page 6, para 3.4]. MUDFA works were split from the Infracore works because this was normal practice in

the construction industry, where preparatory work and underground work is done by one specialist contractor and the remainder of the work is done by different specialists. The minutes also record Stewart McGarrity explaining page 4 of the close report (contained in the papers for the 9 April meeting) which referred to an increase in base costs for Infracore of £17.8m

[CEC00079902, page 6, para 4.2; CEC00114831, page 50]. I cannot explain this increase, which I think would have been explained verbally by Stewart McGarrity at the meeting without written documentation. The minutes refer to a discussion of a recovery in the MUDFA programme [CEC00079902, page 6, para 4.3]. This was always hoped for but MUDFA kept experiencing unforeseen issues. There was no basis to hope for a recovery although I hoped one would occur. The minutes recorded further slippage in relation to Infracore signature [CEC00079902, page 7, para 7.2]. Matters were quite fluid at that point. All slippage was going to be costly to TIE. The PD report contained in the papers for the TPB meeting on 7 May revisited the transfer of design risk [CEC00079902, page 11]. This had been a problem since the outset and was repeatedly revisited. The same part of the PD report also records the request for a price increase from BBS, which was rejected by the TPB.

73. In an email to Gill Lindsay and Rebecca Andrew dated 8 May 2008 Stan Cunningham, Committee Services Manager, advised that the current plan for tabling a report noting the further price increase from £508m to £517.2m, and seeking approval for the Chief Executive to instruct TIE to enter into the relevant contracts, meant that *"it may be the first time that many of the members are aware of this matter. This is not satisfactory ..."*

[CEC01248988]. The fact that Stan Cunningham raised the issue supports my belief that members were kept in the dark about lots of things. I sat at the TIE Board or TPB as it became, I was aware of some things, but councillors in general were not aware. It was not necessary at this stage to seek full Council approval to enter into the contracts as we had already given authority to the Chief Executive to sign the contract once he was satisfied with it. A further Council meeting would only have caused further delay.

74. On 13 May 2008, shortly before contract signature, Tom Aitchison submitted a report to the Policy and Strategy Committee on Financial Close and Notification of Contract Award [USB00000357]. The report advised that the estimated capital cost for phase 1a was now £512m and that, in return for the increase in price, TIE had secured a range of improvements to the contract terms and risk profile [USB00000357, page 2, paras 2.7, 2.9 and 2.11]. This report needed to be considered as a matter of urgency, to allow Financial Close to take place immediately. The report was marked "not for publication" as it was very sensitive.
75. At the Policy and Strategy Committee meeting on 13 May, Jenny Dawe was appointed as Convenor of the Committee and Steve Cardownie as Vice Convenor. This was a matter of routine as Convenors and Vice Convenors were appointed or reappointed annually. Jenny Dawe and Steve Cardownie would have been the Convenors previously, because she was the leader of the Council and he was deputy. The minutes of the meeting note that notice of the addition of the item relating to Financial Close and notification of contract award had been given at the start of the meeting [CEC01891564, page 7]. This was not on the issued agenda. This was an extra item that Jenny Dawe ruled could be considered at the meeting. Members of the committee were provided with the report on Financial Close [USB00000357]. I was at the meeting as I was a member of the Committee but have no other recollection of it. Councillors Buchanan, Jackson, Mackenzie and I were also members of the TIE or TEL Boards and declared an interest at the meeting [CEC01891564, page 8]. We had been advised by the Council's Secretary as to how Declarations of Interest were to be disclosed as appropriate for us. Other than the report that had been issued at the start of the meeting, a senior officer of the Council was available for questioning, which was normal committee practice. The report required to be considered as a matter of urgency. Delay was a risk. The reason for the increase in price was to get a fixed price agreed with the contractors. That was the outcome of the negotiations. The Infracore Pricing Schedule (Schedule 4) was not mentioned or discussed at this meeting. It was a given that any changes or notified departures from the original specification were bound to be costly. The

difficulty was caused by the interpretation of what a change or notified departure was. As Convenor, Jenny Dawe also ruled that a changed position in procurement negotiations for the ETN constituted a material change in circumstances which should be reconsidered at the meeting on 13 May [CEC01891564, page 7]. I do not know if this matter was reconsidered or what the outcome was. A certified extract of the minute from the meeting notes that the committee authorised the Chief Executive to instruct TIE to enter into the contracts [CEC01222172]. I think this was the final sign off from the Council.

76. The Infracore contract suite was duly signed on 13 and 14 May 2008. The change that had been made to the contract between December 2007 and contract signing in May 2008 was that BBS wanted more money for more risk. I cannot recall if I received a briefing from CEC legal officers, at any time, on the effect of the contract, including the pricing in Schedule 4. However, we did discuss it at TIE Board meetings or the TPB. Some of those meetings were attended by DLA who probably explained it to us. At that stage I was still under the impression that the risks all lay with the contractor. That was what we were told by Willie Gallagher, Tom Aitchison and Gill Lindsay. I was not familiar with nor did I understand the Pricing Assumptions set out in Schedule 4. Once I became aware that the price was fixed with the design drawings issued at November 2007, I then knew that the change was going to cost TIE a lot of money.

### **Events between May 2008 – December 2008**

77. The TPB minutes for 4 June 2008 recorded that TPB membership was to be reduced [USB00000005, page 8, para 12.1]. This was to make it more manageable for David Mackay. The PD report for the meeting on 2 July 2008 discussed design and listed a number of approvals that had been submitted and approved [USB00000005, page 12]. Pressure was being put on the people concerned to speed things up. The PD report also noted that Infracore's rate of mobilisation was disappointing [USB00000005, page 12]. The TPB

was concerned at the lack of urgency, and the effect that design and MUDFA slippage might have. The same papers contained a risk drawdown in relation to a sewer at the A8 Gogar underpass [USB00000005, page 32]. This was a specific complication caused by the presence of unforeseen items when the ground was opened up. This caused increased cost but was necessary for the job to be done.

78. The minutes for the TPB meeting on 30 July 2008 noted that Willie Gallagher recorded his concern on MUDFA progress and Infracore mobilisation and progress [CEC01053601, page 5, para 2.1]. We noted these concerns at the TPB with patient disappointment. Susan Clark outlined MUDFA issues but I cannot recall exactly what these were [CEC01053601, page 6, para 2.3]. Willie Gallagher stated that the Board should not be unduly worried about progress [CEC01053601, page 6, para 2.5]. There were no underlying issues; it was just poor management by the contractor, which we presumed was taking all the risk at the time. It was noted that Infracore was claiming that delay to the Infracore programme was being caused by poor IFC drawings [CEC01053601, page 7, para 2.12]. We were updated on this by Willie Gallagher but were not there to micromanage. The PD Report in the papers for the meeting on 27 August 2008 stated overall progress remained behind the master programme [CEC01053601, page 9]. It did not say if the position was getting better or worse, which I was verbally informed of, and felt slightly frustrated. On the other hand, the report noted that the design position was getting worse. As ever, design delays were a concern. The TPB suggested that the relevant officials kept the pressure on. It was noted that improvement in MUDFA was required to prevent an impact on Infracore [CEC01053601, page 10]. Despite this, it was not in the risk register. The same issue arose in respect of the slow progress of Infracore. It was always said that delays would result in increased expenditure but this risk to CEC was not noted in the Report. I do not know why this was the case.
79. The minutes of the TPB meeting held on 27 August 2008 record that the close out plan for aligning Infracore proposals with the SDS design was being finalised and Steven Bell would report to the September TPB on the

associated programme and costs [CEC01053637, page 5, para 1.5]. This showed that things were progressing, although I had thought that these matters had largely been resolved. Infraco mobilisation was also discussed [CEC01053637, page 6, para 2.1]. There was a perception that they were not mobilising bodies or equipment. Steven Bell and the TIE management team were in regular contact with the contractors to ask what was going on and they said that progress had been made in some areas. If the MUDFA work was not completed in the street then Bilfinger could not get on with their work. Any delay could have knock-on effects on the delivery of the whole project in accordance with the agreed timescale. There were also issues with consents. The fact that the detailed designs had to be approved by the Council's planning was a control mechanism. Progress was positive, but there were bound to be glitches in a project of this size. I do not remember what the effect was or what was being done to address the issues. Positive and negative aspects of Infraco progress were explained by Steve Bell but I cannot cross-reference these with the table which appeared in the PD report with the papers for the TPB meeting on 24 September 2008 [CEC01053637, pages 7 and 10]. As designs were to be provided just in time any slippage meant they would be too late. The consequence of this would be that the job would be unable to continue if they had not received the detailed design of a particular section, which would come at a cost to TIE. At that stage, it was hoped that any slippage could be made up later.

80. The TPB was always aware of the risks with design delays. I do not know why these risks were not recorded on the risk register. The risk register was part of the TPB papers but I did not necessarily study it. The papers could run to 100 pages and I had a limited time to read them, so that was something I would maybe skim over unless something jumped out at me. Some risks are referred to in the PD Report, for example, but do not appear in the risk register [CEC01053637, page 12]. I do not know why this was the case. Late running of MUDFA was listed as a risk in the risk register [CEC01053637, page 16, risk 48]. The risks were not in numerical order. There was a strategy for dealing with this and that the responsible officer was Frank McFadden.

81. I am aware of a Report to the Council from TIE dated 18 December 2008 [CEC01043168]. This noted that since summer 2008 work had been carried out to develop the business case for line 1b. The report from TIE continued to note that an indicative figure of £87m had been provided by BBS for phase 1b but that this was open only until March 2009. This had gone on notwithstanding the comments in the report to the Council on Financial Close and Notification of Contract Award dated 1 May 2008 that the firm costs had increased by £27m [CEC00906940, page 3, para 4.1], whereas the risk allowance had reduced by £17m. It is stated in an SNP Group Motion on 1 May 2008 that this movement in cost may impact severely on the ability to deliver tramline 1b [TIE00153367]. Despite the cost issues, I am aware that the Highlight Report to the Chief Executive's Internal Planning Group dated 29 April 2009 shows that the Council were still considering a network consisting of lines 1a and 1b [CEC00860021]. I cannot recall if it was explained to the Council why work carried on notwithstanding the comments noted in the report to the Council of 1 May 2008 about the difficulty in delivering Line 1b in view of the increased costs of 1a. It was still the ambition to see how much we could deliver as and when the funding became available. TIE was engaged with the contractor on re-programming phase 1a to address the slow start up of construction. This was caused by the issues with the designs over running and MUDFA.
82. The minutes of the TPB meeting held on 24 September 2008 record that Steven Bell explained the positive and negative aspects of Infracore progress [CEC01210242, page 6, para 2.20]. I cannot recall what these were. The PD report included in the papers for the 24 September meeting had stated that a detailed breakdown of potential slippage and opportunities for recovery would be provided for the following month's TPB papers [CEC01053637, page 9]. I cannot recall if this was provided. The PD report in the papers for the meeting on 22 October 2008 made reference to a table identifying slippage and action [CEC01210242, page 9]. I am not aware what this referred to. The same report stated that there had still been no construction work [CEC01210242, page 10]. Construction on the bridges was underway, but there was nothing completed. It was also clear that the design was failing to keep up. This was



notwithstanding the fact that the design programme had reached version 31. I recollect that there were many conversations about version 31, but I cannot recollect the detail.. There was never any consideration as to whether there was a fundamental problem which might pose risk to the project as a whole, as matters were still at an early stage. The PD report noted that approvals were progressing well and we would have been reassured at the meeting that matters were at an early stage and we could catch up with the timetable [CEC01210242, page 10]. The PD report also discusses implementation of the traffic management system for the Mound [CEC01210242, page 10]. I recall that this did not work and everything came to a halt. The result of this was that a new system had to be devised for the Princes Street works. The same wording in relation to Infracore mobilisation and risk appears as in previous reports [CEC01210242, pages 11 and 13]. This was because nothing had changed as not much was happening.

83. I attended a meeting held at the City Chambers on Friday 28 November 2008. The note of that meeting records that Jenny Dawe requested that TIE suspend the implementation of Haymarket Phase 2 until after the embargo period [CEC01069591, page 2]. There was a group of city centre businesses who called themselves the Tram Operations Group headed up by Gordon Drummond from Harvey Nichols, who was their Managing Director. The business community had been in touch with Jenny Dawe and Tom Buchanan (who was Convenor of Economic Development) so we had a meeting to discuss it. The embargo was a halt to work for December and until approximately 15 January. I thought the embargo was excellent. It caused some delays but they were regarded as a price to pay to keep the city functioning and moderately happy over the festive season. This decision was reversed by the Policy and Strategy Sub-Committee on 12 May 2009 for the next festive period. This was intended to mitigate further delay.
84. An action note arising from the Tram IPG dated 1 December 2008 records that Tom Aitchison was to meet with Councillors Dawe, Cardownie and Buchanan and me to brief us on the Princes Street closure [CEC01069093, page 1]. Following on from that meeting it was agreed that Tom would report

back to us on the implementation of the embargo. The tram IPG was an officer committee that did not have Councillors on it.

85. On 10 December 2008, Councillor Iain Whyte sent an email to Jenny Dawe, Alan Jackson, Tom Aitchison and Donald McGougan and me. This quoted a message board post citing a comment by David Mackay to the effect that TIE had never started with a fixed budget, because "*the design changes as you go along*" [TIE00887286, page 3]. I do not recall receiving this email, but I was generally concerned about the project at this stage. It was still my understanding that the price of the project was fixed, but there had to be some room for change.
86. I was sent the papers for the Tram Project Board meeting on 17 December [CEC00988024] which contained the minutes of the meeting which took place in November. I was not at the November meeting. I cannot recall at this stage to what degree I read those papers. If I knew I was not going to be at the meeting, I may not have read them.
87. I cannot recall when, and how, I first became aware that there was a dispute between TIE and BSC in relation to the infrastructure contract. It would have been mentioned at a TPB meeting or else maybe in a phone call from one of the key players. I was told by TIE that we had a robust contract and that the contractor was failing in their obligations under it. I was disappointed that we had reached that point. It was later said to me that this was because BSC were a delinquent contractor, but at that stage I had no reason to think anything other than that they were being a bit difficult. At TIE Board level the Councillors were supportive of the TIE Executive. I do not know whether the strategy was referred back to the Council itself. It was left as a commercial issue for TIE to manage. We were told that the contract dispute resolution procedures were covered in the contract. We were informed of outcomes as matters went to adjudication. We got a progress report as the dispute unfolded. There were discussions at Board meetings and I was given expert advice, both from the contractual people, and Andrew Fitchie from DLA Piper. They kept reinforcing the view that the contract was a sound one. My views

on these matters only changed when Gill Lindsay retired. It was then pointed out there might be problems.

## **Events in 2009 and the Princes Street Agreement**

88. The minutes for the TPB meeting held on 17 December 2008 record that Kenneth Hogg considered that there were “issues” with the governance structure. He expressed concern that at times the Board could not discharge their functions fully [CEC00988028, page 6, para 2.3]. I do not recall what these issues were. The relationship between TIE, TEL and Lothian Buses became an issue. The minutes also record a discussion about the sufficiency of the remaining risk allowance for MUDFA. I cannot recall the details of this discussion [CEC00988028, page 6, para 2.12]. A substantial amount of the content of the PD Report and the TS Report contained in the papers for the TPB meeting on 22 January 2009 [CEC00988028] was the same as that for the previous month. The two reports ran in parallel. The TPB papers that I received were both the TIE report in TIE’s own words and then re-stated in TS’s style. The design section of the PD report referred to good progress but also notes that reasons for design slippage are being reviewed [CEC00988028, page 12]. I do not know what the position was. I was not concerned that the statement about reviewing and recording reasons for design slippage was repeated with no feedback as to what was being achieved, as I cannot recall this being highlighted to me. For the second month the TS report contained a statement that the quantum of designs which were required to go through a re-design process as a result of the approvals process or VE was being captured in the programme analysis and would be reported on in future months. [CEC00988028, page 26]. I was expecting the approvals process or VE to be reported on as and when there were things to report. There was no set deadline. The late completion of utility works in one particular location (Lindsay Road) was created as a new risk [CEC00988028, page 43]. The effect of this was a delay to the programme and therefore an extension of time claim so additional cost was incurred.

89. An action note following the IPG on 29 January 2009 which was attended by Council officials stated that absolute clarity was still needed on the price and noted that there was concern BSC costs did not represent value for money [CEC00867661, page 2]. I do not recall if the senior Council officials who attended this meeting made me or other members aware of these concerns.
90. I was sent the papers for the Joint Tram Project Board/TIE Board dated 11 February 2009 [CEC00988034] which contained the minutes from the previous meeting I attended on 22 January 2009. The TPB minutes for January 2009 noted that the party with power to regulate governance was CEC [CEC00988034, page 6, para 2.5]. This was accepted by the members of the TPB. It was a statement of fact. Concern was also expressed as to conflict of interests [CEC00988034, page 6, para 2.6]. This arose from obligations of confidentiality: the Councillors on the TPB could not share their knowledge with the rest of the Council. I do not recall that anything was done and I am not sure what could have been done to resolve it. It became more critical with the dispute, as other Councillors wanted to know what was going on and we could not tell them. The minutes record that we were told that MUDFA was 65% complete [CEC00988034, page 8, para 2.32]. I cannot recall how complete I understood it should have been in terms of the programme. I cannot recall if information about MUDFA progress was made available to me at the time. I could have obtained that information if I thought it necessary by asking Steven Bell or his deputy Susan Clark. They were my source of a lot of information and I had a reasonable working relationship with both of them. In the PowerPoint for the meeting there is a note that there was a significant risk of a major dispute (page 4 of the slides) [CEC00988036]. I cannot recall what discussion took place at the TPB about this issue.
91. On 12 February 2009, Dave Anderson sent me an email, attaching a copy of a letter from David Mackay of the same date to Dr Keysberg [CEC00900092] [CEC00900093]. Dave Anderson sent me this letter to keep me informed. He was still a novice at the Council and he did not know about controlling information. The letter stated that Infracore were not providing TIE with evidence to support their assertions that there had been a contract variation,

and that Infraco would state that the changes were too complex for them to provide a properly-calculated estimate [CEC00900093, page 1]. This tallies with what we were told at TIE Board meetings. David Mackay was escalating the allegations to BSC. Similarly, I understood that BSC had failed to comply with the contractual requirement to provide properly-calculated estimates. Without this being done, TIE could not price the changes. All the invoices in the estimates from BSC were gone over very carefully by TIE's finance team. The letter also stated that estimates had been of very poor quality or had contained significant exaggeration of Infraco's entitlement [CEC00900093, page 2]. The TPB had received feedback that the team appraising the estimates considered them to be inflated. David MacKay made further assertions that: (1) the Infraco did not yet have its key supply chain contractors under a formal contract; (2) there was little visible evidence of management of the SDS contractor; (3) there was little evidence of the demonstration of system integration activities or compliance with the design review obligations [CEC00900093, page 2]. I had no reason to doubt David Mackay. I was not there to micromanage. David Mackay copied the letter to CEC and Transport Scotland. CEC noted it and had no reason to doubt the stand he was taking. Infraco was not honouring its obligations under the contract.

92. A dispute arose between TIE and BBS prior to the planned commencement of works on Princes Street in February 2009. On Friday 22 February I received an email sent on behalf of David Mackay, containing the text of a message which he was about to send to the Infraco [CEC00867359]. The message stated that their previous email responding to questions in relation to Princes Street had been *"typically overlaid with extraneous comments and bold statements of Infraco's position which are not backed up in any reference to the terms of the Contract"*. I had perhaps heard of a dispute concerning Princes Street previously, but this email was the first time I was informed about it in detail. Princes Street was a key part of the whole route. The MUDFA work had already been completed there. It was the highest profile bit of the route and it seemed that BSC were taking the opportunity to be particularly difficult and demanding more money. They had asked for between



£50m and £80m. I was aware that BB had recently lost £50m on a Norwegian contract. I cannot now recollect the root cause of the Princes Street dispute. BSC were claiming that they were not obliged to begin any work on Princes Street without further payment. This was deemed to be disobedience under the contract by David Mackay and TIE. That is how it was portrayed to me by David Mackay and the other officers concerned. I had no reason not to support TIE and was happy to let TIE get on with their strategy to resolve the dispute. I do not recall to what extent, if at all, the strategy, and the eventual Princes Street Supplemental Agreement, was approved by the Council. TIE were trying to get BSC to get on with the work without delay without having to use the contractual dispute resolution procedures. As far as I was aware this was only because it was better to work amicably rather than go to litigation. As far as I was aware this was the first dispute between TIE and BSC in relation to the Infraco contract.

93. On 23 February I emailed all Liberal Democrat Party Councillors with an update [CEC00900879]. The email noted the demand for additional payment, and that our role was not to assist BSC in balancing their books. BSC's reputation by that stage was going a bit ahead of them, where they had fallen out with the sponsors. There had been a large dispute in Vancouver and we were aware of other instances where it was alleged they had not honoured their contractual obligations. The email was a factual report for my colleagues, working within the confidentiality restrictions.
94. On 27 February 2009 I sent an email to Jenny Dawe and David Mackay [CEC00868427] [CEC02084199, page 2] informing them about a meeting I had had with Richard Walker of BSC. My assistant arranged this meeting on my behalf. The purpose was to hear BSC's version of events. The Council Solicitor and senior Council officials were not aware of this meeting. I had heard a large number of horror stories about Richard Walker. Equally, he was coming up with all sorts of allegations about what he said was TIE's misbehaviour. I did not think that the meeting would jeopardise TIE's position in any way, otherwise I would not have done it. I do not know at this stage, if the relevance of the clauses in Schedule 4 had been explained to me or if I

thought it appropriate for the Council to seek independent legal advice on Schedule 4 and its effect. Richard Walker alleged that TIE did not have any senior civil engineers who could relate to Bilfinger Berger and understand their problems. My feeling was~~ed~~ that he was belittling TIE. I noted the discrepancies between his version of events and that given consistently to the TIE Board which concerned me. That is when I started to doubt what I was being told at TIE Board meetings. David Mackay responded to my email on 27 February in relation to what he termed Richard Walker's 'improper allegations' [CEC00868427]. This alleviated my concerns but I retained slight doubts. TIE wished to demonstrate that other clients had run into difficulties with Billfinger Berger [CEC02084199]. I was being told that BB's behaviour in various big contracts around the world were giving a cause for concern and that litigation had followed. I have already mentioned the problems in Vancouver and Norway. I think there was another issue in the Gulf States. Amongst these papers is a letter from Stephen Bell to Martin Foerder noting that the BSC consortium would not be releasing the questions and answers document to the media as requested by TIE on 5 March 2009 [CEC02084199, page 3]. There were efforts on the Council and TIE's side to keep most contractual details confidential. BSC warned TIE that they would release documents, but they were contractually prohibited from doing so.

95. I am aware of a letter dated 5 March 2009 from Tom Aitchison to David Mackay [CEC00870592]. This set out a number of measures required to keep the Council updated about disputes. The purpose of this letter was to protect the Council's position and to remind David Mackay of the order of things. I did not have any concerns at that time (or later) as to whether TIE were keeping the Council fully informed of the disputes with BSC.
96. I am aware of an email dated 6 March 2009 from Andrew Fitchie to Gill Lindsay, attaching the parties' position papers in relation to the Princes Street dispute [CEC01031402]. In an email sent to Tom Aitchison dated 11 March 2009 [CEC00869667] Colin Mackenzie advised that it was possible the Infracore contract was not robust enough, that as a result affordability became an issue and that the Council officers were lacking the requisite information,

certainty and confidence at that time. This is the first indication that someone in the Council's legal side was starting to question the reliability of the contract. Colin Mackenzie is the one who started the Emperor's new clothes phase. DLA's Chris Horsley, responded to CEC attaching a paper entitled "DLA Piper Response to CEC Questions" dated 12 March 2009 [DLA00001357]. I cannot recall whether Councillors received a briefing from CEC officers around this time on the differing interpretations of the contract or if we were informed of the consequences for the Council if TIE's interpretation of the main provisions in the contract was incorrect. I was notified about the use of the contract Dispute Resolution Procedures and the outcome of those procedures through TIE Board meetings, not through the Council.

97. A joint TPB and TIE Board meeting was held on 11 March 2009. The slides for the meeting noted that the DRP was a means to make progress in anticipation of broader Infraco engagement [CEC00379023, page 3]. I was being told by TIE that Infraco failed to engage fully. The same slide discussed as a strategic option a negotiated settlement of termination of BSC and noted that replacement of BB in the consortium might be a necessity. Neither of these were attractive options. If we had changed contractor, it would have caused delay, and any sort of settlement for cancelling the contract would have been costly with nothing to show for it. The slides noted that Transport Scotland required to be provided with a view of the impacts of current disputes with the Infraco programme and outturn costs by the last week of March 2009 [CEC00379023, page 6]. I expect that this was provided. I do not recall the response.
98. A report was presented to the Council entitled 'Edinburgh Transport: integration of bus and tram' on 12 March 2009 [CEC02083751]. This was the first report to the Council to refer to contractual difficulties between TIE and BSC. In the report Tom Aitchison noted [CEC02083751, page 3] that *"members will appreciate that I am restricted in what I can say while commercially confidential negotiations are taking place"*. Commercial confidentiality came up time and time again. I cannot say at this stage what steps were taken to address any such concerns other than there were some



confidential briefings on a need to know basis. That is just what would normally happen in these circumstances, although I cannot say if it happened in relation to this report. As Councillors involved in the project we had privileged information, so we could make our judgements based on that. What our colleagues who were not in the same position did was for their own discretion. It would have affected the other Councillors' ability to make decisions as they did not have the same information. Those Councillors tended to be guided by those of us whom they appreciated did have the inside information. I cannot recall what conditions the contractors wished to impose in relation to carrying out works. The Report referred to a report submitted to the Policy and Strategy Committee (PSC) for a meeting dated 24 February 2009 [CEC02083751, page 3]. Minutes from the Council website show that the Report to the PSC related to the contractual problems. As a member of the PSC I cannot recall this report and what was said regarding the contractual difficulties. At this stage the Council, given their interest as funder of last resort, were receiving legal advice about the contractual dispute from in-house lawyers.

99. In an email to Marshall Poulton dated 7 April 2009 with the subject heading *"Edinburgh Trams; Strategic Options and DRP"*, Colin Mackenzie made certain observations on the dispute between TIE and BBS and raised certain concerns [CEC00900419]. Colin Mackenzie sent a further email on 9 April 2009 to Marshall Poulton, Max Thomson, Andy Conway and Alan Coyle attaching a report on the dispute between BBS and TIE [CEC00900404 and CEC00900405]. The report noted that there were 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"* [CEC00900405, pages 1-2]. I was not aware of the matters noted in these emails.
100. I am aware that the minutes for the TPB meeting on 11 March 2009 recorded that David Mackay was going to meet John Swinney and Stewart Stevenson

on 17 March [CEC00888781, page 5, para 1.1]. I cannot recall the purpose and outcome of that meeting, but I imagine it was just to update the Ministers on what was happening. David Mackay and other senior officers of TIE had periodic meetings with Ministers right through the project when there were matters to discuss, so it was not out of the ordinary. The use of PwC for advice was discussed [CEC00888781, page 5, para 3.2]. I do not recollect this. The minutes record that the TPB agreed to the Princes Street change which would lead to an increase in project costs [CEC00888781, page 7, para 10.3]. The Board requested a change order be prepared so we told them to go ahead. I do not know if the Board were told how much it was going to cost at this stage. The minutes noted that lessons had been learned through the Princes Street process. These were principally that the contractors were difficult and that there were questions about the robustness of the main contract because that was what BSC were arguing about. At the 24 March TPB 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 [CEC00888781]. I was prepared to go along with this and had no reason to doubt his judgment. 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 is no guarantee that this will be the case if there is a compensation event (same basis as the original contract)"*. I do not recall in detail what the benefits of the PSSA were, but the main benefit was to get the work underway. At 1.11 Stewart McGarrity outlines the available headroom in the funding envelope and at 1.12 Stewart McGarrity essentially said that this headroom only exists as long as there was no further disruption or delays. I cannot recall if the Board were worried by this stage that the project would not be delivered within budget, but some progress was being made anyway.

101. On 30 April 2009 the Council were given an update on the tram project by way of an 'Update Report' by the Directors of City Development and Finance [CEC02083772]. The Report indicated that the PSSA allowed the works to proceed on the basis of "demonstrable cost". The Report did not spell out exactly what was meant by this. It did say, however, that this meant that the

contractor would be paid on this basis should they uncover unforeseen ground conditions. The Report claimed that this represented no further transfer of risk to the public sector [CEC02083772, page 2, para 3.3]. I do not recall what my views on these matters were. I had no role in the negotiation. It was not my role to do any micromanagement. The rationale for the PSSA was that it provided the basis to break the impasse with the contractors. The decision to concede a supplementary agreement was taken quickly. Councillors were probably not given a sufficient opportunity to consider and comment on the agreement before it was entered into, but I am not sure what we would have contributed anyway. The effect of the agreement was explained to Councillors on the Boards. I do not know how other Councillors were briefed. The report stated that the full scope of the project could be delivered within previously agreed funding levels " [CEC02083772, page 3, para 3.11]. I do not regard this as in any way misleading. At the time the authors did not know better. The report referred to a full review of the project programme [CEC02083772, page 4, para 3.13]. I do not now know what this was.

102. The papers for the TPB meeting on 6 May 2009 contained a report on 'Utility strategy to completion' [CEC00633071, page 26] This raised the possibility of the removal of Carillion from the MUDFA contract. Three reasons for removal were suggested: performance, quality and cost. The proposal to remove Carillion would have prolonged MUDFA even more and it was already taking far longer than anticipated. The nub of the row with BB was that the streets were not ready for them because the MUDFA work had not been done. There had been a delay because Carillion had taken over McAlpine, who had been the original contractors, and that had caused complications. Any more changes were bound to cause more delays and would set everything back even further. I do not know if the savings referred to in the paper materialised. It had earlier been identified that the payment terms under MUDFA were such that Carillion were probably making a loss. I do not know why it was thought that it would be possible to get better terms at that stage. Presumably there was some thought that another contractor might be prepared to finish off the work at a cheaper rate but I would have thought that

would have been unlikely. It seems that initially the intention was that the works at the two ends of the line would be handed on. However, later works in the city centre were also handed on. I cannot recall what my understanding of the reason for the change in approach was.

103. The dispute between the "Base Date Design Information" (BDDI) and "Issued for Construction" (IFC) drawings had arisen by this time and was considered at the meeting. The PD report in the papers referred to 'constructive discussions' on the issue [CEC00633071, page 9]. This was all about the design problems between basic drawings and those that were ready for construction, by which time they had been vetted and gone through planning. The risk register listed the treatment strategy as the establishment of a process that would act as a control mechanism for design changes [CEC00633071, page 18]. I do not know what sort of process was envisaged. It was apparent from a very early stage that the programme had slipped. In May 2009 it was considered that the slippage could be made up with improved productivity rates. There was mention somewhere in the papers that in some places BB were actually ahead of schedule, being quite productive on those stretches where they were getting on with it. There was hope, therefore, if they had that attitude elsewhere they could catch up. They had a reputation worldwide of doing major contracts and getting them done promptly. The PD report stated that it had been necessary to defer works on Leith Walk because the MUDFA works were not finished [CEC00633071, page 13]. I do not recall particular discussions on that. There were particular complications with the MUDFA work in Leith Walk because when you open up an old street you never know what you are going to find. The argument was that there were still plenty of places where BB could have got on with work where MUDFA was not an issue. The TS report noted that work was continuing on Princes Street, Edinburgh Park Bridge, Gogarburn Bridge and the new access road at Verity House [CEC00633071, page 36]. The first of these were under the PSSA and the others were to be off-street structures. BSC were supposed to have almost 50% of the work completed and instead had done only 3%.

104. The issue of Infracore Notices of TIE Change (INTCs) was discussed at the TPB meeting on 3 June 2009. In terms of the Infracore contract, the contractor was of the view that circumstances were such that where there was a deemed change to the contract requirements, they were entitled to serve an INTC. This could entitle them to additional payment under the contract or additional time in which to complete the works. I do not know if this was the first time that the issue of INTCs had been explained to the TPB. I do not know how many INTCs had been served on TIE by the contractors by the end of June or what gave rise to them. In the minutes for the TPB meeting held on 6 May 2009, it is recorded that there was a lack of an agreed programme [CEC01021587, page 6, para 3.8]. This was presumably because there were differences of opinion between TIE and the contractors as to where we were. Not having an agreed programme on the project was not helpful. The minutes record that a meeting was organised between David Mackay and Richard Jeffrey and John Swinney and Stewart Stevenson on 7 May [CEC01021587, page 7, para 3.9]. I did not attend this meeting. It was also noted that the design was being held up by delays to the SDS design (some of which were caused by TIE and some by redesign) and by delays to the Siemens detailed design. It was noted that there is no issue with CEC processing the approvals [CEC01021587, page 7, para 4.3]. I cannot explain why design was being delayed by TIE. I do not know why designs were being re-designed. Presumably it was felt necessary for installation. I do not know if it was correct that there were no issues with CEC processing approvals at that stage. The minutes also noted ongoing design work for phase 1b [CEC01021587, page 8, para 5.4]. This was because we were still hopeful of being able to deliver that phase as well. The cost for phase 1b was included in the overall cost of the project.
105. The Minutes of the TPB meeting on 8 July note that there was a discussion of strategic options [CEC00983221, pages 7-8, para 4.6]. The strategic options had already been defined. When Richard Jeffrey came on board he started reorganising the thought processes. I think Richard Jeffrey produced a paper on the strategic options, but I do not know if it was presented to the TPB. The TS report contained in the papers for the TPB meeting on 8 July included a

Time Schedule Report which indicated that many matters had slipped but that recovery could be achieved [CEC00983221, pages 40-41]. The same table and statement appeared month after month in the TS report although the degree of slippage increased. I was happy with this at the time. If BB had sped up their work there could have been recovery. I do not recall if I discussed this matter at the meeting of the TPB or if I raised it at another time with anyone else. I am aware of an email from Andy Conway to Alasdair Sim, sent on 15 July 2009 and responding to an earlier email attaching the TPB minutes for 9 July. Andy Conway queried why a comment by Richard Jeffrey to the effect that there was 'no way we'll be able to build the tram for £545m' had been omitted from the minutes [TIE00763898]. I cannot recall if it was clear to the Council at that stage that the tram could not be built for £545m.

106. A joint TPB and TIE Board meeting was held on 8 July 2009. The slides for the meeting contained the Chief Executive's quarterly report. This listed problems with the project which had existed from the beginning, namely: (1) risk management strategy; (2) procurement strategy (3) design/design management; (4) contractor appointment/behaviour; (5) optimistic estimates [CEC00379021, page 3]. These were basic issues and fundamental things to get right. The slides also noted that there was: (1) a lack of clear HR governance; (2) no recognisable people plan; (3) a lack of strategic clarity and individual level; (4) silos and politics, not 'one team'; (5) a lack of clear purpose; (6) confused governance; (7) infighting [CEC00379021, pages 4 and 7]. I imagine now that this was Richard Jeffrey's analysis of what was going on after he had been in the job for a little while.
107. The slides for the joint meeting noted that four options were presented to the TPB in July: (1) to negotiate settlement of all issues with BSC; (2) a formal contractual approach using the DRP and other remedies; (3) to reduce/rephase BSC scope by instruction or by negotiation; (4) to end the BSC contract either by termination or by negotiation [CEC00379021, page 15]. The TPB approved option 2 to try to restore the situation and get things moving. It was seen at that stage as the most effective. TIE had a team from McGrigors to challenge each DRP as it arose. I do not know why McGrigors

were employed to do this rather than DLA. It might have been a resource issue because DLA did not have the manpower or it might have been that Richard Jeffery wanted a fresh legal approach.

108. On 13 August 2009 Richard Jeffery emailed Board members to inform them that BSC would not start work on Shandwick Place unless this work was undertaken on a cost plus arrangement [CEC00679723]. As a Board member I did not discuss this with other elected members due to confidentiality rules. The PSSA set a precedent and paved the way for BBS to claim further additional costs in respect of other on-street works, such as Shandwick Place, by changing the basis of payment under the contract so it was no longer fixed price.
109. The Status Report to the Council on 20 August 2009 was the first report to state that it would be very difficult to deliver phase 1a within the budget price of £545m [CEC00308517, page 3, para 3.12]. The report noted that a revised programme and costs baseline had not been agreed [CEC00308517, page 2, para 3.5]. The report further noted that utility works had given rise to additional costs of £7m. This was said to have arisen from programme slippage and also additional costs associated with measured works. This was attributed partly to unexpected ground conditions owing to inaccurate data held by utility companies and the Council [CEC00308517, page 2, para 3.8]. Anything found when digging started was unexpected, as the streets had not been opened up before. Presumably test bores were completed, but the records obtained from the utility companies were incomplete. I do not know what more could have been done. I am not aware of whether the utility companies offered an assurance that their data was accurate, and I do not know what investigations were carried out to verify information obtained from those sources. The report noted that TIE were invoking formal contractual dispute mechanisms. It was noted that TIE had taken Counsel's opinion, but given the nature of the process and the complexity of certain issues, it was unreasonable to expect that all adjudication outcomes would be awarded in favour of TIE [CEC00308517, page 3, para 3.11]. We were still being advised by David Mackay and other senior members of TIE that the contract was

robust and it was up to the contractors to comply with it. I do not know when my views on TIE's prospect of success changed, but eventually we did start to have doubts after being unsuccessful in a number of a lot of the disputes when things went to arbitration. Our doubts grew progressively because of this. Most significantly, the report noted that in view of the disputes, it was not possible to forecast accurately the budget outturn [CEC00308517, page 3, para 3.12]. I do not remember if this caused me any concerns. The Council affirmed their commitment to provide the whole of the tram line to Newhaven, notwithstanding that it was not considered possible accurately to forecast the cost of the project. This was an aspiration whilst managing the expectations of the city.

110. The minutes for the TPB meeting on 29 July 2009 record an update given by Richard Jeffrey on key strategic themes. He had been in his post for three months by this stage. The minutes noted that Infracore works were held up due to commercial issues arising from design changes [CEC00739552, page 7, para 3.2]. The commercial issue was the costing of design changes. I do not know if this was solely related to the movement between BDDI and IFC drawings or to other design changes. The Minutes also suggest that the DRP process that had been undertaken did not need to go all the way to a conclusion [CEC00739552, page 9, para 3.7]. The TPB still hoped that settlement could be achieved. The PD report in the papers for the TPB meeting on 26 August 2009 noted that it could not be expected that all adjudication outcomes would be in TIE's favour [CEC00739552, page 13]. The consequence of this would be cost implications for the project. The PD report also noted a number of reasons for delays, including that delays were being caused by BSC's failure to submit preparatory paperwork [CEC00739552, page 13]. This paperwork dealt with costing for individual pieces of work. I do not know which of the various listed reasons for delay had the greatest effect. The figure in the PD report for MUDFA works completed showed a big jump from the figure given to TS in the previous month [CEC00983221, page 14]. We needed better weather in the summer months. This was at a stage when different subcontractors had got involved and were working on the project. A note in the Costs section of the PD



Report stated that TIE might not have “sufficient contractual leverage to instruct commencement” of works [CEC00983221, page 18]. This was when weaknesses in the contract started to come to light. Powers of enforcement of the contract were missing for TIE. In the TS report for August 2009 there were references to “Temporary and permanent works re-design” [CEC00983221, page 46]. I do not know what the nature of the re-design was or why it was required. I do not recall why it arose at this time. BSC’s behaviour was part of the problem as they would not start work until the cost impacts of the changes were agreed. In TIE’s view, their costings for pieces of work were rather generous.

111. There was a discussion at the TPB on the issue of betterment in relation to recovery of the costs of the MUDFA works from statutory utilities. The minutes of the TPB meeting on 29 July 2009 recorded that Steven Bell had noted that several million pounds of betterment value had been secured from Scottish Power and Scottish Water [CEC00983221, page 7, para 3.3]. I had raised the subject several times myself. I felt the utilities should have been reimbursing us for betterment. Meetings were being held with the companies, who agreed in principle but getting them to agree a figure and pay was more difficult. The July minutes recorded that Steven Bell was to prepare a summary statement for the August meeting of the outstanding areas where betterment would arise. However, there was no such document in the papers for the next meeting or referred to in the minutes of that meeting. I do not know whether this exercise was carried out. It may have been overtaken by other issues.
112. The TPB minutes for 26 August 2009 recorded that the Board was told that Infracore progress was slower than desirable, largely as a result of ongoing contractual matters [CEC00848256, page 6, para 3.2]. I was disappointed with performance at this time. The same part of the minutes recorded that works on the Shandwick Place tram stop had not started due to on-going discussions with BSC regarding treatment of on-street sections. BSC were delaying work pending a resolution of the wider contractual matters. I was only aware of the position taken by the contractors as it was covered in a

verbal report to the meeting. I do not know if my understanding changed later. The TS report contained in the papers for the TPB meeting on 23 September 2009 still noted that it was expected that programme recovery could be achieved in respect of the majority of items [CEC00848256, pages 56-57]. If a resolution to the dispute could be reached then there was no reason why BB could not get on with it. I remained confident that there could be recovery. As matters had now moved on a few months from the statement made in the papers for early July I was still hopeful that enforcement of the contract would have the desired effect. In the TS Report there was also a note that the fact matters had entered DRP meant that TIE could instruct BSC to progress with the works in the DRP [CEC00848256, page 33]. I cannot recall if there was a discussion as to whether this was likely to make it possible to break the deadlock. The giving of such instructions was not the subject of consideration at the TPB. This would have been micromanaging. By this time, I considered that the continuing effects of MUDFA and then the unwillingness of BB to get on with the work were the real causes of delay in the Infracore contract. Despite all the problems discussed in earlier months, the relevant section of the TS report still begins with reference to the appointment of direct BSC resources and the final appointment of package contractors. I do not know at this stage whether this was my view or not. The TS report makes reference to a challenge process to which possible disputes were subject before referral to DRP [CEC00848256, page 33]. I imagine this was an internal process to see how robust the case was. The TS report also noted that slippage had been addressed as part of the re-calibration of the programme and that opportunities were being identified to mitigate its effects [CEC00848256]. I do not know what my understanding of this was.

113. At the TPB meeting on 23 September 2009, the minutes record that we received a verbal update on the various disputes between TIE and BSC [CEC00842029, page 5, para 3.5]. It was common for things not to be set out in writing. We got verbal reports from David Mackay or Steven Bell as appropriate, and Richard Jeffrey. The minutes also noted that Steven Bell would prepare a summary report for the next TBB outlining areas of dispute within the current supplementary agreement arrangements [CEC00842029,

page 5, para 3.5]. No such paper was included in the papers for the October meeting [CEC00842029], and I doubt such a document was ever provided to me. It was probably an oral briefing. Things were moving quite quickly and the principals did not have time to produce written reports constantly.

114. The minutes for the TPB meeting on 21 October recorded that BSC were refusing to carry out on-street works without a supplementary agreement entitling them to payment on a cost plus basis [CEC00681328, page 9, para 3.5]. In my view, this was indicative of BB's reluctance to get on with the job and willingness to manipulate the small print of the dispute resolution system. The October minutes record that Steven Bell was to prepare a quarterly report on betterment contributions for MUDFA [CEC00681328, page 7, para 3.2]. I am sure the TPB received a report on betterment contributions for MUDFA from Steven Bell at some stage, but I cannot recall the detail. The same part of the minutes noted that there were discussions with Carillion regarding their exit from the contract. The MUDFA works were said to be 98% complete. I presume that the remaining work was being done by other contractors. At that stage there were a number of parts that were being done by different contractors, either sub-contracting to Carillion or perhaps directly contracted to TIE. I understand that in the table contained in the TS report in the TPB papers for 18 November 2009, all the figures showing the cumulative fall behind schedule were inaccurate [CEC00681328, page 40]. I understand that the same is true of the table in TS Reports for December [CEC00416111, page 52], January [CEC00473005, page 53], February [CEC00474418, page 33], and March [TIE00894384, page 34]. This was not noticed, commented on or corrected at the time. This did not catch the eye. We received almost 100 pages of papers to read within 36 hours of the TPB meeting. You had to speed read the bits you thought were pertinent. If I had been aware, I would have raised a question and I am sure other Board members would have done so as well.
115. The decisions of the Carrick Knowe and Gogarburn adjudications were made available. An independent arbiter who dealt with the DRP processes was conducting the review. I do not know who it was. The TPB only noted the

outcome. We had no input. One of the issues in relation to these disputes was whether certain matters constituted 'Changes' under the contract. I cannot recall at this stage if there was a discussion as to what approach TIE intended to take on the issue. By the time of the November 2009 report to TS it was apparent that nearly all the risk provision was exhausted and the Infraco works were only 10% done [CEC00681328, pages 18, 40 and 61]. I am sure this was a source of concern, but I cannot recall any detail.

116. On 18 November 2009, DLA provided the Solicitor to the Council with an "Overview of Adjudicator's Decisions" [CEC00479382], in relation to decisions dated 16 November 2009 by Mr Hunter on the disputes relating to the Gogarburn and Carrick Knowe Bridges. I do not think that other members and I ever received a briefing from CEC officials or TIE on this overview. I do not recall seeing these documents before, and there was no reason why I should have seen them.

## Events in 2010

117. An opinion from Richard Keen QC on the interpretation of the Infraco contract [CEC00356397] was given in the course of dispute resolution on 14 January 2010. The opinion concluded that "*Changes of design principle, shape and form and outline specification*" constituted "notified departures", entitling the contractor to seek further monies under para 3.4.1 of Schedule 4 of the Infraco contract [CEC00356397, page 9, para 13]. The opinion was provided to the Solicitor to the Council and CEC legal officials by email from Julie Smith on 12 April 2010 [CEC00356396]. I do not think that other members and I ever received a briefing from CEC officials or TIE on this opinion. I had been assured by DLA up to that point that the contract was robust. Counsel's opinion was only sought when there were doubts or challenges from BB. I do not have any views on whether the Council as ultimate stakeholder, should have taken separate legal advice at an earlier stage. The reason why parties had differing interpretations of the contract was that they had different interests. I cannot recall if TIE or Council officers ever reported to the Council

on what was covered by the price in the original contract, and why departure from that was necessary. I understand that in January and February 2010 CEC appear to have instructed their own legal advice from Dundas and Wilson. I do not think I was informed of the outcome of that advice.

118. On 8 February 2010 [CEC00492018], Councillors Jenny Dawe, Steve Cardownie, Iain Whyte and Andrew Burns and I received an email from Alison Bourne expressing concern that the Council reports in advance of the Budget meeting on 11 February made little mention of the financial position of the tram project. The fact that the tram had its own independent financial structure meant it did not impact particularly on the Council's budget itself which I, as Finance Convener, was proposing at that stage. The Council or the budget reports did not talk about the tram because it had its own independent funding structure. Mrs Bourne's email referred to unexpected works at Russell Road and TIE's failure to provide clear sites to the infrastructure contractor. I cannot now recall what these issues were. Mrs Bourne had a concern that there might not be sufficient headroom within the current prudential borrowing limit to meet the funding shortfall. Despite Mrs Bourne's concerns, I was not concerned at that time. My understanding was that there would only be implications for prudential borrowing if we needed to raise more money and at that stage we were not predicting a funding shortfall for the tram. I was still hopeful of getting the job done within the funding envelope that we had.
119. In an email dated 4 March 2010 [CEC00474750] Alan Coyle sent the Directors of City Development and Finance a 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 [CEC00474751, page 3]. I cannot recall specifically the extent to which the different options were discussed with me. The options being considered were robust enforcement of the contract or methods to get rid of BB. Stopping the line at St Andrew Square was discussed, but stopping at Haymarket was not viable. I was aware of these cost estimates through the Board meetings. I do not know how they were reported to the Council itself.

120. Richard Walker of BBS sent a letter to Tom Aitchison, Gordon Mackenzie, Donald McGougan and David Anderson dated 8 March 2010 [CEC00548823]. I did not see this letter. It was not addressed to me and it was to be treated as 'private and confidential'. Gordon Mackenzie had taken over from me as Transport Convenor by that stage in 2009.
121. The minutes of the Tram Project Board meeting on 10 March 2010 note that Richard Jeffrey and David Mackay had provided a detailed briefing to John Swinney MSP, Stewart Stevenson MSP, and also to senior representatives of TS [CEC00379020, page 1, para 2.1]. Ministers were still committed to putting £500m into the project and accordingly had an interest. They had had regular update meetings. The minutes also recorded that, following the PSSA, BSC were seeking to impose a new set of terms governing all on-street works which were unacceptable to TIE, not least because, if accepted, TIE would potentially be exposed to sanction for breach of procurement regulations and because they did not offer best value. A detailed counter-proposal had been prepared by TIE [CEC00379020, pages 2-3]. The two options were Project Pitchfork and Project Carlisle, but I cannot remember the details.
122. The same minutes also record discussion of design delays. Whilst TIE changes had driven some of this delay, for example in areas such as Gogar Interchange and Picardy Place, there had been no clear justification from BSC as to the reasons for overall delay or any evidence of design management and mitigation of delay. The minutes noted that the scope of what SDS had been asked to deliver compared to the base scope had increased substantially, though the reasons had not been communicated to TIE by BSC [CEC00379020, page 2]. It was not unusual for SDS to be delaying things, but given that SDS had been novated to the consortium it was up to them to manage the designers. I do not know what was done in response. Richard Jeffrey stated that whilst TIE did not dispute that utility diversion delays, (which were to TIE's account) had caused substantial delay to the construction programme, BSC had not demonstrated that they had effectively sought to mitigate delay [CEC00379020, page 2]. Delay represented additional revenue to BSC. There were various time penalties that they could

put into play. The minutes recorded that TIE had expressed concerns about BSC's approach to fulfilling certain obligations and the interpretation of particular clauses in the contract [CEC00379020, page 3]. Richard Jeffrey confirmed that independent legal and Counsel's advice had been analysed and this had affirmed TIE's approach to these matters. Advice was obtained in January from Richard Keen QC. I had not seen this advice and did not know if Richard Jeffrey's account of it was accurate. I believed that it would be, however. We made decisions on the guidance we had from the people we regarded as being the experts. Richard Jeffrey confirmed that TIE had attended a series of detailed reviews of the current financial position with CEC and Transport Scotland. Stewart McGarrity reported that a detailed financial analysis had been undertaken over a range of possible outcomes and presented the results of this analysis to the Board [CEC00379020, page 3]. I do not recall my views at this time about the affordability of the project.

123. The minutes record that the TPB approved a strategy for the way forward [CEC00379020, pages 4-5]. Elements of this strategy were noted as being to confirm a new way of working with BSC which mitigated against further dispute risk and to report progress regularly to the TPB. I do not recall at this stage what the new way of working was to be. The TPB received regular progress updates and I had no reason to doubt their accuracy.

126. The minutes for the TPB meeting on 14 April 2010 record that the strategy as approved at the previous meeting had been initiated. The next steps were outlined by Richard Jeffrey [CEC00245907, page 5, para 2.1]. The minutes also recorded that MUDFA works were 94% complete [CEC00245907, page 6, para 3.1]. I am aware that six months earlier in the October minutes they were reported to be 98% complete [CEC00681328, page 7, para 3.2]. The difference could be the result of more works being revealed through that time period, but I do not know for certain. Susan Clark is reported as having given a progress report on the contractual areas in which TIE were engaged but I cannot remember precisely what was said [CEC00245907, page 7, para 4.1]. The minutes noted that the TPB approved an increase in the project budgeted to £530m [CEC00245907, page 8, para 5.3]. I think there had been some agreed changes, but I cannot recall what

these changes were. The risk allowance was being run down at times as well, so it wasn't always a gross effect. I do not know whether this is the normal way to manage risk. Risk management is not my area of expertise. The PD report in the papers for the TPB meeting on 5 May 2010 noted that works could not be started on street where sites were available as BSC had failed to satisfy their contractual obligations [CEC00245907, pages 18-19]. I cannot expand on what it says in the report. The TS report in the same papers reported problems with SDS and made reference to the completion of design audits [CEC00245907, pages 31-2]. I cannot recall now what these problems were, but design delays were bound to impact on progress. I do not know the outcome of the design audits but I doubt that a written report was produced and circulated. There was a new design programme almost every month at this time. The management of SDS was a matter for the Infracore contractor.

124. In an email dated 16 April 2010 [CEC00266715] Richard Jeffrey wrote to Board members to inform them that he and Tony Rush had met with Michael Flynn (Siemens) and Richard Walker (BB). The email made reference to clause 80, a clause 65 based approach for on-street, and the Siemens 33 initiative. These clauses and their relevance were probably explained to me verbally, but I cannot recall any detail. Infracore were alleging that they were owed £15m for work done which had not been paid for. They were alleging in a lot of the disputes that they were being underpaid or payments were outstanding, whereas TIE's assessment was that their costings were inflated. This was a matter of interpretation. The Board and I encouraged TIE management to do their best to resolve it. It seemed to be that the consortium were no longer speaking with one voice. There were opportunities to play on Siemens as the good boys and Bilfinger as the bad boys. Siemens had not caused much difficulty. Richard Jeffrey had provided a balanced view and was actively seeking solutions and compromise. I had no reason to doubt him. I do not know what the next steps discussed at the Board were.
125. On 19 April 2010 Richard Jeffrey emailed Jenny Dawe, Iain Whyte, Steve Cardownie, Steve Burgess and Andrew Burns [TRS00010706] setting out TIE's position on the main matters in dispute. He noted that there was



- disagreement about what was included in the original contract price, and BBS' attempts to change the contract to a 'cost plus' basis. He noted the adjudication results, although stated that he could not provide a full briefing on these as they were confidential under the contract. It was appropriate for Richard Jeffrey to brief all the party leaders on the Council as far as he could bearing in mind confidentiality. The email mentioned legal advice having been received from a number of sources. I did not ever see or seek that advice, nor did I give any consideration around that time to whether CEC should seek its own legal advice, independently of TIE. I did not see or seek the adjudication decisions either. I was satisfied that I had received a synopsis of the information. The email was forwarded to me and the other TPB members by Richard Jeffrey on 20 April [CEC00245727]. I did not feel it necessary to request that BSC agree to the adjudication decision being disclosed to members. I felt I was adequately briefed to make decisions,
126. On 21 April 2010 a meeting took place ("Project Carlisle") between TIE and BBS at which parties agreed to investigate a way forward whereby a line would be built to St Andrew Square for a guaranteed maximum price and a new completion date. I am aware of an email from Richard Jeffrey to me and other TPB members dated 30 July 2010 discussing a proposal from BSC and a further email from Richard Jeffrey to the same recipients dated 4 August [CEC00387018] [CEC00247389]. I may have been informed of this verbally, but I cannot recall. I was vaguely aware that discussions were going on but I was not party to them. I was told from time to time that different negotiations with different agendas were going on in an attempt to bring matters to a conclusion.
127. The papers for the TPB meeting on 5 May [CEC00261936, page 10] recorded that an independent expert review of the programme had been conducted and that it had concluded that delivery of phase 1a could be achievable by December 2012. I cannot recall if this report was ever provided to me or who prepared it.
128. On 24 June 2010 an Update Report was issued by the Directors of City Development and Finance to the Council [CEC02083184]. This was a factual

update for the Councillors in general. The Lib Dem motion carried 45/12 in the Council. I seconded the motion. The report noted that it was normal in large construction projects for the scope to change in marginal ways for technical and commercial reasons [CEC02083184, page 5, para 3.10]. I believed then that members of the Council were adequately advised and informed, both when the Final Business Case was approved and prior to the Infracore contract being signed, of the risk or likelihood of scope changes with a resulting increase in cost. I knew about the risk. The report stated that the outcome of the DRPs was 'finely balanced' in terms of legal principles [CEC02083184, page 5, para 3.12]. Some of TIE's claims were sustained by the adjudicator but some were unsuccessful. This was the nature of independent adjudication. 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 [CEC02083184, page 9, para 3.40]. I believed that this was a realistic assessment. I still hoped that a line from the Airport to Newhaven could be built for £600m. Members were given notice of cost overruns and difficulties only after they had occurred. I had no concerns at that stage of when I was informed of different matters. Decisions were being taken as part of the DRP which showed that significant additional sums were due. In my view, I was informed as soon as practicable.

129. The Minutes of the TPB meeting on 2 June 2010 record that Richard Jeffrey outlined the current position regarding the options available in relation to BSC and that two options were being worked on [CEC00223543, page 6, para 2.1]. I think that one option was to continue on with the consortium and the other was to remove them. This was simple, but either course had implications. The minutes also recorded that a contract was to be let for utility works in Baltic Street [CEC00223543, page 8, para 3.1]. I do not recall if it concerned me that new contracts for these works were being awarded at such a late stage. I presume that the purpose of the contract was to complete work at Baltic Street. This may have been an attempt at mitigating the effects of the work for local residents.

130. The next TPB meeting was held on 30 June 2010. I cannot recall if there was a change in approach to BSC at about this time in view of the decisions of the adjudicators in the disputes. The papers for the meeting included a letter from David Mackay to Marshall Poulton dated 8 June 2010 explaining that the full scope of Line 1a could not be completed within the funding envelope of £545m [CEC00223543, page 11]. It had been reported since August 2009 that this was unlikely to be possible. I presume that this letter was sent because TIE had concluded that it was appropriate to tell Marshall Poulton formally as the Tram Monitoring Officer. Marshall Poulton would have been present at meetings and aware of it. The decision taken to instruct the sending of the letter was noted in the PD report [CEC00223543, page 14]. I think the decision to notify was taken because of realism about the cost position. I do not know if Marshall Poulton participated in the making of the decision.
131. The PD Report for the 30 June meeting noted a new twin track approach to Infracore [CEC00223543, page 13]. The old approach was purely to try to enforce the contract. The new approach was either to enforce the contract, or to see if we could find a way of advancing it. The advantage of this was to break the impasse. There were no discussions at the TPB meeting about what could be said of this decision in the report to Transport Scotland. Transport Scotland got a copy of the Board papers in any event. It was also noted that Councillor Gordon Mackenzie had made a public statement calling for the termination of BB's contract [CEC00223543, page 15]. The statement probably upset a few people and ruffled a few feathers. Gordon Mackenzie sat on the TPB. It was not discussed in advance that he was going to make such a statement. He was able to continue on the TPB. The statement was probably just a loose remark to a reporter, or it may have been the way it was picked up by a reporter. The TS report set out the causes of the problems with the Infracore works [CEC00223543, page 26]. I do not recall what I understood the position to be. I presume this would have been elaborated orally at the TPB meeting, but cannot recall who gave the briefing or what was said.

132. The minutes of the TPB meeting on 30 June 2010 record that the new twin-track approach to BSC was discussed in a bit more detail [CEC00244400, pages 7-8, para 2.1]. I imagine the motive at that point was to keep the pressure on BSC. We were not making empty threats. Terminating the contract at that time would have delayed things even further, although it might have been possible, either to re-negotiate with BSC or to take on some new contractors with fresh paperwork. I do not know in how much detail the issue of service of Remediable Termination Notices was discussed. I was not privy to any of these discussions. If Option A failed to produce a change and the agreement necessary for Option B was not forthcoming, we were still led to believe that TIE were on solid ground for taking the project elsewhere. The same part of the minutes records that legal advice had been taken on the merits of the RTN approach. This advice was given by the legal advisors at the time. I am not sure whether this was DLA. It may have been McGrigors or D&W by that point. Option B involved BSC completing part of the project and TIE re-procuring the remainder. That was one way to draw a line under BSC's involvement by getting them to tidy up what they had done. CAF were never a problem, although they built the tramcars too soon and we had nowhere to put them. The minutes record that the TPB was to be kept informed but I cannot recall how this was done.

133. The TS report in the papers for the TPB meeting held on 28 July 2010 recognised for the first time that programme recovery was not possible [CEC00244400, page 47]. This was due to a review of where matters had got to. It was the outbreak of realism.

134. In an email dated 1 August 2010 [CEC00473789] Nick Smith sent Alastair Maclean a document, "Tram-Potted History" [CEC00473790]. Nick Smith's email 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"*. I had not seen this email. Alastair Maclean had just taken over as the Council's Chief Legal Officer and Nick Smith was one of his senior lawyers who was briefing him. The email

1 August 2010  
should be  
8 January 2010

confirms that they did make a point of keeping us in the dark. I am not surprised about this, or that Nick Smith thought it appropriate to give his new boss a briefing. Alastair Maclean was one of my reportees at that point. He was one of the senior officers who reported to me as Finance and Resources Convenor. I did have a number of discussions with him, but not necessarily about this. Our discussions were more about the of how the Council was operating in general, but I did get what I thought was adequate information at the TPB. I did not have concerns at that time that CEC Directors and/or TIE kept other Council members "on a restricted info flow". I had my own constraints that I was aware of, as to how much I could discuss with colleagues. In general, other Councillors were told less than me. Once Alastair Maclean started looking at things, he really started challenging the validity of the contract and questioning DLA's contribution. His predecessor Gill Lindsay had never drawn my attention to anything of that sort. She had gone along with DLA and had been happy enough with things up to that point. I had to make decisions based on the information I had at the time and based on the advisors that I relied on, or thought I could rely on, regarding different topics.

135. On 20 August 2010 CEC officials met with TIE representatives to consider TIE's Project Carlisle Counter Offer. A record of the meeting noted a range of costs of between £539m-£588m for the Airport to St Andrew Square and a range of between £75m-£100m from St Andrew Square to Newhaven, giving a total range of costs, from the Airport to Newhaven, of £614m-£693m [CEC00032056, page 2]. No doubt I was informed of these discussions at the TPB. These discussions were going on in the background, but I do not remember any particular detail.
136. The minutes of the TPB meeting on 25 August 2010 record discussion of the strategic workstreams, and describe Workstream A as focussing on contract administration [CEC00013818, page 7, para 2.1]. I am now aware that this is a difference from the July minutes, which described Option A as concerned with the termination of the contract. 'Contract administration' was working out how to get out of the contract, how to break it or terminate it. As matters

progressed, TIE took the view that termination was no longer the correct course of action. It was thought to be too costly and non-productive. The minutes also noted that it was unlikely that further DRP referrals would be made [CEC00013818, page 8, para 2.4]. In the PD report contained in the papers for the TPB meeting on 22 September 2010, it was stated that TIE had adopted a strategy of not launching further DRPs [CEC00013818, page 15]. I cannot recall why this decision was taken. It would have been made by TIE senior management. The PD report also described the contractual strategy [CEC00013818, page 15]. The contractual strategy was to continue with the assertive approach to management of the contract. TIE were still trying to issue contract notices. Robust enforcement of the contract was still considered to be relevant at that point.

137. In a letter dated 13 October 2010 [TIE00301406] BBS wrote directly to Councillors giving their views on the dispute. BBS advised that of the nine formal adjudication decisions issued, BBS had had six decisions in its favour, with two split decisions (with the principle found in favour of BBS) and with one decision in favour of TIE. BBS stated that, in the interests of accuracy and transparency, and if TIE agreed, BBS had no objection to the disclosure of the adjudication decisions to elected members in order that they could make their own judgement. I considered that this was unsavoury behaviour by Bilfinger. They were attempting to breach some of the confidentiality agreements in the contract by publicising to other Councillors things that were not necessarily in the public domain. I did not see or seek the adjudication decisions at that stage. Members got a summary of the adjudication decisions. I do not think there was any need for us to see the detail. That would have been micromanagement, which is not the duty of a non-Executive Director or a Councillor. I was still disappointed that TIE were losing more than they were winning.
138. The Update Report presented to the Council on 14 October 2010 addressed the motion made at the Council meeting on 24 June 2010. The motion required a refreshed Business Case, detailing the capital and revenue implications of all the options currently being investigated by TIE taking into

account assumptions contained within the original plan that either no longer applied or whose timescales had now substantially changed [CEC02083124, page 1, para 1.1]. On this occasion Councillors had been unhappy with the level of detail provided and had required a more detailed update of the Business Case. That was the motion proposed and I seconded it. Part of this was because of great concern in relation to the financial impact of everything on Lothian Buses. The Update Report also noted that "*The overall outcome of the DRPs, in terms of legal principles, remains finely balanced and subject to debate between the parties*" [CEC02083124, page 7, para 2.50]. This accorded with my understanding at that time. There were still adjudications in which a decision had not been issued and so there was a chance that overall TIE could end up winning a fair number of them. I cannot remember now what legal advice was provided to me in relation to the contractual disputes. I was certainly getting verbal feedback at the Tram Board from TIE senior officials. I could probably have seen the legal advice if I had wanted to. I do not think it hindered me in any way. I believed that I had all the information that I required.

139. I was provided with papers in advance of the meeting of the Tram Project Board dated 21 October 2010. The PD Report noted that Bilfinger Berger were intending to ramp down their workforce [CEC00014055, page 17]. Undoubtedly this was a response to the new TIE tactics. I expect they did not like TIE's attitude or tactics. They were alleging TIE were in breach. The Transport Scotland Report for October described all that had been done by way of serving notices on BSC [CEC00014055, page 33]. This was done from a mixture of motives: a view to terminating unilaterally for breach, pressuring BSC to agree a termination, or getting the works done more quickly and to the correct standard.
140. In an email to Dave Anderson, Donald McGougan and Jim Inch dated 4 November 2010, Alastair Maclean stated that CEC were to instruct "*our own independent analysis of TIE's position by CEC's QC*" and that McGrigors had been appointed to lead that work stream in place of DLA [CEC00012984]. In emails dated 22 and 30 November 2010 to Tom Aitchison, Jim Inch and

Donald McGougan, Alastair Maclean expressed certain concerns about TIE and the legal advice received by TIE [CEC00013411] and [CEC00014282]. In an email to Alastair Maclean dated 30 November 2010 [CEC00013550] Nick Smith gave his personal view on the performance of TIE and DLA. In an email dated 24 November 2010 to Alastair Maclean, Richard Jeffrey stated that *"if the Council has lost confidence in TIE, then exercise your prerogative to remove TIE from the equation"* [CEC00013441, page 2]. I cannot remember what stage I became aware of the matters in these emails but at different times, I was speaking to both of them. I did not see any of these emails at the time. Alastair Maclean was bringing a fresh set of legal eyes to the whole thing and thought that things had got to such an idiotic point that CEC needed to get our own legal advice and make a fresh start with the legal advice. CEC officials were starting to lose confidence in TIE and their advisors in late 2010. Alastair Maclean was having less and less confidence in the contract. The more he understood it, the less robust he felt it was. I was still a member of the Board, but I realised at this stage that things were not going well. I had one or two informal chats with Alastair Maclean, and I think he probably told me that he thought we had a problem. He regarded me as a little bit of a mentor, being his political boss when he came on board and we hit it off reasonably.

141. On 16 November 2010 the Council Chief Executive wrote to the Managing Director of BSC to offer a meeting with Council officers. Later that day, Jenny Dawe and Tom Aitchison met with John Swinney. On 18 November 2010 Jenny Dawe tabled an emergency motion narrating these events and proposing mediation as a means of progressing the tram project [TIE00306955]. I am not aware what was discussed at the meeting with Mr Swinney. I expect we had internal meetings when Jenny Dawe was formulating the motion, and a number of senior Councillors would have discussed it with her. I got on very well with Jenny Dawe. Jenny Dawe was my boss all the time I was on the Council. A very competent lady.
142. On 16 November 2010, Richard Jeffrey advised Alastair Maclean of certain serious concerns he had in relation to events at the time the Infracore contract



was entered into. On 17 November 2010 [CEC00013342] Mr Maclean produced a Note for the Council's Monitoring Officer setting out Mr Jeffrey's concerns. I was not made aware of these concerns at the time but they do not surprise me. Reading the note now, I find it fascinating. I was not on the Remuneration Committee of TIE and was not privy to any of the remuneration issues.

143. The Highlight Report for the IPG meeting on 17 November 2010 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 achieved for £545m-£600m [CEC00010632, page 4]. This was an internal meeting of officers which I was not aware of, but these figures were probably the sort of things that were being discussed at the Tram Boards as the follow on from Project Carlisle.
144. A TPB meeting was held on 17 November 2010. I received the papers in advance [CEC00014175]. This was the first meeting since David Mackay's resignation. The effect of this on the workings of the TPB was minimal. Brian Cox was the senior non-Executive who took over the chair. He had been, effectively, vice chairman anyway. He had chaired occasional meetings when David had not been available. I cannot recall where the discussions had got to in relation to Project Carlisle. The intention at this stage in relation to the contract with BSC was still to work under Project Carlisle. I was getting verbal feedback from TIE officers dealing with BSC, but I cannot remember the details.
145. I am now aware that an exploratory meeting took place on 3 December 2010 between Alastair Maclean and Donald McGougan on behalf of CEC, Richard Walker of Bilfinger Berger and Antonio Campos of CAF. A record of the meeting was produced [CEC02084346]. I was not advised of what was discussed.

146. The minutes of the TPB meeting held on 17 November 2010 record that the possibility of mediation was discussed [TIE00896978, page 7, para 2.1]. . I do not know what was said by the Scottish Ministers or Transport Scotland about this possibility. The PD report contained in the papers for the TPB meeting on 15 December 2010 noted the outcome of the landfill tax adjudication. I cannot remember the discussion of this but in any event I had no understanding of the result, as I was not provided with copies of this (or any other) adjudication decisions.
147. On 16 December 2010 a Business Case Update was provided to the Council by Tom Aitchison [CEC01891570, page 7]. 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 [CEC01891570, page 32, para 5.3]. The minutes of the Council meeting on 16 December record that 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 [CEC02083128, page 22]. There was a desire to get a professional view of where things were from someone outside the project in order to provide some comfort. After the mediation, an outside agency was brought in to manage the project, so that was maybe the way it turned out in the end. I do not know when this occurred or who did it. I still hoped that a line could be built from the Airport to St Andrew Square within the current funding commitment of £545m. Members were provided with sufficient detail in the report to enable them to come to informed decisions, within the constraints of confidentiality. The Update Report presented to the Council at the same meeting noted that mediation discussions involving the Council and BSC would commence early in the New Year, and that, by their nature, mediation discussions had to be conducted on a confidential basis. It noted that it would not be possible to report in detail on the mediation process until it was completed or possible decisions emerged which required consideration by the Council [CEC01891570, page 3, para 3.5]. I do not know if I was consulted in relation to CEC/TIE's proposed approach to the mediation, but I do not think that I was.

## 2011

148. I was provided with the minutes of the Tram Project Board [**TIE00897052**] meeting on 12 January 2011. The papers contained the minutes of the meeting that took place on 15 December. Both the papers for the meeting on 12 January and the minutes of the meeting on 15 December recorded that mediation was being considered. The 15 December minutes record the Board's conclusion that it should commence as soon as possible [**TIE00897052**, pages 8, 17]. The purpose of this was to avoid the messy and costly litigation which would have resulted if we had gone for cancellation at that stage. Changes in personnel brought about the change of heart from the other remedies that had been pursued since about April 2010. I think this was the result of Alastair Maclean arriving, David Mackay leaving and new legal advice being obtained by Alastair and the other discussions which Jenny Dawe conducted with John Swinney.
149. The PD Report contained in the papers for the TPB meeting on 16 March 2011 noted that the only Infraco progress had been at the depot and the depot access bridge and that there had been a cessation of works across the site [**TIE00897064**, pages 15-16]. I think this was because work had ceased pending the mediation. I expect that this issue was discussed at the TPB as it was significant and it is covered in the PD report.
150. The Highlight Report for the meeting of the IPG on 21 January 2011 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, and that this option would also place TIE in the strongest position with regard to any mediation or negotiated settlement. There was reference to TIE's relatively weak tactical and legal position as a result of the adjudication losses and the service of RTNs which had not set out valid and specific grounds for termination. This was contrasted with Infraco, who were said to be extremely well prepared [**CEC01715625**, page

8]. I do not think I was ever much involved with or much aware of these issues. To my knowledge, these matters were not discussed with members.

151. I was provided with the papers for the meeting of the TPB in February 2011 [TIE00897058] for information only. The minutes of the TPB meeting on 12 January 2011 recorded discussion of the Audit Scotland report [TIE00897058, page 13]. I did not read the Audit Scotland report at that time. I was not on the Audit Committee of TIE. The minutes also noted a discussion about the objectives to be secured at any mediation [TIE00897058, page 7]. I do not know if there was a difference of opinion at the meeting as to what would represent a desirable or necessary outcome. The same section of the minutes noted that the responsibilities of directors of TIE and TEL were discussed. I do not recall the content of this discussion. The minutes record that Brian Cox was tasked with writing to CEC to express concerns as to the existing governance arrangements [TIE00897058, page 12, para 8.1]. I think it was felt that the structures were a bit cumbersome and it was time that they were streamlined. There had been discussions on and off about governance all the way through. The concerns were related to the letter sent by Brian Cox to Marshall Poulton of CEC on 18 January 2011 in relation to budget commitments [TIE00081663]. In the paper on Project Change Control submitted to the February 11 meeting, there was a reference to a "*write back of budget*" of £13m [TIE00897058, page 23]. This increased the risk allowance. The TS report also refers to a transfer back of budget [TIE00897058, page 54]]. I do not know what the "*write back of budget*" was or how it operated. It appears that a bonus of £13m was re-credited back to something as a result of changes.

152. Mediation talks took place at Mar Hall in March 2011. Other members and I did not play any part in the preparations for the mediation or the mediation talks. I think Sue Bruce took the view that I did not need to know what was going on. The outcome of the mediation was that TIE was to be scaled down and a new arrangement was put in its place. Other members and I were advised of the outcome of the mediation following its conclusion. I cannot recall now how it was done. A report was probably made to the Council. I was

very relieved that an outcome had been reached and that we were going to get an operating tram system.

153. I was provided with the papers of the Tram Project Board meeting which took place in April 2011. These contained a paper by Fiona Dunn on betterment [TIE00897066, page 40]. This had been something I had raised from time to time previously, as I considered that we were entitled to betterment.
154. The minutes of the TPB meeting on 11 May 2011 record that concerns were expressed by Kenneth Hogg in relation to governance arrangements and the manner in which the mediation agreements had been entered into [TIE00896987, page 3]. Kenneth was a Senior Civil Servant who was the Convenor of the Audit Committee of TIE. He was the Government representative on the TPB. His complaint was about a lack of scrutiny. He was sniping. His Audit Committee had not had a chance to review the settlement. His comments probably were justified.
155. The intended benefits of the tram project were considered in the Business Cases approved by the TPB. Looking at the benefits that were taken into account at the time of the Business Case, in view of the extent of the tram network that had been completed to date, there were some objectives which had not been attained at all. We had not reached Leith. We had to build a truncated system terminating at York Place because we just did not have the money to go any further, whereas the original plan of 2005 took the tram down to Newhaven round the loop at Granton and back up to Roseburn. The costs estimates used in these plans were based on assumptions at the time of drafting and long before any tendering was done, or a contract entered into. They were not precise assumptions. The sums in the Business Cases were the elements that made up the whole thing. Some of them were more easily quantifiable like the tramcars, which were produced for £2m. Other things were subject to variables, such as utilities and infrastructure. I cannot recall what discussions took place in relation to the FBC. I was first given a copy to consider on 30 June at the Council Meeting. There was certainly an element for risk all the way through and I never quite understood Optimism Bias, but I

knew it was a factor that was factored in. I do not know what the Quantified Risk Assessment (QRA) was.

156. The Final Business Case stated expressly that CEC must balance its desire to support the project with its fiduciary responsibility and limited resources. Once TS made it clear that their funding would not exceed £500m, the whole risk of overrun fell on CEC. A 10% overrun on the contract as a whole would have cost an additional £55m and would have more than doubled the Council contribution. Realistically, we appreciated that this was the outcome of Mar Hall. The fact that it would have an impact on potential borrowing and the funding of it would just have to be swallowed. The Council was not paying the commercial loan rates. Risk was a contingency, an allowance if things did not work out according to plan. When things did not work according to plan then some of the risk allowance had to be applied just to balance the books at that stage. The function of drawdowns against the risk allowance was to keep the position up-to-date. The advice of the relevant senior staff at TIE was taken into account in making a decision whether to approve a drawdown.
157. A report to the Council on 16 May 2011 [CEC01891505] stated that mediation had made progress and work had started in priority locations (Minute of Variation 4) while further work was done on other issues. Members were advised at that meeting of the outcome of the mediation including, in particular, the sums discussed or agreed for the off-street and on-street works.
158. On 30 June 2011 the Council were advised of the options for the tram project in a report by the Director of City Development [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 [CEC02044271, page 8]. The report contained five recommendations: (a) that the Airport to St Andrew Square/York Place option be pursued; (b) that the Chief Executive should enter into the Settlement Agreement; (c) that TIE should be authorised to progress on the priority works; (d) that the Director of City Development

should be instructed to report back to the Council on revised governance and funding; (e) that Lothian Buses should be asked to assist in preparing for operations by accepting transfer of ETL [CEC02044271, page 21]. We accepted (a), (c) and (e), but deleted (b) and (d) and replaced them with fresh text. The best option available to the Council at that time was to deliver a tram service as far as we could and, hopefully, from the Airport to St Andrew Square. That seemed to have been rescued from a potential disaster. We were advised by Sue Bruce that the greatly increased cost of the tram line was the best that could be done. Confidential appendices to the report were made available to Members. These included a review by Atkins the transport consultants [CEC02044271, page 27]. They probably came with the papers for the meeting because I think they are not referred to. It was an appendix to the Director's report right at the start. Other members and I were provided with sufficient information to come to an informed decision. At that stage Sue Bruce basically made the decision for us in any event. The Report to CEC on 30 June 2011 presented a contrast to the position presented to the Council at the time of Financial Close as it had not gone through all the rigors of mediation. Consideration was given to the interest that would accrue on the large sums that the City of Edinburgh Council was borrowing. It would have to be factored into future revenue budgets. Claims were made that terminating the Edinburgh Trams Project would be more expensive than building it to St Andrew Square. It made no sense to terminate at that point having spent hundreds of millions of public pounds and have nothing to show for it other than a disgruntled electorate. There was also no certainty as to what the settlement would have been to terminate at that point.

159. On 25 August 2011 the Council were given a further update by way of a report by the Director of City Development. The report concluded that 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 £231m 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)

[TRS00011725, pages 3, 6-7]. At the Council meeting, members voted in favour of an amendment that a line should be built from the Airport to Haymarket. At a meeting of the Council held on 2 September 2011, however, the Council overturned the decision to go only to Haymarket. This was in response to a letter from Transport Scotland stating that there would be no further grant payments if the line stopped at Haymarket. The Council's decision in late 2011 to build a line from the Airport to Haymarket was crazy and I was relieved when we managed to set it aside a few weeks later and continued to York Place. This was because it was forecast that it would not break even if built only to Haymarket whereas, if it came to the city centre, there was a chance of a positive outcome and all the projections were that that would start to pay its way. Lesley Hinds was the one who suggested we just stop it at Haymarket and we were outvoted on that in the Council. Only the Lib Dems wanted to build it the whole way. The reason why Transport Scotland were unwilling to provide further grant payments if the line stopped at Haymarket was that it was a breach of the whole project's rationale. John Swinney was behind this decision which was a good decision and delivered the right outcome. The report to Council in August included a reference to a confidential summary of a report dated 19 August 2011 by Faithful and Gould [TRS00011725, page 4, para 3.16]. I do not recall if members were provided with the report or only a summary of the report. I am now aware that the full report by Faithful and Gould noted 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*" [CEC01727000, page 5] I do not think I was aware of these conclusions at the time. The Council nonetheless agreed to instruct these works to get the job done. Siemens had not normally been guilty of inflated invoicing. In previous stages of the conflict, this had been Bilfinger.

160. A Settlement Agreement was entered into on 16 September 2011 between the Council and BSC which, ultimately, resulted in a reduced tram line (from the Airport to York Place) being built for a total capital cost of approximately £776m. It was a relief that we were getting a tram line, albeit truncated. We were at least getting something to show for our efforts. I am sure that we



were told by Sue Bruce and others that this was the best achievable option. The main features of the contractual arrangements were set out in a confidential appendix to the 30 June 2011 Council report. These were later summarised in a report to the CEC Audit Committee in January 2012 [CEC01914665, page 1] as including a lump sum price for the off-street section between the Airport and Haymarket subject to certain exceptions and a measurement contract basis for the on-street section which included the Council carrying certain risks, including those risks associated with utility diversions. I did have a copy of the June 2011 appendix because it came out with the kit for that meeting. We had now achieved a settlement. I did not understand there to be any realistic alternatives to the settlement agreement. We would have been told by Sue Bruce that it was the only deal we were going to be offered. The additional funding of £231m came from additional Council borrowing. I consider that it was justified to carry on with the project, even with the long-term consequences of borrowing. We had received a wide range of views from constituents on the matter, only some of which were printable.

161. An announcement that the Scottish Ministers and TS would oversee the project and the grant would be reinstated was made on 14 September 2011. The Council appointed external project managers, Turner and Townsend, to assist the process, revised the governance arrangements and began to wind down TIE. Prior to 2007 they had a seat on the TIE Board but when the new Scottish Government came into power in 2007 that person was withdrawn as the new administration did not approve of the trams. TS had still been receiving the TPB papers, but after the settlement agreement, they were far more hands on. By this stage TIE was being wound down and so my involvement was greatly decreased.
162. At a meeting of City of Edinburgh Council on 24 November 2011 Lesley Hinds noted that Jenny Dawe had requested an inquiry into the Edinburgh tram project and asked whether she would circulate this response received from the Scottish Government to elected members. The letter received from the First Minister was circulated and confirmed that the Scottish Government

would be delighted to have an inquiry into the problems surrounding the project [CEC01891428, pages 26-7]. I did not think that a public inquiry was necessary and do not think it will achieve anything. I agreed with Sue Bruce, who was of the view that any Inquiry at that time would have been an unwelcome distraction and that it should wait until the project was complete.

163. 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. Bilfinger Berger got on with it. TIE were gone, the Tram Project Board was gone and I was allowed, during my last year of my time on the Council, to concentrate on other duties. I was involved with finance and resources which was a substantial job. The project appeared to run reasonably smoothly after these agreements due to the settlement that had been achieved at Mar Hall.

## **Project Management and Governance**

### **General**

164. CEC were the principal mover in the whole project. The whole idea sprung out of a Council initiative back in the early 2000s. CEC set up TIE as an arm's-length project management company so they could bring in external expertise. CEC had overall responsibility for the project all the way through because they were the main project sponsors. TIE was the agent. TEL was to be the umbrella company to manage the operations of tram and Lothian Buses. This was because of competition rules in the bus industry concerning one company operating both types of transport. The TPB was an enhanced version of the TIE Board taking elements from TEL to be another umbrella body. It avoided duplication: prior to it being set up both TIE and TEL were meeting separately and so the TPB functioned as an umbrella. Transport Scotland was the government agency in the background, whose responsibility was the management of the £500m of funding provided by the Scottish Government. I did not have any concerns at any time in relation to the performance of any of these bodies, or of their senior personnel. Sometimes, I was frustrated due to occasional difficulties. Neil Renilson was the Chief

Executive of Lothian Buses and he was made Chief Executive of TEL, but there were times when he was less than whole-heartedly in favour of the tram because he was not quite sure how it would gel with his buses and he was difficult. He took early retirement: I do not know whether there were any discussions beforehand as to his retirement. I was reasonably satisfied that the different bodies were fulfilling their roles on the governance arrangements for the tram project. The roles and responsibilities of each of the bodies involved in the delivery and governance of the project were sufficiently clear.

165. I am aware that a Report presented to the Council on 25 August 2011 noted that *"The existing governance arrangements for the tram project are complex [and] have not been effective"*. It was noted that the governance arrangements had had to take account of the complexity of the arm's-length bodies that were proposed to deliver an integrated transport service once trams had become operational and that there was a need to revise the overall arrangements *"to ensure effectiveness, accountability, probity and integrity going forward"* [TRS00011725, page 10]. I think that these were fair comments. Effective governance arrangements had not been introduced at an earlier stage. There had been too many other pressures. It was the Council's responsibility to ensure that effective governance arrangements were in place.
166. I am aware of a presentation entitled 'TRAM Governance Structures', which showed the new governance structure as agreed by Council on 25 August 2011 and 2 September 2011 [TRS00014775, page 2]. At around this time TIE and TEL were phased out. They had outlived their usefulness. There was a new arrangement with outside consultants. The replacement of TIE itself was a significant improvement. The presentation shows an "All Party Oversight Group" [TRS00014775, page 20]. Its role was to ensure that elected members remained informed of progress on the tram project and to allow a formal channel through which key issues could be raised. There was still a need for oversight by the Council. This was a different way of delivering it rather than having non-Executive Directors on the TIE Board. It was phased out when TIE was wound up.

## TIE

167. CEC appointed both Councillors and senior officers to the Board as directors. It also nominated external directors. The make-up of the Board was always in the gift of CEC and there were a number of political appointments. Latterly, these were a cross section politically of Councillors together with a number of senior officers of the Council. I did not have any concerns at any time about the performance of TIE, either as an organisation, or in relation to individual Board members or senior employees. The Council's senior officers and members received information and updates from TIE by attending the TIE Board which met monthly and also from less formal meetings, telephone calls or chance encounters. Confidentiality was an issue. The importance of confidentiality was covered in the course for directors run by DLA. The full Council or the Transport Committee received reports about the tram project from time to time which were drafted jointly by people from TIE and senior officers of the Council. TIE had sufficient experience and expertise to project manage a complex infrastructure project like the Edinburgh tram project. The external directors were selected because they had expertise and they changed depending on what the focus of the company was. At the first stage, the requirement was drafting the legislation to get it through the Scottish Parliament. We had people such as Ewan Brown who was the initial Chairman and who was a merchant banker of distinction. He knew a lot about these things and he had helped to recruit other people with an appropriate background. The Councillors on the board were there as laymen. To my recollection, no consideration was given to instructing an organisation such as a firm of civil engineers with an established track record of project managing major infrastructure projects to assist CEC and/or TIE in project managing the tram project.
168. I am now aware of a "Lessons Learned Report" by TIE on Ingliston Park and Ride One dated 14 September 2007 [CEC01465362]. I do not recall this report and or the matters contained in it..

169. I am aware that there were suggestions that concerns had been raised about TIE's project management of the Stirling-Alloa-Kincardine Railway. This was reported as costing more than double the original budget of £37m and opened three years behind schedule. This was a TIE project when I joined the Board. TS had given it to TIE but it was taken away from TIE in the later stages. It was being run by a distinct team at TIE and we were assured that good progress was being made. It was only when Steven Bell, who joined TIE as Engineering Director, looked at the management that it came to light that this had been very poor. TS were persuaded to take it from TIE and make other arrangements to finish the project. Different individuals were involved in the Tram Project.
170. I am aware that a report to the Council dated 26 June 2003 noted that a performance related bonus scheme had been introduced for TIE staff [CEC02083550, page 5, para 3.22]. I do not know why this was done. This was before I was on the TIE Board. I would not have been involved at all with TIE at that stage and I was never on the Remuneration Committee. I do not know what the formal means by which the Council were to exercise supervision and control over the TIE bonus scheme were. I do not know if Council members were aware of the sums and bonuses paid to TIE staff each year.
171. I am now aware that in an email dated 23 September 2009 [CEC00672873] David Mackay sent Tom Aitchison a paper and accompanying slide presentation [CEC00672874 and CEC00672875] containing proposals to revise the TIE bonus scheme. I am also now aware that in an email to Tom Aitchison dated 25 September 2009 Jim Inch set out a number of concerns in relation to TIE's proposed revised bonus scheme [CEC00673126]. I was not aware of these matters and I do not know whether they should have been discussed with me.
172. The post of Chief Executive of TIE became vacant around June 2006. Willie Gallagher acted as both Chairman and Chief Executive of TIE between around June 2006 and November 2008. This was during the critical time of

getting the contract agreed with the contractors. I did not think this was appropriate. In any corporate entity there should be a separation of functions between the Chair and the Chief Executive. I discussed this with Tom Aitchison, who was the Chief Executive. He explained that at that point there were no other candidates for either job.

### **The City of Edinburgh Council**

173. Initially when TIE was set up, the Board positions were all occupied by Labour Councillors. Around six months after the congestion charging referendum, I was invited to join the Board and one of the Labour people stood down because I was the main opposition spokesman on transport. Allan Jackson, who was my Tory opposite number, joined the Board shortly thereafter so we had cross-party representation on the Board. This evolved over time to reflect the different proportions of the different parties. We were in the role as non-Executive Directors. I think we had a combined oversight of the Project. Between us we were asking questions all the time. We also had external Directors, who brought their own expertise. I am thinking of people like Neil Scales who was the Chief Executive of Mersey Rail and Peter Strachan, who, again, had a lot of railway experience. Peter Strachan latterly worked in Australia, but he joined us by conference phone. Members were able to and did exercise effective oversight and control over the tram project. Members who sat on the Tram Project Board and the Boards of TIE and TEL were there as laymen to represent the citizens of the city. We were not there as technical experts. I do not think there was anybody on the Board with any construction or legal background. I do not consider that any conflict of interest, or potential conflict of interest, arose from Councillors being members of both the Council and the organisations with responsibilities for delivering the project. If we were at Council meetings, or committee meetings our Board membership was declared and, if necessary, we stepped outside while certain items were being discussed.

## Tram Project Board

174. The role, remit and responsibility of the TPB was day to day management of the project. The Council delegated this to the TPB and the TPB reported back to them. I cannot recall when the TPB was created. All parties were represented on the TPB, apart from the SNP who objected to the tram scheme. They had an observer at the TPB. He tended not to come because they did not believe in the tram. I had no concerns, at any time, in relation to the TPB as an organisation or in relation to individual members of the TPB.
175. I am aware of a report by Andrew Holmes and Donald McGougan to the Council entitled "Edinburgh Tram Contracts Acceptance" dated 20 December 2007 . This sought approval for the proposed new governance arrangements (as shown in appendix 1 of the report) and explained that the TPB would be formally constituted as a committee of TEL [CEC02083448, page 2, paras 4.1-4.2]. The TPB was a more informal body brought together to avoid duplication and to stop successive meetings with different combinations of people.

## TEL

176. The Council would have agreed TEL's terms of reference and the powers to manage the relationship between the trams and Lothian Buses. Some of the people on the Lothian Bus Board were a bit prickly about anything that threatened their organisation, and rightly so. TEL formally reported to the Council, but after Mar Hall the old structures were removed. There was a bit of friction with the bus people and Neil Renilson, who was the Chief Executive of the buses, was also made Chief Executive of TEL. He was a concern as he blew hot and cold about the tram. Eventually he retired.
177. Papers for a meeting of the Tram Project Board dated 7 December [CEC01400187, page 59] contained a paper on the TIE/TEL operating agreements from Graeme Bisset. The operating agreements were to be agreed by the full Council on 20 December 2007. The Council's Transport

Infrastructure and Environment Committee and its Tram sub-committee performed an oversight role without matters having to go to the full Council. The Transport, Infrastructure and Environment Committee met every couple of months and that was one way of dealing with matters but its agenda was far more wide-ranging than looking at the tram. The Tram sub-committee was set up which I was Convenor of to begin with. We did not meet all that often because we did not feel there was a need to meet. We were busy enough without having meetings for the sake of meetings.

178. Lothian Buses plc expressed certain concerns in relation to which body would be responsible for ensuring integration of the tram and bus services. Lothian Buses worried about the impact of the tram on their services and how it would affect their passenger numbers. TEL was there to manage the relationship between the buses and the trams.

### **Transport Scotland**

179. Following the debate and vote in the Scottish Parliament in June 2007, Transport Scotland's role in the governance of the project changed. TS's role reflected the fact that the SNP Government at Holyrood were not in favour of the tram and that Transport Scotland had a seat on the TIE Board. The Government still agreed to pay £500m towards the tram, which was the important thing. TS received a copy of the Board papers every month which were revamped into a format they liked. There were also periodic meetings between senior personnel at TIE and Ministers and/or senior officers of Transport Scotland. John Swinney and/or Stewart Stevenson were involved in various meetings with David Mackay throughout the period, especially when the wheels came off the project. I do not think that TS's changed role had an adverse effect on the management, oversight or delivery of the tram project. They were still getting the reports. If they had raised any questions they would be entitled to get answers. TS were the paymaster. Whether TS's changed role lead to less scrutiny of the information and estimates provided by TIE, depends to what extent they read the Board papers. I suppose TS's changed role reduced the opportunity for TS, as a body with experience of



managing and delivering major infrastructure projects, to offer guidance and advice, and exercise oversight and control of the tram project, when they had withdrawn from day to day involvement.

180. I am aware of a draft paper on project governance for the tie Board, TPB, TEL Board and CEC dated 7 December 2007. This summarised the proposed governance and management role in the construction period and suggested that TS were still to have a role in the project [CEC01387398, page 2]. TS had a rapport with the Council according to the proposed governance model and had influence with the Council. TS exercised their oversight of the project through four-weekly reporting in a prescribed format. Their officers met some Council officers on a regular basis to discuss the Board papers.

### **Audit Scotland**

181. Audit Scotland produced reports on the tram project in June 2007 [CEC00785541] and February 2011 [ADS00046]. I do not recall whether I read these documents at the time or not. I did not place all that much reliance on them.

### **OGC Reviews**

182. In May 2006 an Office of Government Gateway (OGC) Readiness Review was carried out of the tram project and a report of the review was delivered to the Chief Executive of TIE on 25 May 2006. The overall status of the project was assessed as "*Red*" (meaning "*To achieve success the project should take action immediately*") [CEC01793454, page 4]. I cannot recall seeing a copy of this report. At that stage we were just working on the legislation so I am not quite sure what part of preparedness the OGC Report was picking us up for.
183. A third OGC Review was carried out in October 2007 and resulted in a "*Green*" rating (ie "*The project is on target to succeed provided that the recommendations are acted upon*") [CEC01562064, page 3]. I cannot recall seeing a copy of this report. The OGC produced a further report on 15

October 2007 entitled "*the Project Risk Review*", which described the risk provision as "*prudent*" [CEC01496784, page 4] . I cannot recall seeing a copy of this report.

## **Public relations and communications**

184. TIE and the Council had communication teams who were working together to put out information in the way that corporate communications people do and to manage the press. Certainly I was exposed with assistance from the corporate communications people to interviews with all manner of different media, including TV and the press. As Transport Convenor I was invited to a number of community councils to speak to them as well as other things. Queries or representations by members of the public were mostly addressed by one particular person at TIE, Mike Connolly. In general, the public were kept fully informed of developments relating to the Tram Project. When it came to local issues I think that they could have been handled better, such as when streets were being opened up. I think that got better though. Communications with the public could have been better handled. We were learning on the job. There was rate relief to mitigate the adverse effects of the tram works. That was all we could afford. We were working with a finite budget.
185. An actions note from the Special Tram IPG dated 1 December 2008 noted that Jenny Dawe met with Jane Wood, Chair of Essential Edinburgh who informed her that TIE's communication with traders had been severely criticised [CEC01069093, page 1]. I was aware of traders' concerns. I attended meetings on a regular basis of what I think was called the Tram Operations Group, which was chaired by the boss at Harvey Nichols, with representatives of a number of the major retailers on it. We had regular dialogue with bodies such as the Leith Traders' Association. I got a very hostile reception at a public meeting in Leith. I had agreed to do this meeting some time in advance. The meeting was in March 2009, by which time the difficulties had started. I was well aware of traders' concerns, therefore. To some extent these were justified, but there were people there with an agenda

as well. There was one difficult character who held me personally responsible for everything. I had some considerable wounds after my time as Transport Convenor. A logistics operation was also put in place so that supplies could get into the shops in particular windows and that was managed by a street management team from TIE to make sure that the traders could get top-ups of stock. A lot of this work was actually delegated to TIE to manage.

Mike Connolly was in charge of a lot of that and they put together the teams of people required. The same action note stated that a single Communications Plan for the whole project needed to be developed [CEC01069093, page 1]. I think this was done. There was friction between the communications people at both organisations and there were emails to that effect. Colin McLachlan who was referred to as the HR and Corporate Affairs Director of TIE had a spat with Isobel Reld who was the Head of Corporate Communications in the Council and with some of her staff. The minutes of the Transport, Infrastructure and Environment Committee meeting on 6 May 2008 noted a request by Harold Nicholson for a referendum on the tram project [CEC01241182, page 2]. This was resisted because it was not just on the tram project. Harold Nicholson addressed the council. He was worried about the impact on heavy rail projects. He was mixing up three things, the tram, the south suburban railway and the rail link to the Airport which had been scrapped by that stage anyway. A referendum would not have been helpful at that stage.

186. In an email dated 26 October 2007 to Willie Gallagher and Jenny Dawe [CEC01507257, page 3] Graeme Russell requested that TIE give consideration to increasing the funding behind the small business compensation scheme. He requested this on the basis that savings of £47m in the tram budget had been widely reported. I thought the public's expectations were properly handled. I think that the savings were being reported prematurely, but I do not know where the £47m figure came from. I was informed that a compensation scheme was the best option, but cannot recall who by. I was not aware of any other options.

187. By email dated 27 May 2008 from Cecilia Black, I was sent papers for the tram operations group meeting at Harvey Nichols [CEC01238879] with a view to addressing the problems which businesses were experiencing as a consequence of the construction. Effective construction logistics teams were put in place and they were in place throughout the project. I am aware that the Tram Operation Group minutes for 28 April 2008 note that a protocol was prepared by the Council setting out the procedure for obtaining approval to work outwith the hours set down in the Code of Construction Practice [CEC01238881, page 1]. There is no doubt that this was discussed with BBS and TIE, but not by me.
188. Leith Business Association (LBA) sent other Councillors and me an email on 30 November 2010 noting that due to the lack of accurate plans, the utility works took far longer than was anticipated or communicated to the businesses on the route [CEC00127068]. The email demanded action from the Council. I cannot recall how the Council responded to this email. I had left the post of Transport Convenor one year previously and would have left it to the new Transport Convenor to deal with.

### **Cost Overrun and Consequences**

189. I first became aware that there was likely to be a significant cost overrun, including that the total capital cost of the project was likely to exceed £545m at the height of the dispute at the end of 2008 and in early 2009. At this time it was obvious that there were problems with the costings and that the behaviour of the contractors was such that it was going to cost us money to get things going. These were the reasons for the overrun. It went back to the delays at the start where the contractor could claim compensation for having mobilised but not being able to work. It went back to the utilities and the design delays. Following the Mar Hall mediation, the additional contribution by the Council was to be financed through prudential borrowing. This was certainly the most cost-effective method because borrowing from the Public Works Loans Board was a lot cheaper than going to the commercial banks. Servicing that debt impacted on the Council's revenue funds which was bound

to impinge on other services and projects. Councillors were kept properly informed of the risk of a cost overrun throughout the project, including the likely amount of the overrun, within the balance of commercial confidentiality. I think that the figure did start appearing in Council reports.

## **Consequences**


190. The failure to deliver the tram project on time, within budget and to the extent projected had an impact on the Council's reputation and that of individual Councillors who had prominent roles in it such as me. There were no particular consequences for my constituents. The route did not impinge on the ward. The shortened line resulted in the project failing to meet the objectives and benefits set out in the Final Business Case. It is a truncated route and also will not have the desired effect of economic regeneration along the waterfront which was part of the original agenda.

## **Final Comments**

191. I think that the main reason for the failure to deliver the project on time and within budget was what turned out to be an inadequate, or inappropriate, Infracore contract. It was unenforceable and this was coupled with some intransigence from Bilfinger. We did not allow enough time for MUDFA and we were perhaps too eager to get the main contractor on the job, despite the advice we had from Dublin that when you open up old streets you never know what you are going to find. The knock-on effects from the delays of MUDFA and the fact that the contractors could not get on the job when they wanted to because the streets were not ready for them and the fact that the contract was not as robust as we had been led to believe were the main reasons for the failure.
192. These failings might have been avoided if a different lawyer had drawn up a different contract. We were told it was a non-standard contract for that sort of work whereas some said with hindsight that a sort of template for these types of contracts had not been followed. This meant that some standard clauses

were not there which did lead one of the principals of Bilfinger, at one stage, to say that it was a stupid contract.

I confirm that the facts to which I attest in this witness statement, consisting of this and the preceding 85 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 July 2017 .....