

STATEMENT OF PETER STRACHAN TO THE EDINBURGH TRAM INQUIRY

DATED 13th March 2018

Introduction

1. Could you please set out your main qualifications and vocational experience?

See career summary included at the end of this statement.

2. Prior to the Edinburgh Tram Project, what, if any experience, did you have in delivering major infrastructure projects including tram or light rail projects?

My roles in British Rail included Resources Manager positions in InterCity East Coast and West Coast where I was involved in a number of infrastructure projects as Sponsor. As Zone Director for Railtrack Midlands (1993-1997), my role included sponsorship responsibility for the Robin Hood and Ivanhoe line reopenings and for the Jewellery Line project.

As Route Director LNW for Network Rail (2005-2009) I chaired Network Rail's Infrastructure Investment Committee, and had sponsorship responsibility for a number of route infrastructure and enhancement projects.

As Chief Executive of the Rail Division of National Express Australia (1999-2003) the portfolio included the operation of Swanston (later M Trams), around 60% of the Melbourne tram network.

3. We understand that you were a Non-Executive Director of Tie Ltd (Tie) between 22 January 2007 and 12 May 2011 and that you were a Non-Executive Director of Transport for Edinburgh Limited (TEL) between 18 December 2009 and 12 May 2011. What were your main duties and responsibilities in these roles?

My recollection is that the Tie Ltd. appointment was from September 2006.

The duties and responsibilities were consistent with those of a non-executive director: to provide independent oversight and leadership of strategy to the Board(s).

4. It would be helpful if you could explain the circumstances surrounding your appointment e.g. were you asked to become a director of these companies or did you apply to become a director of these companies? If the latter, what prompted your application e.g. did you see an advert for these directorships?

The role was advertised nationally and a competitive selection process was undertaken by the City of Edinburgh Council (CEC).

Governance and project management

5. It would be helpful if you could briefly explain your understanding of the role of each of CEC, Transport Scotland, Tie, TEL and the Tram Project Board (TPB) in the tram project (both before and after the award of the Infraco contract in May 2008)?

CEC was the promoter and part funder of the tram project, and the owner of both Tie and TEL.

Transport Scotland was the majority funder of the tram project.

Tie was a wholly owned subsidiary company of CEC, and established as the body to design, procure and implement the tram project (although at the outset Tie was managing a portfolio of other transport projects).

TEL was a wholly owned subsidiary of CEC, with the overarching responsibility to integrate the trams into the public transport of Edinburgh through integration with Lothian Buses.

The Tram Project Board (TPB) was the Project Board set up to take operational responsibility for the tram project by bringing together the funders, the delivery body and the eventual operator.

Over time a number of changes occurred:

- Tie ceased to have projects other than tram in its portfolio.
- Tie became a subsidiary of TEL and the Board composition of TEL was altered to appoint the non-executive directors of tie to the Board of TEL.
- Transport Scotland, whilst remaining the principal funding party, ceased to participate in any of the governance structure of Tie, TEL or TPB in 2007.
- TPB attendance regularly included the non-executive Directors of Tie during 2009.

6. What did you understand the relationship to be between Tie and TEL? What was the relationship between these companies and Tram Project Board (TPB)?

Initially Tie and TEL were both wholly owned, arm's length subsidiaries of CEC.

Following the governance changes which occurred, to my recollection in late 2009/early 2010, Tie became a subsidiary of TEL and the TPB became a formally established sub-committee of TEL.

7. Did you sit on or attend the Tram Project Board (TPB)? If you attended only some of the meetings, who or what determined on which occasions you would attend? Papers were prepared for meetings of the TPB. Were you provided with these and, if so, were you given them for all meetings or only some? If you had attended a TPB meeting, were you able to review the minutes of that meeting and/or follow up what was being done in relation to issues raised. Did you sit on or attend any sub-committees of the TPB?

From my recollection, during 2008, it was agreed to widen the membership of the TPB to include the Directors of Tie, and to hold TPB and Tie Board meetings on

the same day. From that point I was provided with TPB papers and minutes. I did not sit on or attend any TPB sub-committees.

8. Which body or organisation do you consider was in charge of the tram project (again, both before and after the award of the Infraco contract in May 2008)? Were changes made to this over time and, if so, why? Did these changes affect your role and how you performed it?

CEC held the overall responsibility for the tram project throughout. CEC discharged that responsibility through giving Tie the role of design, procurement and implementation of the project, and TEL the role of integration of the tram into the public transport of Edinburgh through integration with Lothian Buses. Through the governance changes described in my response to Question 6 above, this was simplified with TEL having the responsibility for both execution and integration.

9. Which individual did you consider was the Senior Responsible Owner (SRO) for the project and what did you understand this role to entail?

The SRO was the CEO of TEL and the role had the responsibility for the overall delivery of the tram project, including its operational implementation as well as construction.

10. Were you content with the volume, quantity and timing of the information provided to you as a non-executive director? Did you consider that you were properly informed in relation to the decisions that you required to take? Do you consider that you were able adequately to perform your challenge function as a non-executive director?

Board papers were produced in a timely manner and were comprehensive. There was adequate opportunity at Board meetings and outside the formal meetings to discuss matters and to challenge the executive team.

Procurement strategy

11. What was your understanding in early 2007 of the main aims and objectives of the procurement strategy for the tram project and how these aims and objectives would be met?

It was my understanding that the design contract (SDS) and utilities diversion contract (MUDFA) had been previously let and it was the intention to procure an "InfraCo" contract which would incorporate both the physical fixed infrastructure for the tram and the tram vehicles (the tram vehicles contract having been subject to a separate competitive procurement and novated to the InfraCo contract). The strategy was to achieve a fixed price InfraCo contract with the risks of change being transferred to the InfraCo contractor. It was also the intention to transfer unfinished design risk to InfraCo through novation of the SDS contract to the successful InfraCo contractor. Tie would continue to manage the already procured MUDFA contract to conclusion.

Award of the InfraCo contract in May 2008

12. At the time of seeking Council approval for the Final Business Case (December 2007) and of the award of the InfraCo contract (May 2008), what was your understanding of each of the following matters (including the basis of your understanding):

- (1) The extent to which design was complete and all approvals and consents had been obtained and how risks arising from this were allocated between the parties?

Through Board reporting and discussion it was my understanding that the design was incomplete, particularly in areas relating to CEC approvals and consents on streetscape design (for example catenary fixings) and locations such as Picardy Place. Up to the award of the InfraCo contract Tie was continuing to manage SDS to reduce the number of outstanding issues of design, then novating the design contract to InfraCo.

- (2) Which party bore the risks arising from any further delay in completing design or obtaining outstanding approvals and consents?

It was my understanding that post InfraCo award and novation of the SDS contract that the principal risks would be transferred to InfraCo, with the risk relating to client scope changes remaining with Tie.

- (3) The extent to which there had been or continued to be difficulties or delays in completing the utility diversion works?

Progress with the MUDFA works was reported at each Board and it was my recollection that the quantum of works – given particularly what had been discovered once diversion works had commenced – was in excess of that originally envisaged and that diversions would not be complete on the award of the InfraCo contract.

- (4) The risks that arose to Tie/CEC if the utility diversion works were not finished before the InfraCo works commenced (and the likelihood of these risks materialising)?

Given (3) above, it was anticipated that the MUDFA works would be incomplete and that a risk allowance in the overall budget was allocated to complete the works and to deal with any claims the InfraCo contractor may make as a result.

- (5) The extent to which the InfraCo contract was for a fixed price and the extent to which the price was likely to change after contract award?

It was very clearly represented to the Board by the Tie executive team and legal advisers that the InfraCo price was 95% fixed. Indeed, after further pre-close negotiations the price was increased, to take account of further risks being transferred to the contractor. As a non-executive director I recall specifically questioning both the Tie team and DLA on this and was given

assurances that the price was 95% fixed and that the contract suite supported this assertion.

- (6) The extent to which the InfraCo price was based on a number of pricing assumptions, some of which were known not to be accurate and which would result in a Notified Departure or Departures (with consequent price increases) shortly after contract close?

Given the assurances relating to the fixed price nature of the contract, it was not anticipated that the price would immediately go up after contract close.

13. At the two dates referred to, how did the agreements proposed give effect to the procurement strategy for the project?

The agreements were consistent with the procurement strategy in that the separately procured Tramco and SDS contracts would novate to InfraCo, with risk transfer to the InfraCo contractor, and the MUDFA contract would remain under the control of Tie to completion. Acknowledging that there was delay to completing MUDFA which would result in MUDFA works being incomplete at the close of the InfraCo contract, the Board was advised that a risk sum was retained in the overall project budget to address the risk of MUDFA completion delaying the InfraCo contractor.

14. Did your understanding of the above matters change in any way after the award of the InfraCo contract award and, if so, when and why?

Despite the behaviour of the InfraCo contractor, the Board continue to receive assurance that the contract as awarded was as represented to the Board prior to financial close, and this was reinforced when embarking on the various actions to resolve matters between the InfraCo contractor and Tie, including the disputes resolution process and "administering the contract". Any of the bespoke measures, for example, the Princes Street supplemental agreement, were regarded by the Board as methods to break the impasse with the InfraCo contractor and to get work done, particularly in sensitive areas such as Princes

Street where CEC had a strong desire to keep the city “open for business”. The supplemental agreement was used for that purpose, rather than to signal that the InfraCo contractor was correct in its interpretation of the contract.

During 2010 as part of the strategy to resolve matters, Tie embarked on the disputes resolution process (DRP). This strategy was endorsed by the Board and advice was given to the Board that the contract was robust and that DRP would deliver both individual issues’ resolution and as a result, behaviour change from the InfraCo contractor. However, it became clear with a number of the matters being adjudicated in favour of the contractor, Tie’s position was not as robust as had been previously believed, or represented to the Board by the Tie executive team and legal advisers.

In late 2010 (there is a reference in the minutes of the TPB on 17 November 2010 - **TIE00896978**, page 7): “*The Board discussed in detail a wide range of legal, commercial, programme and contingency planning matters as well as the mechanics of delivery for these scenarios. It was agreed that it would be helpful to present the full range of outcomes and consequences of these in matrix form to assist the decision making process.*”) The Board was advised by the CEO of Tie that he was seeking independent legal advice through Anderson Strathern on the interpretation of the InfraCo contract. This advice, which was provided by the Tie CEO to the non-executive Directors in January 2011, placed considerable doubt on the interpretation that Tie had taken on the InfraCo contract and the opportunity that the InfraCo contractor had for price adjustments. I have been advised by the Inquiry that this report is legally privileged and therefore I am unable to discuss its contents further.

15. In the period from December 2007 to May 2008 was there any discussion in either Tie or TEL as to whether the procurement process should be halted? If so, what factors were said to justify a halt and what factors justified pressing on? What was the role of the non-executive directors in relation to this? What was your view? As a non-executive director, what was your view of the increases in price demanded by the contractors between December 2007 and contract signature in May 2008?

I do not recall any specific discussion on whether the procurement process should be halted per se. The non-executive directors were keen to understand the fixed price nature of the contract and the risk which had been transferred to the InfraCo contractor. Along with Kenneth Hogg, I specifically asked questions of the Tie executive team on these matters.

The Tie executive team represented that there had been considerable discussions on price, including relating to the Value Engineering exercise, in the period up to financial close. As a non-executive director I was not particularly concerned by this as, in my experience of large contractual deals, this was not unusual. However, I recall Board members being advised that the InfraCo contractor had attempted to raise the price by £12m (claiming that their price had been understated by circa £17m) at a late stage in the discussions and this was relayed to the Tie Board/TPB in May 2008. I considered this to be a late attempt to increase the contractor's margin. Given that and whilst the Tie executive team had considered alternative options, all of these were represented to create a greater risk than reaching contractual close with the preferred InfraCo contractor. Along with other Board members I supported the Tie executive's team to strongly push back on the Bilfinger Berger-Siemens request.

16. How was the decision taken in May 2008 that the company should enter into the construction contracts? In January 2008, an Approvals Committee consisting of David Mackay, Neil Renilson and Willie Gallagher was formed (see **CEC01246826** – Paper for TPB Meeting on 13 February, pages 8 and 35-40). What was it intended that they should determine and what work did you consider would be undertaken by the Committee to satisfy itself of the matters falling within its remit? What role did you as a Non-executive director have in relation to this?

The Approvals Committee was established to take the delegated authority for execution of the InfraCo contract suite as set out in the resolutions contained in the papers at **CEC01246826**. Delegating to an executive or sub-committee to

close a contract – within delegated authority parameters – is not unusual in transactions of this nature. As a non-executive I considered that the committee had the correct representation of Tie Executive Chair/TEL Chair and the TEL Chief Executive. I expected the committee to have conducted appropriate due diligence on the contractual suite, taken technical, commercial and legal advice and satisfied itself that it was proceeding to execution on a sound basis and within the parameters of the business case and the funding envelope. As a non-executive director neither I, nor the other non-executive directors had any involvement in the working of the Approvals Committee, nor would I have expected to have been involved.

Events following InfraCo contract award

17. What was your understanding of the main reason or reasons for the dispute that arose between Tie and the infrastructure consortium?

There were a number of “disputes” which arose between Tie and InfraCo with differing circumstances according to the location of the works in question.

18. A dispute arose in or around February 2009 in relation to the works at Princes Street. What was your understanding of the main cause or causes of the Princes Street dispute?

Princes Street was, given the significance of the corridor to the City, rightly regarded as an extremely sensitive section of the works. There had been considerable discussion at TPB relating to the access for the InfraCo contractor and the balance of access for works and the need to “keep the city moving”, in relation to bus services and diversionary strategies for bus and other vehicular traffic. InfraCo was granted access to Princes Street in February 2009, but failed to commence the works and effectively demanded an additional payment to mobilise. At the time this appeared to be a further illustration of the pattern of behaviour exhibited by the InfraCo contractor, going back to the late demand for a price increase prior to financial close, and reflective of their slow or non-mobilisation across the contract.

19. The Princes Street dispute was resolved by parties entering into the Princes Street Supplemental Agreement. To what extent, if at all, was approval sought from the Tie Board or TEL board to enter into that agreement? What was your understanding of, and views on, the agreement?

As referred to previously, the supplemental agreement was designed as a “one off” circuit breaker to get the InfraCo to conduct the works on Princes Street, given the high visibility of the site and the reputational issues for the city. The Tie Board was fully consulted on the move to the supplemental agreement, and indeed followed from the discussion at the Tie Board on 11 February 2009 regarding the Board’s dissatisfaction with the performance of the InfraCo contractor and directing the Tie executive team to the course of action described.

20. Following a decision in July 2009 as to what strategy to adopt, Tie engaged the contractual dispute resolution procedures in relation to the disputes with the contractors. What role did you and the other non-executive directors play in relation to this decision? Did you favour this approach and what was the basis for your view? What did you understand to be the matters that were in dispute? Why were these matters taken to adjudication? Was there discussion of what the position would be and what strategy would be adopted if the decisions went against Tie? There were a number of adjudication decisions in late 2009 and 2010. What were your views at the time on the extent to which these decisions favoured Tie or the infrastructure consortium? Did there come a time (and, if so, when) when you considered that the adjudication decisions did not support Tie’s position in the dispute? If so, did that cause you any concern or change of strategy on the part of Tie? What information were you given about the outcome of the adjudications? Were you given – or did you ask to be given – copies of the decisions in those adjudications?

Despite the behaviour of the InfraCo contractor, my recollection is that there were initially two clear strategies adopted to attempt to resolve matters of dispute. Firstly, the establishment of a Project Management Panel, which was

designed to promote a spirit of collaboration between the parties and promote a partnership approach. Secondly, to use the disputes resolution process in the InfraCo contract to resolve the issues. The Tie executive team presented the strategies to the TPB and the Board, including the non-executive directors, were briefed on the issues and endorsed the strategy. The Tie team's view, supported by legal advice, including a QC's opinion, was that Tie's interpretation of the contract was correct and that moving to the DRP would establish Tie's position and force InfraCo to perform the contract. The DRP included provisions for the use of mediation and/or adjudication and both were deployed in the process.

The Board was kept informed by the Tie executive team on the results of the adjudications. Over time, it became clear that the executive team's confidence in Tie's success rate in adjudications was more optimistic than was proved in the results and that the strategy of establishing Tie's position and gaining control was not working through the DRP process.

21. What was the strategy adopted in 2010 and what was it intended that it should achieve?

The "Project Resolution" report, prepared by the Tie Executive team in December 2010, is a comprehensive chronology of the various strategies adopted in 2010 and which led to the decision by TPB to embark on mediation. I have a personal copy (it was issued to named individuals, including as I recall each of the non-executive directors) of the Project Resolution document dated 22 December 2010(**WED00000641**)..

22. Had Tie or TEL taken legal advice in relation to the matters that were in dispute? If so, from whom had it been taken? Where you shown that advice or provided with a summary of it?

Yes. In addition to the continuing advice from DLA, Tie also engaged McGrigors to advise on the DRP strategy, and engaged Counsel and Senior Counsel through the DRP. A note from the Tie CEO dated 3 December 2010 outlines

the arrangement for the split of legal services between DLA and McGrigors(WED00000640). In addition, as referred to above, the Tie CEO engaged Anderson Strathern to advise on the matters relating to the role of DLA with regard to the InfraCo contract.

In respect of the ongoing and specific advice relating to the DRP, this was presented as summaries to the TPB by the Tie Executive team.

23. What were your views on the settlement agreed at the Mar Hall mediation in March 2011 with the infrastructure consortium? What role, if any, did the Tie or TEL board play in discussing or approving the settlement?

It is difficult to express a view as the non-executive directors had no involvement in the process and had not been briefed during the course of mediation. The chair (Vic Emery) expressly stated at the TPB that he was unable to update the Board due to confidentiality undertakings. The first understanding of what had happened was given by the chair on a teleconference which was held with the non-executive directors on 9 May 2011, referring to a series of minutes of variation to the contract. It was clear to the non-executive directors, including myself, that the process had effectively bypassed the existing corporate governance and approvals process and that the non-executive directors were being advised "for information" rather than as members of a governing body or Board.

24. Why did you cease to be a director of Tie and TEL?

The teleconference on 9 May 2011 was followed by a meeting of the TPB on 11 May 2011, where it was confirmed that a payment of £27m had already been made to the InfraCo contractor as part of a further commitment of some £70m derived from the mediation settlement. Given that I and the other non-executive directors had been unable to scrutinise the payment and the details of the deal, and that Council members were due to be briefed on the contents of the variation on 12 May 2011 prior to full Council approval being sought the following week, it rendered me as a non-executive director unable to perform

my function of scrutiny and challenge and therefore unable to discharge my duties as a Board member. I tendered my resignation in writing to the Chief Executive of CEC on 13 May 2011 (TIE00620232, page 2).

General

25. Did you have any concerns, at any stage, in relation to the performance of any of the bodies or organisations involved in the delivery of the tram project (or in relation to any of the senior employees or directors in these organisations)?

In general, and considering the wide range of organisations I have worked with, my belief at the time was that the Tie executive team, which I as a non-executive director interacted with, had a comparable skill set and capability with other similar organisations in the sector. Over time I believe the team was strengthened, and under Richard Jeffrey's leadership as CEO it was at its strongest. In respect of CEC, any of the interactions I had as a non-executive director with individual CEC employees gave me no cause for concern on competence.

Whilst in the early stages on the project there was no suggestion that the legal advice given, and individuals providing it gave cause for concern, my concerns were raised by the Anderson Strathern report which I have referred to above, which cast considerable doubts on the robustness of the InfraCo contract.

My overarching concern through the process related to the performance of InfraCo contractor, specifically Bilfinger Berger, and the apparent reluctance to perform in anything other than an adversarial way, using opportunities to extract additional sums via their interpretation of the contract.

26. Did you have any concerns, at any stage, in relation to the reporting to the Tie or TEL Boards or reporting by those boards to other bodies?

Up until the mediation in the first quarter of 2011, I considered that the reporting to the Tie, TEL boards and the TPB, both in the formal issue of papers,

presentations and oral reports to the meetings, was consistent with what I required as a non-executive director. Given the presence of senior CEC directors at the meetings, in receipt of the same papers and presentations, I consider that the boards were providing sufficient information for CEC to be fully informed and if not, to have the opportunity to request further reports. The Transport Scotland report was a comprehensive document which, again, would have given that organisation sufficient information, or acted as a prompt to request more.

Concluding comments

27. What do you consider were the main reasons why the tram project was not delivered on time and within budget?

As the Inquiry will have discovered, there are multiple contributory factors, however I would summarise the following principal reasons, given with the great benefit of hindsight:

1. The MUDFA strategy underestimated the volume of utility diversions and therefore the time taken and physical activity completed was inconsistent with the initial strategy of handing over “clean” to the InfraCo contractor.
2. The performance of the design contractor resulted in an excessive number of incomplete designs at the novation to the InfraCo contractor.
3. The InfraCo contract as executed was not robust and failed to adequately protect the client from contractor claims and non-performance, and was not fit for purpose for the novation of the SDS activity and risk transfer.
4. The legal and commercial risks arising from the InfraCo contract were not advised to those in governance positions by either external or internal legal advisers.
5. The InfraCo contractor, principally Bilfinger Berger, exploited the opportunity presented by the contract

through claims and tactics designed to frustrate the performance of the work.

28. Do you have any comments on how the cost and time overruns in the Edinburgh tram project might have been avoided?

By addressing each of the principal causes listed in 1-5 in my response to Question 27.

29. Are there any other comments you would like to make that fall within the Inquiry's terms of reference and that are not covered by your answers to the above questions?

No, thank you.

I confirm that the facts to which I attest in this witness statement, consisting of this and the preceding 16 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..... BHL MARCH 2018

Peter Strachan BA MIRO - CAREER SUMMARY

- 2017-date Serco plc: Chairman UK Rail
- 2014-2017 Serco plc: Managing Director, Caledonian Sleeper
- 2013-2014 Serco Australia: Bid Director North West Rail Link
- 2011-2013 Department for Transport: Director-General Major Projects and London
- 2008- 2011 TransLink Transit Authority: Chief Executive Officer
- 2005-2008 Network Rail: Route Director London and North Western
- 2003-2005 Arriva plc: Managing Director Arriva Trains Wales
- 1999-2003 National Express Group (Australia) Pty Ltd: Chief Executive Rail Division
- 1998-1999 National Express Group plc: Director Train Services Midland Main Line Ltd.
- 1997-1998 First Group plc: Managing Director North Western Trains Company Ltd.
- 1993-1997 Railtrack plc: Director Midlands Zone
- 1980-1993 British Rail: progression from Graduate Operations Trainee to Director InterCity West Coast, including Area Freight Supervisor, Doncaster, Area Operations Manager, Carlisle, Area Terminals Manager, Ipswich, Area Terminals Manager, Derby.
- Non-Executive positions:**

- 2005-2009 Trustee, Settle and Carlisle Railway Heritage Trust
- 2005-2009 Non-Executive Director, Institute of Railway Operators
- 2006-2011 Non-Executive Director, Transport Initiatives Edinburgh,
Transport Edinburgh Ltd.
- 2009-2011 Chair, International Public Transport Association (UITP)
Australia and New Zealand
- 2016-date Chair, Inverness City Centre Business Improvement District

