

CERTIFIER AGREEMENT

among

tie LIMITED

and

CITY OF EDINBURGH COUNCIL

and

BILFINGER BERGER CIVIL UK LIMITED

and

SIEMENS plc

and

CONSTRUCCIONES Y AUXILIAR DE FERROCARRILES S.A.

and

HG CONSULTING (SCOTLAND) LIMITED

Certifier's Agreement relating to the Prioritised Works on the Edinburgh Tram Network

TABLE OF CONTENTS

Clause	Heading	Page No.
1	DEFINITIONS AND INTERPRETATION	2
1.1	Definitions	2
1.2	Interpretation and Construction	2
2	APPOINTMENT	3
3	DUTY OF CARE	3
3.1	Duty of Care (warranty)	3
3.2	Duty of Care (reliance).....	3
3.3	Duty of Care (impartiality)	4
4	CERTIFIER'S DUTIES.....	4
4.1	Carrying out the Services	4
5	VALUATION.....	4
5.1	Application for payment	4
5.2	Valuation meeting	4
5.3	Valuation Certificate.....	5
6	FEE	5
6.1	Obligation	5
6.2	Invoices.....	5
6.3	When payment is due	5
6.4	Final date for payment	5
6.5	Notice regarding amount proposing to pay.....	5
6.6	Withholding/deducting payment.....	5
6.7	Interest on late payment	5
6.8	Preliminaries information	6
7	ASSIGNATION	6
7.1	Assignment by the Certifier.....	6
7.2	Assignment by CEC	6
7.3	Certifier's undertaking	6
8	INSURANCE.....	6
8.1	Professional indemnity insurance	6
8.2	Maintenance of insurance.....	6
8.3	Evidence of insurance	7
8.4	Insurance costs.....	7
8.5	Legal fees	7
9	PERSONNEL.....	7
10	SUSPENSION AND TERMINATION.....	7
10.1	Suspension by CEC.....	7
10.2	Suspension by the Certifier.....	7
10.3	Payment to Certifier for Services prior to and during suspension	8
10.4	No compensation for suspension of Services	8
10.5	Termination following suspension	8
10.6	Termination by CEC	8
10.7	Payment to Certifier following termination	9
10.8	Termination not to prejudice pre existing rights and remedies.....	9
11	CONFIDENTIALITY	9
11.1	Obligation of confidentiality.....	9
11.2	Exception	10

TABLE OF CONTENTS

Clause	Heading	Page No.
12	WAIVERS AND REMEDIES CUMULATIVE	10
13	NOTICES	10
13.1	Writing.....	10
13.2	Service	10
13.3	Deemed receipt.....	10
13.4	Addresses for notices	11
14	NOTIFICATION OF LIABILITY, CLAIMS AND DISPUTES.....	12
15	LIMIT ON LIABILITY	12
16	ENTIRE AGREEMENT.....	12
17	SEVERANCE.....	12
18	GOVERNING LAW AND JURISDICTION	12
SCHEDULES		
SCHEDULE PART 1 The Services		15
SCHEDULE PART 2 The Fee.....		19

THIS APPOINTMENT is made

AMONG:

- (1) **tie LIMITED** (company number SC230949), whose registered office is at City Chambers, High Street, Edinburgh, Midlothian, EH1 1YJ ("**tie**") which expression shall include its personal representatives, successors, permitted assignees and transferees;
 - (2) **CITY OF EDINBURGH COUNCIL**, the Local Authority for the said City under the Local Government etc. (Scotland) Act 1994 and having its principal office at City Chambers, High Street, Edinburgh, EH1 1YJ ("**CEC**") which expression shall include its personal representatives, successors, permitted assignees and transferees;
 - (3) **BILFINGER BERGER CIVIL UK LIMITED**, a company incorporated in England and Wales under number 02418086 and having its registered office at 3rd Floor Braywick Gate, Braywick Road, Maidenhead, Berkshire SL6 1DA ("**BBUK**") which expression shall include its personal representatives, successors, permitted assignees and transferees;
 - (4) **SIEMENS plc**, a company incorporated in England and Wales under number 00727817 and having its registered office at Faraday House, Sir William Siemens Square, Frimley, Camberley, Surrey, GU16 8QD ("**Siemens**") which expression shall include its personal representatives, successors, permitted assignees and transferees;
 - (5) **CONSTRUCCIONES Y AUXILIAR DE FERROCARRILES S.A.**, a company registered in Spain and having its registered office at J. M. Iturrioz 26, 20200 Beasain, Spain ("**CAF**") which expression shall include its personal representatives, successors, permitted assignees and transferees,
- (3), (4) and (5) together the "**Infraco**"; and
- (6) **HG CONSULTING (SCOTLAND) LIMITED** (company number SC204303), whose registered office is at 292 St Vincent Street, Glasgow G2 5TQ ("**Certifier**") which expression shall include its personal representatives, successors, permitted assignees and transferees.

BACKGROUND

- (A) tie and Infraco (at that time comprising BBUK and Siemens) entered into a contract on 14 May 2008 under which Infraco was appointed to carry out and manage the design, construction, installation, commissioning, tram procurement, system integration, infrastructure maintenance, tram maintenance and supply of related equipment and materials, trams and related infrastructure in respect of the Edinburgh Tram Network (such contract, amended as detailed below, is herein after referred to as the "**Infraco Contract**");
- (B) By an agreement in writing dated 13 May 2008 ("**Tram Supply Agreement**") tie appointed CAF to design, manufacture and supply 27 Trams and to supply documentation and associated equipment in connection with the Edinburgh Tram Network;
- (C) By a Minute of Variation in writing dated 14 May 2008 ("**MoV1**"), tie, BBUK, Siemens and CAF agreed that CAF would become a party to the Infraco Contract;
- (D) By an agreement in writing dated 14 May 2008 ("**Novation of Tram Supply Agreement**") tie and Infraco agreed, with the consent of CAF as the Tram Supplier, that Infraco would take over the rights and liabilities of tie as the "Client" (as defined in the Tram Supply Agreement) under the Tram Supply Agreement;
- (E) The Infraco Contract was amended by the Princes Street Supplemental Agreement entered into between the Parties in March 2009 and re-executed on 29 May 2009, a Minute of

Variation between the Parties dated 3 June 2009 ("**MoV2**") and a Minute of Variation between the Parties dated 23 April 2010 ("**MoV3**");

- (F) Following a mediation which took place at Mar Hall between 8 and 12 March 2011, tie and Infracore have agreed to vary the Infracore Contract as set out in the Minute of Variation which is in an agreed form and which is to be entered into to give effect to the Prioritised Works (as defined in the MoV4) ("**MoV4**"); and
- (G) tie, CEC, BBUK, Siemens and CAF wish to appoint the Certifier to carry out the duties and obligations of the Certifier described in MoV4 in accordance with this Appointment.

1 DEFINITIONS AND INTERPRETATION

1.1 Definitions

1.1.1 In this Appointment unless the context requires otherwise:

"**Business Day**" means a day, other than a Saturday or a Sunday, on which clearing banks are open for commercial business in Edinburgh;

"**Fee**" means, in respect of the relevant calendar month, the sum calculated in accordance with Schedule Part 2;

"**Invoice**" means the invoice and associated supporting information referred to in Clause 6 (*Fee*);

"**Services**" means the services to be performed by the Certifier including those services set out in Clause 5 and Schedule Part 1; and

"**VAT**" means value added tax as provided for in the Value Added Tax Act 1994 at the rate in force at the due date for payment of any sum under this Appointment.

1.1.2 Unless otherwise defined in this Appointment or the context requires otherwise, words and phrases defined (expressly or by reference) in MoV4 have the same meaning in this Appointment.

1.2 Interpretation and Construction

1.2.1 In this Appointment, unless otherwise specified or the context otherwise requires:

- (a) words in the singular include the plural and *vice versa*;
- (b) words in one gender include all other genders;
- (c) words referring to the whole are treated as including reference to any part of the whole;
- (d) references to a Clause or Schedule are to the relevant clause or schedule of this Appointment;
- (e) reference to a paragraph is to a paragraph in the Background or Schedule;
- (f) reference to this Appointment or to any other document is a reference to this Appointment or to that other document as modified, amended, varied, supplemented, assigned, novated or replaced (in each case, other than in breach of the provisions of this Appointment) at any time;

- (g) reference to a statute or statutory provision is a reference to it as it is in force from time to time and includes:
 - (i) any statute, statutory provision or subordinate legislation which it amends or re-enacts; and
 - (ii) any subordinate legislation made from time to time under that statute or statutory provision; and
 - (h) reference to any Scottish legal term for any action, remedy, method of judicial proceeding, legal document, legal status, court, official or any legal concept, state of affairs or thing is deemed, in respect of any jurisdiction other than Scotland, to include that which most approximates in that jurisdiction to the Scottish legal term.
- 1.2.2 Clause, Schedule and paragraph headings do not affect the interpretation of this Appointment.
 - 1.2.3 Words and phrases defined in any part of this Appointment bear the same meanings throughout this Appointment.
 - 1.2.4 The Background and the Schedules form part of this Appointment.
 - 1.2.5 Any action required to be performed by a party to this Appointment which falls to be performed on a day which is not a Business Day is to be performed on the next Business Day.

2 APPOINTMENT

CEC appoints the Certifier and the Certifier agrees to carry out the Services in accordance with the terms and conditions of this Appointment. The terms of this Appointment shall apply to the Services, whether such services are performed before or after the date of this Appointment. The appointment of the Certifier shall be deemed to have commenced on the earlier of the date of this Appointment and the time when the Certifier first performed the Services.

3 DUTY OF CARE

3.1 Duty of Care (warranty)

The Certifier warrants to each of CEC, tie, BBUK, Siemens and CAF that, in carrying out the Services, it has exercised and will continue to exercise all the reasonable skill, care and diligence to be expected of a prudent, experienced, properly qualified and competent professional of the relevant discipline with experience of carrying out services of a similar scope, type, scale and complexity to the Services and in accordance with all current British Standards and Codes of Practice and any other approved criteria and standards or code and in compliance with all applicable statutes and regulations in relation to projects of a similar size, scope and complexity to the Edinburgh Tram Network project.

3.2 Duty of Care (reliance)

- 3.2.1 The Certifier acknowledges that each of tie, CEC, BBUK, Siemens and CAF have relied and will continue to rely upon the reasonable skill, care and diligence of the Certifier in the performance of the Services and that it owes a duty of care to each of CEC, tie, BBUK, Siemens and CAF under this Appointment.
- 3.2.2 The Certifier warrants that the liability of the Certifier to each of CEC, tie, BBUK, Siemens and CAF for any breach of the terms of this Appointment shall not be affected or diminished where each of CEC, tie, BBUK, Siemens and CAF has suffered no loss, or a loss different from each of CEC, tie, BBUK, Siemens and CAF, by reason of such breach. The Certifier

undertakes to each of CEC, tie, BBUK, Siemens and CAF not to contend that its liability to each of CEC, tie, BBUK, Siemens and CAF is so affected or diminished, whether in defence of proceedings under this Appointment or otherwise; and

- 3.2.3 The Certifier further undertakes to each of tie, BBUK, Siemens and CAF that it will not use any claim of set off in defence of any claim raised by each of tie, BBUK, Siemens and CAF under this Appointment.

3.3 Duty of Care (impartiality)

The Certifier shall carry out the Services (including without limitation the exercise of any discretion in the performance of the Services) independently, fairly and impartially to and as between each of tie, CEC, BBUK, Siemens and CAF. Whilst the Certifier may take into account any representations made by any of tie, CEC, BBUK, Siemens or CAF the Certifier shall not be bound to comply with any representations made by any of them in connection with any matter in which the Certifier is required to exercise its professional judgement.

4 CERTIFIER'S DUTIES

4.1 Carrying out the Services

- 4.1.1 The Certifier shall promptly and efficiently perform the Services consistent with the standards specified in clauses 3.1, 3.2 and 3.3 and as set out in MoV4.
- 4.1.2 The Certifier shall familiarise itself with and shall be deemed to have full knowledge of the provisions of MoV4 and shall be deemed to have taken full account of all the undertakings and warranties, both expressed and implied, on the part of CEC, tie, Infraco, BBUK, Siemens or CAF which are set out in MoV4. The Certifier shall perform the Services in such a manner and at such times that no act, omission or default of the Certifier shall constitute or cause any breach by CEC, tie, Infraco, BBUK, Siemens or CAF of any requirements and/or obligations in MoV4.
- 4.1.3 The Certifier shall comply with all reasonable instructions given to it by CEC except to the extent that the Certifier reasonably considers that any such instructions vary or might vary the Services or its authority or responsibilities under this Appointment or prejudice or might prejudice the exercise by the Certifier of its professional judgement in accordance with clauses 3.1, 3.2 and 3.3. All instructions to the Certifier shall be given by CEC and CEC shall provide a copy of the same to the other parties immediately following issue.

5 VALUATION

5.1 Application for payment

Infraco shall provide to the Certifier and tie a copy of their application for payment with all attendant information in respect of the relevant Valuation Date five (5) Business Days prior to such Valuation Date. Such information is to be issued electronically and in hard copy formats.

5.2 Valuation meeting

Infraco and tie shall invite the Certifier to attend, and the Certifier shall attend, a meeting between those parties on the Valuation Date to consider the relevant application for payment and the Certifier shall be afforded all opportunity to observe, take notes and also to inspect the Prioritised Works.

5.3 **Valuation Certificate**

Following any meeting held pursuant to Clause 5.2 Infraco and tie shall pursuant to clause 9.2 of MoV4 request that the Certifier issue a Valuation Certificate in accordance with paragraph 4.2 of Schedule Part 1.

6 **FEE**

6.1 **Obligation**

CEC shall pay the Fee to the Certifier subject to the due performance by the Certifier of its obligations under this Appointment. For the avoidance of doubt, Infraco shall be under no obligation to make payments to the Certifier.

6.2 **Invoices**

The Certifier must submit an Invoice to CEC for amounts due in respect of the preceding calendar month on the first Business Day of each calendar month. The Invoice must state the basis on which the amount due is calculated and any applicable VAT, and be supplemented by such other information as may be necessary to allow CEC to verify the Invoice to its satisfaction.

6.3 **When payment is due**

Payment becomes due to the Certifier on the date of receipt of the Invoice.

6.4 **Final date for payment**

The final date for payment by CEC is 30 days after the due date.

6.5 **Notice regarding amount proposing to pay**

Not later than five days after the date of receipt of the Invoice, CEC may give written notice to the Certifier stating the amount which CEC proposes to pay and the basis on which that amount is calculated. Where no such notice is given, the amount to be paid is that stated in the Invoice.

6.6 **Withholding/deducting payment**

If CEC intends to withhold payment of and/or deduct any amount in the Invoice which is otherwise due in terms of Clause 6.3 (*When payment is due*), written notice must be given to the Certifier not later than five days before the final date for payment pursuant to Clause 6.4 (*Final date for payment*). The notice must state:

- (a) the amount to be withheld;
- (b) the grounds for withholding and/or deducting payment; and
- (c) the amount of withholding and/or deduction attributable to each ground.

6.7 **Interest on late payment**

If CEC fails to pay any amount due to the Certifier by the final date for payment of that amount, CEC must pay simple interest on the amount due and unpaid as from the final date for payment to the date of payment at the rate of 2% per annum above the base rate from time to time of the Bank of England.

6.8 Preliminaries information

Where requested to do so by the Certifier pursuant to paragraph 5.3 of Schedule Part 1, Infraco shall forthwith provide to the Certifier the information referred to in that paragraph.

7 ASSIGNATION

7.1 Assignment by the Certifier

The Certifier must not assign any rights or obligations under this Appointment without the prior written consent of CEC and Infraco.

7.2 Assignment by CEC

CEC may at any time assign any rights and/or obligations under this Appointment.

7.3 Certifier's undertaking

The Certifier may not at any time assert that any permitted assignee in terms of this Appointment is precluded from recovering any loss resulting from any breach of this Appointment because such assignee is not an original party to this Appointment.

8 INSURANCE

8.1 Professional indemnity insurance

The Certifier confirms that it maintains and will continue and maintain professional indemnity insurance with reputable insurers with a limit of indemnity of not less than ten million pounds (£10,000,000) sterling for any one claim.

8.2 Maintenance of insurance

8.2.1 The Certifier must:

- (a) maintain such insurance for the period commencing on the date on which the Certifier starts providing the Services and expiring on the date occurring six years after the date of completion of the Prioritised Works or termination or expiry of MoV4, if earlier provided that such insurance is generally available to members of the Certifier's profession in the market at commercially reasonable rates and on commercially reasonable terms;
- (b) comply with all conditions and obligations of such insurance policy; and
- (c) immediately inform CEC and Infraco if such insurance ceases to be available at commercially reasonable rates or on commercially reasonable terms. CEC, Infraco and the Certifier must then discuss the best means of protecting CEC's, tie's and Infraco's respective positions and the Certifier must, if requested by CEC and/or Infraco, take out such insurance above commercially reasonable rates if CEC and/or Infraco (as the case may be) undertakes in writing to reimburse the Certifier in respect of the net cost of such insurance above commercially reasonable rates or again at CEC and Infraco's option the Certifier shall take out in any relevant period such reduced cover (if any) as is available and as would be fair and reasonable in the circumstances for the Certifier to obtain.

8.2.2 If the Certifier fails to maintain professional indemnity insurance in accordance with this Clause 8 (*Insurance*) and fails to remedy such default within 14 days of a written request from CEC and/or Infraco then in addition to any other right CEC and Infraco may have CEC and/or Infraco may procure such insurance cover as may be available to provide alternative

equivalent protection and to recover as a debt the cost of maintaining such insurance from the Certifier.

- 8.2.3 The Certifier confirms that (where required by its insurance policy) it has notified its insurers of this Appointment and its contents (and where relevant supplied copies to its insurers including all schedules appendices and other documents ancillary hereto) and confirms that there are no terms or conditions of this Appointment or such other ancillary documents that would invalidate or otherwise prejudice the terms of the Certifier's professional indemnity insurance cover.

8.3 Evidence of insurance

As and when reasonably requested by CEC or Infracore, the Certifier must produce for inspection documentary evidence in the form of a broker's letter or equivalent confirming that such professional indemnity insurance is being properly maintained.

8.4 Insurance costs

Without prejudice to Clause 8.2, from the date of this Appointment CEC shall be responsible for the annual costs of the Certifier maintaining professional indemnity insurance in accordance with Clause 8.1 to the extent that such costs are greater than the costs the Certifier would otherwise incur in maintaining professional indemnity insurance of £2 million for each and every claim on substantially the same terms in respect of the relevant insurance year (provided that CEC shall not be responsible for any increased insurance costs to the extent that such increase is a result of the Certifier's claims history) ("**Increased Insurance Costs**"). In respect of each insurance year (and until the date of expiry of Certifier's obligation to maintain insurance in accordance with Clause 8.2.1(a)), CEC shall pay to the Certifier the Increased Insurance Costs within 30 days of written request, provided that the Certifier has provided such information as may be necessary to allow CEC to verify such request to its reasonable satisfaction.

8.5 Legal fees

CEC shall be responsible for the Certifier's reasonable and properly incurred legal fees in respect of the negotiation of and entering into this Appointment. CEC shall pay to the Certifier such legal fees within 30 days of written request, provided that the Certifier has provided such information as may be necessary to allow CEC to verify such request to its reasonable satisfaction.

9 PERSONNEL

The Certifier undertakes that Colin Smith shall be engaged in the provision of the Services, unless CEC agrees otherwise in writing.

10 SUSPENSION AND TERMINATION

10.1 Suspension by CEC

CEC may suspend the performance of any or all of the Services on the expiry of 14 days' notice given in writing to the Certifier.

10.2 Suspension by the Certifier

If CEC is in default over payments of amounts properly due in respect of the Fee, and no notice of intention to withhold such amounts has been given under Clause 6.6 (*Withholding/deducting payment*) the Certifier may suspend performance of any or all of the Services. This right is subject to the Certifier first giving the CEC and Infracore not less than 28 days' notice in writing of such intention and stating the grounds for suspension. The right

to suspend performance shall cease when either: (i) CEC; or (ii) Infraco pursuant to Clause 10.2A, makes payment of the amount due.

10.2A Payment by Infraco

The Certifier's right to suspend performance under Clause 10.2 (*Suspension by the Certifier*) shall cease if, within the period of twenty eight (28) days referred to in Clause 10.2 (*Suspension by the Certifier*) Infraco pays to the Certifier any sums which have become due under this Appointment but which remain unpaid and have given rise to the service of the notice referred to in Clause 10.2 (*Suspension by the Certifier*).

Where Infraco makes any payment pursuant to this Clause 10.2A (*Payment by Infraco*), CEC shall reimburse Infraco for any such payment within ten (10) Business Days of the payment having been made.

For the avoidance of doubt, the making of any payment by Infraco pursuant to this Clause 10.2A (*Payment by Infraco*) shall not give rise to any liability on the part of Infraco to make any future payments to the Certifier.

10.3 Payment to Certifier for Services prior to and during suspension

On suspension of this Appointment, the Certifier is entitled to payment in respect of the Services rendered in accordance with this Appointment up to the time of suspension. On resumption of a suspended service any such payments will be regarded as payments on account towards the Fee. During any period of suspension the Certifier is entitled to be reimbursed for all proper and reasonable expenses necessarily incurred and first approved by CEC (such approval not to be unreasonably withheld).

10.4 No compensation for suspension of Services

The Certifier is not entitled to any compensation from CEC, tie and/or Infraco for any loss of profit, loss of contracts or any other losses and/or expenses arising out of or in connection with any suspension of the Services under this Appointment.

10.5 Termination following suspension

When the Services, or any part of them, are suspended for 6 months or more either party may make a written request for the Services to be resumed and if no such instruction to resume is given within 14 days after such request either party may terminate this Appointment by serving written notice on the other to that effect.

10.6 Termination by CEC

10.6.1 CEC may terminate the appointment of the Certifier under this Appointment:

- (a) at any time on not less than 14 days' notice in writing;
- (b) immediately if the Certifier becomes insolvent; or
- (c) if the Certifier is in material or persistent breach of its obligations and fails to remedy this within 14 days of receiving a notice from CEC specifying the breach and requiring its remedy.

10.6.2 For the purposes of Clause 10.6.1 (*Termination by CEC*), a party is insolvent if:

- (a) any corporate action, legal proceedings or other proposal, procedure or step is taken in relation to:

- (i) the appointment of a liquidator, receiver, administrator, administrative receiver, compulsory manager or other similar officer in respect of the Certifier or any of its assets; or
 - (ii) any voluntary arrangement, scheme of arrangement or re-organisation of the Certifier; or
 - (iii) any analogous procedure or step is taken in any jurisdiction;
- (b) if the Certifier is an individual, the individual is made bankrupt, is the subject of a voluntary arrangement or applies for a debt relief order or any of the events or circumstances outlined in paragraphs 10.6.2 (d) to 10.6.2 (f) occurs in relation to it or any analogous procedure, step, event or circumstance is taken or occurs in relation to it in any jurisdiction;
- (c) if the Certifier is a partnership any partner is made bankrupt, is the subject of a voluntary arrangement or applies for a debt relief order or any of the events or circumstances outlined in paragraphs 10.6.2 (d) to 10.6.2 (f) occurs in relation to it or any analogous procedure, step, event or circumstance is taken or occurs in relation to it in any jurisdiction;
- (d) the Certifier is unable or admits inability to pay its debts as they fall due, suspends making payments on any of its debts, proposes any composition, assignation or arrangement or, by reason of actual or anticipated financial difficulties, commences negotiations with, one or more of its creditors with a view to re-scheduling any of its indebtedness or any analogous procedure, step, event or circumstance is taken or occurs in relation to it in any jurisdiction;
- (e) the value of the Certifier's assets at any time is less than its liabilities (taking into account contingent and prospective liabilities);
- (f) a moratorium is declared or comes into force in respect of the Certifier or any of its indebtedness.

10.7 Payment to Certifier following termination

If this Appointment is terminated by CEC (other than termination for a breach of any of the terms of this Appointment by the Certifier, unless such breach is pursuant to Clause 9) the Certifier is entitled to be paid its reasonable and proper fees for the Services provided prior to the date of such termination. No other fees, costs, losses or expenses whatsoever are payable.

10.8 Termination not to prejudice pre existing rights and remedies

Termination of this Appointment is without prejudice to the rights and remedies of either party in relation to any negligence, omission, default or breach of contract of the other prior to such termination.

11 CONFIDENTIALITY

11.1 Obligation of confidentiality

The Certifier shall treat as secret and confidential and shall not at any time for any reason disclose or permit to be disclosed to any person or otherwise make use of any unpublished information relating to this Appointment, tie, CEC, BBUK, Siemens and/or CAF or know-how business plans or finances or any such information relating to a subsidiary, supplier, customer or client of tie, CEC, BBUK, Siemens and/or CAF where the information was received during the period of this Appointment. Upon termination of this Appointment for whatever reason the Certifier shall deliver to CEC all working papers, computer disks and

tapes or other materials and copies provided to or prepared by the Certifier pursuant to this Appointment or to any previous obligations owed to CEC, tie, BBUK, Siemens and/or CAF.

11.2 **Exception**

The provisions of Clause 11.1 shall not apply to:

- (a) any disclosure pursuant to a statutory or legal obligation placed upon the Certifier, including any requirements for disclosure under FOISA, the Code, or the Environmental Information Regulations; and
- (b) any information which is required to be disclosed to the Certifier's insurers, financial advisers and/or legal advisers, provided such party is subject to an obligation of confidentiality in substantially similar terms to Clause 11.1.

12 **WAIVERS AND REMEDIES CUMULATIVE**

The rights and remedies provided in this Appointment for the benefit of or in favour of any party are cumulative and do not exclude any other right or remedy provided at law unless expressly stated otherwise. No failure or neglect on the part of either party to exercise such rights or remedies and no single or partial exercise of them precludes any further or other exercise of such rights and remedies.

13 **NOTICES**

13.1 **Writing**

Any notice, consent or approval to be given under or in connection with the matters contemplated by this Appointment is to be in writing and signed by or on behalf of the party giving it.

13.2 **Service**

Any notice or communication referred to in Clause 13.1 (*Writing*) is to be served by delivering it personally or sending it by pre-paid recorded delivery or registered post (or registered airmail in the case of an address for service outside the United Kingdom) or by fax to the address and for the attention of the relevant party set out in Clause 13.4] (*Addresses for notices*) (or as otherwise notified by that party under Clause 13.4).

13.3 **Deemed receipt**

Any notice or other communication referred to in Clause 13.1 (*Writing*) is deemed to have been received:

- (a) if delivered personally, at the time of delivery;
- (b) in the case of pre-paid recorded delivery or registered post, 48 hours from the date of posting;
- (c) in the case of registered airmail, five days from the date of posting; and
- (d) in the case of fax, at the time of transmission;

provided that if deemed receipt occurs after 5pm on a Business Day, or on a day which is not a Business Day, the notice shall be deemed to have been received at 9am on the next Business Day.

13.4 Addresses for notices

The addresses and fax numbers of the Parties for the purposes of Clause 13 (*Notices*) are:

CEC:

Address: Waverley Court, 4 East Market Street Edinburgh EH8 8BG

For the attention of: Director of City Development

Fax number: [REDACTED]

tie:

Address: Citypoint, 65 Haymarket Terrace, Edinburgh EH12 5HD

For the attention of: Tram Project Director

Fax number: [REDACTED]

BBUK:

Address: 9 Lochside Avenue, Edinburgh EH12 9DJ

For the attention of: Martin Foerder

Fax number: [REDACTED]

Siemens:

Address: 9 Lochside Avenue, Edinburgh EH12 9DJ

For the attention of: Alfred Brandenburger

Fax number: [REDACTED]

CAF:

Address: J.M. Iturrioz 26, 20200 Beasain (Gipuzkoa)

For the attention of: Antonio Campos

Fax number: [REDACTED]

Certifier:

Address: [REDACTED]

For the attention of: Colin Smith

Fax number: [REDACTED]

or such other address or fax number in the United Kingdom as may be notified in writing from time to time by the relevant party to the other party.

14 **NOTIFICATION OF LIABILITY, CLAIMS AND DISPUTES**

If the Certifier receives any correspondence from any party concerning any legal liability, claim, dispute or any significant difficulty arising in connection with this Appointment, it must promptly forward a copy to CEC and Infracore unless such documents are legally privileged documents for the benefit of the Certifier (including without limitation any correspondence, documents or memoranda involving any claim or contemplated claim, proceedings or contemplated proceedings involving the Certifier which are privileged).

15 **LIMIT ON LIABILITY**

Notwithstanding any other provision of this Appointment, the maximum liability of the Certifier pursuant to and arising out of this Appointment shall not exceed ten million pounds sterling (£10,000,000) any one claim.

16 **ENTIRE AGREEMENT**

This Appointment sets out the entire agreement and understanding of the parties and supersedes all prior oral and written agreements, understandings or arrangements relating to the subject matter of this Appointment. None of the parties shall be entitled to rely on anything which is not stated in this Appointment or which cannot be implied as being reasonably required to give it business efficacy and it not otherwise inconsistent herewith.

17 **SEVERANCE**

If any provision of this Appointment is or becomes illegal, invalid or unenforceable in any jurisdiction that will not affect:

- (a) the legality, validity or enforceability in that jurisdiction of any other provision of this Appointment; or
- (b) the legality, validity or enforceability in any other jurisdiction of that or any other provision of this Appointment.

18 **GOVERNING LAW AND JURISDICTION**

Clause 117 (*Applicable Law*) of the Infracore Contract applies.

IN WITNESS WHEREOF these presents consisting of this and the preceding eleven (11) pages and the Schedule annexed hereto are executed by the parties as follows:


SUBSCRIBED for and on behalf of
HG CONSULTING (SCOTLAND) LIMITED

at GLASGOW
on the FIFTEENTH day
of JULY 2011
by

..... Director
..... Full Name
COLIN ROSS MITCHELL

before this witness
..... Witness
..... Full Name
SIMON LAMB
..... Address
c/o McGRISONS LLP

SUBSCRIBED for and on behalf of
CITY OF EDINBURGH COUNCIL

at Edinburgh
on the 24th day
of August 2011
by 

Authorised Signatory

SUSAN MARGARET BRUCE
Full Name

before this witness


 Witness

CAROL ANNE STEWART CAMPBELL Full Name

WAVERLEY COURT, Address

EDINBURGH

SUBSCRIBED for and on behalf of
TIE LIMITED

at Edinburgh
on the 24th day
of August 2011
by 

Director/Authorised Signatory

VICTOR R. EMERY
Full Name



before this witness

 Witness

Full Name

Address

SUBSCRIBED for and on behalf of
BILFINGER BERGER CIVIL UK LIMITED

at Edinburgh
on the 24th day
of 
by 

Director/Authorised Signatory

MARTIN FOERDEN
Full Name

before this witness

 Witness

Full Name

Address

at _____ day
on the _____ of 2011
by _____

Full Name

Witness

Full Name

Address

at
on the
of
by

Full Name

Witness

Full Name

Address

SCHEDULES

SCHEDULE PART 1

The Services

1 General

- 1.1 The Certifier shall familiarise itself with MoV4 and any changes issued from time to time, and any other relevant documentation or information referred to in MoV4 (including the relevant provisions of the Infraco Contract) to the extent necessary to fulfil its obligations within the terms of MoV4 and this Appointment.
- 1.2 The Certifier shall perform the Services independently, fairly and impartially to and as between tie, CEC, BBUK, Siemens and CAF and shall take into account all reasonable circumstances.
- 1.3 To the extent necessary in order to be in a position to carry out the Services the Certifier shall:
- (a) request and using reasonable endeavours obtain from Infraco such additional information as it reasonably requires to perform and properly discharge its obligations under this Appointment;
 - (b) where necessary attend project meetings (both on and off Site);
 - (c) enter the Site (complying with Infraco's site rules at all times) and from time to time monitor the Prioritised Works to view the general state and progress of the Prioritised Works to review overall workmanship, samples of goods and materials used or about to be used in the Prioritised Works and to ascertain generally that the terms of the Infraco Contract and MoV4 have been and are being complied with by Infraco. The frequency and timing of the Certifier's visits are dependent on the progress of construction on the Site. All visits are to be included within the fee. The Certifier shall agree a programme with Infraco for the inspection of key construction processes and the completed Prioritised Works and Infraco shall give the Certifier advance notice of these works being carried out on each Site;
 - (d) conduct site inspections on an occasional basis to become satisfied that the Prioritised Works are being undertaken in such a manner as is generally consistent with Good Industry Practice and in a manner likely to result in compliance with the Infraco Contract and MoV4 and promptly notify Infraco, tie and CEC of any likely non-compliance; and
 - (e) conduct visual inspection prior to completion to become satisfied that the Prioritised Works have been undertaken in such a manner as is generally consistent with the MoV4 and the Infraco Contract.

2 Materials, Equipment and D&C Costs

- 2.1 In accordance with Clauses 6, 7 and 8 of MoV4, the Certifier shall:
- (a) on 15 April 2011 issue a certificate (Certificate 1 – First Materials and Equipment and First D&C Costs Certificate) to Infraco and tie (which the Parties acknowledge has already been issued), certifying payment of the agreed sum of £27,000,000 (payable as £7,500,000 to BBUK in respect of an agreed first D&C Costs for design and structures and £19,500,000 to Siemens in respect of an agreed first D&C Costs for pre-installation and pre-commissioning works and in respect of the

transfer to CEC of ownership in and unencumbered title to such Materials and Equipment identified for vesting on 22 April 2011);

- (b) by 3 May 2011, at the request of CEC, tie and Infraco, issue a certificate (Certificate 2 – Second D&C Costs Certificate) to Infraco and tie, certifying payment of the agreed sum of £9,000,000 (payable as £5,000,000 to BBUK and £4,000,000 to Siemens);
- (c) on 15 June 2011, at the request of CEC, tie and Infraco, issue a certificate (Certificate 3A – Second Materials and Equipment) to Infraco and tie, certifying payment of the agreed sum of £4,334,000 (payable as £4,334,000 to Siemens) in respect of an agreed second payment to Siemens in respect of the transfer to CEC of ownership in and unencumbered title to such Materials and Equipment identified in the relevant Vesting Certificate;
- (d) on 13 July 2011, at the request of CEC, tie and Infraco, issue a certificate (Certificate 3B – Second Materials and Equipment) to Infraco and tie, certifying payment of the agreed sum of £4,333,000 (payable as £4,333,000 to Siemens) in respect of an agreed third payment to Siemens in respect of the transfer to CEC of ownership in and unencumbered title to such Materials and Equipment identified in the relevant Vesting Certificate; and
- (e) on 10 August 2011, at the request of CEC, tie and Infraco, issue a certificate (Certificate 3C – Second Materials and Equipment) to Infraco and tie, certifying payment of the agreed sum of £4,333,000 (payable as £4,333,000 to Siemens) in respect of an agreed fourth payment to Siemens in respect of the transfer to CEC of ownership in and unencumbered title to such Materials and Equipment identified in the relevant Vesting Certificate.

3 **Not used**

4 **Prioritised Works**

4.1 In the event that there is a variance of opinion between Infraco and tie in respect of any application made by Infraco and following any meeting referred to in Clause 5.2, the Certifier may query Infraco and/or tie's opinion and ask for full justification of any opinion of value. The extent of inquiry shall be to the Certifier's satisfaction.

4.2 In accordance with clause 9 of the MoV4, on each Valuation Date (as set out in Schedule Part 2 of MoV4), the Certifier shall:

- where satisfied that the works associated with the relevant Fixed Sum Prioritised Works Milestone are complete issue that day a Valuation Certificate in respect of such works to CEC, tie and Infraco; and
- where satisfied that the works associated with the relevant Target Price Prioritised Works Milestone are complete issue that day a Valuation Certificate in respect of such works to CEC, tie and Infraco.

4.3 Where the Certifier is not satisfied that the works associated with the relevant Fixed Sum Prioritised Works Milestone and/or Target Price Prioritised Works Milestone (as applicable) are complete, then it shall immediately notify CEC, tie and Infraco of any outstanding matters which are required to be attended to before the relevant Prioritised Works can be considered to be complete.

5 Preliminaries and delay in the Prioritised Works

- 5.1 The Certifier acknowledges that Preliminaries shall be deemed to be a time based payment and, subject to Paragraph 5.3 below, shall be certified for payment once the relevant time period has elapsed without the need for further valuation or substantiation.
- 5.2 Where the Certifier makes an assessment that the Prioritised Works are in delay as a result of circumstances in respect of which tie is responsible (having regard to MoV4 and/or the relevant terms of the Infraco Contract), Preliminaries shall be certified for payment as set in Paragraph 5.1, above.
- 5.3 In the event that Infraco does not progress the Prioritised Works in accordance with the Prioritised Works Programme and to the extent that tie is not responsible (having regard to MoV4 and/or the relevant terms of the Infraco Contract) for such lack of progress, the Certifier shall make a reasonable assessment of the Preliminaries properly due to Infraco and the same shall be certified for payment. The Certifier shall request that Infraco provide a breakdown of the Preliminaries in respect of each Prioritised Works area and any other percentages that make up the Preliminaries (e.g. design, office overheads etc) in order that the Certifier can make that reasonable assessment.
- 5.4 The Certifier acknowledges that deductions (if any) in Preliminaries shall only apply to the extent MoV4 applies thereto and save as otherwise agreed shall not be applicable to MoV5.

6 Changes

- 6.1 Where tie and Infraco fail to agree the programme implications of a proposed Change pursuant to paragraph 1.3 of Schedule Part 7 of the MoV4, the Certifier shall make a reasonable interim assessment of the extension of time award in respect of the Prioritised Works Programme.
- 6.2 Where tie and Infraco fail to agree the cost implications of a proposed Change pursuant to paragraph 1.3 of Schedule Part 7 of the MoV4, the Certifier shall assess what sums are fair and reasonable in respect of such Change.
- 6.3 The Certifier shall value the Change as follows:
- (a) by measurement and valuation at the rates and prices for similar work in Appendix F to Schedule Part 4 (Pricing) of the Infraco Contract as the case may be in so far as such rates and prices apply;
 - (b) where such rates and prices do not apply, by measurement and valuation at rates and prices deduced therefrom insofar as it is practical to do so;
 - (c) where such rates and prices do not apply and it is not practicable to deduce rates and prices therefrom, by measurement and/or valuation at fair rates and prices in accordance with Appendix G Schedule Part 4 (Pricing) of the Infraco Contract;

For the avoidance of doubt (a) to (c) above are not applicable to the valuation of tie Changes in respect of Systems and Trackwork and any such part of the Prioritised Works Estimate relating to Systems and Trackwork, including preliminaries, shall be valued by way of actual cost and or Prioritised Works Estimated actual cost.

- 6.4 CEC, tie and Infraco shall provide such information to the Certifier as the Certifier may reasonably require in order to value Changes.

7 Certified Deduction

- 7.1 In accordance with Clause 3.3.6 of MoV4, following notification by CEC as to the location to which the Trams, Tram Related Equipment and the Depot Equipment are to be delivered and the delivery of any such Trams, Tram Related Equipment and Depot Equipment to such location, the Certifier shall certify the value of Certified Deductions in respect of such Trams, Tram Related Equipment and Depot Equipment within 3 Business Days of the date(s) of such delivery.

SCHEDULE PART 2

The Fee

The Fee shall be the total number of hours worked by the Certifier in the relevant month multiplied by the applicable rate, the applicable rate being:

- £125 per hour in respect of the first 3 days per week; and
- £90 per hour in respect of any additional days in the relevant week.

This Fee is inclusive of all outlays and expenses, with the exception of:

- the Certifier's reasonably and properly incurred legal fees in respect of the negotiation and entering into this Appointment; and
- the increase of the Certifier's professional indemnity insurance from £2 million to £10 million any one claim,

which shall be payable in accordance with Clauses 8.4 and 8.5.