

AGREEMENT

between

THE CITY OF EDINBURGH COUNCIL, the local authority for the City of Edinburgh in terms of the Local Government etc. (Scotland) Act 1994, having its principal office at Council Headquarters, Waverley Court, East Market Street, Edinburgh, EH8 8BG, or its statutory successors (“**the Council**”)

and

tie Limited, a company incorporated under the Companies Acts (registered number SC230949) and having its Registered Office at City Chambers, High Street, Edinburgh, EH1 1YJ (“**tie**”)

Whereas:-

1. The Council set up tie in May 2002 to assist the Council with implementing its local transport strategy;
2. Powers were conferred upon the Council in relation to the design, construction, commissioning and operation of the Edinburgh Tram Network in terms of the Edinburgh Tram (Line One) Act 2006 and the Edinburgh Tram (Line Two) Act 2006;
3. The Council is the designated planning and roads authority for the City of Edinburgh;
4. In [2003], the Council appointed tie to facilitate the delivery and operation of the proposed tram system for Edinburgh--*[tie to confirm Terms of formal appointment-TBC]*;
5. A general operating agreement between tie and the Council was previously entered into whereby tie agreed to provide services to the Council in developing, procuring and implementing integrated transport projects within Edinburgh;

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6. The terms of the tram Final Business Case and the fact that tie was to enter into various agreements in relation to the Project were approved by the Council on 20 December 2007; and
7. The parties now wish to enter into this agreement to more particularly regulate the relationship between the parties specifically with regard to the procurement and delivery of the trams Project.

NOW THEREFORE THE PARTIES HAVE AGREED AND DO HEREBY AGREE AS FOLLOWS:

1 Definitions

- 1.1 In this Agreement the following terms and expressions shall have the following meanings:

“Agreement”	means this agreement (including the schedules to it), as it may be amended from time to time;
“Tram Monitoring Officer”	means the Council Officer nominated by the Council to monitor the Company;
“Employer’s Requirements”	means <u>[TBC]</u> ;
“Final Business Case”	means the business case relating to the Project which was approved by the Council on 20 December 2007;
“Funding Agreement”	means the Council-accepted grant offer letter from Transport Scotland to the Council dated [];
<u>“Infraco Contract”</u>	<u>means the contract between tie and Bilfinger Berger UK Limited and Siemens plc;</u>
“Legislation”	means all rules, regulations, by-laws, directives, statutes and other binding provisions in force from time to time;

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“Phase 1A”	means <u>[TBC]</u>
“Phase 1B”	means <u>[TBC]</u>
“Project”	means the procurement and delivery of a tram system for Edinburgh (Phase 1A and Phase 1B), as more particularly described in the Final Business Case and approved by the Council in terms of scope; and
“Scope of Works”	means <u>[TBC]</u>
“Services”	means the services, service levels and specification of services set out in the schedule to this Agreement, or as otherwise agreed in writing between the parties from time to time.
“Tram Acts”	means <u>Edinburgh Tram (Line One) Act 2006 and the Edinburgh Tram (Line Two) Act 2006;</u>
“Tramco Contract”	means <u>the contract between tie and CAF; and</u>
“Tram Monitoring Officer”	<u>means the Council officer nominated by the Council to monitor the Company in relation to the Project.</u>

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- 1.2. Headings are included in this Agreement for ease of reference only and shall not affect the interpretation or construction of it.
- 1.3. In this Agreement, references to clauses are, unless otherwise provided, references to clauses of this Agreement and references to schedules are references to the appropriate schedules to it.
- 1.4. In this Agreement, the masculine includes the feminine and the neuter and the singular includes the plural and vice-versa.

2. tie’s Obligations

- 2.1 tie hereby agree to provide the ~~s~~Services specified in this Agreement to the

Council throughout the duration of this Agreement in order to assist in, carry out, promote, manage and administer the Project.

- 2.2 tie shall ensure that all third party advisers and contractors engaged by it shall provide a direct duty of care to the Council in terms acceptable to the Council prior to carrying out any work in relation to the Project, failing which the appointment of any such third party will require approval of the Tram Monitoring Officer.
- 2.3 tie shall use best endeavours to ensure that it delivers a world-class-tram system for Edinburgh as specified in the Final Business Case, the Scope of Works and the Employer's Requirements. tie shall comply with all timescales and financial projections detailed in the Final Business Case.
- 2.4 tie shall use best endeavours to ensure that it is at all times suitably resourced to carry out all the Services specified in this Agreement in relation to the Project.
- 2.5 tie shall use best endeavours to ensure that it does not cause the Council to breach the terms of the Funding Agreement. In particular tie shall use best endeavours to ensure that the Council complies with the conditions relating to publicity in the Funding Agreement.
- 2.6 tie shall use best endeavours to ensure that it complies with and, where it acts on the Council's behalf, shall use best endeavours to ensure that the Council complies with, all Legislation (including all health and safety legislation) relevant to the Project at all times.
- 2.7 tie shall use best endeavours to ensure that all work sites related to the Project are appropriately managed and supervised at all times to ensure compliance with all health and safety Legislation.
- ~~2.7.8~~ tie shall use best endeavours to ensure that it does not infringe the intellectual property rights of any third party at any time.
- ~~2.8.9~~ tie shall use, and shall use best endeavours to procure that all contractors, employees and other third parties which it engages shall use, all reasonable skill, care and diligence in the provision of the Services specified in this Agreement. All work undertaken by tie shall be progressed with due expedition and without delay to achieve timeous completion of the Project.

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2-92.10 tie shall discharge all its obligations in terms of this Agreement in a proper, honest, faithful and diligent manner and shall at all times act in the best interests of the Council (to the fullest extent permitted by law).

2-102.11 Insofar as permitted by law, tie shall at all times promptly comply with all reasonable requests made of it by the Council.

2-112.12 tie shall at all times maintain in place appropriate policies of insurance in relation to all elements of its business and in particular the Project provided that each insurance is available in the United Kingdom insurance market at commercially reasonable rates and on commercially reasonable terms to businesses of the same status and discipline as tie. tie shall promptly inform the Council in writing if any insurance ceases to be maintained and/or ceases to be available in the United Kingdom market at commercially reasonable rates and or commercially reasonable terms. In this event, the Parties shall meet to discuss the means by which any risks previously covered by insurance should be managed, mitigated or controlled. [Any such increase or additional premium required by insurers by reason of tie's own claim record or other acts, omissions, matter or things particular to tie shall be deemed to be within commercially reasonable rates and terms.] [TBC] tie and shall provide evidence of all such insurances upon request by the Council. *[tie to ensure that all insurance shall be in joint names so that the Council is covered? – CDD/Finance to confirm?]*

2-122.13 tie shall ensure that all contractors and consultants engaged or employed by it shall have in place a policy of insurance providing tie [*and the Council - CDD/Finance to confirm*] with appropriate indemnity for all risks relevant to their engagement provided that each insurance is available in the United Kingdom insurance market at commercially reasonable rates and on commercially reasonable terms to businesses of the same status and discipline as the contractor or consultant. tie shall promptly inform the Council in writing if any insurance ceases to be maintained and/or ceases to be available in the United Kingdom market at commercially reasonable rates and or commercially reasonable terms. In this event, the Parties shall meet to discuss the means by which any risks previously covered by insurance should be managed, mitigated or controlled. [Any such increase or additional premium required by insurers by reason of the contractor's or the consultant's own

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claim record or other acts, omissions, matter or things particular to tie shall be deemed to be within commercially reasonable rates and terms. [TBC]

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2.14 tie will ensure that the Public & Products Liability and Professional Indemnity policies are to include an indemnity to principals clause. [tie to explain this requirement further]

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~~2.13~~ 2.15 tie shall use best endeavours to ensure best value when providing the sServices specified in this Agreement and in the discharge of all of tie's responsibilities. tie shall use best endeavours to ensure best value in the use of funds or resources provided through or by the Council.

~~2.14~~ 2.16 tie shall continue to apply principles of good corporate governance and to adopt and adhere to the Council's Code on Corporate Governance (approved by the Council on 29 June 2006) as it may be amended from time to time.

~~2.15~~ 2.17 tie shall allow the Council, its auditors or the Council's other delegated appointees to examine the books, accounts and other records kept by tie (and any subsidiary undertakings of tie) and shall supply the Council with such financial and other information as it may reasonably request from time to time to keep the Council fully informed about the business of tie (and any subsidiary undertakings) and to protect the Council's interests in relation to the terms of this Agreement. tie will supply copies of all board papers to the Tram Monitoring Officer.

~~2.16~~ 2.18 tie shall use best endeavours to ensure that it and all third parties it engages and/or contracts with to carry out any works shall at all times comply with all equalities legislation and shall act in a non-discriminatory manner.

~~2.17~~ 2.19 tie shall liaise with the Council, and any other bodies which the Council may specify, regularly and shall report to the Council on a four-weekly and annual basis with regard to financial matters and progress generally on the Project in a format acceptable to the Council.

~~2.18~~ 2.20 Immediately that tie becomes aware of the likelihood of delay to, or overspend in, the Project it shall notify the Council at the earliest opportunity, informing it of the reasons for the potential delay or overspend and any measures (together with costs) which may mitigate such potential delay or overspend.

~~2.192.21~~ Immediately tie becomes aware that it requires a decision or information essential to the continuity of the Project from the Council to achieve key dates in the Project, tie shall give notice of such requirement to the Council with full supporting information to mitigate any delay to the Project to the fullest extent possible.

~~2.202.22~~ tie shall not settle any single claim in excess of £500,000, or series of claims in any 12 month period which would exceed in aggregate £1,000,000 without prior written approval from the Tram Monitoring Officer.

~~2.212.23~~ tie shall not appoint any employee or consultant with a remuneration or fees over £75,000 without prior written approval from the Tram Monitoring Officer.

~~2.222.24~~ All bonus schemes proposed by tie require to be approved by the Council. tie shall not award any bonus to any employee or contractor without prior written approval from the [Tram Monitoring Officer] of the bonus scheme terms. tie shall supply the Council all information which the Council may reasonably require in order to assess any proposed scheme and the outcomes to which any such bonuses are linked.

~~2.232.25~~ tie will provide a business plan to the Council on an annual basis.

~~2.242.26~~ tie shall use best endeavours to ensure that it and all contractors engaged by it protect the Council's reputation all at times in matters relating to the Project.

~~2.252.27~~ tie shall not novate or otherwise transfer any rights or obligations under any contractual arrangement which the Council has approved and to which tie is a party without the prior written consent of the Tram Monitoring Officer.

~~2.262.28~~ tie shall comply with the terms of all agreements to which it is a party unless authorised in writing by the Tram Monitoring Officer to do otherwise. ~~{issue is to ensure tie complies with agreements, but not if it is considered best to breach the terms and the Council agrees with this assessment}~~

~~2.272.29~~ tie shall comply with the governance diagram set out in [Schedule 2]~~{CDD to confirm which issues are to be referred to TPB and which direct to the Council?}~~.

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~~2.282.30~~ tie warrant that they have at all times complied with the terms of the existing operating agreement between tie and the Council and have at all times acted, insofar as lawful, in the best interests of the Council.

~~2.292.31~~ tie shall produce a communications protocol and have this approved [quarterly/annually] by ~~obtain prior written approval for all announcements or publicity relating to the Project from the Tram Monitoring Officer.~~

~~2.302.32~~ tie will be subject to an independent peer review panel concerning the management of the Project (including all the contract documentation) and will implement all recommendations of the panel once approved by the Council.

3. **Council's Obligations and Delegation**

3.1 The Council hereby delegates to tie, such delegations confirmed for the purposes of section 68 of the respective Tram Acts, full legal authority to (i) enter into and manage the Infraco Contract; (ii) to enter into and novate the Tramco Contract; and (iii) novate the agreement between tie and Parsons Brinkerhoff Limited dated [.] *[TBC - to mirror the Council report wording and recommendations]*.

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3.2 The Council agrees to guarantee tie's financial obligations in relation to certain aspects of the Project on terms acceptable to the Council.

3.3 On the basis that tie has, in the reasonable opinion of the Council, provided adequate evidence that expenditure has been properly and appropriately incurred in relation to the provision of the §Services specified in this Agreement and the Project as agreed by the Council in advance of expenditure commitment, the Council will secure funding for such expenditure and shall pass funding to tie to allow tie to discharge its obligations in terms of this Agreement.

~~3.42~~ *[Terms of appointments of Council officers/members to tie Board to be considered – CDD to confirm]*.

~~3.53~~ The Council will nominate a Council officer to act as a liaison point for day-to-day communication between the Company and the Council.

~~3.64~~ The Council will appoint a Tram Monitoring Officer.

~~3.75~~ The Tram Monitoring Officer will be responsible for determining what approval is required from within the Council to allow him to give any consent

or recommendation required in terms of this agreement. The parties acknowledge that the Tram Monitoring Officer may require to obtain approval of his proposed actions from the full Council or from a relevant committee or sub-committee.

3.86 The Council will ensure that, in the Council's opinion, adequate personnel are made available to the Project to fulfill the Council's role in relation to the Project and that all such personnel shall use reasonable skill and care in executing their responsibilities.

3.9 The Council acknowledges that tie continues to work on other projects in addition to the Project, but tie agree that they shall manage such projects in order that they do not conflict with the terms of this Agreement.

4. Term

4.1 This Agreement shall commence on [2008] and shall continue until termination is agreed between the parties, unless otherwise terminated earlier in accordance with its terms.

5. Indemnity

5.1 Subject to the terms of any guarantee(s) given by the Council, tie is wholly responsible for meeting timeously all obligations, liabilities or claims of whatsoever nature arising out of or in connection with the implementation of its obligations under this Agreement. [tie shall indemnify the Council, its officers, employees and agents from and against all costs, expenses, actions, claims, demands and other liabilities which the Council or its officers, employees and agents may suffer which arise from tie, its employees or its other appointed representatives breaching the terms of this Agreement.][TBC]

6. Termination

6.1 Either party may terminate this Agreement immediately by giving notice to that effect to the other if the other party is in material breach of its obligations and has failed to remedy that breach (assuming it is capable of remedy) within

14 days of receiving such notice.

7. Dispute Procedure

7.1 Any dispute or difference between the parties as to the meaning or intent of this Agreement or the implementation thereof or as to any other matter in any way arising out of or in connection with this Agreement shall be referred to the decision of an Arbiter to be mutually agreed between the parties or, failing agreement, to be appointed by the President for the time being of the Law Society of Scotland. The decision of such Arbiter shall be final and binding on both parties. The application of Section 3 of the Administration of Justice (Scotland) Act 1972 is hereby expressly excluded.

8. Transfer and Sub-contracting

8.1 This Agreement is personal to tie and tie shall not assign, novate, sub-contract or otherwise transfer by any means whatsoever any right or interest or obligation which it may have in or under this Agreement without the prior written consent of the Tram Monitoring Officer.

8.2 For the avoidance of doubt, the Council shall be entitled to assign, novate or otherwise dispose of its rights and obligations under this Agreement.

9. Notices

9.1 Any notice given under this Agreement by either party to the other must be in writing and may be delivered personally, by fax or first class post or by email. In the case of posting, such notice will be deemed to have been given three working days after the date of posting; in the case of fax or email, the next working day; and in the case of personal delivery, at the time of delivery. Notices will be delivered or sent to the addresses of the parties on the first page of this Agreement or at any other address or fax number notified in writing by either party to the other for the purpose of receiving notices after the date of this Agreement. All email notices shall be sent to either [] at tie or [] at the Council.

10. **Freedom of Information**

10.1 The parties acknowledge that they will fully comply with, and will assist each other in complying with, the terms of the Freedom of Information (Scotland) Act 2002.

11. **Nature of Relationship**

~~11.1 This is an Agreement between two independent contracting parties and~~
11.1 Nothing in this Agreement shall create a relationship of agency or partnership between the parties with regard to its subject matter.

11.2 Nothing in the Agreement shall prejudice or affect the Council's rights, powers, duties and obligations in the exercise of its functions as a local authority or in terms of any Legislation.

12. **Entire Agreement and Variations**

12.1 This Agreement and the attached schedules constitute the entire agreement between the parties in relation to their subject matter. Each party confirms that it has not relied upon any representation, undertaking or warranty not recorded in this document in entering into this Agreement. No variation of this Agreement shall be effective unless confirmed in writing and signed by authorised signatories of both parties to this Agreement. This agreement supersedes any prior agreement in relation to its subject matter.

13. **Severability**

13.1 If any term of this Agreement shall be held to be illegal, invalid or unenforceable, in whole or in part, under any enactment or rule of law, such term or part shall to that extent be deemed not to form part of this Agreement but the legality, validity or enforceability of the remainder of this Agreement shall not be affected.

Director/Secretary.....

SCHEDULE 1

~~{Terms and scope of "Services" to be provided by tie to the Council require to be further defined in this schedule - further discussion required as to whether a schedule is required}~~

Schedule 1 to be removed - CDD to confirm which terms below are already covered by ERs, FBC or Scope of Works and which require to be in the main body of the agreement.

Services to be provided

- Procurement of SDS, MUDFA, Infraco & Tramco, including due diligence/audits [this will be done coterminously with close and signing the Operating Agreement, to the extent not already done, so the requirement can be removed. See also comments about an over-arching approval to enter into the contracts in my email]
- ~~Tie will comply with Transport Scotland's four-week reporting requirements and payment application terms in relation to the Project [Covered by the compliance with the Funding Agreement clause 2.17]~~
- ~~Tie must provide the Council with four-weekly cash flow forecasts and financial statements, in the agreed format in relation to the Project and also provide annual figures [Covered by 2.5]~~
- Provide accurate and current information to Tram Project Board, Transport Edinburgh Limited and the Council for appropriate decision making and approvals [as for peer review ?]
- Manage, financially control and timeously execute the SDS, Mudfa, Infraco and Tramco contracts, including managing change controls [add change control to the body of the document ?]
- Effectively and efficiently identify and manage the Project risks and appropriately advise the Council (including reputational, financial, design, third party, etc) [as for change control ?]
- Employ where appropriate the Traffic Management Team so as to effectively control the temporary and permanent traffic management both on and off line, as necessary
- Provide Health & Safety assessments (including HMRi, CDM etc) [include in body]
- Provide Design & Systems assurances [not sure what this means]
- Provide effective communications, consistent with the agreed strategy [include in body]
- Ensure that all contracting parties meet all their obligations (including protocols, traffic management, contract conditions, employer's requirements, site supervision and testing etc) ditto
- Provide the necessary site supervision and management to ensure the assured quality outcomes consistent with the contract requirements, protocols and other agreements with the Council, transport stakeholders and other third parties.
- Deliver the agreed Value Engineering
- Implement and manage the Traffic Regulation Order process ditto
- Effectively liaise with Transport Edinburgh Limited through to the handover ditto

- Take responsibility for the Project land in a manner acceptable to the Council
- Act with due diligence towards the Council's interest and specifically to enact the agreed recommendations from OGC already in the document, OGC will be history
- Manage all third party agreements relating to the Project in an effective manner and in the Council's best interests include in document
- Enactment of the project consistent with the agreed Final Business Case already covered
- Procure appropriate legal advice so as to enable the Council to comply with its statutory obligations
- Carry out other duties as instructed by the Council