

EDINBURGH TRAM NETWORK 2009 GOVERNANCE REORGANISATION FINAL ACTIONS AND APPROVALS REQUIRED

Summary paper for Board meetings 23rd September 2009

(1) Background and purpose of paper

The detailed rationale for the reorganisation has been aired at a number of Board meetings since the end of 2008. The principles have been approved by the Boards and by the Council, most recently at its meeting on 20th August 2009. The final form of the key documents will be submitted to the Council's Policy & Strategy Committee on 29th September 2009 for final approval. This should leave only the mechanics of execution, as described below.

The purpose of this paper and the attachments is to provide a brief reminder of the background and objectives and to provide an overview of the work done in support of execution. Copies of the main documents are attached, though the this paper is designed to cover all key issues.

At the December 2008 TPB, a number of options for streamlining the current governance and corporate model were considered. The structure then and now is:

- CEC is client and principal stakeholder
- TEL is 100% sub responsible for overall delivery and future operational integration
- The TPB is a TEL sub-Committee established to oversee delivery (by tie) and planning for operations
- Tram Project Director reports formally to TPB on progress
- Tie Board is responsible for contractual fulfilment
- TS is principal funder

The governance model reflects inheritance but is working reasonably well. Roles and responsibilities are clear in practice. External parties (TS, Audit Scotland) have no major concerns and the model is operating in line with that approved in the 2007 Final Business Case. Attendance and engagement at regular meetings is generally good.

However, there are areas needing improvement :

- Tie Board meetings go beyond contractual focus and the demarcation between tie and TEL / TPB has grey areas. The calibre of the tie Board and quality of challenge is very good. This is a high quality resource which is somewhat out on a limb. The precise responsibilities of tie Limited are a cause for concern among tie Directors.
- There is considerable overlap in practice between tie Board and TPB interrogation

- Tie is seen as the player responsible for all aspects, not aligned to actual responsibilities (CEC in particular have key responsibilities around interface with public, roads and traffic which are attributed to tie)
- In general, CEC's leadership role is not well reflected in the execution of governance
- The TEL role and business model is not yet distinct. TEL is not established as an active company.

Concern has been expressed at tie Board meetings about the weaknesses described above. A report by tie's internal auditors earlier this year echoed those concerns and recommended that the reorganisation be implemented.

The initial plan was to integrate the full family of organisations – CEC, TEL, tie and LB. It was subsequently determined to do this in two stages, with the first excluding LB. This paper addresses the execution of the first stage. The reorganisation option selected and subsequently approved was known earlier as "Option D", which has the following main features :

- Tie's shares will be transferred to TEL from CEC
- The Boards of tie and TEL will be revised, in particular so that TEL has the full complement needed to oversee the entirety of the tram project through construction and into operations, including maintenance.
- The tie Board retains its normal statutory responsibilities but the focus of governance over construction activity moves to TEL (away from tie), executed under delegation to TEL's sub-committee, the TPB.
- The TEL OA needs to be revised to reflect these matters.
- The tie OAs (the original 2002 "general" OA and the 2007 "tram" OA) would not be amended so that the detail of the changed arrangements are given a low profile with BSC's machinations in mind and also to preserve the documentation which supports tie's status as the Council's "in-house provider" under the procurement regulations.
- The MoU is intended to codify the relationship between TEL, tie and CEC under these new arrangements.

The essence is that the re-constituted TEL Board has responsibility for all aspects of project delivery including those executed by its new subsidiary, tie Ltd.

A summary of the main aspects of the reorganisation is provided below and the main documents are included as attachments :

- Attachment 1 – Chart illustrating proposed corporate and committee structure.
- Attachment 2 – Draft Memorandum of Understanding among CEC, TEL and tie
- Attachment 3 – Draft revised TEL / CEC Operating Agreement
- Attachment 4 – Report from DLA on legal aspects
- Attachment 5 – Report from PwC on tax aspects
- Attachment 6 – Report from DLA on H&S responsibilities
- Attachment 7 – Report from Heath Lambert on insurance aspects
- Attachment 8 & 9 – tie / CEC existing Operating Agreements for reference
- Attachment 10 – Draft minute for execution of share transfer to TEL

(2) Commentary

This section is intended to provide a summary of the key aspects of the governance reorganisation and the attached documents.

Corporate and Committee structure

The chart illustrates the new structure in summary form, and there is a further chart at the end of the draft TEL / CEC Operating Agreement (“OA”) which incorporates the CEC governance model which sits above TEL.

The existing committees of tie Ltd (audit, remuneration and safety) will be disbanded and equivalent committees created under TEL using the same remit and membership.

Draft MoU

Purpose of MoU and status as a legally binding document

This document is legally binding on the parties – CEC, TEL and tie. This aligns its status with the operating agreements. Its purpose is to ensure clarity of responsibility among the parties, including the precedence of the other governance documents.

Inclusion of Gogar interchange

The prospective Gogar interchange is noted in the MoU (and in the TEL / CEC OA) as a dimension of the Tram Project. The obligations of TEL are restricted at present to those which are already established by the agreement between CEC and Transport Scotland relating to design of the interchange. As and when proposals for construction are prepared (including funding and implications for the tram programme and budget) those new obligations will require formal review and approval by TEL.

The MoU requires that CEC, TEL and tie work together to execute the design arrangements and there are a few practical matters which will require further consideration between TEL, tie and CEC in relation to the application of the design arrangements. These will be brought forward to the TPB in due course.

Remuneration Committees

The activities of the tie RemComm will be performed by the new TEL RemComm.

Operations of RemComm

The existing model requires that the tie Board or TEL Board as appropriate deal with all remuneration matters, subject to (1) confirming to CEC that incentivisation arrangements are aligned to project milestones ; and 2) that the

package for tie's Executive Chairman is approved by the Council Chief Executive.

It was agreed that these principles would be maintained in the new arrangements, so that the TEL Board through its RemComm would continue to communicate the confirmation at (1) to the Council and this would include the arrangements for tie. In addition, however, the remuneration policy principles of TEL and tie will be subject to annual approval by the Council Chief Executive and there will be a triennial market testing review of TEL / tie remuneration packages.

The packages of the Chairman and CEO of tie and TEL will continue to be approved on appointment by the Council Chief Executive. Any changes to the packages of the tie or TEL Chairman will continue to be determined by the Council Chief Executive. Thereafter, any changes to the packages of the tie or TEL CEOs will be determined by the tie or TEL Chairman through the TEL RemComm.

Revised TEL / CEC OA

This is based on the existing agreement but reflects TEL's responsibilities under the new structure.

References to Phase 1B

These have been retained as Council policy remains that Phase 1B will be constructed when conditions and funding are right.

Statement of scope of delegated authority from CEC to TEL

It was recognised that the detailed definition of delegated authority to TEL was difficult to draft while the dispute with BSC continued with consequent uncertainty as to programme and cost. However, the principle of providing TEL with limited delegated authority was agreed and that this should be set at increased cost of £1m and / or 3 months programme delay. This replaces the current authority of up to £10m and / or 3 months programme delay. These changes align the authority to that offered down the governance hierarchy to the Project SRO and the Tram Project Director.

The baseline against which these delegations are to be measured is stated to be subject to Council Chief Executive approval rather than specified at this stage, in view of the uncertainty about BSC disputed matters. Firm baselines can be installed when the uncertainty clears.

An open point exists whereby CEC Legal require to confirm that no further amendment to the Council Chief Executive's authority is needed, but this will be a matter for internal CEC governance rather than the OA.

In practice, this means that the existing baseline of £512m and July 2011 revenue commencement will continue to apply and therefore that all cost increases above £1m and delays beyond 3 months will require Council approval. In fact, as the £545m threshold is also threatened, all cost increases are currently matters reserved to the Council. The practical means to manage the current period of uncertainty will be to roll up the impact of anticipated cost increases and / or programme delays with the emerging conclusions to the BSC contractual process and seek an omnibus Council approval at the appropriate time, most likely in early 2010. Regular reporting to the TPB will of course continue.

Remuneration matters

The arrangements noted above are installed into the TEL operating agreement.

Other matters

Important but largely technical changes have been effected in relation to TEL's status as agent of CEC and related matters. These arise from legal and tax considerations.

It was agreed at an early stage to focus changes only where they were needed and aside from the main points above, the OA is in similar form to the existing version, which in turn mirrors the practical aspects of the tie operating agreements.

Legal Report

This addresses the interaction with a range of legislation and contractual arrangements entered into by tie, with an objective of ensuring that any consequential effects are identified. The attachment is the executive summary, full report has been reviewed by CEC Legal and is available on request. The interfaces assessed are :

- Infraco contractual suite
- Tram Acts
- MUDFA and other utility contracts
- DPOFA
- Procurement Law (UK law and EU Directives)
- State aid;
- TUPE;
- Transport Act 1985;
- Competition Law;
- Health and Safety legislation and CDM Regulations.
- Third party agreements
- Collateral warranties

No difficulties are noted under these headings.

The reorganisation offers some scope for BSC mischief but it has been confirmed that the proposals do not change tie or CEC's legal position relative to the Consortium. The mischief, borne of the current dispute, could for example require response to vexatious-type requests for confirmation of tie's capability to execute its contractual obligations, but these matters are regarded as manageable.

The Tram Acts require that a simple letter from CEC to Scottish Ministers is required to secure TEL's position and DLA will advise on content, with timing required to be within 21 days of signing the OA.

There is no requirement in the grant letter to notify Transport Scotland of the proposals, but they are already aware of the principles and an informal communication would be appropriate when concluded.

Tax aspects

The objective here was to assess whether the reorganisation created any tax exposures or impeded the planning for the operational period. Subject to some matters of clarification that will be verbally reported on at the meetings on 23rd September, the conclusion is that there is no new exposure, although it is recommended that the VAT position be cleared with HMRC prior to execution. This has been actioned. A claim to support stamp duty relief is also required in due course.

Health & Safety

Tie's management team and DLA have reviewed the impact of the reorganisation on H&S responsibilities and safety management systems. Attachment 6 provides a comprehensive review of current legislative and best practice considerations for all parties. The attachment also summarises the main actions needed following the reorganisation. The essence of the advice is that :

- 1) there is no weakening or deficiency introduced into the overall structure of safety management so long as certain practical actions are taken, including the establishment of TEL's Safety Committee.
- 2) There is benefit to all involved to refresh understanding of safety management responsibilities and procedures. It is recommended that the attached document is read and any questions raised with Steven Bell ; and
- 3) The opportunity will be taken by the project team to review all important aspects of the safety management system, with a report to the October 2009 TPB.

It is also noted that the position of the remaining tie Board members will require legal protection, so far as can be properly constructed, in view of the directors' limited capacity to influence safety management under the revised structure which incorporates direction by TEL.

Finally, the safety responsibilities of tie's contractors, particularly Infracore, are completely unchanged by the reorganisation.

Insurance

The report from Heath Lambert confirms no difficulties, noting that some policies will require administrative amendment, including D&O cover given revised Board composition.

Existing tie / CEC Operating Agreements

The tie / CEC Operating Agreements are unchanged and have been left in place for the reasons described above. The MoU codifies the overall relationship among the various documents to prevent any ambiguity.

Share transfer

The draft minute will be required to be signed at the Board meeting which effects the share transfer and the draft from CEC Legal is provided now for informal approval.

Company constitutional documents

CEC Legal have confirmed that there are no further amendments required to the Memorandum and Articles of tie or TEL which are necessary to execute the reorganisation in an effective legal manner.

(3) Board composition

It is critical that revised Board composition is agreed and is made ready to execute before or at the same time as the reorganisation is effected.

(4) Tie's other projects

These are limited in scope and risk and are managed under the direction of the tie Chief Executive and his executive team. If any significant project issues should arise, appropriate dialogue will take place with the TEL Board and / or Council officers as appropriate. In the event that any such project impinges on the tram project, the matter will be brought to the attention of the TPB.

(5) Actions required from Boards

The actions required by the Boards (individually – TPB, tie, TEL) are as follows:

TPB :

- to confirm on behalf of TEL Board its satisfaction with the proposed reorganisation and the terms of the draft OA, the terms of the draft MoU and the content of the reports contained in attachments 4-7.

Tie Board :

- to confirm its satisfaction with the proposed reorganisation and the terms of the draft MoU and the content of the reports contained in attachments 4-7
- to approve disbandment of its audit, remuneration and safety committees, noting that these committees will be reconstituted as committees of TEL with the same remit and membership
- to note the requirement that execution of the reorganisation cannot be executed until 1) the documentation has been approved by the Policy & Strategy Committee of the Council on 29th September ; and 2) revised Board membership for TEL has been executed

TEL Board :

- to note the confirmation from the TPB and to confirm on its own behalf its satisfaction with the proposed reorganisation and the terms of the draft TEL / CEC OA, the terms of the draft MoU and the content of the reports contained in attachments 4-7
- to approve the creation of audit, remuneration and safety committees with the same remit and membership as was the case for the tie Ltd equivalent committees which are now to be disbanded
- to approve informally the terms of the draft minute recording the prospective share transfer
- to note the requirement that execution of the reorganisation cannot be executed until 1) the documentation has been approved by the Policy & Strategy Committee of the Council on 29th September ; and 2) revised Board membership for TEL has been executed

(6) Next steps

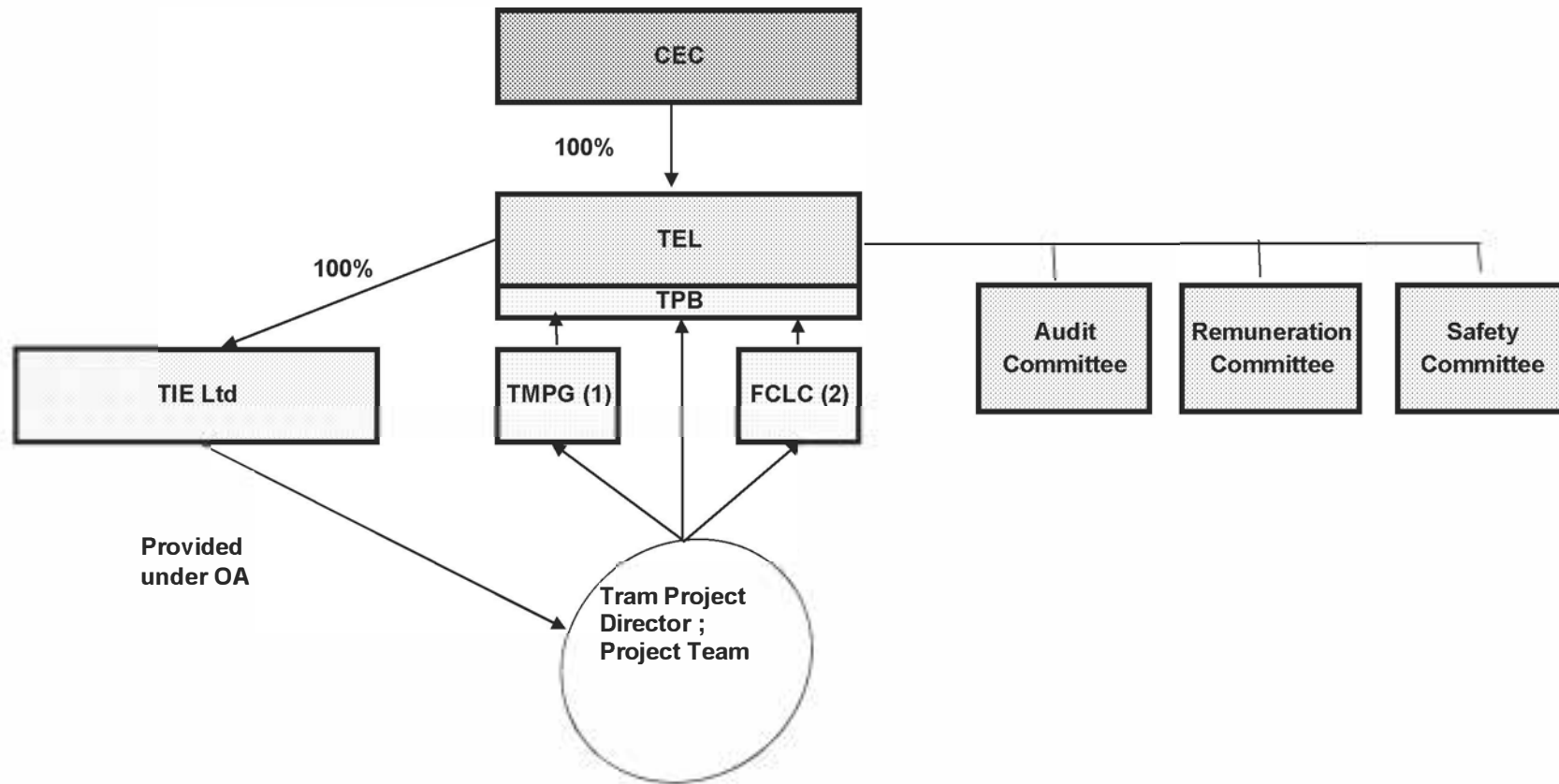
- 1) Approval as above in all respects by the TPB, TEL Board and tie Board on 23rd September, with delegated authority from the tie and TEL Boards to committees to execute all relevant matters.**
- 2) Agree revised tie Board, TEL Board and TPB composition**
- 3) H&S procedures and responsibilities re-aligned and communicated ; position of tie Ltd Board addressed**
- 4) Terms of CEC Chief Executive's authority over changes to delegated authority finalised**
- 5) Tax – clarification of CT aspects, VAT clearance, Stamp Duty Relief Claim**
- 6) Minor changes to insurance cover**
- 7) Approval of report and related documents by Policy & Strategy Committee (29th September 2009)**
- 8) Execution of all reorganisation documents**

- 9) H&S review and report to October TPB**
- 10) Letter to Scottish Ministers**
- 11) Informal notification to Transport Scotland**

GB

16th September 2009

EDINBURGH TRAM PROJECT - REVISED CORPORATE AND COMMITTEE STRUCTURE 2009



- (1) TMPG = Traffic Management Peer Group, properly constituted sub-committee of TPB
- (2) FCLC = Financial, Legal & Commercial Committee, ditto.

MEMORANDUM OF UNDERSTANDING

among

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**”)

and

TRANSPORT EDINBURGH LIMITED, a company incorporated under the Companies Acts (registered number SC269639) and having its Registered Office at 55 Annandale Street, Edinburgh EH7 4AZ (“**TEL**”)

(together “**the Parties**”)

Whereas:-

1. The Council entered into separate operating agreements with both tie and TEL in May 2008 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;
2. The Parties now wish to enter into this agreement to further regulate the relationship between the Parties, specifically with regard to ownership structures and modified governance arrangements.

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

- 1.1 This agreement should be read in conjunction with the TEL and tie Operating Agreements and defined terms should be construed accordingly.
- 1.2 The existing agreement between TEL and the Council is terminated with immediate effect and a revised Operating Agreement will take its place.
- 1.3 The Parties acknowledge that the TEL Operating Agreement now includes obligations with regard to the delivery of the Gogar Intermodal Station project. Therefore, with reference to the definition of “Funding Agreement” in the tie Operating Agreement dated May 2008, the Parties agree that such definition shall be deemed to include the terms of the Gogar Funding Agreement to facilitate the delivery of the proposed Gogar Intermodal Station project. The Parties further agree to work together to ensure that TEL (through tie) manage and deliver the Gogar Intermodal Station project. The Parties acknowledge that further arrangements will need to be formally agreed between TEL and the Council in due course as the Gogar Intermodal Station project progresses beyond the design stage.
- 1.4 With reference to clause 2.20 of the tie Operating Agreement dated May 2008, it is acknowledged by the Parties that although day-to-day management of the tram project will remain with tie, all strategic and other material decisions will be made by TEL and direction will be given to tie on such matters through the Tram Project Board. In this regard the companies shall comply with the governance diagram at Schedule 1 and the governance diagram in the tie Operating Agreement dated May 2008 shall be redundant.
- 1.5 With reference to clause 2.24 of the tie Operating Agreement dated May 2008, it is acknowledged by the Parties that the settlement of any and all claims and payments will now be within the control of TEL and the Tram Project Board as per the terms of the revised Operating Agreement between TEL and the Council, including the terms of authority delegated by the Council to TEL set out therein.
- 1.6 With reference to clause 2.25 of the tie Operating Agreement dated May 2008, it is acknowledged by the Parties that the existing clause shall be redundant and the following provisions shall apply. tie shall no longer require to operate a Remuneration Committee of the tie Board and all relevant tie remuneration matters will be monitored and controlled by the Remuneration Committee of the TEL Board in accordance with the terms of the TEL Operating Agreement.
- 1.7 The remuneration packages of the Chairman and Chief Executive of tie respectively will be determined in accordance with the terms set out in the TEL Operating Agreement.
- 1.8 With reference to clause 2.26 of the tie Operating Agreement dated May 2008, tie will not be required to submit an annual business plan. TEL agrees to include this within its business plan.
- 1.9 In order to avoid duplication, the Parties agree that, with regard to the obligations incumbent upon tie in terms of the tie Operating Agreements, where TEL have already performed an obligation on tie’s behalf, tie need not perform such obligation again. Similarly, an obligation incumbent upon TEL shall be deemed to be fulfilled if a subsidiary of TEL meets that obligation.

- 1.10 The Parties agree that tie has no delegated authority to approve changes to the contractual arrangements, scope, programme, cost or any other substantive aspect of the Project except to the extent that TEL or the Tram Project Board expressly provides such delegated authority to the tie Chief Executive, the designated Tram Project Director or other approved tie director or officer.
- 1.11 The Parties agree that the Tram Monitoring Officer will not formally be a member of the Tram Project Board or a director of TEL and Clause 3.5 of the tie Operating Agreement dated May 2008 will be construed accordingly. However, the Council will use all reasonable endeavours to procure that the Tram Monitoring Officer will, ex officio, attend all meetings of the TEL Board and the Tram Project Board.
- 1.12 The terms of the tie Operating Agreement entered into in 2005 will continue to operate in full insofar as not superseded by the terms of the tie Operating Agreement entered into in May 2008 or by the terms of this Agreement.
- 1.13 The tie Board will retain all statutory responsibilities relevant to tie under the Companies Acts and other relevant legislation and regulatory requirements.
- 1.14 It is acknowledged by the Council and TEL that the obligations placed on tie under the tie Operating Agreements entered into in May 2005 and May 2008 are to be interpreted as being limited by the restrictions placed on tie under this Agreement.
- 1.15 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 (“FOISA”). Insofar as compliant with FOISA, the Parties agree to keep confidential all appropriate matters relating to the business and operations of tie and TEL.

1.16 This Agreement is governed by the Laws of Scotland and the Parties submit to the exclusive jurisdiction of the Scottish Courts.

IN WITNESS WHEREOF this Agreement consisting of this and the preceding three pages and the attached Schedule are executed as follows:

Subscribed for and on behalf of The City of Edinburgh Council at _____ on
day of _____ 2009

Witness.....

Full Name.....

.....
Proper Officer

Address.....

.....

Subscribed for and on behalf of tie Limited at _____ on _____ day of
2009

Director.....

Director/Secretary.....

Subscribed for and on behalf of TEL Limited at _____ on _____ day of
2009

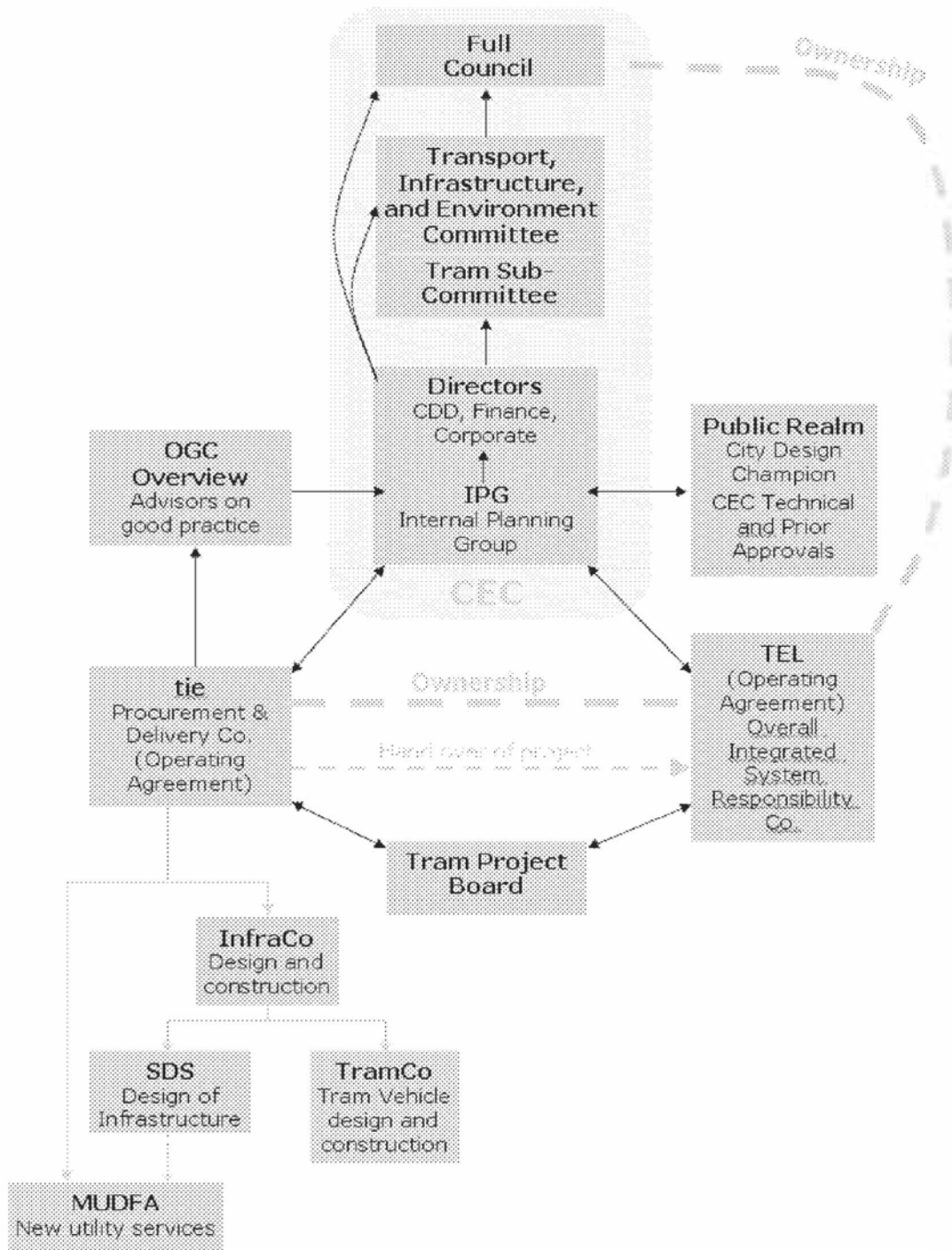
Director.....

Director/Secretary.....

Schedule 1

Governance Diagram

Governance Structure



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

TRANSPORT EDINBURGH LIMITED, a company incorporated under the Companies Acts (registered number SC269639) and having its Registered Office at 55 Annandale Street, Edinburgh EH7 4AZ (“**TEL**”)

(together “**the Parties**”)

Whereas:-

1. The Council set up TEL in June 2004 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. The terms of the tram Final Business Case, setting out *inter alia* the anticipated operational and financial parameters of an integrated tram and bus system in Edinburgh, were approved in principle by the Council on 20 December 2007 via powers delegated to various Council officials;
5. The Council and TEL previously entered into an operating agreement in May 2008;

6. The Parties now wish to enter into this Agreement to replace the agreement noted in preamble 5 above to more particularly regulate the relationship between the Parties specifically with regard to the delivery of the Tram System and the planning of an integrated tram and bus system in Edinburgh and to define the services TEL will provide to the Council; and
7. The Parties acknowledge that this Agreement may require to be adapted in future to accommodate the evolving role of TEL and in particular in advance of operational commencement of the Tram System and the proposed transfer of Lothian Buses shareholding to TEL.

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;
“Baseline Cost”	means the estimated capital cost (including risk allowance) of the Project, as determined by the Council’s Chief Executive and intimated to TEL from time to time in accordance with the terms of this Agreement;
“Baseline Date”	means the estimated revenue commencement date for the Project, as determined by the Council’s Chief Executive and intimated to TEL from time to time in accordance with the terms of this Agreement;

“Final Business Case”	means the business case relating to the Project which was approved by the Council on 20 December 2007, as it may be amended from time to time in agreement with the Council;
“Funding Agreement”	means the Council-accepted grant offer letter from Transport Scotland to the Council (dated 17 January 2008 and accepted 24 January 2008) relating to the Project, as it may be amended from time to time;
“Gogar Funding Agreement”	means the Council-accepted grant offer letter from Transport Scotland to the Council (26 May 2009 2009 and accepted 28 6 May 2009) relating to the Gogar Intermodal Station project, as it may be amended from time to time;
“Gogar Intermodal Station project”	means the delivery of certain limited defined works in relation to a rail and tram interchange at Gogar as further detailed in the Gogar Funding Agreement;
“Infraco Contract”	means the contract dated May 2008 among tie and Bilfinger Berger UK Limited, Siemens plc and Construcciones y Auxiliar de Ferrocarriles S.A. (contracting on a joint and several liability basis) (“the Infraco”), as it may be amended from time to time;
“Legislation”	means all rules, regulations, by-laws, directives, statutes and other binding

	provisions in force from time to time;
“Lothian Buses plc” or “Lothian Buses”	means the company incorporated under the Companies Acts and having its registered office at 55 Annandale Street, Edinburgh EH7 4AZ (Registered Number SC096849);
“Phase 1A”	means phase 1A as more particularly described in the Final Business Case;
“Phase 1B”	means phase 1B as more particularly described in the Final Business Case;
“Project”	means the delivery of the Tram System and the planning of an integrated tram and bus system in Edinburgh (incorporating Phase 1A and Phase 1B and any approved extension of the Tram System), including the delivery of the Gogar Intermodal Station project;
“Services”	means all the services to be provided by TEL as specified in this Agreement, including, without limitation, those specified in Schedule 1;
“tie Limited” or “tie”	means the company incorporated under the Companies Acts and having its registered office at City Chambers, High Street, Edinburgh (Registered Number SC230949);
“tie Operating Agreement”	means the operating agreement between tie and the Council dated May 2008;
“Tram Acts”	means Edinburgh Tram (Line One) Act 2006 and the Edinburgh Tram

	(Line Two) Act 2006;
“Tram Monitoring Officer”	means the Council officer nominated by the Council to monitor TEL in relation to the Project;
“Tram Project Board” or “TPB”	means the committee of the board of TEL established to oversee delivery of the Project; and
“Tram System”	means the tram system comprising Phase 1A and/or Phase 1B, as the context requires, as set out in the Final Business Case and as approved by the Council in terms of scope.

- 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 within the main body 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.
- 1.5. Where this Agreement refers to approval being required from the Council or the Tram Monitoring Officer, the Council shall use best endeavours to procure that such approval is not unreasonably withheld or delayed.

2. TEL’s Obligations

- 2.1 TEL hereby agree to provide the Services to the Council throughout the duration of this Agreement in order to assist in, carry out, promote, manage and administer the Project.
- 2.2 TEL 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 the written approval of the Tram Monitoring Officer.

- 2.3 TEL shall use best endeavours to ensure that it delivers the Project as set out in the Final Business Case (including any subsequent revisions to the Final Business Case or any revised Business Case, all as approved by the Council). TEL shall use best endeavours to comply with all timescales and financial projections detailed in the Final Business Case. TEL will use best endeavours to support delivery of the Tram System so far as it can do within its powers and resources.
- 2.4 TEL shall be responsible for the management of tie and ensuring that all appropriate steps are taken to deliver the Project in accordance with the terms of the tie Operating Agreement and the Memorandum of Understanding between the Parties and tie dated of even date with this Agreement.
- 2.5 The TEL board shall establish such sub-Committees as it deems appropriate and necessary for the proper execution of its responsibilities and will seek to procure, with the approval of the Chief Executive of the Council, that the Board is composed of directors employing the requisite blend of skills, experience and aptitudes.
- 2.6 TEL shall use best endeavours to ensure that it is at all times suitably resourced to carry out all the Services in relation to the Project.
- 2.7 TEL shall use best endeavours to ensure that it does not cause the Council to breach the terms of the Funding Agreement and the Gogar Funding Agreement. In particular TEL shall use best endeavours to ensure that the Council complies with the conditions relating to publicity in the Funding Agreement and the Gogar Funding Agreement. TEL will provide all reasonable assistance to the Council in relation to the Council's compliance with the terms of the Funding Agreement and the Gogar Funding Agreement.
- 2.8 TEL 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.
- 2.9 In the event that TEL has formal responsibility for work sites, TEL 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.
- 2.10 TEL shall use best endeavours to ensure that it does not infringe the

intellectual property rights of any third party at any time.

- 2.11 TEL shall use all reasonable skill, care and diligence, 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. All work undertaken by TEL shall be progressed with due expedition and without delay to achieve timeous completion of the Project.
- 2.12 TEL 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).
- 2.13 Insofar as permitted by law, TEL shall at all times promptly comply with all reasonable requests made of it by the Council.
- 2.14 TEL 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 TEL. TEL shall promptly inform the Tram Monitoring Officer 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. TEL shall provide evidence of all such insurances upon request by the Council. In the event that TEL becomes formally responsible for these matters, TEL shall ensure that the Council is covered as an insured party under the Edinburgh Tram Network Owner Controlled Insurance Programme covering the material damage and third party liability sections and under all other policies of insurance which TEL has arranged, where it is possible to do so at reasonable commercial cost.
- 2.15 TEL shall ensure that all contractors and consultants engaged or employed by it in any capacity shall have in place a policy of insurance providing TEL 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. TEL shall promptly inform the Tram Monitoring Officer 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.

- 2.16 TEL will ensure that the Corporate Public & Products Liability and Professional Indemnity policies are to include an indemnity to principals clause protecting the interest of the Council as principal.
- 2.17 TEL shall provide to the Tram Monitoring Officer upon request, and in any event not less than annually, a report providing full details of all its insurances, including *inter alia* details of (i) the contractors or consultants providing insurance cover to TEL and the Council and level of cover provided; and (ii) contractors or consultants not providing insurance cover and details of the authorisation obtained from the Tram Monitoring Officer in this regard.
- 2.18 TEL shall use best endeavours to ensure best value when providing the Services and in the discharge of all of TEL's responsibilities. TEL shall use best endeavours to ensure best value in the use of funds or resources provided through or by the Council.
- 2.19 TEL 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.
- 2.20 TEL shall allow the Council, its auditors or the Council's other delegated appointees to examine the books, accounts and other records kept by TEL 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 TEL and to protect the Council's interests in relation to the terms of this Agreement. TEL will supply to the Tram Monitoring Officer copies of all relevant TEL and other board papers in connection with the governance arrangements set out in Schedule 2.
- 2.21 TEL 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.

2.22 The Parties acknowledge the terms of the governance arrangements set out in Schedule 2 and TEL shall use best endeavours to comply with the governance diagram. The Parties agree that where this Agreement refers to TEL reporting to, or obtaining approval from, the Council or as the case may be the Tram Monitoring Officer, all such activity shall be made in accordance with this governance diagram. TEL shall establish the Tram Project Board as a Committee of the TEL Board and shall define the responsibilities of the TPB and shall delegate appropriate authority to the TPB to enable the TPB to carry out its responsibilities in accordance with the terms of this Agreement. The following matters will be for the TEL Board to determine and report to the Council as appropriate in terms of the governance arrangements set out in Schedule 2:

All matters affecting the programme, cost and scope of the Project except the following which are matters reserved to the Council:

- (i) any actual or reasonably expected delay beyond 3 months after the Baseline Date; or (ii) any actual or reasonably expected increase in capital cost which would mean that the Baseline Cost is exceeded by greater than £1,000,000; or (iii) any substantial change to the design, scope or service pattern set out in the Final Business Case.

On the basis of information provided by TEL to the Council, the Baseline Date and the Baseline Cost will be determined by the Council's Chief Executive and notified to TEL from time to time. In assessing the source of actual or potential cost increases, the Board of TEL will use best endeavours to ensure that all financial claims are taken properly into account.

TEL may delegate responsibility for all the matters specified above (other than the matters reserved to the Council) to the TPB and the TPB may in turn delegate responsibility for all other matters to tie as appropriate, but only to the extent that such delegation is already within the remit of tie in the context of the tie Operating Agreement. TEL agrees that it shall retain ultimate responsibility for all matters it so delegates.

2.23 TEL shall liaise with the Tram Monitoring Officer, 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. TEL will liaise with the Council and tie to ensure that duplication in reporting procedures is minimized.

- 2.24 Immediately that TEL becomes aware of the likelihood of delay to, or overspend in, the Project it will ensure that notification is given to the Tram Monitoring Officer at the earliest opportunity, informing them of the reasons for the potential delay or overspend and detailing any measures (together with costs) which may mitigate such potential delay or overspend.
- 2.25 Immediately TEL 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, TEL shall give notice of such requirement to the Tram Monitoring Officer with full supporting information to mitigate any delay to the Project to the fullest extent possible.
- 2.26 All relevant tie remuneration matters will be monitored and controlled by the Remuneration Committee of the TEL Board. TEL shall procure that TEL and tie shall develop and have approved by the TEL board a remuneration policy setting out *inter alia* the benchmarks and procedures for proposed bonus achievement and the project milestone outcomes to which any such bonuses are linked. Such policy for both TEL and tie shall require to be approved by the TEL board, through its Remuneration Committee, in advance of each annual reporting period as it will apply in the succeeding annual reporting period. Notwithstanding that it has already commenced, the first such period will be Financial Year 09/10. TEL shall ensure that both TEL and tie's performance bonus incentive arrangements are aligned to appropriate Project milestones and reflect performance achievements beyond the level that might reasonably be expected of individual staff in fulfilling their assigned job roles. The remuneration policy principles to be adopted by TEL's Remuneration Committee each year for both tie and TEL will also require to be approved by the Council's Chief Executive in advance of each annual reporting period. In addition to annual approval by the Council Chief Executive, a full review of TEL and tie's remuneration strategy by the Council ~~Chief Executive~~ will take place every three years to ensure that such strategy remains appropriate in the market from time to time.

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- 2.27 The setting and any alteration of the remuneration packages, including performance bonus incentive arrangements, for the Chairman of TEL and tie respectively will require the prior approval of the Chief Executive of the Council. The remuneration package, including performance bonus incentive arrangements, for the Chief Executive of TEL and tie will, on appointment, require approval by the Chief Executive of the Council and thereafter any changes will be determined by the Chairman of tie or TEL as the case may be, all subject to approval of the Remuneration Committee of the TEL Board.
- 2.28 TEL will provide a business plan for approval by the Council on an annual basis. TEL will incorporate within its annual business plan a full business plan for tie.
- 2.29 TEL 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.
- 2.30 TEL shall not novate or otherwise transfer any rights or obligations under any contractual arrangement which the Council has approved and to which TEL is a party without the prior written consent of the Tram Monitoring Officer.
- 2.31 TEL 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.
- 2.32 TEL shall liaise regularly with tie and the Council in the execution of publicity and communications arrangements.
- 2.33 TEL acknowledge that tie and the Project will be subject to an independent peer review panel concerning the management of the Project (including all the contract documentation) and TEL will implement all reasonable recommendations of the panel once approved under the governance arrangements set out in Schedule 2.
- 2.34 The Parties acknowledge that the Infraco Contract contains Council obligations relating to the maintenance of roads and structures which are integral to the safe and continuous operation of the Tram System and require performance by the Council. TEL undertakes to assist the Council in its discharge of these responsibilities which are identified at Section 40 of the Employer's Requirements in the Infraco Contract. The Council undertakes to carry out the required works and services timeously and to the requisite standard in observance of its statutory powers and duties, subject always to any appropriate budgetary constraints.

3. Council's Obligations and Delegation

- 3.1 In order to facilitate TEL's role in the delivery of the Project, TEL is authorised to operate the delegated authority structure set out in Clause 2.22 in this Agreement, such delegations confirmed for the purposes of the Council's statutory obligations pursuant to the Tram Acts. TEL is further authorised to accept assignment from tie Limited of those contractual agreements previously entered into by tie Limited at a time to be determined by the Council on recommendation from TEL and tie Limited, but only to the extent that no material additional obligations, risks or liabilities are created beyond those for which tie Limited is, or would in due course, become responsible for under the contractual agreements to be assigned
- 3.2 The Council agrees to guarantee TEL's financial obligations in relation to certain aspects of the Project on terms acceptable to the Council.
- 3.3 On the basis that TEL 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 and the Project, the Council will release the funding, or procure that tie releases the funding, which it has secured for such expenditure and shall pass funding to TEL or to tie, as appropriate, to allow TEL to discharge its obligations in terms of this Agreement.
- 3.4 The Council will nominate a Council officer to act as a liaison point for day-to-day communication between TEL and the Council.
- 3.5 The Council will appoint a Tram Monitoring Officer. The Tram Monitoring Officer will be the Director of City Development or the Director of Finance or their nominee.
- 3.6 The Tram Monitoring Officer will be responsible for determining what approval is required from within the Council to allow them 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 their proposed actions from the full Council or from a relevant committee or sub-committee as appropriate.

- 3.7 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.
- 3.8 The Council acknowledges that TEL may work on other projects in addition to the Project, but TEL will use its best endeavours to manage any such projects in such a way as to avoid any conflict with the terms of this Agreement. Any work to be executed by TEL on projects other than the Project must be approved by the Tram Monitoring Officer in advance of commitment by TEL.
- 3.9 The Council agrees to waive its rights to claim against any director, officer or employee of TEL, save in respect of any criminal, fraudulent or willfully negligent action of any such person. This waiver shall not apply to any contractor or consultant engaged by TEL operating in any such role as director or officer.
- 3.10 The Parties acknowledge that one of the main purposes of establishing TEL and its sister company tie is to facilitate the integration of the operation of trams and buses in the City of Edinburgh and to assist the Council, tie, Lothian Buses plc and TEL to function as a single coordinated entity in the delivery, management, operation and ownership of an integrated transport system. The Parties acknowledge that pursuit of these objectives is subject at all times to the Council's statutory responsibilities.

4. Term

- 4.1 This Agreement shall commence on the date of signing and shall continue until termination is agreed between the Parties, unless otherwise terminated earlier in accordance with its terms.

5. Responsibility

- 5.1 Subject to the terms of any guarantee(s) given by the Council, TEL shall use best endeavours to ensure that it is in a position at all times to apply the financial and other resources necessary to discharge timeously all obligations,

liabilities or claims of whatsoever nature arising from the performance of the Services.

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 TEL and TEL 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.

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 the Chairman of TEL or the Tram Monitoring Officer at the Council or such email notified in writing by either party to the other for the purpose of receiving emails after the date of this Agreement.

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 (“FOISA”). Insofar as compliant with FOISA, the Parties agree to keep confidential all appropriate matters relating to the business and operations of TEL.

11. Nature of Relationship

- 11.1 Nothing in this Agreement shall create a relationship of partnership between the Parties with regard to its subject matter. The Parties acknowledge that TEL is acting as the Council’s agent, but solely to the extent, and subject to the terms, set out in this Agreement.
- 11.2 Save as otherwise provided, 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 or relieve TEL from obtaining any approvals or consents required from the Council in any capacity 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. The terms of this agreement supersede the terms of any prior agreement between the Parties.
- 12.2 If any ambiguity or conflict arises between the terms of this Agreement and those of TEL's articles of association then, to the fullest extent permitted by law, the terms of this Agreement shall prevail.

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.

14. Waiver

- 14.1 The failure to exercise or delay in exercising a right or remedy provided by this Agreement or by law does not constitute a waiver of the right or remedy or a waiver of other rights or remedies. A waiver of a breach of any of the terms of this Agreement or of a default under this Agreement does not constitute a waiver of any other breach or default and shall not affect the other terms of this Agreement. A waiver of a breach of any of the terms of this Agreement or of a default under this Agreement will not prevent a party from subsequently requiring compliance with the waived obligation. The rights and remedies provided by this Agreement are cumulative and (subject as otherwise provided for in this Agreement) are not exclusive of any rights or remedies provided by law.

15. Governing Law and Jurisdiction

15.1 This Agreement is governed by the Laws of Scotland and, subject to the terms of clause 7, the Parties submit to the exclusive jurisdiction of the Scottish Courts.

IN WITNESS WHEREOF this Agreement consisting of this and the preceding sixteen pages and the attached Schedules are executed as follows:

Subscribed for and on behalf of The City of Edinburgh Council at _____ on
day of _____ 2009

Witness.....

Full Name.....
Proper Officer

Address.....

Subscribed for and on behalf of Transport Edinburgh Limited at _____ on _____ day
of _____ 2009

Director.....

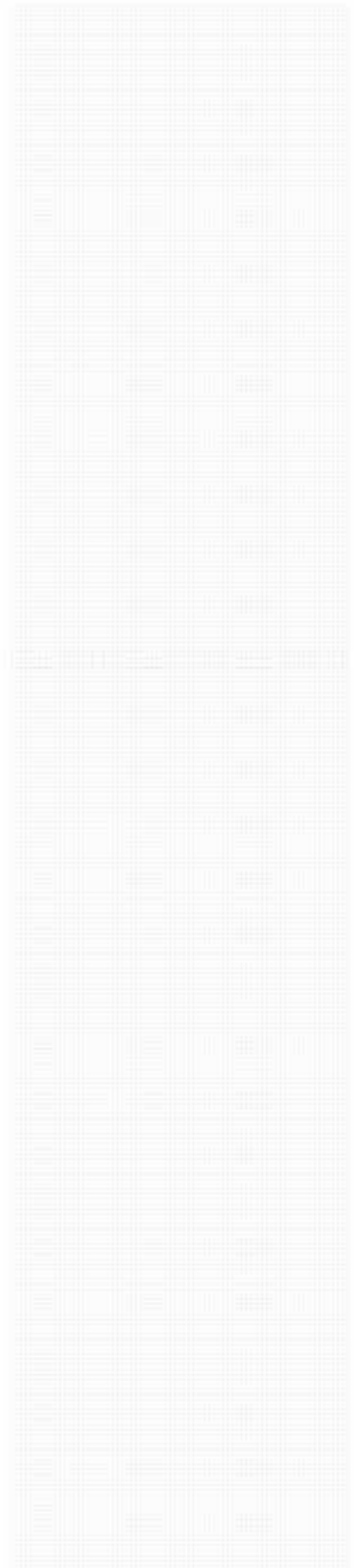
Director/Secretary

SCHEDULE 1

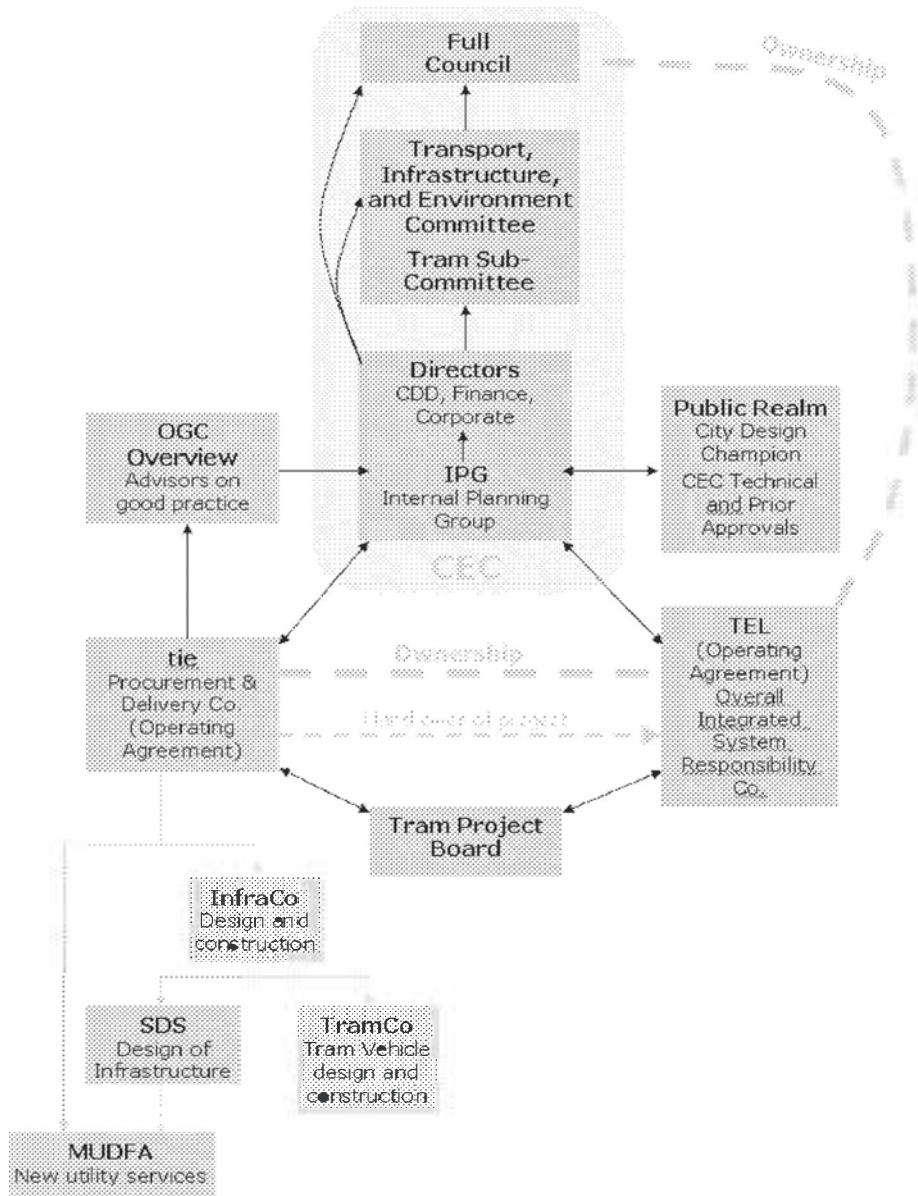
Scope of Services

1.	Development of a fully integrated bus and tram service plan in advance of tram commissioning.
2.	Provide or procure the provision of accurate and current information to the Council for appropriate decision making and approvals
3.	Address with the Council the funding and related implications of Phase 1B
4.	Develop and agree a communication strategy with tie and the Council and provide effective communications, consistent with this strategy
5.	Plan and manage the interface with tie in order to deliver a smooth handover for operations
6.	Carry out other duties as instructed by the Council in relation to the Project
7.	The management of tie in order to ensure that reasonable steps are taken to deliver the Project and the Tram System
8.	Manage and deliver (through tie) the Gogar Intermodal Station project on behalf of the Council in terms of the Gogar Funding Agreement
9.	Act on efficiently and effectively all formal instructions issued by the Council in relation to the Project

Schedule 2
Governance Diagram



Governance Structure



EDINBURGH TRAM NETWORK PROJECT ("ETN")

REVISED GOVERNANCE STRUCTURE

ADVICE NOTE

A. Brief

We are instructed by **tie** Limited to advise in relation to the revisions to the ETN project governance structure. These revisions are to be implemented through an Operating Agreement between City of Edinburgh Council ("CEC") and TEL and an MoU among **tie**, TEL and CEC. This advice is provided to **tie** Limited, TEL Limited and CEC pursuant to our mandate on the basis that the instructions we have received from **tie** represent the entirety of the matters we are asked to address and as if those instructions emanated direct from TEL Limited and from CEC. We have reviewed final drafts of the OA and MoU prepared by CEC Legal.

B. Scope

Our advice covers the following aspects of the ETN governance structure in its new form:

Area 1: Impact on the existing Infraco Contract Suite and ETN delivery commitments;

Area 2: Interaction with the Edinburgh Tram Acts 2006 (Lines One and Two) ("the Tram Acts");

Area 3: The legislative and regulatory framework beyond Area 2; and

Area 4: Other legal or contractual issues.

This paper is presented as a reprise of DLA Piper advice provided on the selected Option D for governance model. In some instances, our advice has covered the evolution of ETN governance and procurement strategy over a prolonged period. Positions in this paper that rely upon previous analysis are highlighted as such but our earlier advice is not repeated in detail.

C. Executive Summary

Area 1

- 1.1 In conventional circumstances, a client-side adjustment of project governance arrangements would be of little or no interest to the delivery partner. Because of the adversarial position adopted by Infraco, our advice is that Infraco may seek to obtain commercial advantage through commentary about or an interpretation of the governance revisions which effectively downgrades **tie's** overall project management authority. We should be clear, however, that there is no contractual ability for Infraco to disrupt, control or prevent the introduction of the revised governance arrangements themselves.
- 1.2 Though unpredictable, Infraco's attitude towards a tactic to extracting advantage from TEL's introduction as **tie's** owner and manager is most likely to become apparent (i) when formal assignation of the ETN Contract Suite to TEL takes place; (ii) possibly in the form of prejudicial comment on **tie's** project management competence during DRP proceedings; and (iii) the assignation of DPOFA (requiring Transdev's consent). Were this to occur before TEL has become client under the Infraco Contract, it would need to be made clear to Infraco and Transdev who (as between **tie** and TEL) would be responsible for managing the Infraco - Transdev operational interface at ETN commissioning and system operating/maintaining phases. This may present an opportunity for Infraco to try to impose its views.

Area 2

- 2.1 In order to ensure that TEL's function and activity as the ultimate manager of ETN delivery, operation and maintenance enjoys the advantages conferred by the Tram Acts, CEC require to notify Scottish Ministers of TEL's new level of engagement. This can be effected by simple letter pursuant to the relevant provisions of the Tram Acts (Sections 69(5) and 68(5) respectively) and is, arguably, a precondition to the assignation of the Infraco Contract to TEL. The exact content of this notification requires to be settled and is needed within 21 days of the signing of the TEL OA.

Area 3

- 3.1 This topic embraces seven separate legal subjects:

Procurement Law (UK law and EU Directives); State aid; TUPE; Transport Act 1985; Competition Law; and Health and Safety legislation and CDM Regulations.

Procurement Law

- 3.2 The revised governance arrangements do not alter the position that, within the ownership of Tel, **tie** remains the 'in-house provider' of project management services to CEC, thereby enjoying an exemption from EU procurement directives as regards its appointment under a contract for services. We consider that TEL also enjoys that status, subject to the comments we make below.

State aid

- 3.3 There are no new state aid issues generated by the current revisions to ETN governance.

TUPE

- 3.4 The TUPE questions have been answered in separate advice earlier this year. That advice concerned the eventual termination of the DPOFA between **tie** and Transdev UK Limited ("Transdev"). No new issues arise from TEL's function, save that transfer (if any) of employees would be to TEL (as opposed to **tie**) on the assumption that DPOFA had been already assigned to TEL.

Transport Act 1985

- 3.5 The issues which arise under this statute are not affected by the introduction of TEL as the prospective owner of Lothian Buses ("LB"). These were analysed extensively in 2004 and are also the subject of an opinion obtained from Queen's Counsel (as well as numerous detailed advices from DLA Piper) which looked at the methodology to achieve the share transfer. Nothing in the revised ETN governance arrangements hinders TEL owning LB, restricts the means of implementing share transfer or makes this more difficult than envisaged under the mechanism reviewed by Queen's Counsel. The recent regulatory authority interest in the Scottish public motor transport market makes it more likely that Edinburgh's integrated transportation plans may be scrutinised from a competition law standpoint, particularly the monopoly (as opposed to anti-competitive practices) aspect. The revised governance arrangement is neutral in this context.

Competition Law

- 3.6 TEL's authority to manage **tie** and the affirmation by MoU of how the Operating Agreements with CEC are to work do not affect the fundamental principle that CEC, **tie**, TEL and LB are

a single economic entity, such that their arrangements to operate an integrated transport system cannot be successfully challenged as infringing the Competition Act 1998 Chapter 1 (anti competitive practices). In any event, the purpose of integration is to improve and increase public transportation output which is unlikely to restrict, distort or prevent competition. CEC has statutory duties to manage public transport in an integrated and efficient manner which the revised governance structure is intended to service.

Health and Safety and CDM Regulations

- 3.7 This is the subject of separate DLA Piper advice papers. In summary, the introduction of TEL, as **tie**'s manager, does not alter the position that, from an external perspective, liability for accidents cannot be specifically allocated or buffered by the existence of Operating Agreements or internal protocols amongst the public sector client organisations. The protection for the Boards, CEC officers and project management is founded on the robustness and compliance of the health & safety plans and processes themselves as designed by **tie** and their effective implementation and monitoring under clearly discharged lines of responsibility. The analysis of CDM Regulations as far as TEL's role is concerned is the same as for **tie**, whereby primary CDM responsibilities sit with Infracore and their designers.

Area 4

Third party agreements

- 4.1 Numerous third party agreements exist to support implementation of the ETN. There are effectively three categories: agreements entered into by CEC directly; agreements entered into by **tie** directly (some are also countersigned by CEC); and less formal commitments made during the parliamentary process. Many of the earlier agreements make no provision for CEC to assign its interests. This is not an immediate issue; however to the extent that the relevant third party has recognised **tie** as its "*de facto*" counterparty, care would be needed if TEL wished to take over that function.

MUDFA

- 4.2 The revised governance arrangements have no effect on this agreement where **tie** acts under delegated powers from CEC. There is no contractual requirement upon **tie** to notify the contractor about TEL's function. We do not understand there to be any thought at present for MUDFA to be assigned to TEL.



Collateral Warranties

4.3 Under the Infraco Contract, **tie** is entitled to obtain collateral warranties in favour of TEL from all key ETN subcontractors. **tie** itself is also entitled to these commitments. A decision is required on whether both **tie** and TEL require collateral warranties from key ETN subcontractors as well as CEC requiring these. These are important as a component of best contractual protection and as part of any project exit strategy and the process is influenced by the Infraco in terms of its obligation to obtain these warranties from its supply chain.

**DLA Piper
15th September 2009**

**EDINBURGH TRAM PROJECT
GOVERNANCE PERFORMANCE AND RESTRUCTURING OPTIONS
OUTLINE TAX CONSIDERATIONS**

This note is draft and strictly for discussion purposes only.

Background

Graeme Bissett prepared a paper dated 24 November 2008 on simplifying the legal structure for the companies involved in delivering and operating the Edinburgh Tram Network. As the paper indicates, the present structure for the Edinburgh Tram Network is:

- CEC is client and principal stakeholder
- TEL is 100% sub responsible for overall delivery and future operational integration
- The TPB is a TEL sub-Comm established to oversee delivery (by tie) and planning for operations
- Tram Project Director reports formally to TPB on progress
- Tie Board responsible for contractual fulfilment
- TS is principal funder

The paper recommended using a single entity with responsibility for the delivery of all current contractual obligations and operational integration planning and, in due course, operational management. This should clarify and streamline responsibilities, ensure a smooth transition from construction to operation and encourage end-to-end accountability.

We understand that the following alternatives have been considered and that Option D has subsequently been identified as the preferred alternative:

- Option A** - TEL is the entity and tie is merged into TEL;
- Option B** - Tie is the entity and TEL is merged into tie; and
- Option C** - New entity ("Newco") is created and both tie and TEL are merged into Newco
- Option D** - Transfer tie's shares to TEL

The following governance documents are expected to be put in place to support the new structure:

- Agreement between CEC and TEL ("TEL Operating Agreement"); and
- Memorandum of Understanding among CEC, TEL and tie ("MoU")

This note discusses the headline tax issues arising to TEL and tie from the transfer of tie shares to TEL and from the TEL Operating Agreement and the MoU. In preparing this, we have reviewed the drafts of the TEL Operating Agreement and MoU sent to us by Graeme Bissett on 4 and 11 September 2009, together with exchanges of emails with DLA Piper, copied to us, of 7, 13 and 15 September 2009.

Tax background information

Transfers of shares are potentially subject to stamp duty at a rate of 0.5%. Currently CEC, TEL, tie and Lothian Buses ("LB") are part of the same group for stamp taxes. This is on the basis that CEC is treated as a body corporate and CEC;

- owns more than 75% of the ordinary share capital of TEL, tie and LB; and
- is entitled to more than 75% of the profits available for distribution to equity shareholders of TEL, tie and LB; and
- is entitled to more than 75% of TEL, tie and LB's assets available for distribution to equity shareholders on a winding up.

CEC, TEL, tie and Lothian Buses ("LB") are also part of the same group for group relief purposes and for chargeable gains purposes.

If a transferee company were to leave the group within 3 years for stamp taxes and 6 years for chargeable gains from when chargeable assets (assets subject to taxation on any gain arising) are transferred to it then exit charges can arise.

TEL has not yet commenced its trade of overall delivery and future operational integration of the tram network and is not VAT registered.

Tie's tax computations have been submitted on the basis that it is a not for profit organisation. Tie, therefore, only pays tax on its interest income and receives a tax deduction for its interest expense. Its tax computation removes non-interest income/ non-interest expenses from taxable profits as a one-line adjustment described as "Not for profit organisation". There are no specific provisions in the tax legislation setting out how not for profit organisations should be taxed, instead their tax treatment has been derived following case law precedent. A note explaining the nature of the company's activities and why it is viewed as a "not for profit" organisation was submitted with the company's first tax computation and return. HM Revenue & Customs did not query the treatment in the first and subsequent returns (confirmed as at 13 February 2009). It might be possible to obtain clearance from HM Revenue & Customs on this point in order to give certainty as to this treatment, and this should be pursued.

LB is currently a trading company.

Options A, B and C

Options A, B and C were not expected to give rise to any significant adverse tax implications and Option D is not significantly more or less favourable from a tax perspective. Consequently, tax was not a major factor in the decision to opt for Option D over the other options that were considered.

Option D – Transfer tie's shares to TEL

We understand that under this scenario the only change to TEL's activities will be that it owns an additional company, tie. Tie's activities do not change; it is only its ownership that changes.

Stamp duty

As TEL is owned by CEC then the UK stamp duty group relief exemption should be available for the transfer of tie's shares to TEL and thus no stamp duty will be payable, provided that the appropriate claim for relief is made. A claim for stamp duty group relief must be signed by a director or secretary or board member of CEC and submitted to HM Revenue & Customs as soon as possible after the transfer takes place. On receipt of this claim, provided that HM Revenue & Customs are satisfied that the conditions for group relief to be available are satisfied, they will adjudicate the transfer document as being subject to nil stamp duty. The following documents must be submitted to HM Revenue & Customs with the claim letter:

- originals and certified copies of the transfer documents entered into in relation to the share transfer;
- a certified copy of the Register of Members of TEL as at the date of transfer; and
- where the consideration for the transfer is to be provided from TEL's cash resources, a copy of the latest accounts of TEL.

Corporation tax

From a corporation tax perspective CEC is a local authority and it is exempt from capital gains tax (section 271(3) Taxation of Chargeable Gains Act 1992). Thus the transfer of tie's shares to TEL should not trigger a chargeable gain and there should be no exit charge in relation to the tie shares if TEL leaves the capital gains group within 6 years of the share transfer. (If chargeable assets are transferred to TEL/tie and either of them leave the group, exit charges could arise.)

VAT

The transfer of shares for a consideration is an exempt supply for VAT purposes. Any VAT incurred directly in relation to the share transfer will need to be included in CEC's partial exemption calculation. This will only be a cost to CEC if the VAT incurred in relation to the share transfer causes CEC to exceed its partial exemption de minimis limit. Where the VAT incurred by CEC in relation to exempt supplies is less than 5% of the total VAT incurred by CEC in respect of all of its activities, it may be recovered in full.

If there is no payment attaching to the transfer of shares, it may be possible to argue that this transaction is non-business and therefore CEC would be entitled to recover any VAT relating to the transfer of shares (under the provisions of section 33 VATA 1994), with no impact upon its partial exemption position.

It is expected that CEC would incur minimal if any VAT directly in connection with the transfer of shares, so any disallowed input VAT is not expected to be significant.

On the basis that the activities of tie and TEL would remain as per the ruling received from HMRC, the VAT incurred by these entities should be fully recoverable, subject to the comments above on the transfer of shares.

TEL Operating Agreement and MoU

TEL is currently dormant but will assume additional responsibilities under the terms of the draft TEL Operating Agreement in relation to its oversight of tie. Under the terms of the draft TEL Operating Agreement, TEL will take responsibility for the management of tie and ensuring that tie delivers on its obligations under the tie Operating Agreement and the MoU. TEL will be obliged to establish the Tram Project Board ("TPB") to oversee the delivery of tram system and provide various related services to CEC.

Corporation tax

TEL will incur costs in this regard and consideration should therefore be given to the point at which TEL commences trading and comes into the charge to corporation tax. TEL will also need to be remunerated on arm's length terms for the additional services that it will provide under the terms of the TEL Operating Agreement in order to comply with transfer pricing requirements.

We have reviewed this draft documentation in order to comment on the tax issues arising from the governance and corporate ownership structure proposed. We would recommend a full review of all documentation relating to the respective roles and responsibilities of the parties, including specifically proposals relating to asset ownership. In particular, it will be important to establish where contracts are being entered into to incur capital expenditure, that the correct party is acting as principal in that contract. We understand that tie is acting as agent for CEC under the Infraco contract in connection with the capital expenditure and its future maintenance. It is important that the Infraco contract is reviewed to confirm that CEC has ownership of the capital asset to be leased and any assignment of the

agency contract will also need to be reviewed to assess whether it will affect the tax deductibility of long funding lease payments to the operator of the trams.

We recommend that a detailed analysis should be undertaken of the asset ownership position, including the application of the long funding lease legislation. This legislation is complex and subject to legislative change which will need to be monitored.

VAT

The new TEL Operating Agreement and MoU should not alter the VAT position as agreed with HMRC in January 2008. 'Agency', in the context of VAT, is accepted to exist where there is agreement between the parties that one will act on the others' behalf, whether this is written, oral or implicit. We would not expect clause 11.1 of the TEL Operating Agreement to affect the activities or VAT liability of tie as it remains a separate legal entity and there is no variation from the existing Agreement between tie and CEC. The nature of the activities and the responsible parties will not change as a result of the transfer of shares in tie to TEL. In the event of a challenge from HMRC regarding the agency relationship there would be a strong argument to look beyond the written agreements to the commercial reality that tie would be acting on behalf of CEC and its activities would meet the remainder of the conditions set out by HMRC.

Even so, in the event that HMRC successfully argued that an agency arrangement did not exist between tie and CEC, under the circumstances as set out to HMRC all of tie's activities would be taxable. Therefore we would expect it to be able to recover all of its input tax (albeit there may be some timing differences) and CEC to be able to recover any VAT it incurs on supplies made by tie. We do not expect there to be a VAT cost to tie if acting as principal rather than agent.

To safeguard their positions, we recommend that the parties request confirmation from HMRC that the restructuring will not affect the VAT position of the three parties.

Conclusion

The changes to the governance structure, and the associated changes to the share ownership and legal structures, will result in some additional tax administration requirements but should not in itself substantially impact the tax burden from the tram operational activities. The additional tax administration includes:

- submission of a stamp duty group relief claim and the accompanying documentation referred to above in relation to the transfer of tie shares to TEL;
- identifying when TEL commences trading and whether tie has any tax exposure for prior periods in relation to its "not for profit" status; and
- requesting confirmation of the VAT position following restructuring from HMRC.

We also recommend agreeing the overall corporation tax treatment of the project with HM Revenue & Customs once a full analysis of the project proposals is undertaken, particularly relating to asset ownership and the application of the long funding lease legislation, but also to review the overall tax efficiency of the arrangements. This legislation is complex and it is anticipated that an outline of the legislation and proposed structure can be provided within 1 month of a request being made with a fuller analysis to follow. The proposed governance structure, should, however, have no impact on the availability or not of capital allowances under the long funding lease legislation.

PricewaterhouseCoopers LLP
12 January 2009
Updated 13 February 2009
Updated 17 September 2009



Edinburgh Tram Network

Governance Structure Revision - Health & Safety Considerations

September 2009

LEGALLY PRIVILEGED - FOISA EXEMPT

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Edinburgh Tram Network

Governance Structure Revision - Health & Safety Considerations

Executive Summary

- The revised Governance Structure will not require fundamental changes to the H&S framework which is currently in place;
- Board level responsibility for H&S will move to TEL from the ~~the~~ Board;
- The SHE sub-committee will report to the TEL Board;
- It is essential that all TEL Directors are fully conversant with their H&S leadership responsibilities as a member of the TEL Board which will exercise significant H&S actions - the responsibilities are outlined in this paper; in addition it is important that the TEL Directors keep up-to-date with H&S legal developments;
- It is also important to be aware of the complex H&S enforcement environment which can result in many entities becoming involved in regulatory action should an incident take place which may include the Principal Contractor, subcontractors, ~~the~~ ltd, TEL and CEC;
- Comprehensive fulfilment of all H&S obligations must continue to be a way of life through the construction and operational phases of the Project and they must continue to be given consideration on a daily basis in all actions and at all levels by parties involved in Project.



Edinburgh Tram Network

Governance Structure Revision - Health & Safety Considerations

Governance Structure

It is noted that:

- **tie's** shares will be transferred to TEL from CEC;
- the governance of the Project moves to TEL from **tie** and is executed under delegation to the tram project board ("TPB"), a subcommittee of the TEL Board. In addition, the Audit Committee of the TEL Board will continue to exercise its role to ensure scrutiny and independent internal audit of **tie**, including Health and Safety arrangement. TEL will oversee the entirety of the Project through construction and into operation, including maintenance;
- day to day management, control and execution of the Project will remain with **tie**; **tie** will report to TEL; all strategic and other material decisions will be made by TEL/CEC; notably **tie** will have no authority to approve changes to contractual arrangements, scope, cost or other substantive aspects of the Project except under an express delegation of authority to **tie** by TEL or the TPB;
- TEL will communicate its decisions through the TPB (a formal sub-committee of TEL); the TPB creates an "inclusive" decision making process but the TPB is not a legally distinct or independent body within the Project Governance structure;
- There is currently a **tie** Safety, Health and Environment ("SHE") sub-committee which reports to the **tie** Board; the revised Governance Structure will result in the H&S sub-committee becoming a formal sub-committee of the TEL Board and no such sub-committee will report to the **tie** Board.

- it is noted that the Governance Arrangements paper and Agreement between CEC and TEL place responsibility for compliance with health & safety on TEL;
- The TPB will ensure that safety is a core agenda item for each meeting and will ensure that a safety report is tabled at each meeting and actioned where appropriate. The TPB will consider H&S issues which will be disseminated to the respective bodies whose representatives make up the TPB. This will ensure that H&S issues are considered at TPB level every four weeks. Further detail of the Board's obligations are outlined in the "Board and Director's responsibilities" section of the paper.

It is important to note that the TPB is not a shelter from health and safety liabilities or a clearing house for liabilities. Legally CEC, TEL and tie cannot position themselves above or below the TPB in the governance structure and thereby declare that they have discharged their health and safety liabilities and have no further duty regarding input into or consideration of health and safety issues. The ultimate responsibilities for the TPB decisions flows to these key stakeholders and a Fiscal may consider that all parties (CEC, TEL and tie), together constitute the entity for the discharge of H&S obligations notwithstanding the statements in the Governance Arrangements paper and Agreement between CEC and TEL. The Project Governance structure and the revised Project Governance structure will, however, distance Transport Scotland somewhat from the H&S responsibilities as simply the funder of the project.

Similarly, it is important to highlight that whilst H&S responsibilities and actions can, in specific circumstances through appointment, become the responsibility of another party, it remains the fundamental statutory responsibility of the delegating party to ensure that the statutory provisions are complied with. The courts will have regard to contracts but there are also overarching statutory provisions which must be complied with.

As a result health and safety implications must be considered by all these parties when making significant decisions affecting design and implementation through the construction and operational phases of the Project.

There may be occasions where a decision which is made by the TPB and is driven by one of the stakeholders to the exclusion of the other members of the board. This may result in the contractual relationships or duties between the stakeholders being considered. Notwithstanding that financial indemnities could be put in place to cover losses suffered, if a particular party declares that it will be held accountable for a decision impacting safety, it is important to highlight that it is not possible to ensure that fines imposed as a result of prosecution can be the subject of an enforceable indemnity. It

is not possible to contract out of criminal liability. It is not possible to insure against a fine and although it may be competent to include a clause in a contract, it is possible that such a clause would be construed by the courts as unenforceable and contrary to public policy. In this context, the representative of each stakeholder would need to look to their employer, (not **tie** or the TPB), with regard to personal accountability. Similarly, if board members decisions are stopped/overruled because of, for example a CEC imperative, rather than it being a transport integration or tram led requirement then those individuals should look for indemnities from CEC in relation to the personal liabilities.

Impact of Revised Governance Structure

The revised Governance Structure will not require fundamental changes to the H&S framework which is currently in place. The most significant change is that Board level decisions will now be taken by the TEL Board rather than the **tie** Board - essentially the Board making body has move up one level. The **tie** Board will be considerably less influential in the decision making process.

Some changes will be required:

- Board level responsibility for H&S will move to TEL from the **tie** Board, however, the directors of the TEL Board will be the same individuals that formed the old **tie** Board.
- There is currently a **tie** H&S sub-committee which reports to the **tie** Board; the revised Governance Structure will result in the H&S sub-committee becoming a formal sub-committee of the TEL Board and no such sub-committee will report to the **tie** Board. The H&S sub-committee will have the same membership, remit and scope of operations.
- There is currently a **tie** Audit subcommittee which report to the **tie** Board. This subcommittee scrutinises the management arrangements through audit across the **tie** business. This utilises independent internal audit validating the Health and Safety arrangements in place. The revised Governance Structure will result in the Audit subcommittee becoming a formal subcommittee of the TEL Board and the **tie** Board. The audit subcommittee will have similar membership, remit and scope of operation.
- The H&S management systems which are operated by **tie** will remain the same in the Revised Governance Structure and the **tie** managers and employees will have the same autonomy. In terms of reporting up and down the management structure, the **tie** H&S team will communicate with the TPB and the TEL Board.

One distinction created by the H&S framework, which is the result of the Revised Governance Structure, is that there will be a **tie** Board (with, a membership of two directors) which will sit below the TEL Board in the governance structure but above the **tie** senior managers and employees. It is anticipated that these directors will also sit on the TEL Board and be involved in the decision making process of the TEL Board. However, there may be situations where do not agree with the TEL Board's H&S decisions but they will be required to implement such decisions as Board members of **tie**. It is considered that provisions should be included in the Operating Agreement such that both the **tie** directors and **tie** as a legal entity are indemnified for all claims, damages, liabilities, damages, penalties, fines (to the extent possible) and expenses if **tie** implement a TEL Board decision which results in **tie** committing a criminal offence and/or incurring civil liability.

Board and Directors' responsibilities

It is important to consider how the key H&S responsibilities can be discharged by the Boards and individual Directors in the exercise of their day-to-day actions.

The clearest and strongest guidance on this subject is outlined in the HSC/IoD Guidance *Leading health and safety at work; Leadership Actions for Directors and Board Members, published October 2007* (this supersedes *Directors' responsibilities for health and safety, INDG 343*). This is a detailed document which contains significant obligations which directors are required to discharge. It is essential reading for all directors. It identifies that custodial sentences have been imposed for various offences by Directors. In terms of the revised Project Governance structure, it will be essential to ensure that the TEL Board executes these significant responsibilities to ensure that they are taking appropriate action as a Board and as Directors.

The HSE/IoD guidance identifies (i) Strong and Active Leadership from the top: (ii) Involvement with the Workforce and (iii) the Continuous Assessment and Review of H&S risks, advice and performance, as essential principles for organisations in the context of H&S issues.

A H&S leadership checklist is contained in the guidance:

- How do you demonstrate the board's commitment to health and safety?
- What do you do to ensure appropriate board-level review of health and safety?

- What have you done to ensure your organisation, at all levels including the board, receives competent health and safety advice?
- How are you ensuring all staff - including the board - are sufficiently trained and competent in their health and safety responsibilities?
- How confident are you that your workforce, particularly safety representatives, are consulted properly on health and safety matters, and that their concerns are reaching the appropriate level including, as necessary, the board?
- What systems are in place to ensure your organisation's risks are assessed, and that sensible control measures are established and maintained?
- How well do you know what is happening on the ground, and what audits or assessments are undertaken to inform you about what your organisation and contractors actually do?
- What information does the board receive regularly about health and safety e.g. performance data and reports on injuries and work-related ill health?
- What targets have you set to improve health and safety and do you benchmark your performance against others in your sector or beyond?
- Where changes in working arrangements have significant implications for health and safety, how are these brought to the attention of the board?

A four-point agenda for embedding H&S principles is detailed in the HSE/IoD guidance which seeks to address the checklist:

1. **The Board should set the direction for effective H&S management** - Executive Directors should develop policies to avoid H&S problems and must respond quickly where difficulties arise or new risks are introduced. Non-Executive Directors must ensure H&S is properly addressed.

In terms of good practice:

- 1.1 H&S should be on the agenda for Board meetings;
- 1.2 The CEO/H&S Director should clearly be identified as the H&S champion - this sends a clear signal that H&S is taken seriously;

- 1.3 H&S targets focus activities and identify what the Board is seeking to achieve;
- 1.4 Non-Executive Directors can act as a "buffer" to ensure that processes that support boards which are facing significant H&S risks are robust.

- 2. **The Board should introduce management systems and practices** that ensure that risks are dealt with sensibly, responsibly and proportionately and that H&S is "owned" by the Board - the Directors should ensure (i) that H&S arrangements are adequately resourced (this is particularly important when new processes are introduced, for example the move into the commissioning and operational phase of the Tram Project); (ii) that the Board obtain competent H&S advice; (iii) risk assessments are carried out; and (iv) employees or their representatives are involved in decisions that affect their H&S.

In terms of good practice:

- 2.1 Directors should ensure they are visible and address any breaches immediately;
- 2.2 H&S should be considered in the appointment of senior management;
- 2.3 H&S should be considered in procurement standards for goods, services and equipment; and the H&S arrangements of key suppliers and contractors should be assessed;
- 2.4 A H&S committee could be established (below Board level) to ensure the key issues are addressed and trivial issues are not escalated to the Board;
- 2.5 Provide the Board with H&S training.

- 3. **The Board should receive both specific and routine H&S reports** - in terms of reporting, the Board should (i) receive reporting of both preventive information (for example training and maintenance programmes) and incident data; (ii) receive audits of management structures and risk controls; (iii) receive reports on significant changes to the construction/commissioning/operation of the Tram Project; and (iv) ensure procedures are in place to adapt to new legal requirements or other significant external factors.

In terms of good practice:

- 3.1 The Board should monitor sickness absence and workplace health as this will alert the Board to developing problems that could result in accidents or long-term illness;

- 3.2 The Board should benchmark the performance of the Tram Project against other similar transport projects;
 - 3.3 H&S performance should be an element of senior managers' appraisals;
 - 3.4 The Board should receive updates on the H&S performance and actions of their contractors;
 - 3.5 Engagement of the Board with employees to ensure H&S is monitored can win greater support for H&S within the project.
4. **A formal H&S review by the Board of H&S performance is essential** - this will establish whether the H&S system is managing risk and protecting its people. The Board should review H&S performance once a year and this review should:
- Examine whether the H&S policy reflects the organisation's current priorities, plans and targets;
 - Examine whether risk management and other H&S systems have been effectively reported to the Board;
 - Report H&S shortcomings and the effect of all relevant Board and management decisions;
 - Decide actions to address any weaknesses and a system to monitor their implementation;
 - Consider immediate reviews in light of major shortcomings, incidents or events.

In terms of good practice:

- 4.1 The annual audit can be incorporated in any Tram Project annual report/review;
- 4.2 Directors could make "on site" visits to gather information for formal review;
- 4.3 Good H&S can be "celebrated" to ensure that appropriate praise is delivered for good actions.

As highlighted below in the "General: the health & safety 'environment'" section of this paper, if a H&S offence is committed with the consent or connivance of, or is attributable to any neglect on the part of any Director, Manager, Secretary or other similar officer of the organisation then that person, as well as the organisation can be prosecuted (section 37 of the Health and Safety at Work etc Act

1974). Clearly ignorance of the law is no defence to such a charge. Similarly ignorance of circumstances which could result in a breach of H&S legislation will not avoid a charge of neglect.

The following key points are highlighted on the HSE website: www.hse.gov.uk/enforce/enforcementguidesc/identifying/directors.htm It is important to note that liability attaches to an individual because of the authority and responsibility that he/she holds (not simply the office which they hold). The HSE will not prosecute an individual just because there has been an offence by a body corporate and there is likely to be some measure of personal failure by one or more members of the management. The HSE state that the purpose of a prosecution is to bring home to a manager etc the extent of his/her responsibilities. In terms of consistency in the criteria applied by inspectors initiating such prosecutions, HSE inspectors are instructed to consider, in relation to the manager etc:

- did s/he have effective control over the matter?
- did s/he have personal knowledge of the circumstances surrounding the event?
- did s/he fail to take obvious steps to prevent the event?
- has s/he had previous advice/warnings?
- was there previous advice to the company?
- is responsibility shared between more than one level of management?

It is also important to note that the legislation does not require a conviction of the body corporate but it does require proof that the body corporate has committed an offence.

Section 40 of the Health and Safety at Work Act 1974 provides a defence to certain statutory provisions such that it is a defence that it was not practicable or reasonably practicable to do more than was in fact done to satisfy the statutory duty or requirement.

General: the health & safety "environment"

Comprehensive fulfilment of all H&S obligations must be a way of life through the construction and operational phases of the Project. They must be given consideration on a daily basis in all actions and at all levels by parties involved in Project. In overall terms, the key H&S considerations for CEC, TEL, the TPB and **tie** are:

- the health & safety of their people - the corporate H&S Management Systems address this responsibility;

- ensuring that the TPB, **tie** and TEL deliver against clearly stated H&S responsibilities in the framework of each element of the Project including working alongside third party H&S management systems;
- monitoring and reporting regularly that these responsibilities are being properly discharged;
- ensuring that all persons employed by **tie** and TEL are competent;
- ensuring the contracts TEL/**tie**/CEC enters into address H&S issues;
- ensuring that H&S ramifications are considered when key investments and business decisions are made.

The effective management of health and safety is of vital importance in the modern business environment. There is both a moral and a legal duty on organisations to conduct their undertakings in such a way as to ensure, so far as reasonably practicable, the health and safety of employees and the public who come into contact with or are affected by their business.

The most obvious consequence of a health and safety policy or procedural failing is injury or loss of life. Failure to comply with H&S legislation can have serious implications, not just in terms of criminal penalties. From a business perspective, the effects of such an incident are wide-ranging and include loss of work time; cessation of operations together with the consequential loss of revenue and resultant financial difficulties; a lowering of morale which can lead to a negative impact on productivity; a loss of management time required to deal not only with the initial incident, but the follow up investigation, enforcement, media and staff issues; an increase in insurance premiums; enforcement action which could take the form of prohibition notices preventing the operation of the business, improvement notices and prosecutions; and last but by no means least, the incalculable costs of reputational damage. It is essential that these effects are considered cumulatively in terms of their impact on the Project as a whole and not simply in terms of the separate entities' individual losses or risks.

In addition to the obvious direct consequence of enforcement action, such as prosecution by the court and the imposition of substantial fines, any enforcement action taken against an organisation may require to be declared in, for example, a funding application.

It is possible that one of the corporate entities could be prosecuted but in terms of sentencing the courts could look at the corporate structure as a whole and the fact that, for example, TEL is a wholly owned subsidiary of CEC could considerably influence the size of the fine imposed.

Under Section 36 of the Health and Safety at Work Act 1974 (HASWA), where the commission of an offence by one person can be shown to have been due to the act or default of another person, that other person may be prosecuted. Where a company commits an offence and this is shown to be due to the act or default of a director (or any other person) that other person may be prosecuted and it is not also necessary for the regulator to prosecute the company. This section therefore brings many people, not just the corporate entity, within the potential scope of the prosecution. TEL and tie could be regarded as separate parties but both could be prosecuted in the circumstances highlighted in this paragraph.

Where a "body corporate" commits a health and safety offence, and the offence is committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, then that person (as well as the body corporate) is liable to be proceeded against (Section 37 HASWA). Again, this therefore considerably widens the potential scope of parties that could be subject to prosecution. In addition, the Company Directors Disqualification Act 1986 empowers the court to disqualify an individual convicted of an offence in connection with the management of a company. As highlighted above, HSE has published guidance on "*Leading health and safety at work; Leadership Actions for Directors and Board Members*". Although not having legal force, it sets out the HSE's expectations of boardroom directors.

However, it should be noted that both these provisions which are similar but address different elements of the widening of liability, require personal fault on the part of the individual or company concerned to be demonstrated, as well as the link between the personal fault and the breach by the company. This makes "secondary" prosecutions must less straightforward than prosecuting the company which is carrying on the business in question. Accordingly, whilst the HSE has in recent times expressed interest in pursuing the options for prosecution "down the management chain", in practice, prosecution of individual directors and managers is usually only pursued where there is very clear evidence of personal fault, usually in relation to small companies. It is, however, not entirely unknown for individuals to be investigated and then for charges against them not to be subsequently pursued, but the threat of proceedings used to extract a guilty plea on the part of the company.

As highlighted below, there is interaction in relation to the decision making process of the entities in the tram project which may influence HSE's consideration of liability in any prosecution. It is therefore essential that, to the extent possible, where statutory obligations are delegated such obligations are clearly allocated.

The creation of an appropriate safety responsible structures, safety management systems and culture will form a key defence to any prosecution, assuming all procedures have been followed. Clearly there would also be a number of other parties involved in a safety incident, for example contractors (in particular the Infraco), sub-contractors, agency staff, designers, CDM-Coordination and third parties. In this regard, it is important to note the significant obligations placed on the Infraco by virtue of the Infraco Agreement in particular Clause 77 (Indemnity from Infraco to tie/CEC) in relation to health and safety issues.

The Corporate Manslaughter and Corporate Homicide Act 2007

The Corporate Manslaughter and Corporate Homicide Act 2007 came into force in the United Kingdom on 6 April 2008. The first prosecution of a company under this new Act is ongoing.

An organisation is guilty of the offence of corporate homicide if the way in which its activities are managed or organised causes a person's death and amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased, (provided that the way in which the activities are managed or organised by its senior management is a substantial element of the breach of a relevant duty).

Breach is punishable by a fine. Although directors do not face personal liability under the Act, the offence will make directors more vulnerable to disciplinary action and further crystallise their accountability for health and safety compliance to their stakeholders. It remains possible for directors and senior management to face personal prosecution under the existing common law or under the Health & Safety at Work etc Act 1974.

On conviction for an offence of corporate homicide the court may make a remedial order namely, an order requiring the accused to (i) take steps specified in the order to remedy the breach which lead to the conviction, (ii) anything which appears to the court to have resulted from the breach provided it was a cause of the death and (iii) any deficiency in the organisation's policies, systems or practices in relation to health and safety of which the breach is indicative. In addition, the court may make a publicity order, namely, an order requiring the accused to publicise in a specified manner, the fact that it has been convicted, particulars of the offence specified in the order, the amount of the fine and the terms of any remedial order.

The Construction, Design and Management Regulations 2007

H&S is clearly of paramount importance in the construction phase of the Project and in this regard CDM 2007 will be a key focus and must be given appropriate prioritisation by all parties at all levels.

It is considered that CEC/TEL are the "client" in terms" of CDM 2007 as the TPB is not a legal entity although it will deliver decisions to **tie** on behalf of CEC/TEL. **tie** is still responsible as the second client (CDM) and client/employer (for general health & safety regulations) because of the day to day Project responsibilities which it holds. Such an election is, however, not a full delegation of all rights and responsibilities. CEC, TEL, **tie** and the TPB must each ensure that its activities or its stakeholders or advisors do not undertake actions that encroach upon the role of the designer under CDM 2007, because this would mean that they would require to demonstrate competency in this role and fulfil added responsibilities. More specifically CDM 2007, defines "designers" widely to include any person who prepares or modifies a design or arranges for, or instructs any person under his/her control to do so - this means that, where they over specify modifications to a project (for example moving a tram stop to a different location which may impact the line of sight of the tram driver) then the client can potentially be considered to be a designer and required to comply with designer's duties.

DLA Piper Scotland LLP, September 2009

The Board of tie Ltd
The Board of Transport Edinburgh Limited
The Solicitor to City of Edinburgh Council

1st September 2009

Dear Sirs

Governance Restructuring of tie Limited

We understand that a restructuring of tie Limited is to take place which will involve:

- tie's shares will be transferred to TEL from CEC;
- the Boards of tie and TEL will be revised, in particular so that TEL has the full complement needed to oversee the entirety of the tram project through construction and into operations, including maintenance;
- the tie Board retains its normal statutory responsibilities but the focus of governance over construction activity moves to TEL (away from tie), executed under delegation to TEL's sub-committee, the TPB;
- the TEL OA needs to be revised to reflect these matters;
- the tie OAs (the original 2002 "general" OA and the 2007 "tram" OA) would not be amended so that the detail of the changed arrangements are given a low profile with BSC's machinations in mind and also to preserve the documentation which supports tie's status as the Council's "in-house provider" under the procurement regulations;
- a Memorandum of Understanding will be agreed to codify the relationship between TEL, tie and CEC under these new arrangements;
- H&S responsibilities will be aligned as necessary.

The insurances currently procured by tie Limited are

- Owner-Controlled Insurance Programme for the construction of the Edinburgh Tram Network and tram fleet covering Construction All Risks, Delay in Start Up and Third Party Liability
- Commercial Combined policy for office risks covering Property Damage, Business Interruption, Money, Employers' Liability and Third Party Liability
- Computer All Risks
- Directors' & Officers' Liability
- Professional Indemnity
- Promotional Bus
- Personal Accident/Business Travel
- Let Property

It is a legal requirement world-wide that anyone seeking a new policy of insurance/reinsurance or cover for additional risks or renewal under an existing policy, must disclose any information that might influence the insurers/reinsurers in fixing the premium or determining whether to accept the risk. Under English law, failure to do so may entitle insurers/reinsurers to avoid cover from inception and to seek repayment of paid claims. If you are in any doubt as to whether information is material you should disclose it.

Heath Lambert Limited is authorised and regulated by the Financial Services Authority
Registered Office: 133 Houndsditch, London, EC3A 7AH. Registered No 1199129 England and Wales

Heath Lambert Group

There is also a Directors' & Officers' Liability policy for One Ticket Limited.

The insurance policies are procured by tie Limited, and as tie's legal status will remain unchanged in that tie will not be wound up but will continue in existence, we do not foresee any reason why the insurances cannot continue in force.

As TEL is a legal entity distinct from tie Ltd, we would expect to include TEL as an insured party under the policies where TEL have an insurable interest, eg any assets belonging to TEL which must be insured.

With regards to Professional Indemnity and Directors' & Officers' Liability insurance, information is being gathered to establish the scope of cover required for TEL. We do not envisage any particular difficulties in obtaining the cover which may be required by TEL for these classes of insurance.

Yours faithfully



Barry Lidford
on behalf of
Heath Lambert Limited.

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CEC00690440_0061

Edinburgh Airport Rail Link tie Ltd Revised Operating Agreement

The City of Edinburgh Council

12 May 2005

1 Purpose of report

The purpose of this report is to seek approval from the Executive to a revised Operating Agreement with **tie** Ltd (formerly known as Transport Initiatives Edinburgh) to allow **tie** to act as promoter of the Edinburgh Airport Rail Link.

2 Summary

- 2.1 **tie** is a private company wholly owned by the City of Edinburgh Council. **tie** was set up to assist the Council with the development, procurement, project management and implementation of certain nominated projects as determined by the Council and contained in the Integrated Transport Initiative.

The extant legal operating agreement between CEC and **tie** was approved by the Council in May 2002.

The revisions to the operating agreement are required to accommodate the request by the Scottish Executive for **tie** to act as the promoter of the Parliamentary Bill for the Edinburgh Airport Rail Link.

3 Main report

tie

- 3.1 **tie** is a private limited company wholly owned by the City of Edinburgh Council. The company was registered at Companies House in April 2002 and started operating in May 2002. The objectives of **tie** are defined in the Company's Memorandum and Articles of Association and relate to assisting the Council in developing and delivering transport projects. **tie** operates on a strictly non-profit making basis.

tie Projects

- 3.2 **tie** has been assigned responsibility for the following transport projects:-
- a Edinburgh Tram Line 1 (serving the city centre and north Edinburgh).
 - b Edinburgh Tram Line 2 (serving west Edinburgh)
 - c Edinburgh Tram Line 3 (serving the south east of the city)
 - d Edinburgh Fastlink (Formerly known as West Edinburgh Busway Scheme – WEBS).
 - e Ingliston Park and Ride
 - f SESTRAN 'One-Ticket' travel ticket scheme
 - g Edinburgh Airport Rail Link (EARL)
- 3.3 **tie** has also assisted Clackmannan Council in the development of the Stirling Alloa and Clackmannan Rail Project – wholly funded by the Scottish Executive. **tie** have also carried a small amount of work for the Forth Estuary Transport Authority.
- 3.4 The Congestion Charging Scheme has been terminated following the referendum and work on Tram Line 3 has ceased following notification by the Scottish Executive that it would no longer be able to fund the project's development after the congestion charging referendum.
- 3.5 Construction of the Edinburgh Fastlink is now completed and the project is in operation.
- 3.6 Private Parliamentary Bills for both Tramlane 1 and Tramlane 2 are being promoted by the City Council. Both Bills have successfully passed their preliminary stages after lengthy Parliamentary Inquiry procedures and are now set to proceed to the consideration stage hopefully leading to Royal Assent by the end of the year.
- 3.7 However EARL, although supported by the Council, was not initiated by the Council. Instead the project was proposed by the Scottish Executive who sought to engage the project development and procurement expertise of **tie** by fully grant funding the project through the auspices of the City Council. Scottish Executive Grant was formally offered for the preparatory work on the project in October 2003. The Scottish Executive are now seeking to reach an agreement with **tie** under which **tie** would act as promoters of the Private Parliamentary Bill and would fund **tie** directly.
- 3.8 In view of the size of the EARL project and the risks associated with the project the Director of City Development believes it is appropriate to formally change the terms of the operating agreement between **tie** and the Council. These changes would empower **tie** to undertake EARL and other non-Council projects and protect the Council from any liabilities or risks arising from such activity by **tie**.

The Operating Agreement

- 3.11 A copy of the proposed Operating Agreement is included as an appendix to this report.

3.12 The revised Operating Agreement

- a Enables **tie** (with Council approval) to provide strategic transport services to other clients primarily in the SESTRAN area and in exceptional circumstances on strategic transport projects outwith the SESTRAN area, provided those projects can be demonstrated to have a significant interest for Edinburgh.
- b Requires the Business Plan to set out the financial position of all **tie**'s activities – irrespective of their "Client".
- c Requires **tie** to ensure that the Council is not liable for **tie**'s activities for other "Clients".
- d Requires **tie** to give priority to Council Projects.
- e Includes procedures for handling conflicts of interest that may arise for **tie** between Council and other party's projects.
- f Requires **tie** to obtain duty of care agreements in favour of the Council from **tie**'s advisors.
- g Removes all clauses or references from the present Agreement relating to Congestion Charging (Road User Charging).

4 Financial Implications

- 4.1 There are no implications on the Council budget.

5 Conclusions

- 5.1 The proposed changes to the Operating Agreement with **tie** Ltd, which have been drafted by the Council Solicitor are essential to limit Council liability from activities of **tie** on behalf of third parties.

6 Recommendations

- 6.1 To note that Scottish Executive have requested that **tie** should promote the Parliamentary Bill for the Edinburgh Airport Air Link.
- 6.2 To approve that **tie** can act as the promoter of the Edinburgh Airport Rail Link.
- 6.3 To approve the revised Operating Agreement between the City of Edinburgh Council and **tie** which is appended to this report and to instruct the Council Solicitor to sign on behalf of the Council.



Andrew Holmes
Director of City Development

4.5.01

Appendices Proposed Agreement between The City of Edinburgh Council and
tie Ltd

Contact/tel Mr Lex Harrison [REDACTED]

Wards affected All Wards

**Background
Papers** None

AGREEMENT

between

THE CITY OF EDINBURGH COUNCIL, the Local Authority for the said City constituted in terms of the Local Government etc. (Scotland) Act 1994 and having its principal offices at City Chambers, High Street, Edinburgh EH1 1YJ (hereinafter referred to as “the Council” and which term “the Council” shall also be deemed to include the statutory successors of the Council)

OF THE FIRST PART

and

TIE LIMITED, a company incorporated under the Companies Acts and having its Registered Office at City Chambers, High Street, Edinburgh EH1 1YJ (Registered Number SC230949) (hereinafter referred to as “the Company”)

OF THE SECOND PART

WHEREAS:-

- (One) The Council and SESTRAN (the South East Scotland Transport Partnership), a voluntary partnership of nine local authorities, have come together to identify, develop, implement and monitor matters of mutual strategic transport interest.
- (Two) The Council has agreed and approved a Local Transport Strategy as the Local transport authority in terms of the Transport (Scotland) Act 2001 (hereinafter referred to as “the Act”).
- (Three) The Council has included in its Local Transport Strategy a number of projects to address the city’s transport problems.
- (Four) The Council wish to enter into an arrangement with TIE Limited, a company formed by the Council for the specific purpose of assisting in the development and delivery of the Council’s Local Transport Strategy.
- (Five) The Company has agreed to provide services to the Council in delivering the Local Transport Strategy and specifically defined projects, as varied by the Council from time to time by developing, procuring and implementing integrated transport projects within Edinburgh and the surrounding SESTRAN area.

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

FIRST

In this Agreement the following words and expressions shall have the

DEFINITIONS

following meanings:-

“Annual Business Plan” - means the Annual Business Plan (including the Adjustment Sheet) annexed as relative hereto, being the Annual Business Plan for the first year and in each consecutive year thereafter means the Annual Business Plan submitted by the Company and approved by the Council in terms of clause SIXTH (3);

“Council sponsored projects” means transport projects identified by the Council and defined in writing as suitable for development, delivery and implementation by the Company;

“SESTRAN area” means the South East Scotland Transport Partnership area of City of Edinburgh, Fife, Stirling, Clackmannanshire, East Lothian, Midlothian, Scottish Borders, Falkirk, Perth and Kinross, and West Lothian Councils respectively or a successor body in which the Council is a statutory participant

“Strategy” - means the Council's revised Local Transport Strategy as approved by the City of Edinburgh Council on 22 January 2004 and as varied from time to time;

“Third Party projects” mean transport projects located within the SESTRAN area, in which the Company is not acting as agent for the Council, but is acting for or on behalf of another party.

“Third Party” means any party or parties with whom the contracts to provide services in connection with a Third Party project.

SECOND

Commencement
and Term

This Agreement shall commence on the date of execution hereof and shall subsist so long as the Company remains in existence or until termination in terms of clause SEVENTEENTH. This Agreement supersedes the Operating Agreement between the parties dated 3rd May 2002.

THIRD

In consideration of the payments as set out in this agreement the Company hereby binds and obliges itself to provide the following services:-

The Company's
Obligations

- (1) To comply in all respects with the Annual Business Plan (including any amendments the Council considers necessary).
- (2) In so far as not already done (i) to develop, procure and implement integrated transport projects (a) sponsored by the Council and (b) Third Party projects in the SESTRAN area in so far as expressly approved by the Council. The Council sponsored projects will form part of the Strategy as defined by the Council from time to time and notified in writing by the Council to the Company. The Council sponsored projects will include but not be restricted to those projects as set out in [Part 1] of the Schedule attached hereto and any other projects approved by the Council. The Company accepts that all projects must be approved in writing by the Council and the number and extent of the projects may be varied by the Council and that the Council at its sole discretion may request the Company to provide services to the Council in respect of every integrated transport project. For the avoidance of doubt the Company hereby agrees that it shall not contract to work on Third Party projects until such approval in writing is issued by the Council. Such approval shall not be unreasonably withheld.

(3) To ensure best value in the provision of services to the Council ; to act commercially; to act in the Council's best interest at all times; in relation to Council sponsored projects the Company shall liase solely in the first instance with the Council regarding the resolution of strategic or business planning issues; to work with the Council to ensure that all of the statutory requirements on the Council in respect of Council Sponsored projects are met to apply principles of good corporate governance; to co-operate with and implement any recommendations made to the Council by its external auditors concerning the performance of this Agreement by the Company; and to co-operate with any monitoring operation carried out by or on behalf of the Council, in particular the Company will provide a copy of all Board papers to the Council's monitoring officer as advised by the Council;

(4)(1) To carry out the following services in relation to the Council sponsored projects referred to at Clause THIRD (3) above as directed by the Council including but not restricted to:-

- (i) providing services to the Council in carrying out or commissioning necessary feasibility work;
- (ii) providing services to the Council in prioritising transport projects to agreed criteria on value for money, social and environmental benchmarks;
- (iii) providing services to the Council in obtaining any necessary statutory approvals where appropriate;

- (iv) providing services to the Council in trying to achieve public acceptance of these schemes through: (a) public consultation; (b) preparation of necessary publicity material; (c) communication with all necessary stakeholders; and (d) preparation of exhibitions etc.
 - (v) providing services to the Council in obtaining funds for Transport Projects through appropriate grants from inter alia bid funding and the Scottish Ministers and funds available to support rail projects from the Strategic Rail Authority or others;
- (2) To carry out Council sponsored project related activities including but not restricted to:
- (i) obtaining all other necessary consents and planning permissions;
 - (ii) establishing the optimal procurement strategy for each project;
 - (iii) preparing specifications and contract documents;
 - (iv) managing the bidding process and meeting all requirements where applicable of the procurement process;
 - (v) managing the award and implementation of the projects;
 - (vi) ensuring that the necessary safety, quality, financial and supervisory controls are implemented over the life of the project;
 - (vii) establishing and monitoring Operations & Maintenance procedures;
 - (viii) ensuring ongoing value for money.

- (ix) securing a relevant share of any increase in revenue to third parties such as fare box revenue resulting from projects implemented by the Council;
 - (x) ensuring that relevant windfall opportunities are obtained e.g. intellectual property rights fees;
 - (xi) seeking funding based on net income through bank finance bonds, income securitisation etc.
 - (xii) seeking equity funding and partners if appropriate.
- (5) Not used.
- (6) Given the level of public sector funding the Company will, where appropriate and required by law, follow regulations governing public procurement.
- (7) Not used.
- (8) In respect of Council sponsored projects the Company shall provide a Duty of Care Agreement in favour of the Council and require all professional advisers and contractors to provide Duty of Care Agreements in favour of the Council.
- (9) To allow the Council in respect of Council sponsored projects and Third Party projects to examine the books, accounts and other records, kept by the Company and each of its subsidiary undertakings (if any) and to supply the Council with all relative information, including quarterly management accounts, budgets and management reports (including explanations of variances against budget) statutory accounts in respect of each financial year of the Company and each of its subsidiary undertakings (if any) and such other trading and financial information relating to the Company and each of its subsidiary undertakings (if any) in such form as the

Council may reasonably require to keep them properly informed about the business of the Company and each of its subsidiary undertakings (if any) and generally to protect the Council's interest.

- (10) In respect of (9) above to participate in formal stakeholder liaison arrangements that may be established from time to time by the Council and the Scottish Executive. The aim of these arrangements will be to assure the mutual exchange of information about Strategy projects.
- (11) Unless the Council directs otherwise, to retain ownership of the assets acquired by the Company in the performance of its obligations in terms of this Agreement with regard to Council Sponsored Projects and to maintain such assets to the highest standard until termination of this Agreement.
- (12) To transfer all of its right, title and interest in and to the residual assets of the Company, obtained in the performance of its obligations in terms of this Agreement, to the Council at zero cost on termination of this Agreement, whenever that might be.
- (13) To obtain all necessary insurance cover for potential liability resulting from ownership of the assets or carrying out its business.

FOURTH

Council's

Obligations

- (1) The Council have secured funding for transport projects to enable payment to be made to the Company in consideration of services including to work on and deliver projects referred to in Clause THIRD (3) which shall for the avoidance of doubt exclude Third Party Projects.
- (2) In return for the services provided by the Company to the Council in relation to the Council sponsored projects referred to at Clause THIRD (3) above, the Council will make payment within 28 days of

receipt of the monthly tax invoices submitted by the Company, which relate to the Services provided by the Company in terms of the Annual Business Plan and the terms of this Agreement. Said invoices will be in a format specified by the Council and payment will be subject to the Council being satisfied that the quarterly reports prepared by the company in terms of clause THIRD (10) properly reflects the agreed position in each Annual Business Plan and for the avoidance of doubt other than as provided for in terms of Clause SIXTH (6) the Council shall not be liable to make payment of any invoice which relates to Third Party projects carried out by the Company.

- (3) Not used.
- (4) Not used.
- (5) The Council will use its reasonable endeavours to appoint up to four non-executive directors from outwith the Council with a proven track record in business, finance and or transport, who would bring valuable expertise to the Board of Directors. These would be annual appointments made by the Council. The Council may re-appoint any director.
- (6) The Council will nominate an individual to act as a liaison officer for day to day communication between the company and the Council;

FIFTH

Not Used

SIXTH

Funding

- (1) The Company shall be responsible for ensuring that its future capital and revenue funding requirements to finance the Council sponsored projects, strategies or schemes as required by the Council are met.

- (2) The Company shall be responsible for ensuring that its future capital and revenue funding requirements to finance Third Party projects expressly authorised by the Council are met. The Company shall free and relieve the Council of any or all liability arising out of contracts, agreements and grant obligations entered into by the Company on Third Party projects.
- (3) The Council will be supplied by the Company on or before 31 December in each year with a draft Annual Business Plan (incorporating capital and revenue budgets, profit and loss account, balance sheet, 12 monthly cashflow statement and output targets for each quarter) for the Company for its next financial year which will allow the Company to deliver the targets as specified by the Council from time to time. The Annual Business Plan will also detail the proposed scope of operations for the year, a project implementation plan, a financial model for the implementation plan, a financial analysis including public, private funding, balance and revenue potential from “farebox” enhancement etc. The Annual Business Plan shall include timescales and output measures for all work streams. The Annual Business Plan will identify the breakdown of the all of the costs of each project separately (including overhead costs) showing Council sponsored and Third Party projects and in addition for any individual transaction in excess of £5m. The Company will include in the Annual Business Plan any proposed public/private partnership strategy, the proposed procurement strategy, a risk allocation model and the proposed staffing and resource allocation to deliver the business plan on time and within budget, together with contingency provision.

- (4) The draft Annual Business Plan for each financial year except in so far as it specifically relates to Third Party Projects, shall be approved by the Council (such approval not to be unreasonably withheld) prior to the commencement of that financial year with such amendments as the Council consider necessary and thereafter such Annual Business Plan incorporating all such amendments and as approved by the Council shall in this Agreement be referred to as the Annual Business Plan for that financial year.
- (5) At the same time as approving the Annual Business Plan the Council shall agree the amount and form of each or any payments to be made by the Council in the financial year to which the Annual Business Plan relates.
- (6) The Annual Business Plan shall include a summary of the net financial and resource effects of Third Party projects and the Council will have no obligation to fund Third Party projects save that in the event the Council requests that the Company provide them with services in relation to Third Party projects , the Company shall be authorised to request funding from the Council on the basis set out in the Annual Business Plan.

SEVENTH

Indemnity

The Company shall be wholly responsible for meeting timeously all obligations, liabilities or claims of whatsoever nature arising out of or in connection with each Council sponsored project and each Third Party project and the implementation of the Company's obligations under this Agreement and hereby binds and obliges itself to indemnify the Council against all liability for such obligations, liabilities or claims.

EIGHTH

Notices

Any Notice requiring to be served hereunder shall be in writing and shall be sufficiently served upon the Council if sent by pre-paid Recorded Delivery post, addressed to the Director of City Development, One Cockburn Street, Edinburgh, or such other authorised representative of the Council as the Director of City Development may notify in writing to the Company and upon the Company if sent by prepaid Recorded Delivery post, addressed to City Chambers, High Street, Edinburgh or such other address as the Company may notify in writing to the Council and any such Notice shall be deemed to have been served Forty eight hours after the date on which the same was posted as aforesaid (excluding weekends and public and statutory holidays). In proving service, it shall be sufficient to prove that the envelope containing the notice was duly addressed to the Company or to the Council as the case may be in accordance with this Clause and posted to the place to which it was so addressed.

NINTH

Intellectual
Property
Rights

The copyright, patent, design rights and any and all other intellectual property rights of whatever nature in any drawings, document, reports, plans and related materials provided by the Company to the Council or prepared by the Company in the performance of its obligations under Council Sponsored projects, in terms of this Agreement shall vest in the Council unless the Council otherwise agrees in writing, which agreement may be subject to such conditions as the Council consider appropriate.

TENTH

Assignment

This Agreement is personal to the Company and the Council, who shall not be entitled to assign their rights hereunder nor, except as herein provided, to delegate the performance of the respective obligations incumbent upon them under this Agreement to any other party.

ELEVENTH

Staffing

The Company shall recruit and employ such staff and advisers as are required by the Board. Council staff may be seconded to or contracted to work with the Company on a full or part time basis and otherwise on terms to be agreed between the Company and the Council. If the Company consider any person so seconded is not suitable for employment in connection with the business it may require the Council to withdraw and replace such person or to take such other steps as may be necessary or expedient. All the salaries, wages, allowances, travelling and accommodation expenses and others to which such personnel may be entitled and all necessary employers, pension and national insurance contributions shall except where otherwise agreed, be borne and paid by the Company, declaring for the avoidance of doubt that where any of such expenditure has been incurred by the Council the Company shall reimburse the Council with the amount of such expenditure.

TWELFTH

Not Used

THIRTEENTH

The identity of the Chairman shall be determined annually by the Council, on written notice to the Company. The Council shall be entitled to change the identity of the Chairman or fill any vacancy in the office of Chairman at any time outwith the annual cycle of appointments by written notice to the Company. The Chairman of the Board shall not have a second or casting vote.

FOURTEENTH

Except with the consent in writing of the Council the Company shall not:-

Matters requiring the consent of the Council

- (a) create, any fixed or floating charge, lien (other than a lien arising by operation of law), security or encumbrance over the whole or any part of the undertaking, property or assets of the Company;

- (b) borrow or raise any sum of money other than in the ordinary and proper course of its business;
- (c) make any loan or advance or give any credit to any person, other than in the normal course of business;
- (d) give any guarantee or indemnity to secure the liabilities or obligations of any person;
- (e) sell, transfer, lease, assign or otherwise dispose of a material part of the undertaking, property and/or assets of the Company or contract so to do;
- (f) issue any shares or any loan stock or any debentures or other securities convertible into shares or debentures or any options in respect of shares in the Company;
- (g) acquire, purchase or subscribe for any shares, debentures, mortgages or securities (or any interest therein) in any company, trust or other body;
- (h) register any transfer of shares in the capital of the Company;
- (i) appoint any person as Chief Executive or Chief Finance Officer of the Company;
- (j) enter into any partnership or profit sharing agreement with any person;
- (k) exceed the total expenditure budget contained in the Annual Business Plan by more than 5%, provided that the Company has sufficient funds to meet additional expenditure when incurred without requiring further funding beyond that provided for in the Annual Business Plan from the council or any third party.

FIFTEENTH

The Company agrees to comply with the spirit and procedures as set out within the communications strategy agreed between the parties at that time.

The obligations contained in this clause shall not apply to any statement by the Company in relation to Third Party projects.

SIXTEENTH

Dispute
Provisions

In the event of any dispute or difference arising between the Company and the Council with regard to the construction of this Agreement and the obligations arising therefrom, shall be determined by a single Arbiter to be appointed by the parties concerned in the dispute or, failing agreement, by the President for the time being of the Law Society of Scotland and shall be deemed to be a Submission to Arbitration within the Arbitration (Scotland) Act, 1894, and any statutory modification or re-enactment thereof for the time being in force and the decision of any Arbiter appointed in terms of this Clause shall be final and binding on the parties concerned in the dispute and the said Arbiter shall have the power to award expenses as he may think fit and the parties hereto hereby expressly waive and exclude any rights competent to them to require the said Arbiter to state a Case for the Opinion of the Court of Session on any question of law arising in the Arbitration and accordingly, Section 3 of the Administration of Justice (Scotland) Act, 1972, shall not apply to any Arbitration hereunder.

SEVENTEENTH

Termination

Either party shall be entitled by notice in writing to forthwith terminate this Agreement if the other party is in material breach of any provision(s) of this Agreement and has failed to remedy that breach (if capable of remedy) within 14 days after receiving notice of such breach.

EIGHTEENTH

Law

This Agreement and the whole matters following hereon shall be construed and receive effect according to the Law of Scotland.

NINETEENTH

Continuation
of
Agreement

All terms, conditions and undertakings contained in these presents, in so far as of a further or continuing nature, are unaltered and will continue and remain in full force and effect and may be founded upon.

TWENTIETH

Terms of this Agreement to Prevail

If any ambiguity or conflict arises between the terms of this Agreement and those of the Articles of Association, the terms of this Agreement shall prevail as between the parties.

TWENTY FIRST

Miscellaneous

- (1) This Agreement does not and shall not in any circumstances constitute a partnership between the parties hereto.
- (2) Nothing herein contained shall (a) import any warranty by the Council in respect of any site owned by the Council to be used in connection with any project or (b) prejudice or affect the Council's rights, powers duties and obligations in the exercise of their functions as local authority or in any other capacity whatsoever under or by virtue of any public, general or local Statute, Order, Instrument, Regulation or Bye-law in operation from time to time in the City of Edinburgh or relieve the Company from the necessity of obtaining such approvals or consents in respect of the plans or otherwise as may from time to time be required from the Council in any such capacity in terms of any such public, general or local Statute or others foresaid.
- (3) In construing this Agreement, the marginal headings shall be ignored.
- (4) In the event of Value Added Tax (VAT) or any other charge tax or levy being chargeable in respect of any payment to be made in terms hereof such Value Added Tax, Charge Tax or Levy will be payable on receipt of a proper tax invoice by the party due to make such payment in addition to such payment.
- (5) The Company shall at all times give priority in terms of advice, interest, financing and resources to Council sponsored projects. Where the Company becomes aware of a potential conflict of interest

between a Council sponsored project and a Third Party project it shall immediately contact the Director of City Development for instructions. The Company shall make every effort to resolve the conflict with the Third Party giving due regard to the Company's obligation in this agreement (Clause Third (4)) to act in the Council's best interest at all times. In the event that such a conflict arises and is not resolved to the satisfaction of the Council , the Council shall request the Company to reconsider its position with regard to the Third Party project..()

TWENTY SECOND

Expenses

The Council and the Company shall each bear their own legal fees and outlays in connection with this Agreement and Schedule annexed hereto.

TWENTY THIRD

Separate
Agreements

The Council and the Company shall enter into separate project agreements as necessary in respect of each project if so required by the Council.

TWENTY FOURTH

The Council hereby acknowledges that the Company may enter into Third Party project contracts within the SESTRAN area, subject to written approval of the said Council. The Company may exceptionally undertake work outside of the SESTRAN area provided the Company demonstrates that in so doing a strategic interest for the Council is met. It is hereby agreed that the Council shall have no liability for debts or obligations due to be performed by the Company under Third Party project contracts. Prior to entering any such contracts the Company shall notify Third Parties that the Council has no such liability. Further the Company shall also notify the Third Party of the Company's obligation in the terms of Clause Third (3) to act in the Council's best interest at all times and to act in

the terms of Clause Twenty First (5) that will be followed in the event of an unresolved conflict of interest.

TWENTY FIFTH

The Council, however, gives no endorsement of any Third Party project subsequently approved in its approval of the Business Plan.

TWENTY SIXTH

Variations

The Council may vary the Part 1 of the said Schedule at any time during the subsistence of this Agreement and any such variation shall be made in writing between the parties hereto.

TWENTY SEVENTH

The Company and the Council agree that both parties where appropriate, will apply the Code of Guidance and Conduct annexed as relative hereto relating to Corporate Governance incorporated in “A framework for Governance of Council Companies”, being a report submitted to the Executive of the Council on 18 December 2001 as such code may be varied/updated from time to time.

TWENTY EIGHTH

The parties hereto consent to registration hereof for preservation and execution: IN WITNESS WHEREOF these presents consisting of this and the [♦] preceding pages, together with the Schedule and the Code of Guidance and Conduct are executed as follows:

They are executed for and on behalf of The City of Edinburgh Council by the following Proper Officer before the following Witness:

Proper Officer.....	Witness.....
Name of Person Signing.....	Name.....
Capacity in which signs.....	Address.....
Date.....
Place.....

They are executed for and on behalf of the Transport Initiatives Edinburgh Limited before the following Witness:

Representative..... Witness.....

Name of Person Signing..... Name.....

Capacity in which signs..... Address.....

Date.....

Place.....

.....MXW462GT.SA(1)

AGREEMENT

between

THE CITY OF EDINBURGH COUNCIL
OF THE FIRST PART

and

TRANSPORT INITIATIVES EDINBURGH
LIMITED
OF THE SECOND PART

2005

GILL LINDSAY, LLB
COUNCIL SOLICITOR
CITY CHAMBERS
HIGH STREET
EDINBURGH

**This is the Schedule referred to in the foregoing Agreement between The
City of Edinburgh Council and TIE Limited**

SCHEDULE PART I

List of projects to be delivered by TIE Ltd

Project	Description	Sponsor
1	Edinburgh Tram Line One (North Edinburgh)	City of Edinburgh Council
2	Edinburgh Tram Line Two (West Edinburgh)	City of Edinburgh Council
3	Ingliston Park and Ride	City of Edinburgh Council
4	Edinburgh Fastlink (West Edinburgh Busway)*	City of Edinburgh Council
5	Edinburgh Airport Rail Link	Scottish Executive
6	“One Ticket”	SESTRAN
7	Stirling Alloa Kincardine Rail Link	Clackmannanshire Council
8	FETA Charging Order	Forth Estuary Transport Authority

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 and the Council wishes to delegate certain of these powers to tie;
3. The Council is the designated planning and roads authority for the City of Edinburgh;
4. 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, including the delivery of the proposed tram system for Edinburgh;
5. 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 in principle by the Council on 20 December 2007 via powers delegated to various Council officials; and

6. 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 and to define the services tie will provide to the Council.

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;
”Employer’s Requirements”	means the employer’s requirements as more particularly defined in the Infraco Contract;
“Final Business Case”	means the business case relating to the Project which was approved by the Council on 20 December 2007, as it may be amended from time to time in agreement with the Council;
“Funding Agreement”	means the Council-accepted grant offer letter from Transport Scotland to the Council relating to the Project, as it may be amended from time to time;
“Infraco Contract”	means the contract between tie and Bilfinger Berger UK Limited and Siemens plc (contracting on a joint and several liability basis)(“the Infraco”), as it may be amended from

	time to time;
“Legislation”	means all rules, regulations, by-laws, directives, statutes and other binding provisions in force from time to time;
“Lothian Buses plc”	means the company incorporated under the Companies Acts and having its registered office at 55 Annandale Street, Edinburgh EH7 4AZ (Registered Number SC096849);
“MUDFA Contract”	means the agreement between Alfred Macalpine Infrastructure Services and tie dated 4 October 2006;
“Phase 1A”	means phase 1A as more particularly described in the Final Business Case;
“Phase 1B”	means phase 1B as more particularly described in the Final Business Case;
“Project”	means the procurement and delivery of a tram system for Edinburgh (Phase 1A and Phase 1B and any approved extension), as more particularly described in the Final Business Case and as approved by the Council in terms of scope;
“Services”	means all the services to be provided by tie as specified in this Agreement, including, without limitation, those specified in Schedule 1;
“Tram Acts”	means Edinburgh Tram (Line One) Act 2006 and the Edinburgh Tram (Line Two) Act 2006;
“Tram Monitoring Officer”	means the Council officer nominated by the Council to monitor tie in relation to the Project;

“Tram Supply Contract” and “Tram Maintenance Contract”	mean the contracts between tie and Construcciones y Auxiliar de Ferrocarriles S.A., as they may be amended from time to time;
“Tram Project Board” or “TPB”	means the committee of the board of TEL established to oversee the delivery of the Project; and
“Transport Edinburgh Limited” or “TEL”	means the company incorporated under the Companies Acts and having its registered office at 55 Annandale Street, Edinburgh EH7 4AZ (Registered Number SC269639).

- 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.
- 1.5. Where this Agreement refers to approval being required from the Council or the Tram Monitoring Officer, the Council shall use best endeavours to procure that such approval is not unreasonably withheld or delayed.

2. tie’s Obligations

- 2.1 tie hereby agree to provide the Services 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 the written approval of the Tram Monitoring Officer.

- 2.3 tie shall use best endeavours to ensure that it delivers a tram system for Edinburgh as specified in the Final Business Case and the Infraco Contract (including the Employer's Requirements). tie shall use best endeavours to 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 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. tie will provide all reasonable assistance to the Council in relation to the Council's compliance with the terms of 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.
- 2.8 tie shall use best endeavours to ensure that it does not infringe the intellectual property rights of any third party at any time.
- 2.9 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. All work undertaken by tie shall be progressed with due expedition and without delay to achieve timeous completion of the Project.
- 2.10 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).
- 2.11 Insofar as permitted by law, tie shall at all times promptly comply with all reasonable requests made of it by the Council.
- 2.12 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

- 2.13 tie shall ensure that all contractors and consultants engaged or employed by it in any capacity shall have in place a policy of insurance providing tie 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 Tram Monitoring Officer 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.
- 2.14 tie will ensure that the Corporate Public & Products Liability and Professional Indemnity policies are to include an indemnity to principals clause protecting the interest of the Council as principal.
- 2.15 tie shall provide to the Tram Monitoring Officer upon request, and in any event not less than annually, a report providing full details of all its insurances, including *inter alia* details of (i) the contractors or consultants providing insurance cover to tie and the Council and level of cover provided; and (ii)

- contractors or consultants not providing insurance cover and details of the authorisation obtained from the Tram Monitoring Officer in this regard.
- 2.16 tie shall use best endeavours to ensure best value when providing the Services 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.
- 2.17 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.
- 2.18 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 to the Tram Monitoring Officer copies of all relevant tie and other board papers in connection with the governance arrangements set out in Schedule 2.
- 2.19 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.
- 2.20 The parties acknowledge the terms of the governance arrangements set out in Schedule 2 and tie shall use best endeavours to comply with this governance diagram. The parties agree that where this Agreement refers to tie reporting to, or obtaining approval from, the Council or as the case may be the Tram Monitoring Officer, all such activity shall be made in accordance with this governance diagram.
- 2.21 tie shall liaise with the Tram Monitoring Officer, 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.
- 2.22 Immediately that tie becomes aware of the likelihood of delay to, or overspend in, the Project it shall notify the Tram Monitoring Officer at the earliest opportunity, informing them of the reasons for the potential delay or

- overspend and detailing any measures (together with costs) which may mitigate such potential delay or overspend.
- 2.23 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 Tram Monitoring Officer with full supporting information to mitigate any delay to the Project to the fullest extent possible.
- 2.24 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. In accordance with the terms of Clause 2.20, all such claims approval will be subject to the governance arrangements set out in Schedule 2.
- 2.25 tie shall procure that it develops and has approved by the tie board a remuneration policy setting out *inter alia* the benchmarks and procedures for proposed bonus achievement and the project milestone outcomes to which any such bonuses are linked. Such policy to be approved by the tie board, through its Remuneration Committee, in advance of annual reporting periods as it will apply in the succeeding annual reporting period. tie's board shall confirm annually to the Tram Monitoring Officer that tie's incentivisation arrangements are aligned to appropriate Project milestones. The remuneration package, including incentivisation arrangements, of the Executive Chairman of tie will on appointment require approval by the Chief Executive of the Council and thereafter be determined annually by the tie board through its Remuneration Committee.
- 2.26 tie will provide a business plan for approval by the Council on an annual basis.
- 2.27 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.
- 2.28 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.
- 2.29 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.
- 2.30 tie shall produce a communications protocol and have this approved quarterly in writing by the Tram Monitoring Officer. The communications protocol will

inter alia reflect the publicity arrangements referred to in Clause 2.5 of this Agreement.

- 2.31 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 reasonable recommendations of the panel once approved under the governance arrangements set out in Schedule 2.
- 2.32 tie shall act as the agent of the Council in the capacity of transport authority for the purposes of the New Roads and Street Works Act 1991 and the application of the Road Works (Sharing of Costs) (Scotland) Regulations 2003.

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

- 3.1 The Council hereby delegates to tie, such delegations confirmed for the purposes of sections 68 and 69 of the respective Tram Acts, full legal authority to (i) enter into and manage the Infraco Contract pursuant to the Council resolution dated 20 December 2007; (ii) to enter into and novate to the Infraco the Tram Supply Contract and Tram Maintenance Contract pursuant to the Council resolution dated 20 December 2007; (iii) novate to the Infraco the agreement between tie and Parsons Brinkerhoff Limited dated 19 September 2005; (iv) make such use of the agreement between tie and Transdev Edinburgh Tram Limited dated 14 May 2004 (as amended) as is deemed expedient by tie in relation to the Project; (v) act as agent for the Council under the New Roads and Street Works Act 1991 for the purposes of enabling contributions to be collected from the relevant utility companies and remitted to the Council; (vi) generally, and subject to the express provisions of this Agreement and unless otherwise instructed by the Council, to act on behalf of the Council in relation to undertaking and implementing all matters arising directly from the management and carrying out of the MUDFA Contract and the other contracts and related works and maintenance programmes detailed in (i) to (v) above; and (vii) confirms that the Council will notify the Scottish Ministers as appropriate under the Tram Acts.
- 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 and the Project, the Council will release the funding which it has secured for such expenditure and shall pass funding to tie to allow tie to discharge its obligations in terms of this Agreement.
- 3.4 The Council will nominate a Council officer to act as a liaison point for day-to-day communication between the Company and the Council.
- 3.5 The Council will appoint a Tram Monitoring Officer. The first Tram Monitoring Officer will be the Director of City Development or their appointed nominee. The Council will use all reasonable endeavours to procure that the Tram Monitoring Officer will be a member of the TPB and a director of TEL.
- 3.6 The Tram Monitoring Officer will be responsible for determining what approval is required from within the Council to allow them 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 their proposed actions from the full Council or from a relevant committee or sub-committee as appropriate.
- 3.7 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.
- 3.8 The Council acknowledges that tie continues to work on other projects in addition to the Project, but tie will use best endeavours to manage such projects in order that they do not conflict with the terms of this Agreement. Any work to be executed by tie on projects other than the Project must be approved by the Tram Monitoring Officer in advance of commitment by tie.
- 3.9 The Council agrees to waive its rights to claim against any director, officer or employee of tie, save in respect of any criminal, fraudulent or willfully negligent action of any such person. This waiver shall not apply to any contractor or consultant engaged by tie operating in any such role as director or officer.

- 3.10 The parties acknowledge that one of the main purposes of establishing tie and its sister company Transport Edinburgh Limited is to facilitate the integration of the operation of trams and buses in the City of Edinburgh and to assist the Council, tie, Lothian Buses plc and TEL to function as a single coordinated entity in the delivery, management, operation and ownership of an integrated transport system.

4. Term

- 4.1 This Agreement shall commence on the date of signing and shall continue until termination is agreed between the parties, unless otherwise terminated earlier in accordance with its terms.

5. Responsibility

- 5.1 Subject to the terms of any guarantee(s) given by the Council, tie shall use best endeavours to ensure that it is in a position at all times to apply the financial and other resources necessary to discharge timeously all obligations, liabilities or claims of whatsoever nature arising from the performance of the Services.

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 the Executive Chairman of tie or the Tram Monitoring Officer at the Council or such email notified in writing by either party to the other for the purpose of receiving emails after the date of this Agreement .

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 tie and CEC both agree that, for the purposes of s.47 VATA 1994, tie is acting as agent of the Council in respect of the Infraco Contract, the Tram Supply Contract, the Tram Maintenance Contract, the MUDFA Contract and other related contracts. tie will enter into such contracts in its own name, but will be acting on behalf of the Council. tie will not own or use any of the goods or services bought on behalf of the Council. tie will not alter the nature or value of any of the supplies made between the Council and the relevant contracting parties in relation to such contracts.
- 11.2 Nothing in this Agreement shall create a relationship of agency (save where the Council expressly authorises tie to act as its agent, including the terms of Clause 11.1) or partnership between the parties with regard to its subject matter.
- 11.3 Save as otherwise provided, 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 or relieve tie from obtaining any approvals or consents required from the Council in any capacity 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. The terms of this agreement supersede the terms of any prior agreement between the parties, but only in relation to its subject matter, including for the avoidance of doubt the agreement referred to in preamble 4 to this Agreement.

12.2 If any ambiguity or conflict arises between the terms of this Agreement and those of tie's articles of association then, to the fullest extent permitted by law, the terms of this Agreement shall prevail.

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.

14. **Waiver**

14.1 The failure to exercise or delay in exercising a right or remedy provided by this Agreement or by law does not constitute a waiver of the right or remedy or a waiver of other rights or remedies. A waiver of a breach of any of the terms of this Agreement or of a default under this Agreement does not constitute a waiver of any other breach or default and shall not affect the other terms of this Agreement. A waiver of a breach of any of the terms of this Agreement or of a default under this Agreement will not prevent a party from subsequently requiring compliance with the waived obligation. The rights and remedies provided by this Agreement are cumulative and (subject as otherwise provided for in this Agreement) are not exclusive of any rights or remedies provided by law.

15. **Governing Law and Jurisdiction**

15.1 This Agreement is governed by the Laws of Scotland and, subject to the terms of clause 7, the parties submit to the exclusive jurisdiction of the Scottish Courts.

IN WITNESS WHEREOF this Agreement consisting of this and the preceding fourteen pages and the attached Schedules are executed as follows:

Subscribed for and on behalf of The City of Edinburgh Council at _____ on
day of _____ 2008

Witness.....

Full Name.....

.....
Proper Officer

Address.....

.....

Subscribed for and on behalf of tie Limited at _____ on _____ day of
2008

Director.....

Director/Secretary.....

SCHEDULE 1

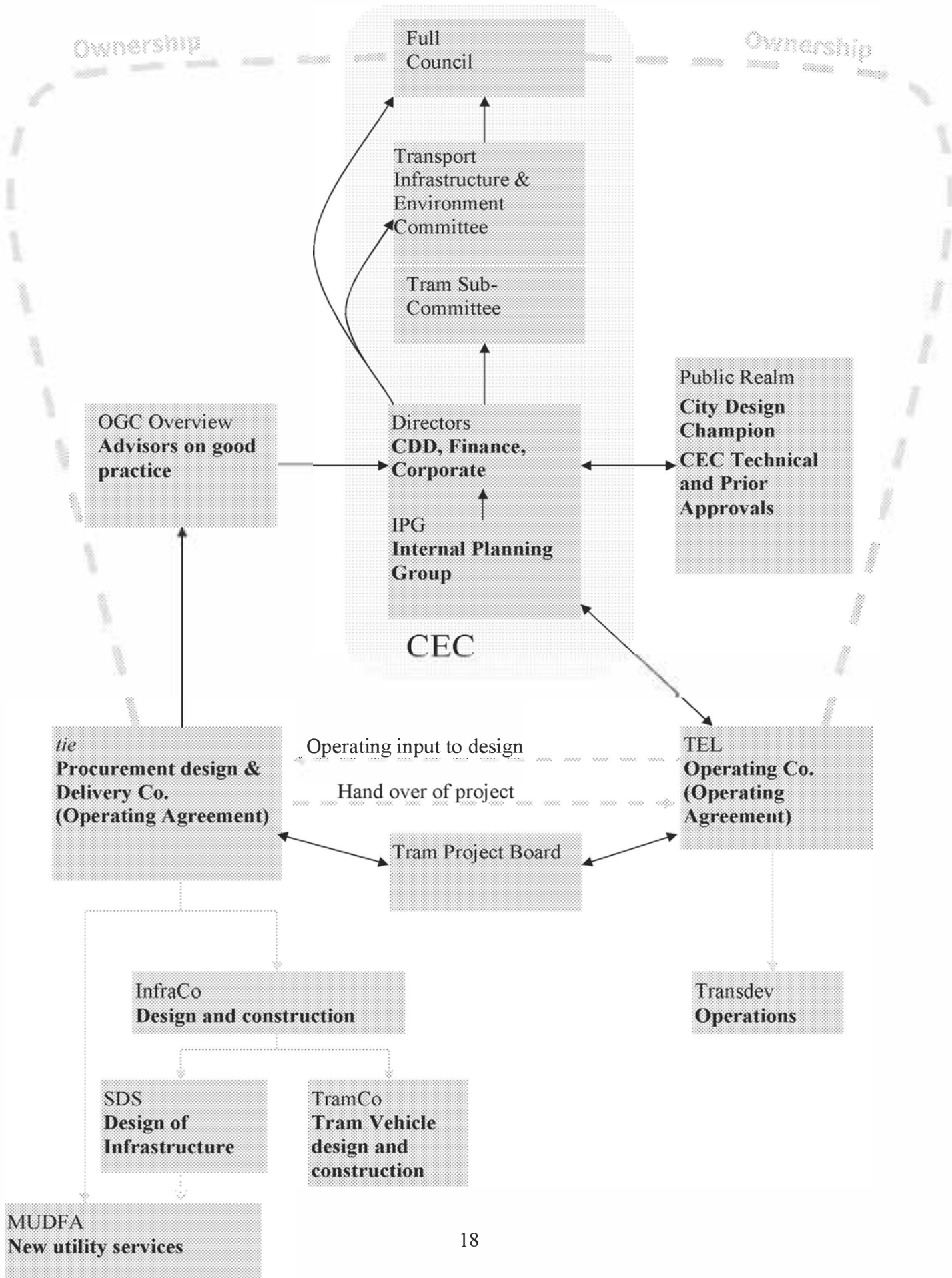
Scope of Services

1.	Procurement and contract award of all contracts required to deliver the tram project, including the Council's obligations
2.	Provide accurate and current information to Tram Project Board, Transport Edinburgh Limited and the Council for appropriate decision making and approvals
3.	Provide efficient and effective project management services for the Project including cost, financial programme, risk, contract and change management
4.	Provide traffic management expertise to effectively implement and manage both temporary and permanent traffic management alterations, including the Traffic Regulation Order process
5.	Comply with Health and Safety requirements and act as the Construction Design Management Regulations co-ordinator, provide Health, Safety, Quality and Environmental management and expertise to ensure effective approvals through the The Railways and Other Guided Transport Systems (Safety) Regulations process. This should include protecting the Council's interests
6.	Ensure the design is assured, and provide the necessary quality of design for technical and prior approvals in a timeous manner
7.	Develop and agree a communication strategy with the Council and provide effective communications, consistent with this strategy
8.	Provide and demonstrate to the Council that appropriate site management services are in place to ensure quality is delivered
9.	Ensure a continued focus on value engineering and deliver any agreed initiatives
10.	Manage the interface with TEL in order to deliver a smooth handover for operations
11.	Manage project land in accordance with the tie/CEC licence
12.	Ensure and demonstrate to the Council that all contracting parties meet their obligations (including protocols, traffic management, contract conditions, employers requirements, site supervision and testing etc)
13.	Manage all third-party agreements in an effective manner and demonstrate that they are in the Council's interest
14.	Carry out other duties as instructed by the Council in relation to the Project
15.	Act on efficiently and effectively all formal instructions issued by the Council in relation to the tram project

Schedule 2

Governance Diagram

GOVERNANCE STRUCTURE



TIE LIMITED
(Registered Number 230949)
(the "Company")

Minutes of a Meeting of the Board of Directors of the Company
held at

on _____ **2009 at [] am/pm**

Present: David Mackay (Chairman)

The Chairman established that a quorum was present and declared the Meeting open.

1. PURPOSE OF MEETING

The Chairman explained that the purpose of the Meeting was to approve the proposed transfer of the 1,000 ordinary shares of £1 each in the Company from The City of Edinburgh Council to Transport Edinburgh Limited.

2. DECLARATION OF INTERESTS

Each of the directors present confirmed that he had no interest in the business to be transacted at the Meeting that he was required to disclose in accordance with the provisions of the Company's articles of association or the Companies Act 2006.

3. TRANSFER OF SHARES

The following duly signed stock transfer form was tabled:

Transferor	Transferee	No. of Shares	Consideration
The City of Edinburgh Council	Transport Edinburgh Limited	1,000	£

The Directors, having regard to their duty to act in the way they consider, in good faith, would be most likely to promote the success of the Company for the benefit of

the members as a whole in accordance with section 172 of the Companies Act 2006, RESOLVED that, subject to the transfer being represented to the Company Secretary duly stamped by HM Revenue & Customs, the Secretary be instructed to register the transfer and to arrange for the relative new share certificate to be sealed and issued to the transferee in due course.

There being no further business, the Chairman declared the Meeting closed.

.....
Chairman