

## Edinburgh Tram Network

### Phase 1 a

#### CEC Obligations under Grant Agreement

This document highlights issues that may arise for the Council as a result of the current contractual dispute between the Council and Bilfinger Berger from clauses included in the Transport Scotland Grant Agreement.

##### **Clause 3.5.1**

***The Council shall carry out the Project with all due diligence and will perform its obligations under the Major Trams Contracts as they fall due for performance and will not exercise any rights to terminate any of the same without first giving the Scottish Ministers 30 days notice.***

##### **Clause 7 (b)**

***The Scottish Ministers shall not be bound to pay to the Council; any sum by way of Grant where, as at the due date for payment, an Event of Default (or event which with the giving of notice, lapse of time or other condition may constitute an Event of Default) has occurred. The Scottish Ministers may at their discretion pay the Grant or any part of an Instalment otherwise due to be paid or any part thereof notwithstanding, and without waiving, any such Event of Default or event.***

This clause could present a scenario whereby the Council defaults and we are still liable for payments on other parts of the project.

#### **Inspection of the Council's Accounts and Records**

##### **Clause 10.1**

***If the Scottish Ministers consider it necessary to gain access to and inspect the Council's accounts and records to verify the proper use of the Grant in accordance with Clause 3, the Council shall on 3 Business Days notice issued by the Scottish Ministers, make all accounts and records available to the Scottish Ministers, their representatives, the Auditor General for Scotland, his/her representative and such other persons as the Scottish Ministers may reasonably specify from time to time.***

This clause could become an issue if the Auditor General should become involved.

### **Clause 10.2**

***If the Scottish Ministers considers it necessary to gain access to and inspect the accounts and records held by tie to verify the proper use of the Grant in accordance with Clause 3, the Council shall procure that on 3 Business Days notice issued by the Scottish Ministers, tie makes all accounts and records available to the Scottish Ministers, their representatives, the Auditor General for Scotland, his/her representatives and such other persons as the Scottish Ministers may reasonably specify from time to time.***

As above.

### **Default**

The occurrence of any of the following circumstances or events shall constitute an Event of Default:

#### **Clause 13.1 (b)**

***the Council ceasing or threatening to cease to deliver the Project or any material part thereof;***

### **Cure**

The Scottish Ministers may at any time issue a Cure Notice in accordance with Clause 13.3.1 if:-

#### **Clause 13.2.1 (c) & (d)**

***the occurrence of any event which allows or which with the lapse of time would allow any party to a Major Trams Contract to terminate the relevant contract before its natural expiry date or to exercise any other remedy thereunder;***

***there shall occur an Event of Default or any event or series of events which the Scottish Ministers (acting reasonably) consider could cause an Event of Default to occur.***

### **Cure Notice and Cure Plan**

#### **Clause 13.3.3 (b)**

***If at any time the Scottish Ministers (acting reasonably) are not satisfied with the progress being achieved by the Council in relation to the Cure Plan or the Operator fails to implement the Cure Plan in accordance with its terms, then the Scottish Ministers may by notice to the Council declare that the payment of the Grant shall be suspended whereupon the liability of the Scottish Ministers in respect of the Grant shall be***

***suspended forthwith. The liability of the Scottish Ministers in respect of the Grant, if suspended, shall be reinstated upon the implementation of the Cure Plan to the satisfaction of the Scottish Ministers or otherwise as the Scottish Ministers may decide. During any period of suspension the Scottish Ministers may, at their sole discretion, make advances to the Council in respect of the Grant without conferring any rights on the Council or waiving any right of the Scottish Ministers.***

### **Remedies**

If the Scottish Ministers become aware of the occurrence of an Event of Default the Scottish Ministers may at any time exercise all or any of the following remedies:

#### ***Clause 13.4.1***

***by notice to the Council terminate this Agreement on such date as the Scottish Ministers in their sole discretion shall stipulate in the Notice;***

#### ***Clause 13.4.2***

***reassess, vary, make a deduction from, withhold or require repayment of the Grant or any part thereof;***

#### ***Clause 13.5***

***This Agreement may be terminated at any time by agreement between the Scottish Ministers and the Council.***

#### ***Clause 13.8***

***If the Council has to repay any amount of the Grant to the Scottish Ministers under this Clause, the Council shall pay to the Scottish Ministers the appropriate sum within 30 days of a written demand from the Scottish Ministers. If the Council fails to pay within the period of 30 days, the Scottish Ministers shall be entitled to interest at the Statutory Rate (as that expression is defined in the Late Payment of Commercial Debts (Interest) Act 1998) on the due amount from the date of the written demand until payment of the full amount.***

### **Assets and Equipment, Intellectual Property**

#### ***Clause 18.1***

***The Council shall keep and shall procure that tie and TEL shall keep all Funded Assets free from all liens, claims, taxes, assessments and encumbrances of any kind and nature at all times and shall not grant any fixed or floating charge or other security over such assets; this***

***provision shall not prevent the Council leasing heritable property for the purpose of the Project on terms customary in Scotland.***

This could be relevant to assets procured but not yet paid for. Using the advance purchases of steel as an example if this has not yet been paid the Infracore supply chain may be able to claim retention of title.

### **Clause 18.3**

***The Council shall not and shall procure that tie and/or TEL, without the prior written approval of the Scottish Ministers, during the lifetime of the Funded Assets sell or otherwise dispose of any item or any series of connected or related items of Funded Assets costing, or costing in aggregate in the case of a connected series, in excess of £1,000,000 unless such items are replaced with items having similar value and utility. During that period the Scottish Ministers shall be entitled to 91.7% of the proceeds of sale of Project Assets.***

This would only come into play should CEC decide to sell assets from the project. We should ensure we title to the project assets.

### **Clause 18.4**

***The Council warrants and undertakes to the Scottish Ministers that all Intellectual Property Rights (as herein after defined) required to deliver the Project are the property of the Council or have been validly licensed or otherwise made available to the Council on terms such that the Council has all necessary rights to employ the same for the purposes of the Project and that the Council is entitled to or will at the relevant time be entitled to confer on the Scottish Ministers or as the Scottish Ministers direct such rights in respect of the Intellectual Property Rights as the Scottish Ministers may require for any purpose contemplated in or connected with this Agreement without incurring any obligation to make payments or other liabilities to any third party.***

***In this clause 18.4 "Intellectual Property Right" means "all rights of ownership, including all copyrights and other intellectual property rights in drawings, designs, manuals, books, leaflets and other printed materials in whatever form including all reports and any such materials stored in or made available by means of an information technology system and the computer software relating thereto and all patents, trademarks, registered designs and other rights in the nature of intellectual property"***

The Council must ensure that we are satisfied that we have title.

