

## EDINBURGH TRAM NETWORK

### LIQUIDATED AND ASCERTAINED DAMAGES FOR DELAY

This note explains the basic mechanics of the liquidated and ascertained damages provisions in the Infraco Contract and the amounts payable by Infraco to **tie**, depending on the different circumstances.

Should there be a delay to any of the planned sectional completion dates (for example, Section A is completion of the Depot and delivery of the first tram) then **tie** can recover liquidated and ascertained damages against Infraco. **tie** may also recover liquidated damages where a Tram exceeds the maximum Tram weight.

#### **Delay attributable to Infraco or both Infraco and Tram Supplier (as Infraco supplier)**

Where the delay to a planned sectional completion date is the sole fault of the Infraco or is contributed to by both the Infraco and the Tram Supplier, then the amount of liquidated and ascertained damages payable by the Infraco to **tie** are as follows:

- delay to completion of Section A (the Depot and delivery of first tram) - £20,000 per week
- delay to completion of Section B (the test track and a minimum of five further trams) - £23,000 per week
- delay to completion of Section C (testing and Commissioning of Phase 1a) - £195,000 per week
- delay to completion of Section D (Shadow running and approval for commencement of revenue) - £246,000 per week

#### **Delay attributable to Tram Supplier**

Where the Tram Supplier's failure to perform under the Tram Supply Agreement is the sole cause of the delay to the planned sectional completion dates, then the amounts payable by the Infraco are as follows:

- delay to completion of Section A - £20,000 per week per Tram
- delay to completion of Section B - £10,460 per week per Tram
- delay to completion of Section C - £10,460 per week per Tram
- delay to completion of Section D - £10,460 per week per Tram

Infraco recovers these LADs from CAF but does not recover costs from Tramco for the delay, creating incentive to manage CAF.

## **Overweight Trams**

Liquidated damages are payable by the Infraco to **tie** if a Tram exceeds the maximum allowable Tram weight. The calculation of this amount is dependent on how overweight the Tram is.<sup>1</sup>

**tie** can elect to reject an overweight Tram, should the excess weight be more than 5% of the maximum Tram weight. These liquidated damages are not capped and do not count towards overall liability.

## **Liability for Delay**

In respect of delays solely attributable to the Infraco, or both the Infraco and the Tram Supplier, the overall liability of the Infraco for liquidated and ascertained damages for delay is subject to a cap of 10% of the Construction Contract Price, which currently equates to approximately £22.2 million.

For delays due solely to the failure of the Tram Supplier, the cap is set at 11% of the Tram Price or a cap of approximately £5,600,000.

If the liability for liquidated damages exceeds these caps, **tie** may, with the agreement of the Infraco, elect to increase such caps. Failure of the Infraco to agree to such request, will be an Infraco Default, allowing **tie** to terminate the Infraco Contract.

## **Payment of liquidated damages and ascertained damages**

**tie** may deduct and retain the amount of any liquidated and ascertained damages against any payments due from **tie** to the Infraco. Alternatively, **tie** can request direct payment of the calculated amount of any liquidated and ascertained damages.

**tie** may not apply liquidated and ascertained damages in respect of a period where **tie** has granted the Infraco an extension of time, and any amounts recovered in respect of such periods shall be reimbursed to the Infraco with interest payable at 2% above the base rate of RBS.

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<sup>1</sup> The formula being:

- the annual fleet kilometres (2.1 million kilometres - 3.2 million kilometres depending on route and frequency)
- the unit cost of electricity at the time the Tram is weighed (£ per hour)
- the excess energy differential factor (0.0856)
- the Net Present Value (21.725)