EDINBURGH TRAM PROJECT
REPORT ON TERMS OF FINANCIAL CLOSE ("CLOSE REPORT")

FOR THE ATTENTION OF THE TRAM PROJECT BOARD, TEL BOARD AND TIE BOARD

DRAFT v6 09.03.08

Purpose of report

The principal contractual commitments to be entered into at Financial Close are :

- **Infraco Contract Suite – incorporating Infraco and Tramco construction / supply and maintenance ; Tramco and SDS Novation ; security documentation ; ancillary agreements and schedules including Employer's Requirements**
- **Council Financial Guarantee**
- **Grant Award Letter**
- **Operating Agreements between the Council and respectively tie and TEL**

Various important agreements with third parties have also been completed or are in substantially agreed form.

The purpose of this report is to provide a comprehensive view of the principal terms of the contracts and related documentation which are being committed to at Close. A reasonable degree of prior knowledge is assumed. A draft version was reviewed at the meetings of the TPB, tie Board and TEL Board on 23rd January 2008 and the approvals below were granted on that date. The approved delegated structure has been implemented.

It is understood that the Council will prepare appropriate papers for its own approval purposes, specifically to support the provision of delegated authority to the tie Executive Chairman to execute the contracts. The Council will also require to confirm its approval of the Grant Award Letter and the Financial Guarantee in addition to the contracts which will be entered into by tie.

TPB	**approval of terms of Infraco and all related documents including note of main open areas, recommendation to TEL on those terms and on the proposed delegated authority to approve and sign ; approval of governance and delegation paper**

TEL	**approval of terms of Infraco and all related documents including note of main open areas, recommendation to Council on those terms and the proposed delegated authority to approve and sign ; acknowledgment of terms which will be assigned to TEL in due course ; approval of the TEL Operating Agreement and; approval of governance and delegation paper**

Tie	**approval of terms of Infraco and all related documents as basis for commitment, including note of main open areas; acknowledgement of the proposed delegated authority to approve and sign ; approval of the tie Operating Agreement ; approval of governance and delegation paper**

Report Contents ~~[Status in brackets]~~

DRAFTING NOTE : THE SECTIONS BELOW HIGHLIGHTED IN YELLOW REQUIRE TO BE UPDATED BY THE PERSONS NAMED.

1. **Introduction**

2. **Infraco Ccontract Ssuite – brief commentary ~~[Work in progress]~~**

~~**3.Council financial guarantee**~~ — **Formatted:** Bullets and Numbering

~~4.~~3. Grant Award letter — **Formatted:** Bullets and Numbering

~~5.~~4. Notification of Award stage and risk of challenge — **Formatted:** Bullets and Numbering

5. Third party agreements ~~[Work in progress]~~ — **Formatted:** Bullets and Numbering

6. Grant Funding Letter — **Formatted:** Bullets and Numbering

~~6.~~7. Land acquisition arrangements

~~7.~~8. Governance arrangements & corporate matters

~~**9.Risk allocation matrix and DLA letter [awaited]**~~ — **Formatted:** Bullets and Numbering

~~10.~~9. Risk assessment of in-process and provisional arrangements ~~[Update required]~~ — **Formatted:** Bullets and Numbering

~~11.~~10. Update on critical workstreams and readiness for construction ~~[awaited]~~ — **Formatted:** Bullets and Numbering

~~12.~~11. Specific confirmations — **Formatted:** Bullets and Numbering

Appendices

Appendix 1 – DLA Report – Infraco Contract Suite, Risk matrix, Council Guarantee
Appendix 2 – Management of Consents Risk [Steven to update paper]
Appendix 3 - Summary presentation on Employer's Requirements [11.03.08 VERSION]
Appendix 42 – Infraco / Tramco pricing summary and tie-in to total project budget
Appendix 53 – Summary of programme
Appendix 64 – Governance & Delegations paper
Appendix 75 – tie Operating Agreement
Appendix 86 – TEL Operating Agreement
Appendix 97 – Synopsis of Infraco contract exclusions
Appendix 108 – OCIP exclusions report

(1) Introduction

The significant stages in the project to date include :

April 2003	**Ministerial approval of initial Business Case and grant award**
December 2003	**Finalisation of STAG and submission of Bills to Parliament**
May 2004	**Commencement of early operator involvement with Transdev**
October 2005	**Commencement of design work under SDS**
April / May 2006	**Royal Assent to Tram Bills**
April 2007	**Commencement of utility diversion work under MUDFA**
May / June 2007	**Change of government and re-confirmation of project**
October 2007	**OGC Gateway 3 Review**
October 2007	**Final Business Case for fully integrated system approved by CEC**
December 2007	**Resolutions to proceed approved by CEC**
March ~~January~~ 2008	**Financial Close – construction and vehicle supply**

Although there have been several key events, the completion of the contract suite which commits delivery of the system is highly significant in terms of the scale of commitment and the definitive nature of the programme to complete the project.

To reach this stage has involved close collaboration over a number of years between tie, TEL and the Council along with principal consulting and contractual partners. Throughout, progress has been monitored by the Project Board and the tie and TEL Boards, with full Council approval at key stages. Until mid-2007, Transport Scotland (and predecessor departments) played an active role in the project, since then a more arms length role has been played but crucially this has supported the commitment to the majority of the funding.

The balance of this report summarises the main features of the project and its supporting documentation as a basis to assess readiness for commitment. More detailed information is available on every aspect on request.

(2) Infraco contract suite

[DLA – ALL AREAS, USING EXISTING MATERIAL AS APPROPRIATE. PLEASE NOTE THAT THE HEADINGS / FORMAT MUST SURVIVE BECAUSE IT HAS BEEN PRE-AGREED WITH CEC TO ENSURE ALL OF THEIR QUESTIONS ARE COVERED]

Content of this section

2.1 Process of drafting, negotiation, review and quality control
2.2 General description of scope, parties and contract structure
2.3 Overview of Infraco contract terms
2.4 SDS Novation Agreement and design delivery and approval process
2.5 Confirmation of BBS acceptance of modelling
2.6 Employer's Requirements and Infraco & Tramco Proposals
2.7 Advance purchase materials
2.8 Infraco payment mechanism
2.9 Infraco performance security arrangements
2.10 Overview of Tramco contract terms
2.11 Tramco payment mechanism
2.12 Tramco performance security arrangements
2.13 Summary pricing statement - Infraco and Tramco
2.14 Summary of programme – Infraco and Tramco
2.15 Risk profile

2.1 Process of drafting, negotiation, review and quality control

The structure, membership and competence of the tie / TEL commercial and technical negotiating team have been assessed previously and haves remained largely consistent since the bid evaluation process commenced. Council officers have operated in an integrated manner with the main negotiating team, which has also had extensive support from our external legal advisors (in DLA Piper's case from late September 2007 onwards following instruction to disengage from the process in May 2007), Transdev and other advisors.[name them?]

Appropriate quality control procedures have been applied to finalisation of the Infraco contract suite. In a number of critical areas, senior tie and TEL people have performed a review of terms independent of the main negotiating team, the important elements of which are set out in this report. The TPB, TEL and tie Boards have been regularly kept abreast of progress in all important areas and have confirmed or redirected effort as appropriate. Communications on these key matters with senior Council officers has been conducted both through the TPB and its sub-committees and also through frequent informal contact. Finally, the OGC Gateway 3 Review Team examined key areas of the contract suite before approval in advance of the October 2007 Council meeting.

In broad terms, the principal pillars of the contract suite in terms of programme, cost, scope and risk transfer have not changed materially since the approval of the Final Business Case in October 2007. It is felt that the process of negotiation and quality control has operated effectively to ensure the final contract terms are robust and that where risk allocation has altered this has been adequately reflected in suitable commercial compromises.

2.2 General description of scope, parties and contract structure

The Infraco contract suite comprises the following principal contracts :

- **Infraco system design, construction and maintenance contract between tie and BBS ;**
- **Employer's Requirements and Infraco Proposals;**
- **Tramco vehicle supply and maintenance contracts between tie and CAF ;**
- **Tramco Novation Agreement establishing Infraco – Tramco arrangements ;**
- **SDS Novation Agreement establishing Infraco – SDS Provider arrangements;**
- **Security documentation,; and**
- **Aancillary agreements and Collateral Warranties ~~Employer's Requirements~~**

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2.3 Overview of Infraco contract terms ~~[DENNIS WITH INPUT FROM ALASTAIR R ON MAINTENANCE]]~~

This section to cover (please insert sub-headings):

This section is not a substitute for reading the Contract itself. It summarises those provisions which CEC has expressed particular interest. It should be understood that the ETN Contract Suite has undergone a lengthy and difficult negotiation and close out phase.

~~Duty of care and general obligations~~
~~Systems integration~~
~~Title to assets created~~
~~Novation – SDS, Tramco~~
~~Infraco maintenance~~
~~Interfaces – Operator, NR~~
~~Consents~~
~~Safety & Security~~
~~Milestones and payment schedule~~
~~Phase 1b and network expansion~~
~~Termination~~
~~Dispute resolution~~
~~Joint & Several liability~~
~~Conditions precedent~~
~~Approval process and signatories~~
~~Warranties and Indemnity~~

The Infraco Works are to be carried out pursuant to an Infraco Contract between tie Ltd and Bilfinger Berger (UK) Limited and Siemens plc. Bilfinger Berger (UK) Limited and Siemens plc have formed an unincorporated consortium to carry out the Infraco Works and are together called the 'Infraco', each company separately being an Infraco Member. ~~Both~~ Bilfinger Berger (UK) Limited and Siemens plc have joint and several liability for the performance and discharge of all obligations under the Infraco Contract and the novated agreements that will be housed within it.

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Authority to Transact

The legal authority of the various counterparties to tie and to CEC (under its Guarantee) will be dealt with in the conventional manner:

- each party will produce certified board minutes or other legally competent evidence of the corporate decision to enter into the ETN Contract Suite;
- all signatories will have legally effective power of attorney from their respective organisations; and
- in relation to foreign companies, an external counsel's opinion covering the legally binding nature of the corporate acts (re Contract execution) carried out in accordance with the Board resolutions, the signatories' delegated authority and the enforceability of the Contracts against the parties through the courts in their respective home jurisdictions.

CEC and tie will be required to produce their legal own authority to transact as has been explained and agreed previously with CEC Legal.

The Infraco Contract ~~comprises an Agreement~~ executed by tie Limited, Bilfinger Berger (UK) Limited and Siemens plc comprises Core Terms and Conditions and a series of ~~referred to~~ detailed Schedules ~~to the Infraco Contract~~ which contain the pr ice for and ~~fully details and further amplifies~~ the scope of the Infraco Works and amplify the responsibilities and commitments accepted by the Infraco.

Conditions Precedent

At present, the draft Infraco Contract provides that the delivery of various ancillary agreements (notably the novations and the performance security package) are conditions precedent to its effectiveness. Since the intention is for all documentation to be closed provided and executed simultaneously, this technical provision may be removed prior to contract award date.

Warranties

The Infraco members provide key individual warranties regarding the Infraco Proposals meeting the Employer's Requirements and regarding their capacity to enter into the Infraco Agreement.

Duty of Care and General Obligations

Under the ~~Agreement~~ Infraco Contract the 'Infraco' has a duty of care and general obligation to carry out and complete the Infraco Works fully in accordance with the Agreement. Infraco ~~are~~ is further obligated to procure that the Infraco Parties ~~which shall include~~ (the Infraco members and their agents, advisors, consultants and sub contractors) carry out the Infraco Works in accordance with inter alia, the ~~Agreement~~Contract, ~~the Employer's Requirements, the Infraco Proposals,~~ the general Law and stipulated tie and CEC policies to enable the Edinburgh Tram Network to be designed, constructed, installed, integrated, tested, commissioned and thereafter operated and maintained. The scope for which the Infraco has contracted is contained in the Employer's Requirements and the Infraco Proposals. ~~The Employer's Requirements are suitably~~

~~detailed such as to elaborate on the intent and to ensure that the Infraco can develop and complete the Infraco Works to enable the delivery of the Edinburgh Tram Network.~~

~~'Infraco' shall ensure that the system integration of the Infraco Works are implemented.~~

Indemnity Provisions

Generally the Infraco must indemnify tie and CEC from all losses incurred as a result of a breach of the Infraco Contract by the Infraco or negligent or wilful acts of the Infraco. This includes where the breach or negligence causes:

- death or injury;

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- damage to property or to the Infraco Works;

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- infringement of third party IPR;

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- causing tie or CEC to breach any law, consents, third party agreements or undertakings entered into prior to the date of the Infraco Contract;

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- causing tie or CEC to breach the Network Rail Asset Protection Agreement, the DPOFA or the Tram Inspector Agreement.

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The Infraco also has a specific obligation to indemnify tie in respect of any losses suffered resulting from the adverse impact of the Infraco Works in respect of the property interests, liabilities or statutory obligations of Forth Ports and Stakis. The Infraco is wholly responsible to tie for any actions or omissions of its employees, agents, advisers and sub-contractors.

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Principal Exclusions:

- any act or omission of tie or CEC is the cause of such death, injury or damage to property;

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- proportion of loss caused by tie/CEC;

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indirect losses of tie/CEC by reason of Infraco breach or negligence, but indirect losses claimed by a third party are carved out of this prohibition. Infraco would therefore be liable to indemnify tie/CEC against a claim for lost revenue asserted by a business adversely affected by Infraco's breach.

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ETN Assets

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The Agreement ~~contains permission~~ provides for the direct transfer of title to CEC in all materials, goods, and equipment ~~included~~ which is intended to be part of the completed Edinburgh Tram Network. 'Infraco' shall procure that ~~each Tram~~ all ETN assets are ~~is~~ supplied free from security interests and that any material stored off site is identified as belonging to CEC, wherever practicable.

Price

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A contract price has been agreed. The contract price and pricing schedules for carrying out the Infraco Works is contained in schedules to the Infraco Contract. A substantial portion of the Contract Price is agreed on a lump sum fixed price basis. ~~however~~ Tthere are certain work elements that cannot be definitively concluded in price and as such Provisional Sums are included (see Section 10 below). ~~provides an up to date view on these contract sums.~~

Programme

The Agreement provides that 'Infraco' shall progress the Infraco Works to achieve timeous delivery and completion of the Infraco Works (or parts thereof) and in their obligations under the Agreement all in accordance with an agreed Programme which is bound into the Schedules. This Programme is the product of tie, Infraco and SDS Provider negotiations and is cardinal to the control of Infraco and SDS Provider's performance and their potential entitlement.

Novations

The Agreement provides that, as a condition precedent, Infraco shall enter into and execute Novation Agreements to incorporate and bind previous agreements between tie and the design provider (SDS), the Tram supplier (Tramco) and the Tram Maintenance provider (Tramco), into the Infraco Contract. These agreements therefore become the full responsibility of 'Infraco' as an essential component of ~~in~~ the completion of the Infraco Works. In addition to the Novation Agreements, collateral warranties are to be provided to tie by the design provider (SDS), the Tram supplier (Tramco) and the Tram Maintenance provider.

Network Rail Interface

Under the Agreement 'Infraco' acknowledges that it will require to comply with the Asset Protection Agreement (APA) with Network Rail in relation to the Edinburgh Tram Network. ~~and that tie has certain specific obligations owed to Network Rail through a framework agreement between Transport Scotland and Network Rail.~~ Infraco are to comply with the APA and undertake that if shall not put tie/CEC in breach of the APA. The APA has been stepped down into the Infraco Contract so that the Infraco is fully on notice of those obligations which it will perform on behalf of tie/CEC. ~~or the framework agreement. 'Infraco' has also obligations which concern interface or co-operation with the operator.~~

Operator Interface

The Infraco's interface with Transdev is dealt with through Clause 17 of the Agreement. A duty of liaison and cooperation is imposed. Interference with maintenance works by the Operator may entitle an Infraco to claim for a Compensation Event and likewise any adverse affect of unplanned maintenance/defective maintenance would give rise to a right of indemnity for tie against any Transdev claim for relief/cost under the DPOFA. Any change to tram operations which adversely impacts the Infraco maintenance could give rise to a tie Change.

Safety

'Infraco' shall provide a permanent representation for the Project Safety Certificate Committee and shall develop and implement a safety management system to address all aspects of safety in working practices during construction , operation and maintenance.

Site Access

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tie has granted a non exclusive licencse to Infraco to enter and remain upon the permanent land of the term of the contract and exclusive licencse to enter and remain upon designated working area for the duration of the Infraco scheme and shall ~~permit~~ provide 'Infraco' with all necessary land consents.

Works on ~~Possession of~~ permanent land or temporary sites by Infraco are ~~shall always be~~ subject to compliance with the requirements of Third Pparty Agreements ~~executed~~ by tie and/ or CEC.

Infraco Maintenance

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Infraco shall comply with the requirements of the Code of Construction Practice and Code of Maintenance Practice with regard to the maintenance of access properties, bus stops, bus services and closure of roads.

The Infraco is obliged to undertake maintenance of the ETN from the time when any section is completed and then under the full Maintenance Services regime once Service Commencement occurs. The Maintenance Services contract is for ten years post Service Commencement, with a unilateral option for tie to extend for five years, subject to any required changes. tie may terminate the Infraco Contract on six months' notice at any time after three years of ETN operation. Compensation is payable as if termination had occurred for tie default.

~~'Infraco' shall procure the appointment of a Tram Inspector and agree the identity of such Tram Inspector to enable the execution of a Tram Inspector Agreement. It is a condition precedent that Infraco enters intowith the Tram Inspector Agreement with tie and the Tram Inspector in the agreed from.~~

Milestones and Payment schedule

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The construction sequence is broken down into construction milestones and critical milestones and procedures have been agreed for the monitoring of progress toward each milestone based upon milestone schedules. Interim Payments will be made to 'Infraco' monthly subject to and in accordance with the completion of stated Milestones. The Agreement obliges 'Infraco' to complete the Infraco Work in sections and 'Infraco''s failure to complete sections by the sectional completion date will result in Infraco becoming liable to pay liquidated and ascertained damages to tie at amounts stated in the Agreement. If 'Infraco' are delayed by reason of certain prescribed events they may be able to apply for a Extension of Time and/or claim costs in connection with certain prescribed events listed in the Agreement.

Variation

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The Agreement contains ~~provisions~~ a relatively conventional contractual change mechanism in relation to the management and evaluation of variations. Variation rules depend upon the type of change instructed whether it is a tie Cchange, tie Mandatory Change or an 'Infraco' Cchange.

Phase 1b and Network Expansions

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'Infraco' acknowledges that tie may, subject to notice' instruct the Phase 1b works to be carried out provided that ~~this~~ the election is made no later than 31st March 20098. The Agreement contains specific provisions ~~for~~ (Schedule 42) under which 'Infraco' ~~to~~ would carry out Phase 1b works if so instructed. Network Expansion (i.e. a spur, interconnect or modification) would fall to be dealt with as a tie Change under the Variation mechanism.

Termination

If tie defaults (on payment above a certain threshold or becomes insolvent) ~~on certain prescribed matters~~ 'Infraco' may serve a termination notice in accordance with the Agreements. The Agreement sets out the ~~rules relating to any~~ treatment of such ~~proposed~~ termination. If 'Infraco' defaults in certain prescribesd matters, tie may, after giving required notice, terminate the Agreement. The Agreement again ~~sits~~sets out the rules relating to such proposed termination as final account, compensation (if any) and tie's rights to compensation.

Under these provisions, the compensation entitlements are sole remedies.

Dispute Resolution

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The Agreement contains provision for the settlement of any disputes under a Dispute Resolution Procedure contained in the Schedules to the Infraco Contract.

Disputes are to be dealt with through a rapid escalation process to Chief Executive level in order to achieve amicable resolution of any unsolved dispute within 15 days. If no settlement is possible, the Chief Executives may elect mediation, adjudication, or court proceedings as the resolution process. The Dispute Resolution Procedure mechanic allows for joinder of related disputes at the instigation of either party. The provisions are exempt form the application of mandatory adjudication time limits (under the Housing Grants Construction Regeneration Act 1996) by virtue of the Tram Acts.

2.4 SDS Novation Agreement and design delivery and approval process [DENNIS WITH INPUT FROM DAMIAN]

Principles of Novation

The novation of SDS Provider to 'Infraco' involves 'Infraco' taking responsibility for managing SDS to produce the remaining design and approvals for the Edinburgh Tram Network.

The principal of novation was to ensure ~~novation also ensures~~ that the integration of design and construction is firmly the responsibility of BBS and gives BBS recourse to the same contractual remedies against SDS as tie would have had in that situation, including critically the ability to claim against SDS's Professional Indemnity Insurance cover in relation to the defective design carried out by SDS.

SDS Provider Novation outcome

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The novation of SDS Provider to the Infraco has been the subject of intense negotiation since preferred bidder announcement. tie's ability to close this element of the procurement has been compromised by:

- SDS Provider indifferent performance to design production programme
- BBS increasing visibility of SDS underperformance
- a reluctance by SDS Provider to engage on the terms of the novation
- the evolving status of the Employer's Requirements and the Infraco Proposals
- the negotiating stance of BBS to avoid importing any risk from SDS failure to manage design approval.
- SDS claims relating to earlier periods of design development and previous tie project management's lack of experience in using the SDS Contract to control SDS performance.

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The terms of the novation of SDS have therefore been settled on the basis that BBS risk adversity required accommodation, otherwise no transfer of responsibility for design production and consent management could have been achieved. Two prime concessions have therefore been made by tie:

(1) to the extent the CEC consenting process is delayed through no fault of SDS Provider, that delay will entitle BBS to claim a Compensation Event under the Infraco Contract (time relief and additional cost). Such a claim would also encompass SDS Provider delay costs. Although the SDS Contract provided that SDS would take all consent risk, without exception, BBS were not prepared to absorb this risk (through recourse to SDS Provider) having carried out post preferred bidders due diligence on SDS design and the consent process with CEC.

(2) If through its own fault or dilatoriness SDS is late in delivering a design into the CEC Consent process and this in turn delays the issue of construction drawings to BBS (Issued for Construction), BBS will be entitled to apply liquidated damages up to an agreed level (currently proposed by tie at £1,000,000 and with approximate minimum rate of £20,000 per week).

BBS would have recovery risk on such liquidated and ascertained damages[1] but beyond the cap, tie would be required to recompense BBS.

(3) BBS are reluctant to take any risk as regards to quality of BBS designs. The current position is that any damages or loss suffered by BBS beyond the £10,000,000 cap under SDS novated contract (in relation to deficiency in SDS design) would be a tie risk.

Following the novation of SDS, tie will hold a collateral warranty from SDS regarding SDS services and work product prior to novation. The terms of the Collateral Warranty will be standard for a design and engineering services consultancy and were substantially contained in one annex to the SDS Contract when it was executed in September 2005. tie will also hold the SDS Parent Company Guarantee which supported the original SDS Contract.

Design expectations of the 'Infraco'

The 'Infraco' offer is based on design completed to date and a programme for future delivery of design. The offer is also based on those approvals achieved to date and a programme for achieving the remaining prior and technical approvals.

[1] Note that the enforceability of such LADs is open to question unless they represent a genuine pre-estimate of BBS loss from the delay.

At the time of the original 'Infraco' bid price in [insert date], X of the Y deliverables had been delivered to tie ltd; P prior approvals and Q technical approvals had been granted. Design has been released to BBS as it has been completed since then. The final 'Infraco' proposal is based on the updated design at [2 February 2008] when A deliverables had been delivered to tie ltd; B prior approvals and C technical approvals had been granted.

The original 'Infraco' construction programme was based on version 22 of the SDS design programme (dated X); the construction programme included in the final 'Infraco' proposal has been updated to match up with version 26 of the SDS design programme (dated 4 February 2008)

The substantial progress with completion of the SDS design has reduced the risk of late production impacting on the construction programme and has given 'Infraco' greater certainty of the construction needed.

Managing Approvals Risk

The risk of securing approvals has been shared between SDS and tie ltd. The 'Infraco' then takes programme and construction risk based on approvals being granted in line with the agreed master programme for the project.

SDS takes the risk of achieving delivery of batches for approval on the agreed date to the agreed quality. That risk is capped at [insert details]. Provided the application for approval is made on time and the quality of application is in line with agreed expectations then tie ltd takes the risk that the Council does not process the application within the 8 week period included in the programme.

The management of this risk has begun long before the application for approval is made. Designs have been reviewed progressively throughout their development involving the relevant Council officials and representatives of other approval bodies. Before applications are made for prior approval there is an 8-week period of informal consultation on top of the earlier involvement in design development. Addressing the comments received from informal consultation significantly improves the design and the chances of the Council being able to process an application within the 8 week formal period.

Design Guidance

In developing the current design, SDS has been under an obligation to take account of:

- the provisions of the Tram Acts
- the Environmental Statement
- statutory and supplemental planning guidance from the Scottish Government and City of Edinburgh Council
- the Tram Design Manual
- all third party agreements in relation to the project
- UK guidance on the safe design and operation of tram systems

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ADD SECTION ON SDS PERFORMANCE GUARANTEE
There is no SDS Provider performance guarantee. There is a £500,000 bond which is callable if SDS Provider fails to novate.

[Provide here a brief overview of the key issues in this critical area]

[The Council requirements here are as follows :

- Full written explanation of SDS Novation to be provided by tie, including risks of failing to deliver design
- Full details are required from tie on status and degree of completion of SDS design work as at 14 January 2008, including prior and technical approvals. If approvals risk is not being transferred to BBS the Council needs to know the impact and likelihood of the risks and a strategy for managing the risks. Confirmation required from BBS/SDS that all prior and technical approvals and all other necessary consents will, as a minimum requirement, be fully compliant with Tram Design Manual and other relevant CEC Policies and Guidelines

- Confirmation that the public sector (tie & CEC) are not liable for delays for Planning or Road Approvals NOTE – THIS IS INCORRECT, STATEMENT OF FACTS NEEDED
- tie to provide written report on previous claim settlement with SDS identifying details, cause of claim and costs of settlement. Are any further claims expected from SDS? Are any further claims from SDS competent

Design version What design version was the BBS contract priced against and what changes has subsequently taken place]

2.5 Confirmation of BBS acceptance of modelling ~~[MATTHEW]~~

[GRAEME - THIS IS NOT ONE FOR DLA PIPER]

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[Provide here a synopsis of the written statement from the Preferred Bidder that they accept the performance run-time model and "law of physics" results and confirmation of acceptance of the emerging quality of design.]

2.6 Employer's Requirements ~~[MATTHEW]~~

[GRAEME - THIS IS NOT ONE FOR DLA PIPER BUT SEE SECTION BELOW ON "LEGAL REVIEW"]

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[Appendix 1 sets out a summary of the Employer's Requirements. FURTHER SUMMARY COMMENT]

The Infraco Proposals and the Employer's Requirements

No legal review has been instructed by tie in relation to the Infraco Proposals, on the basis that these are technical responses to the outline Employer's Requirements issued initially by tie in October 2006 at ITN stage and then progressively until final bid submissions as at [7] August 2007.

In early January 2008, tie instructed an urgent review of the Employer's Requirements Version [3.0] by DLA Piper. In the time available (less than a week) all sections (barring [◆] and [◆]) were commented by DLA Piper at a level aimed to (i) improve terminology consistency, (2) wherever possible, to convert non-contractual language into statements of obligation and (3) remove ambiguity or repetition. The majority of these adjustments were made by tie but DLA Piper has not be involved since.

Since that exercise there have been [three] further iterations of the Employer's Requirements but no further legal review. Consequently, no legal assurance can be given regarding the current content of the Employer's Requirements and their consistency with the Infraco core terms and conditions. BBS' position as of 4 March 2008 was that they could not sign the Infraco Contract without a thorough review of the Employer's Requirements by their legal team. tie has instructed SDS to carry out an exercise to bring the Employer's Requirements and the Infraco Proposals into alignment so that SDS Provider are able to warrant that their design will be in compliance the Employer's Requirements. This may result in further changes to the Employer's Regulations and/or the Infraco Proposals, limiting the value of any interim legal review.

The risk created by discrepancies between the version of the Employer's Requirements eventually settled on and the Infraco core terms and conditions lies in the Infraco attempting to exploit ambiguity to engineer the need for tie Change or Relief when none is in fair justified. tie project management will need to be vigilant in identifying and closing off such opportunities using the contract provisions which impose duties on Infraco to respect ambiguities and discrepancies.

2.7 Advance purchase materials ~~[STEWART]~~

[Explain here how the Infraco contract allow[2] BBS to pre purchase material and equipment prior to design approval? If so how is CEC protected if such materials do not meet CEC approval.] This risk is with BBS if material is purchased to support unapproved design or design that has not been consented.

2.8 Infraco Payment mechanism ~~[STEWART TO REFRESH]~~

Construction

Payment under the contract is entirely against a 4 weekly ~~claim~~ application from Infraco in respect of milestones which have previously been certified by tie as having been achieved. The milestone schedule reflects the Infraco price allocated in amounts to series of construction milestones and critical milestones and to the future period in which each milestone is expected to be achieved in accordance with the agreed programme.

The milestone schedule and certification mechanism has been prepared and agreed in accordance with the following key principles:

- Save in respect of agreed advance payments, **Infraco will not be paid in advance of its own outgoing cash flows through its own supply chain**
- **The individual milestones are defined such that the process of determining whether or not they have been achieved will be subject to the minimum of uncertainty or dispute**

[2] It is up to BBS when they procure materials through their supply chain. The Infraco Contract does not and should not control this.

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- The certification of a milestone will require evidence that all required relevant consents and approvals have been delivered in respect of the related works

The contract provides an effective mechanism for the addition and variation to milestones (valuation or date) initiated by either tie or Infraco.

Infraco will submit a detailed claim for payment within 3 business days of the end of each 4 week reporting period in respect of milestones certified as achieved following which tie will have 5 business days to certify the total payment and a further 15 business days to make payment. There are no express retentions of payment but a retention bond is provided as explained below. and tie has a contractual right of set off.

Commissioning and Maintenance

Infraco will commission Phase 1a in 4 key sections, transfer title accordingly and hand over control of each section to the operator and maintainers:

- Section A – The depot, certified after system acceptance test T1 has been passed for that section;
- Section B – Depot to the Airport, certified after system acceptance test T1 has been passed for that section;
- Section C – The rest of Phase 1a, certified after system acceptance test T1 has been passed for that section and system acceptance test T2 has been passed for Phase 1a, and
- Section D – Driver training and commissioning, certified after system performance test T3 has been passed for Phase 1a.

Certification of Section D requires that in addition to passing the system performance demonstration all relevant consents and approvals have been obtained and documentation and initial spares have been delivered.

After the period of trial running without passengers has been completed, ~~then~~ passenger service will commence.

During the commissioning period, Infraco will be paid Mobilisation Milestone Payments according to the programme for establishing the maintenance organisation and systems. The Operator, Transdev, will be paid on a 4 week reporting period basis up to a maximum of a capped sum for the commissioning activities as a whole.

After the commencement of passenger operation, the Operator and the Infraco will be paid their respective operating and maintenance fees on a 4 week reporting period basis The performance of the delivered systems in passenger service will be monitored against two final system acceptance test criteria, Network Performance test T4 and Reliability test T5. After the Reliability Certificate has been certified then the 4 weekly fees paid will be subject to the performance regime.

2.9 Infraco performance security arrangements ~~[STEWART TO REFRESH]~~

Bonds during construction period

Two bonds are being provided by Infraco from Standard & Poors A- rated financial institutions (expected to be ANZ Bank and Deutsche Bank)~~of good credit~~, a Performance Bond and a Retention Bond. Both bonds are in substance 'on-demand', meaning there is no requirement that proof of failure (beyond formal notification) by Infraco must be produced by tie before a claim can be made under the bond.

The Performance Bond is in the amount of £20m throughout the construction period reducing to £10m when a certificate of Revenue Service Commitment is issued and further reducing to £8m when a certificate of Network Certificate relating to the achievement of performance criteria is issued. The issue of the aforementioned certificates is subject to a rigorous testing regime as defined in the Employers Requirements, including evidence that all relevant consents and approvals have been delivered, and provides both security for tie/CEC and incentive to Infraco to perform.

The Retention Bond is in the amount of £2m initially adjusting to the following amounts at sectional completion:

£4m section A – The depot
£6m section B – Depot to the Airport
£8m section C – The rest of Phase 1a
£10m section D – Driver training and commissioning
£6m at issue of Network Certificate (pertaining to reliability as defined in the Employers Requirements)

The Retention Bond is released when a Reliability Certificate is issued. ~~and the required bond for the maintenance stage of the contract has been provided.~~

The Operator provides a Performance Bond in amount of £10,000,000 from a financial institution of good credit. The Bond is 'on-demand', meaning there is no requirement for proof of failure by the Operator to be produced by tie before a claim can be made under the bond.

~~The Performance Bond provided by the Operator is in the amount of £10m.~~

During the maintenance phase post Service Commencement, Infraco is required to provide a performance security (or submit to a cash deposit/retention regime) at any time that there is determined by survey to be remedial work of a value greater than £50,000 the minimum to reinstate the Edinburgh Tram Network assets to the Handback Condition. The amount may be up to £1,000,000., ~~This may either be in the form of a cash deposit or an on-demand Handback Bond covering the full value.~~

~~The bonds are provided by banks of global standing.~~

Parent Company Guarantees (PCGs)

PCGs are provided by the ultimate holding companies of both Infraco consortium members in respect of all performance, financial and other obligations of their subsidiaries which are

contracting with tie. The substance of these entities, which are the group holding companies in each case, has been subject to ~~legal~~ financial verification.

The PCGs respect the joint and several liability provisions in the Infraco contract; each claim by tie under the PCG's must be served on each of the parent companies in the proportion of their share of the Infraco consortium but in the event of either parent company failing to honour payment of such a claim, the other parent company is liable up to the limit of overall liability specified in the Infraco contract (20% of the Infraco contract price).

The PCGs provide that in the event of a change in control or ownership of the subsidiary companies which are entering into the Infraco contract, the PCG's remain in force until a replacement PCG has been provided on terms which are acceptable to tie.

In all other respects the PCGs are constructed such that the obligations and liabilities of the parent companies mirror that of the two subsidiaries in the Infraco consortium including the dates on which obligations are set expire.

All obtainable necessary collateral warranties have been agreed sought and provided for as requirements of Infraco.

Performance securities during maintenance period [THERE ARE NONE]
[o/s]

2.10 Overview of Tramco contract terms ~~[DENNIS WITH INPUT FROM ALASTAIR R]~~

This section to cover :

General description of scope, parties and contract structure
Duty of care and general obligations
Systems integration
Title to assets created
Tramco maintenance
[Interfaces – Operator]
Consents
Safety & Security
Milestones
Management of variations
Phase 1b and network expansion
Termination
Dispute resolution
Joint & Several liability
Conditions precedent
Approval process and signatories
Warranties & indemnities

Trams will be supplied pursuant to a Tram Supply Agreement between tie Limited and Contrucciones y Auxilliar de Ferrocarilles S.A (CAF) "Tramco". Tramco are to carry out the Tram works and design, manufacture, engineer, supply, test, commission deliver and provide 27 trams and if required any additional trams in accordance with the Employer's Requirements, the

tram Suppliers Proposal and agreed programme. Tramco shall ensure that all data, component, systems, devices, equipment, software and mechanism incorporated in the trams are fit for purpose and compatible with each other. Tramco shall operate under good industry practice, comply with all applicable laws and consents and ensure that each tram meets the required standards. The parties have agreed to work in mutual cooperation to fulfil the agreed roles and responsibilities to carry out and complete the tram works in accordance with the Agreement.

Tramco shall provide support in respect of the key elements of system integration of the tram works with the Edinburgh Tram Network.

Tramco acknowledges that the operator shall be responsible for the Operator Maintenance of the Edinburgh Tram Network and that Tramco would at all times liaise with the Operator.

Tramco shall deliver and finalise the designs, design data and all other deliverables as prescribed in the Employer's Requirements.

The Agreement allows for the introduction of changes either by tie or Tramco always subject to notices and prescribed rules. tie may, subject to notice and terms, order additional trams with related spare parts and special tools.

Tramco shall at all times utilise a Project Quality Assurance Programme compliant to standards.
A tram manufacturing and delivery programme is agreed and regular monitoring of progress will take place.
There is provision is the Agreement for tie to be involved in inspecting the trams at various stages of the manufacturing process. Tramco shall deliver the trams to the designated point of delivery at the depot and delivery tests shall be conducted.

Tramco, tie and the operator shall agree a training programme and the detailed implementation.

Tramco shall provide Trams free form all security interests transforming title to CEC.

Termination of the Agreement may be made by either party subject to certain prescribed defaults and terms.

2.11 Tramco payment mechanism ~~[STEWART TO REFRESH]~~

<u>Supply agreement</u>

The payment mechanism under the supply contract conforms substantially to that under the Infraco contract as described above with the milestone payments heavily weighted towards:

- Initial mobilisation and establishment of supply chain
- Delivery of tram vehicles
- Attainment of performance and reliability standards as specified

<u>Maintenance agreement</u>
Infraco is required to provide a security at any time that there is determined by survey to be remedial work of a value greater than £50,000 to reinstate the Edinburgh Tram Network assets to the Handback Condition. This may either be in the form of a cash deposit or an on-demand Handback Bond covering the full value.

2.12 Tramco performance security arrangements ~~[STEWART TO REFRESH]~~

Bonds during supply period

Tramco will provide a Reliability bond in the defined amount of 5% of the Tramco price such bond to be provided on or before the due date of delivery of the first Tram vehicle.

Parent Company Guarantee (PCG)

The supply and maintenance contracts with Tramco are with the ultimate holding company so the issue of a PCG does not arise. The liability cap of Tramco under the tram supply agreement is 20% of the Tramco supply price.

Performance securities under maintenance agreement
Tramco is required to provide a security at any time that there is determined by survey to be remedial work of a value greater than £50,000 required to reinstate the Tram assets to the Handback Condition,. This may either be in the form of a cash deposit or an on-demand Handback Bond covering the full value of the remedial work outstanding. The liability cap of the Tramco under the tram maintenance agreement is 18.5% of the aggregate 30 year Tram maintenance price.

2.13 Summary Pricing Statement – Infraco and Tramco ~~[STEWART]~~

Appendix 2 provides a summary of the total Infraco and Tramco contract cost and a tie-in to the total project budget.

[The Council requires a detailed analysis of prices, costs and risks allowance. tie required to explain how prices for maintenance, etc. impact on operating cost assumptions]

2.14 Summary of Programme – Infraco and Tramco [STEVEN]

Appendix 3 contains a summary of the agreed programme. The critical milestones are :

[To reflect Phase 1a and 1b]

[MUDFA – relationship to Infraco programme and statement of slippage allowance]

2.15 Risk profile ~~[MARK H / SUSAN / STEWART]~~

~~A full analysis of the risk matrix is contained in Section 9 of this report, together with a letter from DLA relating the matrix to the final form of the Infraco contract suite.~~

~~[Updated QRA and relationship to 25 October version] tie written statement to CEC on risks at 25/10/07 compared to risks immediately before contract close~~

[Commentary on updated risk register :

- **Black flag risks – Provide a list of these items and what is the likelihood of any of these risks occurring ? What is tie's strategy to avoid said risks materialising ? What is the cost of exiting from a Black Flag item ?**
- **Details of the risk management strategy for the key risks through delivery**
- **Detailed analysis of programme risk. Confirmation of the risk allowance for programme delay. Detail of items on critical path and what is being done to ensure they do not cause (further) delay.**
- **Risk register updated to reflect risk of prior and technical approvals not being obtained prior to financial close]**

[Updated QRA and relationship to 25 October version] tie written statement to CEC on risks at 25/10/07 compared to risks immediately before contract close

Cost per week of not signing on time to be estimated by tie.

Third Party Agreements disclosure list and acceptance of these by BBS

OCIP exclusions – text needed

(3) CEC Financial Guarantee

[DLA TO UPDATE]

CEC are required to provide a guarantee to the Infraco of the financial obligations (including future variations) of tie under the Infraco contract in recognition of the fact that tie on its own has no capacity to bear any financial commitment insofar as it is not 'back to back' with the funding of the project which is channelled through CEC. In this sense it is materially consistent with the provisions of the PCGs (including periods allowed for payment of amounts due) ~~and duration of the agreement)~~ provided by the Infraco, except that it is a guarantee of financial obligations only and not of performance. the CEC Guarantee will be released upon issue of the ETN Reliability Certificate, that is to say approximately nine to twelve months after Service Commencement. Any pre-existing claims will survive release until settled.

The terms and conditions of the CEC Guarantee and in particular its call mechanics, liability cap and protections are in line with market practice for this type of instrument. It should be noted that the Guarantee may be called upon by the Infraco on multiple occasions if tie is in payment default more than once. The instrument has been drafted, negotiated and settled with direct involvement and support of CEC Legal and Finance.

The guarantee is provided to Infraco meaning either or both of Bilfinger & Berger UK Limited or Siemens PLC or their assignees as permitted and approved under the Infraco contract. ~~The guarantee remains in force until the Infraco contract ceases, or when tie has met all payment obligations if earlier, and would remain in force in the event of any change in function, control or ownership of tie.~~

~~The provisions of the guarantee ensure that tie will not be compromised in it's management of the contract by virtue of an ability on the part of BBS to go directly from CEC for recompense.~~ CEC will benefit from the same contractual ~~rights and remedies~~ defences and entitlements to set off as tie and will have no liability greater than tie's. No claim can be made for an amount which is in dispute if ~~it~~ tie has been referred the matter under the dispute resolution provisions of the contract.

The practical day to day implication of the G~~g~~uarantee is that its provisions will not be invoked so long as the process for drawdown of cash from CEC to tie to meet payment obligations as they fall due is uninterrupted. Any dispute under the Guarantee would be subject to court proceedings.

(4) Grant Award Letter

Transport Scotland will provide up to £500m of the total capital cost and the balance will be provided by CEC, which has initially allocated £45m for this purpose. The source of these funds is a matter for the two funders. The Government grant is documented in an award letter which is specific to the project but follows standard terms for grants under S70 of Transport (Scotland) Act 2001. CEC has identified a range of sources and an independent review confirmed the validity of the assumptions made by the Council.

The programme concentrates on Phase 1a initially and the parties have the opportunity to commit to Phase 1b before 31 March 2009 on pre-agreed terms with BBS. During 2008-9, an

assessment will be made of funding availability to support Phase 1b. Government contribution will not exceed £500m under the current arrangements.

Grant will be drawn down pro rata with Council contribution. The amounts of grant available in each financial year will be capped, with the balance of any undrawn grant added to the sum available in 2010-11. There are detailed arrangements for payment approval and audit.

With the contributions agreed, the pro rata drawdown mechanism becomes an accounting process each month and within tolerances will not create any difficulty. The annual capping does have potential to create difficulty, but it is felt there is sufficient tolerance in the spend plans versus funding availability that this limitation is manageable.

The terms of the grant letter are weighted in favour of the awarding body and fall short of the sort of protection which a borrower would seek from a commercial lending bank. This is however normal and the Council are satisfied that the terms of the award offer sufficient protection bearing in mind the relationship between Government and the Council.

The letter was negotiated with TS by tie and Council Finance and Legal officials with ~~support~~ comment from DLA. Basic Commentary has been provided by DLA Piper in relation to the development of the Grant Funding letter but Transport Scotland's relatively rigid approach to how the terms of the Grant should be settled with CEC meant that detailed legal advice for tie was unlikely to influence the outcome and therefore of marginal value to CEC. It is noted that the same legal advisors advised Transport Scotland on the Grant Funding Letter as were advising tie on aspects of the ETN. {Infraco Contract interface with GFL.

See Section 8 for taxation assessment.

(5) Notification of Award, challenge process and cooling-off period

This section contributed by Jim McEwan, who performed a review of procurement process integrity independent of the main procurement team.

[DLA AND JIM TO UPDATE BASED ON TERMS OF FINAL DEAL]

Summary

Over the last 12 months tie has pursued the procurement of both the Infraco contract for the construction of the Tram infrastructure in its entirety and the Tramco contract for the supply and delivery of the Tram vehicles. The focus of the procurement strategy was to deliver fixed price contracts for each.

The process followed for each contract was consistent with that specified by the EU directive on Public procurement and details of the evaluation methodology employed are outlined below.

The Bilfinger Berger and Siemens (BBS) consortium have been duly awarded the Infraco contract.

CAF has been awarded the Tramco contract.

In the event of any challenge to these awards tie is well placed to successfully defend the fairness and integrity of the process undertaken in the selection.

Infraco

The Evaluation Methodology employed by tie in the Tram Project is detailed in a document dated 8th January 2007 'Evaluation Methodology for submissions in response to the invitation to negotiate issued on 3rd October 2006 for the procurement of the Infraco for Edinburgh Tram Network' .

In the process 6 key areas were identified in the evaluation and a stream leader appointed to each :

Financial
Programme and Project Execution Proposals
Project Team and Resources
Technical and Design proposals
Legal and Commercial
Insurance

Evaluation team members were identified in the methodology together with stream leaders for each of the key areas

Each team was charged to prepare a 'consensus' score matrix on each of the key areas, these have been duly completed and lodged in the central document repository.

Proper probity on the process was maintained with financial information being restricted to only those in the finance stream and to the tie executive team.

Security employed on maintaining confidentiality was consistent with best practice with documentation stored in a locked room and the financial documentation stored in a locked cabinet within the room. (Note: The details of the financial bids were only available to those in the Financial stream, the evaluation of the other streams was therefore carried out without prejudice on costs.)

All meetings with Suppliers were documented and the notes of said proceedings are held in the central repository.

Financial position was reviewed as was the normalisation process which ensures bids are viewed on an equal footing basis

<u>Tramco</u>

The Evaluation Methodology employed by tie in the Tram Project is detailed in a document dated 11th October 2006 and titled Tramco Evaluation Methodology.

The process employed was identical to that employed in the Infraco evaluation as detailed above with 6 streams and the same methods of approach on scoring, confidentiality, probity and security. All required documents have been lodged in the central document repository.

(6) Third Party Agreements [ALASDAIR S / SUSAN]

This section contributed by Alasdair Sim, who took the lead role developing the agreements. A second (and consistent) view on risk is provided by Stewart McGarrity in Section 109.

In addition to the principal Infraco Contract Suite, there are a number of agreements which are of varying significance to Financial Close. This section describes the purpose and status of these agreements, together with an assessment of the level of risk to programme / cost arising from the agreements remaining open at the date of Financial Close.

THE AGREEMENTS ASTERISKED ARE REGARDED AS THE MOST IMPORTANT IN RELATION TO REACHING A ROBUST POSITION AS AT FINANCIAL CLOSE.

The agreements addressed in this section are as follows :

6.1 Edinburgh Airport Limited - Licence *
6.2 Edinburgh Airport Limited – Lease *
6.3 Edinburgh Airport Limited – Operating Agreement
6.4 CEC/tie Licence *
6.5 SRU Side Agreement
6.6 Royal Bank of Scotland Agreement
6.7 Local Code of Construction Practice – Forth Ports *
6.8 Local Code of Construction Practice – New Edinburgh Limited *
6.9 Local Code of Construction Practice – Edinburgh Airport *
6.10 Network Rail Asset Protection Agreement *
6.11 Network Rail Depot Change *
6.12 Network Rail Station Change *
6.13 Car Park Compensation Agreements
6.14 Network Rail Framework Agreement
6.15 Network Rail Lease Agreement
6.16 Forth Ports Agreement
6.17 Stanley Casinos Agreement
6.18 Other Site Specific Code of Construction Plans
6.19 Licence – The Gyle
6.20 Licence – West Craigs
6.21 Network Rail – Neighbour Agreement
6.22 Network Rail – Operating Agreement
6.23 Network Rail – Bridge Agreement
6.24 Telewest utility agreement
6.25 Scottish Power utility agreement
6.26 DPOFA 2007 Revision
6.27 Mobilisation agreements (Infraco and Tramco)

6.1 Edinburgh Airport Limited - Licence *

Purpose of Agreement

This is a licence agreement between Edinburgh Airport Ltd and City of Edinburgh Council, the purpose of which is to enable/facilitate the construction of the Edinburgh Tram within the boundary of Edinburgh Airport. This agreement covers MUDFA and INFRACO works as well as the construction of the Burnside Road alternative access route, and sets out the working arrangements between EAL, tie/CEC and contractors working on the Edinburgh Tram Network.

Current Status of Agreement

The agreement is signed. This agreement has been drawn down into Schedule 13 of the INFRACO Contract.

6.2 Edinburgh Airport Limited – Lease *

Purpose of Agreement

This is a 175 year lease between Edinburgh Airport Limited and City of Edinburgh Council to facilitate the operation of the Edinburgh Tram Network. This lease follows the terms of the Minute of Agreement signed by the two parties during the Parliamentary process in September 2005.

Current Status of Agreement

This agreement is signed.

6.3 Edinburgh Airport Limited – Operating Agreement

Purpose of Agreement

The purpose of the operating agreement is to set out operational interface arrangements and procedures for running passenger services to and from the airport. This agreement will be an evolving document which will be updated periodically during the lifetime of the project.

Current Status of Agreement

An outline document is current under review by tie and TEL. The intention is to develop this document into draft agreement form during the first quarter of 2008, and complete the agreement prior to commencement of passenger services.

Risk to INFRACO Contract Award

The Operating Agreement is a non-construction related document, and for this reason, it offers insignificant risk to CEC for award of the INFRACO Contract.

6.4 CEC/tie Licence *

Purpose of Agreement

The purpose of this licence is to pass over responsibility for land acquired for the ETN from CEC to tie. This will enable tie to manage the process of making land available to INFRACO on a programme/needs basis using the agreed Land Access Permit Procedure. CEC will manage the land/asset until the point that INFRACO take occupation of each worksite.

Current Status of Agreement

The agreement is signed.

6.5 SRU Side Agreement

Purpose of Agreement

This agreement governs design and construction activities in the vicinity of the Murrayfield Stadium. The agreement includes the construction of the Murrayfield Tram Stop, Roseburn Street Viaduct, Murrayfield Retaining Wall, the Wanderers Clubhouse remodelling and the relocation of the training pitches. The agreement also sets out the requirement to develop a local construction plan which the INFRACO contractor will be obliged to comply with. This will also include arrangements in relation to the temporary occupation of land within the Murrayfield site. The draft SRU agreement has been stepped down into Schedule 13 of the INFRACO Contract.

Current Status of Agreement

The agreement is currently in near final draft format. However it is now unlikely that this will signed by financial close. This is because of a number of technical matters which will take some time to resolve, including VE savings arising from design of Roseburn Viaduct and the specification of pitch relocation and ancillary works related to flood prevention. The latter point is being pursued to optimise works and lower overall cost. The fallback arrangement should final execution of the agreement be held back whilst technical/design matters are concluded, is that SRU will provide a letter confirming that the wording of key elements of the document is in agreed form.

Risk to INFRACO Contract Award

INFRACO works are expected to commence in the vicinity of Murrayfield in August 2008. Risk to award of INFRACO Contract is considered low.

6.6 Royal Bank of Scotland Agreement

Purpose of Agreement

This agreement builds upon the existing Section 75 Agreement between RBS and CEC which sets out the funding arrangements for the Gogarburn Tram Stop. The current proposal is for the INFRACO contractor to undertake the works within RBS land under licence, and sets out the procedure for CEC to later acquire the operational land based on the 'as built' (and at nil cost) using the GVD process. The agreement also covers the desire of RBS to maintain the landscaping between the Gogarburn Tram Stop and the A8 Glasgow Road.

Current Status of Agreement

The agreement is currently in draft format, with finalisation expected on completion of the detail design, as this will allow final costs for the tram stop to be calculated. RBS have provided written confirmation that access to the land will be secured under licence.

Risk to INFRACO Contract Award

INFRACO works are expected to commence in the vicinity of Gogarburn from June 2008. Risk to award of INFRACO Contract is considered low.

6.7 Local Code of Construction Practice – Forth Ports *

Purpose of Document

The existing Minute of Agreement between Forth Ports and CEC requires the development of a Local Code of Construction Plan to govern how the construction works are to be undertaken within the Forth Ports area. This would include method statements, programme details and consultation/notification requirements to be agreed prior to the commencement of construction. The Forth Ports Minute of agreement is included with Schedule 13 of the INFRACO Contract.

Current Status of Document

tie are currently drafting a local COCP for the Forth Ports area to a template format. This will require BBS input which will need to be included prior to engagement with Forth Ports. tie meet with the Forth Ports Project Manager on a weekly basis and will arrange confirmation by side letter that matters are in progress and on schedule and that Forth Ports do not intend imposing further restrictions beyond those placed within the existing agreement that would impact negatively on either INFRACO costs or programme.

Risk to INFRACO Contract Award

INFRACO works are expected to commence in the Forth Ports area from June 2008. MUDFA works will recommence in the Leith Docks area following the Easter embargo period from April 2008, and is currently being undertaken on a work by works licence basis, which contains the relevant elements that INFRACO will include within the final Local Code of Construction Practice document.

On confirmation of Forth Ports' position as indicated above, risk to award of INFRACO Contract is considered low.

6.8 Local Code of Construction Practice – New Edinburgh Limited *

Purpose of Document

The existing Minute of Agreement between New Edinburgh Ltd and CEC requires the development of a Local Code of Construction Plan to govern how the construction works are to be undertaken within Edinburgh Park. This would include method statements, programme details and consultation/notification requirements to be agreed prior to the commencement of construction.

Current Status of Document

tie are currently drafting a local COCP for Edinburgh Park to a template format. This will require BBS input which will need to be included prior to engagement with New Edinburgh Ltd. tie to meet with NEL and arrange for confirmation by side letter that there are no other restrictions beyond those placed within the existing agreement that would impact negatively on either INFRACO costs or programme.

Risk to INFRACO Contract Award

INFRACO works (track) are expected to commence in Edinburgh Park from June 2008, with construction of the Edinburgh Park Station Bridge commencing in August 2008. On confirmation of NEL position as indicated above, risk to award of INFRACO Contract is considered low.

6.9 Local Code of Construction Practice – Edinburgh Airport *

Purpose of Document

The licence between EAL and CEC sets out construction requirements in Schedule Part 5 – Development Rights and Obligations. This agreement has been drawn down into Schedule 13 of the INFRACO Contract.

<u>Current Status of Document</u>
tie are currently drafting a local COCP based on the obligations set out in Schedule Part 5 to a template format. This will require BBS input which will need to be included prior to engagement with EAL. tie meet with the EAL Project Manager on a four weekly basis and will arrange confirmation by side letter that matters are in progress and on schedule and that EAL do not intend imposing further restrictions on construction beyond those placed within the existing agreement that would impact negatively on either INFRACO costs or programme.

<u>Risk to INFRACO Contract Award</u>
MUDFA programme within Airport expected to commence on 30 March 2008; INFRACO works are expected to commence in September 2008. On confirmation of EAL position as indicated above, risk to award of INFRACO Contract is considered low.

Network Rail (NR) agreements – general

The suite of NR agreements comprises the following :

[List only – bullet summary state of completion]

CEC requirements here are as follows :

Full statement from tie on current status of every proposed agreement between CEC and NR, including Depot Full statement from tie on current status of every proposed agreement between CEC and NR, including Depot and Station Change Procedures. Full risk analysis in respect of each agreement explaining consequences for CEC in terms of time and cost relative to any delays in concluding agreements. This analysis to cross refer to BBS programme. CEC expects the Network Rail Suite of documents to be in agreed form apart from the Operating Agreement which should be substantially agreed before tie contract with BBS - as Depot and station change will not be concluded until 1st March, the APA will not be signed until at least that point in time. Update required on status of NR agreements required.

NR is contracting with third parties re other works at the Depot. Risk analysis to be provided regarding impact on BBS contract (time and cost) arising from late completion of NR works. Full statement required from tie on the following NR agreements. PPA, Framework Agreement, APA, Neighbourhood Agreement, Lease, Bridge Agreement, Haymarket Car Park, Servitudes incl Balgreen and Haymarket, Lift & Shift, Immunisation, Station & Depot Change and Oil Tanks.

Plan B to take account of any delays in achieving agreement with NR on all matters, including Caley Ale House, Lift and Shift and Immunisation. This to be included in QRA report.

Written confirmation from First Scotrail (and from other TOCs in respect of Station Change) that they are not objecting to Depot and Station Change.

6.10 Network Rail Asset Protection Agreement *

Purpose of the Agreement

The APA is an agreement between NR and CEC which governs design/construction activities as well as access to Network Rail land. The APA is designed to ensure that the heavy rail network can operate in tandem with the construction and commissioning of the ETN.

Current Status of Agreement

There are issues to resolve between NR and CEC in relation to indemnities and future costs. These have been referred to Transport Scotland and the Office of Rail Regulation (ORR) for resolution. Closure on this issue is currently being pursued.

Setting the indemnities issues aside, a final APA draft was received from NR on 18/01/08, which is currently being reviewed and an agreed form of wording is expected to be confirmed by CEC and NR on 25/01/08.

The finalisation of the APA is suspensive on the approval of the Station and Depot Change Proposals (these are Regulated Processes also covered in later sections below). The APA will require to be signed before the INFRACO contractor can take access to Network Rail land.

Risk to INFRACO Contract Award

The most significant risk relates to the proposed BBS construction programme in the vicinity of Haymarket Station Car Park. The demolition of the Caley Ale House followed by the construction of the Haymarket Tram Stop viaduct is scheduled from commencement on 31 March 2008. At this stage therefore, reaching agreement on the principal terms of the APA and related agreements is an important risk to the date of financial close.

6.11 Network Rail Depot Change *

CEC comments here are :

NR is contracting with third parties re other works at the Depot. Risk analysis to be provided regarding impact on BBS contract (time and cost) arising from late completion of NR works. Full statement required from tie on the following NR agreements. PPA, Framework Agreement, APA, Neighbourhood Agreement, Lease, Bridge Agreement, Haymarket Car Park, Servitudes incl Balgreen and Haymarket, Lift & Shift, Immunisation, Station & Depot Change and Oil Tanks.

Purpose of Document

This is a regulated process between Network Rail and First ScotRail, the operator of the Haymarket Light Maintenance Depot. Depot change is the process which defines the revised lease arrangements which will be required as a result of the tram construction and operation. This procedure also defines the methodology of undertaking works in the vicinity of the Haymarket Depot and sets out the interface requirements of the Depot Manager. A key requirement of FSR is that only one contractor (at a single work site) will be permitted to conduct works within the depot area at any given time. BBS are aware of this constraint, and have sequenced their programme and depot construction methodologies accordingly.

Current Status of Document

The formal submission of the Depot Change (by NR) to FSR was completed on 11/01/08. The regulated process allows for a maximum review period of 45 calendar days for comments to be submitted. If no comments are received then the proposal receives deemed consent. The review period expires on 28 Feb 2008.

tie and BBS met with NR and FSR on 08/01/08 and agreed the content and detail contained within the Depot Change Proposal. Whilst the formal regulated change will not be completed by Financial Close, tie are seeking written confirmation from FSR that they have no objection to the proposals. It is expected that this confirmation will be provided by 25/01/08.

Risk to INFRACO Contract Award

The risk arising from depot change agreement in itself is considered low. However, the INFRACO works at Haymarket Depot are scheduled for commencement after completion of the NR Pollution Prevention Works Contract (PPLMD). It is a legislative requirement for NR to comply with environmental standards, and the proposed works involve a number of activities within the Haymarket Depot, including the relocation of diesel fuel tanks, in close proximity to the proposed Roseburn Street viaduct. These NR managed works are scheduled for completion at the end of July 2008.

There is a residual risk that should the PPLMD works be delayed, which is outwith the control of tie, then the INFRACO programme in this area would also be delayed.

Risk to award of INFRACO Contract is considered moderate and we are seeking confirmation from NR as to progress in order to fully assess this risk.

6.12 Network Rail Station Change *

Purpose of Document
This is a regulated process between Network Rail and First ScotRail as the operator of Haymarket Station. The Station Change procedure also requires the consent of the other Train Operating Companies (TOC's) using the station and these are; Arriva Cross Country, Virgin, Trans Pennine Express, National Express East Coast and EWC.

The station change concerns the permanent loss of 49 parking spaces at Haymarket Station Car Park and the temporary closure of the car park as a result of the construction of the Haymarket Viaduct and Tram Stop, as well as the relocation of taxis currently operating from the forecourt of station.

Current Status of Document
NR formally submitted the Station Change proposal to FSR on 16/01/08, which triggers the start of the 45 calendar day consultation process which ends on 01/03/08.

tie are working with NR and FSR to fast track this process and are aiming to get written confirmation from the TOC's at a workshop scheduled for 24 January 2008 that they have no in principle objection to the Station Change Proposal pending conclusion of the formal regulated consultation process.

Risk to INFRACO Contract Award
Risk to award of INFRACO Contract is considered low.

6.13 Car Park Compensation Agreements

Purpose of Document
The loss of income generating cark park spaces at Haymarket Station is a compensation matter for both NR and FSR. Under Station Change, FRS receives a standard indemnity from Network Rail to cover losses, so the commercial arrangements can be negotiated separately and do not form part of the Station Change approval process.

Current Status of Document
tie are awaiting FSR to provide a date to commence these discussions, and FSR have confirmed that the compensation formulae adopted for the Platform Zero settlement can be used as a basis for this negotiation.

Risk to INFRACO Contract Award
The compensation settlement to both NR and FSR are commercial arrangements which have a budget allocation within the FBC and are not part of the Station Change approval process. There is therefore minimal risk to the award of the INFRACO contract.

6.14 Network Rail Framework Agreement

Purpose of Agreement
This is an overarching document beneath which reside a suite of construction, property and operations related agreements.

Current Status of Agreement
The Framework Agreement is in largely agreed form, pending NR confirmation that they accept the CEC negotiating position that the use of CPO Powers will be limited to resolving any future title issues in relation to the proposed lease.
A side letter from NR is to be provided confirming the status of this agreement.

Risk to INFRACO Contract Award
The Framework Agreement is not a construction related document, so the Risk to award of INFRACO Contract is insignificant.

6.15 Network Rail Lease Agreement

Purpose of Document
This is a 175 year lease between NR and CEC to allow operation of the ETN.

Current Status of the Agreement
The lease is substantially in agreed form, pending drafting on protecting CEC position in relation to the treatment of contamination in the vicinity of Haymarket Light Maintenance Depot. The lease does not become active until after construction and commissioning have been completed, and is suspensive on the execution of an Operating Agreement with Network Rail.

A side letter from NR is to be provided confirming the status of this agreement.

Risk to INFRACO Contract Award

The lease is not a construction related document, so the Risk to award of INFRACO Contract is insignificant.

6.16 Forth Ports Agreement

Purpose of Agreement
A variation of the existing Minute of Agreement between CEC and Forth Ports is currently in draft. This agreement is based around changes to the design in the Leith Docks area, which will be funded by Forth Ports.

Current Status of Agreements
Heads of Terms have been agreed and signed by CEC and Forth Ports. The highways and track design activities will be completed by October 2008, and a full understanding of the cost implications of these changes will not be attained until then. It is envisaged that the Stanley Casinos agreement will be concluded at the same time as the Forth Ports agreement.

The transfer of land from Forth Ports to CEC will be part of the FP contribution to the project, and this is part of the existing Section 75 agreement.

Risk to INFRACO Contract Award
INFRACO under novation assume responsibility for the SDS Programme, which will dictate the construction programme in the Forth Ports area. CEC risk to award of the INFRACO contract is therefore considered low.

6.17 Stanley Casinos Agreement

The Stanley Casinos side agreement is also design dependant, and takes cognisance of the revised junction and access proposals at the Constitution Street/Ocean Drive junction. The agreement will also include provision for remodelling the Casino car Park.

6.18 Other Site Specific Code of Construction Plans

Purpose of Documents
As part of the suite of side agreements drawn down into Schedule 13 of the INFRACO Contract, there is a requirement in several agreements for the contractor to develop a local construction plan or CoCP as part of the notification/consultation process in advance of the works commencement. The relevant agreements are:

- USS
- Safeway/Morrisons
- Murrayfield Indoor Sports Club
- ADM Milling
- Ocean Terminal
- Royal Yacht Britannia
- Baird Drive Residents (Community Liaison Group undertaking)

Current Status of Documents

tie have prepared a suite of drafts setting out the construction related requirements of the relevant side agreements. BBS input will be required as these plans are developed and presented to the relevant 3rd parties.

It is notable that the construction requirements laid down in these side agreements generally relate to those aspects of site working such as confirmation of programme, maintenance of access during the works, pedestrian management, dealing with dust/noise, site cleanliness, reinstatement of property etc, that one would normally expect a competent contractor to be cognisant of.

Risk to INFRACO Contract Award

All relevant 3rd Party agreements are detailed within the INFRACO contract in Schedule 13. The requirements on Infraco are entirely in line with normal construction practice and the risk to CEC for award of the INFRACO contract is considered low.

6.19 Licence – The Gyle

Purpose of Document

The licence will allow the INFRACO contractor to undertake the works within Gyle owned land prior to permanent acquisition. In agreeing to undertake this work under licence, CEC will be able to meet the terms of the existing side agreement whereby permanent land take is to be minimised. At this stage in the design process, SDS cannot define with certainty the extent of the operational land. The proposal made to The Gyle is therefore to defer permanent acquisition until this certainty is available.

The acquisition of the 'as built' operational land will eliminate the risk of not meeting the obligations of the side agreement. The existing side agreement already makes provision for a licence to undertake works.

Current Status of Agreement

tie have put this proposal to The Gyle and are seeking confirmation in writing that this is acceptable. It is expected that a positive outcome will be received by 25/01/08.

Risk to INFRACO Contract Award

INFRACO works are expected to commence in the vicinity of The Gyle from June 2008. Risk to award of INFRACO Contract is considered insignificant, as CEC still has the ability to invoke the GVD for this land, a process that can be concluded in 28 days.

6.20 Licence – West Craigs

Purpose of Document

The licence will allow the INFRACO contractor to undertake the works within West Craigs owned land prior to permanent acquisition. In agreeing to undertake this work under licence, CEC will be able to meet the terms of the existing side agreement whereby permanent land take is to be minimised. At this stage in the design process, SDS cannot define with certainty the extent of the operational land. The proposal made to West Craigs is therefore to defer permanent acquisition until this certainty is available.

The acquisition of the 'as built' operational land will eliminate the risk of not meeting the obligations of the side agreement. The existing side agreement already makes provision for a licence to undertake works.

Current Status of Agreement

tie have put this proposal to West Craigs and are seeking confirmation in writing that this is acceptable. It is expected that a positive outcome will be received by 25/01/08.

Risk to INFRACO Contract Award

INFRACO works are expected to commence on the proposed licence site from January 2009. Risk to award of INFRACO Contract is considered insignificant, as CEC still has the ability to invoke the GVD for this land, a process that can be concluded in 28 days.

6.21 Network Rail – Neighbour Agreement

Purpose of Agreement

This agreement sets out the ongoing relationship between CEC and Network Rail for managing the interface between tram lease land, NR operational land and other CEC land which is adjacent to the railway. The Neighbour Agreement will be updated as required over the period of lease.

Current Status of the Agreement

This agreement is approaching agreed form with NR, the latest draft is with the NR legal team for review.

Risk to INFRACO Contract Award

The Neighbour Agreement is a non-construction related document, and for this reason, it offers insignificant risk to CEC for award of the INFRACO Contract.

6.22 Network Rail – Operating Agreement

Purpose of Agreement

The purpose of the operating agreement is to set out operational interface arrangements and procedures for running tram passenger services adjacent to the railway line. This agreement will be an evolving document which will be updated periodically during the lifetime of the project.

Current Status of Agreement

A draft is current under review by tie and TEL. The intention is to develop this document into draft agreement form during the first quarter of 2008, and complete the agreement prior to commencement of passenger services.

Risk to INFRACO Contract Award

The Operating Agreement is a non-construction related document, and for this reason, it offers insignificant risk to CEC for award of the INFRACO Contract.

6.23 Network Rail – Bridge Agreement

Purpose of Agreement

The purpose of the Bridge Agreement is to set ongoing maintenance and operational responsibilities for the Carrick Knowe and Edinburgh Park Station Bridges, as these structures interface directly with the heavy rail network

Current Status of Agreement
A draft is current under review by CEC, and subject to finalisation of the detail design of the relevant structures (scheduled for July 2008), the intention is to finalise this agreement by end of August 2008.

Risk to INFRACO Contract Award
The Bridge Agreement is a non-construction related document, and for this reason, it offers insignificant risk to CEC for award of the INFRACO Contract.

6.24 Telewest utility agreement

COMMENTARY REQUIRED

6.25 Scottish Power utility agreement

COMMENTARY REQUIRED

6.26 DPOFA 2007 Revision

A negotiation was concluded with Transdev to amend the DPOFA signed in 2004. The process is now complete and the principal agreed changes relate to :

- Improved performance bond underpinning both mobilisation and operating obligations
- Alignment with Infraco contract where previous drafting was based on anticipated Infraco terms
- Scope revised to reflect the Phase 1a / 1b configuration from the originally anticipated Lines 1 and 2
- Revisals to KPI performance regime based on up to date commercial view.
- Replacement of original tram revenue incentive mechanism with a reduced cost recharge, reflecting a fully integrated bus and tram system
- Alignment of insurance arrangements under OCIP
- Obtained tram cost synergy savings with introduction of TEL being responsible for transport integration

6.27 Mobilisation agreements (Infraco and Tramco)

[DENNIS TO UPDATE]

The pre-close mobilization agreements with Infraco and Tramco are designed to enable works necessary to maintain programme. The agreements are The Advance Works and Mobilisation Contract ("AWM") and Tram Advance Works Contract ("TAW").

The core of the AWM is that Infraco will perform a schedule of works with payment determined by "Agreed Element Estimates" agreed by the parties in respect of each element of work.

The AWM does not overlap with the Infraco Contract because, when the Infraco Contract is entered into, the AWM automatically terminates. The Infraco Contract therefore deals with payment and other terms relating to advance works underway at that time. The AWM also states that it terminates if the Infraco Contract is not entered into by 28 January and an extension will therefore need to be agreed. The TAW works similarly, in that it ends automatically when the Tram Supply Agreement is entered into. Again, the deadline for this to occur is 28 January subject to agreed extension.

The work on utility diversion under the MUDFA contract and related arrangements is described in Section 11 below.

(7) Network Rail - Asset Protection Agreement

The Asset Protection Agreement has been negotiated exhaustingly with Network Rail over a period in excess of one year. The outcome is a document which achieves significant commercial improvements for tie/CEC on what was originally offered by Network Rail. The arrangement is nevertheless heavily tilted in Network Rail's favour, as is inevitable given the starting point of the biased regulatory template agreements. The main improvements secured have been:

- Significant widening of the circumstances in which tie can recover money from Network Rail;
- Reasonableness in Network Rail actions and ability to refer to the Infraco ETN Suite form of Dispute Resolution Procedure;
- Dilution of indemnities given by tie to Network Rail to a mutually acceptable level.

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The unreasonable position taken by Network Rail regarding the indemnities contained in the Protection Provisions Agreements (entered into to remove Network Rail's objection to the tram scheme) delayed closure for a considerable time. This has now been resolved to restrict the scope and duration of this indemnity, particularly during construction.

The property aspects of the ETN-NR post construction interface have been handled by Dundas & Wilson.

(87) Land acquisition arrangements

<u>Purpose of process</u>
The process of assembling land required for the construction and operation of the Edinburgh Tram Network has been managed using a combination of Compulsory Purchase (using the General Vesting Declaration Procedure), and entering into long term lease arrangements with Network Rail and Edinburgh Airport Limited.

<u>Current Status of Agreement</u>
By financial close, the position in regard to Land available to INFRACO is as follows:

Nature Of Land	Land Area (sqm)	Available to INFRACO	Land Take Achieved	Target Date	No Plots

Pre GVD	498	Yes	0.1%	Nov-05	3
GVD 1&2	177467	Yes	21.0%	Feb-07	43
GVD 3	167854	Yes	19.9%	Jul-07	22
GVD4	43323	Yes	5.1%	Sep-07	19
GVD5	2381	Yes	0.3%	Dec-07	5
GVD6	83588	Yes	9.9%	Dec-07	17
Licences	24885	Yes	2.9%	Jan-08	14
BAA Licence	18388	Yes	2.2%	Nov-07	17
NR APA	42480	See above	5.0%	Feb-08	37
Forth Ports (S75)	80293	Yes	9.5%	Mar-08	51
Adopted Roads	202521	Yes	24.0%	Achieved	78
	843679		100.0%	Total	306

Of the total land required, 85.5 % is under the control of CEC through ownership or license, a further 9.5% is committed under Forth Ports existing S75 agreement with the balance of 5% subject to the Network Rail APA agreement discussed above.

(9~~8~~) Governance & corporate arrangements

9.1 ~~8.1~~ Governance & delegations

The Governance model deployed to oversee and control the project has evolved as the project itself has moved through different stages of development. Appendix 5 is a detailed paper which was approved by the Boards on 23rd January. The paper sets out :

1) **the proposed governance model for the construction period ; and**
2) **the proposed levels of delegated authority**

The paper is an update of previous submissions to the Boards and differs only in two material respects – the inclusion of specific levels of delegated authority and alignment with the terms of the tie and TEL Operating Agreements (see below). Neither of these factors should cause concern : the levels of delegated authority are in line with those previously deployed by the TPB and the terms of the operating agreements have been subject to significant scrutiny by senior people over recent months.

8.2 Operating agreements

These agreements are now in final agreed form and are attached at Appendices 5 and 6.

tie

The tie agreement was previously reviewed by the tie Board in December 2007 and the changes since then are in line with the request made by the tie Board. The tie agreement ~~supercedes~~supersedes the existing agreement and sets out tie and the Council's mutual responsibilities for delivering the tram project.

TEL

The TEL agreement reflects TEL's role but the detailed wording is consistent with the tie agreement. The TEL agreement sets out the specific authority delegated to it by the Council with acknowledgement that TEL will sub-delegate its authority to the TPB.

These internal agreements have been settled, where possible, taking account of DLA Piper's advice to tie and CEC in relation to (i) their acceptability as evidence of agency authority to transact and (ii) their potential adverse impact on the project's strategy towards competition law.

These documents should be executed immediately and supplied to BBS for their due diligence, failing which there may be a delay in BBS accepting that tie has due authority to sign the Infraco Contract Suite.

8.3 Taxation

Advice has been taken from PwC on two principle areas :

1) **The tax effect of the Infraco contract suite structure ; and**
2) **The VAT status of the grant funding**

The main objective in tax planning has been to ensure that the arrangements were VAT neutral such that there would be no irrecoverable input VAT and that no unforeseen output VAT would require to be accounted for. We have a formal report from PwC addressed to tie, CEC and TEL confirming this. We have also engaged with HMRC and have a clearance letter from them confirming that the objective is achieved.

The contract structure has also been assessed by PwC to ensure that it will be possible in due course to establish a cost base in TEL by either selling or leasing system assets owned by CEC which will create corporation tax shelter in TEL. This could prove very valuable over the operating period of the integrated system.

~~(9) Risk allocation matrices and DLA Report [ANDREW F]~~

~~[THIS SECTION IS DEPENDENT UPON THE FINAL TERMS OF THE INFRACO CONTRACT SUITE]~~

(10) Risk assessment of in-process and provisional arrangements [STEWART TO REFRESH]

This section contributed by Stewart McGarrity, who reviewed those areas of the documents which are provisional in nature and the documents which will be in draft form at Close.

10.1 Overview

tie's approach to identifying and managing risks was fully explained in the Final Business Case. This section reviews the current status of the risks relating to the Infraco and Tramco contracts which were identified as wholly or partly retained by the public sector beyond financial close which were:

- **The process for granting of approvals and consents;**
- **The process for granting of permanent TRO's**
- **The interface with the implementation of utility diversion works**
- **Delays to design approvals for reasons outside the control of the Infraco**

- Stakeholder instructed design changes

Specific areas covered are:

- Price certainty achieved through the Infraco and Tramco contracts with a view on items included in the contract price which will remain provisional at Financial Close
- Specific exclusions from the Infraco contract price
- Responsibility for consents and approvals

And as an area of particular concern to stakeholders:

- The risks associated with significant 3rd Party Agreements not concluded in full at Financial Close.

10.2 Price certainty achieved

The Tramco price agreed at £54.4m is a fixed sum in pounds sterling for the supply of trams. The overall capital costs estimate for Tramco also includes a fixed sum of £2.3m for mobilisation costs associated with the maintenance contract and to be paid prior to the commencement of operations.

The Infraco price of £216.3m comprises
- £219.9m of firm costs
- less £13.8m of Value Engineering initiatives taken into the price with the agreement of BBS but with qualifications attached
- plus £10.2m of items which remain provisional at Financial Close.

A thorough risk appraisal has been carried out on the deliverability of the Value Engineering initiatives with reference to the qualifications which attach to them. As a result a prudent allowance of £4m has been made (in the Base Cost estimate for Infraco) against the possibility that for certain items these qualifications will not be removed.

Provisional items comprise a defined list of 13 Items each with a clear process for and programme for resolution. The estimate for each item has been reviewed by tie's technical consultants and by BBS and the risk of understatement is considered to be low. The most significant item is a £6.3m allowance for civil works, including utilities, at Picardy Place as the design for the approved layout is not yet complete. The cost of the actual tramway, tram stop and associated works at Picardy Place are included in the firm element of the price.

The overall capital cost estimate for Infraco includes a further £3.4m comprising £1.4m for maintenance mobilisation (as for Tramco), £1m for major spare parts based upon a schedule of prices provided by Infraco and a £1m provision for known design changes at the Airport tram stop where the change are yet to be included in the design which formed the basis of the Infraco price.

10.3 Infraco price basis and exclusions

Appendix 7 provides a detailed analysis of exclusions.

The Infraco price is based upon the Employers Requirements which have been in turn subject to thorough quality assurance including synchronisation with the current SDS design. Crucially the price includes for normal design development (through to the completion of the consents and approvals process – see below) meaning the evolution of design to construction stage and excluding changes if design principle shape form and outline specification as per the Employers Requirements. The responsibility for consents and approvals is further considered below.

Significant exclusions from the Infraco price are items not included in the Employers Requirements in respect of (responsibility for securing incremental sources of funding in brackets):

- Additional works at Picardy Place, London Road and York place (CEC)
- Additional works at Bernard Street (CEC)
- Full footway reconstruction in Leith Walk (CEC)
- Additional works in St Andrew Square outwith the tram alignment (CEC)
- Changes within the Forth Ports area (Forth Ports)
- Any other scope required by third parties not already included in the Employers Requirements by virtue of a commitment in an existing agreement

10.4 Responsibility for consents and approvals

As previously tie/CEC will retain the risk associated with the process of obtaining TROs and TTROs (some for TTROs post-Service Commencement which are Infraco's responsibility) whilst Infraco (together with their novated designer SDS) will bear the cost and programme consequences of not delivering the information in sufficient quality and timeliness to process the applications. Full provision has been made in the Risk Allowance for the costs associated with a public hearing and other costs associated with obtaining the TROs.

For all other required consents and approvals (either design or construction related) the principles which apply are:

- Infraco (including SDS) bear the costs and programme consequences associated with not delivering the required information in a timely and sufficient manner to the consenting or approving authority

- tie/CEC bear the incremental cost and programme consequences associated with a delay in granting consent or approval having received the required information in a timely and sufficient manner and/or the cost and programme consequences of changes to design principle shape form and outline specification (as per the Employers Requirements) required to obtain the consent or approval.

- or where any consent is withheld on unreasonable grounds by the approval body.

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To clearly delineate responsibility and therefore risk allocation the Infraco contract and associated schedules, including the SDS Novation Agreement, clearly defines in detail and in a manner agreed by Infraco, SDS and tie/CEC:

- The necessary consents and approvals already obtained at Financial Close

- The remaining consents and approvals and whether the information to obtain such rests with Infraco or SDS

- The expectations with regard to quality of information including compliance with relevant law and regulation

- The programmed dates for delivering information and obtaining the necessary consents and approvals consistent with achieving the overall programme for the project

The role of tie in this complex process is to carefully manage the programme of delivery and take mitigating action as necessary to avoid any cost or programme implications from slippage on individual items. tie also retains responsibility for obtaining specific items including obtaining NR possessions which align with the construction programme agreed with Infraco.

The Risk Allowance does not provide for the cost or programme consequences associated with a wholesale failure of this process – see QRA alignment & Risk Allowance below.

10.5 3rd Party Agreements

~~All relevant agreements with 3rd parties form part of the Infraco contract (at schedule [13] and the Infraco price includes for the costs of any works and/or any construction constraints imposed by these agreements and as reflected in the Employers Requirements [Important issue still under debate with BBS].~~

The position achieved regarding Third Party commitments made by the ETN project is as follows:

(1) At ITN issue in October 2006, DLA Piper had included all major third party agreements tie had concluded at that time (plus SRU agreement in draft) in the so-called Schedule 13. This put Infraco on notice of the requirements to carry out work and/or observe constraints in these agreements. The inclusion of these agreements in the ITN documentation was carried out by DLA Piper without details tie instruction and that remains the case. That is to say the obligations selected for step down are DLA Piper's judgement, but not informed by any sectional engineering view from tie. The third party agreements - with the except ion of the utilities divisions and Network Rail APA - were all prepared by Dundas & Wilson for CEC without DLA Piper's input.

(2) In addition to the Schedule 13 agreements (which has been updated to introduce one further agreement concluded since ITN issue date), tie had entered into a range of commitments with private individuals and smaller businesses during the parliamentary phase and beyond. Following preferred bidder appointment, BBS took the position that they had never been shown or given access to these papers (contained on two CDs). Whether this assertion is accurate or not, that is the qualification BBS held to with determination. This situation was negotiated strenuously by tie.

(3) BBS have accepted the contractual outcome that:

- BBS must comply with the obligations set out in Schedule 13;

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- BBS must not put tie/CEC in breach of (or in a position where it cannot use entitlement under) the Schedule 13 Agreements (which include, in essence, Network Rail APA and EAL Agreements);

- BBS undertakes to take all reasonable steps to ensure not to cause tie/CEC to be in breach of the CD commitments;

- if BBS is impaired by constraints/requirements in the CD commitments which are, in essence, unusual or could not reasonably have been foreseen by an experienced contractor, BBS will be entitled to apply for relief and any demonstrable additional cost

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SDS are contractually obliged to ensure that their design deliverables take account of all third party agreements and commitments and they are guaranteeing this to BBS under the Novation Agreement.

EAL

A number of issues have arisen from mismatches between the Licence agreed to permit construction activity at the airport under MUDFA and tie Infraco Contract and the terms of the pursuant lease negotiated with EAL. These are required to be corrected to remove risk and a Minute of Variation is under preparation.

A future risk is uncovered at present. the terms under which EAL is entitled to require the tramsway to be shifted (post January 1, 2013) do not include an indemnity in relation to any defects or unforeseen interference in the ETN system which might result from this construction activity and its ultimate interface with the existing system. tie is assessing this.

SRU
This agreement is included in Schedule 13 in draft form but no pricing allowance is at present made for the Infraco executing the works.

A thorough risk assessment has been carried out with regard to all third party agreements which will not be concluded at Financial Close and attention is drawn to the following significant matters which are significant for the award of Infraco:

Network Rail Asset Protection Agreement (APA) – The APA, which provides Infraco with access to NR land for construction, cannot be formally concluded until the Station Change and Depot Change processes above have been concluded. However even if a side letter were to overcome this obstacle, the APA as currently drafted contains wide ranging Indemnity clauses in respect of all future events which CEC cannot regard as tenable. It is not possible to determine a quantified risk allowance in respect of these indemnities and no provision is made in the Risk Allowance for the project.

Station Change (actually between NR and First Scotrail/TOCs) - The risk here relates to the programme implications of not getting access to the car park at Haymarket for Infraco to commence demolition of the Caley Ale House at the end of March 2008 and the acquisition of car parking spaces for the permanent Tram works. A statutory consultation period is in process and we hope to have confirmation of no objection in principle agreement by the date of financial close. The Infraco's also has responsibilities to obtain all necessary construction consents prior

to commencing the works. tie is of the opinion that a delay of 3 to 4 weeks to the start of this activity could be absorbed with no impact on critical path or costs.
Depot Change (actually between NR and First Scotrail) - The risk again relates to the programme implications of Infraco not getting access to the depot site at Roseburn for Tram works programme to commence in July 2008. Again the statutory consultation process has begun and tie is seeking a comfort letter confirming no abjection to the proposals before financial close. The risk of undue delay to the agreement (or prior pollution prevention works by Network Rail at the depot) is considered to be small.

Local Codes of Construction Practice – Existing agreements with Forth Ports, New Edinburgh Limited and Edinburgh Airport require that such local agreements be concluded with these parties. Any additional requirements by these parties which might have cost or programme consequences which tie and the Infraco cannot effectively mitigate would be an additional cost to tie/CEC. Tie considers that the likelihood of significant additional costs arising from these agreements is minimal.

10.6 QRA and Risk Allowance

tie's risk identification and management procedures as detailed in the FBC describe a process whereby risks associated with the project which have not been transferred to the private sector are logged in the project Risk Register. Where possible the cost of these risks is quantified by a QRA in terms of a range of possible outcomes, probability of occurrence and thereby the Risk Allowance which is included in the capital cost estimate for the project.

The project Risk Register also details the "treatment plans" being followed to mitigate individual risks and thereby avoid all or part of the cost allowance.

As the Infraco and Tramco procurements have progressed tie has maintained and reviewed contractual Risk Allocation Matrices, which reflect the risks retained by the public sector arising from the contracts, and has exercised prudence in ensuring the Risk Register, QRA and therefore Risk allowance provide adequately for risks retained for the public sector including the major areas or risk assessed above. There has been no material change in the Risk Allocation Matrices between Preferred Bidder stage and the position now.

The Final Business Case cost estimate of £498m includes a risk allowance of £49m which in turn includes

- £17.5m in respect of procurement stage risks on Infraco and Tramco including all the risks associated with achieving price certainty and risk transfer to the public sector as has been effectively achieved in the Infraco contract as summarised above. The negotiated Infraco and Tramco prices, inclusive of provisional sums and other allowances as described, will result in an aggregate crystallisation of the Risk Allowance in the amount of £14.2m thus leaving a balance £3.3m to be held as a contingency against residual risk during the construction phase.

- £3.2m in respect of specifically identified risks held by and to be managed by tie during the construction phase including adverse ground conditions, unidentified utilities and the interface with non-tram works.

- £4.3m in respect of post Financial Close consents and approvals risks which provides for the cost or programme consequences of imperfections which may arise in elements of the consents and approval risk transfer as described above.

- £[3.3]m [To be confirmed] to provide for the cost of minor Infraco / Tramco programme slippage of up to [X] months (other than as a result of delays to MUDFA which is provided for elsewhere in the risk allowance.

tie has assessed these amounts as providing adequately for the residual risk retained by the public sector arising from the Infraco and Tramco works and the post Financial Close consents and approvals process. However the Risk Allowance does not provide for the costs of:

- Significant changes in scope from that defined in the Employers Requirements – whether such changes were to emerge from the consents and approvals process or otherwise
- Significant delays to the programme as a result of the consenting or approving authorities failing to adhere to the agreed programme (Infraco/SDS having met their own obligations) or any other tie/CEC initiated amendment to the construction programme which forms part of the Infraco contract.

All other things being equal any such changes falling into these categories would give rise to an increase in the cost estimate for Phase 1a of the project above £498m.

10.7 Value Engineering Opportunities [STEWART / JIM]

CEC requirements are :

[VE summary included in the final deal and highlighting other potential savings.]

Statement on % of costs fixed and % outstanding as provisional sums with programme for moving these to fixed costs. ASSUME THIS COULD BE RELATED TO THE PRICING SUMMARY IN THE INFRACO SECTION.

(11) Update on critical workstreams and readiness for construction [STEVEN]

- Design due diligence
- Run-time due diligence
- TTRO / TRO process
- MUDFA including interface with Infraco programme

- Management team and handover
- Safety
- Commercial management
- Insurance
- Risk management

(12) Specific confirmations

On the basis of the content of this report and supporting documentation, it is considered that :

- **The Infraco Contract Suite is in terms acceptable for commitment ; and in particular**
  - **The Tramco Novation Agreement is in terms acceptable for commitment**
  - **The SDS Novation Agreement is in terms acceptable for commitment**
- **The CEC Financial Guarantee is in terms acceptable for commitment and is aligned in all material respects with the Infraco Contract Suite**
- **The tie Operating Agreement is in terms acceptable for commitment**
- **The TEL Operating Agreement is in terms acceptable for commitment**