



ROLEY

DRAFT INFRACO CONTRACT

EDINBURGH TRAM NETWORK

ALLOCATION OF CONTRACTUAL RISKS IN THE DRAFT INFRACO CONTRACT AS
NEGOTIATED BY TIE FOLLOWING ITN SUBMISSION

25 SEPTEMBER 2007

(Based on 8 March 2007 Version of the draft Infraco Contract as negotiated by tie)

Risk : General Obligations Clauses	Allocation		
	Public Sector	Private Sector	Shared
[2.2] Extension of Term - Failure to serve notice to propose extension no later than 180 days prior to expiry date	✓		
[3.5] Termination by either party due to failure to satisfy a CP within 3 months of Effective Date which is not waived. NOTE: Roley has refused to accept the indemnity provision remains live on termination under this Clause.			✓
[4.4] ¹ Discrepancies, errors or omissions in, or between the Infraco Proposals and, the Employers Requirements		✓	
[4.5] ² Failure to bring discrepancies or requirements for further information in relation to documents to the attention of tie's Representative. NOTE: Time limit to raise issue remains - to be agreed		✓	
[5] Failure to adequately inspect the Site and to take due and proper account of the risks listed below in carrying out the Infraco Works. NOTE: This is qualified by reference to inspection being only superficial and not involving any intrusive surveys.			✓
[5.1.1] ³ the ground conditions on the Site. NOTE: tie accepts risk of unforeseeable ground conditions not apparent from ITN.			✓
[5.1.2] all relevant safety requirements and environmental matters		✓	
[5.1.3] the form and nature of the Site		✓	
[5.1.4] the nature of the materials to be excavated		✓	

¹ Roley to review wording.

² Business days and mark-up review subject to agreement on how ERs are amended.

³ Roley accepts subject to review of SI reports.

Risk : General Obligations Clauses	Allocation		
	Public Sector	Private Sector	Shared
[5.1.5] the extent and nature and difficulty of the work and materials necessary for the completion of the Infraco Works.		✓	
[5.1.6] ⁴ the quality of any existing structures which will form part of, be adjacent to or be associated with the ETN ⁵		✓	
[5.1.7] injury or damage to property adjacent to the Site and to occupiers of such property		✓	
[5.1.8] interference from parties other than tie.		✓	
[5.1.9] the precautions, times and methods of working necessary to comply with the Code of Construction Practice and Code of Maintenance Practice and, in accordance with Good Industry Practice to minimise and nuisance or interference		✓	
[5.1.10] use by third parties of land being part of or next to ETN. NOTE: not accepted at present by Roley.		✓	
[5.1.11] means of communication with and restrictions of access to the Site		✓	
[5.1.12] accommodation required by Infraco		✓	
[5.1.13] generally to obtain all necessary information as to risks, contingencies and other circumstances influencing or affecting the Infraco Works. NOTE: this is footnoted without text.		[✓]	
[6.3] Failure to cooperate in order to facilitate carrying out the Infraco Works ⁶			✓
[6.3.1] Failure to approach all Permitted Variations on a collaborative and Open Book Basis			✓
[6.3.2] Failure to use reasonable endeavours to avoid unnecessary complaints, disputes and claims against the other Party			✓
[6.3.3] Failure to comply with Dispute Resolution Procedure in relation to any such complaints, disputes and claims with or against the other Party			✓
[6.3.4] Interference with the rights of the other Party in performing its obligations under the Infraco Contract, or in any other way hindering or preventing the other Party from performing those obligations or from enjoying the benefits of its rights			✓
[6.3.5] Failure to take reasonable steps to mitigate any costs, unnecessary acts, foreseeable losses and liabilities of the other Party which are likely to arise out of any failure by the non complying party to take the steps listed in Cl. 6.3.1 to 6.3.4 above			✓
[6.3.6] Failure to take reasonable steps to manage, minimise and mitigate all costs			✓
[6.8] Failure to procure the attendance of any of the Infraco Parties as required by tie at quarterly meetings		✓	

⁴ Agreed subject to DD and reassessment.

⁵ Agreed subject to review of bridge assessments in due diligence and reassessment prior to award . Significant reservation.

⁶ Clause 6.3 contains partnering obligations

Risk : General Obligations Clauses	Allocation		
	Public Sector	Private Sector	Shared
[7.1] Failure to perform the Infraco Works fully and faithfully in accordance with the Infraco Contract		✓	
<p>Failure to carry out the works in accordance with:</p> <ul style="list-style-type: none"> • [7.2] a reasonable level of professional skill, care and diligence to be expected of a properly qualified and competent professional contractor experienced in carrying out works and services of a similar nature to the Infraco Works • [7.3.1] the Infraco Contract • [7.3.2] enabling the ETN to be designed, constructed, installed, tested and commissioned, and thereafter operated and maintained • [7.3.3] the Infraco's quality management system and plans. • [7.3.4] the Employer's Requirements • [7.3.5] the Infraco's Proposals • [7.3.6] tie and CEC policies • [7.3.7] the Code of Construction Practice • [7.3.8] the Code of Maintenance Practice • [7.3.9] the Tram Legislation • [7.3.10] applicable Laws, Land Consents and Consents • [7.3.11] using reasonably practicable means to ensure impacts are no worse than residual impacts as identified in the Environmental Statements • [7.3.12] environmental regulations and requirements • [7.3.13] Good Industry Practice • [7.3.14] the requirement to ensure that the design of the ETN is buildable • [7.3.15] the requirement to provide assistance to tie in ensuring best value • [7.3.16] the requirement not to wilfully detract from image of tie, TEL, CEC, the Scottish Ministers, Transport Scotland or the ETN • [7.3.17] OGC's "Excellence in Construction" initiative • [7.3.18] the requirement to ensure sustainability of the ETN in relation to energy consumption and the supply of materials from sustainable resources • [7.3.19] requirement not to carry out works in a manner likely to be injurious to persons or property and where liability results from Infraco negligence or breach of the Infraco Works NOTE: This does not encompass injurious affection caused by non-compliance with Law. • [7.3.20] requirement to use Key Personnel 		✓	

Risk : General Obligations Clauses	Allocation		
	Public Sector	Private Sector	Shared
[7.5.1] Failure to use reasonable endeavours to maximise construction productivity by reference to international best practice		✓	
[7.5.2] Failure to use reasonable endeavours to minimise disruption to the city of Edinburgh		✓	
[7.5.3] Failure to use reasonable endeavours to maintain safety and minimise the potential for accidents and safeguards the Infraco Works		✓	
[7.5.4] Failure to use reasonable endeavours to safeguard the efficiency in the obtaining of Consents		✓	
[7.5.5] Failure to use reasonable endeavours to minimise costs		✓	
[7.6] Failure to keep itself fully informed about current professional and technical standards and about all matters relating to, or which might have a bearing on, the Infraco Works.		✓	
[7.8] Failure to fully understand the scope and extent of requirements and sufficiency of information to complete the Infraco Works		✓	
[7.9-7.10] ⁷ Content of Background Information supplied by tie or any of its stakeholders. NOTE: Roley has reserved its position on the Employers Requirements which is a central contractual document alongside the Infraco Proposals to meet them.			✓
[7.11] Failure to liaise with any party, as required, to produce information required so that the Infraco Works can be progressed properly, according to Programme and in accordance with the Infraco Contract		✓	
[7.12] Failure to liaise with regard to material types, methods and programmes, cost effectiveness and temporary works in respect of any Permitted Variation		✓	
[7.13] Failure to provide all labour, goods, materials, Infraco's Equipment, Temporary Works, transport to and from the Site and everything else of a temporary or permanent nature required in respect of the Infraco Works which is either required in the infraco Contract or could have been reasonably foreseen by an experienced contractor		✓	
[7.14] Failure to ensure the adequacy, stability and safety of all site operations and methods of construction		✓	
[7.15] Use or specification of any materials which are known to be deleterious or contravene any relevant standard or code of practice (including Over Arup guidance or Good Industry Practice)		✓	
[7.16] Use of or installation on the Edinburgh Tram Network of materials which are not in accordance with the Employer's Requirements on the date of such use or installation		✓	
[7.17] Failure to notify tie of any ground, geophysical or other surveys which the Infraco intends to carry out		✓	
[7.18] Failure to notify tie of any Abortive Work		✓	

⁷ Background Information - Subject to DD, review of land risk provisions and ER amendments. Further substantive drafting required to reflect the risk position ultimately settled.

Risk : General Obligations Clauses	Allocation		
	Public Sector	Private Sector	Shared
[26.17] Failure to comply with all regulatory requirements and tie's Drug and Alcohol Policy		✓	

Risk : System Integration ⁸	Allocation		
	Public Sector	Private Sector	Shared
Failure to implement: <ul style="list-style-type: none"> [8.1.1] work to define sub-system performance and demonstrate that the System Availability Target can be met 		✓	
<ul style="list-style-type: none"> [8.1.2] management of technical interfaces including system wide issues such as electro-magnetic compatibility and stray current protection, noise, vibration and wheel/rail interface [8.1.3] test management, including the preparation of method statements, test scripts, the setting of pass/fail criteria, and analysis [8.1.4] alignment of operations and maintenance procedures [8.1.5] system activation [8.1.6] safety assurances and the Case for Safety [8.1.7] a requirements traceability matrix 		✓	
[8.2] Failure to ensure that Trams and engineers works vehicles are fully integrated with the Infraco Works		✓	
[8.3] Failure to carry out all of the system integration activities described in the Employer's Requirements and Infraco's Proposals		✓	
[8.4] Failure to liaise with the Operator and tie in respect of system operation and related design, Systems Acceptance Tests and operational defects		✓	
[8.5] Failure to ensure that design is compatible with system integration throughout the Term		✓	
[8.6] Failure to manage configuration control of the ETN		✓	

Risk : Infrastructure and Equipment	Allocation		
	Public Sector	Private Sector	Shared
[9.1] Failure to pay the Infraco resulting in the title in all materials, goods and equipment not transferring to CEC	✓		
[9.2/9.3/9.4] Failure to clearly identify project assets as the property of CEC, whether on sit or off site		✓	
[9.6.1] Failure of tie to issue the Certificate of Tram Commissioning			✓

⁸ Roley has accepted risk for System Integration but further review of details under novated contracts and Employer's Requirements is required

Risk : Infrastructure and Equipment	Allocation		
	Public Sector	Private Sector	Shared
(due to tie default or due to tests not having been passed) resulting in title in the Trams not transferring to CEC			
[9.7] Compatibility of all infrastructure, equipment and systems and fitness for purpose (as defined complaint with the Employer's Requirements), excluding items free issued to the Infraco by tie		✓	
[9.8/9.9] Euro Compliance of equipment, excluding items free issued to the Infraco by tie		✓	
[9.10] Failure to make the Trams and any materials (in which title has passed to tie or CEC) available to the Infraco for performance of its obligations	✓		

Risk : Bonds, Guarantees and Collateral Warranties	Allocation		
	Public Sector	Private Sector	Shared
[74.1] Failure to provide an adjudication performance bond for the required amount		✓	
[74.3] Failure to provide a retention and handback bond for the required amount		✓	
[74.5] ⁹ Downgrading of bond surety to A- rating or below by Standard & Poor's, subject to availability of bond at commercially reasonable cost.		✓	
[74.6] Failure to provide an Infraco parent company guarantee in agreed form.		✓	
[74.7] ¹⁰ Failure to provide an Infraco collateral warranty in favour of CEC and Network Rail.		✓	

Risk : Deliverables	Allocation		
	Public Sector	Private Sector	Shared
[10.1] ¹¹ Failure to prepare Deliverables in accordance with the Infraco Contract and Programme		✓	
[10.2] Failure to submit any Deliverables associated with any Permitted Variations to tie 's Representative for review pursuant to the Review Procedure		✓	
[10.3] Failure to allow tie 's Representative reasonable opportunity to review any Deliverable at any stage of development		✓	
[10.4/10.6] Failure to provide Deliverables in format required for tie extranet and in the numbers required by tie		✓	
[10.5] Failure to prepare a Submittal Programme which meets the		✓	

⁹ Subject to availability of sureties to provide such Bond.

¹⁰ Subject to review of Asset Protection Agreement by Roley.

¹¹ Roley requiring further review of details under novated contracts/ERs.

Risk : Deliverables	Allocation		
	Public Sector	Private Sector	Shared
Programme			
[10.6/10.7] Failure to comply with the Submittal Programme timescales			✓
[10.7] Introduction of alternative Submittal Programme where tie cannot comply with the original programme (not arising from Infraco default) to be treated as a tie change.	✓		
[10.8] Failure to give due consideration to tie or tie's Representative at a meeting called by tie or tie's Representative to discuss the development of a Deliverable		✓	
[10.9] ¹² Amendment to a Deliverable where such Deliverable does not meet the requirements of the Infraco Contract		✓	
[10.9] ¹³ Amendment to a Deliverable where such Deliverable does not meet the requirements of any "Approval Bodies"	✓		
[10.12/10.13] Risks from conflicts, ambiguities, discrepancies, errors or omissions in or between Deliverables		✓	
[54.4] Failure to provide Technical Records in a format reasonably specified by tie		✓	
[54.5] Maintenance, security, bugs etc in relation to the Infraco's computer systems and equipment		✓	

Risk : Novation and Other Key Interfaces ¹⁴	Allocation		
	Public Sector	Private Sector	Shared
[11.1] Failure to execute the novation agreement by the SDS Provider or the Infraco		✓	
[11.1] Failure of tie to create the novation agreement	✓		
[11.2.1] Failure of the Infraco to procure a collateral warranty from the SDS provider		✓	
[11.2.2] ¹⁵ Failure of tie to deliver the SDS Agreement Letter to the Infraco	✓		
[11.3] Failure to procure that the SDS Provider carries out and completes the SDS Services		✓	
[11.4] Management of the performance of the SDS Services and liability for them		✓	
[11.5] Amendment of the SDS Agreement without the consent of tie		✓	
[11.6] Failure to procure the attendance of the SDS Provider at any meeting in relation to the Infraco Works		✓	

¹² Accepted subject to review of drafting.

¹³ Accepted subject to review of drafting.

¹⁴ Subject to due diligence by Roley on the relevant agreements.

¹⁵ "SDS Agreement Letter" to be defined; this is to contain revisions to the SDS Scope post novation.

Risk : Novation and Other Key Interfaces ¹⁴	Allocation		
	Public Sector	Private Sector	Shared
[11.7] Failure to procure services required from the SDS Provider following a request from tie		✓	
[11.8] ¹⁶ Termination of the SDS Agreement without the consent of tie		✓	
[11.9] ¹⁷ Failure, if required by tie , on termination or expiry of the Infraco Contract to novate, assign or otherwise transfer the SDS Agreement to tie , the Operator, the Scottish Ministers, TEL, CEC, Transport Scotland or their successors with no worse financial standing than tie or to any other person whose obligations are unconditionally guaranteed under the SDS Agreement by such a person ¹⁸		✓	
[12.1] Failure to enter into a novation agreement with tie and the Tram Supplier. NOTE: Subject to due diligence by Roley on final TSA.		✓	
[12.2] Failure to procure that the Tram Supplier enters into a collateral warranty in favour of tie		✓	
[12.3] Failure to procure that the Tram Supplier carries out and completes the Tram Supply Obligations in accordance with the Tram Supply Agreement		✓	
[12.4] Management of the performance of the Tram Supply Obligations and liability for them		✓	
[12.5] Making amendment to the Tram Supply Agreement (including the Tram Supply Obligations) without the prior approval of tie		✓	
[12.6] Failure to procure the attendance of the Tram Supplier at any meeting in relation to the Infraco Works		✓	
[12.7] Failure to procure supply of additional Trams, spare parts and services following a request from tie		✓	
[12.8] ¹⁹ Determination of the appointment of the Tram Supplier without the prior written approval of tie ²⁰		✓	
[12.9] ²¹ Failure, if required by tie , on termination or expiry of the Infraco Contract to novate, assign or otherwise transfer the Tram Supply Agreement to tie , the Operator, the Scottish Ministers, TEL, CEC, Transport Scotland or their successors with no worse financial standing than tie or to any other person whose obligations are unconditionally guaranteed under the Tram Supply Agreement by such a person		✓	
[13.1] Failure to enter into a novation agreement with tie and the Tram Maintainer		✓	
[13.2] Failure to procure that the Tram Maintainer enters into a collateral warranty in favour of tie		✓	
[13.3] Failure to procure that the Tram Maintainer carries out and completes the Tram Maintenance Services in accordance with the		✓	

¹⁶ Reinstatement subject to review of Roley wording.

¹⁷ Redraft to allow for Infraco rights on precedent breach to be retained. Removal of mark-up subject to DD.

¹⁸ Roley to provide wording preserving its rights for a precedent breach

¹⁹ Reinstatement subject to review of Roley wording.

²⁰ Subject to Roley review and subsequent provision of wording to protect it when Tramco in material breach.

²¹ Redraft to allow for Infraco rights on precedent breach to be retained. Removal of mark-up subject to DD.

Risk : Novation and Other Key Interfaces ¹⁴	Allocation		
	Public Sector	Private Sector	Shared
Tram Maintenance Agreement			
[13.4] Management of the performance of the Tram Maintenance Services and liability for them		✓	
[13.5] Amendment of the Tram Maintenance Agreement without the prior written approval of tie		✓	
[13.6] Failure to procure the attendance of the Tram Maintainer at any meeting in relation to the Infraco Works		✓	
[13.7] Failure to procure that the Tram Maintainer shall supply any additional spare parts and/or perform any additional services which are required by tie in respect of the ETN		✓	
[13.8] ²² Determination of the appointment of the Tram Maintainer without the prior written approval of tie		✓	
[13.9] ²³ Failure, if required by tie , on termination or expiry of the Infraco Contract to novate, assign or otherwise transfer the Tram Supply Agreement to tie , the Operator, the Scottish Ministers, TEL, CEC, Transport Scotland or their successors with no worse financial standing than tie or to any other person whose obligations are unconditionally guaranteed under the Tram Supply Agreement by such a person		✓	
[14.1] Failure to enter into a sub-contract with the Infrastructure Maintainer		✓	
[14.2] Failure to procure that the Infrastructure Maintainer enters into a collateral warranty in favour of tie		✓	
[14.3] Failure to procure that the Infrastructure Maintainer carries out and completes the Infrastructure Maintenance Services		✓	
[14.4] Management of the performance of the Infrastructure Maintenance Services and liability for them		✓	
[14.5] Amendment of the Infrastructure Maintenance Agreement (including the Infrastructure Maintenance Services) without the prior written approval of tie		✓	
[14.6] Failure to procure the attendance of the Infrastructure Maintainer at any meeting in relation to the Infraco Works		✓	
[14.7] Failure to procure that the Infrastructure Maintainer shall perform any additional services which are required by tie in respect of the ETN	✓	✓	
[14.8] ²⁴ Determination of the appointment of the Infrastructure Maintainer without the prior written approval of tie		✓	
[14.9] ²⁵ Failure, if required by tie , on termination or expiry of the Infraco Contract to novate, assign or otherwise transfer the Tram Supply Agreement to tie , the Operator, the Scottish Ministers, TEL, CEC, Transport Scotland or their successors with no worse financial standing than tie or to any other person whose obligations are		✓	

²² Reinstatement subject to review of Roley wording.

²³ Roley seeking redraft to allow for Infraco rights on precedent breach to be retained. Removal of mark-up subject to DD.

²⁴ Reinstatement subject to review of Roley wording.

²⁵ Roley seeking redraft to allow for Infraco rights on precedent breach to be retained. Removal of mark-up subject to DD.

Risk : Novation and Other Key Interfaces ¹⁴	Allocation		
	Public Sector	Private Sector	Shared
unconditionally guaranteed under the Tram Supply Agreement by such a person			
[15.1] ²⁶ Risks arising through the Roads Demarcation Agreement. NOTE: If this agreement is not settled prior to contract award, Infraco will seek a tie change.	✓		✓
[16.2] ²⁷ Risks arising through the Asset Protection Agreement. NOTE: If this agreement is not settled prior to contract award, Infraco will seek a tie change.	✓		✓

Risk : Operator Interface	Allocation		
	Public Sector	Private Sector	Shared
[17.2/17.6] ²⁸ Occurrence and costs to the Infraco of an Operator Event which the Infraco has not materially contributed to, and has suffered a material adverse impact	✓		
[17.3/17.4/17.7] Failure to mitigate (at reasonable inconvenience and cost), notify tie of or maintain reports of an Operator Event or matters which may precede an Operator Event		✓	
[17.8] ²⁹ Failure to, from the date of the Agreement, take into account comments of the Operator when refining Design and failure to deliver Infraco comments on functional and maintainability issues to tie and the operator		✓	
[17.9] ³⁰ Obstruction of the Operator in respect the Operator Maintenance Plan and Maintenance Services		✓	
[17.9] ³¹ Obstruction by the Operator of the Infraco in respect of the Maintenance Services	✓		
[17.10] Failure to act upon Operator instructions		✓	
[17.11-13] Failure to notify tie and the operator of requirements for Operator Maintenance and failure to co-operate in the planning and execution of any Operator Maintenance, Maintenance Services and any planned or unplanned works or activities		✓	
[17.16] DPOFA Changes	✓		
[17.17] Failure to provide DPOFA Change Response when required by tie		✓	
[17.18.1.1/51.2] Failure to liaise with HMRI and the emergency services		✓	
[17.18.1.2] Failure to develop and implement the Infraco Safety Management System		✓	
[17.20/17.21] Failure to complete safety and service readiness		✓	

²⁶ Roley position reserved pending due diligence.

²⁷ Roley position reserved pending due diligence.

²⁸ Roley position reserved pending due diligence.

²⁹ To be clarified during due diligence.

³⁰ **tie** to talk with AR on this clause to clarify his position.

³¹ Roley requires clarification on which parts of the ETN are to be maintained by the Operator.

Risk : Operator Interface	Allocation		
	Public Sector	Private Sector	Shared
verification each morning to the satisfaction of the Operator			
[17.22] ³² Failure to liaise effectively with the Operator in the co-ordination of health and safety issues at the Depot		✓	
[17.23] Failure to give the Operator and tie a minimum of one month's notice of any planned lifecycle maintenance forming part of the Maintenance Services to be carried out on any part of the ETN		✓	
[17.24] Failure to provide tie and the Operator with a combined maintenance plan not less than 6 months prior to the Planned Service Commencement Date, subject to supply to the Infraco of the Operator Maintenance Plan [9] months prior to the Planned Service Commencement Date			✓
[17.25/17.26] ³³ Failure to provide technical advice and information to the Operator during normal working hours; failure to provide reasonable works/site access to Operator; interference with Operator mobilisation.		✓	
[17.27/17.28] Interference with Infraco while on Site; damage to the Infraco Works caused by the Operator or tie	✓		
[17.29] Failure to work closely and effectively with the Operator to complete the System Acceptance Tests and related obligations on testing and commissioning		✓	
[17.31] Failure of the Infraco to work collaboratively with the Operator and failure of the Operator to work collaboratively with the Infraco to: <ul style="list-style-type: none"> • [17.31.1] maximise productivity during the Infraco Works and minimise disruption for the public and third parties • [17.31.2] ensure the delivery of complete system integration • [17.31.4] minimise and give the best advance notice of interruption to Transport Services • [17.31.5] not hinder proper performance of the Project Development Services, Project Operations and obligations under the Infraco Contract • [17.31.6] support adherence to timetables and the Programme • [17.31.7] report promptly any proposed change permitted under the DPOFA or the Infraco Contract and related mitigation • [17.31.8] use reasonable endeavours to minimise interface disputes 			<ul style="list-style-type: none"> ✓ ✓ ✓ ✓ ✓ ✓ ✓

³² Roley reserves position pending understanding of Depot.

³³ Charging mechanism for additional hours to be discussed.

Risk : Land Issues and Consents ³⁴	Allocation		
	Public Sector	Private Sector	Shared
[18.1/18.20] ³⁵ Failure to provide appropriate licence to enter land and the necessary Land Consents ³⁶	✓		
[18.2] Encroachment on land outside of the Permanent Land and Temporary Sites		✓	
[18.3/18.6/18.17] Breach of a Land Consent or use of Temporary Sites outside that specified in the Acts		✓	
[18.4] Failure to give tie not less than 40 days' notice where access is required to any Temporary Site for the purposes of carrying out the Infraco Works		✓	
[18.5/18.13] Failure to provide access to the Temporary Sites following 40 days' notice having been given by the Infraco	✓		
[18.7/18.8] ³⁷ Failure to minimise period of possession of Temporary Site, or failure to quit occupation of such Temporary Site after 28 days (3 months where a Site Office has been established) following the completion of the Infraco Works to such Temporary Site		✓	
[18.9] Failure to give notice of the vacation of a Temporary Site		✓	
[18.10] Failure to remove all temporary works from a Temporary Site and restore the land to the reasonable satisfaction of the land owner		✓	
[18.10.1] Demolition of a building or any part thereof without the consent of tie		✓	
[18.10.2] Failure to provide tie with sufficient evidence (including a detailed record of the condition of the land both before and after the occupation of the Temporary Site) to show that restoration obligations have been complied with		✓	
[18.12] Failure to provide notice of temporary possession for maintenance purposes, excluding where any Building Fixing Agreement contains a right for the Infraco to enter onto any land		✓	
[18.13] Temporary possession for maintenance purposes under section 27(1) of the Tram Acts.	✓		
[18.14.1] Breach of requirement to be less than 20m away from Infraco Works		✓	
[18.14.2] Breach of reasonable requirements in connection with maintenance		✓	
[18.14.3] Breach of requirement to avoid possession of houses or gardens		✓	
[18.14.3] Breach of requirement to avoid possession of occupied buildings		✓	
[18.15/18.21] Provision of land and/or Land Consents which are required by the Infraco outside the Permanent and Temporary Land		✓	

³⁴ Consent definition to be split into **tie** Consents and Infraco Consents and risk allocation of Clause 19 to be appropriately agreed.

³⁵ To be expanded to allow for exclusivity.

³⁶ "**Land Consents**" means all licences to occupy land, wayleaves, and any other licences, permissions, rights of access and related consents in respect of the land required for the Infraco Works;

³⁷ **tie** to revert after checking with Land Team.

Risk : Land Issues and Consents ³⁴	Allocation		
	Public Sector	Private Sector	Shared
[18.16] Failure to use reasonable endeavours to provide assistance to tie in the provision and amendment of Land Consents		✓	
[18.19] Breach of obligations under Schedule 13 (Third Party Agreements). NOTE: any Third Party Agreements disclosed post Award will be treated as a tie change.		✓	
[19.1] ³⁸ Failure to obtain, maintain and implement all Consents which may be required to carry out and complete the Infraco Works. NOTE: drafting currently places consent risk with tie, not Infraco.			✓
[19.2] Failure to provide copies of Consents to either Party's Representative			✓
[19.4] Cost of obtaining and maintaining in effect the Traffic Regulation Orders	✓		
[19.5] Failure to provide reasonable assistance to tie in obtaining and maintaining in effect the Traffic Regulation Orders		✓	
[19.6] Failure to update the Consents Programme by each Reporting Period End Date and to obtain any new Consents			✓
[19.9] Failure to give all notices and pay all fees required to be given or paid by Law in relation to the Infraco Works			✓
[19.10-19.12] ³⁹ Failure to comply with Special Requirements of any Approval Bodies affected by the Infraco Works, provided tie has notified the Infraco of these ⁴⁰			✓
[20.1] ⁴¹ Failure to submit the Proposals ⁴² to tie at least 6 months prior to the date on which the Infraco proposes to install, maintain, modify or replace any relevant supporting infrastructure and to obtain tie 's consent to the Proposals		✓	
[20.1.2] Failure to submit the necessary applications and obtain necessary Consents			✓
[20.2/20.4] Failure to submit revised proposals		✓	
[20.3] tie to obtain Consents and Building Fixing Agreements	✓		
[20.5] Where a building fixing agreement is to be used, securing the consent of the Heritable Proprietor and any other relevant party to allow the Infraco to carry out a survey and securing the agreement of the Heritable Proprietor to allow the setting of such building fixings (both at Infraco cost)		✓	
[20.6] Failure to inform the Infraco of failure to obtain the consent of the relevant Heritable Proprietor	✓		

³⁸ Consents responsibility to be split and risk to be agreed and sub-clauses to be reinserted.

³⁹ Special requirements schedule required.

⁴⁰ Costs of compliance with Special Requirements are borne by **tie** as a **tie** change.

⁴¹ Subject to due diligence.

⁴² "Proposals" means, in relation to each section of OLE forming part of the Edinburgh Tram Network, the Infraco's proposals for the type of supporting infrastructure to be installed in relation thereto, together with any information or documentation which would be reasonably required by **tie** in order to properly evaluate such proposals

Risk : Land Issues and Consents ³⁴	Allocation		
	Public Sector	Private Sector	Shared
[20.7] Where necessary due to the Heritable Proprietor withholding its consent to building fixings, the responsibility for and cost of the procedure of application to the sheriff pursuant to the Acts or submittal of alternative plans		✓	
[20.8] Failure by tie to respond within 10 days stating its preferred method for supporting the OLE	✓		
[20.9] Failure to procure that CEC uses all reasonable endeavours to assist the Infraco in the procedure for application to the sheriff pursuant to the Acts ⁴³	✓		
[20.9.1] Rejection of application by sheriff, revised proposals are an Infraco change		✓	
[20.9.2] If the Section 16(4) route not used, then tie change	✓		
[20.11] This provision conflicts with Clause 20.3		?	
[20.12] Cost of removal of a building fixing and installation of OLE pole	✓		
[20.13] Selection of method for supporting OEL where building cannot support the loadings of a building fixing		✓	
[21.4] Failure to obtain any street works licence, road opening permit and any other consent, licence or permission (other than any Land Consents) that may be required for the Infraco Works		✓	
[21.5] Failure to give notice to a relevant authority of its proposal to commence any work		✓	
[22.1] ⁴⁴ Adverse physical conditions and artificial obstructions, subject to information being provided ⁴⁵		✓	
[22.5] Reasonable extra costs, EoT, suspension and/or a variation in dealing with unexploded ordnance, unidentified utility apparatus, unidentified contaminated land or unforeseeable ground conditions (with Background Information as baseline of foreseeability)	✓		
[23] Failure to provide tie and tie's Representative and any person authorised by tie or tie's Representative with access upon reasonable prior notice to any site, workshop or facility etc during normal working hours		✓	
[24] ⁴⁶ Failure to execute the Depot Licence and comply with the terms thereof		✓	

⁴³ Note that although **tie** shall procure that CEC offers such assistance, this will be at Infraco's cost

⁴⁴ Subject to the provision of information.

⁴⁵ Save in respect of unidentified utilities, contaminated land or unexploded ordnance and any ground condition not foreseeable from the Background Information.

⁴⁶ Subject to due diligence on the Depot Licence by Roley.

Risk : Sub-Contracting and Personnel	Allocation		
	Public Sector	Private Sector	Shared
[28.2] Sub-contracting of part of the Infraco Works without tie's consent except in respect of SDS Provider, Tram Supplier, Tram Maintainer, the Infrastructure Maintainer and any approved sub-contractor and/or trades		✓	
[28.4] ⁴⁷ Failure to incorporate required contract terms into subcontracts to be entered into by agreed "Key Sub-Contractors"		✓	
[28.5] Failure to provide such skilled technical assistants and labour as required for execution of the Infraco Works		✓	
[28.6] Removal of any employee of the Infraco and/or a Sub-Contractor who misconducts himself or is incompetent		✓	
[28.7] ⁴⁸ Failure to provide Key Sub-Contractor collateral warranties to tie in favour of tie and/or in favour of CEC and Network Rail (any other party must be identified prior to Award)		✓	
[28.8] Failure to use reasonable endeavours to procure that any Sub-Contractor shall within 40 business days of any reasonable request by tie provide to tie a collateral warranty		✓	
[28.9] Failure in performance by Sub-Contractors		✓	

Risk : Performance of the Works	Allocation		
	Public Sector	Private Sector	Shared
[25.1] Failure to observe the reasonable instructions of tie's Representative		✓	
[25.7] Failure to inform Infraco of the identity of tie's Representative	✓		
[26] Acts or omissions of the Infraco's Representative		✓	
[26.1] Failure to provide sufficient superintendence to the Infraco Works		✓	
[26.2/26.5/26.7] Failure to obtain/retain tie's approval of the Infraco's Representative or his deputy		✓	
[26.10] Failure to provide sufficient staff and involve the Key Personnel		✓	
[26.12] Failure to ensure that there are no changes to the Key Personnel without tie's prior written consent and that any replacement persons shall be of at least equivalent status an ability to the person whom they replace		✓	
[26.13] Failure to use all reasonable endeavours to ensure the continuity of the personnel assigned to perform the Infraco Works and to carefully select Key Personnel having careful regard to their existing work load and other planned commitments		✓	
[26.14] Failure to ensure that Key Personnel have the requisite level of skill, experience and authority		✓	

⁴⁷ To define Key Sub-Contractors. Roley do not agree to the approval of any Sub-Contracts beyond SDS, TSA, TMA and IMA.

⁴⁸ Roley seeks to finalise following definition of Key Sub-Contractors. NR accepted subject to APA review.

Risk : Performance of the Works	Allocation		
	Public Sector	Private Sector	Shared
[26.16] Contracting of or retention of as an adviser or consultant any person currently or previously employed or engaged in the previous 3 months by tie without the prior written approval by tie		✓	
[26.17] Failure of Key Personnel and other staff to comply with regulatory requirements, tie's drug and alcohol policy		✓	
[26.18] Allowing the consumption of, or work of under, the influence of alcohol or drugs or the giving, selling or bartering of the same		✓	
[27.1] Failure to employ careful, skilled and experienced staff or site supervisors with CSCS (or equivalent) certification		✓	
[27.2] The removal of any person employed on the Infraco Works who, in the opinion of tie's Representative, misconducts himself or is incompetent or negligent		✓	

Risk : Construction ⁴⁹	Allocation		
	Public Sector	Private Sector	Shared
[29.1] Errors in the position, levels, dimensions or alignment of any setting out of the Infraco Works during progress of Infraco Works		✓	
[30.1] Failure to have full regard to safety of all persons entitled to be on Site and to keep the Site in an orderly state to avoid danger to such persons		✓	
[30.2] Failure to provide required lights, guards, fencing etc		✓	
[30.3] Failure to comply with health and safety legislation and requirements		✓	
[30.4] ⁵⁰ Failure to undertake instruction and training and provide and issue passes for admission to the Site		✓	
[30.6] ⁵¹ Failure to provide a list of the names of all workers requiring passes together with two photographs		✓	
[30.9] Failure to ensure that the Infraco Parties are confined only to that portion of the Site necessary to enable them to carry out the Infraco Works		✓	
[30.10] Failure to keep the Site secure		✓	
[30.11] Failure to take reasonable steps to prevent unauthorised persons being admitted to the Site		✓	
[31.1] ⁵² Failure to take full responsibility for the care of the Infraco Works from the Effective Date until, in relation to each Section, the date of issue of a Certificate of Sectional Completion in relation to that Section		✓	
[32.1] Failure to comply with requirements in Schedule 3 (<i>Code of</i>		✓	

⁴⁹ Roley wishes to discuss the practical aspects of compliance with clauses 30.5-30.9.

⁵⁰ Acceptable subject to definition of "Designated Work Area".

⁵¹ Roley wishes to discuss the practical aspects of compliance with clauses 30.5 - 30.9 post PB.

⁵² Risk transfer and handover details required; this drafting conflicts with core Infraco responsibilities.

Risk : Construction ⁴⁹	Allocation		
	Public Sector	Private Sector	Shared
<i>Construction Practice and Code of Maintenance Practice</i>) as to maintenance of access to properties, bus stops and bus services and the closure of roads			
[32.2] Failure to comply with requirements in Schedule 3 (<i>Code of Construction Practice and Code of Maintenance Practice</i>) and to minimise nuisance, inconvenience or interference to the business or operations of the owners, tenants, bus operators and to the public		✓	
[32.3] ⁵³ Failure to use reasonable endeavours to obtain written consent of adjoining or neighbouring landowners with regard to interference with their rights	✓		
[33.1] Failure to use reasonable means to prevent damage from "extraordinary traffic" related to the ETN.		✓	
[33.1] Failure to select routes and use vehicles to as far as possible avoid unnecessary damage to roads and bridges.		✓	
[33.2] ⁵⁴ Strengthening bridges or altering or improving any highway connecting with the Site to facilitate installation of the Trams, the Infraco's Equipment or Temporary Works		✓	
[33.3] Claims for damage to highways or bridges		✓	
[34.1] Failure to construct and complete Infraco works in strict accordance with the Agreement and in strict accordance with tie's instructions		✓	
[34.2] Failure to keep materials, Infraco's equipment, labour, mode and manner of construction in accordance with the Infraco Contract		✓	
[34.3] Time and cost (Compensation Event) if tie's instructions result in any delay or disruption or cost to the Infraco	✓		
[39] Discovery of Fossils and Antiquities (including historical human remains) on Site	✓		

Risk: Maintenance	Allocation		
	Public Sector	Private Sector	Shared
Failure to carry out all maintenance, repair and works to the ETN as is necessary to: <ul style="list-style-type: none"> • [52.1.1] Maintain the ETN in accordance with the Maintenance Programme and the Maintenance Plan • [52.1.2] Ensure that the requirements of the Maintenance Specifications are met at all times • [52.1.3]⁵⁵ Comply with the Operator Procedures • [52.1.5] Ensure that no maintenance or repair work shall prejudice to the Care for Safety 		<ul style="list-style-type: none"> ✓ ✓ ✓ ✓ 	

⁵³ Subject to clarification of clause 19 and land risk issues

⁵⁴ Subject to due diligence of Tramco

⁵⁵ Position reserved until Operator Procedures have been reviewed.

Risk: Maintenance	Allocation		
	Public Sector	Private Sector	Shared
<ul style="list-style-type: none"> [52.1.9] Hand back of the ETN in a condition consistent with the Infraco having complied with Clause 52 (<i>Maintenance</i>) provided that: 1) the Infraco will not be in breach because of fair wear and tear or expiry of working life, and 2) this clause imposes no obligations on the Infraco to carry out any Operator Maintenance 		✓	
[52.2/52.3] Failure to work with Operator in respect of daily handover, comments and checklist		✓	
[52.4] ⁵⁶ Failure to support, assist and co-operate with tie Parties as tie may reasonably require from time to time		✓	
[52.5] ⁵⁷ Failure to carry out Mobilisation Services on or before the appropriate Mobilisation Milestone Dates		✓	
[52.6] Safety and efficiency of the Maintenance Services, so that the ETN is capable of being operated in a safe and efficient manner and free of any reasonably avoidable risk of pollution, nuisance, interference or hazard		✓	
[52.7] Failure to employ and train all staff necessary to perform the Maintenance Services in accordance with the Infraco Contract		✓	
[52.8] ⁵⁸ Failure to provide and employ all staff necessary to perform the Mobilisation Services in accordance with the Infraco Contract		✓	
[52.9] Failure to supply only new materials and goods		✓	
[52.10-52.13] ⁵⁹ The provision of all Spare Parts and Special Tools required for the Maintenance Services (including the provision of valid calibration certificates)		✓	
[52.14] Review of the level of Minimum Spare Parts Pool			✓
[52.14] Variation of the Minimum Spare Parts Pool ⁶⁰	✓		
[52.15] Effecting repairs of all defects in, failures or damage to the ETN irrespective of cause.		✓	
[52.16] Cost of repairs referred to in 52.15 above to the extent that any damage to the ETN is caused by: 1) a breach of the Infraco Contract by Infraco or 2) any negligent act or omission by the Infraco or any Infraco Party		✓	
[52.17] ⁶¹ Cost of repair to the extent that any damage to the ETN is NOT caused by 1) a breach of the Infraco Contract by Infraco or 2) any negligent act or omission by the Infraco or any Infraco Party	✓		
[52.19] Temporary Repairs and obtaining approvals thereafter		✓	
[52.20/52.21] Failure to provide assistance, information and advice to tie and the Operator which is reasonably required in the case of incidents or failures affecting the ETN and reporting thereon ⁶²		✓	

⁵⁶ Obligation to be clarified

⁵⁷ Mobilisation Services to be defined.

⁵⁸ Obligation to be clarified.

⁵⁹ Intention to be clarified.

⁶⁰ Variation to the Minimum Spare Parts Pool shall be treated as a **tie** Change.

⁶¹ Roley proposes to have a pre-approved lot of prices for standard repairs.

⁶² Infraco can recover its costs where the incident or failure was not due to its negligence or omission

Risk: Maintenance	Allocation		
	Public Sector	Private Sector	Shared
[52.23] Failure to report and propose a solution to defects where rectification falls within the scope of the Infrastructure Maintenance Services in the ETN which may prejudice safety or reliable operation of the ETN ⁶³		✓	
[52.24] Failure to provide additional systems availability requested by tie following Infraco's confirmation of its ability to so provide		✓	
[52.25] Failure to keep up to date and supply a maintenance manual, electronically and free of charge, to tie's representative		✓	
[53] ⁶⁴ Use, handling and disposal of Hazardous Materials		✓	
[54] ⁶⁵ Maintenance of Technical Records and Computer Systems		✓	

Risk : Quality, Testing and Examination	Allocation		
	Public Sector	Private Sector	Shared
[35.1] Testing and examination of the quality, weight or quantity of any materials used before use in the Infraco Works		✓	
[35.2] Costs of samples		✓	
[35.3/41.2/44.2/47.2] ⁶⁶ Costs of any specified tests (additional tests will be a tie change)		✓	
[36.1] Failure to give 48 hours notice to allow examination of work prior to covering up		✓	
[36.2] Cost of uncovering where Infraco Works <u>are</u> found to be in accordance with Agreement	✓		
[36.2] Cost of uncovering where Infraco Works are found <u>not</u> to be in accordance with Agreement		✓	
[37.1] Unsatisfactory work or materials		✓	
[37.5] Costs of opening up and testing for unsatisfactory work and materials following repeat offences.		✓	
[38.3] Urgent repairs carried out by tie which the Infraco was liable to carry out under the Agreement and which in the opinion of tie's Representative, acting reasonably, gives rise to an immediate threat to health and safety		✓	
[38.4] Urgent repairs carried out by the Infraco (except to the extent such work results from Infraco's default)	✓		
[40] Errors or omissions in the Infraco Works		✓	
[43.5] ⁶⁷ Compliance with obligations in the Tram Inspector Agreement	✓	✓	
[43.10] Costs of appointment and services of the Tram Inspector	✓		

⁶³ Costs allocated in accordance with clauses 52.16/52.17.

⁶⁴ Maintenance of Hazardous Materials Register to be clarified.

⁶⁵ This is subject to a review of the Maintenance Services Connecting Agreement

⁶⁶ Principle agreed, drafting to be finalised.

⁶⁷ Pending due diligence on Tram Inspector Agreement

Risk : Quality, Testing and Examination	Allocation		
	Public Sector	Private Sector	Shared
[44.1/45.1/47.1] Failure to inspect the Infraco works on the dates specified	✓		
[46.2] ⁶⁸ Carrying out of Snagging List works		✓	
[47.2/47.4] Failure to complete T5 and to satisfy tie that T5 is complete and that a Network Certificate/Reliability Certificate should be issued		✓	
[48] Tests, surveys, trials or searches at tie's request where the defect or fault is one for which the Infraco is NOT liable under the Agreement	✓		
[48] Tests, surveys, trials or searches at tie's request where the defect or fault is one for which the Infraco is liable under the Agreement		✓	
[55.3] Costs associated with surveys and audits which do not show non-compliance by the Infraco	✓		
[55.4] Costs associated with surveys and audits which show a material non-compliance by the Infraco		✓	
[55.5/55.6] Failure to rectify in agreed period		✓	
[56.1] ⁶⁹ Failure to comply with Schedule 6 Maintenance Payment Regime in respect of performance monitoring		✓	
[56.3-56.5] Failure to submit Service Quality Reports, Annual Service Reports and Self-Monitoring Plans at the required times		✓	
[56.6] Failure to assist tie in respect of monitoring procedures		✓	
[56.8] Increased monitoring as a result of Underperformance Warning Notices being issued		✓	
[105.1.2] Failure to operate a quality management system in accordance with BS EN 150 9001:2000		✓	

Risk : Programme	Allocation		
	Public Sector	Private Sector	Shared
[60.1/60.9/62.1] ⁷⁰ Failure to progress Infraco Works with due expedition and in a timely and efficient manner in accordance with the Programme and to mitigate any delays		✓	
[60.4] Deemed acceptance of a revised programme due to failure by tie's Representative to accept, reject or request further information within 10 Business Days in respect of revised programmes proposed by the Infraco	✓		

⁶⁸ Snagging protocol, time limit and long lead time to be agreed.

⁶⁹ Subject to review of maintenance services meeting agreement with Roley.

⁷⁰ Subject to review of MUDFA programme by Roley.

Risk : Programme	Allocation		
	Public Sector	Private Sector	Shared
[60.2/60.5/60.7] Failure to update and to provide further information in respect of the revised programme proposed by Infraco		✓	
[62.1] Late completion of any Section resulting in LADs NOTE: Levels of LADs are not yet agreed. Drafting of clause is not completed yet.		✓	
[62.6] ⁷¹ Failure to deliver a Tram to the Depot by the Agreed Delivery Date ⁷²		✓	
[62.11] Tram exceeding Maximum Tram Weight		✓	
[87.1] Suspension on instructions of tie's Representative in circumstances not provided below	✓		
[87.1.3] Suspension by reason of Infraco Breach affecting the construction respectful of health and safety of persons and property.		✓	
[87.2] Occurrence of abandonment or omission of Infraco Works if permission to resume not granted by tie within 6 months.	✓		

Risk : Relief Events (time) and Compensation Events (time and/or costs)	Allocation		
	Public Sector	Private Sector	Shared
[18.20 / Definition of Compensation Event] Occurrence of any delay caused by tie failing to give possession or access including refusal of third party to permit Infraco to exercise occupation rights.	✓		
[Definition of Compensation Event] Occurrence of any delay caused by CEC stopping up streets	✓		
[Definition of Compensation Event] Occurrence of any delay caused by Utilities Works or MUDFA works	✓		
[Definition of Compensation Event] Delay caused by breach by tie , a tie Party or act of Network Rail which adversely affects the performance of the Infraco Works	✓		
[Definition of Compensation Event] Delay caused by discovery of unexploded ordnance, utility apparatus or contaminated land which did not at the time of such discovery form part of the Infraco Works	✓		
[Definition of Compensation Event] Any inaccuracy, incompleteness or unfitness for purpose of any of the Background Information. NOTE: This is not consistent with clauses 7.9 and 7.10 and results in significant risk retention.	✓		
[Definition of Compensation Event] Failure by tie to obtain Land Consent, Building Fixing Agreement/Consent, land agreement or TRO.	✓		
[Definition of Compensation Event] Protestor Action	✓		
[Definition of Compensation Event] Power Failure or bursting of pipes, apparatus save when caused by Infraco.	✓		

⁷¹ Intention to be clarified before clause 62 can be agreed.

⁷² Subject to due diligence

Risk : Relief Events (time) and Compensation Events (time and/or costs)	Allocation		
	Public Sector	Private Sector	Shared
[Definition of Compensation Event] Vandalism impacting ETN.			
[Definition of Compensation Event] Operator interference with Infraco.	✓		
[34.3] Occurrence of any referable delay caused by instructions from tie's Representative under Clause 34.3	✓		
[37.5/definition] Occurrence of any referable delay caused by orders or directions from tie's Representative in respect of the removal of unsatisfactory work or materials ⁷³	✓		
[49.1/49.3] Failure to remove materials and equipment at the correct time		✓	
[63.2/63.7] ⁷⁴ Cost of repairing or making good any damage to property or personal injury or death suffered on the Site caused by Protestor Action except where such Protestor Action is directed at the Infraco "personally" and not at the project.	✓		
[Definition of Relief Event] Delay caused by terrorism	✓		
[Definition of Relief Event] Delay caused by UK strike or industrial dispute affecting Infraco workforce.	✓		
[86.6/Definition of Relief Event] Delay caused by a Force Majeure Event	✓		
[61.1] Increase to rate of progress where no entitlement to extension of time		✓	
[61.6] Acceleration measures required by tie to accelerate programme not arising out of any default by the Infraco	✓		
[Definition of Relief Event] Delay caused by fire, flood (other than flood caused by bursting or overflowing of apparatus and pipes), explosion, lightning, tempest or earthquakes, power failure or failure of operators or pipes	✓		
[63.3] Removal of protestors from the ETN ⁷⁵	✓		
[65.3] ⁷⁶ [Definition] Failure to notify tie within 20 Business Days of awareness of delay event/compensation event		✓	
[64/65.8.1] ⁷⁷ Failure to identify long lead time works NOTE: drafting remains to be settled. Roley seeks agreement POA Preferred Bidder.		✓	
[64/65.8.2] Failure to identify enabling works required		✓	
[64/65.8.3] Failure to manage interface with CEC		✓	
[64/65.8.4] Failure to manage interface with third party consent provider		✓	

⁷³ The cost of the test or opening up is to be borne by the Infraco. However, unless it can be shown that the workmanship or materials were not in accordance with the Agreement, the orders will constitute a Relief Event.

⁷⁴ **tie** to provide reworked drafting with new risk position.

⁷⁵ Note that Infraco may request the assistance of **tie** to remove protestors where Infraco can show, to **tie's** satisfaction, that the legal remedies available to Infraco have been exhausted or are unsuitable (clause 63.4). However, Infraco will indemnify **tie** in respect of any costs incurred in providing such assistance (clause 63.7).

⁷⁶ Subject to review by Roley of revised drafting.

⁷⁷ Drafting remains to be settled. Roley seeks agreement post Preferred Bidder. List of Relief/Compensation Events needs to flow through from TSA/TMA and apply to Maintenance Period. Note: drafting remains to be settled. Roley seeks agreement post Preferred Bidder.

Risk : Relief Events (time) and Compensation Events (time and/or costs)	Allocation		
	Public Sector	Private Sector	Shared
[64/65.8.5] Failure to identify required instructions		✓	
[64/65.9] Any other cause of delay not being a Relief Event or Compensation Event or caused by Infraco breach		✓	
[80.14] Delay/costs due to a tie Change (save where the Infraco could have prevented the need for the tie change)	✓		
[87.1] Occurrence of any referable delay/costs caused by suspension by tie's Representative	✓		

Risk : Payment and Measurement	Allocation		
	Public Sector	Private Sector	Shared
[41.1] Failure to attend testing relevant to Milestone achievement	✓		
[41.3] Failure to satisfy tie in relation to the achievement of a milestone (including a critical milestone)		✓	
Payment provisions are not complete and cannot be commented on here			
[67.6/67.8] ⁷⁸ Failure to submit valid VAT invoice on time		✓	
[67.14/68.12] ⁷⁹ Failure to adhere to requirement to procure collateral warranties prior to payment		✓	
Failure by tie to issue Maintenance Service Interim Certificate deemed to be an issue of MSIC for full amount claimed	✓		
[69.1] Interest on Late Payment at Base Rate + 2% (against Infraco Invoice or tie set off)			✓
[69.3] Failure to issue a notice of withholding within the prescribed time period	✓		
[70.1] Payment of tax on any taxable supplies to tie		✓	
[70.5] Reimbursement of third party VAT intended in Party Costs	✓	✓	

Risk : Warranties	Allocation		
	Public Sector	Private Sector	Shared
[75] Breach of corporate warranties given to the best of Infraco's knowledge and belief.		✓	

⁷⁸ Subject agreement on practicalities.

⁷⁹ % deletions subject to future agreement.

Risk : Required Insurances	Allocation		
	Public Sector	Private Sector	Shared
[76.1] Failure to procure and maintain Required Insurances		✓	
[76.11] Failure to comply with the terms of the Required Insurances or OCIP Insurances		✓	
[76.13] Commercially unreasonable rates and terms of insurance			✓
[76.14] ⁸⁰ Failure to obtain or maintain OCIP Insurances	✓		
[76.16] ⁸¹ Excesses/deductibles under OCIP Insurances or Additional Insurances to the extent that the claim is due to acts or omissions of the Infraco		✓	

Risk : Indemnities, liability and sole remedy	Allocation		
	Public Sector	Private Sector	Shared
[49.2] Loss or damage to Infraco's Equipment, Temporary Works, goods or materials, Trams, engineers works vehicles, Spare Parts, Special Tools (subject to clause 77.2)		✓	
[[77.1] ⁸² The Infraco to indemnify the Indemnified Parties from and against any and all claims, suits, losses, liabilities damages, penalties, fines, forfeitures, and the costs and expenses incident thereto (including without limitation any legal costs of defence) as a result of the Infraco's negligence or breach of the Agreement]. NOTE: see footnote 84.		✓	
[[77.2] Death of, or injury to, persons, loss of or damage to property, loss or damage to the Infraco Works; causing itself or CEC to be in breach of any law, the Asset Protection Act, The DPOFA, the Roads Demarcation Agreement, Tram Inspector Agreement, the Third Party Agreements, other undertakings, Land Consent, Permanent Land or Temporary Land; IPR infringement, making alternative arrangements resulting from any act, omission, neglect, or breach of statutory duty by tie , CEC, any tie Party or any of their respective agents, servants or other contractors (not being employed by the Infraco or any Infraco Party) or for or in respect of any claims, suits, losses, liabilities, damages, penalties, fines, forfeitures, demands, proceedings, damages, costs, charges and expenses.] NOTE: see footnote 84	✓		
[77.10] ⁸³ Indirect Losses NOTE: see footnote; under negotiation			✓

⁸⁰ Roley has OCIP renewal issues to be clarified.

⁸¹ Roley has OCIP renewal issues to be clarified.

⁸² Clause 77 (Indemnity) remains under negotiation.

⁸³ Subject to Indirect Loss definition.

Risk : Changes	Allocation		
	Public Sector	Private Sector	Shared
[79.2] Failure to maintain a change control register and provide a copy (and updates) to tie		✓	
[80] tie Change	✓		
[80.4/80.8] Failure to comply with Estimate time limits		✓	
[80.6/80.14] Failure to include attempt to minimise costs, need for, and impact of the tie Change		✓	
[80.7] Failure to demonstrate that it is appropriate to subcontract for the tie Change and obtain best value for money		✓	
[80.8] Failure to agree the Estimate			✓
[80.10.3.3] Refusal to implement tie change on grounds that it would increase probability of an Infraco breach	✓		
[80.11] Withdrawal of tie Notice of Change	✓		
[80.12] Deemed withdrawal of a tie Change due to failure to issue tie Change Order within 30 days of agreement on Estimate			✓
[80.13] No EoT or Costs of Infraco could have foreseen the need for or materially reduced the scope of the tie charge. NOTE: under review by Roley	✓		
[80.15-80.17] Failure by the Infraco to notify tie within set periods of matters which may constitute a tie Change		✓	
[81] Infraco Change		✓	
[81.1] Failure to notify tie of matters which may constitute and Infraco Change		✓	
[81.2.1] Reduction in Contract Price if Infraco Change results in lower costs		✓	
[81.2.2] Increase in costs to Infraco if such increased costs result from an Infraco Change		✓	
[81.3] Failure to propose a change which might result in a saving of more than £20,000		✓	
[82.2] Failure to take reasonable steps to minimise the inconvenience to the Infraco and disruption to the Programme of any Small Works.		✓	
[82.3] Failure to carry out and complete any Small Works in accordance with Small Works Cost Notice		✓	
[82.4] Payment of costs in Small Works Cost Notice	✓		
[83.2] Failure to take reasonable steps to minimise the duration of any Accommodation Works		✓	
[83.3] Failure to carry out and complete any Accommodation Works in accordance with Accommodation Works Cost Notice		✓	
[83.4] Payment of costs in Accommodation Works Cost Notice	✓		
[84] ⁸⁴ Qualifying Changes in Law ⁸⁵ (time and cost implications)	✓		

⁸⁴ End and definitions still to be negotiated and redrafted to reflect outcome.

Risk : Changes	Allocation		
	Public Sector	Private Sector	Shared
<ul style="list-style-type: none"> [84.2.1] failure to use all reasonable endeavours to minimise increase in costs [84.2.2-3] failure to mitigate effects and implement changes in most cost effective manner 		✓	
[84.3] Failure to implement the change in all circumstances (except to the extent that such change is not necessary to implement the Qualifying Change in Law)		✓	
[84.4.1] ⁸⁶ Payment in respect of Qualifying Changes in Law which exceed a threshold of £150,000.	✓		
[84.4.2] Where the limit of £150,000 in aggregate has been exceeded, payment in respect of SDS Qualifying Changes in Law are above a threshold of £15,000 in respect of each and every event.	✓		
[84.4.3], Where the limit of £150,000 in aggregate has been exceeded, payment in respect of Tram Supply Qualifying Changes in Law which are above a threshold in respect of £30,000 in respect of each and every event	✓		
[84.4.4] Where the limit of £150,000 in aggregate has been exceeded, payment in respect of Tram Maintenance Qualifying Changes which are above a threshold of £15,000 in respect of each and every event.	✓		
[84.4.5] Where the limit of £150,000 in aggregate has been exceeded, payment in respect of Infrastructure Maintenance Qualifying Changes in Law which are above a threshold of £75,000 in respect of each and every event.	✓		
NOTE: Roley is seeking a cap on aggregate exposure under these provisions of £150,000. tie to consider and revert			
[84.5] General Change In Law ⁸⁷			✓
[85.1] The cost of any Phase 1b option	✓		
[86.2.2] The cost of any Network Expansions	✓		

Risk : Termination	Allocation		
	Public Sector	Private Sector	Shared
[87] Suspension of Work (unless necessary by reason of default on the part of Infraco and for proper construction, health and safety reasons) for 6 months. NOTE: tie considering grounds for suspension.	✓		

⁸⁵ "Qualifying Change in Law" means:

(a) a Discriminatory Change in Law ("Discriminatory Change in Law" means a Change in Law, the terms of which apply expressly to: (a) the ETN; and/or (b) the Infraco and not to other persons); and/or alternation to CEC/tie policies;
(b) a Specific Change in Law ("Specific Change in Law" means any Change in Law which specifically applies to the same as or similar to the Infraco Works but excluding the making, amendment or revocation of any traffic regulation order)

⁸⁶ tie to revert on Aggregate Cap.

⁸⁷ Redrafting required since Roley seeks benchmarking.

Risk : Termination	Allocation		
	Public Sector	Private Sector	Shared
[88] Termination on tie Default: agreement terminates 30 days after tie receives Infraco notice under 88.1, specifying default. tie has 30 days to rectify, if capable of rectification.	✓		
[88.8] tie Default termination liability: all works carried out as valued; prelims; supplies/materials committed under contract; demobilisation costs; subcontractor breakage costs; loss of profit (under negotiation by Roley)	✓		
[88.9] Suspension for non-payment by tie	✓		
[89] Voluntary Termination by tie three years after the issue of the first certificate of Service Commencement (same terms as 88.8)	✓ (financial)	✓	
[90] Risk of termination due to: <ul style="list-style-type: none"> • [Definition] Infraco insolvency event⁸⁸ • [Definition] breach of provision of the Agreement which materially and adversely affects the Infraco Works not remedied within 30 days of notice. • LDs cap at Clause 62.3 is exceeded. • [Definition] Infraco's unremedied failure to take out and maintain the Required Insurances • [Definition] failure to achieve Sectional Completion Date or the Service Commencement Date on or before the date falling [12 months] after the Planned Service Commencement Date or Planned Sectional Completion Date.⁸⁹ • [Definition] Infraco's wilful breach of confidentiality obligations • [Definition] Infraco's failure to resolve a conflict of interest NOTE: subject to DD • [Definition] Change in legal status or control of the Infraco which is materially prejudicial to carrying out and completing the Infraco Works NOTE: subject to review • [Definition] Permanent abandonment without due cause of the whole of the Infraco Works or a material part of them • [Definition] Infraco's failure to commence Works within 90 days of Commencement Date • [Definition] Infraco's suspension of works without cause for 15 days after a written notice to proceed NOTE: subject to review • [Definition] The issue of 3 or more underperformance Warning Notices in any 12 month period NOTE: Roley requires DD. • [Definition of tie Default] tie's failure to make any payment due under Interim Certificates 	✓	✓ ✓ ✓ ✓ ✓ ✓ ✓ ✓ ✓ ✓ ✓ ✓ ✓	

⁸⁸ Roley requires review.

⁸⁹ Roley requires a review.

Risk : Termination	Allocation		
	Public Sector	Private Sector	Shared
<ul style="list-style-type: none"> [Definition of tie Default] tie's breach of material obligation under the Agreement which substantially frustrates or renders it impossible for the Infraco to perform its obligations for a continuous period of 30 days tie Insolvency Event tie breach of assignation provision (assignation permitted to CEC, Minister and TEL otherwise requires Infraco prior consent which can be withheld without reason) 	✓		
[93] Infraco's persistent breach of its obligations		✓	
<ul style="list-style-type: none"> [91.6] Force Majeure (ultimate termination as per tie Default) [92] Infraco or Sub-Contractor commits a Prohibited Act 	✓	✓	

Risk : Miscellaneous	Allocation		
	Public Sector	Private Sector	Shared
[50.3] ⁹⁰ Failure in role as Principal Contractor under CDM where such action results from any action, lack of action or default on the part of the Infraco.		✓	
[51.1] Failure to report accidents to HSE		✓	
[58] ⁹¹ TUPE responsibilities. NOTE: Roley has required extensive amendment.	✓	✓	
[58.9] ⁹² Costs of compliance with TUPE provisions	✓		
[59.5] Reasonable and demonstrable costs arising and steps being required following a step-in for Health and Safety and Environmental reason		✓	
[71.2] Employment related and land fill tax fluctuations where tie is informed of such increase within 3 months	✓		
[71.2] Tax fluctuations where tie is NOT informed of such increase within 3 months		✓	
[73] Failure to provide reasonable assistance to tie in respect of best value performance and improvement		✓	
[95.3/95.4/95.5] Failure to provide continuity services following termination		✓	
[[98.1-98.2] Unauthorised Assignation	✓	✓	
[98.3 & 4] Failure to inform tie of any Change in Control	✓	✓	
[99] Occurrence of a Conflict of Interest		✓	
[101.2] Unauthorised disclosure of confidential information		✓	

⁹⁰ To be reviewed by Roley.

⁹¹ Subject to Agreement between parties at PB.

⁹² Subject to Agreement between parties at PB.

Risk : Miscellaneous	Allocation		
	Public Sector	Private Sector	Shared
[101.7] Breach of terms of FOISA ⁹³	✓		
[102] Unauthorised use of Project IPR NOTE: These provisions remain under negotiation.		[✓]	
[102.2] Failure properly to assign IPR or grant appropriate licences to tie		[✓]	
[102.4] Failure to grant a licence in accordance with this clause	[✓]		
[102.9] Failure to use reasonable endeavours to procure licences of Third Party Software for tie		[✓]	
[102.10] Failure to ensure back up of Deliverables in accordance with Good Industry Practice		[✓]	
[102.12] Failure to provide source code, object code and documentation in relation to Third Party Software to tie		[✓]	
[102.9] Failure to procure the grant of a sub-licence for any relevant Third Party Software		[✓]	
[103] Breach of data controller obligations		[✓]	
[105.3] Failure to comply with the HSQE system		[✓]	
[115] Breach of discrimination legislation		✓	
[118] Failure to act reasonably when exercising discretion.			✓
[121] Failure to arrange interface with operator	✓		

Risk : Dispute Resolution	Allocation		
	Public Sector	Private Sector	Shared
[Schedule 9 paragraph 7] Loss of right to dispute due to failure to raise dispute within 3 months of becoming aware of Dispute.	✓	✓	
[Schedule 9 paragraph 9] Loss of right to dispute due to failure to meet any timescales prescribed in DRP (Other than in respect of the adjudication provisions)	✓	✓	

⁹³ Infraco acknowledges that tie is subject to the requirements of the FOISA and the Infraco undertakes to assist and cooperate with tie (at Infraco's expense) with such compliance. However, it is still tie that has the obligation to comply