



(1) TIE LIMITED

- and -

(2) SCOTT WILSON RAILWAYS LIMITED

**AGREEMENT FOR PROVISION OF
TECHNICAL SUPPORT SERVICES**

relating to

THE EDINBURGH TRAM NETWORK

tie limited
19 Haymarket Yards
Edinburgh
EH12 5BH

CEC01580826_0001

CONTENTS

1.	DEFINITIONS AND INTERPRETATION	1
2.	DURATION	16
3.	DUTY OF CARE, STANDARDS AND THE SERVICES TO BE PROVIDED	17
4.	QUALITY ASSURANCE	21
5.	PROGRESS REPORTING	21
6.	KEY PERSONNEL AND STAFF	23
7.	SUB-LETTING AND THE APPOINTMENT OF TSS PROVIDER PARTIES	25
8.	MANAGEMENT OF THE SERVICES	25
9.	METHODS OF PAYMENT	27
10.	ARRANGEMENTS FOR INVOICING AND PAYMENT	28
11.	SET-OFF	30
12.	AUDIT	30
13.	CHANGES	30
14.	QUALIFYING CHANGE IN LAW	34
15.	REQUIRED INSURANCES	34
16.	ERRORS AND/OR OMISSIONS IN THE SERVICES	36
17.	TERMINATION FOR TSS PROVIDER DEFAULT	36
18.	TERMINATION, ABANDONMENT OR SUSPENSION OF THE SERVICES BY TIE	37
19.	TERMINATION OR SUSPENSION FOR TIE DEFAULT	37
20.	TERMINATION FOR CORRUPT GIFTS AND PAYMENTS	38
21.	TERMINATION BY REASON OF FORCE MAJEURE	38
22.	PERSISTENT BREACH	39
23.	PAYMENT FOLLOWING TERMINATION OR SUSPENSION	40
24.	EFFECTS OF TERMINATION OR EXPIRY	41
25.	INDEMNITY BY TSS PROVIDER, LIABILITY AND SOLE REMEDY	42
26.	DISPUTE RESOLUTION PROCEDURE	43

27. ASSIGNATION.....	43
28. CHANGES IN LEGAL STATUS AND CHANGES IN CONTROL.....	44
29. CONFLICT OF INTEREST.....	44
30. COPYRIGHT AND INTELLECTUAL PROPERTY.....	44
31. CONFIDENTIAL INFORMATION.....	46
32. WAIVER.....	49
33. ENTIRE AGREEMENT.....	49
34. NOTICES.....	50
35. CONSENT AND APPROVAL.....	51
36. DISCRIMINATION.....	51
37. FURTHER ASSURANCE.....	51
38. APPLICABLE LAW.....	51
39. VARIATIONS TO BE IN WRITING.....	51
40. NO PARTNERSHIP OR AGENCY.....	51
41. INVALID TERMS.....	52
42. THIRD PARTY RIGHTS.....	52
43. PARTNERSHIPS.....	52
SCHEDULE ONE.....	54
SCOPE OF SERVICES.....	54
SCHEDULE TWO.....	77
KEY PERSONNEL.....	77
SCHEDULE THREE.....	79
PRICING SCHEDULES.....	79
SCHEDULE FOUR.....	99
MASTER PROJECT PROGRAMME.....	99
SCHEDULE FIVE.....	101
COMMERCIALLY SENSITIVE INFORMATION.....	101
SCHEDULE SIX.....	102
REQUIRED INSURANCES.....	102

SCHEDULE SEVEN	106
PANELS FOR THE DISPUTE RESOLUTION PROCEDURE	106
SCHEDULE EIGHT	108
DISPUTE RESOLUTION PROCEDURE	108

AGREEMENT

BETWEEN

- (1) **TIE LIMITED** a company incorporated under the Companies Act with registration number SC230949 and having its registered office at City Chambers, High Street, Edinburgh, Midlothian, EH1 1YJ ("**tie**") which expression shall include its successors in title and permitted assignees; and
- (2) **SCOTT WILSON RAILWAYS LIMITED**, a company incorporated under the Companies Act with registration number 03033277 and having its registered office at Scott House, Basing View, Basingstoke, Hampshire, RG21 4JG (the "TSS Provider") which expression shall include its permitted assignees.

WHEREAS

- A **tie** requires a consultant to perform the Services (as hereinafter defined) in respect of the Edinburgh Tram Network (as hereinafter defined).
- B Pursuant to a notice published in the Official Journal of the European Union on 18 January 2005 with reference 2005/512-011453, **tie** invited expressions of interest from appropriately qualified parties for the performance of the Services.
- C By competitive procurement process, conducted in accordance with Law, **tie** has selected the TSS Provider to perform the Services in accordance with this Agreement.
- D **tie** has issued a Letter of Appointment (as hereinafter defined) in response to the TSS Provider's Formal Offer (as hereinafter defined).

NOW IT IS HEREBY AGREED AS FOLLOWS:

1. DEFINITIONS AND INTERPRETATION

- 1.1 In this Agreement (including the recitals and the Schedules), save as otherwise expressly stated or as the context otherwise requires, the following words and expressions shall have the meanings hereby ascribed to them:

"Abortive Work" means any work which cannot be used in relation to the Edinburgh Tram Network (but not including work occurring as part of any iterative process);

"Affected Party" means a Party that is unable to comply with all or a material part of its obligations under this Agreement as a direct result of a Force Majeure Event;

"Agreement" means the main body of this document (as may be amended from time to time in accordance with this Agreement) together with the Schedules, and the Formal Offer, and the Letter of Appointment;

"Approval Bodies" means any Relevant Authorities, planning authorities, roads authorities, HMRI, Network Rail, the Office of Rail Regulation, the Strategic Rail Authority (or its successor in Scotland), the Civil Aviation Authority, National Air Traffic Services and any other parties who are to issue Consents which may be required for the construction, installation, commissioning, completion and opening of the Edinburgh Tram Network;

"BAA" means BAA plc, a company incorporated under the Companies Act with registration number 1970855 and having its registered office at 130 Wilton Road,

London, SW1V 1LQ which expression shall include its successors in title and assignees and any of its associated or subsidiary companies with interests at Edinburgh International Airport;

"Background Information" means all and any materials, documents, drawings, plans or other information in paper, electronic or any other form, relating in any way to this Agreement and the Tram Legislation (and the parliamentary process) and made available to the TSS Provider by **tie**, CEC and/or any of their respective members, officers, agents and/or advisers during the procurement competition relative to this Agreement or thereafter;

"Business Day" means any day other than a Saturday, Sunday or a public holiday recognised by CEC;

"Capital Streetworks Programme" means the CEC road maintenance and enhancement programme;

"CDM Regulations" means the Construction (Design and Management) Regulations 1994 (S.I. 1994/3140) or any Regulations superceding these;

"CEC" means the City of Edinburgh Council and its successors and assignees whomsoever;

"Change Control Register" means the register maintained by the TSS Provider pursuant to Clause 13.17;

"Change in Control" means any sale or disposal of any legal, beneficial or equitable interest in any or all of the share capital of a corporation or the control over the exercise of voting rights in a corporation or the control over the right to appoint or remove directors of a corporation.

"Change in Law" means the coming into effect after the last date of execution of this Agreement of:

- (a) Legislation, other than any Legislation which on the date of this Agreement has been published:
 - (i) in a draft Bill as part of a Scottish Executive/Scottish Parliament or United Kingdom Government consultation paper;
 - (ii) in a Bill (including the Tram Bills);
 - (iii) in draft subordinate Legislation within the meaning of section 21(1) of the Interpretation Act 1978; or
 - (iv) as a proposal in the Official Journal of the European Communities;
- (b) any Guidance (other than Guidance which on the date of this Agreement has been published (in draft or otherwise) in any Scottish Executive, Scottish Parliament or United Kingdom Government consultation paper (and/or on any Scottish Executive, Scottish Parliament or United Kingdom Government internet site)); or
- (c) any applicable judgement of a relevant court of law which changes a binding precedent;

"Code" means the Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002 as the same may be amended, varied or replaced from time to time;

"Code of Construction Practice" means the code which has been developed in conjunction with all relevant parties with regard to construction practices, environmental issues, safety issues and other aspects relative to the construction, installation and commissioning of the Edinburgh Tram Network;

"Commercially Sensitive Information" means the subset of Confidential Information listed in Schedule 5 (*Commercially Sensitive Information*) comprised of information:

- (a) which is provided by the TSS Provider to **tie** in confidence for the period set out in that schedule; and/or
- (b) that constitutes a trade secret;

"Commissioning and Defects Resolution Phase" means the period commencing with trial running by the Infraco and ending with the expiry of the contractual defects liability period (as determined by **tie**) under the Infraco Contract;

"Confidential Information" means any information which has been designated as confidential by either Party in writing or that ought to be considered as confidential (however it is conveyed or on whatever media it is stored) including information which relates to the business, affairs, properties, assets, trading practices, goods, services, developments, trade secrets, Intellectual Property Rights, know-how, personnel of either Party, all personal data and sensitive personal data within the meaning of the Data Protection Act 1998, and the Commercially Sensitive Information;

"Construction and Installation Phase" means the Project phase in which the Infraco is designing, building and installing the Network Infrastructure and E&M System Components;

"Consents" means without limitation all permissions, consents, approvals, non-objections, certificates, permits, licences, agreements, statutory agreements and authorisations, Planning Permissions, traffic regulation orders, building fixing agreements, building control approvals, building warrants, and all other necessary consents and agreements from the Approval Bodies, or any Relevant Authority, any other relevant third parties whether required by Law or the Tram Legislation or under contract;

"Construction Panel" has the meaning given to it in paragraph 19.1 of Schedule 8 (*Dispute Resolution Procedure*);

"Construction Proposals" means the proposals for the construction, installation and commissioning of the Edinburgh Tram Network to be developed by the Infraco;

"CPO" means Compulsory Purchase Order;

"Deliverables" means the specific items listed in Appendix 2 to Schedule 1 (*Scope of Services*) and all other documents, information, reports, diagrams, records, manuals, schedules, databases, reinforcement details, photographs, formulae, consultation materials, plans, designs, specifications, drawings, details, calculations, transport and other models and simulations, the outputs and reports based on any models, programmes and all other material created and/or provided by the TSS Provider (and/or any TSS Provider Party or any other third party) in the performance of the Services and the TSS Provider's obligations under this Agreement;

"Design Manual" means the design manual issued by CEC as may be amended from time to time;

"Design Phase" means any of: Requirements Definition Phase, Preliminary Design Phase or Detailed Design Phase;

"Design and Technical Gateway Process" means the process set out in clause 7.3 of the SDS Agreement and as outlined in Schedule 1 (*Scope of Services*) to this Agreement;

"Detailed Design Phase" means the phase described in paragraph 2.6 of schedule 1 (*Scope of Services*) of the SDS Agreement;

"Discriminatory Change in Law" means a Change in Law, the terms of which apply expressly to:

- (a) the Edinburgh Tram Network; and/or;
- (b) the TSS Provider and not to other persons;

"Dispute" means any dispute, difference or unresolved claim between the Parties in connection with or arising from this Agreement;

"Dispute Resolution Procedure" means the procedure set out in Schedule 8 (*Dispute Resolution Procedure*);

"DPOFA" means the development partnering and operating franchise agreement between **tie** and the Operator dated 14 May 2004;

"Edinburgh Tram Network" means Line One and Line Two or either of them, as may be amended from time to time, together with any modification, line extension, spur, interconnection and any additional line which may be instructed by **tie**;

"Effective Date" shall have the meaning given in Clause 2.1.1;

"E&M System Components" means all electrical and mechanical machinery, devices and equipment including:

- (a) trams;
- (b) tram track;
- (c) OLE;
- (d) traction and auxiliary power supply network (including network reinforcement if required);
- (e) supervisory and control system (for both tram and highway traffic control);
- (f) communication systems;
- (g) fare collection equipment;
- (h) security systems; and
- (i) depot systems and associated maintenance plant and equipment.

"EMC" means electromagnetic compatibility;

"Environmental Compliance" means satisfaction of and compliance with all Law, regulations and consents governing environmental matters;

"Environmental Information Regulations" means the Environmental Information (Scotland) Regulations 2004 Scottish SI 2004/520;

"Environmental Statement" means the environmental statements supporting each of the Tram Bills;

"Estimate" means the estimate to be provided by the TSS Provider pursuant to Clause 13.3;

"Expiry Date" means the date which falls three years after the Service Commencement Date, such Expiry Date being subject to **tie's** right to extend the Expiry Date pursuant to Clause 2.3, Clause 5.4, **tie's** right to vary the Services in accordance with Clause 13 (*Changes*) and **tie's** right to vary the Agreement in accordance with Clause 39 (*Variations to be in Writing*);

"Final Persistent Breach Notice" has the meaning given in Clause 22.2;

"Financial Panel" has the meaning given to it in paragraph 19.1 of Schedule 8 (*Dispute Resolution Procedure*);

"FOISA" means the Freedom of Information (Scotland) Act 2002 and any subordinate legislation made under this Act from time to time together with any guidance and/or codes of practice issued by the Scottish Information Commissioner in relation to such legislation;

"Force Majeure Event" means the occurrence after the Effective Date of:

- (a) war, civil war, armed conflict or terrorism; or
- (b) nuclear, chemical or biological contamination unless the source of the contamination is the result of actions by the TSS Provider or any TSS Provider Party; or
- (c) pressure waves caused by devices travelling at supersonic speeds.

"Formal Offer" shall mean the tender for the Services issued by the TSS Provider and dated 13 May 2005, as the same has been made on the basis of responses 4 and 5 in the document entitled "TSS ITT - Technical Query No. 1" issued by **tie**, as such tender has been supplemented and/or amended by (a) e-mail correspondence and attachments from Mark Jackson to Gerry Henderson dated 24th June 2005 (14.22 and 15.02) and (b) e-mail correspondence and attachments from Mark Jackson to Gerry Henderson dated 27th June 2005 (13.59 and 17.36);

"Functional Requirements Specification" means the Requirements Specification for Civil Engineering Works, the Requirements Specification for Overall System and Performance Requirements, the Requirements Specification for Supervision, Command and Control Suite of Systems, the Requirements Specification for Electrification and Power, the Requirements Specification for Tram Vehicle and the System-Wide Non-Functional Requirements (which form schedules 11 to 16 (inclusive) of the SDS Agreement) as may be amended and developed from time to time;

"General Change in Law" means a Change in Law which is not a Discriminatory Change in Law or a Specific Change in Law;

"Good Industry Practice" means using standards, practices, methods and procedures conforming to Law and exercising that degree of skill, care, diligence, prudence and foresight that would reasonably be expected from a large, reputable, professionally qualified, competent and skilled organisation experienced in carrying out activities of a similar nature, scope and complexity to those comprised in the Services, and seeking in good faith to comply with its contractual obligations and all duties owed by it;

"Guidance" means any applicable guidance, direction or determination issued by any regulatory body with which **tie** and/or the TSS Provider is bound to comply;

"Heavy Rail Parties" means Network Rail, the ScotRail franchisee, the Strategic Rail Authority (and its successor in Scotland), the Office of Rail Regulation and train and freight operating companies with franchise routes or track access affected by the Edinburgh Tram Network;

"HMRI" means Her Majesty's Railway Inspectorate;

"HSE" means Health & Safety Executive;

"Indemnified Liabilities" means actions, claims (including third party claims), demands, proceedings, losses, damages, liabilities, costs and expenses (including reasonable legal fees and expert witness fees);

"Indemnified Parties" has the meaning given in Clause 25.1;

"Indirect Loss" means any business interruption, loss of profits, loss of business, loss of business opportunity, loss of or damage to or corruption of data or loss of management time or time of other employees;

"Information" has the meaning given under section 73 of FOISA;

"Infraco" means the infrastructure provider to be appointed or appointed by **tie** in relation to the Edinburgh Tram Network;

"Infraco Contract" means the contract to be entered into or entered into by **tie** with the Infraco in relation to the completion of the design and carrying out the construction, commissioning and maintenance planning of the Edinburgh Tram Network;

"Insolvency Event" means any of the following events:

- (a) the TSS Provider is unable to pay its debts as they fall due or is insolvent or admits in writing its inability to pay its debts as they fall due;
- (b) the TSS Provider suspends for a period of two months making payments on all or any class of its debts or a moratorium is declared by the TSS Provider in respect of its indebtedness;
- (c) the TSS Provider ceases business or announces an intention to do so;
- (d) the TSS Provider (being an individual), such expression to include single members of a partnership (whether limited or not) becomes bankrupt or makes composition or arrangement with its creditors, or is the subject of an application to the Court for an interim order under the Insolvency Act 1986,
- (e) the following are entered into:

- (i) a voluntary arrangement (other than a solvent one) for a composition of debts of the TSS Provider;
 - (ii) a scheme of arrangement in respect of the TSS Provider pursuant to the Insolvency Act 1986 or the Companies Act 1985; or
 - (iii) a material composition or arrangement other than a solvent one with the TSS Provider's creditors;
- (f) either of the following:
- (i) the winding-up of the TSS Provider (including passing a shareholders' resolution or the presentation of a petition by the TSS Provider for the purpose of winding up the TSS Provider); or
 - (ii) its administration (including where an application is made by the TSS Provider, or petition is presented by the TSS Provider for or any meeting of its directors or members resolves to make an application for an administration order);
- (g) an order for the winding-up or administration of the TSS Provider is made;
- (h) any liquidator, judicial custodian, receiver, administrative receiver, administrator or the like is appointed in respect of the TSS Provider or any material part of the TSS Provider's assets;
- (i) possession is taken of, or any execution or other process (other than on the dependence or inhibition) is levied or enforced upon, any material part of the property (whether real or personal) of the TSS Provider by or on behalf of any creditor or encumbrancer of the TSS Provider; or
- (j) anything analogous to any of the events mentioned in paragraphs (a) to (i) above occurs in relation to the TSS Provider under the law of any relevant jurisdiction;

"Intellectual Property Rights" means any rights in or to any patent, design right, utility model, trade mark, brand name, service mark, trade name, business name, logo, invention (whether registered or unregistered), domain name, semi-conductor right, topography right, software designs and/or other materials, source code, copyright, moral right, or rights in databases and any other rights in respect of any industrial or intellectual property, whether capable of being registered or not, including all rights to apply for any of the foregoing rights or for an extension, revival or renewal of any of the foregoing rights and any similar or analogous rights to any of the above, whether arising or granted under the law of Scotland or of any other jurisdiction;

"Internal Resolution Procedure" means the procedure described in paragraphs 10 and 11 of Schedule 8 (*Dispute Resolution Procedure*);

"Joint Revenue Committee or "JRC" means the consultant or consultants appointed by **tie** to perform transport modelling functions in relation to the Edinburgh Tram Network;

"Key Personnel" means those staff specified as such in Schedule 2 (*Key Personnel*);

"Law" means:

- (a) any applicable Legislation;

- (b) any applicable Guidance; and
- (c) any applicable judgment of a relevant court of law which is a binding precedent,

in each case in force in Scotland;

"Legal Panel" has the meaning given to it in paragraph 19.1 of Schedule 8 (*Dispute Resolution Procedure*);

"Legislation" means any Act or instruments of the Scottish Parliament or the United Kingdom Parliament or subordinate legislation within the meaning of section 21(1) of the Interpretation Act 1978, any exercise of the Royal Prerogative, and any enforceable community right within the meaning of section 2 of the European Communities Act 1972;

"Letter of Appointment" means the letter from **tie** to the TSS Provider dated 25th July 2005 accepting the TSS Provider's Formal Offer;

"Line One" means Sectors DHY6 (excluding the tramstop at Murrayfield and the alignment between that tramstop and the junction at Roseburn), HOT1, HOT2, HOT3, HOT4, HOT5, HOT6, HCT1, CTO1 and CTO2 as may be amended from time to time;

"Line Two" means Sectors ARP1, DHY1, DHY2, DHY3, DHY4, DHY5, DHY6 (excluding the tramstop at Haymarket and the alignment between that tramstop and the junction at Roseburn), and GNB1 as may be amended from time to time;

"Line One and Line Two" means Sectors ARP1, DHY1, DHY2, DHY3, DHY4, DHY5, DHY6, HOT1, HOT2, HOT3, HOT4, HOT5, HOT6, HCT1, CTO1, CTO2 and GNB1 as shown in the Programme Phasing Structure as may be amended from time to time;

"Master Project Programme" means the overall project programme maintained by **tie** and as may be extended in accordance with Clause 5.4 of this Agreement;

"Network Infrastructure" means all infrastructure, equipment and apparatus including:

- (a) civil and structural engineering works (formation, structures, retaining walls and the like);
- (b) track formation;
- (c) road works;
- (d) traffic management systems;
- (e) tram stops;
- (f) depot, buildings and associated external works;
- (g) substation buildings and associated external works;
- (h) foul and surface water drainage systems;
- (i) building services (E&M) infrastructure;
- (j) environmental mitigation measures;

- (k) hard and soft landscaping; and
- (l) stray current (to the extent required) and EMC control systems.

"Network Rail" means Network Rail Infrastructure Limited, a company incorporated under the Companies Act with registered number 2904587 and having its registered office at 40 Melton Street, London, NW1 2EE which shall include its successors in title and assignees;

"Notice of Adjudication" has the meaning given in paragraph 10.1 of Schedule 8 (*Dispute Resolution Procedure*);

"Notification" has the meaning given in paragraph 10.1 of Schedule 8 (*Dispute Resolution Procedure*);

"OLE" means overhead line equipment and related apparatus including wires, catenaries and the like;

"Open Book Basis" means the availability and disclosure (consistent with operation of Clause 12 (*Audit*) of all underlying data and calculations used by the TSS Provider to create and justify costings and financial analysis presented to **tie**;

"Operations Panel" has the meaning given to it in paragraph 19.1 of Schedule 8 (*Dispute Resolution Procedure*);

"Operator" means Transdev Edinburgh Tram Limited, a company incorporated in Scotland under registered number SC267598 and having its registered office at Level 2, Saltire Court, 20 Castle Terrace, Edinburgh, EH1 2ET, appointed by **tie** as operator under the DPOFA or any party which is a successor appointed by **tie**;

"Panels" has the meaning given to it in paragraph 19 of Schedule 8 (*Dispute Resolution Procedure*);

"Parliamentary Undertakings" means any undertaking given to a Parliamentary Committee during the passage of the Tram Bills through the Scottish Parliament, and any undertaking or agreement given to any person in consideration of his refraining from opposition to the Tram Bills through the Scottish Parliament;

"Party" means each and any of the parties to this Agreement and Parties shall be construed accordingly;

"P3e" means Primavera 3e;

"Persistent Breach Notice" has the meaning given in Clause 22.1;

"Planned Service Commencement Date" means the programmed date of service commencement of 31 December 2009 as may be amended from time to time by **tie** and notified to the TSS Provider;

"Planning Permission" means any planning permission, planning approval, approval of reserved matters, listed building consent, conservation areas consent and/or other consent or approval;

"Possession Strategy" means the commitments secured by **tie** from the Heavy Rail Parties, in particular Network Rail, regarding work of any nature and at any stage of the Project on or adjacent to operational railway land, property or apparatus;

"Preliminary Design Phase" means the phase described in paragraph 2.4 of schedule 1 (*Scope of Services*) of the SDS Agreement;

"Programme Phasing Structure" means the programme set out in Appendix 1 of Schedule 1 (*Scope of Services*) as may be amended by **tie** from time to time and notified to the TSS Provider;

"Prohibited Act" means:

- (a) offering, giving or agreeing to give to **tie**, the Scottish Executive, CEC, or any **tie** Party or any other public body or any person owned or employed by any of them any gift or consideration of any kind as an inducement or reward:
 - (i) for doing or not doing (or for having done or not having done) any act in relation to the obtaining or performance of this Agreement; or
 - (ii) for showing or not showing favour or disfavour to any person in relation to this Agreement;
- (b) paying commission or agreeing to pay commission to any person in connection with the award of this Agreement;
- (c) committing any offence:
 - (i) under the Prevention of Corruption Acts 1889-1916 or section 68(2) of the Local Government (Scotland) Act 1973;
 - (ii) under any Law creating offences in respect of fraudulent acts; or
 - (iii) at common law in respect of fraudulent acts in relation to this Agreement or any other relevant agreement with **tie**, the Scottish Executive, CEC or any other public body; or
- (d) defrauding or attempting to defraud or conspiring to defraud **tie**, CEC, the Scottish Executive or any other public body;

Any references within this Agreement to any "Prohibited Act" shall include acts outwith the United Kingdom and the references within the definition "Prohibited Act" to UK legislation shall be deemed to be amended to refer to legislation in other jurisdictions outside of the United Kingdom.

"Project" means the development, implementation and operation of the Edinburgh Tram Network;

"Project Cost Plan" means the cost plan developed and maintained by the TSS Provider pursuant to Section 8.1 of Schedule 1 (*Scope of Services*) to this Agreement;

"Project IPR" means all Intellectual Property Rights in the Deliverables and the Specially Written Software and any other Intellectual Property Rights created in the performance of the Services which are specific in nature to the performance of the Services;

"Qualifying Change in Law" means:

- (a) a Discriminatory Change in Law; and/or
- (b) a Specific Change in Law.

"Referral Notice" has the meaning given in paragraph 27 of Schedule 8 (*Dispute Resolution Procedure*);

"Referring Party" has the meaning given in paragraph 16 of Schedule 8 (*Dispute Resolution Procedure*);

"Related Contract" has the meaning given in paragraph 55 of Schedule 8 (*Dispute Resolution Procedure*);

"Related Dispute" has the meaning given in paragraph 55 of Schedule 8 (*Dispute Resolution Procedure*);

"Relevant Authority" means any court with the relevant jurisdiction and any local authority, national authority or supra national agency, inspectorate, minister, Scottish Executive, body official or public or statutory person of the government of the United Kingdom or of the European Union and "Relevant Authorities" shall be construed accordingly;

"Requests for Information" shall have the meaning set out in FOISA or any apparent request for information under FOISA, the Environmental Information Regulations or the Code.

"Required Insurances" means the insurances set out in Part 1 of Schedule 6 (*Required Insurances*) as may be amended from time to time in accordance with this Agreement;

"Requirements Definition Phase" means the phase described in paragraph 2.3 of schedule 1 (*Scope of Services*) of the SDS Agreement and as outlined in Schedule 1 (*Scope of Services*) to this Agreement;

"Responding Party" has the meaning given in paragraph 17 of Schedule 8 (*Dispute Resolution Procedure*);

"Roads Authority" means City of Edinburgh Council and any other relevant local authority;

"Safety Management Plan" means the plan developed and maintained by the TSS Provider in accordance with Schedule 1 (*Scope of Services*);

"Schedules" means Schedule 1 (*Scope of Services*), Schedule 2 (*Key Personnel*), Schedule 3 (*Pricing Schedules*), Schedule 5 (*Commercially Sensitive Information*), Schedule 6 (*Required Insurances*), Schedule 7 (*Panels for the Dispute Resolution Procedure*) and Schedule 8 (*Dispute Resolution Procedure*), as the same may be amended from time to time in accordance with the terms of this Agreement;

"SDS Agreement" means the agreement between the SDS Provider and tie;

"SDS-JRC Modelling Suite" means the transport modelling suite to be designed, developed, calibrated, verified and commissioned jointly by the SDS Provider and the JRC pursuant to the terms of their respective commissions;

"SDS Provider" means the system design services provider to be appointed by tie;

"Sector" means each sector identified in the Programme Phasing Structure;

"Services" shall mean those services to be performed by the TSS Provider which are set out in Schedule 1 (*Scope of Services*) to this Agreement and for the avoidance of doubt, shall include any variations pursuant to the provision of this

Agreement, and shall also include the other obligations which the TSS Provider is required to carry out as expressed and instructed pursuant to this Agreement;

"Service Commencement Date" means the date the Edinburgh Tram Network goes into passenger carrying service.

"Specially Written Software" means programs which are written by or on behalf of the TSS Provider specifically to enable the TSS Provider to carry out its obligations under this Agreement;

"Specific Change in Law" means any Change in Law which specifically applies to the provision of a service the same as or similar to the Services (but not to the provision of other services) but excluding the making, amendment or revocation of any traffic regulation order;

"Sub-Sector" means each sub-sector identified in the Programme Phasing Structure;

"Surveys" shall mean investigations, reports, assessments, analysis, data collection and all surveys carried out for the Project including in connection with:

- (a) ground penetrating radar and ground investigation;
- (b) contamination, pollution, air and water quality;
- (c) photographic, topographical, hydrographic;
- (d) structural, building and cellar surveys;
- (e) condition of structure (dilapidation and vulnerability) surveys;
- (f) environmental, ecological and archaeological surveys;
- (g) noise and vibration baseline (pre and post construction) surveys;
- (h) frontager surveys;
- (i) radio frequency surveys;
- (j) traffic and public transport surveys;
- (k) 3-D representational modelling.

"System Acceptance Criteria" means the set of technical criteria developed by the TSS Provider with appropriate support from the SDS Provider, Infraco, the Tram Supplier and the Operator to achieve certification that the Edinburgh Tram Network is safe to trail run, commission and operate;

"System Integration Plan" means the plan developed by the Infraco and the SDS Provider to ensure that the Project is successfully commissioned and achieves certification at the end of the relevant defects liability period that all component parts operate as an integrated whole with fully interdependent operability between Network Infrastructure and the E&M Systems Components;

"System Integration Plan Topic Audit" means all components of the Edinburgh Tram Network including:

- (a) underground services;

- (b) track layout;
- (c) power supply/OLE;
- (d) control room and related systems;
- (e) depot;
- (f) tram vehicles;
- (g) information systems;
- (h) ticketing (including inter-modal systems);
- (i) signalling, supervisory control and communications - tram and road traffic;
- (j) EMC;
- (k) maintenance;
- (l) liaison with Approval Bodies, other public transport operators and emergency services;
- (m) roles and responsibilities by the Infraco, the Tram Supplier and SDS Provider.

"System-Wide Preliminary Design Requirements" means the high level requirements for the whole of the Edinburgh Tram Network developed by the SDS Provider;

"Technical Specifications" are the specifications to be prepared by the SDS Provider and developed by the Infraco to describe the technical aspects of each part of the Edinburgh Tram Network which shall meet the Functional Requirements Specifications and shall allow all aspects of the Edinburgh Tram Network to be procured, constructed, installed, commissioned and maintained;

"Testing and Commissioning Plan" means the plan and proposals developed and applied by the Infraco to test and commission the Project and reviewed and audited by the TSS Provider pursuant to Schedule 1 (*Scope of Services*) to this Agreement;

"Termination Date" means the date of termination expressed in a notice served in accordance with Clauses 17 (*Termination for TSS Provider Default*), 18 (*Termination, Abandonment or Suspension of the Services by tie*), 19 (*Termination or Suspension for tie Default*), 20 (*Termination for Corrupt Gifts and Payments*), 21 (*Termination by Reason of Force Majeure*) or 22 (*Persistent Breach*) (as appropriate);

"Third Party Software" means programs, the Intellectual Property Rights in which are (a) owned by a third party and (b) used by TSS Provider to carry out its obligations under this Agreement;

"tie Change" means any addition, modification, reduction or omission in respect of the Services or any other term of this Agreement instructed in accordance with Clause 13 (*Changes*);

"tie Change Order" means the written confirmation issued by tie to proceed with a tie Change on the basis of an Estimate (as modified, if required);

"tie Default" means one of the following events:

- (a) a failure by **tie** to make payment of any amount of money that is due and payable by **tie** to the TSS Provider under this Agreement exceeding 5% of the value of the Services to be performed under this Agreement (as such value is determined in accordance with this Agreement); or
- (b) a breach by **tie** of any of its material obligations under this Agreement which substantially frustrates or renders it impossible for the TSS Provider to perform its obligations under this Agreement for a continuous period of 90 days;

"tie Notice of Change" means a notice served by **tie** pursuant to Clause 13.1, setting out the matters specified in Clause 13.2;

"tie Party" means any advisers appointed by **tie** or any of **tie's** employees, agents, contractors and sub-contractors of any tier and its or their directors, officers and employees (excluding the TSS Provider or any TSS Provider Party);

"tie's Representative" means the person or persons appointed by **tie** from time to time and notified to the TSS Provider;

"Topics Register" means the central project register of all known issues relating to the design, construction, testing, commissioning, operation and maintenance of the Edinburgh Tram Network;

"Tram Bills" means the Edinburgh Tram (Line One) Bill and the Edinburgh Tram (Line Two) Bill;

"Tram Legislation" means the Edinburgh Tram (Line One) Bill and the Edinburgh Tram (Line Two) Bill, and after such Bills are enacted means the Edinburgh Tram (Line One) Act, the Edinburgh Tram (Line Two) Act and such other legislation relative to the Edinburgh Tram Network as may be enacted from time to time;

"Tram Supplier" means the tram supplier to be procured by **tie** in relation to the supply of trams for the Edinburgh Tram Network;

"Tram Supply Contract" means the contract to be entered into by **tie** or other party with the Tram Supplier in relation to the supply of trams for the Edinburgh Tram Network;

"Transport Edinburgh Limited" means Transport Edinburgh Limited, (registered number SC269639) and having its registered office at City Chambers, High Street, Edinburgh, Midlothian, EH1 1YJ which shall include its successors in title and permitted assignees;

"TSS Provider Default" means the events set out in Clause 17.1;

"TSS Provider IPR" means:

- (a) all Intellectual Property Rights (including Intellectual Property Rights in relation to the TSS Provider Software) which the TSS Provider can demonstrate by documentary evidence were already existing and owned by or licensed to the TSS Provider prior to the Effective Date; and
- (b) any modifications or developments of any of the rights listed in paragraph (a) above which are generic in nature and not specific to the performance of the Services;

"TSS Provider Party" means any sub-consultant, supplier, sub-contractor, specialist and/or any other party appointed by the TSS Provider in accordance with Clause 7 (*Sub-Letting and the Appointment of TSS Provider Parties*) to perform any part of the Services (and "TSS Provider Parties" will be construed accordingly);

"TSS Provider Software" means programs, the Intellectual Property Rights in which are (a) owned by the TSS Provider; and (b) used by the TSS Provider to carry out its obligations under this Agreement;

"TSS Provider's Representative" means the person or persons appointed by **tie** from time to time and notified to the TSS Provider;

"Utilities Diversions Contractor" shall mean the party or parties appointed by **tie** to undertake advanced works to divert and/or protect utilities apparatus prior to the mobilisation of Infracore generally for the Project or in any Sector or Sub-Sector;

"WBS" means appropriate work and tasks breakdown structure.

1.2 Unless the context requires otherwise:

1.2.1 words importing gender include masculine, feminine and neuter;

1.2.2 the singular includes the plural and vice versa;

1.2.3 a reference to any part, Clause, sub-clause or Schedule is, except where it is expressly stated to the contrary, a reference to such part, Clause or sub-clause of or Schedule to this Agreement;

1.2.4 a reference in any Schedule to any part, paragraph or sub-paragraph is, except where it is expressly stated to the contrary, a reference to such part, paragraph or sub-paragraph of that Schedule (as the case may be);

1.2.5 any reference to this Agreement or to any other document shall include any variation, amendment, or supplement to this Agreement or such other document as expressly permitted under the terms of this Agreement;

1.2.6 any reference to any enactment, order, regulation or other similar instrument (including any EU instrument) (whether specifically named or not) shall be construed as a reference to the enactment, order, regulation or instrument as amended, replaced, consolidated or re-enacted and shall include any orders, consents, regulations, legally binding codes of practice or subordinate legislation (within the meaning of section 21(1) of the Interpretation Act 1978) made thereunder;

1.2.7 a reference to a person includes individuals, firms, partnerships, bodies corporate, joint ventures, government departments and any organisation capable of suing or being sued and references to any of the same include the others and their successors and assignees and transferees to the extent that such assignation and transfer are expressly permitted under the terms of this Agreement;

1.2.8 headings and the contents list are for convenience of reference only and do not affect the interpretation of this Agreement;

1.2.9 the ejusdem generis rule does not apply and the meaning of general words is not to be restricted by any particular examples preceding or following those general words;

- 1.2.10 a reference to a time of day is a reference to the time in Scotland;
 - 1.2.11 subject to the restrictions imposed by this Agreement on subcontracting, an obligation to do something includes an obligation to procure it to be done;
 - 1.2.12 an obligation not to do something includes an obligation not to wilfully allow it to be done;
 - 1.2.13 the word "including" means "including without limitation"; and
 - 1.2.14 a reference to "consent" shall mean consent in writing.
- 1.3 This Agreement shall be interpreted and construed as a whole provided that in the event of any inconsistency or conflict between:
- 1.3.1 the main body of this Agreement and the Schedules, the main body of this Agreement shall prevail to the extent of any such inconsistency or conflict over the Schedules
 - 1.3.2 the main body of this Agreement and the Schedules and the Formal Offer and/or the Letter of Appointment, the main body of the Agreement and the Schedules shall prevail to the extent of any such inconsistency or conflict over the Formal Offer and/or the Letter of Appointment
- unless expressly stated otherwise by **tie**.
- 1.4 In the case of any inconsistency or conflict between or in any of the documents forming the Agreement, or any inconsistency or conflict between the Agreement and any instructions from **tie** or **tie**'s Representative, the TSS Provider shall notify **tie** within three Business Days and **tie** shall, subject to Clause 1.3 issue in writing such further instructions as **tie** considers appropriate in its absolute discretion to resolve the inconsistency or conflict.
- 1.5 Where a Party comprises two or more persons:
- 1.5.1 any obligations on the part of that Party contained or implied in this Agreement are deemed to be joint and several obligations on the part of those persons; and
 - 1.5.2 references to that party include references to each and any of those persons.

2. DURATION

- 2.1 Effective Date
 - 2.1.1 This Agreement shall come into effect on the last date of execution of this Agreement.
- 2.2 Expiry of this Agreement
 - 2.2.1 This Agreement shall continue in effect until the earlier of:
 - (i) the Expiry Date; and
 - (ii) the Termination Date.
- 2.3 **tie** shall have the option to extend the term of this Agreement by up to three years beyond the Expiry Date by notifying the TSS Provider in writing no later than three

months prior to the Expiry Date that **tie** wishes an extension and giving the length of such extension.

3. DUTY OF CARE, STANDARDS AND THE SERVICES TO BE PROVIDED

- 3.1 **tie** hereby appoints the TSS Provider in accordance with the terms of this Agreement and the TSS Provider hereby accepts full responsibility for and agrees to perform the Services and its other obligations under this Agreement fully and faithfully in the best interests of **tie**.
- 3.2 The TSS Provider warrants to **tie** that, in the performance of the Services and its other obligations under this Agreement, it shall exercise a reasonable level of professional skill, care and diligence to be expected of a properly qualified and competent technical support services provider experienced in performing services similar to the Services in connection with projects of a similar size, scope and complexity as the Edinburgh Tram Network.
- 3.3 The TSS Provider shall (each as distinct and separate obligations) perform the Services and its other obligations under this Agreement (exercising the level of skill, care and diligence set out in Clause 3.2):
- 3.3.1 so as to comply in all respects with this Agreement;
 - 3.3.2 so as to enable the Edinburgh Tram Network to be procured, constructed, installed, tested and commissioned, and thereafter successfully operated and maintained;
 - 3.3.3 in accordance with the TSS Provider's quality management system and plans;
 - 3.3.4 so as to ensure compliance with the Functional Requirements Specifications and the Technical Specifications (as applicable);
 - 3.3.5 in accordance with the Design Manual;
 - 3.3.6 so as to ensure compliance with the Tram Legislation;
 - 3.3.7 so as to ensure compliance with all applicable Law and Consents;
 - 3.3.8 in accordance with the Parliamentary Undertakings;
 - 3.3.9 in compliance with the Environmental Statements, and all other applicable environmental regulations and requirements;
 - 3.3.10 so as to permit compliance with the Code of Construction Practice and with the Construction Proposals;
 - 3.3.11 in accordance with Good Industry Practice
 - 3.3.12 to ensure that the design of the Edinburgh Tram Network is buildable;
 - 3.3.13 to assist **tie** in ensuring that Best Value (pursuant to the Local Government (Scotland) Act 1973 as amended by the Local Government in Scotland Act 2003) has been secured in the performance of the Services.
 - 3.3.14 in such manner so as not wilfully to detract from the image and reputation of **tie**, Transport Edinburgh Limited, CEC, the Scottish Executive or any project related to the performance of the Services;

- 3.3.15 in a manner that is not likely to be injurious to persons or property; and
 - 3.3.16 using the Key Personnel, and any nominated call off resource set out in Schedule 2 (*Key Personnel*) and such other staff as may be approved by **tie** for that type of work.
- 3.4 The TSS Provider shall ensure that:
- 3.4.1 construction and installation productivity is maximised by reference to international best practice;
 - 3.4.2 disruption is minimised to the city of Edinburgh;
 - 3.4.3 efficiency is safeguarded in the obtaining of Consents;
 - 3.4.4 the Infraco's compliance with the Construction Code of Practice is optimised; and
 - 3.4.5 trial running and commissioning is carried out in accordance with programme and relevant Consents.
- 3.5 The TSS Provider's duties and obligations under or pursuant to this Agreement will not be released, diminished or in any other way affected by any independent inquiry into any matter which may be made or carried out by **tie** or by any firm, company or party on **tie**'s behalf nor by any action or omission of any such firm, company or party whether or not such action or omission might give rise to any independent liability of such firm, company or party to **tie**.
- 3.6 The TSS Provider is deemed to have satisfied itself that it fully understands the scope and extent of the Services and its other obligations under this Agreement and that it has sufficient information or will at the relevant time have sufficient information, to enable it to perform the Services and its other obligations under this Agreement. Specifically, in this context, the TSS Provider acknowledges that it has had full access to the agreement and all relevant technical and commercial documentation comprising the SDS Provider's terms and conditions of appointment with **tie** and its scope of work.
- 3.7 The TSS Provider acknowledges that **tie** will rely upon the skill and judgement of the TSS Provider in connection with all matters for which the TSS Provider is responsible under this Agreement.
- 3.8 The TSS Provider hereby warrants that it shall owe the same duty of care owed to **tie** under this Agreement to the other consultants appointed by **tie** in relation to the Project as the TSS Provider, that the Services have been and will be performed to the level of skill, care and diligence set out in Clause 3.2 of this Agreement, and that these said other consultants shall be entitled to rely upon this warranty.

Background Information

- 3.9 The TSS Provider acknowledges that certain Background Information has been made available to it in relation to this Agreement. The TSS Provider further acknowledges that **tie** does not give any warranty or undertaking as to the completeness, currency, accuracy or fitness for any purpose of any of the Background Information and, subject to the express provisions of this Agreement, neither **tie**, any **tie** Parties, nor any of its or their employees shall be liable to the TSS Provider in contract, delict (including breach of statutory duty), or otherwise as a result of:

- 3.9.1 any inaccuracy, error, defect, omission, unfitness for any purpose or inadequacy of any kind whatsoever in the Background Information; nor
- 3.9.2 any failure to make available to the TSS Provider any materials, documents, drawings, plans or other information relating to this Agreement;

provided that nothing in this Clause 3.9 shall exclude any liability in respect of any statements made or information provided fraudulently.

- 3.10 The TSS Provider acknowledges and confirms that as part of the Services it has conducted its own analysis and review of the Background Information and has before the execution of this Agreement, or upon receipt if received thereafter, satisfied itself fully as to the veracity, accuracy, reasonableness, scope, materiality, currency (where applicable) and completeness of all such Background Information upon which it places reliance.

Liaison and Compliance with Master Project Programme and Project Cost Plan

- 3.11 The TSS Provider shall liaise with **tie**, any **tie** Party, the Tram Supplier, the Infracore, the SDS Provider, the Operator and any other parties as may be required by **tie** as often as is necessary in order to ensure that the Services and its other obligations under this Agreement are performed properly and in accordance with the terms of this Agreement and in alignment with the Master Project Programme and the Project Cost Plan.
- 3.12 The TSS Provider shall collaborate and liaise with **tie** throughout the performance of the Services, inter alia, to ensure due consideration is given to the type of materials and optimum and cost effective construction methods, construction programme and temporary works, as appropriate and to maximise productivity and minimise disruption.
- 3.13 Where **tie**, or other bodies or persons involved in related works or services appoint other consultants or use their own staff for purposes related to the Services, or the TSS Provider's other obligations under this Agreement, the TSS Provider shall, subject to Clause 3.8, use all reasonable endeavours (including the use of liaison with such other bodies or persons) to ensure that the Services, the TSS Provider's other obligations under this Agreement and these related works are carried out together with the greatest economy and in accordance with the Master Project Programme.
- 3.14 In performing the Services and its other obligations under this Agreement, the TSS Provider will have regard to the constraints imposed by the Master Project Programme and the Project Cost Plan and to the objective of keeping the overall costs of the Services and its other obligations under this Agreement within any budgetary constraints agreed with **tie**. If the TSS Provider considers that there may be a conflict between its obligations under this Clause 3.14 and the performance of the Services and/or the performance of any of the TSS Provider's obligations under this Agreement, it will within three Business Days give written notice of the same to **tie**.
- 3.15 The TSS Provider shall provide **tie** with all Deliverables as required by **tie** in accordance with the terms of this Agreement including the terms of the Formal Offer and where no timescale has been specified such Deliverables shall be provided to **tie** as soon as reasonable practicable. The TSS Provider shall provide to **tie**, at no cost to **tie**, three copies of such Deliverables in hard copy form and one copy in soft copy form (as appropriate to the relevant format of the Deliverables). In respect of any further copies it may require, **tie** agrees to pay the reasonable copying charges or other reasonable charges of the TSS Provider for provision of the same to **tie**.

Provision of all labour, goods, materials and services

- 3.16 The TSS Provider shall perform the Services and shall provide all labour, goods, materials and services whether of a temporary or permanent nature required, in and for the execution of the Services so far as the necessity for providing the same is specified in this Agreement or could reasonably be foreseen therefrom by a TSS Provider experienced in work of similar nature and scope as the Services. For the avoidance of doubt, the TSS Provider shall ensure that at no cost to **tie** its Key Personnel and staff have appropriate means of interpersonal communication, site transportation, IT and computer hardware support and minor office equipment and relevant Project specific training for interface with third parties, Heavy Rail Parties and Approval Bodies.

Prohibited Materials

- 3.17 The TSS Provider warrants to **tie** that it shall use such skill and care consistent with any supervisory and inspection responsibilities to be undertaken as part of the Services to see that there shall not be used, any materials which at the time of specification or use (as the case may be):

3.17.1 are known to be deleterious in the particular circumstances in which they are specified to be used (either to health and safety or to the durability of any works on which the TSS Provider is employed by **tie**); or

3.17.2 contravene any relevant standard or code of practice issued from time to time by The BSI Group or under a European directive relating to standards; or

3.17.3 do not accord with the guidelines contained in the edition of the publication "Good Practice in Selection of Construction Materials" (Ove Arup & Partners) current at the date of specification of use; or

3.17.4 contravene Good Industry Practice.

CDM Regulations

- 3.18 The TSS Provider warrants to **tie** that it shall carry out and fulfil the responsibilities of planning supervisor imposed by the CDM Regulations and shall obtain and review all requisite information from the SDS Provider (or other party) designated as designer under the CDM Regulations. The TSS Provider shall notify **tie** as soon as it becomes aware, or reasonably anticipates that it shall have insufficient resources or the necessary competence to comply with its obligations under the CDM Regulations.

Mitigation and Open Book Accounting

- 3.19 The TSS Provider undertakes to co-operate with **tie** in order to facilitate the performance of this Agreement and, in particular, will:

3.19.1 approach all pricing, estimating and budgeting functions on a collaborative and Open Book Basis;

3.19.2 use reasonable endeavours to avoid unnecessary complaints, disputes and claims against or with **tie**;

3.19.3 not interfere with the rights or obligations of **tie** in performing its obligations under this Agreement, nor in any other way hinder or prevent **tie** from performing its obligations or from enjoying the benefits of its rights;

3.19.4 take reasonable steps to mitigate any costs, unnecessary acts, foreseeable losses and liabilities of the **tie**; and

3.19.5 take all reasonable steps to manage, minimise and mitigate all costs.

4. QUALITY ASSURANCE

4.1 The TSS Provider shall operate a quality management plan commensurate with Schedule 1 (*Scope of Services*), and comply with such system. Such quality management system shall be reflected in appropriate quality management plans, the standard of which shall comply with BS EN 150 9001:2000.

4.2 If in the opinion of **tie**, any Deliverable is not prepared in accordance with the TSS Provider's quality management plan or with any other provision of the Agreement, **tie** shall so inform the TSS Provider in writing giving reasons. Such non-compliance shall be treated as an error or omission in the performance of the Services and the provisions of Clause 16 (*Errors and/or Omissions in the Services*) shall apply.

4.3 Compliance with any such approved quality management system shall not relieve the TSS Provider from any of its other duties, obligations or liabilities under this Agreement.

5. PROGRESS REPORTING

5.1 Master Project Programme

5.1.1 The TSS Provider shall progress the Services with due expedition and in a timely and efficient manner without delay, to achieve timeous delivery and completion of the Services (or any part thereof) and its other obligations under this Agreement in accordance with the requirements of the Master Project Programme.

5.1.2 The TSS Provider shall provide input for the Master Project Programme concerning its responsibilities and Deliverables at intervals as may be reasonably required by **tie**, provided that any amendments to the Master Project Programme shall only be made with **tie**'s prior written approval.

5.2 The TSS Provider shall provide:

5.2.1 all resource reporting/time sheet and cost allocation to be coded to suit the WBS activities. The coding of activities and resources to be agreed with **tie**;

5.2.2 time sheets to be completed weekly against planned works as generated by Primavera P3e, any deviations to be reported in a weekly slippage report and notification of remedial actions to be authorised by **tie**'s Representative;

5.2.3 weekly time sheets are to be submitted by 9:00am on the Tuesday following the relevant week;

5.2.4 calendar month progress reporting to include as a minimum and to be issued 3 working days before the progress meeting:

5.2.4.1 planned versus actual cost and resource summary;

5.2.4.2 monthly forecast;

5.2.4.3 two monthly critical impact notice (any internal or external factor which may affect Deliverables or Master Project Programme); and

5.2.4.4 labour histograms detailing planned and actual resourcing.

5.3 Delays

- 5.3.1 Within three Business Days of the date on which the TSS Provider is aware of the likelihood of delay to the performance of any element of the Services such that the Master Project Programme is unlikely to be met, the TSS Provider shall notify **tie**, informing **tie** of the reasons, the likely delay and any measures, with estimated costs, which may mitigate the delay.
- 5.3.2 Following such notification, the TSS Provider shall promptly provide **tie** with all necessary information to enable **tie** to approve any amendments to the Master Project Programme which the TSS Provider wishes to make in accordance with Clause 5.3.1.
- 5.3.3 If **tie** instructs the TSS Provider to mitigate the delay, any such mitigation shall be at the TSS Provider's expense, if the delay was the fault of the TSS Provider, otherwise any costs associated with such instruction will be dealt with as a variation in accordance with Clause 13 (*Changes*).

5.4 Extensions of Time

- 5.4.1 If for any other reason outwith the control of the TSS Provider and not arising out of the TSS Provider's breach of this Agreement or the TSS Provider's negligent or wilful act or omission, the TSS Provider considers that the TSS Provider is entitled to an extension of time for completion of the Services, the TSS Provider shall within 10 Business Days of becoming aware of such possible entitlement to an extension of time, request an extension of time from **tie** stating the reason for the request and clearly indicating the length and basis of calculation of the extension of time requested.
- 5.4.2 Subject to Clause 5.4.3, within 10 Business Days of receipt of such notice **tie** shall respond, either:
- (i) agreeing to the extension of time and consequent amendment of the Master Project Programme; or
 - (ii) granting an amended extension of time and consequent amendment of the Master Project Programme; or
 - (iii) clearly stating the further information required before reaching a decision; or
 - (iv) rejecting the request, clearly stating **tie**'s reason for doing so.
- 5.4.3 The TSS Provider shall not be entitled to any extension of time if and to the extent that the TSS Provider could, by the exercise of reasonable foresight and diligence, have prevented or (where such action is within the power of the TSS Provider and the TSS Provider could reasonably be expected to take such action, having regard to the scope and nature of the Services) reduced the requirement for such extension of time.

5.5 tie Decisions & Information

- 5.5.1 Within three Business Days of the date on which the TSS Provider finds that a **tie** decision or information essential to the continuity of the Services or to achieving the Master Project Programme is likely to be required, the TSS Provider shall give notice of that requirement to **tie** with full supporting

information including the date by which such decision or information is required to ensure that there is no delay to the continuity of the Services.

- 5.5.2 **tie** shall then within seven days, in liaison with the TSS Provider, determine and notify the TSS Provider in writing of the date by which the decision is to be made or the information is to be provided.
- 5.5.3 In the event that **tie's** notified date or **tie's** actual decision or provision of information results in delay to the continuity of Services the matter shall be treated as an extension of time in accordance with Clause 5.4.
- 5.5.4 Where the TSS Provider makes any recommendation to **tie** requiring the decision and agreement of **tie** to proceed, any foreseeable consequential effect of the application of that recommendation not fully described and evaluated to **tie** at the time of the recommendation or earlier shall be the full responsibility of the TSS Provider.

5.6 **Abortive Work**

- 5.6.1 Immediately that the TSS Provider becomes aware that any element of Services is likely to be Abortive Work for any reason, the TSS Provider shall notify **tie** of:
 - (i) the probable nature of the Abortive Work;
 - (ii) the cause of the Abortive Work being abortive;
 - (iii) the estimated effect of the Abortive Work in terms of cost, of time in completion of the Services and of any other matters in relation to the Agreement; and
 - (iv) any measures to be taken which may mitigate that effect.
- 5.6.2 The TSS Provider and **tie** shall jointly investigate, and **tie** shall determine the actual extent of any Abortive Work.
- 5.6.3 Payment by **tie** to the TSS Provider in respect of any Abortive Work which has been carried out by the TSS Provider shall be determined as a variation in accordance with Clause 13 (*Changes*) of this Agreement provided always that no payment shall be due for Abortive Work which has resulted from any fault of the TSS Provider and/or any breach by the TSS Provider of its obligations under this Agreement.

6. **KEY PERSONNEL AND STAFF**

- 6.1 The TSS Provider shall ensure that:
 - 6.1.1 the Key Personnel shall have day-to-day responsibility for and be involved in the performance of the Services; and
 - 6.1.2 in addition to the Key Personnel, there shall at all times be a sufficient number of staff (including all relevant grades of supervisory staff) available as shown in Schedule 2 (*Key Personnel*) for the provision of the Services in accordance with this Agreement, in particular to respond to call off instructions from **tie** pursuant to Section 1.2 of Schedule 1 (*Scope of Services*) to this Agreement. This obligation shall include ensuring that there are sufficient staff to cover periods of holiday, sickness and other absences

and anticipated and actual peaks in servicing **tie's** requirements for the Services.

- 6.2 The TSS Provider shall locate staff in supporting functions at such locations as the TSS Provider considers convenient for the Project, provided that:
- 6.2.1 the TSS Provider acknowledges that it will not be entitled to any reimbursement from **tie** in relation to the travel of any person to or from Edinburgh, or for the accommodation or subsistence of any person visiting Edinburgh; and
 - 6.2.2 **tie** will require the TSS Provider to make the Key Personnel available for meetings in Edinburgh at such times as **tie** may, in its sole discretion, direct; and
 - 6.2.3 if required by **tie**, the TSS Provider's Representative and other members of the TSS Provider's staff (as **tie** may reasonably require) shall be required to be co-located in Edinburgh with **tie** or such other location as may be reasonably required by **tie**.
- 6.3 The TSS Provider shall ensure that there are no changes to the Key Personnel without **tie's** prior written consent (such consent not to be unreasonably withheld or delayed in the case of a change necessitated by sickness or reasonable annual, maternity, paternity or compassionate leave or where one of the Key Personnel's employment ceases) and that any replacement persons shall be of at least equivalent status and ability to the person whom they replace.
- 6.4 The TSS Provider shall use all reasonable endeavours to ensure the continuity of the personnel assigned to perform the Services and shall select Key Personnel having careful regard to those persons' existing work load and other planned commitments.
- 6.5 The TSS Provider shall ensure that its Key Personnel and call-off staff shall:
- 6.5.1 have the level of skill, experience and authority appropriate (i) to the Services to which such staff are allocated and (ii) the standards to be achieved pursuant to this Agreement; and
 - 6.5.2 receive such training and supervision as is necessary to ensure the proper performance of this Agreement and compliance with all regulatory requirements appropriate to and required for the performance of the Services in accordance with this Agreement.
- 6.6 All Key Personnel should have a nominated deputy who shall be capable of fulfilling the duties of the person for whom they are deputising in the event of their absence and who shall be kept fully informed of project status in the relevant area.
- 6.7 The TSS Provider shall not, during the period of this Agreement, contract or retain as an adviser or consultant any person currently or previously employed or engaged (as appropriate) in the previous three months) by **tie** unless the prior written approval of **tie** has been obtained.
- 6.8 **tie** shall be at liberty to object to and require the TSS Provider to remove from the performance of the Services any person employed by the TSS Provider (including any person from any permitted TSS Provider Party) who, in the reasonable opinion of **tie**, misconducts himself, herself or itself or is incompetent or negligent in the performance of its duties or persists in any conduct which is prejudicial to safety or health, and such persons shall not be again employed upon the Services without the

permission of **tie**. No compensation shall be payable by **tie** in respect of such objection and removal.

- 6.9 If **tie** gives the TSS Provider notice that any member of staff should be removed from involvement in the Services, the TSS Provider shall immediately comply with such notice.
- 6.10 The TSS Provider shall (and shall procure that the Key Personnel, its staff employed in the performance of the Services and the TSS Provider Parties) comply with all regulatory requirements appropriate to and required for the performance of the Services and any rules, regulations and instructions from **tie's** Representative.
- 6.11 In the event that on short notice **tie** instructs the cessation, suspension or reduction of any task, workstream or responsibility within the Services being undertaken by the TSS Provider, the TSS Provider shall withdraw any staff or resource made unnecessary or redundant by such instructions in such a manner as to eliminate disruption. The TSS Provider shall be responsible for planning orderly demobilisation of all Key Personnel and other staff on completion of their function. In the event that **tie** require additional support, the call-off of relevant staff shall be dealt with pursuant to Schedule 1 (*Scope of Services*).

7. SUB-LETTING AND THE APPOINTMENT OF TSS PROVIDER PARTIES

- 7.1 The TSS Provider shall not sub-let the whole of the Services.
- 7.2 Subject to Clause 7.3, 7.4 and 7.5, the TSS Provider may sub-let part of the Services with the prior written approval of **tie** to a sub-consultant, supplier, sub-contractor, specialist and/or other party for performance of that specific part of the Services.
- 7.3 The TSS Provider shall supply all relevant information (including curriculum vitae, financial and legal information, information on relevant experience and technical capacity, insurance details and the methodology for provision of the sub-let services) required by **tie** to enable a decision to be made by **tie** on the suitability of the proposed sub-consultant, supplier, sub-contractor, specialist and/or other party to perform the relevant part of the Services. **tie's** decision on the use of any sub-consultant, supplier, sub-contractor, specialist and/or other party shall be final.
- 7.4 The TSS Provider shall be wholly responsible for the performance of the Services including any part of the Services carried out by any TSS Provider Party appointed by the TSS Provider.
- 7.5 Within 14 days of any written request from **tie**, the TSS Provider shall procure the execution of a collateral warranty by any TSS Provider Party in **tie's** favour or in favour of such other party as may be reasonably required by **tie**, and in a form acceptable to **tie** (acting reasonably).

8. MANAGEMENT OF THE SERVICES

- 8.1 "**tie's** Representative" shall:
 - 8.1.1 be responsible for the day to day supervision of the Services to be performed by the TSS Provider;
 - 8.1.2 exercise the functions and powers of **tie** in relation to the Project which are identified in this Agreement;
 - 8.1.3 exercise such other functions and powers of **tie** under this Agreement as **tie** may notify to the TSS Provider from time to time; and

8.1.4 be the primary point of contact for the TSS Provider with **tie**;

and the TSS Provider shall observe, and shall procure that any TSS Provider Parties observe, all reasonable instructions of **tie** and **tie's** Representative in relation to this Agreement. The TSS Provider shall not and shall procure that any TSS Provider Parties shall not act upon any instruction from any other party unless confirmed by **tie** or **tie's** Representative in writing. If the TSS Provider or any TSS Provider Parties shall receive any such instructions, the TSS Provider shall notify **tie** or **tie's** Representative immediately.

- 8.2 **tie's** Representative shall be entitled at any time, by notice in writing to the TSS Provider, to authorise any other persons to exercise the functions and powers of **tie** delegated to him, either generally or specifically. Until further notice from **tie**, any act of any such person shall, for the purposes of this Agreement, constitute an act of **tie's** Representative and all references to "**tie's** Representative" in this Agreement (apart from this Clause 8 (*Management of the Services*)) shall be taken as references to such person so far as they concern matters within the scope of such person's authority.
- 8.3 **tie** may by notice in writing to the TSS Provider change the identity of **tie's** Representative. **tie** shall (as far as reasonably practicable) consult with the TSS Provider prior to the appointment of any replacement for **tie's** Representative, taking account of the need for liaison and continuity in respect of this Agreement. Such change shall have effect on the date specified in the written notice.
- 8.4 During any period when a **tie** Representative has not been appointed (or when **tie's** **Representative** is unable through illness, incapacity or any other reason whatsoever to carry out or exercise his functions under this Agreement), **tie** shall carry out the functions which would otherwise be performed by **tie's** Representative.
- 8.5 No decision, act or omission of **tie**, or **tie's** Representative shall, except as otherwise expressly provided in this Agreement:
- 8.5.1 in any way relieve or absolve the TSS Provider from, modify, or act as a waiver or personal bar of, any liability, responsibility, obligation or duty under this Agreement;
- 8.5.2 in the absence of an express written instruction or authorisation issued by **tie** under Clause 13 (*Changes*), constitute or authorise a variation; or
- 8.5.3 be construed as restricting or binding **tie** in any way save with regard to the specific project matters to which it relates.
- 8.6 The TSS Provider shall be entitled to treat all instructions and directions of **tie's** Representative as those of **tie** provided always that such instructions or directions of **tie's** Representative are in writing, are not in conflict with or are inconsistent with this Agreement or any other express instructions or directions of **tie**, and the TSS Provider shall not be required to determine whether an express authority has in fact been given. The TSS Provider shall, as soon as reasonably practicable, bring to the attention of **tie** any instructions or directions that are given to the TSS Provider that are ambiguous or in conflict or are inconsistent, and **tie** will verify such instructions in writing.
- 8.7 If for any reason **tie's** Representative considers it necessary to give any instructions or directions orally, then, provided that **tie** confirms such instruction or direction **tie** within five Business Days, then such oral instruction or direction shall be deemed to be an express instruction or direction of **tie**.

- 8.8 The TSS Provider shall appoint a representative ("**TSS Provider's Representative**") who shall:
- 8.8.1 act as the principal point of contact for **tie**, and **tie's** Representative in relation to all matters related to this Agreement;
 - 8.8.2 have full authority to act on behalf of the TSS Provider for all purposes of this Agreement and **tie** and **tie's** Representative shall be entitled to treat all instructions and directions of the TSS Provider's Representative as those of the TSS Provider;
 - 8.8.3 manage and co-ordinate the provision of the Services by the TSS Provider (and any TSS Provider Party) and the integration of provision of the Services with the tasks being performed by **tie's** internal team and the other advisers appointed by **tie** Advisers; and
 - 8.8.4 liaise with **tie's** Representative in relation to various matters including, the scope of the Services to be carried out from time to time.
- 8.9 The TSS Provider may by written notice to **tie** change the identity of the TSS Provider's Representative. Where the TSS Provider wishes to do so, it shall by written notice to **tie** propose a substitute for approval, taking account of the need for liaison and continuity in respect of the provision of the Services and the Master Project Programme when the change is proposed. Such appointment shall be subject to the prior written approval of **tie** (not to be unreasonably withheld or delayed).
- 8.10 The TSS Provider shall also nominate a deputy to the TSS Provider's Representative. During any period when the TSS Provider's Representative is unable through illness, incapacity, annual leave or any other reason whatsoever to carry out or exercise his functions under this Agreement, such deputy shall carry out the functions which would otherwise be performed by the TSS Provider's Representative.

9. METHODS OF PAYMENT

- 9.1 The fees for the performance of the Services shall be:
- 9.1.1 a fixed lump sum or sums, as set out in Schedule 3 (*Pricing Schedules*) to this Agreement or as may be otherwise agreed by **tie** in accordance with this Agreement; or
 - 9.1.2 a time based fee in accordance with the relevant rates set out in Schedule 3 (*Pricing Schedules*) to this Agreement; or
 - 9.1.3 a combination of Clauses 9.1.1 and 9.1.2
- PROVIDED THAT any discounts from the fees to be paid in respect of the performance of the Services (as such discounts are referred to in this Agreement) shall apply in respect of the payment to be made to the TSS Provider pursuant to Clauses 9 (*Methods of Payment*) and 10 (*Arrangements for Invoicing and Payment*).
- 9.2 Subject to Clause 9.5, applications for payment in respect of any fixed lump sum pursuant to Clause 9.1.1 shall be made in accordance with Clause 10 (*Arrangements for Invoicing and Payment*) on the basis of monthly payments against the total fixed lump sums or on a one-off basis.
- 9.3 Applications for payment in respect of any fee pursuant to Clause 9.1.2 shall be ascertained by multiplying the time reasonably spent in the performance of the

Services by the relevant hourly rate set out in Schedule 3 (*Pricing Schedules*) to this Agreement and shall be made in accordance with Clause 10 (*Arrangements for Invoicing and Payment*).

- 9.4 Any payment which is due to the TSS Provider shall be paid in accordance with the procedure set out in Clause 10 (*Arrangements for Invoicing and Payment*).
- 9.5 The TSS Provider acknowledges and agrees that, in respect of any fixed lump sum or sums referred to in Clause 9.1.1, **tie** shall not be liable to pay the TSS Provider any additional sum of money in relation to the Services to which the fixed lump sum or sums relates, unless agreed specifically in writing by **tie** in accordance with this Agreement.

10. ARRANGEMENTS FOR INVOICING AND PAYMENT

- 10.1 Subject to Clause 9 (*Methods of Payment*), the TSS Provider shall submit each application for payment in respect of any fixed lump sum or sums and any other fees, costs and/or expenses agreed in accordance with this Agreement, which are being claimed by the TSS Provider for the previous calendar month, to **tie's** Representative within 3 Business Days following the last day of each calendar month.
- 10.2 Each application for payment shall:
- 10.2.1 set out the proportion of any fixed lump sum (or part thereof) and any other fees claimed together with two hard copies of all supporting documentation. ;
 - 10.2.2 set out any other costs and/or expenses where it has been agreed in writing that such costs and/or expenses shall be charged to **tie**; and
 - 10.2.3 a forecast of the fees and any associated costs and/or expenses which the TSS Provider estimates could be claimed for the next two months following the month which is the subject of the VAT invoice, together with a breakdown of the tasks and workstreams which relate to such forecast.
- 10.3 **tie** shall procure that **tie's** Representative shall, subject to any clarifications as are in **tie's** opinion (acting properly and reasonably) necessary, certify by notice in writing (an "Interim Certificate") to the TSS Provider that part of the sum claimed in the application for payment which is approved by **tie** and give reasons why any part of the sum claimed has not been certified and the value of the sums involved no later than 10 Business Days following the date on which the application for payment was received by **tie**.
- 10.4 The TSS Provider shall submit a VAT invoice to **tie** within seven days of the date of the Interim Certificate. Payment will become due to the TSS Provider on the date of issue of the said Interim Certificate by **tie** and, subject to Clause 10.5 the final date for payment by **tie** of such valid VAT invoice shall be 30 days from the date of issue of the Interim Certificate by **tie**.
- 10.5 If the TSS Provider is late in submitting its application for payment to **tie** by more than 3 Business Days after the required timescales in Clause 10.1, payment in respect of any amount certified in an Interim Certificate shall become due to the TSS Provider on the date of receipt of the relevant valid VAT invoice by **tie** in respect of the late application for payment, and the final date for payment of such valid VAT invoice shall be 30 days from the first day of the calendar month following receipt of the valid VAT invoice.
- 10.6 If the TSS Provider is late in submitting a valid VAT invoice to **tie** by more than 3 Business Days after the required timescale in Clause 10.4, payment of any amount

certified in an Interim Certificate shall become due to the TSS Provider on the date of late receipt of the relevant valid VAT invoice by **tie** and the final date for payment of such late valid VAT invoice shall be 30 days from the first day of the calendar month following receipt of the late valid VAT invoice.

10.7 Adjustments to Fixed lump sums, capped sums and rates

10.7.1 Without prejudice to Clause 10.5, any fixed lump sum or sums and/or any capped sum or sums set out in Schedule 3 (*Pricing Schedules*) to this Agreement or agreed in accordance with this Agreement will not be adjusted except by the express written agreement of **tie** in the following circumstances:

- (i) where there has been a variation of the Services in accordance with Clause 13 (*Changes*);
- (ii) where the start of the Services comprised in the fixed lump sum or sums has been delayed by more than 12 months of the programmed date for commencement priced in the Formal Offer provided always that there shall be no adjustment where the cause of such delay is the TSS Provider's breach of this Agreement or the TSS Provider's negligent or wilful act or wilful omission;

10.7.2 The rates set out in Schedule 3 (*Pricing Schedules*) to this Agreement shall not be adjusted unless the Programme has extended beyond the programme for the provision of services priced in the Formal Offer provided always that there shall be no adjustment where the cause of such delay is the TSS Provider's breach of this Agreement or the TSS Provider's negligent or wilful act or wilful omission. Such adjustment shall be made at **tie's** absolute discretion on the basis of a review in respect of adjustments to the Retail Price Index.

10.8 Payments to TSS Provider Parties

10.8.1 Where, with the agreement of **tie**, the TSS Provider has appointed any TSS Provider Parties, no additional payments shall be made over and above any fixed lump sum or sums, and/or any capped sum or sums, or the rates set out in Schedule 3 (*Pricing Schedules*) to this Agreement, unless expressly agreed by **tie** in writing.

10.8.2 Where **tie** has expressly agreed in writing that payment shall be made by **tie** for the services of TSS Provider Parties, the TSS Provider shall apply for such payment in accordance with Clause 10.1.

10.9 Interest on Late Payments

10.9.1 In the event of failure of **tie** to make payment in accordance with this Clause 10 (*Arrangements for Invoicing and Payment*), **tie** shall pay to the TSS Provider interest upon any payment not paid by the final date for payment at a rate per annum equivalent to 2 per cent above the Base Rate of the Royal Bank of Scotland current on the date upon which such payment first becomes overdue adjusted to reflect any changes to the rate during the period over which the payment remains overdue.

10.10 **TSS Provider to remain responsible**

10.10.1 The final payment for any Services shall not be interpreted as being the satisfaction of **tie** that the Services have been performed in accordance with the Agreement.

10.10.2 The responsibility of the TSS Provider for the Services shall not come to an end solely by reason of the making of any payment therefor.

11. **SET-OFF**

11.1 Subject to Clause 11.2, **tie** may deduct any amount payable by the TSS Provider to **tie** whether by way of damages or in respect of any loss or expense sustained by **tie** by reason of the TSS Provider's breach of this Agreement from any other payment or payments due to be made to the TSS Provider by **tie** under this Agreement.

11.2 Any notice of intention to withhold payment shall be served by **tie** at least three days prior to the final date for payment calculated in accordance with Clause 10 (*Arrangements for Invoicing and Payment*) and such notice shall state the sums being withheld and the detailed reason or detailed reasons for such withholding. Where an effective notice of intention to withhold payment is given, but on the matter being referred to the Dispute Resolution Procedure, it is decided that the whole or part of the amount should be paid, the decision shall be construed as requiring payment not later than:

11.2.1 7 days from the date of the decision, or

11.2.2 the date which, apart from the notice, would have been the final date for payment,

whichever is the later.

12. **AUDIT**

12.1 The TSS Provider shall produce to **tie** any documents or provide any information relevant to the performance of the Services or any part thereof as **tie's** auditors may require and shall provide any documents or information reasonably required by **tie** in respect of any TSS Provider Parties.

12.2 Proper books, vouchers, accounts and records relating to the Services and any services being performed by TSS Provider Parties shall be maintained by the TSS Provider at its place of business and shall be available for inspection by **tie** or any officer authorised by **tie** at all reasonable times during the duration of the Agreement and for six years after the termination or expiry of this Agreement.

13. **CHANGES**

13.1 Unless expressly stated in this Agreement or as may otherwise be agreed by the Parties, **tie** Changes shall be dealt with in accordance with this Clause 13 (*Changes*). If **tie** requires a **tie** Change, it must serve a **tie** Notice of Change on the TSS Provider.

13.2 A **tie** Notice of Change shall:

13.2.1 set out the proposed **tie** Change in sufficient detail to enable the TSS Provider to calculate and provide the Estimate in accordance with Clause 13.3 below;

- 13.2.2 require the TSS Provider to provide **tie** within 18 days of receipt of the **tie** Notice of Change with an Estimate, and specify whether any competitive quotes are required; and
- 13.2.3 set out how **tie** wishes to pay (where relevant) for any proposed **tie** Change.
- 13.3 As soon as is reasonably practicable, and in any event within 18 days after having received a **tie** Notice of Change, the TSS Provider shall deliver to **tie** the Estimate. The Estimate shall include the opinion of the TSS Provider (acting reasonably) on:
- 13.3.1 whether relief from compliance with any of its obligations under this Agreement is required during or as a result of the implementation of the proposed **tie** Change;
- 13.3.2 any impact on the performance of the Services;
- 13.3.3 any impact on the Master Project Programme, and any requirement for an extension of time;
- 13.3.4 any amendment required to the Agreement as a result of the implementation of the proposed **tie** Change,
- 13.3.5 the proposed method of delivery of the proposed **tie** Change;
- 13.3.6 proposals to mitigate the impact of the proposed **tie** Change; and
- 13.3.7 any increase or decrease in any sums due to be paid to the TSS Provider (including any milestone payments and lump sum payments) as a result of the implementation of the proposed **tie** Change.
- 13.4 The valuation of any **tie** Change made in compliance with this Clause 13 (*Changes*) shall be added to or deducted from the sums due to be paid to the TSS Provider as the case may be, and shall be ascertained by **tie** as follows:
- 13.4.1 by measurement and valuation at the rates and prices for similar work in Schedule 3 (*Pricing Schedules*) in so far as such rates and prices apply;
- 13.4.2 if such rates and prices do not apply by measurement and valuation at rates and prices deduced therefrom in so far as it is practical to do so;
- 13.4.3 if such rates and prices do not apply and it is not practicable to deduce rates and prices therefrom by measurement and/or valuation at fair rates and prices; or
- 13.4.4 if the value of the **tie** Change cannot properly be ascertained by measurement and/or valuation, the value of the resources and labour employed thereon, as appropriate, in accordance with the basis of rates for provisional work set out in Schedule 3 (*Pricing Schedules*);
- provided that where any **tie** Change would otherwise fall to be valued under Clauses 13.4.1 and 13.4.2 above, but **tie**'s Representative is of the opinion that the instruction therefor was issued at such a time or was of such content as to make it unreasonable for the alteration or addition to be valued, the value of the **tie** Change shall be ascertained by measurement and/or valuation at fair rates and prices.
- 13.5 The TSS Provider shall include in the Estimate evidence demonstrating that:

- 13.5.1 the TSS Provider has used all reasonable endeavours to minimise (including by the use of competitive quotes) any increase in costs and to maximise any reduction of costs;
- 13.5.2 the TSS Provider has, where required by **tie**, sought competitive quotes from persons other than the TSS Provider Parties in pursuance of its obligation under Clause 13.5.1 above;
- 13.5.3 the TSS Provider has investigated how to mitigate the impact of the **tie** Change; and
- 13.5.4 the proposed **tie** Change will (where relevant) be implemented in the most cost-effective manner, including showing that when such expenditure is incurred, Changes in Law that are foreseeable at that time have been taken into account by the TSS Provider.
- 13.6 If the TSS Provider does not intend to use its own resources to implement any proposed **tie** Change, it shall:
- 13.6.1 demonstrate that it is appropriate to subcontract the implementation of such **tie** Change; and
- 13.6.2 comply with Good Industry Practice with the objective of ensuring that it obtains best value for money when procuring any TSS Provider Party or Deliverable required in relation to the proposed **tie** Change.
- 13.7 As soon as reasonably practicable after **tie** receives the Estimate, the Parties shall discuss and agree the issues set out in the Estimate. From such discussions **tie** may modify the **tie** Notice of Change, and **tie** may require the TSS Provider to seek and evaluate competitive tenders. In each case the TSS Provider shall, as soon as practicable, and in any event not more than 14 days after receipt of such modification, notify **tie** of any consequential changes to the Estimate.
- 13.8 If the Parties cannot agree on the contents of the Estimate, then either Party may refer the Estimate for determination in accordance with the Dispute Resolution Procedure provided that the TSS Provider shall not be obliged to implement any proposed **tie** Change where:
- 13.8.1 **tie** does not have the legal power or capacity to require the implementation of such proposed **tie** Change; or
- 13.8.2 implementation of such proposed **tie** Change would
- (iii) be contrary to Law;
 - (iii) not be technically feasible;
 - (iv) substantially and materially increases the probability of a substantial non-compliance with this Agreement by the TSS Provider; or
 - (v) be outwith the specific competence of the TSS Provider either in performing the activity required by the **tie** Change or in supervising a TSS Provider Party to carry out the activity required by the **tie** Change.
- 13.9 As soon as reasonably practicable after the contents of the Estimate have been agreed or determined pursuant to the Dispute Resolution Procedure **tie** shall:

13.9.1 issue a **tie** Change Order; or

13.9.2 withdraw the **tie** Notice of Change.

For the avoidance of doubt, the TSS Provider shall not commence work until instructed through the receipt of a **tie** Change Order.

13.10 If **tie** does not issue a **tie** Change Order within 30 days of the contents of the Estimate having been agreed or determined pursuant to Clause 13.9, then the **tie** Notice of Change shall be deemed to have been withdrawn.

Restrictions on Entitlements to Relief for a tie Change

13.11 The TSS Provider shall not be entitled to any extension of time, payment or relief in respect of any **tie** Change if and to the extent that the TSS Provider could (where such action is within the power of the TSS Provider and the TSS Provider could be reasonably expected to take such action, having regard to the scope and nature of the Services) by the exercise of reasonable foresight and diligence, have prevented or materially reduced the requirement for such **tie** Change.

13.12 If, having received instructions from **tie** or **tie's** Representative, the TSS Provider considers that compliance with those instructions would amount to a **tie** Change, the TSS Provider shall within 10 Business Days of any instructions being received, notify **tie** of the same and, if it is agreed by the Parties or determined pursuant to the Dispute Resolution Procedure that a **tie** Change would arise if the instructions were complied with, **tie** may proceed with the instruction in accordance with this Clause 13 (*Changes*).

13.13 Any failure by the TSS Provider to notify **tie** within 10 Business Days of instructions being received that it considers compliance with such instructions from **tie** or **tie's** Representative would amount to a **tie** Change shall constitute an irrevocable acceptance by the TSS Provider that any compliance with **tie's** or **tie's** Representative's comments shall be without cost to **tie** and without any entitlement to any extension of time or other relief.

13.14 Any failure by the TSS Provider to notify **tie** within 10 Business Days of becoming aware of any other matter or occurrence which could amount to a **tie** Change shall constitute an irrevocable acceptance by the TSS Provider that in being instructed to deal with such matter or occurrence as a **tie** Change, the TSS Provider shall not be entitled to any costs, extension of time or other relief, in respect of such **tie** Change.

Changes proposed by the TSS Provider

13.15 Within 10 Business Days of the TSS Provider becoming aware of the need or desirability for a variation to the Services, the TSS Provider shall notify **tie** of the reasons, consequential effects including any increase or reduction in costs, and options available to mitigate these effects with a recommendation for action by **tie**.

13.16 If **tie** wishes to proceed with a variation proposed by the TSS Provider, **tie** shall serve a **tie** Notice of Change on the TSS Provider and Clauses 13.2 to 13.10 shall be adhered to by **tie** and the TSS Provider.

Change Control Register

13.17 The TSS Provider shall maintain a Change Control Register which shall detail the status and gives summary information on all withdrawn, potential and confirmed variations under this Agreement.

14. QUALIFYING CHANGE IN LAW

- 14.1 If a Qualifying Change in Law occurs or is to occur, then either Party may write to the other to express an opinion on its likely effects, giving details of its opinion of:
- 14.1.1 any necessary change in the Services;
 - 14.1.2 whether any changes are required to the terms of the Agreement to deal with the Qualifying Change in Law; or
 - 14.1.3 whether relief from compliance with obligations is required, as a result of the Qualifying Change in Law;
- in each case giving in full detail the procedure for implementing the Qualifying Change in Law. Responsibility for any costs of such implementation (and any resulting variation to payments due under this Agreement or other payment method at **tie's** discretion) shall be dealt with in accordance with Clauses 14.2 and 14.3 below.
- 14.2 As soon as reasonably practicable after receipt of any notice from either Party under Clause 14.1 above, the Parties shall discuss and agree the issues referred to in Clause 14.1 above and any ways in which the TSS Provider can mitigate the effect of the Qualifying Change of Law and the TSS Provider shall:
- 14.2.1 provide evidence to **tie** that the TSS Provider has used and will continue to use all reasonable endeavours (including where appropriate and practicable the use of competitive quotes) to minimise any increase in costs and maximise any reduction in costs;
 - 14.2.2 demonstrate how the effects of the Qualifying Change in Law will be mitigated;
 - 14.2.3 demonstrate that the relevant changes will be implemented in the most cost-effective manner, including showing that when expenditure will be incurred or has been incurred, foreseeable Changes in Law at that time will be taken into account by the TSS Provider; and
 - 14.2.4 give evidence as to how the Qualifying Change in Law has affected the fees and/or costs of similar consultants.
- 14.3 As soon as reasonably practicable after the issues referred to in Clauses 14.1 and 14.2 have been agreed between the Parties or determined pursuant to the Dispute Resolution Procedure, **tie** shall give a **tie** Notice of Change and the provisions of Clause 13 (*Changes*) shall apply except that the TSS Provider shall be obliged to implement the change in all circumstances (except to the extent that such change is not necessary to implement the Qualifying Change in Law). **tie** shall issue a **tie** Change Order once it has been agreed or determined pursuant to the Dispute Resolution Procedure. In assessing the value of the change, **tie** shall pay the agreed amount less the agreed threshold of £15,000 for each and every event. **tie** will, at its sole discretion, determine the scope of each and every event.
- 14.4 Except as otherwise expressly provided in this Agreement, the TSS Provider shall be responsible for any increase in its costs and shall not be entitled to any relief from its obligations under this Agreement to the extent that the same is caused as a result of a General Change in Law

15. REQUIRED INSURANCES

- 15.1 The TSS Provider shall, at its own cost, procure that each of the Required Insurances is taken out, comes into effect and is maintained with reputable insurers authorised to carry out insurance business in the United Kingdom and otherwise in accordance with the requirements of Schedule 6 (*Required Insurances*).
- 15.2 The Required Insurances referred to in Clause 15 (*Required Insurances*) shall be effected with insurers approved by the Authority, such approval not to be unreasonably withheld or delayed. The TSS Provider shall not make any material alteration to the terms of the Required Insurances without **tie**'s prior approval (which approval shall not be unreasonably withheld). If the insurer makes or attempts to make any material alteration or purports to withdraw cover, or if the TSS Provider is unable to obtain professional indemnity insurance, the TSS Provider shall promptly give notice of this to **tie**.
- 15.3 The TSS Provider shall ensure that its insurance broker gives **tie** as soon as reasonably practicable after any of the Required Insurances is taken out, replaced or renewed, a letter of undertaking in the form set out in Part 2 of Schedule 6 (*Required Insurances*). The TSS Provider shall notify **tie** as soon as reasonably practicable of any material changes to the levels of deductibles in the Required Insurances.
- 15.4 The TSS Provider shall provide satisfactory evidence to **tie** that the Required Insurances have been effected. The TSS Provider shall upon request produce to **tie** receipts for the payment of current insurance premiums, and on the anniversary of the Effective Date and on each subsequent anniversary thereof until the Expiry Date, the TSS Provider shall complete an insurance questionnaire in relation to the Required Insurances provided by **tie** and submit such completed questionnaire to **tie** as soon as reasonably practicable.
- 15.5 The TSS Provider shall confirm to **tie** in writing on or around the date of the first and each subsequent anniversary of the Effective Date that the Required Insurances continue to be maintained. The TSS Provider shall, when required by **tie**, make available for inspection by **tie**, documentary evidence that such Required Insurances are being properly maintained. For the avoidance of doubt, **tie** acknowledges that there may be a delay between the renewal date and issue of such evidence and such delay will not be deemed to be a failure of the TSS Provider to provide evidence of cover.
- 15.6 If the TSS Provider shall fail upon request to produce to **tie** satisfactory evidence that there is in force the Required Insurances referred to in this Clause 15 (*Required Insurances*) or is otherwise in breach of this Clause 15 (*Required Insurances*), **tie** may, on behalf of the TSS Provider, effect and keep in force any such insurance and pay such premium or premiums as may be necessary for that purpose and from time to time deduct the amount so paid by **tie** as aforesaid from any monies due or which may become due to the TSS Provider.
- 15.7 The TSS Provider shall increase the limit of indemnity and amend the terms of the third party liability insurance set out in Schedule 6 (*Required Insurances*) if required to meet the requirements of any third party (including Network Rail and BAA) with regard to any of the Services to be performed by the TSS Provider in accordance with this Agreement. Any costs associated with such increase and/or amendment shall be borne by the TSS Provider.
- 15.8 The TSS Provider shall not take any action or fail to take any reasonable action or (in so far as it is reasonably within its power) permit or allow others to take or fail to take any action (including failure to disclose any fact) as a result of which any of the Required Insurances may be rendered void, voidable, unenforceable or suspended or impaired in whole or in part or which may otherwise render any sum paid out under any relevant policy repayable in whole or in part.

- 15.9 The supply to **tie** of any insurance policy or insurance certificate or renewal certificate or other evidence of compliance with this Clause 15 (*Required Insurance*) shall not imply, or be taken as, acceptance by **tie** that:
- 15.9.1 the extent of insurance cover is sufficient and its terms are satisfactory; or
 - 15.9.2 in respect of any risks not insured against, insurable interests or parties not insured, an acceptance by **tie** that the same were uninsurable.

16. ERRORS AND/OR OMISSIONS IN THE SERVICES

- 16.1 If during the performance of the Services and/or where a TSS Provider has completed the Services, **tie** becomes aware of any error or omission in the performance of the Services or of any other breach of this Agreement, **tie** shall notify the TSS Provider, who shall, at its own expense and in liaison with **tie** and/or any other party or parties nominated by **tie**, rectify any error or omission or breach, or where this is agreed by **tie** to be impracticable or undesirable, take such other agreed steps to address the error or omission.
- 16.2 Any costs to **tie** of remedying any such errors or omissions or breaches shall be paid by the TSS Provider to **tie**.
- 16.3 These arrangements shall in no respect diminish **tie**'s ability to recover damages from the TSS Provider, for losses incurred by **tie** consequent upon the error or omission or breach in question.

17. TERMINATION FOR TSS PROVIDER DEFAULT

- 17.1 **tie** may terminate this Agreement upon giving written notice to the TSS Provider, and this Agreement shall terminate on the date falling 30 days after the service of such notice if:
- 17.1.1 the TSS Provider breaches any material provision or requirement of the Agreement; or
 - 17.1.2 the circumstances envisaged by Clause 31.7 apply;
 - 17.1.3 following a written warning and the removal of any member of the Key Personnel, any replacement member of the Key Personnel is, in the opinion of **tie**, incompetent to perform any of his duties;
 - 17.1.4 the TSS Provider conducts itself in a manner which **tie** considers to be incompatible with the performance of the Services, and/or in such manner so as to wilfully detract from the image and reputation of **tie**, CEC, Transport Edinburgh Limited, the Scottish Executive or any project related to the performance of the Services, or
 - 17.1.5 any partner or director of the TSS Provider directly involved with this Agreement is expelled from or sanctioned by his relevant professional Institute or Institution, thus compromising the performance of the Services; or
 - 17.1.6 an Insolvency Event occurs; or
 - 17.1.7 the TSS Provider fails to resolve a conflict of interest in accordance with Clause 29 (*Conflict of Interest*) to the reasonable satisfaction of **tie**.

17.1.8 there is a change in legal status of the TSS Provider or a Change in Control of the TSS Provider which is materially prejudicial to the performance of the Services.

17.2 The TSS Provider shall immediately notify **tie** of

17.2.1 any resolution or decision by the board of directors of the TSS Provider or a decision by any director of the TSS Provider to seek legal or financial advice pertaining to the solvency of the TSS Provider; and

17.2.2 any presentation of any petition for the purpose of winding up the TSS Provider or any petition for an administration order.

18. TERMINATION, ABANDONMENT OR SUSPENSION OF THE SERVICES BY TIE

18.1 **tie** may terminate this Agreement at any time and for whatever reason upon giving written notice to the TSS Provider, and this Agreement shall terminate on the date falling 60 days after the date of service of such written notice.

18.2 At any time **tie** may decide to postpone or abandon any part of the Services and, if **tie** decides to postpone or abandon any part of the Services, **tie** may by notice in writing to the TSS Provider seek to vary the Services either by excluding the Services (or any part thereof) to be performed by the TSS Provider, or by suspending performance of the same, and in such notice **tie** shall specify the Services affected.

18.3 Unless otherwise notified in writing by **tie**, if **tie** shall not have required the TSS Provider to resume the performance of Services in respect of the whole or any part of the Services suspended under Clause 18.2 within a period of 12 months from the date of the notice, the Agreement shall forthwith automatically terminate in whole if the whole of the Services has been terminated or in part, if part of the Services has been terminated.

18.4 The TSS Provider shall, upon receipt of any notice in accordance with this Clause 18 (*Termination, Abandonment or Suspension of the Services*) by **tie** terminating, entirely suspending or abandoning the whole or any part of the Services, proceed in an orderly manner but with all reasonable speed and economy to take such steps as are necessary to bring to an end or suspend (as appropriate) the Services. **tie** and the TSS Provider shall meet within 7 days of the said receipt of such notice to assess any unavoidable costs arising.

19. TERMINATION OR SUSPENSION FOR TIE DEFAULT

19.1 If a **tie** Default has occurred and the TSS Provider wishes to terminate this Agreement, the TSS Provider must serve a termination notice on **tie** within 30 days of becoming aware of the **tie** Default. Failure to do so shall be a waiver of the right to terminate.

19.2 The TSS Provider shall specify in the termination notice the type of **tie** Default which has occurred entitling the TSS Provider to terminate.

19.3 Provided the TSS Provider has complied with Clauses 19.1 and 19.2, this Agreement shall terminate on the day falling 60 days after the date on which **tie** receives the termination notice, unless **tie** rectifies the **tie** Default within 60 days of receipt of the termination notice.

19.4 The TSS Provider shall not be entitled to, and shall not purport to, terminate this Agreement or accept any repudiation of this Agreement, except as expressly

provided in this Clause 19 (*Termination or Suspension for tie Default*) or Clause 21 (*Termination by Reason of Force Majeure*).

- 19.5 If **tie** shall fail to pay the TSS Provider in full any amount properly due and payable under this Agreement by the final date for payment in accordance with the requirements of Clause 10 (*Arrangements for Invoicing and Payment*) and no effective notice to withhold payment has been given by **tie** to the TSS Provider, the TSS Provider may, after giving **tie** 60 days' notice in writing of the same stating the ground or grounds on which it is intended to suspend performance, suspend the performance of the Services until payment in full is made by **tie**.

20. TERMINATION FOR CORRUPT GIFTS AND PAYMENTS

- 20.1 The TSS Provider or anyone employed by it or acting on its behalf (including any TSS Provider Party) shall not commit any Prohibited Act.
- 20.2 If the TSS Provider, or anyone employed by it or acting on its behalf (including any TSS Provider Party), commits any Prohibited Act, then **tie** shall be entitled to act in accordance with Clauses 20.3 to 20.7.
- 20.3 If a Prohibited Act is committed by the TSS Provider or by an employee of the TSS Provider not acting independently of the TSS Provider, then **tie** may terminate this Agreement by giving notice to the TSS Provider.
- 20.4 If a Prohibited Act is committed by an employee of the TSS Provider acting independently of the TSS Provider, then **tie** may give notice to the TSS Provider of termination and this Agreement will terminate, unless within 30 days of receipt of such notice the TSS Provider terminates the employee's employment and (if necessary) procures the performance of the relevant part of the Services by another person.
- 20.5 If a Prohibited Act is committed by anyone acting on behalf of the TSS Provider (excluding employees of the TSS Provider but including any TSS Provider Party, and their employees) and not acting independently of the TSS Provider, then **tie** may give notice to the TSS Provider of termination and this Agreement will terminate.
- 20.6 If a Prohibited Act is committed by anyone acting on behalf of the TSS Provider (excluding employees of the TSS Provider but including any TSS Provider Party and their employees) and acting independently of the TSS Provider, then **tie** may give notice to the TSS Provider of termination and this Agreement will terminate, unless within 30 days of receipt of such notice the TSS Provider terminates that party's employment and procures the performance of the relevant part of the Services by another person.
- 20.7 Any notice of termination under this Clause 20 (*Termination for Corrupt Gifts and Payments*) shall specify:
- 20.7.1 the nature of the Prohibited Act;
 - 20.7.2 the identity of the person whom **tie** believes has committed the Prohibited Act; and
 - 20.7.3 the date on which this Agreement will terminate, in accordance with the applicable provision of this Clause 20 (*Termination for Corrupt Gifts and Payments*).

21. TERMINATION BY REASON OF FORCE MAJEURE

- 21.1 Neither Party shall be entitled to bring a claim for a breach of obligations under this Agreement by the other Party or incur any liability to the other Party for any losses or damages incurred by that other Party to the extent that a Force Majeure Event occurs and such party is directly prevented from carrying out such obligations by that Force Majeure Event provided that such prohibition on bringing a claim and exclusion of liability shall not operate if and to the extent that:
- 21.1.1 the Affected Party could, by the exercise of reasonable foresight and diligence, have prevented or reduced the effect of the Force Majeure Event; and
- 21.1.2 the Affected Party could, whether before or after the occurrence of the Force Majeure Event, have reduced or eliminated the resulting breach of its obligations under this Agreement by taking reasonable steps.
- 21.2 On the occurrence of a Force Majeure Event, the Affected Party shall notify the other Party as soon as reasonably practicable, specifying details of the Force Majeure Event and providing evidence of its effect on the obligations of the Affected Party and any action proposed to remove or mitigate its effect.
- 21.3 The Parties shall enter into bona fide discussions with a view to alleviating the effects of such Force Majeure Event, and if the terms or measures to remove the effect of the Force Majeure Event cannot be agreed on or before the date falling 12 months after the date of the commencement of the Force Majeure Event or by the end of such longer period as the Parties may have agreed, or such Force Majeure Event is continuing or its consequence remains such that the Affected Party is unable to comply with all or a material part of its obligations under this Agreement for a period of more than 12 months after the date of the commencement of the Force Majeure Event or by the end of such longer period as the Parties may have agreed, either Party shall have the option to terminate this Agreement by written notice to the other.
- 21.4 The Parties shall at all times following the occurrence of a Force Majeure Event use all reasonable endeavours to prevent and mitigate the effects of any delay to the performance of the Services and the TSS Provider shall at all times during which a Force Majeure Event is subsisting take all steps in accordance with Good Industry Practice to overcome or minimise the consequences of the Force Majeure Event.
- 21.5 The Affected Party shall notify the other party as soon as reasonably practicable after the Force Majeure Event ceases or no longer causes the Affected Party to be unable to comply with its obligations under this Agreement. Following such notification, this Agreement shall continue to be performed on the terms existing immediately prior to the occurrence of the Force Majeure Event.

22. PERSISTENT BREACH

- 22.1 If a breach by the TSS Provider of any of its obligations under this Agreement has occurred more than once then **tie** may serve a notice ("**Persistent Breach Notice**") on the TSS Provider:
- 22.1.1 specifying that it is a Persistent Breach Notice;
- 22.1.2 giving reasonable details of the breach; and
- 22.1.3 stating that such breach is a breach which, if it recurs frequently or continues, may result in a termination of this Agreement.
- 22.2 If, following service of such a Persistent Breach Notice, the breach specified has continued or occurred once again after the date falling 30 days after the date of

service of the Persistent Breach Notice and before the date falling 365 days after the date of service of such notice, then **tie** may serve another notice ("**Final Persistent Breach Notice**") on the TSS Provider:

- 22.2.1 specifying that it is a Final Persistent Breach Notice;
- 22.2.2 stating that the breach specified has been the subject of a prior Persistent Breach Notice within the period of 365 days prior to the date of service of the Final Persistent Breach Notice; and
- 22.2.3 stating that if such failure is not remedied within 7 days or is remedied and occurs once or more within the 180 day period after the date of service of the Final Persistent Breach Notice, this Agreement may be terminated with immediate effect.

23. PAYMENT FOLLOWING TERMINATION OR SUSPENSION

- 23.1 No compensation shall be payable by **tie** to the TSS Provider for termination of this Agreement whether under contract, delict (including negligence), breach of (or compliance with) statutory duty, restitution or otherwise but without prejudice to payments due under Clause 23.3.
- 23.2 Within 30 days of termination of this Agreement and following receipt of a valid VAT invoice, **tie** shall pay to the TSS Provider:
 - 23.2.1 any undisputed sums due from **tie** to the TSS Provider pursuant to Clauses 9 (*Methods of Payment*) and 10 (*Arrangements for Invoicing and Payment*);
 - 23.2.2 any entitlement to demobilisation costs pursuant to Clause 23.3; and
 - 23.2.3 any sums due to the TSS Provider in respect of any work in progress which have not been certified in accordance with Clause 10 (*Arrangements for Invoicing and Payment*) provided that the calculation of such sums have been certified as follows:
 - 23.2.3.1 the TSS provider shall have provided **tie** with a valuation of all work in progress in relation to the services in accordance with the provisions of Clause 13.4 and subject to Clause 9 (*Methods of Payment*);
 - 23.2.3.2 **tie** shall, subject to any clarifications as are in **tie's** opinion (acting properly and reasonably) necessary, certify by notice in writing to the TSS Provider that part of the work in progress which is approved by **tie** and give reasons why any part of the work in progress has not been certified and the value of the sums involved no later than 10 Business Days after the date on which such valuation was received. **tie's** valuation of such work in progress shall be final and binding.
- 23.3 **tie** shall make payment to the TSS Provider of any demobilisation costs which have been demonstrably and reasonably incurred by the TSS Provider in the event of a termination in respect of:
 - 23.3.1 **tie** Default pursuant to Clause 19 (*Termination or Suspension for tie Default*);
or
 - 23.3.2 termination or abandonment pursuant to Clause 18 (*Termination, Abandonment or Suspension of the Services by tie*);

- 23.3.3 suspension for a period exceeding 12 months pursuant to Clause 18 (*Termination, Abandonment or Suspension of the Services by tie*).
- 23.4 The TSS Provider shall use all reasonable endeavours to minimise and mitigate any demobilisation costs under Clause 23.3 and **tie** shall not be liable to pay the TSS Provider for such demobilisation costs to the extent that the TSS Provider has failed to eliminate or mitigate such demobilisation costs or to the extent that such demobilisation costs have arisen out of the TSS Provider's breach of this Agreement or any negligent or wilful act or omission by the TSS Provider.
- 23.5 Within 30 days of termination of this Agreement, the TSS Provider shall pay to **tie** any sums due from the TSS Provider to **tie** pursuant to this Agreement.
- 23.6 This Agreement shall terminate automatically on the Expiry Date unless it shall have been terminated earlier in accordance with the provisions of this Agreement. The TSS Provider shall not be entitled to any compensation on expiry of the Agreement.
- 23.7 Within 30 days of expiry of this Agreement, **tie** shall pay to the TSS Provider any undisputed sums due from **tie** to the TSS Provider in accordance with Clauses 9 (*Methods of Payment*) and 10 (*Arrangements for Invoicing and Payment*).
- 23.8 Within 30 days of expiry of this Agreement, the TSS Provider shall pay to **tie** any sums due from the TSS Provider to **tie** pursuant to this Agreement.
- 23.9 Either Party may refer any Dispute about disputed sums to the Dispute Resolution Procedure. If it is determined pursuant to the Dispute Resolution Procedure that the whole or part of any disputed amount is due to either **tie** or the TSS Provider, **tie** or the TSS Provider (as appropriate) shall raise an invoice within 30 days in respect of such determined amount and payment shall be made by the relevant Party within 60 days of the receipt of such invoice.
- 23.10 In the event of the Agreement being terminated under Clause 17 (*Termination for TSS Provider Default*) or Clause 20 (*Termination for Corrupt Gifts and Payments*) or Clause 22 (*Persistent Breach*), **tie** shall be entitled to recover from the TSS Provider all losses, liabilities damages, penalties, fines, forfeitures, and the costs and expenses incident thereto (including without limitation legal costs of defence) sustained by **tie** by such termination, and, without prejudice to the generality of this provision, **tie** may forthwith employ and pay persons to carry out, manage and complete the Services and recover the costs of so doing from the TSS Provider.
- 23.11 In any case in which **tie** has required the TSS Provider to suspend the carrying out of the Services, **tie** may at any time within the period of 12 months from the date of **tie**'s notice served in accordance with Clause 18.2 (or such longer period as may be notified in writing by **tie**) require the TSS Provider in writing to resume the performance of such Services. In such event, if the TSS Provider needs to perform any additional services in connection with the resumption of the Services, **tie** shall pay the TSS Provider fair and reasonable costs in respect of the performance of such additional services which shall be treated as a **tie** Change and agreed in accordance with Clause 13.

24. EFFECTS OF TERMINATION OR EXPIRY

- 24.1 Subject to Clause 23.2, the TSS Provider shall not have any other right or remedy against **tie** on termination of this Agreement.
- 24.2 Subject to any exercise by **tie** of its rights to perform, or to procure a third party to perform, the obligations of the TSS Provider, the Parties shall continue to perform their obligations under this Agreement, notwithstanding the giving of any notice of

default or breach or termination notice, until the termination of this Agreement becomes effective.

- 24.3 Any termination or expiry of this Agreement shall not prejudice or affect the accrued rights or claims of either Party.
- 24.4 On expiry of this Agreement or any earlier termination of this Agreement for whatever reason, all Deliverables shall be handed to **tie**, provided that the TSS Provider may retain one copy of any Deliverable where such copy is required for the purposes of Law or any recognised regulatory requirement or for record purposes (where **tie**, acting reasonably, agrees). The provisions of Clause 31 (*Confidential Information*) will continue to apply to these Deliverables beyond expiry of this Agreement or any earlier termination for whatever reason.
- 24.5 In order to aid the progress of the performance of the Services, **tie** may make available to the TSS Provider various information, materials and documents. On expiry of this Agreement or any earlier termination of this Agreement for whatever reason, all such information, materials and documents shall be returned to **tie** provided that the TSS Provider may retain one copy of any information, materials and documents where such copy is required for the purposes of Law or any recognised regulatory requirement. The provisions of Clause 31 (*Confidential Information*) will continue to apply to such information, materials and documents beyond expiry of this Agreement or any earlier termination for whatever reason.
- 24.6 Completion or termination of the Services shall not affect the TSS Provider's obligations under Clauses 3 (*Duty of Care, Standards and the Services to be provided*), 9 (*Methods of Payment*), 10 (*Arrangements for Invoicing and Payment*), 11 (*Set-Off*), 12 (*Audit*), 15 (*Required Insurances*), 16 (*Errors and/or Omissions in the Services*), 23 (*Payment Following Termination or Suspension*), 24 (*Effects of Termination or Expiry*), 25 (*Indemnity by TSS Provider*), 26 (*Dispute Resolution Procedure*), 30 (*Copyright and Intellectual Property*) and 31 (*Confidential Information*). Those obligations shall continue in full force and effect.

25. INDEMNITY BY TSS PROVIDER, LIABILITY AND SOLE REMEDY

- 25.1 The TSS Provider shall indemnify **tie** and its officers, agents and employees ("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) which any of the Indemnified Parties may hereafter incur, become responsible for, or pay out as a result of or in connection with:
- 25.1.1 any of the TSS Provider's, or its employees' or any TSS Provider Party's negligent or wilful acts or wilful omissions in the performance of the Services;
- 25.1.2 breach of any term or provision of this Agreement; or
- 25.1.3 breach of any Law; or
- 25.1.4 any non-performance or delay in performance of the TSS Provider's obligations under this Agreement.
- 25.2 The Parties acknowledge and agree that the only rights available to them to terminate this Agreement are those expressly set out in this Agreement and that neither Party shall be entitled to exercise a right to terminate or rescind or accept the repudiation of this Agreement under any other right whether arising in common law or statute or otherwise howsoever (other than for fraud or a fraudulent misrepresentation).

25.3 Nothing in this Agreement shall exclude or limit the liability:

25.3.1 of either Party for:

25.3.1.1 death or personal injury caused by that Party's negligence or the negligence of anyone for whom that Party is vicariously liable;

25.3.1.2 fraud or fraudulent misrepresentation; or

25.3.1.3 any breach of warranty given as to valid and marketable title, freedom from unduly onerous burdens and conditions or entitlement to possession by action of prescription; or

25.3.2 of the TSS Provider, for any breach of this Agreement or any delict (including negligence) or other liability arising prior to termination of this Agreement;

provided that nothing in this Clause 25.3 shall confer on either Party rights or remedies that they would not otherwise have.

25.4 Subject to Clause 25.3, neither party shall be entitled to claim damages for breach of this Agreement, in delict (including negligence), breach of statutory duty or on any other basis whatsoever to the extent that such damages claimed by that Party are for Indirect Losses suffered by that Party provided that for the avoidance of doubt, nothing in this Clause 25.4 shall affect either Party's liability to the other Party, in respect of any claim, action, proceedings or demand against such other Party by a third party in connection with Indirect Loss suffered.

25.5 The TSS Provider shall not be relieved or excused of any responsibility, liability or obligation under this Agreement by the appointment of any TSS Provider Party. The TSS Provider shall, as between itself and **tie**, be responsible for the selection, pricing, performance, acts, defaults, omissions, breaches, delict and offences of any TSS Provider Party. All references in this Agreement to any act, default, omission, breach, delict or offence of the TSS Provider shall be construed to include any such act, default, omission, breach or delict of any TSS Provider Party.

26. DISPUTE RESOLUTION PROCEDURE

The parties agree that any dispute or difference arising from or in connection with this Agreement shall be dealt with in accordance with the provisions set out in Schedule 8 (*Dispute Resolution Procedure*) to this Agreement.

27. ASSIGNATION

27.1 Without prejudice to Clause 7 (*Sub-Letting and the Appointment of TSS Provider Parties*), the TSS Provider shall not assign, novate or otherwise transfer the whole or any part of the Agreement without the prior written agreement of **tie**.

27.2 **tie** shall be entitled to assign, novate or transfer the whole or any part of this Agreement:

27.2.1 to CEC or any other body with no worse financial standing than that of **tie** who, as a result of any Change in Law, takes over all or substantially all the functions of **tie**; or

27.2.2 to any other person whose obligations under this Agreement are unconditionally and irrevocably guaranteed (in a form reasonably acceptable to the TSS Provider) by **tie** or by a person falling within Clause 27.2.1; or

27.2.3 to Transport Edinburgh Limited; or

27.2.4 with the prior written consent of the TSS Provider (such consent not to be unreasonably withheld or delayed).

28. CHANGES IN LEGAL STATUS AND CHANGES IN CONTROL

28.1 If the legal status of the TSS Provider shall change in any way, **tie** shall be so informed by the TSS Provider in writing, immediately.

28.2 If there is a Change in Control in the TSS Provider, **tie** shall be informed immediately by the TSS Provider in writing.

29. CONFLICT OF INTEREST

29.1 The TSS Provider shall:

29.1.1 be responsible for ensuring that no conflict of interest arises in respect of its duties under the Agreement;

29.1.2 make all possible enquiries to ensure that there is no conflict of interest prior to its assuming the duties required of it under the terms of the Agreement; and

29.1.3 consult and advise **tie** if the TSS Provider considers that a conflict of interest arises or if he considers that a conflict of interest may exist or may arise or may be foreseeable and shall furnish **tie** with such information as shall enable **tie** to determine whether or not a conflict of interest has arisen.

30. COPYRIGHT AND INTELLECTUAL PROPERTY

30.1 All TSS Provider IPR shall continue to be owned by the TSS Provider.

30.2 The TSS Provider hereby:

30.2.1 assigns by way of future assignment to **tie** with full title guarantee the Project IPR which is created by it and shall procure that Project IPR created by any TSS Provider Party is also so assigned, for all of the residue of the term of such rights and all renewals or extensions thereof and together with all accrued causes of action in respect thereof;

30.2.2 grants to **tie** a non-exclusive perpetual irrevocable royalty free licence to use such TSS Provider IPR as may be necessary for **tie** to use in relation to any projects associated with the Services;

30.2.3 grants to **tie** the right to grant non-exclusive non-assignable sub-licences to third parties for such lengths of time as **tie** may reasonably require and otherwise on the same terms as the licence granted to **tie** pursuant to Clause 30.2.2 above, to use the TSS Provider IPR referred to in that Clause (other than in relation to Third Party *** which is subject to the provisions of Clause 30.9) insofar as is necessary or desirable for such third party to use such TSS Provider IPR in relation to any projects associated with the Services.

30.3 For the avoidance of doubt, the persons to whom **tie** may grant sub-licences pursuant to Clause 30.2 above shall include:

30.3.1 the Operator and any party other than the Operator providing support to **tie** in relation to the Edinburgh Tram Network;

- 30.3.2 **tie** and any **tie** Party;
- 30.3.3 Infraco;
- 30.3.4 the Tram Supplier;
- 30.3.5 any party providing maintenance in relation to the Edinburgh Tram Network;
- 30.3.6 the Joint Revenue Committee;
- 30.3.7 any party appointed by **tie** as Utilities Diversions Contractor; and
- 30.3.8 any assignee or transferee under this Agreement.
- 30.4 **tie** hereby grants to the TSS Provider a non-exclusive revocable royalty free licence for the duration of this Agreement to use such Project IPR as is owned by it as may be necessary for the TSS Provider to use solely and exclusively for the purpose of performing the Services.
- 30.5 The copyright in this Agreement and any data or software supplied to the TSS Provider by **tie**, shall remain solely with **tie**.
- 30.6 The TSS Provider shall at any time and from time to time hereafter at the request of **tie** execute all such documents and do all such further acts as may be required in order to vest the rights referred to in Clause 30.2.1 in **tie**.
- 30.7 The TSS Provider waives any and all moral rights held or to be held by the TSS Provider in the Deliverables and the Project IPR and shall procure that all of the TSS Provider Parties who are authors of the whole or any part of the Deliverables or the Project IPR waive and abandon in writing all moral rights.
- 30.8 The TSS Provider agrees that all rights in the Project IPR shall remain the property of **tie** and the TSS Provider shall retain no rights in the Project IPR beyond the licence granted in Clause 30.4 above. The TSS Provider shall be entitled to use such Project IPR only on the terms set out herein and solely for the purpose of the performance of the Services. In particular, otherwise as permitted in this Agreement herein, the TSS Provider shall not disclose, assign, sub-licence, lease, rent or otherwise dispose of the Project IPR.
- 30.9 To the extent that any of the Deliverables are generated by or maintained on a computer or similar system, the TSS Provider shall use all reasonable endeavours to procure for the benefit of **tie**, at no charge or at the lowest reasonable fee, the grant of a licence or sub-licence for any relevant Third Party Software on the same terms as the TSS Provider Software is licensed to **tie**, to enable **tie** or its nominee to access and otherwise use (subject to the payment by **tie** of the relevant fee, if any) such Deliverables in connection with this Agreement. As an alternative, the TSS Provider may provide such Deliverables in a format which may be read by software generally available at reasonable prices in the market at the relevant time or in hard copy format.
- 30.10 The TSS Provider shall ensure the back-up and storage in safe custody of the Deliverables in accordance with Good Industry Practice. Without prejudice to this obligation, the TSS Provider shall submit to **tie**'s Representative for approval its proposals for the back-up and storage in safe custody of the Deliverables and **tie** shall be entitled to object if the same is not in accordance with Good Industry Practice. The TSS Provider shall comply, and shall cause all the TSS Provider Parties to comply, with all such proposals to which **tie** Representative has given his or her approval. The TSS Provider may vary its procedures for such back-up and

storage subject to submitting its proposals for change to **tie** Representative, who shall be entitled to object on the basis set out above.

- 30.11 Where a claim or proceeding is made or brought against **tie** or its permitted licensees which arises out of the infringement of any Intellectual Property Rights in any Deliverables or other materials provided by the TSS Provider or any TSS Provider Party to **tie** then the TSS Provider shall indemnify and keep **tie** indemnified on demand at all times from and against all Indemnified Liabilities arising in connection with such claim or proceedings.
- 30.12 For the purposes of this Clause 30 (*Copyright and Intellectual Property*), "use" shall include the acts of copying, modifying, adapting and translating the material in question and/or incorporating them with other materials and the term "the right to use" shall be construed accordingly.
- 30.13 The provisions of this Clause 30 (*Copyright and Intellectual Property*) shall apply during the continuance of this Agreement and after its termination howsoever arising, and immediately following termination howsoever arising, the TSS Provider shall provide **tie** with:
- 30.13.1 a copy of the object code for the Third Party Software and the TSS Provider Software on media that is reasonably acceptable to **tie**;
- 30.13.2 a copy of the source code for the Specially Written Software on media that is reasonably acceptable to **tie**; and
- 30.13.3 a copy of all documentation, manuals and other technical information relating to the Third Party Software, the Specially Written Software and the TSS Provider Software that is reasonably required by **tie** to operate, manage and support the Third Party Software, the Specially Written Software and the TSS Provider Software.
- 30.14 The TSS Provider shall not reproduce or publish any document or matter relating to the Services or this Agreement, either alone or in association with any other body or person, without the prior written consent of **tie**.

31. CONFIDENTIAL INFORMATION

- 31.1 Each Party:
- 31.1.1 shall treat all Confidential Information belonging to the other Party as confidential and safeguard it accordingly; and
- 31.1.2 shall not disclose any Confidential Information belonging to the other Party to any other person without the prior written consent of the other Party, except to such persons and to such extent as may be necessary for the performance of the Agreement or except where disclosure is otherwise expressly permitted by the provisions of this Agreement.
- 31.2 The TSS Provider shall take all necessary precautions to ensure that all Confidential Information obtained from **tie** under or in connection with the Agreement:
- 31.2.1 is given only to such of the staff and professional advisors or TSS Provider Parties engaged to advise it in connection with the Agreement as is strictly necessary for the performance by the TSS Provider of the Services and its other obligations under this Agreement and only to the extent necessary for the performance by the TSS Provider of the Services and its other obligations under this Agreement;

- 31.2.2 is treated as confidential and not disclosed (without prior approval) or used by any staff or such professional advisors or TSS Provider Parties otherwise than for the purposes of the Agreement.
- 31.3 Where it is considered necessary in the opinion of **tie**, the TSS Provider shall ensure that staff or such professional advisors or TSS Provider Parties sign a confidentiality undertaking before commencing work in connection with the Agreement.
- 31.4 The TSS Provider shall not use any Confidential Information it receives from **tie** otherwise than for the purposes of the Agreement.
- 31.5 The provisions of Clauses 31.1 to 31.4 shall not apply to:
- 31.5.1 any information which is or becomes public knowledge (otherwise than by breach of this Clause);
 - 31.5.2 any information which was in the possession of the receiving Party, without restriction as to its disclosure, before receiving it from the disclosing Party;
 - 31.5.3 any information which is received from a third party who lawfully acquired it and who is under no obligation restricting its disclosure;
 - 31.5.4 any information which is independently developed without access to the Confidential Information;
 - 31.5.5 any disclosure pursuant to a statutory, legal or parliamentary obligation placed upon the Party making the disclosure, including any requirements for disclosure under FOISA, the Code, or the Environmental Information Regulations pursuant to Clauses 31.8 to 31.12 (inclusive); or
 - 31.5.6 in relation to any disclosure for the purpose of:
 - 31.5.6.1 the examination and certification of **tie**'s accounts; or
 - 31.5.6.2 any examination (pursuant to applicable Law) of the economy, efficiency and effectiveness with which **tie** has used their resources or funding made available for the Project;
 - 31.5.7 in relation to any public relations material, press releases, public representations or conference engagements in relation to the Project planned by the TSS Provider (provided that the TSS Provider has obtained **tie**'s prior written approval);
 - 31.5.8 any information which is required to be disclosed to that Party's insurers and/or legal advisers subject to Clauses 31.2 and 31.3;
 - 31.5.9 any registration of information in respect of the Consents and any property registration required;
 - 31.5.10 any disclosure of information by **tie** to Transport Edinburgh Limited, CEC, Partnerships UK Limited or any department, office or agency of the Scottish Executive or the UK government.
 - 31.5.11 any disclosure for the purpose of:

- (a) the examination and certification of **tie**'s, or the TSS Provider's accounts; or
- (b) any examination pursuant to the Local Government (Scotland) Act 1973 as amended by the Local Government in Scotland Act 2003 of whether **tie** has secured Best Value in the performance of its functions; or

31.5.12 any disclosure of Confidential Information obtained from the TSS Provider:

- (a) to any government department or any other local government authority or public authority equivalent in status to **tie**. All government departments or any other local government authority or public authority equivalent in status to **tie** receiving such Confidential Information shall be entitled to further disclose the Confidential Information to other government departments or any other local government authority or public authority equivalent in status to **tie** on the basis that the information is confidential and is not to be disclosed to a third party which is not part of any government department or any other local government authority or public authority equivalent in status to **tie**; or
- (b) to any person engaged in providing any services to **tie** for any purpose relating to or ancillary to the Agreement;

provided that in disclosing information under this Clause 31 (*Confidential Information*) **tie** discloses only the information which is necessary for the purpose concerned and requires that the information is treated in confidence and that a confidentiality undertaking is given where appropriate.

- 31.6 Nothing in this Clause shall prevent either Party from using any techniques, ideas or know-how gained during the performance of the Agreement in the course of its normal business, to the extent that this does not result in a disclosure of Confidential Information or an infringement of Intellectual Property Rights.
- 31.7 In the event that the TSS Provider fails to comply with this Clause 31 (*Confidential Information*), **tie** reserves the right to terminate the Agreement by notice in writing in accordance with Clause 17.1.
- 31.8 The TSS Provider acknowledges that **tie** is subject to the requirements of FOISA and the Environmental Information Regulations and shall assist and cooperate with **tie** (at the TSS Provider's expense) to enable **tie** to comply with these Information disclosure requirements. **tie** agrees that it shall comply with the terms of the Code in respect of the discharge of its obligations under FOISA.
- 31.9 The TSS Provider shall and shall procure that the TSS Provider Parties shall:
- 31.9.1 transfer the Request for Information to **tie** as soon as practicable after receipt and in any event within two Business Days of receiving a Request for Information;
 - 31.9.2 provide **tie** with a copy of all Information in its possession or power in the form that **tie** requires within five Business Days (or such other period as **tie** may specify) of **tie** requesting that Information; and
 - 31.9.3 provide all necessary assistance as reasonably requested by **tie** to enable **tie** to respond to a Request for Information within the time for compliance set out

in section 10 of FOISA or regulation 5 of the Environmental Information Regulations.

- 31.10 **tie** shall be responsible for determining at its absolute discretion whether the Confidential Information and/or any other Information:
- 31.10.1 is exempt from disclosure in accordance with the provisions of the Code, FOISA or the Environmental Information Regulations;
- 31.10.2 is to be disclosed in response to a Request for Information, and
- 31.11 In no event shall the TSS Provider respond directly to a Request for Information unless expressly authorised to do so by **tie**.
- 31.12 The TSS Provider acknowledges that **tie** may be obliged, pursuant to the Code, FOISA, or the Environmental Information Regulations to disclose Information:
- 31.12.1 without consulting with the TSS Provider, or
- 31.12.2 following consultation with the TSS Provider and having taken its views into account.
- 31.13 The TSS Provider shall ensure that all information and Deliverables produced in the course of the Agreement or relating to the Agreement is retained for disclosure and shall permit **tie** to inspect such records as requested from time to time.
- 31.14 The TSS Provider acknowledges that any lists or schedules provided by it outlining Confidential Information are of indicative value only and that **tie** may nevertheless be obliged to disclose Confidential Information in accordance with Clause 31.10.
- 31.15 Any public relations material, press releases, public presentations or conference engagements in relation to the Project planned by the TSS Provider require **tie's** prior written approval.

32. WAIVER

- 32.1 Save where expressly stated, no failure or delay by **tie** to exercise any right or remedy in connection with this Agreement will operate as a waiver of it or of any other right or remedy nor will any single or partial exercise preclude any further exercise of the same, or of some other right or remedy. A waiver of any breach of this Agreement shall not be deemed to be a waiver of any subsequent breach.
- 32.2 The TSS Provider agrees that no waiver shall occur or be deemed to have occurred unless or until a clear and unequivocal express waiver of a clearly identified default is contained in a written notice by **tie** to the TSS Provider expressly for the purpose of effecting such waiver.
- 32.3 The Parties' rights and remedies under this Agreement are, except where provided otherwise in this Agreement, independent, cumulative and do not operate to exclude one another or any rights or remedies provided by law.

33. ENTIRE AGREEMENT

- 33.1 Except where expressly provided otherwise in this Agreement, this Agreement constitutes the entire agreement between the Parties in connection with its subject matter and supersedes all prior representations, communications, negotiations and understandings concerning the subject matter of this Agreement.

- 33.2 Each of the Parties confirms to the other that it has neither been induced to enter into this Agreement in reliance on, nor has it made, any representation or warranty except those contained or referred to in this Agreement.
- 33.3 Any representations or warranties other than those contained or referred to in this Agreement are superseded and extinguished by this Agreement.
- 33.4 Each Party irrevocably and unconditionally waives all rights and remedies which it might otherwise have had in relation to any representations or warranties other than those contained or referred to in this Agreement.

34. NOTICES

34.1 Any notice or notification required or authorised to be given under this Agreement by one Party to the other shall be:

34.1.1 in writing;

34.1.2 sent by one of the following methods:

- (i) pre-paid registered or recorded delivery post or facsimile transmission addressed to the Party to which it is given at:
 - (a) in the case of notices given to **tie**: **tie** Limited, Verity House, 19 Haymarket Yards, Edinburgh EH12 5BH, fax number 0131 622 8301, attention: Projects Director, or such other address or fax number in the United Kingdom as **tie** may notify the TSS Provider from time to time for that purpose; or
 - (b) in the case of notices given to the TSS Provider, Scott Wilson Railways, Buchanan House, 58 Port Dundas Road, Glasgow, G4 0HG (fao Mark Jackson) or such other address or fax number in the United Kingdom as the TSS Provider may notify **tie** from time to time for that purpose; or
- (ii) facsimile transmission addressed to **tie's Representative** or the TSS Provider's Representative (as appropriate) at a facsimile number notified to the giving Party by the receiving Party for the service of notices under this Agreement from time to time; or
- (iii) personal delivery into the hands of:
 - (a) in the case of notices given to **tie**, **tie's Representative**; or
 - (b) in the case of notices given to the TSS Provider, the TSS Provider's Representative.
- (iv) e-mail to:
 - (a) in the case of notices given to **tie**, **tie's Representative**; or
 - (b) in the case of notices given to the TSS Provider, the TSS Provider's Representative.

34.1.3 be deemed duly served:

- (i) if sent by pre-paid registered or recorded delivery post, 2 clear Business Days after posting; or

- (ii) if sent via facsimile transmission or personal delivery, on the day of issue of the relevant fax confirmation receipt or such personal delivery (as appropriate), unless that day is not a Business Day in which case it shall be deemed duly served on the next Business Day thereafter; or
- (iii) if sent via e-mail, the date of written acknowledgement by the Party to whom the notice was served.

35. CONSENT AND APPROVAL

35.1 The giving of any consent or approval by or on behalf of **tie** shall not in any way relieve the TSS Provider of any of its obligations under the Agreement or of its duty to ensure the correctness, accuracy or suitability of the matter or thing which is the subject of the consent or approval.

35.2 Failure by **tie** to disapprove or object to any matter or thing shall not prejudice its power subsequently to take action under the Agreement in connection therewith.

36. DISCRIMINATION

The TSS Provider shall not (and the TSS Provider shall insert a clause to this effect in each contract with any TSS Provider Party) unlawfully discriminate within the meaning and scope of the provisions of the Equal Pay Act 1970, the Sex Discrimination Act 1975, the Race Relations Act 1976, the Disability Discrimination Act 1995, the Employment Equality (Sexual Orientation) Regulations 2003 and the Employment Equality (Religion or Belief) Regulations 2003.

37. FURTHER ASSURANCE

Each Party shall at the reasonable request and cost of the other (save where it is expressly provided that the cost of such act or execution shall be for that party's account) do any act or execute any document that may be necessary to give full effect to this Agreement.

38. APPLICABLE LAW

38.1 This Agreement, any document completed or to be completed in accordance with its provisions and any matter arising from it or any such document shall be governed by and construed in accordance with Scots law.

38.2 Subject to Clause 26 (*Dispute Resolution Procedure*) of this Agreement, the Parties hereby irrevocably submit to the exclusive jurisdiction of the Court of Session in relation to this Agreement, any such document and any such matter.

39. VARIATIONS TO BE IN WRITING

No variation, or alteration of any of the provisions of this Agreement shall be effective unless it is in writing and signed by both Parties.

40. NO PARTNERSHIP OR AGENCY

40.1 Nothing in this Agreement shall be construed as creating a partnership between **tie** and the TSS Provider.

40.2 The TSS Provider shall not (and shall procure that the TSS Provider Parties shall not) act or purport to act as agent for **tie** in relation to any matter unless specifically authorised in writing under this Agreement by the TSS Provider shall not be entitled to bind **tie** in any way or to create any liability or cause of action against **tie** and shall

not hold itself out (and shall procure that no TSS Provider Party shall hold itself out) as having any such authority or power.

41. INVALID TERMS

41.1 If any term of this Agreement shall be held to any extent to be invalid, unlawful or unenforceable:

41.1.1 that term shall to that extent be deemed not to form part of this Agreement; and

41.1.2 the validity and enforceability of the remainder of this Agreement shall not be affected.

42. THIRD PARTY RIGHTS

Subject to any other express provision of this Agreement, a person who is not party to this Agreement shall have no right to enforce any term of this Agreement.

43. PARTNERSHIPS

43.1 If the TSS Provider is a partnership, the obligations of the TSS Provider under this Agreement are the joint and several obligations of all persons who are or become partners of the TSS Provider and their respective executors and representatives whomsoever as well as the firm and its whole stock, funds, assets and estate and such obligations shall subsist and remain in full place and effect notwithstanding any change or changes which may take place in the partnership of the TSS Provider whether by the assumption of a new partner or partners or by the bankruptcy, apparent insolvency or death of any individual partner.

IN WITNESS WHEREOF these presents on this and the preceding 51 pages together with Schedules One to Eight (inclusive) which are annexed and signed as relative hereto are executed as follows:

EXECUTED for and on behalf of **TIE LIMITED** at
on _____ 2005 by:

Director/Authorised Signatory	_____
Full Name	_____
Witness Signature	_____
Full Name	_____
Address	_____

EXECUTED for and on behalf of **TSS**
PROVIDER at

on _____ 2005 by:

Director/Authorised Signatory

Full Name

Witness Signature

Full Name

Address

**This is Schedule One referred to in the foregoing Agreement between
the Client and the TSS Provider**

SCHEDULE ONE

SCOPE OF SERVICES

1. GENERAL REQUIREMENTS

1.1 The TSS Provider shall make available to tie for the duration of the appointment the technical and commercial expertise and concomitant resource capacity to service and discharge the following functions:

1.1.1 primary responsibility for management and execution of all associated activity, individual tasks and deliverables including assessment, information assembly, advice, structuring and completion with regard to:

- Quality Assurance as set out in Section 2 of this Scope of Services;
- Environmental Compliance as set out in Section 4 of this Scope of Services;
- Safety as set out in Section 3 of this Scope of Services;
- Development and application of system acceptance criteria for trial running and entry into public service as set out in Section 5 of this Scope of Services;
- Technical development of a public transport integrated ticketing system and methodology as set out in Section 6 of this Scope of Services.

1.1.2 responsibility to provide tie with general technical and management support, advice, assistance and specific Deliverables and work product as may be required and commensurate with activities being undertaken during all phases of the Project with regard to:

- Land acquisition, compensation and undertakings as set out in Section 7 of this Scope of Services;
- Commercial matters as set out in Section 8 of this Scope of Services;
- Approvals as set out in Section 9 of this Scope of Services;
- Design related services and system integration as set out in Section 10 of this Scope of Services;
- Utilities and third party undertakings and agreements as set out in Section 11 of this Scope of Services;

- Heavy Rail Interface as set out in Section 12 of this Scope of Services;
 - Project planning support as set out in Section 13 of this Scope of Services;
 - Network Expansion as set out in Section 14 of this Scope of Services.
- 1.2 The TSS Provider shall have the requisite additional resourcing to deploy (on instructions from tie) to take responsibility for tasks (whether within the functions set out in Section 1.1 or different to these) involving the application of the TSS Provider's core disciplines and expertise in both lead management and execution and support roles. The TSS Provider shall make available such additional resourcing as instructed by tie available to commence provision of relevant Services within 10 working days of tie's written request, the make up of such resource to be subject to the prior consent of tie (not to be unreasonably withheld or delayed). Whenever feasible, tie will provide 4 weeks' notice of a requirement for TSS Provider to stand down and/or demobilise resources.
- 1.3 The TSS Provider shall regularly interrogate the Master Project Programme and the programmes of other tie advisors to confirm to tie that programmes are realistic, that resources employed are adequate and that the progress of individual contracts and commissions is meeting the requirements of the Master Project Programme and tie's overall procurement and Project delivery strategy.
- 1.4 The TSS Provider shall be responsible at all times for providing tie with appropriate technical and commercial support as requested by tie with regard to dispute and claims management and resolution. The TSS Provider will report to tie on the validity and quantum of any claim and advise on its effect on Master Project Programme.
- 1.5 TSS shall provide technical assistance in connection with the parliamentary process and passage of the Tram Bills to Royal Assent.
- 1.6 The TSS Provider shall provide tie with specialist advice and documentation review in relation to procurement activities for the Edinburgh Tram Network as required, including:
- preparation of tender documentation;
 - review of compatibility of tenders with the Design Manual, Technical Specifications and aspirational objectives of City of Edinburgh Council;
 - as instructed, answering tenderers queries through clarification on technical issues;
 - attending tender meetings, presentations and negotiations;
 - leading the technical review and evaluation of tenders;
 - review of programme proposals and provision of variance reports;
 - review of cost plans proposals and provision of variance reports;
- review of system integration proposals.

- 1.7 The TSS Provider shall provide project wide support to **tie**'s Project team. Key personnel of the TSS Provider are required to liaise regularly with **tie** and other advisors for the benefit of the Project and the TSS Provider shall co-operate and work with all other **tie** advisors on a close and proactive basis. This function shall ensure that Project execution and programming are aligned with budgetary requirements. Appendix 2 to this document sets out a non-exhaustive list of key Deliverables for the TSS Provider.

2. QUALITY ASSURANCE

- 2.1 The TSS Provider shall be responsible to **tie** for developing an overall quality management strategy with all associated plans to guide Project implementation. In consultation with **tie** and **tie's** other advisors, the TSS Provider shall develop a consolidated quality management plan which shall be used by all parties to manage and review project quality. The plan will include recommendations for strategic reviews and quality audits to provide a robust scheme to meet technical and commercial objectives. The quality management plan shall include proposals for a review of all parties' deliverables, both in terms of quality compliance and best practice and of their acceptability in relation to other work streams, in particular the development of System-Wide Preliminary Design Requirements, the detailed design and the Technical Specifications prepared by the SDS Provider.
- 2.2 The TSS Provider shall take the lead to co-ordinate the SDS Provider, the Operator, and **tie's** other advisors in the undertaking of comparative technology reviews so as to identify the most appropriate ways of delivering the functionality required of the Edinburgh Tram Network and its component parts. At Preliminary Design Phase, these reviews shall include:
- a scoping study outlining the areas to be investigated;
 - a programme outlining the latest date for modification of any specifications within the overall programme together with interaction of activities; and
 - reports and presentations analysing and assessing the options and justifying the final selections of technologies in terms of time, cost, quality, safety, risk and maintainability.
- 2.3 During the Construction and Installation Phase, the TSS Provider shall carry out sufficient audits of the Infraco, Tram Supplier and the Utilities Diversions Contractor to ensure compliance with the approved quality assurance plans. The TSS Provider shall report on a regular (to be agreed) basis on compliance with the quality assurance plans, highlighting any non-conformance, agreeing corrective actions and auditing progress on corrective actions. The TSS Provider shall work closely with the Operator in respect of impacts on operational issues.
- 2.4 The TSS Provider shall audit and report to **tie** on the development by the Infraco and Tram Supplier of procedures and acceptance criteria for successful factory acceptance tests.
- 2.5 The TSS Provider shall develop and manage an appropriate methodology for reporting and certifying that testing, trialling and commissioning has been successfully executed and/or for resolving non compliances.
- 2.6 The TSS Provider shall audit the trialling and commissioning of the SDS-JRC Modelling Suite for approval by **tie** on or before 31 March 2006 pursuant to applicable approval process and support Transport Edinburgh Limited regarding modelling outcomes.

- 2.7 The TSS Provider shall ensure that all aspects of the Project are conducted under a co-ordinated quality management regime such that:
- the integrity and intellectual property in all Project technical documentation relating to change is properly safeguarded;
 - any and all proposals for change are recorded by the TSS Provider and controlled in the Change Control Register;
 - the most up to date versions of documents, drawings and specifications are readily available for all relevant authorised parties to view and use through a centrally hosted appropriate medium;
 - all agreed changes are recorded and communicated timeously to the appropriate parties;
 - software and the associated release notes are recorded and a copy of that software release is securely held centrally; and
 - operational and safety implications are assessed, reported and approved by **tie**.
- 2.8 The TSS Provider shall administer the Topics Register. The Topics Register shall be formulated as the central project register of all known issues relating to the design, construction, testing and commissioning, operation and maintenance of the Edinburgh Tram Network such that:
- 2.8.1 the Topics Register shall record and prioritise all issues as they arise that require to be specifically addressed. TSS Provider shall amend the record as appropriate to track the manner in which recorded issues have been resolved to **tie's** satisfaction. The TSS Provider is required to add to, or respond to issues as appropriate and lead and co-ordinate regular review meetings at which the Topics Register will be updated and actions assigned; and
- 2.8.2 the TSS Provider shall provide **tie** on a quarterly basis with an ongoing compilation of a 'project lessons learned' and best practice log (for the Project as well as input to any future development and network expansion). This shall form a living appendix to the Topics Register and the TSS Provider shall advise **tie** on its application to the Project on an ongoing basis.
- 2.9 The TSS Provider shall monitor and audit comprehensive production by the Infraco (and its E&M System Component suppliers), the Tram Supplier and the Operator of appropriate training plans for operations and maintenance staff (including manuals) and trial running plans.
- 2.10 The TSS Provider shall provide **tie**, as instructed, with a completion report audit for each significant work package delivered by the SDS Provider and the Infraco and all tram supply made by the Tram Supplier.
- 2.11 The TSS Provider shall review the Infraco's, the Tram Supplier's and the Operator's payment applications upon completion of relevant payment triggers or milestones and certify that in its opinion all documentation and relevant data has been presented to **tie** and that the payment trigger or milestone has been duly achieved.
- 2.12 The TSS Provider shall audit the Tram Supplier's operation, maintenance and safety manuals and documentation for compliance with the Functional Requirements Specification, the System Integration Plan and the Safety Management Plan.

- 2.13 The TSS Provider shall manage all matters relating to its role under this Agreement as planning supervisor for the purpose of CDM regulations.
- 2.14 The TSS Provider shall review and report to **tie** in relation to the SDS Provider's System-Wide Preliminary Design Requirements compatibility with the environmental requirements of the Project, in particular existing environmental impact assessments and recommended mitigation measures. The TSS Provider shall monitor Infraco compliance with environmental obligations during the Construction and Installation Phase.
- 2.15 As instructed, the TSS Provider shall support **tie**, Transport Edinburgh Limited (or **tie's** assignee) in certain aspects of the management of **tie's** arrangements with the Operator pursuant to the DPOFA.

3. SAFETY

- 3.1 The TSS Provider shall be responsible for developing a safety management procedure for **tie** and putting in place all associated plans:
- 3.1.1 develop and maintain the initial safety justification strategy and documentation as prepared by the SDS Provider, Infraco, the Operator and **tie**, using Goal Structured Notation (GSN), and define the proposed arguments and the required supporting evidence to be provided. The TSS Provider shall proceed to undertake comprehensive safety analysis to allow the TSS Provider to develop the Safety Management Plan concurrent with the design to prove that the Edinburgh Tram Network is acceptably safe;
 - 3.1.2 utilising information provided by all relevant parties produce a migration plan for the Safety Management Plan that shows constructability and commissioning as well as user training and compliance with programmed dates for entering operational and public service;
 - 3.1.3 audit that the SDS Provider has undertaken such safety analysis that will allow development of the Safety Justification Document concurrent with the detailed design to prove that the system once constructed and operational will be acceptably safe;
 - 3.1.4 audit and review the Testing and Commissioning Plan and provide observation, monitor progress and advise on safety and quality implications throughout the Construction and Installation Phase;
 - 3.1.5 ensure that there is a co-ordinated approach between the Infraco and the Operator to managing safety throughout the Construction and Installation Phase; and
 - 3.1.6 support, co-ordinate and conclude early safety engineering activities such that 'safety' requirements are identified, assessed for risk and a hazard log initiated.
- 3.2 The TSS Provider shall ensure that there is a co-ordinated approach to managing safety during the Commissioning and Defects Resolution Phase. This shall include the production by the TSS Provider (and agreement with Infraco, SDS Provider, Operator and **tie**) of a pre-operational safety management strategy before commencement of trial running.
- 3.3 The TSS Provider from appointment onwards shall act as the planning supervisor in accordance with CDM requirements throughout all phases of the Project. This shall