

DATED

2007

(1) tie LIMITED

- and -

(2) ◆

AGREEMENT

relating to

**SELECTION FOR APPOINTMENT AS
PREFERRED BIDDER**

DLA Piper Scotland LLP Collins House,
Rutland Square Edinburgh EH1 2AA
Tel: +44 (0) 8700 111 111 Fax: +44 (0)131
242 5562

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BETWEEN

(1) **tie LIMITED** (as agent for the City of Edinburgh Council "**CEC**"), a company incorporated with registration number SC230949, and having its registered office at City Chambers, Edinburgh, Midlothian EH1 1YJ

(2) ("**Bidder**") ♦

WHEREAS

(A) In the Invitation to Negotiate ("**ITN**") dated 3 October 2006, **tie** formally invited tenders for a comprehensive or turnkey contract in relation to the Edinburgh tram network, trams and related infrastructure ("**Infraco Contract**").

(B) Following a negotiated procedure, **tie** has invited final technical, legal, commercial and financial offers ("**Submissions**") from the two bidders who responded to the ITN ("**Bidders**"), **tie** intends, having evaluated the Submissions in accordance with the methodology and those criteria described in the ITN, to select one Bidder for appointment as the preferred bidder ("**PB**") in relation to the Infraco Contract subject always to formal approval of that selection by the CEC. The contents of the Submissions now form the basis of the Draft Deal for each of the Bidders.

(C) This Agreement sets out the terms on which the Bidder will accept appointment as PB, should this be **tie's** decision.

IT IS HEREBY AGREED

1. DEFINITIONS

In this agreement, the following capitalised expressions shall have the following meanings:

"**Contract Terms**" means those contract terms finalised with the Bidder;

"**Draft Deal**" means the draft contract package including documentation which has been provided to the Bidder by **tie** and taken into account by the detailed contents of the Submission. The following documents more particularly comprise the Draft Deal:

- 1. this Agreement;

2. the Contract Terms and Schedules [◆] to that Contract;
3. the Employer's Requirements;
4. the Infraco Proposals; and
5. the Price;
6. the PB Finalisation Programme

"Employer's Requirements" means those requirements supplied to the Bidder by **tie** [*with reference* [◆]];

"Infraco Proposals" means the proposal by the Bidder to deliver the Edinburgh Tram Network in accordance with the Contract Terms, Contract Schedules and Employer's Requirements

"PB Finalisation Issues" has the meaning given to it at clause 3.1;

"PB Finalisation Programme" means the programme set out at Appendix 2 to this Agreement, showing the methodology by under which **tie** and the Bidder will use reasonable endeavours to resolve the PB Finalisation Issues

"Preferred Bidder Period" means the period between selection of a Preferred Bidder and award of the Infraco Contract and concurrent novation of SDS and TRamco to Infraco.

"Price" means that financial proposal and all associated information submitted to **tie** by the Bidder as part of its Submission as set out in the Draft Deal Package;

"SDS" means Parsons Brinckerhoff Limited, a company registered with number 2554514 and having its registered office at Amber Court, William Armstrong Drive, Newcastle Business Park, Newcastle Upon Tyne NE4 7YQ, engaged by **tie** Limited under a contract dated 19 September 2005;

"Subcontractors" means collectively SDS and Tramco;

"Tramco" means CAF, selected by **tie** as preferred bidder for the award of the Tramco Contract;

"Tramco Contract" means the contract to be entered into by **tie** with Tramco substantially in the form reviewed by the Bidder and to be novated to the Bidder;

2. DRAFT DEAL

- 2.1 The Bidder agrees and confirms that the Draft Deal constitutes the entirety of its Infraco Proposal and, therefore, the terms on which it will be appointed as PB, should this be **tie's** decision.
- 2.2 Subject only to clause 3, the Bidder accordingly agrees that any appointment of it as PB by **tie** is solely on the basis that the Bidder adheres in all respects to the terms of the Draft Deal, and that the Bidder will neither require, propose or procure circumstances to cause any change to the terms of any aspect of the Draft Deal or to any other matter relating to the Submission, the Infraco Contract, the SDS Contract the Tramco Contract other than to resolve the PB Finalisation Issues.

3. PB FINALISATION

- 3.1 Without prejudice to the generality of clause 2.2, **tie** and the Bidder acknowledge and agree that there are a limited number of matters contained in the Draft Deal, or otherwise related to the Submission or the Infraco Contract, which must be resolved before **tie** seek CEC approval to enter into the Infraco Contract with PB ("**PB Finalisation Issues**"). The PB Finalisation Issues are more particularly set out at Appendix 1 to this Agreement.
- 3.2 Should the Bidder be appointed by **tie** as PB, **tie** and the Bidder will use best endeavours and act in good faith to agree the PB Finalisation Issues in accordance with the PB Finalisation Programme.
- 3.3 **tie** will amend the Draft Deal at its discretion to reflect (but only to reflect) agreements reached between **tie** and PB in relation to the PB Finalisation Issues pursuant to this clause 3.

4. STATUS AS PREFERRED BIDDER

- 4.1 Should **tie** appoint the Bidder as PB, **tie** will have the right (without prejudice to any other right that **tie** might have under any contract, pursuant to the ITN or at law as a result of any of the matters referred to in this clause 4.1) to terminate the Bidder's status without notice or compensation as PB if:
- 4.1.1 the Bidder commits any breach of the terms of this Agreement;

- 4.1.2 the Bidder and **tie** are unable to agree, to the satisfaction of **tie**, any one or more of the PB Finalisation Issues in accordance with the PB Finalisation Programme; or
- 4.1.3 the Bidder proposes, requires any change or procures circumstances which result in any change to any aspect of the Draft Deal or to any other matter related to its Submission or the Infraco Contract which is not a PB Finalisation Issue.
- 4.1.4 progress against the PB finalisation Programme is such that in **tie**'s opinion the PB Finalisation Issues will not be resolved such that a Contract Award and concurrent novation of Tramco and SDS is unlikely to take place by 28th January 2008
- 4.1.5 the Bidder and **tie** are unable to agree the final terms of an option for Phase 1b on terms acceptable to **tie**
- 4.2 **tie** shall not be obliged to, but at its sole discretion may, award a contract to the PB where
 - 4.2.1 The estimated infrastructure works cost for Phase 1a as finalised during the Preferred Bidder Period exceeds or is forecast to exceed £218.5m inclusive of the Infraco Contract Price
 - 4.2.2 The estimated infrastructure works of Phase 1b as finalised during the Preferred Bidder Period exceeds or is forecast to exceeds £54.7m inclusive of the Infraco Contract Price
 - 4.2.3 The estimated total project cost for phase 1b exceeds £500m, as estimated by **tie**
 - 4.2.4 The City Of Edinburgh Council do not accept **tie**'s contract award recommendation
 - 4.2.5 Transport Scotland do not approve **tie**'s Business Case for the Project
 - 4.2.6 The Scottish Executive do not provide adequate funding for the Project
- 4.3 Should **tie** decide not to appoint the Bidder as PB, the Bidder agrees to remain committed as a Reserve Bidder. Accordingly, the Draft Deal will remain the basis of

an offer by the Bidder capable of acceptance by written notice by **tie** to the Bidder until the end of March 2008. Following any such notice, the Bidder will at that point assume the status of Preferred Bidder, and the terms of this Agreement will apply in relation to the relevant Draft Deal

- 4.4 Tie reserves the right to negotiate with the Reserve Bidder at any time prior to award of the Infraco Contract.
- 4.5 The Bidder accepts and reconfirms its agreement to comply with, all of the terms of the ITN.

5. NOVATION

- 5.1 The Bidder accepts and acknowledges that, should **tie** appoint it as PB, it is required to and shall enter into novation agreements with **tie**, Tramco and SDS to novate the sub-contracts to the Bidder.
- 5.2 Without prejudice to any other specific rights of **tie** in relation to these novations at law, under any contract or as set out in the ITN and the relevant novation agreements, the Bidder will use all reasonable endeavours to cooperate with **tie** in relation to these novations and to ensure that they are fully effective.
- 5.3 The issues to be resolved to enable novation of Tramco and SDS are as explicitly set out in the Draft Deal

6. VALUE ENGINEERING AND MANAGEMENT OF SDS

- 6.1 Without prejudice to any other obligation of the Bidder under the ITN, or the Infraco Contract or any other document related to it the Bidder will, if **tie** appoints it as PB, use all reasonable endeavours to cooperate with **tie** in relation to Value Engineering and to support and deliver the cost reductions “Value Engineering Items” listed in the Draft Deal Documentation to the satisfaction of **tie**.
- 6.2 The Bidder will participate in the management of the SDS provider to deliver the design outputs (Design Deliverables), including changes to accommodate Value Engineering savings and including:-
 - 6.2.1 Attending management meetings with **tie** and SDS

- 6.2.2 Review progress on design delivery and to work with tie and SDS to overcome issues impeding progress whilst maintaining alignment with the Bidder's construction programme
- 6.2.3 To advise tie on the prioritisation of SDS design and to advise details of designs that are not required by the Bidder
- 6.2.4 Assist tie in the validation of the quality of SDS designs produced

7. DUE DILIGENCE

- 7.1 The Bidder agrees to conduct due diligence in respect of the following:-
 - 7.1.1 The Deliverables provided under the SDS contract in order to a) confirm acceptance of the system performance requirements set out in the Employer's Requirements and b) confirm the acceptability in terms of quality of the SDS Deliverables produced. This due diligence exercise is to be concluded within the durations set out in the PB Finalisation Programme.

8. PREFERRED BIDDER PROGRAMME AND REQUIREMENTS

- 8.1 The Bidder agrees to deliver resolution of the PB Finalisation Issues in accordance with the PB Finalisation Programme.

9. DISPUTE RESOLUTION

- 9.1 In the event of any Dispute in relation to this Agreement the Chief Executives of the respective Parties will meet to resolve the issue.
- 9.2 This Agreement shall be governed by and construed in accordance with Scottish law and any dispute arising between the Parties shall be subject to the non exclusive jurisdiction of the Scottish Courts.

EXECUTED for and on behalf of tie **LIMITED** at

on the ◆ 2007

Authorised signatory:

Full name:

EXECUTED for and on behalf of [◆] at

on the ◆ 2007

Authorised signatory:

Full name:

APPENDIX 1

PB Finalisation Issues

[APPENDIX 2

PB Finalisation Programme]