

[Insert tie logo]

(1) TIE LIMITED

- and -

(2) [MUDEFA CONTRACTOR]

**MULTI-UTILITIES
DIVERSION FRAMEWORK
AGREEMENT**

relating to
the Edinburgh Tram Network

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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 and permitted assignees; and
- (2) [◆] a company incorporated under the Companies Act with registration number [◆] and having its registered office at [◆] ("**MUDFA Contractor**") which expression shall include its personal representatives, successors and permitted assignees.

WHEREAS

- A. **tie** requires a contractor to carry out and complete the MUDFA Works (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 30 September 2005 with reference 2005 S 189-186063, **tie** invited expressions of interest from appropriately qualified parties to carry out and complete the MUDFA Works.
- C. By a competitive procurement process conducted in accordance with **tie's** internal procedures and in accordance with law, **tie** has selected the MUDFA Contractor to carry out and complete the MUDFA Works in accordance with this Agreement.
- D. **tie** has issued a Letter of Appointment (as hereinafter defined) in response to the MUDFA Contractor's Formal Offer (as hereinafter defined).

NOW IT IS HEREBY AGREED AS FOLLOWS:

1. DEFINITIONS AND INTERPRETATION

- 1.1 Unless otherwise defined in this Clause 1.1, in this Agreement (including the recitals and the Schedules), save as the context otherwise requires, the following words and expressions shall have the meanings hereby ascribed to them:

"**Access Permit**" has the meaning given in paragraph 3.4.1 of Schedule 2 (*Technical Requirements*);

"**Access Permit Form**" has the meaning given in paragraph 3.4.2 of Schedule 2 (*Technical Requirements*);

"**Additional Insurance**" has the meaning given in Clause 55.17;

"**Advance Works**" means the works which the MUDFA Contractor may be required by tie to carry out in accordance with paragraph 2.50 of Schedule 1 (*Scope of Works and Services*);

"**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;

"**Affiliate**" means in relation to any organisation:

- (a) any person having any shares in or membership of that organisation, whether directly, through nominees or through shares in or membership of any other person; and
- (b) any person in which that organisation holds shares or of which that organisation is a member whether directly, through nominees or through shares in or membership of any other person;

"**Agreement**" means Clauses 1 to 84 (inclusive) together with the Schedules, the Formal Offer and the Letter of Appointment all as may be amended from time to time in accordance with this Agreement;

"**Anticipated Final Account**" or "**AFA**" has the meaning given in Clause 48.3;

"**Apparatus**" means the BT Apparatus, the Easynet Apparatus, the NTL Apparatus, the Scottish Water Apparatus, the Scotland Gas Networks Apparatus, the Thus Apparatus, [the BAA Apparatus], [the Scottish Power Apparatus], [Forth Ports Apparatus], [the GEO Networks Apparatus] [and the Telewest Apparatus] and any other equipment, apparatus or other devices (above or below ground and any structure for the lodging within that structure of equipment or apparatus or any structure required to maintain or afford access) constructed, installed or moved by the MUDFA Contractor or otherwise involved in the carrying out of the MUDFA Works;

"**Approval Bodies**" means any Relevant Authorities, Utilities, planning authorities, roads authorities, BAA, Network Rail and any other parties who are to issue Consents which may be required for the construction and completion of the MUDFA Works;

"**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;

"**BAA Apparatus**" means any equipment, apparatus or other devices belonging to, used by or maintained by BAA above or below ground and includes any structure for the lodging within that structure of equipment or apparatus or any structure required to maintain or afford access whether or not forming part of the MUDFA Works;

"**BAA Works**" means any works to be carried out by the MUDFA Contractor in respect of BAA Apparatus which are described in Part 4 of Schedule 1 (*Scope of Works and Services*);

"**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 MUDFA Contractor 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;

"**Bills of Quantities**" means the priced and completed bills of quantities (including preliminaries) set out in Schedule 4 (*Bills of Quantities*);

"**BT**" means British Telecommunications PLC, a company incorporated under the Companies Act with registered number 1800000 and having its registered office at 81 Newgate Street, London EC1A 7AJ;

"**BT Apparatus**" means electronic communications apparatus as defined in paragraph 1(1) of Schedule 2 (the Electronic Communications Code) of the Telecommunications Act 1984 (as amended or extended) belonging to, used by or maintained by BT above or below ground and for the avoidance of doubt includes any structure for the lodging within that structure of equipment or apparatus or any structure required to maintain or afford access whether or not forming part of the MUDFA Works;

"**BT Specification LM550 (Issue 6)**" means the specification of the same name as the same may be amended, updated or replaced from time to time;

"BT Works" means any works to be carried out by the MUDFA Contractor in respect of BT Apparatus which are described in Part 4 of Schedule 1 (*Scope of Works and Services*);

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

"CAA" means the Civil Aviation Authority;

"CEC" means the City of Edinburgh Council;

"CDM Regulations" or **"CDM"** means the Construction (Design and Management) Regulations 1994;

"Certificate of Substantial Completion" means any certificate issued under Clause 40 (*Notification of Substantial Completion*);

"Change Control Register" means the change control register to be maintained by the MUDFA Contractor in accordance with Clause 46.17;

"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 Effective Date of:

- (a) Legislation, excluding the Tram Bills and 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;
 - (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 Union;
- (b) any Guidance, (excluding Guidance which on the Effective Date 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;

"Coal Authority" means a body established under the Coal Industry Act 1994 and having its principal office at 200 Lichfield Lane, Mansfield, Nottinghamshire, NG18 4RG;

"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;

"Communications Plan" means the plan to be prepared by the MUDFA Contractor in accordance with paragraph 2.45 of Schedule 1 (*Scope of Works and Services*);

"Confidential Information" means any information which has been designated as confidential by either party in writing 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 process, 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;

"Consents" means without limitation all permissions, consents, approvals, non-objections, certificates, permits, licences, agreements, statutory agreements and authorisations, planning permissions, listed building consents, approval of reserved matters, conservation areas consent, temporary traffic regulation orders, wayleaves, 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 provided that, subject to Clause 9.5, Consents shall not include any Land Consents;

"Construction Panel" has the meaning given to it in paragraph 19.1 of Schedule 9 (*Dispute Resolution Procedure*);

"Construction Programme" means the construction programme set out in Part B of Schedule 8 (*Programme*) as developed and extended in accordance with the terms of this Agreement;

"Construction Services" means the works and services to be provided by the MUDFA Contractor as described in Part 3 of Schedule 1 (*Scope of Works and Services*);

"Construction Works" means the the BT Works, the Easynet Works, the NTL Works, the Scotland Gas Networks Works, the Scottish Water Works, the Thus Works, [BAA Works], [the Forth Ports Works], [the GEO Works], [the Scottish Power Works], [the Telewest Works] and any other works to be carried out by the MUDFA Contractor in terms of this Agreement;

"Construction Phase" means the period shown in the Construction Programme during which the MUDFA Contractor shall carry out and complete the Construction Services and the Construction Works;

"Contract Price" means the sum to be ascertained and paid in accordance with the provisions hereinafter contained for the construction and completion of the MUDFA Works in accordance with the Agreement;

"Date For Completion" means the date for completion of the whole of the MUDFA Works stated in the Construction Programme as may be amended or extended from time to time in accordance with this Agreement;

"DDA" means the Disability Discrimination Act 1995;

"Defects Correction Certificate" means a certificate issued under Clause 44.1;

"Defects Correction Period" means the period of five years calculated from the date on which the MUDFA Contractor becomes entitled to the last Certificate of Substantial Completion for the MUDFA Works or part thereof;

"Deliverables" means all documents, information, reports, diagrams, records, method statements, risk assessments, manuals, schedules, databases, photographs, formulae, plans, designs, specifications, drawings, details, calculations, models and simulations, the outputs and reports based on any models, programmes and all other material created and/or provided by the MUDFA Contractor (and/or any MUDFA

Contractor Parties or any other third party) in the performance of the MUDFA Works;

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

"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 MUDFA Contractor 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 9 (*Dispute Resolution Procedure*);

"Easynet" means Easynet Telecommunications Limited, a company incorporated under the Companies Act with registered number 02883980 and having its registered office at 44-46 Whitfield Street, London W1T 2RJ;

"Easynet Apparatus" means any equipment, apparatus or other devices belonging to, used by or maintained by Easynet above or below ground and includes any structure for the lodging within that structure of equipment or apparatus or any structure required to maintain or afford access whether or not forming part of the MUDFA Works;

"Easynet Works" means any works to be carried out by the MUDFA Contractor in respect of Easynet Apparatus which are described in Part 4 of Schedule 1 (*Scope of Works and Services*);

"Edinburgh Tram Network" means Line One and Line Two of the Edinburgh Tram Network as described in the Tram Bills, and as may be amended from time to time together with any modification, line extension, spur, interconnection, and any additional line;

"Effective Date" means the last date of execution of this Agreement;

"Enabling Works" means the works which the MUDFA Contractor may be required by **tie** to carry out in accordance with paragraph 2.51 of Schedule 1 (*Scope of Works and Services*);

"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 MUDFA Contractor pursuant to 47.3;

"Final Account" or **"FA"** means the final account as agreed by **tie** in accordance with Clause 49.6;

"Final Account Certificate" shall have the meaning given in Clause 49.6;

"Final Buildability Report" means the report to be prepared by the MUDFA Contractor and submitted for approval by **tie** in accordance with paragraph 2.33 of Schedule 1 (*Scope of Works and Services*);

"Financial Panel" has the meaning given to it in paragraph 19.1 of Schedule 9 (*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 MUDFA Contractor or any MUDFA Contractor Parties; or
- (c) pressure waves caused by devices travelling at supersonic speeds; or
- (d) a natural disaster.

"Formal Offer" means the tender for the MUDFA Works issued by the MUDFA Contractor and dated [◆];

"Forth Ports" means Forth Ports PLC a company incorporated under the Companies Acts with registered number SC134741 and having its registered office at 1 Prince of Wales Dock, Leith, Edinburgh EH6 7DX;

["Forth Ports Apparatus" means any equipment, apparatus or other devices belonging to, used by or maintained by Forth Ports above or below ground and includes any structure for the lodging within that structure of equipment or apparatus or any structure required to maintain or afford access whether or not forming part of the MUDFA Works;]

"Forth Ports Site" means those areas of ground in the City of Edinburgh identified in the parliamentary drawings allocated sheet numbers 6 to 12 inclusive as annexed to the Edinburgh Tram (Line One) Bill as either limits of land to be acquired or used or limits of deviation and which are as at the Effective Date within the ownership of Forth Ports;

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

["GEO Apparatus" means electronic communications apparatus as defined in paragraph 1(1) of Schedule 2 (the Electronic Communications Code) of the Telecommunications Act 1984 (as amended or extended) belonging to, used by or maintained by GEO Networks above or below ground and for the avoidance of doubt includes any structure for the lodging within that structure of equipment or apparatus or any structure required to maintain or afford access whether or not forming part of the MUDFA Works;]

["GEO Networks" means GEO Networks Limited, a company incorporated under the Companies Act with registered number 05615269 and having its registered office at 22 St Peg Close, Cleckheaton, West Yorkshire BD19 3SJ;]

["GEO Works" means any works to be carried out by the MUDFA Contractor in respect of GEO Apparatus which are described in Part 4 of Schedule 1 (*Scope of Works and Services*);]

"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 MUDFA Works, and seeking in good faith to comply with its contractual obligations and all duties owed by it;

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

"Historic Scotland" means an agency within the Scottish Executive Education Department which was established in April 1991 and having its principal office at Longmere House, Salisbury Place, Edinburgh, EH9 1SH;

"Indemnified Parties" has the meaning given to it in Clause 56.1;

"Indirect Losses" means any damage, cost third party claim, expense or loss incurred by a party to this Agreement as a consequence of a breach of this Agreement or a negligent act or omission which relates to loss of profits or revenue, loss of use, loss of production or output, interruption or loss of business or business opportunity or other consequential or indirect loss;

"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;

"Initial Buildability Report" means the report to be prepared by the MUDFA Contractor in accordance with paragraph 2.11 of Schedule 1 (*Scope of Works and Services*);

"Insolvency Event" means any of the following events:

- (a) the MUDFA Contractor is unable to pay its debts as they fall due or is insolvent or admits in writing inability to pay its debts as they fall due;
- (b) the MUDFA Contractor suspends for a period of two months making payments on all or any class of its debts or a moratorium is declared by the MUDFA Contractor in respect of its indebtedness;
- (c) the MUDFA Contractor ceases business or announces an intention to do so;

- (d) the following are entered into:
 - (i) a voluntary arrangement (other than a solvent one) for a composition of debts of the MUDFA Contractor;
 - (ii) a scheme of arrangement in respect of the MUDFA Contractor 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 MUDFA Contractor's creditors;
- (e) either of the following:
 - (i) the winding-up of the MUDFA Contractor (including passing a shareholders' resolution or the presentation of a petition by the MUDFA Contractor for the purpose of winding up the MUDFA Contractor); or
 - (ii) its administration (including where an application is made by the MUDFA Contractor, or petition is presented by the MUDFA Contractor for or any meeting of its directors or members resolves to make an application for an administration order);
- (f) an order for the winding-up or administration of the MUDFA Contractor is made;
- (g) any liquidator, judicial custodian, receiver, administrative receiver, administrator or the like is appointed in respect of the MUDFA Contractor or any material part of the MUDFA Contractor's assets;
- (h) 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 MUDFA Contractor by or on behalf of any creditor or encumbrancer of the MUDFA Contractor;
- (i) anything analogous to any of the events mentioned in paragraphs (a) to (i) above occurs in relation to the MUDFA Contractor under the law of any relevant jurisdiction; or
- (j) in the event that tie has made a demand pursuant to the performance bond for due, proper and complete performance of any of the MUDFA Contractor's

obligations, including indemnification against liabilities incurred by **tie** by reason of the MUDFA Contractor's default under this Agreement and, in the opinion of **tie** (acting reasonably), no substantive action in response to such demand has been taken within a period of 10 Business Days of the date of such demand. For the avoidance of doubt, this provision creates no requirement on **tie** to make such demand prior to any decision by **tie** on the operation of Clause 57 (*Default of MUDFA Contractor*);

"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, know-how, 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;

"Interim Certificate" shall have the meaning given in Clause 49.3;

"Internal Resolution Procedure" means the procedure described in paragraphs 10 and 11 of Schedule 9 (*Dispute Resolution Procedure*);

"Key Personnel" means those staff identified as key personnel of the MUDFA Contractor and/or any MUDFA Contractor Parties in Schedule 12 (*Key Personnel*);

"Land Consents" means all licences to occupy land, wayleaves, temporary traffic regulation orders and any other licences, permissions, rights of access and related consents;

"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 9 (*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 and any bye-laws of any local or other statutory authority;

"Letter of Appointment" means the letter from **tie** to the MUDFA Contractor dated [◆] accepting the MUDFA Contractor's Formal Offer;

"Longstop Date" means [27 April 2008 - to be checked against Programme];

"MUDFA Contractor Change" means a change proposed by the MUDFA Contractor in accordance with Clause 46.15 and approved by **tie** in accordance with Clause 46 (*Changes*);

"MUDFA Contractor Default" means the events set out in Clause 57.1;

"MUDFA Contractor's Equipment" means all appliances or things of whatsoever nature required in or about the construction and completion of the MUDFA Works but does not include materials or other things intended to form or forming part of the MUDFA Works;

"MUDFA Contractor IPR" means:

- (a) all Intellectual Property Rights which the MUDFA Contractor can demonstrate by documentary evidence were already existing and owned by or licensed to the MUDFA Contractor prior to the Effective Date; and
- (b) any modifications or developments of any of the Intellectual Property Rights referred to in (a) above which are generic in nature and not specific to the performance of the MUDFA Works;

"MUDFA Contractor Party" means each and any of the MUDFA Contractor's employees, directors, officers, agents and contractors and its or their sub-contractors (of any tier) including Sub-Contractors and shall include its or their directors, officers

and employees as they are involved in relation to the MUDFA Works and "MUDFA Contractor Parties" shall be construed accordingly;

"MUDFA Contractor's Representative" has the meaning given in Clause 15.2;

"MUDFA Works" means as the context requires, all or any of the works to be constructed and completed and/or services to be provided by the MUDFA Contractor in accordance with the Agreement. This shall include any Temporary Works, the Pre-Construction Services, the Construction Services, the Construction Works, the Risk Services, the Stakeholder Services, the provision of accommodation and vehicle and/or all other obligations which the MUDFA Contractor is required to comply with and which are set out in this Agreement;

"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 16 of Schedule 9 (*Dispute Resolution Procedure*);

"Notification" has the meaning given in paragraph 10.1 of Schedule 9 (*Dispute Resolution Procedure*);

"NTL" means NTL Group and NTL National on a joint and several basis;

"NTL Apparatus" means any equipment, apparatus or other devices belonging to or maintained by NTL Group or NTL National above or below ground and includes any structure for the lodging within that structure of equipment or apparatus or any structure required to maintain or afford access whether or not forming part of the MUDFA Works;

"NTL Works" any works to be carried out by the MUDFA Contractor in respect of NTL Apparatus which are described in Part 4 of Schedule 1 (*Scope of Works and Services*);

"NTL Group" means NTL Group Limited, a company incorporated under the Companies Act with registered number 02586701 and having its registered office at NTL House, Bartley Wood Business Park, Hampshire RG27 9UP;

"**NTL National**" means NTL National Networks Limited, a wholly owned subsidiary of NTL Group, incorporated under the Companies Act with registered number 05174655 and having its registered office at NTL House, Bartley Wood Business Park, Hampshire RG27 9UP;

"**OCIP Insurances**" means the insurances referred to in Clause 56.14, which shall be notified to the MUDFA Contractor from time to time;

"**Open Book Basis**" means the availability and disclosure (consistent with operation of Clause 68 (*Audit*) of all underlying data and calculations used by the MUDFA Contractor to create and justify costings and financial analysis presented to **tie**;

"**Panels**" has the meaning given to it in paragraph 19 of Schedule 9 (*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 a party to this Agreement and Parties shall be construed accordingly;

"**Permits to Work**" means the permits to work issued by **tie** in accordance with paragraph 3.5 of Schedule 2 (*Technical Requirements*);

"**PPE**" means personal protective equipment;

"**Preambles**" means the preambles set out within Schedule 4 (*Bills of Quantities*);

"**Pre-Construction Completion Certificate**" means the completion certificate to be issued by **tie** in accordance with Clause 8.3;

"**Pre-Construction Deliverables**" means the specific deliverables listed in paragraph 2.52 of Schedule 1 (*Scope of Works and Services*);

"**Pre-Construction Phase**" means the period shown in the Pre-Construction Programme during which the MUDFA Contractor shall carry out and complete the Pre-Construction Services;

"Pre-Construction Programme" means the pre-construction programme set out in Part A of Schedule 8 (*Programme*) as developed and extended in accordance with this Agreement;

"Pre-Construction Services" means the works and services to be provided by the MUDFA Contractor as described in Part 2 of Schedule 1 (*Scope of Works and Services*);

"Prime Cost (PC) Item" means an item in the Agreement which contains (either wholly or in part) a sum referred to as Prime Cost (PC) which will be used for the carrying out of work or the supply of goods, materials or services for the MUDFA Works;

"Principal Contractor" has the meaning given to it in the CDM Regulations;

"Programme" means, as the context requires, either or both of the Pre-Construction Programme and the Construction Programme;

"Prohibited Act" means:

- (a) offering, giving or agreeing to give to **tie**, the Scottish Executive, the Scottish Ministers, 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, the Scottish Ministers 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 IPR" means all Intellectual Property Rights in the Deliverables and any other Intellectual Property Rights created in carrying out the MUDFA Works which are specific in nature to carrying out the MUDFA Works;

"Provisional Sum" means a sum included and so designated in the Agreement as a specific contingency for the carrying out of work or the supply of goods, materials or services which may be used in whole or in part or not at all at the direction and discretion of **tie's** Representative and such work, and/or supply of goods, materials or services shall be valued in accordance with the rates and prices contained within Schedule 4 (*Bills of Quantities*);

"Qualifying Change in Law" means:

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

"Referral" has the meaning given in paragraph 27 of Schedule 9 (*Dispute Resolution Procedure*);

"Referring Party" has the meaning given in paragraph 16 of Schedule 9 (*Dispute Resolution Procedure*);

"Related Contract" has the meaning given in paragraph 55 of Schedule 9 (*Dispute Resolution Procedure*);

"Related Dispute" has the meaning given in paragraph 55 of Schedule 9 (*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, Scottish Minister, Transport Scotland, 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 and shall include 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 11 (*Required Insurances*) as may be amended from time to time in accordance with this Agreement;

"Responding Party" has the meaning given in paragraph 17 of Schedule 9 (*Dispute Resolution Procedure*);

"Retention" shall have the meaning given in Clause 49.4;

"Review Procedure" means the review procedure set out in Schedule 5 (*Review Procedure*);

"Risk Services" means the services to be provided by the MUDFA Contractor as described in Part 5 of Schedule 1 (*Scope of Works and Services*);

"Schedules" means Schedule 1 (*Scope of Works and Services*), Schedule 2 (*Technical Requirements*), Schedule 3 (*Specification*), Schedule 4 (*Bills of Quantities*), Schedule 5 (*Review Procedure*), Schedule 6 (*Sub-Contractor Collateral Warranty*), Schedule 7 (*Performance Bond*), Schedule 8 (*Programme*), Schedule 9 (*Dispute Resolution Procedure*), Schedule 10 (*Panels for the Dispute Resolution Procedure*), Schedule 11 (*Required Insurances*), Schedule 12 (*Key Personnel*) and Schedule 13 (*Third Party Agreements*) as the same may be amended from time to time in accordance with the terms of this Agreement;

"Scotland Gas Networks" means Scotland Gas Networks PLC, a company incorporated under the Companies Act with registered number SC 264065 and having its registered office at Inveralmond House, 200 Dunkeld Road, Perth, Perthshire PH1 3AQ;

"Scotland Gas Networks Apparatus" means any mains, pipes, pressure governors, ventilators, cathodic protection or other equipment, apparatus belonging to or maintained by a gas transporter, including Scotland Gas Networks, within the meaning of Part 1 of the Gas Act 1986 for the purposes of the transportation and/or supply of gas and includes any structure for the lodging within that structure of apparatus or any structure required for giving access to apparatus whether or not forming part of the MUDFA Works;

"Scotland Gas Networks Works" means any works to be carried out by the MUDFA Contractor in respect of Scotland Gas Apparatus which are described in Part 4 of Schedule 1 (*Scope of Works and Services*);

"Scottish Environment Protection Agency" or **"SEPA"** means a body established under the Environment Act 1995 and having its principal office at Erskine Court, Castle Business Park, Stirling, FK9 4TR;

"Scottish Natural Heritage" means a statutory agency whose remit is set out in sections 1, 2 and 3 of the Natural Heritage (Scotland) Act 1991 and having its principal office at 12 Hope Terrace, Edinburgh, EH9 5NP;

[**"Scottish Power"** means SPD, SPT and SPPS on a joint and several basis;]

[**"Scottish Power Apparatus"** means any equipment, apparatus or other devices belonging to or maintained by Scottish Power above or below ground and includes any structure for the lodging within that structure of equipment or apparatus or any structure required to maintain or afford access whether or not forming part of the MUDFA Works;]

[**"Scottish Power Works"** means any works to be carried out by the MUDFA Contractor in respect of Scottish Power Apparatus which are described in Part 4 of Schedule 1 (*Scope of Works and Services*);]

"Scottish Water" means a body established under the Water Industry (Scotland) Act 2002 and having its principal office at Castle House, 6 Castle Drive, Dunfermline, Fife KY11 8GG;

"Scottish Water Apparatus" means any equipment, apparatus or other devices belonging to or maintained by Scottish Water above or below ground and includes any structure for the lodging within that structure of equipment or apparatus or any

structure required to maintain or afford access whether or not forming part of the MUDFA Works;

"Scottish Water Works" means any works to be carried out by the MUDFA Contractor in respect of Scottish Water Apparatus which are described in Part 4 of Schedule 1 (*Scope of Works and Services*);

"SDS Provider" means Parsons Brinckerhoff Limited, a company incorporated under the Companies Act with registration number 02554514 and having its registered officer at Amber Court, William Armstrong Drive, Newcastle Business Park, Newcastle Upon Tyne, NE4 7YQ which expression shall include its permitted assignees or such other system design services provider appointed by **tie** from time to time in relation to the Edinburgh Tram Network;

"Site" means the land to be acquired or used as described in the Tram Legislation, and other lands and other places on, under, in, or through which the MUDFA Works are to be constructed and any other lands or places covered by the Land Consents and/or provided by **tie** for the purposes of the Agreement together with such other places as may be designated in the Agreement or subsequently agreed by **tie's** Representative as forming part of the Site;

"SPD" means SP Distribution Limited, a company incorporated under the Companies Act with registered number SC 181925 and having its registered office at 1 Atlantic Quay, Glasgow G2 8SP;]

"Specific Change in Law" means any Change in Law which specifically applies to the same as or similar to the MUDFA Works but excluding the making, amendment or revocation of any traffic regulation order;

"Specification" means the specification or specifications set out in Schedule 3 (*Specification*) and any modification thereof or addition thereto as may from time to time be furnished or approved in writing by **tie's** Representative;

"SPPS" means SP Power Systems Limited, a company incorporated under the Companies Act with registered number SC 215841 and having its registered office at 1 Atlantic Quay, Glasgow G2 8SP;]

"SPT" means SP Transmission Limited, a company incorporated under the Companies Act with registered number SC 181926 and having its registered office at 1 Atlantic Quay, Glasgow G2 8SP;]

"Stakeholder Services" means the services to be provided by the MUDFA Contractor as described in Part 6 of Schedule 1 (*Scope of Works and Services*);

"Stakis" means Stakis Limited a company incorporated under the Companies Acts with registered number 22163 and having its registered office at 4 Cadogan Square, Glasgow;

"Stakis Property" means ALL and WHOLE the subjects let to Stakis by virtue of (1) the Lease between Edinburgh Airport Limited and Stakis plc dated 10 March and 5 April and recorded in the Division of the General Register of Sasines applicable to the County of Midlothian as in the Books of Council and Session on 21 April, all months in the year 1995, and (2) the Minute of Variation of Lease between Edinburgh Site No.1 (CI) Limited and Stakis Limited dated 27 November and 19 December both months in the year 2003, and recorded in the Division of the General Register of Sasines applicable to the County of Midlothian as in the Books of Council and Session on 14 April 2004;

"Stakis Site" means those subjects forming part of the Stakis Property and which, for the purposes of the Edinburgh Tram (Line Two) Bill comprise Plot Numbers 329, 330, 333 and 334 on the parliamentary drawing allocated sheet number 20 as annexed to the Edinburgh Tram (Line Two) Bill, but only to the extent the same are let to Stakis as the Stakis Property;

"Sub-Contractor" means any sub-contractor, sub-consultant, supplier, specialist, Utility Specialist Contractor and/or other party appointed in accordance with Clause 12 (*Sub-Contracting*), or otherwise approved by **tie**, and "Sub-Contract" is to be interpreted accordingly;

"Substantial Completion" has the meaning given to it in Clause 40.3;

"Transport Edinburgh Limited" or **"TEL"** means Transport Edinburgh Limited a company incorporated under the Companies Act with registered number SC269639 and having its registered office at City Chambers, High Street, Edinburgh, Midlothian, EH1 1YJ;

[**"Telewest"** means Telewest Communications Networks Limited, a company incorporated under the Companies Acts with registered number 03071086 and having its registered office at Export House, Cawsey Way, Woking, Surrey GU21 6QX;]

["Telewest Apparatus" means all equipment, apparatus or other devices belonging to or maintained by Telewest above or below ground and includes any structure for the lodging within that structure of equipment or apparatus or any structure required to maintain or afford access whether or not forming part of the MUDFA Works;]

["Telewest Works" means any works to be carried out by the MUDFA Contractor in respect of Telewest Apparatus which are described in Part 4 of Schedule 1 (*Scope of Works and Services*);]

"Temporary Works" means all temporary works of every kind required in or about the construction and completion of the MUDFA Works;

"Tender Total" or "TT" means the total of the Bills of Quantities at the Effective Date;

"Third Party Agreements" means the agreements detailed in Schedule 13 (*Third Party Agreements*)

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

"Thus" means Thus PLC, a company incorporated under the Companies Act with registered number SC 192666 and having its registered office at 1-2 Berkeley Square, 99 Berkeley Street, Glasgow G3 7HR;

"Thus Apparatus" means any equipment, apparatus or other devices belonging to or maintained by Thus above or below ground and includes any structure for the lodging within that structure of equipment or apparatus or any structure required to maintain or afford access, whether or not forming part of the MUDFA Works;

"Thus Works" means any works to be carried out by the MUDFA Contractor in respect of Thus Apparatus which are described in Part 4 of Schedule 1 (*Scope of Works and Services*);

"tie Change" means any addition, modification, reduction or omission in respect of the MUDFA Works or any other term of this Agreement instructed in accordance with Clause 46 (*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 certified in an Interim Certificate as due and payable by **tie** to the MUDFA Contractor under this Agreement exceeding 5% of the Tender Total; or
- b) a breach by **tie** of any of its material obligations under this Agreement which substantially frustrates or renders it impossible for the MUDFA Contractor to perform its obligations under this Agreement for a continuous period of ninety days;

"tie Notice of Change" means a notice issued under Clause 46 (*Changes*);

"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 MUDFA Contractor and any MUDFA Contractor Party);

"tie's Representative" means any person, firm or company so appointed from time to time by **tie** and notified in writing as such to the MUDFA Contractor;

"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 Limits of Deviation" means the limits of deviation set out in the Tram Legislation;

"TTROs" means temporary traffic regulation orders;

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

"Utilities" means BT, Easynet, NTL, Scottish Water, Scotland Gas Networks, Thus, [BAA], [Forth Ports], [Scottish Power], [GEO Networks] and [Telewest] and "Utility" shall be construed accordingly;

"Utility Specialist Contractors" means Easynet and/or its approved sub-contractor and shall mean any other Utility or its approved sub-contractor, or any other specialist contractor or consultant which shall require the MUDFA Contractor to appoint as its sub-contractor in accordance with Clauses 3.14, 53.1 or 53.2 or otherwise in accordance with Clause 12 (*Sub-Contracting*) and the other provisions of this Agreement;

"Utilities Specifications" means the specifications for the MUDFA Works in respect of each of the Utilities' Apparatus as set out in Appendix A of Schedule 3 (*Specification*);

"Utilities Works" means any works carried out, or to be carried out, by the Utilities or any other public utility company whether relative to the MUDFA Works or otherwise;

"Value Engineering Incentive" or "VEI" means (Tender Total - Anticipated Final Account) x 20% which sum shall be no greater than £1,000,000 sterling and no less than £250,000 sterling;

"Value Engineering Incentive Payment" shall be calculated as follows:

Final Account	Value Engineering Incentive Payment
Where FA = AFA + ($\geq 10\%$ of the AFA)	0
Where FA = AFA + ($\geq 7.5\% < 10\%$ of the AFA)	VEI x 10% or £250,000, whichever is the greater
Where FA = AFA + ($\geq 5\% < 7.5\%$ of the AFA)	VEI x 33% or £250,000, whichever is the greater
Where FA = AFA + ($\geq 2.5\% < 5\%$ of the AFA)	VEI x 66% or £250,000, whichever is the greater
Where FA = AFA + ($< 2.5\%$ of the AFA)	VEI x 85% or £250,000, whichever is the greater
Where FA = AFA	VEI
Where FA = AFA - ($< 2.5\%$ of the AFA)	VEI x 110%

Where FA = AFA - ($\geq 2.5\% < 5\%$ of the AFA)	VEI x 120%
Where FA = AFA - ($\geq 5\% < 7.5\%$ of the AFA)	VEI x 130%
Where FA = AFA - ($\geq 7.5\% < 10\%$ of the AFA)	VEI x 140%
Where FA = AFA - ($\geq 10\%$ of the AFA)	VEI x 150%

"Works Breakdown Structure" or "WBS" means the works breakdown structure to be developed by the MUDFA Contractor in accordance with Schedule 1 (*Scope of Works and Services*);

"Work Order" means any order issued by **tie** in accordance with Clause 8.8;

"Work Order Confirmation Notice" means any work order confirmation notice issued by **tie** in accordance with Clause 8.8;

"Work Order Proposal" means any work order proposals given by the MUDFA Contractor in accordance with Clause 8.8;

"Work Order Requirements" means the work order requirements set out in Clause 8.9;

"Work Section" means any work section which forms part of a Work Sector;

"Work Section Programme" means the programme developed by the MUDFA Contractor in respect of each Work Section which shall form part of the Construction Programme;

"Work Sector" means the work sectors which are identified as follows:¹

	Work Sector	
	From	To
1	Haymarket (Haymarket Terrace)	Newhaven Road (Lindsay Road)

¹ Are chainages required?

2	Haymarket Corridor (Haymarket Terrace)	Haymarket Corridor (Roseburn Junction)
3	Granton Square (North of Granton Park Avenue)	Newhaven Road (Lindsay Road)
4	Haymarket (Roseburn Junction)	Granton Square (North of Granton Park Avenue)
5	Haymarket (Roseburn Junction)	Gogar (Gogar Depot)
6	Gogar (Gogar Depot)	Airport

"Work Site" means any work site within any Work Section;

"Work Site Completion Certificate" has the meaning given in paragraph 3.7.1 of Schedule 2 (*Technical Requirements*);

"the 1991 Act" means the New Roads and Street Works Act 1991;

"the 2003 Regulations" means the Road Works (Sharing of Costs of Works) (Scotland) Regulations 2003;

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 Schedule is, except where it is expressly stated to the contrary, a reference to such Clause, Sub-Clause 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, draft 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 ;
- 1.2.8 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;
- 1.2.9 a reference to a time of day is a reference to the time in Scotland;
- 1.2.10 subject to the restrictions imposed by this Agreement on subcontracting, an obligation to do something includes an obligation to procure it to be done;
- 1.2.11 an obligation not to do something includes an obligation not to wilfully allow it to be done;
- 1.2.12 the word "including" means "including without limitation"; and
- 1.2.13 a reference to "consent" shall mean consent in writing;
- 1.2.14 the headings and marginal notes in the Agreement shall not be deemed to be part thereof or be taken into consideration in the interpretation or construction thereof or of the Agreement;
- 1.2.15 all references herein to Clauses are references to clauses numbered in the Agreement and not to those in any document forming part of the Agreement;
- 1.2.16 the word "cost" when used in the Agreement means all expenditure properly incurred or to be incurred whether on or off the Site including overhead finance and other charges properly allocatable thereto but does not include any allowance for profit;

1.2.17 communications which under the Agreement are required to be "in writing" may be handwritten, typewritten or printed and sent by hand, post, email, facsimile or other means resulting in a permanent record;

1.2.18 any reference to any Deliverable or course of action being reviewed, approved, agreed, consented to or otherwise processed in accordance with this Agreement, means that the provisions of Schedule 5 (*Review Procedure*) shall apply except where otherwise agreed in writing by **tie**; and

1.2.19 References to "traffic management" and "Temporary Traffic Regulation Orders" (TTROs) shall be deemed to include the requirements of BAA, Forth Ports and any other third party relating to road closures and procedures.

1.3 Where a party comprises two or more persons:

1.3.1 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

1.3.2 references to that party include references to each and any of those persons.

1.4 This Agreement shall come into effect on the Effective Date.

2. CONTRACTOR'S GENERAL RESPONSIBILITIES

2.1 **tie** hereby appoints the MUDFA Contractor in accordance with the terms of this Agreement and the MUDFA Contractor hereby accepts full responsibility and agrees to carry out the MUDFA Works fully and faithfully in the best interests of **tie**.

2.2 The MUDFA Contractor warrants to **tie** that, in the performance of the MUDFA Works it shall exercise a reasonable level of professional skill, care and diligence to be expected of a properly qualified and competent contractor experienced in carrying out and completing works similar to the MUDFA Works in connection with projects of a similar size, scope and complexity.

2.3 The MUDFA Contractor shall (each as distinct and separate obligations) carry out the MUDFA Works (exercising the level of skill, care and diligence set out in Clause 2.2):

2.3.1 so as to comply in all respects with this Agreement;

- 2.3.2 so as to enable the Edinburgh Tram Network to be constructed, installed, tested and commissioned, and thereafter operated and maintained insofar as this is compatible with the obligations on the MUDFA Contractor under this Agreement;
 - 2.3.3 in accordance with the MUDFA Contractor's quality management system and plans;
 - 2.3.4 in accordance with the Design Manual to the extent applicable to the MUDFA Works;
 - 2.3.5 so as to ensure compliance with the Tram Legislation;
 - 2.3.6 so as to ensure compliance with all applicable Law, Land Consents and Consents;
 - 2.3.7 in compliance with the Environmental Statements, and all other applicable environmental regulations and requirements;
 - 2.3.8 in accordance with Good Industry Practice;
 - 2.3.9 to ensure that the design of the Edinburgh Tram Network is buildable insofar as this is compatible with the obligations on the MUDFA Contractor under this Agreement;
 - 2.3.10 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 MUDFA Works;
 - 2.3.11 in such manner so as not wilfully to detract from the image and reputation of **tie**, Transport Edinburgh Limited, CEC, the Scottish Ministers, the Utilities or the Edinburgh Tram Network;
 - 2.3.12 in a manner that is not likely to be injurious to persons or property; and
 - 2.3.13 using the Key Personnel and such other staff as may be approved by **tie**.
- 2.4 Notwithstanding that the SDS Provider shall be responsible for the design and specification of the MUDFA Works (excluding the Temporary Works), the MUDFA Contractor shall be responsible for its input into the design and specification of the MUDFA Works or any part thereof (except as may be expressly provided in this

Agreement). The MUDFA Contractor shall carry out the design and specification of any Temporary Works and the MUDFA Contractor shall exercise the level of skill, care and diligence set out in Clause 2.2 in carrying out such design and specification.

2.5 The MUDFA Contractor shall, to the extent necessary to carry out the MUDFA Works and its other obligations under this Agreement take due and proper account of the risks associated with the Edinburgh Tram Network arising from:

2.5.1 use by third parties of any of the land which will form part of or be associated with or will be adjacent to the Edinburgh Tram Network;

2.5.2 the quality of any existing structures;

2.5.3 the obligations assumed or the undertakings given in any Parliamentary Undertakings relative to this Agreement; and

2.5.4 safety requirements and environmental matters.

2.6 In carrying out the MUDFA Works, the MUDFA Contractor shall use best endeavours to:

2.6.1 maximise construction productivity by reference to international best practice;

2.6.2 minimise disruption to the city of Edinburgh;

2.6.3 minimise the diversionary works;

2.6.4 maintain safety; and

2.6.5 minimise out-turn costs.

2.7 The MUDFA Contractor shall at all times keep itself fully informed about current professional standards and about all matters relating to, or which might have a bearing on, carrying out the MUDFA Works.

2.8 The MUDFA Contractor'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**.

- 2.9 The MUDFA Contractor is deemed to have satisfied itself that it fully understands the scope and extent of the MUDFA Works, and that it has sufficient information or will at the relevant time have sufficient information, to enable it to carry out the MUDFA Works.
- 2.10 The MUDFA Contractor acknowledges that **tie** will rely upon the skill and judgement of the MUDFA Contractor in connection with all matters for which the MUDFA Contractor is responsible under this Agreement.
- 2.11 The MUDFA Contractor acknowledges that certain Background Information has been made available to it in relation to this Agreement. The MUDFA Contractor 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**, CEC, any **tie** Parties, nor any of its or their employees shall be liable to the MUDFA Contractor in contract, delict (including breach of statutory duty), or otherwise as a result of:
- 2.11.1 any inaccuracy, error, defect, omission, unfitness for any purpose or inadequacy of any kind whatsoever in the Background Information; nor
 - 2.11.2 any failure to make available to the MUDFA Contractor any materials, documents, drawings, plans or other information relating to this Agreement;
- provided that nothing in this Clause 2.11 shall exclude any liability in respect of any statements made or information provided fraudulently.
- 2.12 The MUDFA Contractor acknowledges and confirms that as part of the MUDFA Works it has conducted its own analysis and review of the Background Information and has before the Effective Date, or upon receipt if received thereafter, satisfied itself as to the veracity, accuracy, reasonableness, scope, materiality, currency (where applicable) and completeness of all such Background Information upon which it places reliance.
- 2.13 The MUDFA Contractor shall liaise with Infraco, the SDS Provider, the Utilities, **tie**, any **tie** Party, and any other parties as may be required by **tie** to facilitate the production, by such persons, of any information required from them, in order that the

MUDFA Works can be progressed according to the Programme. The MUDFA Contractor shall liaise with Infraco, the SDS Provider, the Utilities, **tie**, any **tie** Party, and any other parties as may be required by **tie** as often as is necessary in order to ensure that the MUDFA Works are carried out properly and in accordance with the terms of this Agreement.

- 2.14 The MUDFA Contractor shall collaborate and liaise with **tie** and the SDS Provider throughout carrying out the MUDFA Works, 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.
- 2.15 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 MUDFA Works, the MUDFA Contractor shall use all reasonable endeavours (including the use of liaison with such other bodies or persons) to ensure that the MUDFA Works and these related works are carried out together with the greatest economy and in accordance with the Programme.
- 2.16 In carrying out the MUDFA Works, the MUDFA Contractor will have regard to the constraints imposed by the Programme and to the objective of keeping the overall costs of the MUDFA Works within any budgetary constraints notified to the MUDFA Contractor by **tie**. If the MUDFA Contractor considers that there may be a conflict between its obligations under this Clause 2.16 and the performance of the MUDFA Works, the MUDFA Contractor shall within 3 Business Days give written notice of the same to **tie**.
- 2.17 The MUDFA Contractor warrants to **tie** that it has not and shall not use any materials which at the time of use:
- 2.17.1 are known to be deleterious in the particular circumstances in which they are used (either to health and safety or to the durability of any works on which the MUDFA Contractor is employed by **tie**); or
 - 2.17.2 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
 - 2.17.3 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

- 2.17.4 contravene Good Industry Practice.
- 2.18 The MUDFA Contractor shall warrant that any materials supplied as part of the MUDFA Works shall be in accordance with Schedule 3 (*Specification*) and/or the requirements of any relevant Works Order.
- 2.19 The MUDFA Contractor undertakes to co-operate with **tie** in order to facilitate the carrying out of the MUDFA Works and in particular will:
- 2.19.1 approach all pricing, estimating and budgeting functions on a collaborative and Open Book Basis;
- 2.19.2 use reasonable endeavours to avoid unnecessary complaints, disputes and claims against or with **tie**;
- 2.19.3 not interfere with the rights of **tie** in performing its obligations under this Agreement, nor in any other way hinder or prevent **tie** from performing those obligations or from enjoying the benefits of its rights;
- 2.19.4 take reasonable steps to mitigate any costs, unnecessary acts, foreseeable losses and liabilities of **tie**; and
- 2.19.5 take all reasonable steps to manage, minimise and mitigate all costs.
- 2.20 The MUDFA Contractor shall notify **tie** of any ground, physical, geophysical investigations or archaeological or ecological surveys or any other investigations or surveys which it intends to carry out before such investigations or surveys are carried out.
- 2.21 The MUDFA Contractor shall subject to the provisions of the Agreement provide all labour, goods, materials, MUDFA Contractor's Equipment, Temporary Works, transport to and from and in or about the Site, services and everything whether of a temporary or permanent nature required in and for the execution and completion of the MUDFA Works so far as the necessity for providing the same is specified in the Agreement or could be reasonably foreseen therefrom by a contractor experienced in work of a similar nature and scope as the MUDFA Works.
- 2.22 The MUDFA Contractor shall take full responsibility for the adequacy, stability and safety of all site operations and methods of construction.

- 2.23 Immediately that the MUDFA Contractor becomes aware that any element of MUDFA Works is likely to be abortive work for any reason, the MUDFA Contractor shall notify **tie** of:
- 2.23.1 the probable nature of the abortive work;
 - 2.23.2 the cause of the abortive work being abortive;
 - 2.23.3 the estimated effect of the abortive work in terms of cost, of time in completion of the MUDFA Works and of any other matters in relation to the Agreement; and
 - 2.23.4 any measures to be taken which may mitigate that effect.
- 2.24 The MUDFA Contractor and **tie** shall jointly investigate, and **tie** shall determine the actual extent of any abortive work.
- 2.25 Payment by **tie** to the MUDFA Contractor in respect of any abortive work which has been carried out by the MUDFA Contractor shall be determined as a variation in accordance with Clause 46 (*Changes*) and shall be paid in accordance with Clause 49 (*Payment*) provided always that no payment shall be due for abortive work which has resulted from any fault of the MUDFA Contractor and/or any breach by the MUDFA Contractor of its obligations under this Agreement.

3. OBLIGATIONS IN RESPECT OF THE UTILITIES

- 3.1 The MUDFA Contractor warrants to **tie** that in carrying out the MUDFA Works it shall ensure that:
- 3.1.1 all MUDFA Works are carried out in accordance with the relevant requirements of the Utilities Specifications and the relevant Works Order Requirements;
 - 3.1.2 that any action of the MUDFA Contractor or any MUDFA Contractor Party does not cause any Utility to be in breach of its statutory duties;
 - 3.1.3 all Apparatus is appropriately safeguarded and protected in accordance with the relevant Utilities Specifications, the relevant Works Order Requirements and relevant Access Permit; and

- 3.1.4 all new Apparatus and materials which is installed or used in the carrying out of the MUDFA Works are in accordance with the relevant part of the Utilities Specifications and the relevant Works Order Requirements.
- 3.2 Throughout the term of this Agreement, the MUDFA Contractor shall ensure that it keeps **tie** fully and promptly informed of all material matters concerning the MUDFA Works, particularly those matters which could adversely affect the ability of any of the Utilities to continue to supply uninterrupted services to their customers and the public.
- 3.3 In the event of any dispute or difference arising between any of the Utilities and **tie** in respect of the MUDFA Works, the MUDFA Contractor shall provide **tie** with such assistance as **tie** may require to resolve such dispute or difference.
- 3.4 The MUDFA Contractor undertakes (and shall procure that each MUDFA Contractor Party shall undertake) not to use any means or to take any actions which could have the effect of nullifying, undermining or rendering less effective or ineffective any provision of, or the underlying purpose of any agreement which **tie** may have in place with any of the Utilities.
- 3.5 The MUDFA Contractor shall ensure that the MUDFA Contractor's Representative or an alternative suitably qualified representative attends such meetings with any of the Utilities as may be required by **tie** to review the status of the MUDFA Works and any other issues which are of concern to or affect any of the Utilities in relation to the MUDFA Works.
- 3.6 On the provision of at least one Business Day's notice, the MUDFA Contractor shall permit any of the Utilities to inspect the MUDFA Works or any part of the MUDFA Works. In the event of an emergency, the MUDFA Contractor shall facilitate access to the Utilities for inspection purposes without the provision of any prior notice.
- 3.7 The MUDFA Contractor shall provide such assistance to any of the Utilities as may be required to deal with any situation where any of the Utilities is required to carry out any emergency works in pursuance of any statutory or regulatory obligation, and/or in the interests of health and safety. Any costs incurred by the MUDFA Contractor in providing such assistance shall be dealt with in accordance with Clause 33 (*Urgent Repairs and Emergencies*).

- 3.8 The MUDFA Contractor shall comply with all relevant health and safety regulations and standards. In the event of a health and safety related event arising as a result of the MUDFA Works, the MUDFA Contractor shall carry out any remedial or other work or repair as instructed by **tie's** Representative in accordance with Clause 33 (*Urgent Repairs and Emergencies*), and the MUDFA Contractor shall provide **tie** with such assistance as **tie** may require to ensure that a solution is reached to resolve the situation which is acceptable to both the relevant Utility and **tie**.
- 3.9 The MUDFA Contractor acknowledges that certain of the Utilities shall be carrying out Utility Works at the same time as the MUDFA Works are being carried out. The MUDFA Contractor shall use reasonable endeavours to allow the execution by any of the Utilities of such Utility Works and the MUDFA Contractor shall co-ordinate the MUDFA Works with the Utility Works. For the avoidance of doubt, the Utility Works shall not form part of the MUDFA Works.
- 3.10 On reasonable notice from **tie**, the MUDFA Contractor shall allow access to any surveyor to carry out condition surveys of any Apparatus on behalf of **tie** or on behalf of any of the Utilities.
- 3.11 If any survey demonstrates that the MUDFA Contractor has damaged any Apparatus, the cost of the survey, the making good of such damage and all other costs shall be met by the MUDFA Contractor.
- 3.12 If the MUDFA Contractor uncovers previously unreferenced apparatus during the course of the MUDFA Works, the MUDFA Contractor shall:
- 3.12.1 do all things necessary to identify the owner or party responsible for the apparatus;
 - 3.12.2 as instructed by **tie**, apply for and obtain, or assist in applying for and obtaining all such approvals as may be required to allow the MUDFA Contractor to continue to carry out the MUDFA Works in respect of such apparatus; and
 - 3.12.3 procure any other relevant information, as may be required by **tie**, in respect of such apparatus;
- in such a way as to minimise so far as possible any adverse impact on the Programme.

- 3.13 The MUDFA Contractor may, if necessary, ask **tie** to request the reasonable assistance of any of the Utilities in order to assist the MUDFA Contractor to carry out the activities specified in Clause 3.12 above.
- 3.14 Notwithstanding Part 4 of Schedule 1 (*Scope of Works and Services*), in the event that certain of the Construction Works may only be carried out by a Utility by virtue of a statutory or other regulatory obligation, or in the event that any Utility makes a specific request to **tie** that the Utility wishes itself to carry out certain of the Construction Works or if there are specialist works or services which are required, if required by **tie**, the MUDFA Contractor shall procure the appointment of a Utility Specialist Contractor to execute that part of the Construction Works, and the provisions of Clause 12.6 shall apply.
- 3.15 The MUDFA Contractor shall assist **tie** by supplying any information on costs as may be required by **tie** in its negotiations with any of the Utilities in relation to the recovery of costs under the 1991 Act and/or the 2003 Regulations.
- 3.16 In carrying out the MUDFA Works in relation to BT Apparatus the MUDFA Contractor shall;
- 3.16.1 comply with BT Specification LM550 (Issue 6), the relevant part of the Utilities Specification and the relevant Works Order Requirement;
- 3.16.2 warrant that all materials used in respect of the MUDFA Works in relation to BT Apparatus conform to all applicable BT specifications, and drawings, the relevant part of the Utilities Specification and the relevant Works Order Requirements;
- 3.16.3 undertake to remedy all defects in the MUDFA Works in relation to BT Apparatus which arise from faulty or incorrect materials, workmanship or performance standards which are not in accordance with the applicable BT specifications, drawings and instructions, the relevant part of the Utilities Specification and the relevant Works Order Requirements;
- 3.16.4 warrant in respect of the structures of installed jointing chambers for a period of at least ten years, and in respect of installed ducts, for a period of at least five years, that the said jointing chambers and installed ducts conform to all applicable BT specifications. This warranty shall commence on the day that access to such jointing chambers and ducts is made available to BT; and

- 3.16.5 take any corrective action that may be notified to the MUDFA Contractor by **tie** and ensure that such corrective action is taken without undue delay and within a reasonable timescale to replace the defective materials in respect of any MUDFA Works relative to BT Apparatus or to commence the necessary remedial work as soon as possible, but in any case within such reasonable time as may be specified by **tie**.
- 3.17 Without prejudice to any other right or remedy of **tie**, if the MUDFA Contractor does not repair or replace the defective materials or attend the relevant site and effect all necessary remedial work to the reasonable satisfaction of **tie** within such period as may be specified by **tie**, then **tie** or BT may perform the work or make arrangements for the work to be performed by a third party, and the cost of so doing shall be payable by the MUDFA Contractor;
- 3.18 Without prejudice to any other right or remedy of **tie**, where defective work at any time results in additional costs being incurred by **tie** due to the imposition of charges on BT from any third party, such costs and charges shall be recoverable in full from the MUDFA Contractor.
- 3.19 The MUDFA Contractor shall not execute the placing, installation, bedding, packing, removal, connection or disconnection of any Scotland Gas Networks Apparatus, or execute any filling around such Scotland Gas Networks Apparatus (where such Scotland Gas Networks Apparatus is laid in a trench) within 600 millimetres of such Scotland Gas Networks Apparatus or where such Scotland Gas Networks Apparatus is operating at or in excess of seven bar pressure within 1500 millimetres of such Scotland Gas Networks Apparatus.

4. PERFORMANCE BOND, PARENT COMPANY GUARANTEE AND COLLATERAL WARRANTY

- 4.1 No later than 7 days after the Effective Date, the MUDFA Contractor shall provide to **tie** a performance bond in the form of Schedule 7 (*Performance Bond*) which has been issued by a surety approved in advance by **tie**.
- 4.2 The performance bond shall be for an amount of £5,000,000 sterling and shall be callable by **tie** on demand.
- 4.3 In the event the credit rating of the surety referred to in Clause 4.1 is downgraded to A- or a lower rating by Standard & Poors, **tie** shall be entitled to request the MUDFA

Contractor to procure a substitute performance bond on identical terms from a surety approved in advance by **tie**.

4.4 On the Effective Date, the MUDFA Contractor shall procure the execution and delivery to **tie**, of a parent company guarantee, in a form which is approved in advance by **tie**.

4.5 Within fourteen days of any written request from **tie**, the MUDFA Contractor shall execute a collateral warranty (in a form which is acceptable to **tie** acting reasonably) in favour of any third party in respect of carrying out the MUDFA Works.

5. DOCUMENTS MUTUALLY EXPLANATORY

5.1 Subject to Clause 5.2, the several documents forming the Agreement are to be taken as mutually explanatory of one another and in case of ambiguities or discrepancies the same shall be explained and adjusted by **tie** who shall thereupon issue to the MUDFA Contractor appropriate instructions in writing which shall be regarded as instructions issued in accordance with Clause 14 (*Work to be to Satisfaction of tie*) provided that in the event of any inconsistency or conflict between 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**.

5.2 The MUDFA Contractor shall review all the documents forming the Agreement, and all documents, drawings or other subsequent information produced to amplify the documents forming the Agreement and/or issued by **tie** as part of a Works Order, within 5 Business Days of the date of receipt of such documents, drawings or other subsequent information, and shall bring to the attention of **tie's** Representative any discrepancies, or requirements for further information arising from them. Failure to comply with this obligation shall prevent the MUDFA Contractor from being entitled to an extension of time or additional monies in respect of problems which would have been notified or requests which would have been made had this obligation been complied with.

6. PROVISION AND INTERPRETATION OF INFORMATION

6.1 Subject to Clause 10 (*Adverse Physical Conditions and Artificial Obstructions*) the MUDFA Contractor shall be deemed to have inspected and examined the Site and its

surroundings and to have satisfied itself before the Effective Date as to the nature of the ground, the sub-surface conditions and sub-soil (any information in connection therewith which may have been provided by or on behalf of **tie** being provided by way of information only without any warranty or representation as to its accuracy, reliability or completeness and **tie** shall not be liable for any use of or reliance on such information), the form and nature of the Site, the extent, nature and difficulty of the work and materials necessary for the completion of the MUDFA Works, the means of communication with and restrictions of access to the Site, the accommodation the MUDFA Contractor may require, and in general to have obtained for itself all necessary information as to risks, contingencies and all other circumstances influencing or affecting the MUDFA Works. The MUDFA Contractor shall not be entitled to any extension of time or to any additional payment on grounds of any misunderstanding or misinterpretation of any such matter, nor shall the MUDFA Contractor be released from any of the risks accepted or obligations undertaken by the MUDFA Contractor under the Agreement on the ground that the MUDFA Contractor did not or could not have foreseen any matter which might affect or have affected the execution of the MUDFA Works.

6.2 The MUDFA Contractor shall be deemed to have:

6.2.1 based its tender on its own inspection and examination as aforesaid and on all information whether obtainable by it or made available by **tie**; and

6.2.2 satisfied itself before submitting its tender as to the correctness and sufficiency of the rates and prices stated by it in the Bills of Quantities which shall (unless otherwise provided in the Agreement) cover all its obligations under the Agreement.

7. DEVELOPMENT, REVIEW, FINALISATION AND DELIVERY OF THE DELIVERABLES

7.1 The MUDFA Contractor shall develop and finalise the Deliverables in accordance with this Agreement, and **tie** shall be entitled to review the Deliverables in accordance with Schedule 5 (*Review Procedure*).

7.2 The MUDFA Contractor shall submit any changes and any other Deliverables associated with any changes developed pursuant to Clause 46 (*Changes*) to **tie**'s Representative for review pursuant to Schedule 5 (*Review Procedure*).

- 7.3 It is **tie's** intention to establish and maintain an extranet which **tie's** Representative, **tie**, any **tie** Parties, the MUDFA Contractor, the SDS Provider and any other party reasonably required by **tie** may access remotely by computer (through an appropriate login/security regime) to view any Deliverables and electronically store and/or print copies of such Deliverables. The MUDFA Contractor shall provide the Deliverables to **tie** in a format which will enable **tie** to upload the Deliverables onto the extranet.
- 7.4 The MUDFA Contractor shall, as soon as reasonably practicable after the Effective Date, submit to **tie's** Representative a submittal programme setting out the order in which each Deliverable is to be submitted for review in accordance with the Review Procedure and the Programme for uploading the Deliverables on to the extranet in accordance with Clause 7.3. The MUDFA Contractor may, as necessary, update such programme and shall submit the same from time to time to **tie's** Representative so that **tie** has at least 10 Business Days' notice of any revision to the periods shown in the previous submittal programme and the MUDFA Contractor shall submit to **tie's** Representative five copies of each draft Deliverable in hard copy form and one copy in agreed soft copy form (as appropriate to the format of the deliverable) no later than the end of the period shown in the submittal programme for that Deliverable.
- 7.5 Where **tie's** Representative does not consider that **tie** will be able to comply with the periods specified in Schedule 5 (*Review Procedure*) for indicating 'no objection' status or the making of objections in relation to any Deliverable because of the volume of documents to be received in accordance with the submittal programme, **tie's** Representative may introduce an alternative timetable and the MUDFA Contractor shall comply with such alternative timetable. Provided that, where **tie** is unable to comply with the time periods set out in Schedule 5 (*Review Procedure*) and such inability is not due to any breach of this Agreement, omission or fault on the part of the MUDFA Contractor, the introduction of an alternative timetable shall be treated as a **tie** Change and the terms of Clause 46 (*Changes*) shall apply.
- 7.6 The MUDFA Contractor shall allow **tie's** Representative, at any time, a reasonable opportunity to view any Deliverable at any stage of development, and this opportunity shall be made available to **tie's** Representative as soon as reasonably practicable following receipt of any written request from **tie's** Representative.
- 7.7 During the preparation of the Deliverables, **tie** and/or **tie's** Representative shall at its discretion be entitled to call for a meeting to discuss the development of any Deliverable, and the MUDFA Contractor shall give due consideration to any

comments made by **tie** or **tie's** Representative at any such meetings. As soon as reasonably practicable following any such meeting, the MUDFA Contractor will prepare and circulate to those attending the meeting a report listing the Deliverables discussed and any comments made at such meeting.

- 7.8 If it should be found that any Deliverable does not fulfil the requirements of this Agreement or the needs of any Approval Bodies, the MUDFA Contractor shall at its own expense amend the Deliverable. Such amendment shall be made in accordance with Schedule 5 (*Review Procedure*) and such amendment and rectification shall ensure that the Deliverable shall satisfy the requirements of this Agreement and any Approval Bodies.
- 7.9 The MUDFA Contractor shall provide to **tie**, at no cost to **tie**, five copies of the agreed Deliverables in hard copy form and one copy in an agreed soft copy form (as appropriate to the format of the Deliverables).
- 7.10 In addition to the requirements of Clause 7.9, the MUDFA Contractor shall provide to **tie**, at no cost to **tie**, five copies in hard copy form and one copy in an agreed soft copy form of the as-built drawings and any manuals prepared.
- 7.11 In respect of any further copies of a particular Deliverable which **tie** may require, **tie** shall pay the MUDFA Contractor the reasonable copying charges or other reasonable charges for the provision of the same to **tie**.
- 7.12 The MUDFA Contractor accepts all risks arising from any conflicts, ambiguities, discrepancies, errors or omissions that subsequently appear within or between any of the Deliverables, and the MUDFA Contractor shall not be entitled to make any claim against **tie** for an extension of time, payment or otherwise in respect of any rectification of such conflicts, ambiguities, discrepancies, errors or omissions.
- 7.13 The MUDFA Contractor shall within 3 Business Days notify **tie** upon becoming aware of any conflicts, ambiguities, discrepancies, errors or omissions within or between any of the Deliverables. Where there are any conflicts, ambiguities, discrepancies, errors or omissions, the MUDFA Contractor shall provide with any notification, its proposals for resolving such conflicts, ambiguities, discrepancies, errors or omissions in compliance with this Agreement. Such proposals could include the suggestion that no action is required. The MUDFA Contractor shall proceed with its proposals to resolve any such conflicts, ambiguities, discrepancies, errors or omissions as soon as reasonably practicable. If the proposal from the

MUDFA Contractor is that no action is required or **tie** does not agree with the action proposed by the MUDFA Contractor, **tie** may notify the MUDFA Contractor, within 10 Business Days of the MUDFA Contractor's notice, to resolve any conflicts, ambiguities, discrepancies, errors or omissions in a different manner (which notification shall be binding on the MUDFA Contractor).

7.14 The MUDFA Contractor shall confirm with **tie** with regard to **tie's** requirements on the content and style of each Pre-Construction Deliverable before such Pre-Construction Deliverables are submitted to the Review Procedure.

7.15 The MUDFA Contractor shall ensure that all Deliverables comply with the document control requirements specified at paragraph 3.2.2 of Schedule 2 (*Technical Requirements*).

8. COMMENCEMENT OF PRE-CONSTRUCTION SERVICES, GATEWAY TO COMMENCEMENT OF THE CONSTRUCTION SERVICES AND CONSTRUCTION WORKS AND ISSUE OF WORKS ORDERS

8.1 The provision of the Pre-Construction Services, Risk Services and Stakeholder Services shall commence on the Effective Date, and the provision of these Pre-Construction Services, Risk Services and Stakeholder Services shall be carried out and completed in accordance with the terms of this Agreement.

8.2 The MUDFA Contractor shall within 3 Business Days notify **tie** when the MUDFA Contractor considers that it has completed each of the Pre-Construction Services to be carried out during the Pre-Construction Phase and that all matters to be agreed in respect of the Pre-Construction Services have been agreed between the MUDFA Contractor and **tie**. Without limitation, the MUDFA Contractor shall not serve such notice until the Pre-Construction Deliverables have been approved in accordance with the Review Procedure.

8.3 If **tie** agrees that all of the Pre-Construction Services have been completed and/or the relevant matters agreed, **tie** shall issue a Pre-Construction Completion Certificate within 10 Business Days. Notwithstanding that a Pre-Construction Completion Certificate may have been issued by **tie**, the MUDFA Contractor shall not commence the Construction Works in respect of any Work Section until **tie** shall have confirmed such commencement by issue of the relevant Work Order Confirmation Notice in accordance with Clause 8.8.

- 8.4 To the extent that **tie** considers that any Pre-Construction Services have not been completed by the MUDFA Contractor and/or the relevant matters agreed, **tie** shall within 10 Business Days notify the MUDFA Contractor in writing accordingly, including details of the further activities to be carried out by the MUDFA Contractor in order to complete the Pre-Construction Services.
- 8.5 After receiving any notification from **tie** under Clause 8.4, the MUDFA Contractor shall within 3 Business Days re-notify **tie** when the MUDFA Contractor considers that it has completed each of the Pre-Construction Services to be carried out during the Pre-Construction Phase and that all matters to be agreed during the Pre-Construction Services have been agreed between the MUDFA Contractor and **tie**, and the provisions of Clauses 8.2 to 8.4 shall apply mutatis mutandis to such re-notification.
- 8.6 To the extent that some but not all of the Pre-Construction Services to be carried out during the Pre-Construction Phase have been completed and/or the relevant matters agreed, **tie** may, in its sole discretion, instruct the Construction Services to commence and/or issue Work Orders and Work Order Confirmation Notices in accordance with Clause 8.8 in respect of any Work Section and in such circumstances:
- 8.6.1 **tie** may direct that some or all of the works and/or services to be performed as part of the Construction Works (which shall include the provision of vehicles and accommodation in accordance with Schedule 1 (*Scope of Works and Services*)) shall be commenced following the issue of a Work Order Confirmation Notice;
- 8.6.2 **tie** may direct that some or all of the works and/or services to be performed as part of the Construction Services shall be commenced; and
- 8.6.3 the MUDFA Contractor shall continue to provide the Pre-Construction Services until (i) the relevant Pre-Construction Services have been completed, and (ii) all matters to be agreed in respect of the Pre-Construction Services have been agreed between the MUDFA Contractor and **tie**, or until **tie** otherwise directs.

PROVIDED ALWAYS that **tie** shall not issue a Pre-Construction Completion Certificate in respect of the Pre-Construction Services until all of the Pre-Construction Services have been completed and/or the relevant matters agreed.

- 8.7 Unless instructed in accordance with Clause 8.6 or otherwise by **tie**, the MUDFA Contractor shall commence the Construction Services immediately following the issue of the first Work Order Confirmation Notice.
- 8.8 Before the MUDFA Contractor is permitted by **tie** to commence carrying out the Construction Works (which shall include the provision of vehicles and accommodation in accordance with Schedule 1 (*Scope of Works and Services*)) in any Work Section, the following procedure shall be followed (unless expressly varied by **tie** in writing):
- 8.8.1 **tie** shall issue a Work Order in accordance with the Programme and each Work Order shall include the Work Order Requirements;
- 8.8.2 within 5 Business Days (or such other period as **tie**, acting reasonably, may expressly agree in writing) of the receipt of any Works Order, the MUDFA contractor shall submit a Work Order Proposal;
- 8.8.3 within 5 Business Days of the receipt of any Work Order Proposal, **tie** shall either:
- 8.8.3.1 confirm the relevant Work Order by issuing a Work Order Confirmation Notice; or
- 8.8.3.2 withdraw the Work Order; or
- 8.8.3.3 discuss the issues set out in the Work Order Proposal. From such discussions, **tie** may modify its original Work Order and, if required by **tie**, the MUDFA Contractor shall submit an amended Work Order Proposal within 3 Business Days. The provisions of this Clause 8.8.3 shall be reapplied until the relevant Work Order is either confirmed or withdrawn by **tie**.
- 8.9 In respect of each Work Section, the Work Order Requirements shall, as required in the context of each Work Order and subject to Clause 8.11, include:
- 8.9.1 the scope and description of the works, services and supplies required from the MUDFA Contractor;
- 8.9.2 the design and drawings for the required works;

- 8.9.3 any additional requirements including any requirements in relation to specification, reinstatement, quality control and testing and commissioning in addition or as an alternative to the requirements set out in Schedule 3 (*Specification*);
 - 8.9.4 any additional requirements from the Utilities including any requirements for liaison in respect of any enabling works and/or any Utilities Works;
 - 8.9.5 any additional requirements from any third party affected by the proposed works;
 - 8.9.6 the required Land Consents;
 - 8.9.7 any additional programme constraints;
 - 8.9.8 any additional construction constraints including any amendments to Schedule 2 (*Technical Requirements*);
 - 8.9.9 the pre-construction health and safety plan and instructions from the planning supervisor;
 - 8.9.10 any requirements or additional requirements for site establishment, accommodation and vehicles; and
 - 8.9.11 a request for an update to the relevant part of the Anticipated Final Account and any additional requirements for pricing.
- 8.10 In respect of each Work Section, each Work Order Proposal shall respond to the relevant Work Order and, subject to Clause 8.11, include the following information (unless the MUDFA Contractor is expressly instructed to the contrary by **tie**):
- 8.10.1 the MUDFA Contractor's risk assessments and method statements which respond to the health and safety and quality plans prepared for the MUDFA Works;
 - 8.10.2 a Work Section Programme and any other relevant programme information;
 - 8.10.3 updated costs with regard to the relevant part of the Anticipated Final Account;

- 8.10.4 all necessary information as specified in Schedule 2 (*Technical Requirements*) including any relevant Access Permit Forms;
 - 8.10.5 any comment on the content of the Work Order, or any issues arising therefrom; and
 - 8.10.6 any other necessary details and supporting information to enable **tie** to issue a Work Order Confirmation Notice.
- 8.11 Where any of the information forming part of any Works Order and/or Works Order Proposal has been previously during the Pre-Construction Phase, **tie** or the MUDFA Contractor (as appropriate) shall confirm that such information is still valid.
- 8.12 The MUDFA Contractor shall give adequate notice in writing to **tie's** Representative of any further information or instruction that the MUDFA Contractor may require for the construction and completion of the MUDFA Works in respect of each Work Section.

9. LAND CONSENTS AND POSSESSION OF SITE AND ACCESS

- 9.1 In respect of each Work Section, **tie** shall from time to time prescribe:
- 9.1.1 the extent of portions of the Site of which the MUDFA Contractor is to be given possession;
 - 9.1.2 the order in which such portions of the Site shall be made available to the MUDFA Contractor;
 - 9.1.3 the availability and the nature of the access which is to be provided by **tie**; or
 - 9.1.4 the order in which the MUDFA Works shall be constructed.
- 9.2 As part of each Work Order and subject to Clause 9.1, **tie** shall provide the MUDFA Contractor with all Land Consents which **tie** believes are necessary in order for the MUDFA Contractor to carry out and complete the MUDFA Works in the relevant Work Section.
- 9.3 The MUDFA Contractor shall notify **tie** as soon as reasonably practicable on becoming aware of any new Land Consents which may be required in order to carry out and complete the MUDFA Works.

- 9.4 As required by **tie**, the MUDFA Contractor shall use reasonable endeavours to assist **tie** to obtain any Land Consents and any new Land Consents including providing works programmes, providing any relevant information, and notifying land owners. Any reasonable costs associated with assisting **tie** shall be paid by **tie** to the MUDFA Contractor.
- 9.5 The MUDFA Contractor warrants that it shall not breach the terms of any Land Consent. In respect of each Work Section, if the MUDFA Contractor breaches any term of any Land Consent and/or does not complete its works in accordance with the programme for that Work Section and within the time specified within any Land Consent, the MUDFA Contractor shall be required to seek any amendment to the existing Land Consent or new Land Consent which may be required in order to carry out and complete the MUDFA Works in the relevant Work Section. In such circumstances, the MUDFA Contractor shall not be entitled to apply for an extension of time or any payment. If the MUDFA Contractor does not obtain the required amendment or new Land Consent, **tie** shall recover the costs from the MUDFA Contractor which are associated with **tie** obtaining such amendment or new Land Consent.
- 9.6 The MUDFA Contractor acknowledges that **tie** and/or CEC have entered into agreements with third parties with regard to land access and other issues.
- 9.7 The MUDFA Contractor shall comply with Schedule 13 (*Third Party Agreements*) and the MUDFA Contractor warrants that it shall not breach the terms of Schedule 13 (*Third Party Agreements*).
- 9.8 If the MUDFA Contractor suffers delay and/or incurs extra cost from failure on the part of **tie** to give possession or access in accordance with the terms of this Clause 9 **tie's** Representative shall take such delay into account in determining any extension of time to which the MUDFA Contractor is entitled under Clause 38 (*Extension of Time for Completion*) and the MUDFA Contractor shall be paid in accordance with Clause 49 (*Payment*) the amount of such cost as may be reasonable except to the extent that such delay and/or extra cost result from the MUDFA Contractor's default or result from the MUDFA Contractor's failure to use its best efforts to minimise the consequences, in terms of cost or delay, of the relevant failure. If such failure requires any variation to any part of the MUDFA Works, the same shall be deemed to have been given pursuant to Clause 46 (*Changes*).

9.9 The MUDFA Contractor shall bear all costs and charges for any access required by it in addition to those provided by **tie**. The MUDFA Contractor shall also provide at its own cost any additional facilities outside the Site required by it for the purposes of the MUDFA Works.

10. ADVERSE PHYSICAL CONDITIONS AND ARTIFICIAL OBSTRUCTIONS

10.1 The risk of encountering adverse physical conditions and artificial obstructions during the course of the execution of the MUDFA Works shall be borne by the MUDFA Contractor and the MUDFA Contractor shall use its best endeavours to adjust the order and sequence in which the MUDFA Contractor proposes to execute the MUDFA Works in such a manner as to minimise the effects of the delay in, or if possible to avoid altogether any delay in, the progress by the MUDFA Contractor of the MUDFA Works. If the MUDFA Contractor shall have demonstrated to the reasonable satisfaction of **tie's** Representative that the MUDFA Contractor has used its best endeavours as aforesaid and delay cannot be avoided by such use and such conditions could not, in the opinion of **tie's** Representative, reasonably have been foreseen by an experienced contractor, the MUDFA Contractor shall be entitled to make a claim for extension of time under Clause 38.1 but shall not be entitled to claim additional payment for any additional cost incurred.

11. SPECIAL REQUIREMENTS IN RELATION TO STATUTORY AND/OR OTHER BODIES

11.1 The MUDFA Contractor shall consult and comply with the special requirements of any statutory parties affected by the MUDFA Works which parties may include:

11.1.1 Scottish Environment Protection Agency;

11.1.2 Coal Authority;

11.1.3 Historic Scotland;

11.1.4 Scottish Natural Heritage;

11.1.5 BAA;

11.1.6 Network Rail; and

11.1.7 The Scottish Executive Rural Affairs Department.

- 11.2 The MUDFA Contractor shall comply with the special requirements and shall liaise with the relevant statutory parties to ensure that the MUDFA Contractor has obtained and complies with these special requirements as updated and amended from time to time. The MUDFA Contractor shall comply with such special requirements as updated and amended.
- 11.3 Compliance with such special requirements by the MUDFA Contractor shall not relieve the MUDFA Contractor of any of its obligations and liabilities under the Agreement and fulfilment of such other obligations and liabilities shall not relieve the MUDFA Contractor of its responsibilities to comply with the said special requirements.

12. SUB-CONTRACTING

- 12.1 The MUDFA Contractor shall not sub-contract the whole of the MUDFA Works.
- 12.2 Subject to Clauses 12.3 and 12.4, the MUDFA Contractor may sub-contract part of the MUDFA Works with the prior written approval of **tie**, to a sub-contractor, supplier, sub-consultant, specialist and/or other party for performance of that specific part of the MUDFA Works.
- 12.3 Except in relation to Utility Specialist Contractors, the MUDFA Contractor 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 works) required by **tie** to enable a decision to be made by **tie** on the suitability of the proposed sub-contractor, supplier, sub-consultant, specialist and/or other party to perform the relevant part of the MUDFA Works. **tie's** decision on the use of any sub-contractor, supplier, sub-consultant, specialist and/or other party shall be final.
- 12.4 The form of sub-contract for any work which is to be sub-contracted is to be approved by **tie**, and before **tie** gives its consent to the proposed sub-contracting (and as a condition precedent to such consent) **tie** shall be entitled to require the proposed sub-contract to be approved by it in its final form. Provided, however, that such sub-contract shall in any event:
- 12.4.1 incorporate all relevant conditions of this Agreement including Schedule 9 (*Dispute Resolution Procedure*);
- 12.4.2 procure compliance with Schedule 2 (*Technical Requirements*);

- 12.4.3 provide that the sub-contractor shall provide the collateral warranties referred to in Clause 12.8;
- 12.4.4 require the sub-contractor to provide through the MUDFA Contractor to **tie's** Representative at the proper time consistent with the Programme such information of every type and description as the sub-contractor has undertaken to provide and as are reasonably necessary and in sufficient detail to enable the MUDFA Works to be completed in accordance with the Agreement; and
- 12.4.5 require the sub-contractor to comply with all programme requirements which are relevant for the timely execution of the part of the MUDFA Works to be carried out under the said sub-contract.
- 12.5 The MUDFA Contractor shall and shall procure that every Sub-Contractor shall, provide and employ in connection with the execution of the MUDFA Works:
- 12.5.1 only such technical assistants as are skilled and experienced in their respective occupations and such sub-agents, foremen and leading hands as are competent to give proper supervision to the work they are required to supervise; and
- 12.5.2 such skilled, semi-skilled and unskilled labour as is necessary for the proper and timely execution of the MUDFA Works.
- 12.6 The MUDFA Contractor shall enter into a sub-contract (in accordance with the provisions set out in Clause 12.4) with each of the Utility Specialist Contractors to procure that each of the Utility Specialist Contractors carry out and complete the relevant activities which are described in Part 4 of Schedule 1 (*Scope of Works and Services*) or any activities which are identified in Clause 3.14, in accordance with the terms of this Agreement.
- 12.7 Notwithstanding the provisions of paragraph 6 of Schedule 2 (*Technical Requirements*), **tie's** Representative shall be at liberty after due warning in writing to require the MUDFA Contractor to remove from the MUDFA Works any Sub-Contractor who mis-conducts itself or is incompetent or negligent in the performance of its duties or fails to conform with any particular provisions with regard to safety which may be set out in the Agreement or persists in any conduct which is prejudicial

to safety or health and such Sub-Contractor shall not be again employed upon the MUDFA Works without the permission of **tie's** Representative.

12.8 The MUDFA Contractor shall procure that every Sub-Contractor shall, within 10 Business Days of any request by **tie**, provide to **tie** a collateral warranty:

12.8.1 in favour of **tie** in the form set out in Schedule 6 (*Sub-Contractor Collateral Warranty*) with only such amendments as **tie** may approve; and/or

12.8.2 in favour of such party as may be required by **tie** in the form set out Schedule 6 (*Sub-Contractor Collateral Warranty*) with only such amendments as **tie** may approve.

12.9 The MUDFA Contractor shall be and shall remain wholly liable to **tie** under this Agreement for carrying out and completing the MUDFA Works including any part of the MUDFA Works carried out by any Sub-Contractor.

13. TIE'S REPRESENTATIVE

13.1 Subject to Clause 13.2, **tie's** Representative may exercise the authority specified in or necessarily to be implied from the Agreement. **tie's** Representative shall:

13.1.1 be responsible for the day to day supervision of the MUDFA Works to be performed by the MUDFA Contractor;

13.1.2 exercise such other functions and powers of **tie** under this Agreement as **tie** may notify to the MUDFA Contractor from time to time; and

13.1.3 be the primary point of contact for the MUDFA Contractor with **tie**;

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

13.2 **tie** may by notice in writing to the MUDFA Contractor from time to time, restrict the authority of **tie's** Representative and/or require **tie's** Representative to obtain the specific approval of **tie** before exercising any such authority. In the event of such

restriction or requirement, the MUDFA Contractor shall look to **tie** to exercise the relevant authority or to confirm that **tie** has given the relevant approval.

- 13.3 Except as expressly stated in the Agreement, **tie's** Representative shall have no authority to amend the Agreement nor to relieve the MUDFA Contractor of any of its obligations under the Agreement.
- 13.4 **tie** may by notice in writing to the MUDFA Contractor change the identity of **tie's** Representative. **tie** shall consult with the MUDFA Contractor 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.
- 13.5 During any period when a **tie's** 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.
- 13.6 No decision, act or omission of **tie** or **tie's** Representative shall, except as otherwise expressly provided in this Agreement:
- 13.6.1 in any way relieve or absolve the MUDFA Contractor from, modify, or act as a waiver or personal bar of, any liability, responsibility, obligation or duty under this Agreement;
- 13.6.2 in the absence of an express written instruction or authorisation issued by **tie** under Clause 46 (*Changes*) constitute or authorise a variation; or
- 13.6.3 be construed as restricting or binding **tie** in any way save with regard to the specific project matters to which it relates.
- 13.7 Where **tie's** Representative is not a single named individual, **tie's** Representative shall within 7 days of the Effective Date notify to the MUDFA Contractor in writing the name of the individual who will act on its behalf and assume the full responsibilities of **tie's** Representative under the Agreement. **tie's** Representative shall thereafter in like manner notify the MUDFA Contractor of any replacement of the named individual.

- 13.8 **tie's** Representative may from time to time delegate any of the duties and authorities vested in **tie's** Representative, and **tie's** Representative may at any time revoke such delegation. Any such delegation:
- 13.8.1 shall be in writing and shall not take effect until such time as a copy thereof has been delivered to the MUDFA Contractor or the MUDFA Contractor's Representative; and
- 13.8.2 shall continue in force until such time as **tie's** Representative shall notify the MUDFA Contractor in writing that the same has been revoked.
- 13.9 Instructions given by **tie's** Representative or by any person exercising delegated duties and authorities under Clause 13.8 shall be in writing. Provided that if for any reason it is considered necessary to give any such instruction orally the MUDFA Contractor shall comply therewith.
- 13.10 Any such oral instruction shall be confirmed in writing as soon as is possible under the circumstances. Provided that if the MUDFA Contractor confirms in writing any such oral instruction which confirmation is not contradicted in writing by **tie's** Representative forthwith it shall be deemed to be an instruction in writing by **tie's** Representative.
- 13.11 Upon the written request of the MUDFA Contractor, **tie's** Representative or the person exercising delegated duties or authorities under Clause 13.8 shall specify in writing under which of his duties and authorities the instruction is given.

14. WORK TO BE TO SATISFACTION OF TIE

- 14.1 The MUDFA Contractor shall construct and complete the MUDFA Works in strict accordance with the Agreement to the satisfaction of **tie** and shall comply with and adhere strictly to **tie** and **tie's** Representative's instructions on any matter connected therewith (whether mentioned in the Agreement or not). The MUDFA Contractor shall take instructions only from **tie's** Representative or, subject to Clause 13.8, from its duly appointed delegate.
- 14.2 The whole of the materials, MUDFA Contractor's Equipment and labour to be provided by the MUDFA Contractor under Clause 2 (*Contractor's General Responsibility*) and the mode, manner and speed of construction of the MUDFA Works are to be of a kind and conducted in a manner acceptable to **tie's** Representative.

14.3 If in pursuance of Clause 5 (*Documents Mutually Explanatory*) or Clause 14.1, **tie's** Representative shall issue instructions which involve the MUDFA Contractor in delay or disrupt its arrangements or methods of construction so as to cause the MUDFA Contractor to incur cost beyond that reasonably to have been foreseen by an experienced contractor then **tie's** Representative shall take such delay into account in determining any extension of time to which the MUDFA Contractor is entitled under Clause 38 (*Extension of Time for Completion*) and the MUDFA Contractor shall be paid in accordance with Clause 49 (*Payment*) the amount of such cost as may be reasonable except to the extent that such delay and/or extra cost result from the MUDFA Contractor's default or result from the MUDFA Contractor's failure to use its best efforts to minimise the consequences, in terms of cost or delay, of the relevant instruction. If such instructions require any variation to any part of the MUDFA Works, the same shall be deemed to have been given pursuant to Clause 46 (*Changes*).

15. MUDFA CONTRACTOR'S SUPERINTENDENCE AND KEY PERSONNEL

15.1 The MUDFA Contractor shall provide all necessary superintendence during the construction and completion of the MUDFA Works and for as long thereafter as **tie's** Representative may reasonably consider necessary. Such superintendence shall be given by sufficient persons having adequate knowledge of the operations to be carried out (including the methods and techniques required, the hazards likely to be encountered and methods of preventing accidents) for the satisfactory and safe construction of the MUDFA Works.

15.2 The MUDFA Contractor's senior representative on the Site ("**MUDFA Contractor's Representative**") must be approved by **tie's** Representative on behalf of **tie**, for which purpose the MUDFA Contractor shall first provide **tie's** Representative with full details of the experience and qualifications of the MUDFA Contractor's Representative.

15.3 The MUDFA Contractor shall ensure that, so long as the MUDFA Contractor's Representative remains an employee or servant of the MUDFA Contractor and is not incapacitated by illness or otherwise nor absent in consequence of his reasonable holiday entitlement, the MUDFA Contractor's Representative shall undertake overall supervision of the MUDFA Works for whatever time may be required to ensure the completion of the MUDFA Works in accordance with the Agreement. The MUDFA Contractor's Representative shall be responsible for the safety of all operations.

- 15.4 The MUDFA Contractor's Representative shall:
- 15.4.1 act as the principal point of contact for **tie**, and **tie's** Representative in relation to all matters related to this Agreement;
 - 15.4.2 have full authority to act on behalf of the MUDFA Contractor for all purposes of this Agreement, and **tie** and **tie's** Representative shall be entitled to treat all instructions and directions of the MUDFA Contractor's Representative as those of the MUDFA Contractor; and
 - 15.4.3 manage and co-ordinate the provision of the MUDFA Works by the MUDFA Contractor (and any Sub-Contractor) and the integration of provision of the MUDFA Works with the tasks being performed by **tie's** internal team and the other advisers and contractors appointed by **tie**.
- 15.5 The MUDFA Contractor's Representative shall not be changed by the MUDFA Contractor without the consent of **tie** to such change and the approval of **tie's** Representative of the substitute pursuant to Clause 15.2. The MUDFA Contractor shall take account of the need for liaison and continuity in respect of the provision of the MUDFA Works in accordance with the Programme when any change is proposed.
- 15.6 The MUDFA Contractor shall also nominate a deputy to the MUDFA Contractor's Representative. During any period when the MUDFA Contractor'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 MUDFA Contractor's Representative.
- 15.7 **tie's** Representative may at any time request the removal from the MUDFA Works of the MUDFA Contractor's Representative or his deputy for reasons of incompetence or inefficiency and request the prompt appointment of a satisfactory substitute, approved by **tie's** Representative pursuant to Clause 15.2.
- 15.8 Any costs incurred by the MUDFA Contractor in replacing the MUDFA Contractor's Representative (in any circumstances) shall be borne by the MUDFA Contractor.
- 15.9 The MUDFA Contractor shall ensure that the Key Personnel shall have day-to-day responsibility for and be involved in the performance of the MUDFA Works.

- 15.10 The MUDFA Contractor shall locate staff at such locations as the MUDFA Contractor considers convenient for the MUDFA Works, provided that:
- 15.10.1 the MUDFA Contractor 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
- 15.10.2 **tie** will require the MUDFA Contractor to make the Key Personnel available for meetings in Edinburgh at such times as **tie** may, in its sole discretion, direct; and
- 15.10.3 the MUDFA Contractor's Representative and five Key Personnel from the MUDFA Contractor's management team (as **tie** may reasonably require) shall be required to be co-located in Edinburgh with **tie's** project team. The identity, roles and functions of such Key Personnel shall be agreed with **tie**.
- 15.11 The MUDFA Contractor 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.
- 15.12 The MUDFA Contractor shall use all reasonable endeavours to ensure the continuity of the personnel assigned to perform the MUDFA Works and shall select Key Personnel having careful regard to those persons' existing work load and other planned commitments.
- 15.13 The MUDFA Contractor shall ensure that its Key Personnel shall:
- 15.13.1 have the level of skill, experience and authority appropriate to (i) the MUDFA Works to which such staff are allocated, and (ii) the standards to be achieved pursuant to this Agreement; and
- 15.13.2 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 MUDFA Works in accordance with this Agreement.

- 15.14 All Key Personnel should have a nominated deputy who shall be capable of fulfilling the duties of the person to whom they are deputising in the event of their absence and who shall be kept fully informed of project status in the relevant area.
- 15.15 The MUDFA Contractor 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 3 months by **tie** unless the prior written approval of **tie** has been obtained.
- 15.16 The MUDFA Contractor shall (and shall procure that the Key Personnel, its staff employed in the performance of the MUDFA Works and the Sub-Contractors) comply with all regulatory requirements appropriate to and required for the performance of the MUDFA Works and any rules, regulations and instructions from **tie's** Representative.

16. REMOVAL OF MUDFA CONTRACTOR'S EMPLOYEES

- 16.1 The MUDFA Contractor shall employ or cause to be employed in and about the construction and completion of the MUDFA Works and in the superintendence thereof only persons who are careful, skilled and experienced in their several trades and callings.
- 16.2 Notwithstanding the provisions of paragraph 6 of Schedule 2 (*Technical Requirements*), **tie's** Representative shall be at liberty to object to and require the MUDFA Contractor to remove or cause to be removed from the MUDFA Works any person employed thereon who in the opinion of **tie's** Representative mis-conducts himself or is incompetent or negligent in the performance of his duties or fails to conform with any particular provisions with regard to safety which may be set out in the Agreement or persists in any conduct which is prejudicial to safety or health, and such persons shall not be again employed upon the MUDFA Works without the permission of **tie's** Representative.
- 16.3 Any costs incurred by the MUDFA Contractor in removing, or causing to be removed, a person in accordance with this Clause 16 (*Removal of MUDFA Contractor's Employees*) shall be borne by the MUDFA Contractor.

17. SETTING-OUT

- 17.1 The MUDFA Contractor shall be responsible for the true and proper setting-out of the MUDFA Works and for the correctness of the position, levels, dimensions and

alignment of all parts of the MUDFA Works and for the provision of all necessary instruments, appliances and labour in connection therewith.

17.2 If at any time during the progress of the MUDFA Works, any error shall appear or arise in the position, levels, dimensions or alignment of any part of the MUDFA Works, the MUDFA Contractor, on being required so to do by **tie's** Representative, shall at its own cost rectify such error to the satisfaction of **tie's** Representative unless such error is based on incorrect data supplied in writing by **tie's** Representative in which case the cost of rectifying the same shall be borne by **tie**.

17.3 The checking of any setting out or of any line or level by **tie's** Representative shall not in any way relieve the MUDFA Contractor of its responsibility for the correctness thereof and the MUDFA Contractor shall carefully protect and preserve all benchmarks, sight rails, pegs and other things used in setting out the MUDFA Works.

18. BOREHOLES AND EXPLORATORY EXCAVATION

18.1 If at any time during MUDFA Works, **tie's** Representative shall require the MUDFA Contractor to make boreholes or to carry out exploratory excavation, such requirement shall be ordered in writing and shall be deemed to be a variation under Clause 46 (*Changes*) unless a Provisional Sum or Prime Cost Item in respect of such anticipated work shall have been included in the Bills of Quantities.

19. SAFETY AND SECURITY

19.1 The MUDFA Contractor shall throughout the progress of the MUDFA Works have full regard for the safety of all persons entitled to be upon the Site and shall keep the Site (so far as the same is under its control) and the MUDFA Works in an orderly state appropriate to the avoidance of danger to such persons.

19.2 The MUDFA Contractor shall among other things in connection with the MUDFA Works provide and maintain at its own cost all lights, guards, fencing, warning signs and watching when and where necessary or required by **tie's** Representative or required in accordance with Schedule 2 (*Technical Requirements*) or by any statutory or other competent authority for the protection of the MUDFA Works or for the safety and convenience of the public or others.

19.3 Without prejudice to Clause 23.3, the MUDFA Contractor shall comply with, and shall procure that its employees, agents and others on the Site shall comply with, all their respective duties and obligations under all legislation and other requirements

having the force of law relating to the health, safety and conduct of construction operations.

- 19.4 **tie** requires the MUDFA Contractor to undertake instruction and training, and provide and issue passes for the admission of any person having business on the Site, including persons who are not employees of the MUDFA Contractor or any Sub-Contractor, to the Site or to any part thereof as specified in Schedule 2 (*Technical Requirements*). In such event any person who fails to show his pass on demand to any duly authorised employee or agent of the MUDFA Contractor or **tie** may be refused admission. The MUDFA Contractor shall procure the return of any pass so used at any time on the demand of **tie** or on the cessation of the bearer's employment on the MUDFA Works.
- 19.5 Passes and the procedure for their use shall be subject to **tie's** approval and requirements which may be varied from time to time.
- 19.6 If required by **tie**, the MUDFA Contractor shall submit a list of the names of all workers requiring passes, together with two photographs of each person and shall satisfy **tie** of their good faith and identity before passes are issued.
- 19.7 Except with the written permission of **tie** to be given when necessary for the execution of the MUDFA Works and subject to such terms as may be imposed, the employees of the MUDFA Contractor and any Sub-Contractor shall not be permitted to enter any part of the Site under the control of other contractors or of **tie** or any other owner, and the MUDFA Contractor shall warn its employees and Sub-Contractors that any person found within those areas without such authority, is liable to be removed from the MUDFA Works.
- 19.8 The MUDFA Contractor shall ensure that its employees, Sub-Contractors, agents and others on the Site are confined to only that portion of the Site necessary to enable them to carry out the MUDFA Works.
- 19.9 The MUDFA Contractor shall ensure that the MUDFA Works and any part of the Site (including any Work Site) upon which the MUDFA Works are being carried out shall be kept secure at all times.

20. ADMISSION TO SITE

- 20.1 The MUDFA Contractor shall take all reasonable steps prevent unauthorised persons being admitted any part of the Site (including any Work Site) upon which the

MUDFA Works are being carried out. If **tie** gives the MUDFA Contractor notice that any person is not to be admitted to such part of the Site, the MUDFA Contractor shall take all practicable steps to prevent that person being admitted.

- 20.2 If and when instructed by **tie**, the MUDFA Contractor shall give to **tie** a list of names and addresses of all persons who are or and may be at any time concerned with the MUDFA Works or any part thereof, specifying the capacities in which they are so concerned, and giving such other particulars as **tie** may reasonably require.

21. CARE OF THE WORKS

- 21.1 The MUDFA Contractor shall save as in Clause 21.2 take responsibility for the care of the MUDFA Works, the Apparatus, and any materials, plant and equipment for incorporation within the MUDFA Works from the Effective Date until the date of issue of the last Certificate of Substantial Completion, when the responsibility for the said care shall pass, as appropriate, to **tie** or to a Utility in the event that such Utility is carrying out any Utilities Works.

- 21.2 If **tie's** Representative issues a Certificate of Substantial Completion for any Work Sector or part thereof, the MUDFA Contractor shall cease to be responsible for the care of that Work Sector or part thereof and the Apparatus situated therein from the date of issue of that Certificate of Substantial Completion and the responsibility for the care of that Work Sector or part thereof shall pass, as appropriate, to **tie** or to a Utility in the event that such Utility is carrying out any Utilities Works.

- 21.3 Notwithstanding that any Utilities Works are being carried out at the same time as the MUDFA Works, the MUDFA Contractor's responsibilities for the care of the MUDFA Works, the Apparatus and any materials, plant and equipment for incorporation within the MUDFA Works, shall continue subject to Clauses 21.1 and 21.2.

- 21.4 The MUDFA Contractor shall take full responsibility for the care of any work and materials, plant and equipment for incorporation therein which the MUDFA Contractor undertakes during the Defects Correction Period until such work has been completed.

- 21.5 In the event of any loss or damage to:

21.5.1 any Apparatus or the MUDFA Works or part thereof; or

21.5.2 any materials, plant or equipment for incorporation therein;

while the MUDFA Contractor is responsible for the care thereof, the MUDFA Contractor shall at its own cost rectify such loss or damage so that the MUDFA Works conform in every respect with the provisions of the Agreement (where relevant) and tie's Representative's instructions. The MUDFA Contractor shall also be liable for any loss or damage to the MUDFA Works and any Apparatus occasioned by the MUDFA Contractor and/or any MUDFA Contractor Parties in the course of any operations carried out by the MUDFA Contractor and/or any MUDFA Contractor Parties for the purpose of complying with the MUDFA Contractor's obligations under Clauses 41 (*Work Outstanding*) and 42 (*Contractor to Search*).

22. PROTESTOR ACTION

22.1 The MUDFA Contractor shall take whatever action and measures as are necessary to protect the MUDFA Works from protestor action and shall not be entitled to any additional costs or extension of time as a result of any such protestor action.

22.2 The MUDFA Contractor shall be responsible, at its own cost, for repairing, reinstating or making good any damage to property (including the MUDFA Works and any Apparatus) on the Site or the personal injury or death suffered by the MUDFA Contractor or any MUDFA Contractor Party while on the Site which is caused by or results from protestor action.

23. GIVING OF NOTICES, PAYMENT OF FEES AND CONSENTS

23.1 Except where otherwise provided in the Agreement, the MUDFA Contractor shall give all notices and pay all fees required to be given or paid by any Act of Parliament or any Regulation or Bye-law of any local or other statutory authority in relation to the construction and completion of the MUDFA Works and by the rules and regulations of all public bodies and companies whose property or rights are or may be affected in any way by the MUDFA Works.

23.2 [tie shall repay or allow to the MUDFA Contractor all such sums as tie's Representative shall certify to have been properly payable and paid by the MUDFA Contractor in respect of such fees and also all rates and taxes paid by the MUDFA Contractor in respect of the Site or any part thereof or anything constructed or erected thereon or on any part thereof or any temporary structures situated elsewhere but used

exclusively for the purposes of the MUDFA Works or any structures used temporarily and exclusively for the purposes of the MUDFA Works.]²

- 23.3 The MUDFA Contractor shall notify CEC and all local statutory undertakers of the dates and times when the MUDFA Contractor will require their services on the Site and shall be responsible for the co-ordination of their works if necessary with the remainder of the MUDFA Works.
- 23.4 Where **tie's** authorisation or completion of documentation in respect of compliance with any Law is required, the MUDFA Contractor shall furnish the relevant documentation to **tie** and permit **tie** a period of 14 days to authorise or complete it.
- 23.5 The MUDFA Contractor shall (at its own cost and expense):
- 23.5.1 obtain and maintain in effect all Consents which may be required to carry out and complete the MUDFA Works as is consistent with, required by or contained within this Agreement; and
- 23.5.2 implement each Consent within the period of its validity and in accordance with its terms.
- 23.6 The MUDFA Contractor shall provide copies of such Consents to **tie's** Representative. At the request of the MUDFA Contractor, **tie** may at its discretion render appropriate assistance, without any obligation, in relation to obtaining any Consent.
- 23.7 Acknowledgement by **tie** of the copies of Consents provided to them pursuant to Clause 23.6 shall not in any way affect the MUDFA Contractor's obligations or relieve the MUDFA Contractor from its obligations pursuant to this Clause 23 (*Giving of Notices, Payment of Fees and Consents*) or otherwise.
- 23.8 **tie** shall be entitled to request information in relation to the progress of the application for any Consent and the Consent itself and the MUDFA Contractor shall provide the same at no cost to **tie**.

² How are costs to be dealt with?

24. NEW ROADS AND STREET WORKS ACT 1991 AND TRAM LEGISLATION

24.1 In this Clause 24 (*New Roads and Street Works Act 1991 and Tram Legislation*) "**the Acts**" shall mean the New Roads and Street Works Act 1991 and the Tram Legislation.

24.2 For the purpose of obtaining any licences under the Acts required for the MUDFA Works, the undertaker shall be CEC and for the purposes of the Acts, **tie** shall be the licensee.

24.3 All other expressions common to the Acts and to this Clause 24 (*New Roads and Street Works Act 1991 and Tram Legislation*) shall have the same meaning as those assigned to them by the Acts.

24.4 **tie** shall obtain any street works licence and any other consent, licence or permission that may be required for the carrying out of the MUDFA Works and shall supply the MUDFA Contractor with copies thereof including details of any conditions or limitations imposed.

Provided that where the licence contains a prohibition against assignation which is notified to the MUDFA Contractor then the MUDFA Contractor shall give **tie** all notices required to be given by the undertaker and shall indemnify **tie** from and against all costs and charges which may arise from any failure by it so to do.

24.5 The MUDFA Contractor shall be responsible for giving to any relevant authority any required notice (or advance notice where prescribed) of its proposal to commence any work. A copy of each such notice shall be given to **tie**.

25. INTERFERENCE WITH TRAFFIC AND ADJOINING PROPERTIES

25.1 The MUDFA Contractor shall comply with the requirements of Schedule 2 (*Technical Requirements*) with regard to the maintenance of access to properties and the closure of roads.

25.2 The MUDFA Contractor shall at all times seek to minimise any nuisance or inconvenience to or interference with the business or operations of the owners, tenants or occupiers of the Site or other premises upon or in the locality of the Site and to the public generally, including measures to reduce the nuisance from noise, dust, smell, fumes and vibration during the carrying out of the MUDFA Works. The

MUDFA Contractor shall comply with the requirements of Schedule 2 (*Technical Requirements*) in this regard.

- 25.3 Without prejudice to the MUDFA Contractor's obligations under Clause 25.1, if the carrying out of the MUDFA Works or the remedying of any defects therein is likely to necessitate any interference with the rights of adjoining or neighbouring landowners, tenants or occupiers, then the MUDFA Contractor shall without cost to **tie** obtain the prior written agreement of such landowners, tenants and/or occupiers, and such agreement shall be subject to the approval of **tie** before execution. The MUDFA Contractor shall comply in every respect with any conditions contained in any such agreement.

26. AVOIDANCE OF DAMAGE TO HIGHWAYS ETC

- 26.1 The MUDFA Contractor shall use every reasonable means to prevent any of the highways or bridges communicating with or on the routes to the Site from being subjected to extraordinary traffic within the meaning of the Roads (Scotland) Act 1984 by any traffic of the MUDFA Contractor or any MUDFA Contractor Party.

In particular, the MUDFA Contractor shall select routes and use vehicles and restrict and distribute loads so that any such extraordinary traffic as will inevitably arise from the moving of MUDFA Contractor's Equipment and materials or manufactured or fabricated articles from and to the Site shall be limited as far as reasonably possible and so that no unnecessary damage or injury may be occasioned to such highways and bridges.

- 26.2 Save insofar as the Agreement otherwise provides, the MUDFA Contractor shall be responsible for and shall pay the cost of strengthening any bridges or altering or improving any highway communicating with the Site to facilitate the movement of MUDFA Contractor's Equipment or Temporary Works required in the carrying out of the MUDFA Works. The MUDFA Contractor shall indemnify and keep indemnified **tie** against all claims for damage to any highway or bridge communicating with the Site caused by such movement including such claims as may be made by any competent authority directly against **tie** and/or CEC pursuant to any Act of Parliament or other Statutory Instrument and shall negotiate and pay all claims arising solely out of such damage.
- 26.3 If, notwithstanding Clause 26.1, any damage occurs to any bridge or highway communicating with the Site arising from the transport of materials or manufactured

or fabricated articles being or intended to form part of the MUDFA Works and/or the Temporary Works, the MUDFA Contractor shall notify **tie's** Representative as soon as the MUDFA Contractor becomes aware of such damage or as soon as the MUDFA Contractor receives any claim from the authority entitled to make such claim.

27. FOSSILS ETC

27.1 All fossils, coins, articles of value or antiquity and structures or other remains or things of geological or archaeological interest discovered on the Site shall as between **tie** and the MUDFA Contractor be deemed to be the absolute property of **tie** and the MUDFA Contractor shall take reasonable precautions to prevent its workmen or any other persons from removing or damaging any such article or thing and shall immediately upon discovery thereof and before removal acquaint **tie's** Representative of such discovery and carry out at the expense of **tie**, **tie's** Representative's orders as to the disposal of the same.

28. QUALITY ASSURANCE

28.1 The MUDFA Contractor shall operate a quality management system, the standard of which shall comply with BS EN 150 9001:2000 and the MUDFA Contractor shall comply with such system. Such quality management system shall be reflected in appropriate quality management plans. Such plans shall be developed in accordance with the quality management system.

28.2 If in the opinion of **tie's** Representative, any Deliverable has not been prepared in accordance with the MUDFA Contractor's quality management system or with any other provision of the Agreement, **tie's** Representative shall so inform the MUDFA Contractor in writing giving reasons. Such non-compliance shall be treated as an error or omission in carrying out the MUDFA Works and the MUDFA Contractor shall not be entitled to make any claim against **tie** for an extension of time or payment in respect of such error or omission.

28.3 Compliance with any such quality management system shall not relieve the MUDFA Contractor from any of its other duties, obligations or liabilities under this Agreement.

28.4 The MUDFA Contractor shall appoint (or shall procure the appointment of) a quality manager as soon as reasonably practicable following the Effective Date. The identity

of the quality manager (and any replacement) shall be subject to the approval of **tie's** Representative (such approval not to be unreasonably withheld or delayed).

28.5 The quality manager shall:

28.5.1 ensure the effective operation of the quality systems described in this Clause 28 (*Quality Assurance*);

28.5.2 audit the quality systems at regular intervals and report the findings of such audit to **tie's** Representative;

28.5.3 review all quality systems at intervals agreed with **tie's** Representative to ensure their continued suitability and effectiveness; and

28.5.4 liaise with **tie's** Representative on all matters relating to quality management.

29. RETURNS OF LABOUR AND CONTRACTOR'S EQUIPMENT

29.1 The MUDFA Contractor shall, if required by **tie's** Representative, deliver to **tie's** Representative a return in such form and at such intervals as **tie's** Representative may prescribe showing in detail the numbers of the several classes of labour from time to time employed by the MUDFA Contractor on the Site and such information respecting MUDFA Contractor's Equipment as **tie's** Representative may require. The MUDFA Contractor shall require the Sub-Contractors to observe the provisions of this Clause 29 (*Returns of Labour and Contractor's Equipment*).

30. QUALITY OF MATERIALS AND WORKMANSHIP, SAMPLES AND TESTS

30.1 All materials and workmanship shall be the respective kinds described in the Agreement and in accordance with **tie's** Representative's instructions, and shall be subjected from time to time to such tests as **tie's** Representative may direct at the place of manufacture or fabrication or on the Site or such other place or places as may be specified in the Agreement. The MUDFA Contractor shall provide such assistance, instruments, machines, labour and materials as are normally required for examining, measuring and testing any work and the quality, weight or quantity of any materials used, and shall supply samples of materials before incorporation in the MUDFA Works for testing as may be selected and required by **tie's** Representative.

30.2 All samples shall be supplied by the MUDFA Contractor at its own cost.

30.3 The cost of making any test shall be borne by the MUDFA Contractor.

31. ACCESS TO SITE

31.1 **tie's** Representative, any person authorised by **tie's** Representative and authorised representatives from any of the Utilities shall at all times have access to the MUDFA Works and to the Site and to all workshops and places where work is being prepared or whence materials, manufactured articles, and machinery are being obtained for the MUDFA Works and the MUDFA Contractor shall afford every facility for and every assistance in obtaining such access or the right to such access.

32. EXAMINATION OF WORK BEFORE COVERING UP

32.1 No work or Apparatus shall be covered up or put out of view without the consent of **tie's** Representative and the MUDFA Contractor shall afford full opportunity for **tie's** Representative and representatives from any of the Utilities to examine any Apparatus and examine and measure any work which is about to be covered up or put out of view and to examine foundations before permanent work is placed thereon. The MUDFA Contractor shall give due notice to **tie's** Representative and each of the Utilities (as appropriate) whenever any such work, foundations or Apparatus is or are ready or about to be ready for examination and **tie's** Representative shall without unreasonable delay, unless he considers it unnecessary and advises the MUDFA Contractor accordingly, attend for the purpose of examining such Apparatus, examining and measuring such work or of examining such foundations.

32.2 The MUDFA Contractor shall uncover any part or parts of the MUDFA Works including any Apparatus or make openings in or through the same as **tie's** Representative may from time to time direct and shall reinstate and make good such part or parts to the satisfaction of **tie's** Representative. If any such part or parts have been covered up or put out of view after compliance with the requirements of Clause 32.1 and are found to have been carried out in accordance with the Agreement, the cost of uncovering, making openings in or through, reinstating and making good the same shall be borne by **tie** but in any other case all such costs shall be borne by the MUDFA Contractor.

33. URGENT REPAIRS AND EMERGENCIES

33.1 If, in the opinion of **tie's** Representative, any remedial or other work or repair is urgently necessary by reason of any emergency, accident or failure or other event occurring to, in or in connection with the MUDFA Works or any part thereof, either during the carrying out of the MUDFA Works or during the Defects Correction

Period, **tie's** Representative shall so inform the MUDFA Contractor with confirmation in writing.

33.2 Thereafter, if the MUDFA Contractor is unable or unwilling to carry out such work or repair at once, **tie** may itself carry out or procure the carrying out of the said work or repair.

33.3 If the work or repair so carried out by **tie** is work, which in the opinion of **tie's** Representative, the MUDFA Contractor was liable to carry out at its own expense under the Agreement, all costs and expenses properly incurred by **tie** in relation to such work shall be recovered from the MUDFA Contractor by **tie** and may be deducted from any monies due or to become due to the MUDFA Contractor.

34. REMOVAL OF UNSATISFACTORY WORK AND MATERIALS

34.1 **tie's** Representative shall during the progress of the MUDFA Works have power to instruct in writing:

34.1.1 the removal from the Site within such time or times specified in the instruction, of any materials which in the opinion of **tie's** Representative are not in accordance with the Agreement; and

34.1.2 substitution of such materials with materials in accordance with the Agreement; and/or

34.1.3 the removal and proper replacement (notwithstanding any previous test thereof or interim payment therefor) of any work which in respect of:

34.1.3.1 materials or workmanship; or

34.1.3.2 design by the MUDFA Contractor for which the MUDFA Contractor is responsible;

is not in the opinion of **tie's** Representative in accordance with the Agreement. After consultation with the MUDFA Contractor and with the agreement of **tie**, **tie's** Representative may allow all or any of such materials, workmanship or design to remain and confirm this in writing to the MUDFA Contractor (which shall not constitute a **tie** Change under Clause 46 (*Changes*)).

- 34.2 In the case of default on the part of the MUDFA Contractor in carrying out such instruction, **tie** shall be entitled to carry out or procure the carrying out of such instruction, and all costs and expenses properly incurred by **tie** in relation to such default shall be recoverable from the MUDFA Contractor by **tie** and may be deducted by **tie** from any monies due or to become due to the MUDFA Contractor.
- 34.3 Failure of **tie** or **tie's** Representative to disapprove any work or materials shall not prejudice the power of **tie** or **tie's** Representative subsequently to take action under this Clause 34 (*Removal of Unsatisfactory Works and Materials*).
- 34.4 If any workmanship or materials are not in accordance with the Agreement, **tie's** Representative may issue such orders or directions under Clauses 31 (*Access to Site*) or 34 (*Removal of Unsatisfactory Works and Materials*) to test or open up for inspection as are reasonable in the circumstances to establish to the satisfaction of **tie's** Representative the likelihood or extent, as appropriate to the circumstances, of any further similar non-compliance.
- 34.5 To the extent that such orders or directions are reasonable in the circumstances, whatever the results of the test or opening up, and notwithstanding Clauses 30.3, 32.2 and 42 (*Contractor to Search*), the cost of such test or opening up shall be borne by the MUDFA Contractor. The orders or directions shall not constitute **tie** Changes under Clause 46 (*Changes*) but shall, unless the test or inspection showed that the workmanship or materials were not in accordance with the Agreement, constitute a cause of delay for the purposes of Clause 38 (*Extension of Time for Completion*).

35. PROGRAMME

- 35.1 The MUDFA Contractor shall progress the MUDFA Works with due expedition and in a timely and efficient manner without delay, to achieve timeous delivery and completion of the MUDFA Works (or any part thereof) and its other obligations under this Agreement in accordance with the Programme.
- 35.2 During the Pre-Construction Phase, the MUDFA Contractor shall develop the Pre-Construction Programme submitted as part of the MUDFA Contractor's tender, in accordance with Schedule 1 (*Scope of Works and Services*);
- 35.3 During the Pre-Construction Phase, the MUDFA Contractor shall develop the Construction Programme submitted as part of the MUDFA Contractor's tender, in accordance with Schedule 1 (*Scope of Works and Services*);

- 35.4 The MUDFA Contractor shall update the Pre-Construction Programme and the Construction Programme in accordance with the requirements of Schedule 1 (*Scope of Works and Services*);
- 35.5 The MUDFA Contractor shall submit to **tie's** Representative for his acceptance any change to the Pre-Construction Programme and/or the Construction Programme showing the revised order or manner in which the MUDFA Contractor proposes to carry out the MUDFA Works.
- 35.6 **tie's** Representative shall within 10 Business Days after receipt of any revised programme from the MUDFA Contractor:
- 35.6.1 accept the revised programme in writing; or
- 35.6.2 reject the revised programme in writing with reasons; or
- 35.6.3 request the MUDFA Contractor to supply further information to clarify or substantiate the revised programme or to satisfy **tie's** Representative as to its reasonableness having regard to the MUDFA Contractor's obligations under the Agreement.

Provided that if none of the above actions is taken within the said period of 10 Business Days, **tie's** Representative shall be deemed to have rejected the revised programme as submitted as the Programme.

- 35.7 The MUDFA Contractor shall within 5 Business Days after receiving from **tie's** Representative any request under Clause 35.6.3 or within such further period as **tie's** Representative may allow, provide the further information requested, failing which the revised programme shall be deemed to be rejected.

Upon receipt of such further information, **tie's** Representative shall within a further 5 Business Days accept or reject the revised programme in accordance with Clauses 35.6.1 or 35.6.2. In the event that the revised programme is accepted, the revised programme shall form and become the Pre-Construction Programme or Construction Programme (as appropriate).

- 35.8 Should it appear to **tie's** Representative at any time that the actual progress of the MUDFA Works does not conform with the Programme, **tie's** Representative shall be entitled to require the MUDFA Contractor to produce a revised programme showing such modifications to the Programme as may be necessary to ensure completion of

the MUDFA Works or any Work Sector within the time for completion as defined in Clause 37 (*Time for Completion*) or extended time granted pursuant to Clause 38 (*Extension of Time for Completion*). In such event the MUDFA Contractor shall submit its revised programme within 10 Business Days or within such further period as **tie's** Representative may allow. Thereafter the provisions of Clauses 35.6 and 35.7 shall apply.

35.9 Acceptance by **tie's** Representative of the MUDFA Contractor's programme in accordance with Clauses 35.6, 35.7 and 35.8 shall not relieve the MUDFA Contractor of any of its duties or responsibilities under the Agreement.

36. SUSPENSION OF WORK³

36.1 The MUDFA Contractor shall on the written order of **tie's** Representative suspend the progress of the MUDFA Works or any part thereof for such time or times and in such manner as **tie's** Representative may consider necessary and shall during such suspension properly protect and secure the work so far as is necessary in the opinion of **tie's** Representative. Except to the extent that such suspension is:

36.1.1 otherwise provided for in the Agreement;

36.1.2 necessary by reason of weather conditions or by some default on the part of the MUDFA Contractor; or

36.1.3 necessary for the proper construction and completion or for the safety of the MUDFA Works or any part thereof in as much as such necessity does not arise from any act or default of **tie's** Representative or **tie**,

then if compliance with **tie's** Representative's instructions under this Clause 36 (*Suspension of Work*) involves the MUDFA Contractor in delay or extra cost, **tie's** Representative shall take such delay into account in determining any extension of time to which the MUDFA Contractor is entitled under Clause 38 (*Extension of Time for Completion*) and the MUDFA Contractor shall be paid in accordance with Clause 49 (*Payment*) the amount of such extra cost as may be reasonable except when such suspension is otherwise provided for in the Agreement or is necessary by reason of some default on the part of the MUDFA Contractor or is necessary by reason of weather conditions or for the proper execution or for the safety of the MUDFA Works or any part of them.

³ Time periods to be checked.

36.2 If the progress of the MUDFA Works or any part thereof is suspended on the written order of **tie's** Representative and if permission to resume work is not given by **tie's** Representative within a period of three months from the date of suspension then the MUDFA Contractor may unless such suspension is otherwise provided for in the Agreement or continues to be necessary by reason of some default on the part of the MUDFA Contractor serve a written notice on **tie's** Representative requiring permission within twenty eight days from the receipt of such notice to proceed with the MUDFA Works or that part thereof in regard to which progress is suspended. If within the said twenty eight days **tie's** Representative does not grant such permission, the MUDFA Contractor by a further written notice so served may (but is not bound to) elect to treat the suspension where it affects part only of the works as an omission of such part under Clause 46 (*Changes*) or where it affects the whole Works as an abandonment of the Agreement by **tie**.

37. TIME FOR COMPLETION

37.1 The whole of the MUDFA Works and each of the Work Sectors required to be completed within a particular time in terms of the Programme shall be substantially completed by the MUDFA Contractor within the time so stated (or such extended time as may be allowed under Clause 38 (*Extension of Time for Completion*) or revised time agreed under Clause 39.2).

37.2 Each Work Section required to be completed within a particular time in terms of the relevant Work Section Programme shall be substantially completed by the MUDFA Contractor within the time so stated (or such extended time as may be allowed under Clause 38 (*Extension of Time for Completion*) or revised time agreed under Clause 39.2).

37.3 The MUDFA Contractor shall take all reasonable steps to mitigate the effects of any delay to the progress of the MUDFA Works.

38. EXTENSION OF TIME FOR COMPLETION

38.1 Should the MUDFA Contractor consider that:

38.1.1 any **tie** Change ordered under Clause 46 (*Changes*); or

38.1.2 any delay caused by **tie** failing to issue any Work Order in accordance with the Programme; or

- 38.1.3 any delay caused by the failure on the part of **tie** to give possession or access as referred to in Clause 9.8;
- 38.1.4 any delay caused by adverse physical conditions and artificial obstructions which are referable to this Clause 38 (*Extension of Time for Completion*) in accordance with Clause 10.1;
- 38.1.5 any delay caused by instructions issued by **tie's** Representative as referred to in Clause 14.3;
- 38.1.6 any delay caused by orders or directions from **tie's** Representative in respect of the removal of unsatisfactory work or materials referred to in Clause 34.5 which are referable to this Clause 38 (*Extension of Time for Completion*);
- 38.1.7 any delay caused by the suspension of MUDFA Works which are referable to this Clause 38.1.7 in accordance with Clause 36.1;
- 38.1.8 any delay caused by the execution of any Utilities Works; or
- 38.1.9 a material breach by **tie** of this Agreement;

be such as to entitle the MUDFA Contractor to an extension of time for the substantial completion of the MUDFA Works, the MUDFA Contractor shall within 10 Business Days after the cause of any delay has arisen deliver to **tie's** Representative full and detailed particulars in justification of the period of extension claimed in order that the claim may be investigated at the time. This shall include:

- 38.1.9.1 the cause of the delay;
- 38.1.9.2 the MUDFA Contractor's estimate of the likely effect of such delay upon the Programme;
- 38.1.9.3 mitigation measures adopted and why unsuccessful;
- 38.1.9.4 the estimated additional cost that shall be incurred; and
- 38.1.9.5 any acceleration measures which the MUDFA Contractor could take to mitigate the effects of such delay and an estimate of the costs thereof.

- 38.2 **tie's** Representative shall upon receipt of such particulars consider all the circumstances known to him at that time and make an assessment of the delay (if any) that has been suffered by the MUDFA Contractor as a result of the alleged cause and shall so notify the MUDFA Contractor in writing.
- 38.3 Should **tie's** Representative consider that the delay suffered fairly entitles the MUDFA Contractor to an extension of the time for the substantial completion of the MUDFA Works such extension shall be granted forthwith and be notified to the MUDFA Contractor in writing. The Programme shall be revised accordingly by the MUDFA Contractor in accordance with the terms of Clause 35.6 to 35.7. In the event that the MUDFA Contractor has made a claim for an extension of time but **tie's** Representative does not consider the MUDFA Contractor entitled to an extension of time **tie's** Representative shall so inform the MUDFA Contractor without delay.
- 38.4 Notwithstanding the generality of the foregoing, **tie's** Representative shall, in assessing any delay or extension of time for the purpose of this Clause 38 (*Extension of Time for Completion*):

38.4.1 not take into account:

38.4.1.1 any event or cause of delay which is in any way consequent upon or necessitated by any negligence, omission, default, breach of contract or breach of statutory duty of the MUDFA Contractor, its servants or agents or any Sub-Contractor or their respective servants or agents; or

38.4.1.2 any delay which is concurrent with another delay for which the MUDFA Contractor is responsible;

38.4.2 take into account an event or cause of delay only if and to the extent that the MUDFA Contractor establishes to the satisfaction of **tie's** Representative that the MUDFA Contractor has used its best endeavours to adjust the order and sequence in which the MUDFA Contractor proposes to execute the MUDFA Works in such a manner as to minimise the effects of the delay in, or if possible to avoid altogether any delay in, the progress of the MUDFA Works; or

- 38.4.3 take into account only those events or causes of delay which appear to **tie's** Representative to be likely to result in the eventual delay in completion of the MUDFA Works in accordance with the Agreement.
- 38.5 The MUDFA Contractor shall not be entitled to and shall be deemed to have irrevocably waived any entitlement to any extension of time unless the MUDFA Contractor has within 10 Business Days of becoming aware of the circumstances or occurrences which have caused or are likely to cause delay to the MUDFA Contractor in the performance of the MUDFA Works notified **tie** in writing and submitted to **tie** the detailed particulars in accordance with Clause 38.1 in relation to any extension of time to which the MUDFA Contractor considers itself entitled in order that such submission may be investigated at the time.
- 38.6 The MUDFA Contractor shall not be entitled to and shall be deemed to have irrevocably waived any entitlement to any extension of time if the MUDFA Contractor has failed to:
- 38.6.1 identify the required dates for design information from the SDS Provider during the Pre-Construction Phase; or
 - 38.6.2 identify the long lead time works and/or order any long lead time materials; or
 - 38.6.3 identify the enabling works which are required from the Utilities in order to commence any part of the MUDFA Works; or
 - 38.6.4 manage the required interface with the Utilities in so far as this forms part of the MUDFA Works; or
 - 38.6.5 manage the required interface with CEC in so far as this forms part of the MUDFA Works; or
 - 38.6.6 fails to identify any instructions which are required from **tie** in order to progress the MUDFA Works in accordance with the Programme.⁴
- 38.7 If the MUDFA Works are delayed in circumstances other than those entitling the MUDFA Contractor to an extension of time as set out in Clause 38.1 or as a result of a Force Majeure Event, the MUDFA Contractor shall inform **tie** at the earliest opportunity and shall give an estimate of the likely effect upon the Programme. The

MUDFA Contractor at its own expense shall take such acceleration measures as are necessary to achieve the requirements of the Programme.

39. RATE OF PROGRESS

39.1 If for any reason which does not entitle the MUDFA Contractor to an extension of time, the rate of progress of the MUDFA Works is at any time in the opinion of **tie's** Representative, too slow to ensure substantial completion by the time or extended time for completion prescribed by Clauses 37 (*Time for Completion*) and 38 (*Extension of Time for Completion*) as appropriate, or any previously agreed revised time for completion agreed under Clause 39.2, **tie's** Representative shall notify the MUDFA Contractor in writing and the MUDFA Contractor shall thereupon take such steps as are necessary and to which **tie's** Representative may consent to expedite the progress so as substantially to complete the MUDFA Works by that prescribed time or extended time. The MUDFA Contractor shall not be entitled to any additional payment for taking such steps.

39.2 Where **tie** desires either:

39.2.1 a Date for Completion earlier than the Date for Completion current at the date of issue of the preliminary instruction under Clause 39.3; or

39.2.2 to have the MUDFA Works completed by the Date for Completion where, following delays or stoppage to programme for whatever reason, the MUDFA Works would not be so completed in the absence of any acceleration or resequencing arrangements; or

39.2.3 to obviate the necessity for, or to order the cancellation of, or a reduction in the length of, any extension of time being fixed under Clause 38 (*Extension of Time for Completion*) so that either the Date for Completion current at the date of preliminary instruction under Clause 39.3 is not extended or is not extended by the length of the extension of time that would otherwise have been given under Clause 38 (*Extension of Time for Completion*);

tie's Representative may issue a preliminary instruction under Clause 39.3.

39.3 If **tie's** Representative issues a preliminary instruction to the MUDFA Contractor to accelerate the carrying out or alter the sequence and timing of any work to be

⁴ To be reviewed

executed under the provisions of the Agreement, **tie's** Representative shall in such instruction set out the exact nature of the requirements of **tie** in regard to the Date for Completion as referred to in Clause 39.2 for which the preliminary instruction has been issued.

39.4 If the MUDFA Contractor sustains a reasonable objection to such an instruction, the preliminary instruction shall either be withdrawn or so varied as to meet such objection and may then be re-issued by **tie's** Representative.

39.5 As soon as reasonably practicable after receipt of the preliminary instruction (or after receipt of a preliminary instruction re-issued under Clause 39.4) the MUDFA Contractor shall inform **tie's** Representative in writing in respect of the proposed instruction:

39.5.1 of the amount of any additional cost to which the MUDFA Contractor should be entitled as a result of compliance with the instruction when issued by **tie's** Representative subject to Clause 50.1; or

39.5.2 that it is not reasonably practicable to state such a sum and that the cost to **tie** of compliance by the MUDFA Contractor will therefore have to be ascertained in accordance with Clause 46 (*Changes*); and

39.5.3 the earlier date for completion which can become the Date for Completion for all the purposes of the Agreement (and which will correspond within the meaning of Clause 37 (*Time for Completion*)); or

39.5.4 the extent to which an extension of time that would otherwise be fixed under Clause 38 (*Extension of Time for Completion*) can be cancelled or reduced and the date for completion which as a result will be or become the Date for Completion for all the purposes of the Agreement (and which will correspond with a revised time for completion within the meaning of Clause 37 (*Time for Completion*)).

39.6 If on receipt of the information given to **tie's** Representative under Clause 39.5 **tie** wishes to pay the amount referred to in Clause 39.5.1 and to accept the Date for Completion stated by the MUDFA Contractor pursuant to Clause 39.5.3 **tie** shall cause **tie's** Representative to issue an instruction:

39.6.1 confirming the details of the acceleration or alteration of sequence or timing required, and

39.6.2 fixing the Date for Completion and the amount to which Clause 39.5.1 refers shall be included as if it were a variation.

39.7 Following any instruction under Clause 39.6 the MUDFA Contractor shall revise the Programme in accordance with the terms of Clause 35 (*Programme*).

40. NOTIFICATION OF SUBSTANTIAL COMPLETION

40.1 In respect of each Work Sector, when the MUDFA Contractor considers that a Work Sector has been substantially completed and has satisfactorily passed any final test that may be prescribed by the Agreement, the MUDFA Contractor may give notice in writing to that effect to **tie's** Representative. Such notice shall be accompanied by an undertaking to finish any outstanding work in accordance with the provisions of Clause 41.1.

40.2 **tie's** Representative shall within twenty one days of the date of delivery of such notice either:

40.2.1 issue to the MUDFA Contractor a Certificate of Substantial Completion stating the date on which in his opinion the Work Sector was substantially completed in accordance with the Agreement; or

40.2.2 give instructions in writing to the MUDFA Contractor specifying all the work which in **tie's** Representative's opinion requires to be done by the MUDFA Contractor before the issue of such a certificate.

If **tie's** Representative gives such instructions the MUDFA Contractor shall be entitled to receive a Certificate of Substantial Completion within twenty one days of completion to the satisfaction of **tie's** Representative of the work specified in the said instructions.

40.3 For the purposes of this Clause 40 (*Notification of Substantial Completion*), 'Substantial Completion' shall mean successful testing and commissioning of the Apparatus in accordance with the provisions of Schedule 3 (*Specification*) and/or the relevant Works Order, and approval by **tie** of any reinstatement in accordance with the provisions of Schedule 3 (*Specification*) and/or the relevant Work Order.⁵ **tie's** Representative may at his discretion issue a Certificate of Substantial Completion notwithstanding that minor items of work remain to be completed, in which event

⁵ **tie** to consider the definition of "Substantial Completion"

such incomplete work and/or commissioning and adjustment shall be included in the work outstanding which is to be finished by the MUDFA Contractor in accordance with the provisions of Clause 41 (*Work Outstanding*).

41. WORK OUTSTANDING

- 41.1 The undertaking to be given under Clause 40.1 may after agreement between **tie's** Representative and the MUDFA Contractor specify a time or times within which the outstanding work shall be completed. If no such times are specified, any outstanding work shall be completed as soon as practicable during the Defects Correction Period.
- 41.2 The MUDFA Contractor shall deliver up to **tie** the MUDFA Works and each Work Sector and part thereof, at the end of the Defects Correction Period in the condition required by the Agreement (fair wear and tear excepted) to the satisfaction of **tie's** Representative. To this end, the MUDFA Contractor shall, as soon as practicable, carry out all work of repair, amendment, reconstruction, rectification and making good defects of whatever nature as may be required of the MUDFA Contractor in writing by **tie's** Representative during the Defects Correction Period or within fourteen days after its expiry as a result of an inspection made by or on behalf of **tie's** Representative prior to its expiry. Provided that (but without prejudice to Clause 33 (*Urgent Repairs and Emergencies*)), where **tie's** Representative states that, in his opinion, any such defect is likely to cause unreasonable inconvenience to any Utility, CEC or any third party or is likely directly or indirectly to cause any further damage to any Apparatus or any property, the MUDFA Contractor shall comply with **tie's** Representative's instruction forthwith and in any event within 48 hours from its receipt.
- 41.3 All work required under Clause 41.2 shall be carried out by the MUDFA Contractor at its own expense if, in **tie's** Representative's opinion, it is necessary due to the use of materials or workmanship not in accordance with the Agreement or to neglect or failure by the MUDFA Contractor to comply with any of its obligations under the Agreement. In any other event the value of such work shall be ascertained and paid for as if it were additional work.
- 41.4 If the MUDFA Contractor fails to do any such work as aforesaid **tie** shall be entitled to carry out that work itself or by using other contractors and if it is work which the MUDFA Contractor should have carried out at its own expense, **tie** shall be entitled to recover all costs and expenses properly incurred by **tie** in relation to such work

from the MUDFA Contractor and **tie** may deduct the same from any monies that are or may become due to the MUDFA Contractor.

42. CONTRACTOR TO SEARCH

42.1 The MUDFA Contractor shall, if required by **tie's** Representative in writing, carry out such surveys, searches, tests or trials as may be necessary to determine the cause of any defect, imperfection or fault under the directions of **tie's** Representative. Unless the defect, imperfection or fault is one for which the MUDFA Contractor is liable under the Agreement, the cost of the surveys, searches, tests or trials carried out by the MUDFA Contractor as aforesaid shall be borne by **tie**. If the defect, imperfection or fault is one for which the MUDFA Contractor is liable, the cost of the surveys, searches, tests or trials carried out as aforesaid shall be borne by the MUDFA Contractor and the MUDFA Contractor shall in such case repair, rectify and make good such defect, imperfection or fault at its own expense in accordance with Clause 41 (*Work Outstanding*).

43. NON-REMOVAL OF MATERIALS AND CONTRACTOR'S EQUIPMENT

43.1 No MUDFA Contractor's Equipment, Temporary Works, materials for Temporary Works or other goods or materials owned by the MUDFA Contractor and brought on to the Site for the purposes of the Agreement shall be removed without the written consent of **tie's** Representative which consent shall not unreasonably be withheld.

43.2 **tie** shall not at any time be liable for the loss of or damage to any MUDFA Contractor's Equipment, Temporary Works, goods or materials.

43.3 If the MUDFA Contractor fails to remove any of the said MUDFA Contractor's Equipment, Temporary Works, goods or materials in accordance with Schedule 2 (*Technical Requirements*) within such reasonable time after completion of the MUDFA Works as **tie's** Representative may allow, then **tie** may sell or otherwise dispose of such items. From the proceeds of the sale of any such items, **tie** shall be entitled to retain any costs or expenses incurred in connection with their sale and disposal before paying the balance (if any) to the MUDFA Contractor.

44. DEFECTS CORRECTION CERTIFICATE

44.1 At the end of the Defects Correction Period and when all outstanding work referred to under Clause 40 (*Notification of Substantial Completion*) and all work of repair, amendment, reconstruction, rectification and making good of defects, imperfections,

shrinkages and other faults referred to under Clause 41 (*Work Outstanding*) and Clause 42 (*Contractor to Search*) have been completed, **tie's** Representative shall issue to the MUDFA Contractor a Defects Correction Certificate stating the date on which the MUDFA Contractor shall have completed its obligations to construct and complete the MUDFA Works to **tie's** Representative's satisfaction.

44.2 The issue of the Defects Correction Certificate shall not be taken as relieving the MUDFA Contractor from any liability arising out of or in any way connected with the performance of its obligations under the Agreement.

45. LIQUIDATED DAMAGES FOR DELAY

45.1 If the MUDFA Contractor fails to achieve substantial completion of any Work Sector by the Longstop Date, the MUDFA Contractor shall pay to **tie** the sum of £50,000 sterling for every week (or pro-rated for each day) which shall elapse between the date on which the prescribed time expired and the date on which the final Work Sector is substantially completed in accordance with this Agreement. The said sum represents **tie's** genuine pre-estimate of the [minimum level of] damages per week likely to be suffered by **tie** if any Work Sector is not substantially completed in accordance with the Agreement.

45.2 All sums payable by the MUDFA Contractor to **tie** pursuant to this Clause 45 (*Liquidated Damages for Delay*) shall be paid as liquidated damages for delay and not as a penalty.

45.3 The total amount of any liquidated damages payable by the MUDFA Contractor under this Clause 45 (*Liquidated Damages for Delay*) shall be limited to £1,300,000 sterling.

45.4 **tie** may:

45.4.1 deduct and retain the amount of any liquidated damages becoming due under the provisions of this Clause 45 (*Liquidated Damages for Delay*) from any sums due or which become due to the MUDFA Contractor including any Value Engineering Incentive Payment; or

45.4.2 require the MUDFA Contractor to pay such amount to **tie** forthwith.

If upon a subsequent or final review of the circumstances causing delay, **tie's** Representative grants a relevant extension or further extension of time in respect of

the Longstop Date **tie** shall no longer be entitled to liquidated damages in respect of the period of such extension.

Any sum in respect of such period which may already have been recovered under this Clause 45 (*Liquidated Damages for Delay*) shall be reimbursed forthwith to the MUDFA Contractor. Interest shall not be payable by **tie** on any amounts so reimbursed.

45.5 If after liquidated damages have become payable, **tie's** Representative orders a variation under Clause 46 (*Changes*) or any other situation outside the MUDFA Contractor's control arises any of which in **tie's** Representative's opinion results in further delay in respect of the Longstop Date:

45.5.1 **tie's** Representative shall so notify the MUDFA Contractor and **tie** in writing;
and

45.5.2 **tie's** further entitlement to liquidated damages in respect of the Longstop Date shall be suspended until **tie's** Representative notifies the MUDFA Contractor and **tie** in writing that the further delay has come to an end.

Such suspension shall not invalidate any entitlement to liquidated damages which accrued before the period of further delay started to run and subject to any subsequent or final review of the circumstances causing delay any monies already deducted or paid as liquidated damages under the provisions of this Clause 45 (*Liquidated Damages for Delay*) may be retained by **tie**.

45.6 The recovery by **tie** of liquidated damages under this Clause 45 (*Liquidated Damages for Delay*) shall not in any way relieve the MUDFA Contractor from its obligation to complete the MUDFA Works, nor from any of its other obligations or liabilities under the Agreement.

46. CHANGES

46.1 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 46 (*Changes*). If **tie** requires a **tie** Change, it must serve a **tie** Notice of Change on the MUDFA Contractor.

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

- 46.2.1 set out the proposed **tie** Change in sufficient detail to enable the MUDFA Contractor to calculate and provide the Estimate in accordance with Clause 46.3 below;
 - 46.2.2 require the MUDFA Contractor to provide **tie** within [eighteen] days of receipt of **tie** Notice of Change with an Estimate, and specify whether any competitive quotes are required; and
 - 46.2.3 set out how **tie** wishes to pay (where relevant) for any proposed **tie** Change.
- 46.3 As soon as is reasonably practicable, and in any event within [eighteen] days after having received a **tie** Notice of Change, the MUDFA Contractor shall deliver to **tie** the Estimate. The Estimate shall include the opinion of the MUDFA Contractor (acting reasonably) on:
- 46.3.1 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;
 - 46.3.2 any impact on the performance of the MUDFA Works;
 - 46.3.3 any impact on the Programme, and any requirement for an extension of time;
 - 46.3.4 any amendment required to the Agreement as a result of the implementation of the proposed **tie** Change,
 - 46.3.5 the proposed method of delivery of the proposed **tie** Change;
 - 46.3.6 proposals to mitigate the impact of the proposed **tie** Change; and
 - 46.3.7 any increase or decrease in any sums due to be paid to the MUDFA Contractor as a result of the implementation of the proposed **tie** Change.
- 46.4 The valuation of any **tie** Changes made in compliance with this Clause 46 (*Changes*) shall be added to or deducted from the sums due to be paid to the MUDFA Contractor as the case may be, and shall be ascertained by **tie** as follows:
- 46.4.1 by measurement and valuation at the rates and prices for similar work in Schedule 4 (*Bills of Quantities*) insofar as such rates and prices apply;

46.4.2 if such rates and prices do not apply by measurement and valuation at rates and prices deduced therefrom insofar as it is practical to do so;

46.4.3 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

46.4.4 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 4 (*Bills of Quantities*);

provided that where any **tie** Change would otherwise fall to be valued under Clauses 46.4.1 or 46.4.2 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 so valued, the value of **tie** Change shall be ascertained by measurement and/or valuation at fair rates and prices.

46.5 The MUDFA Contractor shall include in the Estimate evidence demonstrating that:

46.5.1 the MUDFA Contractor 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;

46.5.2 the MUDFA Contractor has, where required by **tie**, sought competitive quotes from persons other than the MUDFA Contractor Parties in pursuance of its obligation under Clause 46.5.1 above;

46.5.3 the MUDFA Contractor has investigated how to mitigate the impact of **tie** Change; and

46.5.4 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 MUDFA Contractor.

46.6 If the MUDFA Contractor does not intend to use its own resources to implement any proposed **tie** Change, it shall:

- 46.6.1 demonstrate that it is appropriate to subcontract the implementation of such **tie** Change; and
- 46.6.2 comply with Good Industry Practice with the objective of ensuring that it obtains best value for money when procuring any MUDFA Contractor Party or Deliverable required in relation to the proposed **tie** Change.
- 46.7 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 MUDFA Contractor to seek and evaluate competitive tenders. In each case the MUDFA Contractor shall, as soon as practicable, and in any event not more than fourteen days after receipt of such modification, notify **tie** of any consequential changes to the Estimate.
- 46.8 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 MUDFA Contractor shall not be obliged to implement any proposed **tie** Change where:
 - 46.8.1 **tie** does not have the legal power or capacity to require the implementation of such proposed **tie** Change; or
 - 46.8.2 implementation of such proposed **tie** Change would:
 - 46.8.2.1 be contrary to Law;
 - 46.8.2.2 not be technically feasible;
 - 46.8.2.3 substantially and materially increases the probability of a substantial non-compliance with this Agreement by the MUDFA Contractor; or
 - 46.8.2.4 be outwith the specific competence of the MUDFA Contractor either in performing the activity required by the **tie** Change or in supervising a MUDFA Contractor Party to carry out the activity required by the **tie** Change.
- 46.9 As soon as reasonably practicable after the contents of the Estimate have been agreed or determined pursuant to the Dispute Resolution Procedure **tie** shall:
 - 46.9.1 issue a **tie** Change Order ; or

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

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

46.10 If **tie** does not issue a **tie** Change Order within thirty days of the contents of the Estimate having been agreed or determined pursuant to Clause 46.9, then the **tie** Notice of Change shall be deemed to have been withdrawn.

Restrictions on Entitlements to Relief for a tie Change

46.11 The MUDFA Contractor 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 MUDFA Contractor could (where such action is within the power of the MUDFA Contractor and the MUDFA Contractor could be reasonably expected to take such action, having regard to the scope and nature of the MUDFA Works), by the exercise of reasonable foresight and diligence, have prevented or materially reduced the requirement for such **tie** Change.

46.12 If, having received instructions from **tie** or **tie's** Representative, the MUDFA Contractor considers that compliance with those instructions would amount to a **tie** Change, the MUDFA Contractor 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 46 (*Changes*).

46.13 Any failure by the MUDFA Contractor 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 MUDFA Contractor that any compliance with **tie's** or **tie** Representative's comments shall be without cost to **tie** and without any entitlement to any extension of time or other relief.

46.14 Any failure by the MUDFA Contractor 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 MUDFA Contractor that in being instructed to deal with such matter or occurrence as a **tie** Change, the MUDFA

Contractor shall not be entitled to any costs, extension of time or other relief, in respect of such **tie** Change.

Changes proposed by the MUDFA Contractor

46.15 Within 10 Business Days of the MUDFA Contractor becoming aware of the need or desirability for a variation to the MUDFA Works, the MUDFA Contractor 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**.

46.16 If **tie** wishes to proceed with a variation proposed by the MUDFA Contractor, **tie** shall serve a **tie** Notice of Change on the MUDFA Contractor and Clauses 46.2 to 46.14 shall be adhered to by **tie** and the MUDFA Contractor.

Change Control Register

46.17 The MUDFA Contractor 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.

46.18 No variation ordered in accordance with this Clause 46 (*Changes*) shall in any way vitiate or invalidate the Agreement.

46.19 [No order in writing shall be required for increase or decrease in the quantity of any work where such increase or decrease is not the result of an order given under this Clause 46 (*Changes*) but is the result of the quantities exceeding or being less than those stated in the Bills of Quantities.]⁶

47. QUALIFYING CHANGES IN LAW

47.1 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:

47.1.1 any necessary change in the MUDFA Works;

47.1.2 whether any changes are required to the terms of this Agreement to deal with the Qualifying Change in Law; or

⁶ Is this required?

47.1.3 whether relief from compliance with any obligations under this Agreement 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 47.2 and 47.3 below.

47.2 As soon as reasonably practicable after receipt of any notice from either Party under Clause 47.1 above, the Parties shall discuss and agree the issues referred to in Clause 47.1 above and any ways in which the MUDFA Contractor can mitigate the effect of the Qualifying Change in Law and the MUDFA Contractor shall:

47.2.1 provide evidence to **tie** that the MUDFA Contractor 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;

47.2.2 demonstrate how the effects of the Qualifying Change in Law will be mitigated;

47.2.3 demonstrate that the relevant changes will be implemented in the most cost-effective manner, including showing that when expenditure is incurred or has been incurred, foreseeable Changes in Law at that time have been taken into account by the MUDFA Contractor; and

47.2.4 give evidence as to how the Qualifying Change in Law has affected the fees and/or costs of similar consultants.

47.3 As soon as reasonably practicable after the issues referred to in Clause 47.2 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 46 (*Changes*) shall apply except that the MUDFA Contractor 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.

47.4 Except as otherwise expressly provided in this Agreement, the MUDFA Contractor 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.

48. VALUE ENGINEERING INCENTIVE

48.1 During the Pre-Construction Phase, the MUDFA Contractor shall work with the SDS Provider, the Utilities and **tie** to, where possible, reduce the Tender Total and the costs associated with the MUDFA Works by:

48.1.1 proposing and agreeing design solutions involving value engineering;

48.1.2 proposing and agreeing methods for maximising construction productivity;

48.1.3 proposing and agreeing the manner in which any disruption caused during the MUDFA Works to the City of Edinburgh is minimised;

48.1.4 achieving savings in the preliminary costs, and the setting up costs;

48.1.5 refinement of the sequence of work shown in the Construction Programme submitted as part of the MUDFA Contractor's tender;

48.1.6 proposing alternative materials and components which meet the requirements of the Agreement (subject to the approval of **tie**);

48.1.7 achieving savings in respect of the required Temporary Works; and

48.1.8 achieving savings associated with risk mitigation.

48.2 The MUDFA Contractor, the Utilities, **tie** and the SDS Provider shall complete the activities described in Clause 48.1 no later than 10 Business Days before the anticipated completion of the Pre-Construction Phase. The MUDFA Contractor and **tie** (both acting reasonably) shall discuss and agree any revision to the Tender Total within 5 Business Days of the completion of the activities described in Clause 48.1.

48.3 Any revision to the Tender Total agreed in accordance with Clause 48.2 shall be referred to as the Anticipated Final Account.

48.4 If the Final Account is less than the Tender Total, the MUDFA Contractor shall be entitled to apply for a Value Engineering Incentive Payment in accordance with

Clause 49.6 provided always that unless expressly waived by **tie** in writing, the MUDFA Contractor shall not be entitled to apply for a Value Engineering Incentive Payment if the MUDFA Contractor has materially breached the terms of this Agreement and/or breached any health and safety legislation.

48.5 If the MUDFA Contractor fails to achieve substantial completion of each Work Sector by the Longstop Date, **tie** shall be entitled to deduct liquidated damages in accordance with Clause 45 (*Liquidated Damages for Delay*) from any Value Engineering Incentive Payment which is due to the MUDFA Contractor in accordance with this Clause 48 (*Value Engineering Incentive*).

49. PAYMENT

49.1 **tie** hereby agrees to pay to the MUDFA Contractor for the carrying out and completion of the MUDFA Works, the Contract Price at the times and in the manner prescribed by this Agreement.

49.2 Unless otherwise agreed, the MUDFA Contractor shall submit each application for payment for the works and services which are being claimed by the MUDFA Contractor for the previous calendar month within 3 Business Days following the final date of each calendar month. Each application for payment shall:

49.2.1 show the estimated contract value of the MUDFA Works carried out up to the end of the previous calendar month;

49.2.2 set out a list of any goods or materials delivered to the Site for but not yet incorporated in the MUDFA Works and their value;

49.2.3 show the estimated amounts to which the MUDFA Contractor considers itself entitled in connection with all other matters for which provision is made under the Agreement, including any Temporary Works or MUDFA Contractor's Equipment for which separate amounts are included in the Bills of Quantities;

49.2.4 include an updated cost loaded programme in electronic form (P3e) together with two hard copies of all supporting documentation;

49.2.5 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

49.2.6 include a forecast of the works, services and any associated costs and/or expenses which the MUDFA Contractor estimates could be claimed for the next three months following the month which is the subject of the application for payment, together with a breakdown of the tasks and workstreams which relate to such forecast.

Amounts payable in respect of any Utility Specialist Contractors are to be listed separately from amounts payable in respect of the MUDFA Works.

49.3 **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 MUDFA Contractor that part of the sum claimed in each 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 after the date on which application for payment was received by **tie**.

49.4 Within 7 days of the date of the Interim Certificate, the MUDFA Contractor shall submit a valid VAT invoice to **tie** for ninety seven per cent (97%) of the sum certified in each Interim Certificate. **tie** shall retain three per cent (3%) of such sums certified in each Interim Certificate (the "**Retention**"). Payment will become due to the MUDFA Contractor on the date of issue of each Interim Certificate by **tie** and the final date for payment by **tie** of each VAT invoice shall be thirty days from the date of issue of each Interim Certificate by **tie**.

49.5 It shall be a condition precedent to the first payment (and in respect of collateral warranties, any subsequent payment) to the MUDFA Contractor under the Agreement that it shall have provided to **tie**:

49.5.1 the performance bond in accordance with Clause 4.1; and

49.5.2 the parent company guarantee in accordance with Clause 4.4; and

49.5.3 the collateral warranties if requested by **tie** in accordance with Clause 12.8.

49.6 No later than three months after the date of the Defects Correction Certificate, the MUDFA Contractor shall submit to **tie's** Representative a statement of final account and supporting documentation showing in detail the value in accordance with the Agreement of the MUDFA Works carried out by the MUDFA Contractor, together

with all further sums which the MUDFA Contractor considers to be due to it under the Agreement up to the date of the Defects Correction Certificate.

Within three months after receipt of the MUDFA Contractor's final account and of all information reasonably required for its verification, **tie's** Representative shall issue a certificate ("**Final Account Certificate**") stating the amount which in his opinion is finally due under the Agreement from **tie** to the MUDFA Contractor or from the MUDFA Contractor to **tie** as the case may be up to the date of the Defects Correction Certificate and after giving credit to **tie** for all amounts previously paid by **tie** and for all sums to which **tie** is entitled under the Agreement. Provided that if at that time there remains to be carried out by the MUDFA Contractor any outstanding work referred to under Clause 40 (*Notification of Substantial Completion*) or any work ordered pursuant to Clauses 41 (*Work Outstanding*) and 42 (*Contractor to Search*) **tie's** Representative may withhold certification until the completion of such work of so much of the said remainder as shall in the opinion of **tie's** Representative represent the cost of the work remaining to be carried out.

Such amount shall, subject to Clause 45 (*Liquidated Damages for Delay*), be paid to or by the MUDFA Contractor as the case may require.

- 49.7 Within 7 days of the date of the Final Account Certificate, the MUDFA Contractor shall submit a valid VAT invoice to **tie** for the value of the Final Account Certificate and for the total of all Retentions retained by **tie** in accordance with Clause 49.4. Payment will become due to the MUDFA Contractor on the date of issue of the Final Account Certificate by **tie** and the final date for payment by **tie** of the valid VAT invoice shall be thirty days from the date of issue of the Final Account Certificate by **tie**.
- 49.8 In the event of failure of **tie** to make payment in accordance with this Clause 49 (*Payment*), **tie** shall pay to the MUDFA Contractor 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.
- 49.9 Subject to Clause 49.10, **tie** may deduct any amount payable by the MUDFA Contractor to **tie** whether by way of damages or in respect of any loss or expense sustained by **tie** by reason of the MUDFA Contractor's breach of this Agreement

from any other payment or payments due to be made to the MUDFA Contractor by **tie** under this Agreement.

49.10 Any notice of intention to withhold payment shall be served by **tie** at least 3 days prior to any final date for payment calculated in accordance with this Clause 49 (*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:

49.10.1 7 days from the date of the decision, or

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

whichever is the later.

49.11 The MUDFA Contractor shall be entitled to payment of interest as provided in Clause 49.8 in respect of the relevant part of any payments which have been withheld in accordance with Clause 49.10 but are subsequently determined as being payable by **tie** to the MUDFA Contractor either by agreement between the Parties or a decision following a referral to the Dispute Resolution Procedure. The interest shall be calculated for the period between the date when the relevant part of the payment should have been paid but for the notice of intention to withhold payment and the date on which payment is made by **tie** in accordance with Clause .

49.12 The MUDFA Contractor shall be entitled to offer, and **tie** may at its sole discretion accept, a retention bond, in lieu of the operation of Clause 49.4 above:

49.12.1 the MUDFA Contractor shall ensure that the retention bond is available and in full force and effect as from the Effective Date until the expiry of the Defects Correction Period:

49.12.2 the retention bond shall be issued in a form and by a surety acceptable to **tie** and shall be expressed as irrevocable and unconditionally payable forthwith on demand to **tie** in an amount of £[◆] by electronic transfer of funds to an account nominated by **tie**, upon written notification from **tie** to the surety that the MUDFA Contractor has failed to execute the MUDFA Works in accordance with the requirements of this Agreement. Demand for payment

under the retention bond shall not be subject to any further action or recourse being taken by **tie**;

49.12.3 without prejudice to any claims that are then outstanding under the retention bond, **tie** shall release the original retention bond to the surety on the date of issue of the Final Account Certificate by **tie**. In the event that the credit rating of the surety is at any time downgraded, **tie** shall be entitled to require the MUDFA Contractor to arrange for the issue of a replacement retention bond issued at no cost to **tie** by a different surety acceptable to **tie**;

49.12.4 in the event that a retention bond is not provided under this Clause 49.12 but ceases subsequently to be in full force and effect, **tie** shall be entitled to withhold any monies due to the MUDFA Contractor as may be necessary to place **tie** in the position it would have been in pursuant to Clause 49.4, had such bond not been provided; and

49.12.5 failure by the MUDFA Contractor to maintain an acceptable retention bond (or a replacement therefor) shall permit **tie** to operate Clause 49.4 forthwith without further notice. Acceptance of a further retention bond following failure to maintain shall be at **tie's** discretion.

50. MEASUREMENT

50.1 The quantities set out in the Bills of Quantities are the estimated quantities of the work and they are not to be taken as the actual and correct quantities of the MUDFA Works to be carried out by the MUDFA Contractor in fulfilment of its obligations under the Agreement.

50.2 No error in description in the Bills of Quantities or omission therefrom shall vitiate the Agreement nor release the MUDFA Contractor from the carrying out of the whole or any part of the MUDFA Works in accordance with any Work Order, Schedule 3 (*Specification*) or from any of the MUDFA Contractor's other obligations or liabilities under this Agreement. Any such error or omission shall be corrected by **tie's** Representative and the value of the work actually carried out shall be ascertained in accordance with Clause 46.4. Provided that there shall be no rectification of any errors, omissions or wrong estimates in the descriptions, rates and prices inserted by the MUDFA Contractor in the Bills of Quantities.

51. MEASUREMENT AND VALUATION

- 51.1 **tie's** Representative shall, except as otherwise stated, ascertain and determine by admeasurement the value in accordance with the Agreement of the work done in accordance with the Agreement.
- 51.2 Notwithstanding that the actual quantities carried out in respect of any item is greater or less than those stated in the Bills of Quantities, there shall be no increase or decrease in the rates in the Bills of Quantities in consequence thereof.
- 51.3 **tie's** Representative shall when he requires any part or parts of the work to be measured give reasonable notice to the MUDFA Contractor who shall attend or send a qualified agent to assist **tie's** Representative in making such measurement and shall furnish all particulars required by either of them. Should the MUDFA Contractor not attend or neglect or omit to send such agent then the measurement made by **tie's** Representative shall be taken to be the correct measurement of the work.
- 51.4 Where any work is carried out on a daywork basis the MUDFA Contractor shall be paid for such work under the conditions and at the rates and prices set out in the daywork schedule included in the Agreement or failing the inclusion of a daywork schedule the MUDFA Contractor shall be paid at the rates and prices and under the conditions contained in the "Schedules of Dayworks carried out incidental to Contract Work" issued by The Civil Engineering Contractors Association (formerly issued by The Federation of Civil Engineering Contractors) current at the date of the carrying out of the daywork.
- 51.5 The MUDFA Contractor shall furnish to **tie's** Representative such records, receipts and other documentation as may be necessary to prove amounts paid and/or costs incurred. Such returns shall be in the form and delivered at the times **tie's** Representative shall direct and shall be agreed within a reasonable time.
- 51.6 Before ordering materials the MUDFA Contractor shall if so required submit to **tie's** Representative quotations for the same for his approval.

52. METHOD OF MEASUREMENT

- 52.1 Unless otherwise provided in the Agreement or unless general or detailed description of the work in the Bills of Quantities or any other statement clearly shows to the contrary, the Bills of Quantities shall be deemed to have been prepared and

measurements shall be made according to the instructions contained within the Preambles to the Bills of Quantities.

53. USE OF PROVISIONAL SUMS

53.1 In respect of every Provisional Sum, **tie's** Representative may order either or both of the following:

53.1.1 work to be carried out or goods, materials or services to be supplied by the MUDFA Contractor the value thereof being determined in accordance with Clause 46 (*Changes*) and included in the Contract Price;

53.1.2 work to be carried out or goods, materials or services to be supplied by a Utilities Specialist Contractor.

53.2 In respect of every Prime Cost Item, **tie's** Representative may order either or both of the following:

53.2.1 that the MUDFA Contractor employ a Utilities Specialist Contractor for the carrying out of any work or the supply of any goods, materials or services included therein following the MUDFA Contractor having sought at least three competitive quotes from sub-contractors approved by the relevant Utilities and **tie**.

53.2.2 that the MUDFA Contractor itself carry out any such work or supply any such goods, materials or services, in which event, the MUDFA Contractor shall be paid in accordance with the terms of a quotation submitted by it and accepted by **tie's** Representative or in the absence thereof the value shall be determined in accordance with Clause 46 (*Changes*) and included in the Contract Price.

54. WARRANTIES

54.1 The MUDFA Contractor hereby represents, warrants and undertakes to **tie** that:

54.1.1 none of the MUDFA Contractor, the MUDFA Contractor Parties or any of their respective representatives or Affiliates or professional advisers or employees or anyone acting on behalf of any of them have committed any Prohibited Act;

54.1.2 all information which has been given by any of the MUDFA Contractor, the MUDFA Contractor Parties or any of their respective representatives or Affiliates or advisers or employees or anyone acting on behalf of any of them to any member, officer, employee or adviser of **tie** was, when given true, complete and accurate in all material respects and there is no fact or matter not disclosed in writing to **tie** which:

54.1.2.1 renders any such information untrue, inaccurate or misleading; or

54.1.2.2 might, if disclosed, adversely affect the decision of anyone considering whether or not to contract with the MUDFA Contractor;

54.1.3 the MUDFA Contractor:

54.1.3.1 is duly incorporated under the laws of [◆] and has the power to own its own assets and carry on its own business; and

54.1.3.2 has full power and authority (and does not require the consent, authority or licence of any third party) to enter into and perform this Agreement which constitutes a valid and binding obligation on the MUDFA Contractor in accordance with its terms; and

54.1.3.3 will not, by performing its obligations under this Agreement, be in breach of any undertaking, agreement or legal obligation of any nature in respect of any third party or of any applicable law so as to have a material adverse effect on its ability to discharge its obligations under this Agreement;

54.1.4 the MUDFA Contractor [and the MUDFA Contractor's parent company] is not involved in any dispute with HM Inland Revenue, HM Customs & Excise, the European Commission, the Office of Fair Trading, or any other fiscal or regulatory authority in any jurisdiction concerning any matter which could materially and adversely affect the business of the MUDFA Contractor or the MUDFA Works in any way;

54.1.5 the MUDFA Contractor does not use any processes and is not engaged in any activities which involve the misuse of any confidential or proprietary information belonging to any third party;

- 54.1.6 no claim is presently being assessed and no litigation, arbitration or proceeding is in progress or, to the best of the knowledge and belief of the MUDFA Contractor pending or threatened, against the MUDFA Contractor or any of its management or assets which might have an adverse effect on the ability of the MUDFA Contractor to perform the obligations in this Agreement;
- 54.1.7 the MUDFA Contractor's provision of any Deliverables and the use by tie of any of the Deliverables provided to it as part of the MUDFA Works has not infringed and shall not infringe any third party's Intellectual Property Rights;
- 54.1.8 there has been no material adverse change to the financial condition of the MUDFA Contractor [or the MUDFA Contractor's immediate parent company] since the audited accounts for the financial year [◆] including any matter resulting in a downgrade of the MUDFA Contractor's] [or the MUDFA Contractor's immediate parent company's] credit rating with any commercially acknowledged independent rating agency reporting the construction sector; and
- 54.1.9 the performance of the MUDFA Works does not create any situation in which a conflict of interest arises for the MUDFA Contractor.
- 54.2 Each of the warranties, representations and undertakings given under Clauses 54.1.1 to 54.1.9 shall be construed as a separate and independent warranty, representation and undertaking and shall not be limited or restricted by reference to or inference from any other terms of this Agreement.
- 54.3 The MUDFA Contractor shall immediately disclose in writing to tie any event or circumstance which may arise or become known to it after the Effective Date which is materially inconsistent with any of the warranties, representations or undertakings given under Clauses 54.1.1 to 54.1.9 or which has or is likely to have a material adverse effect on the MUDFA Works.

55. REQUIRED INSURANCES

- 55.1 The MUDFA Contractor shall, at its own cost, procure that each of the Required Insurances is taken out and comes into effect on the relevant date specified in each "Period of Insurance" set out in Part 1 of Schedule 11 (*Required Insurances*) and shall maintain the Required Insurances in full force and effect until the relevant date

specified in each "Period of Insurance" set out in Part 1 of Schedule 11 (*Required Insurances*), provided that each such Required Insurance is available in the EU insurance market at commercially reasonable rates and on commercially reasonable terms to contractors of the same status as at the date of the Agreement and discipline as the MUDFA Contractor.

- 55.2 The MUDFA Contractor shall procure that all Required Insurances shall:
- 55.2.1 be maintained in accordance with Part 1 of Schedule 11 (*Required Insurances*); and
- 55.2.2 be placed at all times with insurers authorised to carry out insurance business in the United Kingdom and confirmed in writing as acceptable by **tie** (such written acceptance not to be unreasonably withheld or delayed).
- 55.3 The MUDFA Contractor shall not make any material alteration to the terms of the Required Insurances (including material changes to the level of deductibles) without **tie's** prior approval (which approval shall not be unreasonably withheld). If any such material alteration to the Required Insurances is made, the MUDFA Contractor shall complete the questionnaire set out in Part 3 of Schedule 11 (*Required Insurances*), duly endorsed by its insurance broker. If the insurer makes or attempts to make any material alteration or purports to withdraw cover, the MUDFA Contractor shall promptly give notice of this to **tie**.
- 55.4 The MUDFA Contractor shall ensure that each of its insurance brokers gives **tie** as soon as reasonably practicable after any policy of Required Insurance is taken out, replaced or renewed, a letter of undertaking in the form set out in Part 2 of Schedule 11 (*Required Insurances*).
- 55.5 The MUDFA Contractor shall provide satisfactory evidence to **tie** that the Required Insurances have been effected. Thereafter, the MUDFA Contractor shall upon request produce to **tie** receipts for the payment of current insurance premiums or equivalent documentary evidence to confirm that such Required Insurances are being properly maintained, and on the anniversary of the Effective Date and on each subsequent anniversary thereof until the date of expiry or earlier termination, the MUDFA Contractor shall complete an insurance questionnaire set out in Part 3 of Schedule 11 (*Required Insurances*) in relation to the Required Insurances provided by **tie** and submit such completed questionnaire to **tie** as soon as reasonably practicable. If the MUDFA Contractor defaults in insuring or continuing to maintain

the Required Insurances , **tie** may insure against any risk in respect of which such default has occurred and recover any premiums from the MUDFA Contractor as a debt immediately due and payable.

55.6 The MUDFA Contractor shall:

55.6.1 procure that the professional indemnity insurance, contractor's plant all risks insurance and the third party liability insurance which is to be maintained by the MUDFA Contractor in accordance with Part 1 of Schedule 11 (*Required Insurances*) contains a waiver of subrogation against **tie** save in respect of fraud or deliberate non-disclosure; and

55.6.2 where the MUDFA Contractor is obliged to effect any Required Insurances, not bring any claim or action against **tie** (or any **tie** Party) in respect of any loss or damage in circumstances where and to the extent that the MUDFA Contractor could recover such loss or damage under such insurance (whether or not such insurance has in fact been effected or, if effected, has been vitiated as a result of any act or omission of the MUDFA Contractor (or any MUDFA Contractor Party), including but not limited to non-disclosure or under-insurance), provided that, to avoid doubt, this Clause 55.6.2 shall not by itself prevent the MUDFA Contractor from claiming against **tie** (or any **tie** Party) in respect of a breach of this Agreement by **tie** or any **tie** Party for any loss or damage not covered because of the level of deductibles under such insurance permitted by this Agreement or to the extent such loss or damage exceeds the greater of the insurance placed or the minimum limit of indemnity required in respect of such insurance under Part 1 of Schedule 11 (*Required Insurances*).

55.7 The MUDFA Contractor shall not take any action or fail to take any reasonable action or (insofar 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, 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.

55.8 The supply to **tie** of any insurance policy or insurance certificate or renewal certificate or other evidence of compliance with this Clause 55 (*Required Insurances*) shall not imply, or be taken as, acceptance by **tie** that:

- 55.8.1 the extent of insurance cover is sufficient and its terms are satisfactory; or
- 55.8.2 in respect of any interests or parties not insured or any risks not insured against, an acceptance by **tie** that the same were uninsurable.
- 55.9 Neither failure to comply nor full compliance with the provisions of this Clause 55 (*Required Insurances*) shall relieve the MUDFA Contractor of its liabilities and obligations under this MUDFA.
- 55.10 The MUDFA Contractor shall apply any proceeds of any policies of insurance maintained in accordance with Part 1 of Schedule 11 (*Required Insurances*) in satisfaction of the claim, demand, proceeding or liability in respect of which such proceeds are payable (unless already paid direct to the third party or employee by the insurer).
- 55.11 The MUDFA Contractor undertakes with **tie** in relation to the Required Insurances:
- 55.11.1 to comply with all requirements of the insurers; and
- 55.11.2 to give notice to **tie** immediately upon the happening of any event which will adversely affect any policy of insurance effected in accordance with this Clause 55 (*Required Insurances*), including the downgrading of the credit rating to A- or lower by Standard & Poors of any party providing any of the Required Insurances.
- 55.12 The MUDFA Contractor shall immediately inform **tie** in writing if any of the Required Insurances cease to be maintained and/or cease to be available in the EU insurance market at commercially reasonable rates and on commercially reasonable terms to contractors of the same status as at the Effective Date and discipline as the MUDFA Contractor. In this event, the Parties shall meet to discuss the means by which any risks previously covered by the Required Insurances should be managed, mitigated or controlled. Any increased or additional premium required by insurers by reason of the MUDFA Contractor's own claims record or other acts, omissions, matters or things particular to the MUDFA Contractor shall be deemed to be within commercially reasonable rates and terms.
- 55.13 The MUDFA Contractor shall fully co-operate with any measures reasonably required by **tie**, including (without limitation) completing any proposals for insurance and associated documents or maintaining such insurance at rates above commercially reasonable rates if **tie** undertakes in writing to reimburse the MUDFA Contractor in

respect of the net cost of such insurance to the MUDFA Contractor above commercially reasonable rates or, if **tie** effects such insurance at or above commercially reasonable rates, reimbursing **tie** in respect of what the net cost of such insurance to **tie** would have been at commercially reasonable rates and terms.

55.14 The MUDFA Contractor acknowledges that **tie** has taken out insurances (the "**OCIP Insurances**") and agrees to comply with the requirements of the insurers with whom the OCIP Insurances are placed. The MUDFA Contractor agrees that it will intimate to **tie** any act, occurrence or failure which may:

55.14.1 lead to any claim being made under the OCIP Insurances; or

55.14.2 render any of the OCIP Insurances void, voidable, unenforceable, 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.

55.15 The MUDFA Contractor shall not take any action or fail to take any reasonable action or (insofar 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 OCIP Insurances may be rendered void, voidable, unenforceable, 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.

55.16 The MUDFA Contractor shall bear all excesses and deductibles payable in respect of claims made under the OCIP Insurances or the Additional Insurances, where such claim is due to the act or omission of the MUDFA Contractor or where the MUDFA Contractor or any MUDFA Contractor Party is otherwise responsible for such claim in terms of this Agreement.

55.17 **tie** may ask the MUDFA Contractor to take out and maintain any insurance from time to time in the names of the parties reasonably requested by **tie** (the "**Additional Insurance**"). If Additional Insurance is required, the terms of this Clause 55 (*Required Insurances*) including the provisions which are stated to apply to the "Required Insurances" shall apply with any appropriate adjustment to be agreed between the Parties as a **tie** Change. The MUDFA Contractor shall procure that any Additional Insurance shall:

55.17.1 (if **tie** so requires) contain a provision that **tie** is named as a co-insured party;

- 55.17.2 provide that any Additional Insurance shall continue in effect and unaltered for the benefit of the insured parties for at least ninety days after written notice by registered mail of any cancellation (including non-renewal), change, modification or lapse for any reason;
- 55.17.3 contain a provision that requires the insurer to send copies of all notices of cancellation or alteration or suspension or any other notices given under or in relation to the policy to **tie** promptly upon receiving any notices of cancellation or alteration or suspension or any other notices;
- 55.17.4 contain a provision that a notice of a claim given to the insurer by **tie** (if **tie** is a co-insured) or the MUDFA Contractor under the policy shall, in the absence of manifest error, be accepted by the insurer as valid notification of a claim in respect of the interests of all insured parties;
- 55.17.5 contain a provision to the effect (on the basis of non-vitiation/severability) that all the provisions of any the Additional Insurance shall operate as if there were a separate policy in effect (save in respect of the sums insured, limits of liability and excesses/deductibles which shall be at the levels stated) for each named insured and that non-compliance with any policy term, condition or warranty and/or misrepresentation of material information by the MUDFA Contractor or any other co-insured will not affect the rights and/or interests of **tie** under any policies effected as Additional Insurance;
- 55.18 The MUDFA Contractor shall supply **tie** with copies of every policy document, insurance certificate and renewal certificate relating to any Additional Insurance (or such other evidence of insurances as may be reasonably required by **tie**) and documentary evidence to the effect that the Required Insurances (other than any Additional Insurance) have been taken out and are being maintained as soon as it is available but in any event no later than 7 days (in respect of certificates) and sixty days (in respect of policies) after the inception of the relevant policies, together with evidence of payment of the premiums and any periodic renewal certificates.
- 55.19 The MUDFA Contractor shall inform **tie** in writing as soon as reasonably practicable after it receives a claim or becomes aware of the occurrence of any event that may give rise to a claim under any Additional Insurance and will ensure that **tie** is kept fully informed of subsequent action and developments concerning the claim; such written information shall not be required in relation to any claim of less than £50,000

(indexed). The MUDFA Contractor shall take such steps as are necessary or appropriate to ensure that each MUDFA Contractor Party, in respect of any event or claim of a like nature arising out of or relating to the operation or responsibility of that MUDFA Contractor Party, takes in relation to the MUDFA Contractor like action to that which the MUDFA Contractor is required to take under this Clause 55.19 in relation to **tie**, and shall inform **tie** promptly of information thus received from any MUDFA Contractor Party .

55.20 Notwithstanding, and without prejudice to, any other provision hereof (but subject always to Clause 56 (*Indemnities, Liability and Sole Remedy*)), the MUDFA Contractor undertakes to the extent it has the right to do so under the relevant policy that it will not (and that each of the MUDFA Contractor Parties to the extent each respectively has the right to do so under the relevant policy will not) settle any Additional Insurance claim above £50,000 (indexed) without the prior written agreement of **tie** (such agreement not to be unreasonably withheld or delayed).

56. INDEMNITIES, LIABILITY AND SOLE REMEDY

56.1 Subject to the exception set out in Clause 56.2, the MUDFA Contractor shall indemnify **tie**, CEC 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:

56.1.1 death or injury to any person;

56.1.2 loss of or damage to any property;

56.1.3 loss of or damage to any part of the MUDFA Works;

56.1.4 any of the MUDFA Contractor's, or its employees' or any MUDFA Contractor Party's negligent or wilful acts or wilful omissions in the performance of the MUDFA Works; or

56.1.5 breach of any term or provision of this Agreement including any Law; or

56.1.6 causing **tie** and/or CEC to be in breach of any Law; or

56.1.7 damage to any Apparatus caused by the MUDFA Contractor; or

- 56.1.8 causing tie and/or CEC to be in breach of any agreement with the Utilities in respect of the MUDFA Works or the Utilities Works; or
- 56.1.9 causing tie and/or CEC to be in breach of any of the Third Party Agreements and any other undertakings which have been given by tie and/or CEC to any third party and which have been notified to the MUDFA Contractor; or
- 56.1.10 causing tie and/or CEC to be in breach of any Land Consent; or
- 56.1.11 infringement or alleged infringement of a third party's Intellectual Property Rights.
- 56.2 The exception referred to in Clause 56.1, which is the responsibility of tie, is death of, or injury to, persons or loss of or damage to property resulting from any act, neglect, or breach of statutory duty by tie, its agents, servants or other contractors (not being employed by the MUDFA Contractor or any Sub-Contractor) or for or in respect of any claims, demands, proceedings, damages, costs, charges and expenses in respect thereof or in relation thereto.
- 56.3 The MUDFA Contractor's liability to indemnify tie under Clause 56.1 shall be reduced in proportion to the extent that the act or neglect of tie, its agents, servants or other contractors (not being employed by the MUDFA Contractor or any Sub-Contractor) may have contributed to the said death, injury, loss or damage.
- 56.4 Notwithstanding the generality of Clause 56.1, if any of the Utilities suffers interruption or loss of service arising as a result of a breach of any of the terms of this Agreement by the MUDFA Contractor and/or as a result of any negligent act or omission of the MUDFA Contractor (and/or any MUDFA Contractor Party), the MUDFA Contractor shall indemnify tie from any loss, costs, expense or damage including Indirect Losses incurred by such Utilities as a result of any liability under any applicable customer charter requirements to customers and/or under any contract with a customer, for such interruption or loss of service.
- 56.5 Notwithstanding the generality of Clause 56.1, in the event that any of the Utilities suffers any loss, costs, expense or damage as a result of a claim made under any Law which may be applicable to the MUDFA Works and/or the rules and regulations of public bodies, as a result of the breach of any of the terms of this Agreement by the MUDFA Contractor and/or as a result of the negligent act or omission of the MUDFA Contractor (and/or any MUDFA Contractor Party), the MUDFA Contractor

shall indemnify **tie** from any loss, costs, expense or damage incurred by such Utility as a result of such claim.

56.6 Notwithstanding the generality of Clause 56.1, the MUDFA Contractor shall indemnify **tie** from all loss, costs, claims, expenses and damages that may arise directly or indirectly as a result of any adverse impact or effect which the MUDFA Works may have upon the property interests, liabilities and statutory obligations of Forth Ports:

56.6.1 in respect of the sea defences, quay walls or harbour edges in so far as forming part of or situated adjacent to the Forth Ports Site or in any way affected by the MUDFA Works, including without prejudice to the generality, all liability upon Forth Ports arising by virtue of the Coast Protection Act 1949; and

56.6.2 relative to the sea bed, including all liability upon Forth Ports arising by virtue of the Forth Ports Authority Order Confirmation Act 1969 and the status of those parts of the Firth of Forth as a site of special scientific interest.

56.7 Notwithstanding the generality of Clause 56.1, the MUDFA Contractor shall indemnify **tie** from all loss, costs, claims, damages and expenses that may arise as a result of any adverse impact or effect which the MUDFA Works may have upon the property interests, liabilities and obligations of Stakis:-

56.7.1 in relation to the flood defences in so far as forming part of or situated adjacent to the Stakis Site or in any way affected by the MUDFA Works; and

56.7.2 resulting in an adverse change to the existing flood defences for the Stakis Property.

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

56.8.1 of either Party for:

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

56.8.1.2 fraud or fraudulent misrepresentation;

56.8.2 of the MUDFA Contractor, 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 56.8 shall confer on either Party rights or remedies that they would not otherwise have.

- 56.9 Subject to Clause 56.8, 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 56.9 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 any Indirect Loss suffered. Such claim, action, proceedings or demand shall include any claim, action, proceedings or demand received by **tie** and/or CEC from any of the Utilities or received in relation to any breach of the Third Party Agreements or the Land Consents.
- 56.10 The MUDFA Contractor shall not be relieved or excused of any responsibility, liability or obligation under this Agreement by the appointment of any MUDFA Contractor Party. The MUDFA Contractor shall, as between itself and **tie**, be responsible for the selection, pricing, performance, acts, defaults, omissions, breaches, delict and offences of any MUDFA Contractor Party. All references in this Agreement to any act, default, omission, breach, delict or offence of the MUDFA Contractor shall be construed to include any such act, default, omission, breach or delict of any MUDFA Contractor Party.
- 56.11 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).
- 56.12 The Parties further acknowledge and agree that the express rights provided in this Agreement in relation to termination and the calculation and payment of amounts due following such termination are exclusive and are in place of (and not cumulative with) any other rights or remedies which might arise as a consequence of such termination. The Parties hereby waive all other rights and remedies arising from such

termination, whether express or implied, arising by common law (including in delict), by statute or otherwise howsoever provided that nothing in this Clause 56.12 shall exclude the right of the Parties to claim remedies expressly conferred on them by this Agreement.

56.13 Except where otherwise stated the MUDFA Contractor shall pay all tonnage and other royalties rent and other payments or compensation (if any) for getting stone sand, gravel, clay or other materials required for the MUDFA Works.

57. DEFAULT OF MUDFA CONTRACTOR

57.1 In the event that the MUDFA Contractor:

57.1.1 an Insolvency Event occurs;

57.1.2 breaches any material provision or requirement of the Agreement; or

57.1.3 conducts itself in a manner which **tie** considers to be incompatible with the performance of the MUDFA Works and/or in such a manner so as to wilfully detract from the image and reputation of **tie**, CEC, the Scottish Ministers or any project related to the performance of the MUDFA Works; or

57.1.4 breaches Clause 72 (*Confidentiality*); or

57.1.5 following a written warning and the removal of any member of the Key Personnel has proposed any replacement member of the Key Personnel who is in the opinion of **tie** incompetent to perform any of his duties; or

57.1.6 fails to resolve a conflict of interest in accordance with Clause 69 (*Conflicts of Interest*) to the reasonable satisfaction of **tie**; or

57.1.7 has reported a change in the legal status of the MUDFA Contractor or a change in control of the MUDFA Contractor which is materially prejudicial to carrying out and completing the MUDFA Works; or

57.1.8 has abandoned the MUDFA Works without due cause; or

57.1.9 without reasonable excuse has failed to commence the Pre-Construction Services, Construction Services and/or Construction Works in accordance with Clause 8 (*Commencement of Pre-Construction Services, Gateway to Commencement of the Construction Services and Issue of Works Orders*); or

57.1.10 has suspended the progress of the MUDFA Works without due cause for fourteen days after receiving from **tie's** Representative written notice to proceed; or

57.1.11 has failed to remove goods or materials from the Site or to pull down and replace work for fourteen days after receiving from **tie's** Representative written notice that the said goods materials or work has been condemned and rejected by **tie's** Representative; or

57.1.12 despite previous warnings by **tie's** Representative in writing, is failing to proceed with the MUDFA Works with due diligence or is otherwise persistently or fundamentally in breach of its obligations under the Agreement;

then **tie** may after giving 7 days notice in writing to the MUDFA Contractor specifying the event relied on, determine the MUDFA Contractor's employment under this Agreement, and/or enter upon the MUDFA Works and any other parts of the Site and expel the MUDFA Contractor therefrom without thereby avoiding the Agreement or releasing the MUDFA Contractor from any of its obligations or liabilities under the Agreement.

Where a notice of termination is given pursuant to a certificate issued by **tie's** Representative under this Clause 57.1 it shall be given as soon as is reasonably possible after receipt of the certificate. Provided that **tie** may extend the period of notice to give the MUDFA Contractor an opportunity to remedy the situation.

57.2 Where **tie** has entered upon the MUDFA Works and any other parts of the Site as set out in Clause 57.1, **tie** may:

57.2.1 complete the MUDFA Works itself; or

57.2.2 employ any other contractor to complete the MUDFA Works;

and in either case may use for such completion any of the MUDFA Contractor's Equipment, Temporary Works, goods and materials on any part of the Site. For this purpose **tie** shall continue to enjoy its right to copy and use all drawings specifications and other documents made by or on behalf of the MUDFA Contractor.

tie may at any time sell any of the said MUDFA Contractor's Equipment, Temporary Works and unused goods and materials and apply the proceeds of sale in or towards

the satisfaction of any sums due or which may become due to it from the MUDFA Contractor under the Agreement.

57.3 Where **tie** has entered upon the MUDFA Works and any other parts of the Site, the MUDFA Contractor shall, if so instructed by **tie's** Representative in writing within 7 days of such entry, assign to **tie** any agreement which the MUDFA Contractor may have entered into for the supply of any goods or materials and/or for the carrying out of any work for the purposes of the Agreement.

57.4 No compensation shall be payable by **tie** to the MUDFA Contractor for termination under this Clause 57 (*Default of MUDFA Contractor*) whether under contract, delict (including negligence), breach of (or compliance with) statutory duty, restitution or otherwise but without prejudice to payments due under Clause 57.7.

57.5 As soon as may be practicable after any such entry and expulsion by **tie**, **tie's** Representative shall fix and determine as at the time of such entry and expulsion:

57.5.1 the amount (if any) which has been reasonably earned by the MUDFA Contractor in respect of work actually done by it under the Agreement; and

57.5.2 the value of any unused or partially used goods and materials which are under the control of **tie**;

and shall certify accordingly.

57.6 If **tie** enters upon the MUDFA Works and any other parts of the Site and expels the MUDFA Contractor in accordance with this Clause 57 (*Default of the MUDFA Contractor*), **tie** shall not be liable to pay the MUDFA Contractor any money under the Agreement (whether in respect of amounts certified by **tie's** Representative or otherwise) including any sums certified under Clause 57.4 unless or until **tie's** Representative certifies that an amount is due to the MUDFA Contractor under Clause 57.7.

57.7 **tie's** Representative shall certify the difference between:

57.7.1 such sum as would have been due to the MUDFA Contractor if the MUDFA Contractor had completed the MUDFA Works together with any proceeds of sale under Clause 57.2; and

- 57.7.2 the costs of completing the MUDFA Works (whether or not the MUDFA Works are completed under a separate contract) damages for delay (if any) and all other expenses properly incurred by **tie**.
- 57.8 Such difference as is certified by **tie's** Representative in Clause 57.7 shall be a debt due to **tie** or the MUDFA Contractor as the case may be.
- 57.9 If **tie's** Representative is satisfied at any time prior to the completion of the MUDFA Works that such sum as calculated under Clause 57.7.2 exceeds such sum as calculated under Clause 57.7.1, **tie's** Representative may issue an interim certificate to that effect notwithstanding that the MUDFA Works have not been completed and such interim certificate shall be considered a debt due from the MUDFA Contractor to **tie**.
- 57.10 Every certificate issued by **tie's** Representative pursuant to this Clause 57 (*Default of MUDFA Contractor*) shall be sent to the MUDFA Contractor with such detailed explanation as may be necessary.
- 57.11 The provisions of this Clause 57 (*Default of MUDFA Contractor*) are without prejudice to any other rights and remedies of **tie**.
- 57.12 The MUDFA Contractor shall immediately notify **tie** of
- 57.12.1 any resolution or decision by the MUDFA Contractor or the board of directors of the MUDFA Contractor or a decision by any director of the MUDFA Contractor to seek legal or financial advice pertaining to the solvency of the MUDFA Contractor; and/or
- 57.12.2 any presentation of any petition for the purpose of winding up the MUDFA Contractor or any petition for an administration order.

58. TERMINATION OR SUSPENSION FOR TIE DEFAULT

- 58.1 If a **tie** Default has occurred and the MUDFA Contractor wishes to terminate this Agreement, the MUDFA Contractor must serve a termination notice on **tie** within thirty days of becoming aware of the **tie** Default. Failure to do so shall be a waiver of the right to terminate.
- 58.2 The MUDFA Contractor shall specify in the termination notice the type of the **tie** Default which has occurred entitling the MUDFA Contractor to terminate.

- 58.3 Provided the MUDFA Contractor has complied with Clauses 58.1 and 58.2, this Agreement shall terminate on the day falling sixty days after the date on which **tie** receives the termination notice, unless **tie** rectifies the **tie** Default within sixty days of receipt of the termination notice.
- 58.4 The MUDFA Contractor 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 58 (*Termination or Suspension for **tie** Default*) or Clause 59 (*Termination by Reason of Force Majeure*).
- 58.5 Upon expiry of the sixty days notice referred to in Clause 58.3 and notwithstanding the provisions of Clause 43 (*Non-Removal of Materials and Contractor's Equipment*) the MUDFA Contractor shall with all reasonable despatch remove from the Site all MUDFA Contractor's Equipment. In the event of any failure so to do **tie** shall have like powers to those contained in Clause 43.3 to dispose of any MUDFA Contractor's Equipment.
- 58.6 No compensation shall be payable by **tie** to the MUDFA Contractor for termination of this Agreement in terms of this Clause 58 (*Termination or Suspension for **tie** Default*) whether under contract, delict (including negligence), breach of (or compliance with) statutory duty, restitution or otherwise but without prejudice to payments due under Clause 58.7.
- 58.7 Upon termination of the MUDFA Contractor's employment pursuant to Clause 58.3 and following receipt of a valid VAT invoice, **tie** shall pay the MUDFA Contractor (in so far as such amounts or items have not already been covered by payments on account made to the MUDFA Contractor) the value of all work carried out prior to the date of termination and in addition:
- 58.7.1 the amounts payable in respect of any preliminary items so far as the work or service comprised therein has been carried out or performed and a proper proportion of any such items which have been partially carried out or performed;
- 58.7.2 the cost of materials or goods reasonably ordered for the MUDFA Works which have been delivered to the MUDFA Contractor or of which the MUDFA Contractor is legally liable to accept delivery (such materials or goods becoming the property of **tie** upon such payment being made to the MUDFA Contractor); and

58.7.3 the reasonable cost of removal under Clause 58.5.

Provided that the MUDFA Contractor shall use all reasonable endeavours to minimise and mitigate any costs referred to in this Clause 58.7 and **tie** shall not be liable to pay the MUDFA Contractor for such costs to the extent that the MUDFA Contractor has failed to minimise or mitigate such costs or to the extent that such costs have arisen out of the MUDFA Contractor's breach of this Agreement or any negligent or wilful act or omission by the MUDFA Contractor. Any payment to be made under this Clause 58.7 shall be treated as a final account and the provisions of Clauses 49.6 and 49.7 shall apply.

58.8 If **tie** shall fail to pay the MUDFA Contractor in full any amount properly due and payable under this Agreement by the final date for payment in accordance with the requirements of Clause 49 (*Payment*) and no effective notice to withhold payment has been given by **tie** to the MUDFA Contractor, the MUDFA Contractor may, after giving **tie** sixty 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 MUDFA Works until payment in full is made by **tie**.

59. TERMINATION BY REASON OF FORCE MAJEURE

59.1 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:

59.1.1 the Affected Party could, by the exercise of reasonable foresight and diligence, have prevented or reduced the effect of the Force Majeure Event;
and

59.1.2 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.

59.2 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.

- 59.3 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.
- 59.4 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 MUDFA Works and the MUDFA Contractor 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.
- 59.5 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.
- 59.6 No compensation shall be payable by **tie** to the MUDFA Contractor for termination of this Agreement in terms of this Clause 59 (*Termination by Reason of Force Majeure*) whether under contract, delict (including negligence), breach of (or compliance with) statutory duty, restitution or otherwise but without prejudice to payments due under Clause 59.7.
- 59.7 Upon termination of the MUDFA Contractor's employment pursuant to Clause 59.3 **tie** shall be under the same obligations with regard to payment as if termination on the grounds of **tie** default had occurred in accordance with the provisions of Clause 58 (*Termination or Suspension for tie Default*).

60. TERMINATION DURING THE PRE-CONSTRUCTION PHASE

- 60.1 During the Pre-Construction Phase, **tie** may terminate this Agreement at any time and for whatever reason upon giving written notice to the MUDFA Contractor that this Agreement shall terminate on the date falling thirty days after the date of service of such written notice.
- 60.2 Upon expiry of the thirty days notice referred to in Clause 60.1 and notwithstanding the provisions of Clause 43 (*Non-Removal of Materials and Contractor's Equipment*) the MUDFA Contractor shall with all reasonable despatch remove from the site all MUDFA Contractor's Equipment.
- 60.3 No compensation shall be payable by **tie** to the MUDFA Contractor for termination of this Agreement in terms of this Clause 60 (*Termination During the Pre-Construction Phase*), whether under contract, delict (including negligence), breach of (or compliance with) statutory duty, restitution or otherwise but without prejudice to payments due under Clause 60.4.
- 60.4 Upon termination of the MUDFA Contractor's employment pursuant to Clause 60.1 **tie** shall be under the same obligations with regard to payment as if termination on the grounds of **tie** default had occurred in accordance with the provisions of Clause 58 (*Termination or Suspension for tie Default*).

61. TERMINATION FOR CORRUPT GIFTS AND PAYMENTS

- 61.1 The MUDFA Contractor or anyone employed by it or acting on its behalf (including any Sub-Contractor) shall not commit any Prohibited Act.
- 61.2 If the MUDFA Contractor, or anyone employed by it or acting on its behalf (including any Sub-Contractor), commits any Prohibited Act, then **tie** shall be entitled to act in accordance with this Clause 61 (*Termination for Corrupt Gifts and Fraud*).
- 61.3 If a Prohibited Act is committed by the MUDFA Contractor or by an employee of the MUDFA Contractor not acting independently of the MUDFA Contractor, then **tie** may terminate this Agreement by giving notice to the MUDFA Contractor.
- 61.4 If a Prohibited Act is committed by an employee of the MUDFA Contractor acting independently of the MUDFA Contractor, then **tie** may give notice to the MUDFA Contractor of termination and this Agreement will terminate, unless within thirty days of receipt of such notice the MUDFA Contractor terminates that employee's

employment and (if necessary) procures the performance of the relevant part of the MUDFA Works by another person.

61.5 If a Prohibited Act is committed by anyone acting on behalf of the MUDFA Contractor (excluding employees of the MUDFA Contractor but including any Sub-Contractor, and their employees) and not acting independently of the MUDFA Contractor, then **tie** may give notice to the MUDFA Contractor of termination and this Agreement will terminate.

61.6 If a Prohibited Act is committed by anyone acting on behalf of the MUDFA Contractor (excluding employees of the MUDFA Contractor but including any Sub-Contractor and their employees) and acting independently of the MUDFA Contractor, then **tie** may give notice to the MUDFA Contractor of termination and this Agreement will terminate, unless within thirty days of receipt of such notice the MUDFA Contractor terminates that party's contract and procures the performance of the relevant part of the MUDFA Works by another person.

61.7 Any notice of termination under this Clause 61 (*Termination for Corrupt Gifts and Fraud*) shall specify:

61.7.1 the nature of the Prohibited Act;

61.7.2 the identity of the person whom **tie** believes has committed the Prohibited Act; and

61.7.3 the date on which this Agreement will terminate, in accordance with the applicable provision of this Clause 61 (*Termination for Corrupt Gifts and Fraud*).

61.8 No compensation shall be payable by **tie** to the MUDFA Contractor 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 61.9.

61.9 Upon termination of the MUDFA Contractor's employment pursuant to this Clause 61 (*Termination for Corrupt Gifts and Payments*), **tie** shall be under the same obligations with regard to payment as if termination on the grounds of **tie** default had occurred in accordance with the provisions of Clause 58 (*Termination or Suspension for tie Default*).

62. EFFECTS OF TERMINATION OR EXPIRY

- 62.1 Subject to the provisions of Clauses 58 (*Termination or Suspension for **tie** Default*) and 59 (*Termination by Reason of Force Majeure*), the MUDFA Contractor shall not have any other right or remedy against **tie** on termination of this Agreement.
- 62.2 Subject to any exercise by **tie** of its rights to perform, or to procure a third party to perform, the obligations of the MUDFA Contractor, 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.
- 62.3 Any termination or expiry of this Agreement shall not prejudice or affect the accrued rights or claims of either Party.
- 62.4 On expiry of this Agreement or any earlier termination of this Agreement for whatever reason, all Deliverables and any information provided by **tie** to the MUDFA Contractor shall be returned to **tie**.
- 62.5 This Agreement shall terminate automatically on the expiry of this Agreement unless it shall have been terminated earlier in accordance with the provisions of this Agreement. The MUDFA Contractor shall not be entitled to any compensation on expiry of the Agreement.
- 62.6 Expiry or termination of the Agreement shall not affect the MUDFA Contractor's obligations under Clauses 2 (*Contractor's General Responsibilities*), 3 (*Obligations in respect of the Utilities*), 49 (*Payment*), 55 (*Required Insurances*), 56 (*Indemnities, Liability and Sole Remedy*), 57 (*Default of MUDFA Contractor*), 58 (*Termination or Suspension for **tie** Default*), 59 (*Termination by Reason of Force Majeure*), 60 (*Termination During the Pre-Construction Phase*), 61 (*Termination for Corrupt Gifts and Payments*), 62 (*Effects of Termination or Expiry*), 63 (*Dispute Resolution Procedure and Jurisdiction*), 68 (*Audit*), 71 (*Copyright and Intellectual Property*) and 72 (*Confidentiality*). Those obligations shall continue in full force and effect.

63. DISPUTE RESOLUTION PROCEDURE AND JURISDICTION

- 63.1 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 9 (*Dispute Resolution Procedure*).

63.2 Subject to Clause 63.1, 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.

63.3 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.

64. LABOUR-TAX AND LANDFILL TAX FLUCTUATIONS⁷

64.1 The rates and prices contained in the Bills of Quantities shall be deemed to take account only of the levels and incidence in force at the date for return of tenders of:

64.1.1 the taxes, levies, contributions, premiums or refunds (including national insurance contributions but excluding income tax and any levy payable under the Industrial Training Act 1982 or any statutory re-enactment or amendment thereof for the time being in force) which are by law payable by or to the MUDFA Contractor or anyone carrying out any part of the MUDFA Works under the instruction of the MUDFA Contractor in respect of their workpeople engaged on the Agreement;

64.1.2 any landfill tax payable by the MUDFA Contractor or anyone carrying out any part of the MUDFA Works under the instruction of the MUDFA Contractor pursuant to the Finance Act 1996 (Sections 39-71 and Schedule 5) and the Landfill Tax Regulations 1996 or any statutory re-enactment or amendment thereof for the time being in force;

64.1.3 any aggregate levy payable by the MUDFA Contractor or anyone carrying out any part of the MUDFA Works under the instruction of the MUDFA Contractor pursuant to the Finance Act 2001 or any statutory re-enactment or amendment thereof for the time being in force;

and shall not take account of any level or incidence of the aforesaid matters foreseeable or known to take effect at some later date.

64.2 Notwithstanding Clause 47 (*Qualifying Changes in Law*), if after the date for return of tenders there shall occur any change in the level and/or incidence of any such taxes, levies, contributions, premiums or refunds the MUDFA Contractor shall so

⁷ ICE standard drafting. To be reviewed by GH/GE.

inform **tie's** Representative and the net increase or decrease shall be taken into account in arriving at the Contract Price. The MUDFA Contractor shall supply the information necessary to support any consequent adjustment to the Contract Price. All certificates for payment issued after submission of such information shall take due account of the additions or deductions to which such information relates.

65. VALUE ADDED TAX⁸

65.1 The MUDFA Contractor shall be deemed to have allowed in its tender for the tax payable by it as a taxable person to the Commissioners of Customs and Excise being tax chargeable on any taxable supplies to **tie** which are to be made under the Agreement.

65.2 All certificates issued by **tie's** Representative under Clause 49 (*Payment*) shall be net of Value Added Tax.

In addition to the payments due under such certificates **tie** shall separately identify and pay to the MUDFA Contractor any Value Added Tax properly chargeable by the Commissioners of Customs and Excise on the supply to **tie** of any goods and/or services by the MUDFA Contractor under the Agreement.

65.3 If any dispute, difference or question arises between either **tie** or the MUDFA Contractor and the Commissioners of Customs and Excise in relation to any tax chargeable or alleged to be chargeable in connection with the Agreement or the MUDFA Works each shall render to the other such support and assistance as may be necessary to resolve the dispute, difference or question.

65.4 Clause 63 (*Dispute Resolution Procedure and Jurisdiction*) shall not apply to any dispute, difference or question arising under this Clause 65 (*Value Added Tax*).

66. CDM REGULATIONS 1994⁹

66.1 In this Clause 66 (*CDM Regulations 1994*):

"**Regulations**" means the Construction (Design and Management) Regulations 1994 or any statutory re-enactment or amendment thereof for the time being in force;

⁸ ICE standard drafting to be reviewed by GH/GE.

⁹ Standard ICE drafting. Graham Walker (TSS) to review.

"**Planning Supervisor**" and "**Principal Contractor**" mean the persons so described in regulation 2(1) of the Regulations;

"**Health and Safety Plan**" means the plan prepared by virtue of regulation 15 of the Regulations.

66.2 Where and to the extent that the Regulations apply to the MUDFA Works and

66.2.1 **tie's** Representative is appointed Planning Supervisor and/or;

66.2.2 the MUDFA Contractor is appointed Principal Contractor;

then in taking any action as such they shall state in writing that the action is being taken under the Regulations.

66.3 Any action under the Regulations taken by either the Planning Supervisor or the Principal Contractor and in particular any alteration or amendment to the Health and Safety Plan shall be deemed to be a **tie's** Representative's instruction pursuant to Clause 14 (*Work to be to Satisfaction of tie*). Provided that the MUDFA Contractor shall in no event be entitled to any additional payment and/or extension of time in respect of any such action to the extent that it results from any action, lack of action or default on the part of the MUDFA Contractor.

66.4 If any such action of either the Planning Supervisor or the Principal Contractor could not in the MUDFA Contractor's opinion reasonably have been foreseen by an experienced contractor the MUDFA Contractor shall as early as practicable give written notice thereof to **tie's** Representative.

66.5 The MUDFA Contractor shall continue to carry out its role as Principal Contractor notwithstanding that any Utilities Works are being carried out at the same time as the MUDFA Works.

67. NOTICE OF ACCIDENTS

67.1 In the event of any notifiable accident or dangerous occurrence arising at the Site during the carrying out of the MUDFA Works, the MUDFA Contractor shall be responsible for reporting to the Health and Safety Executive under the Reporting of Injuries and Diseases and Dangerous Occurrences Regulations 1985.

68. AUDIT

68.1 The MUDFA Contractor shall produce to **tie** any documents or provide any information relevant to the performance of the MUDFA Works or any part thereof as **tie** or **tie's** auditors may require and shall provide any documents or information reasonably required by **tie** or **tie's** auditors in respect of any MUDFA Contractor Parties.

68.2 Proper books, vouchers, accounts and records relating to the MUDFA Works and any works or services being performed by any MUDFA Contractor Parties shall be maintained by the MUDFA Contractor 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.

69. CONFLICTS OF INTEREST

69.1 The MUDFA Contractor shall:

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

69.1.2 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

69.1.3 consult and advise **tie** if the MUDFA Contractor considers that a conflict of interest exists 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.

70. ASSIGNATION

70.1 Without prejudice to Clause 12 (*Sub-Contracting*), the MUDFA Contractor shall not assign, novate or otherwise transfer the whole or any part of the Agreement without the prior written agreement of **tie**.

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

- 70.2.1 to the Scottish Ministers, TEL, CEC or any local authority or other body with no worse financial standing than that of **tie** who takes over all or substantially all the functions of **tie**; or
- 70.2.2 to any other person whose obligations under this Agreement are unconditionally and irrevocably guaranteed (in a form acceptable to the MUDFA Contractor acting reasonably) by **tie** or a person falling within Clause 70.2.1; or
- 70.2.3 with the prior written consent of the MUDFA Contractor (such consent not to be unreasonably withheld or delayed) to any person not covered by Clause 70.2.1 or 70.2.2.
- 70.3 If the legal status of the MUDFA Contractor shall change in any way, **tie** shall be informed immediately by the MUDFA Contractor in writing.
- 70.4 If there is a Change in Control in relation to the MUDFA Contractor, **tie** shall be informed immediately by the MUDFA Contractor in writing.

71. COPYRIGHT AND INTELLECTUAL PROPERTY

- 71.1 The copyright of this Agreement and any other documents or data supplied by **tie** or **tie's** Representative to the MUDFA Contractor shall not pass to the MUDFA Contractor but the MUDFA Contractor may obtain or make at its own expense any further copies required by it for the purposes of the Agreement.
- 71.2 All MUDFA Contractor IPR shall continue to be owned by the MUDFA Contractor.
- 71.3 The MUDFA Contractor hereby:
- 71.3.1 assigns by way of future assignation to **tie** with full title guarantee the Project IPR which is created by it and shall procure that Project IPR created by any MUDFA Contractor 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;
- 71.3.2 grants to **tie** a non-exclusive perpetual irrevocable royalty free licence to use such MUDFA Contractor IPR as may be necessary for **tie** to use in relation to any projects associated with the MUDFA Works;

- 71.3.3 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 71.3.2 above, to use the MUDFA Contractor IPR referred to in that Clause (other than in relation to Third Party Software which is subject to the provisions of Clause 71.9) insofar as is necessary or desirable for such third party to use such MUDFA Contractor IPR in relation to any projects associated with the MUDFA Works.
- 71.4 **tie** hereby grants to the MUDFA Contractor a non-exclusive revocable royalty free licence for the duration of this Agreement to use such Project IPR as is owned by **tie** as may be necessary for the MUDFA Contractor to use solely and exclusively for the purpose of performing the MUDFA Works.
- 71.5 The MUDFA Contractor 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 this Clause 71 (*Copyright and Intellectual Property*) in **tie**.
- 71.6 The MUDFA Contractor waives any and all moral rights held or to be held by the MUDFA Contractor in the Project IPR and shall procure that all of the MUDFA Contractor Parties who are authors of the whole or any part of the Project IPR waive and abandon in writing all moral rights.
- 71.7 The MUDFA Contractor agrees that all rights in the Project IPR shall remain the property of **tie** and the MUDFA Contractor shall retain no rights in the Project IPR beyond the licence granted in Clause 71.4 above. The MUDFA Contractor 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 MUDFA Works. In particular, otherwise as permitted in this Agreement herein, the MUDFA Contractor shall not disclose, assign, sub-licence, lease, rent or otherwise dispose of the Project IPR.
- 71.8 To the extent that any of the Deliverables are generated by or maintained on a computer or similar system, the MUDFA Contractor 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 MUDFA Contractor Software is licensed to the MUDFA Contractor, 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 MUDFA Contractor 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.

71.9 The MUDFA Contractor 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 MUDFA Contractor shall submit to **tie's** Representative for approval its proposals for the back-up and storage in safe custody of the Deliverables and **tie's** Representative shall be entitled to object if the same is not in accordance with Good Industry Practice. The MUDFA Contractor shall comply, and shall cause all the MUDFA Contractor Parties to comply, with all such proposals to which **tie's** Representative has given his or her approval. The MUDFA Contractor may vary its procedures for such back-up and storage subject to submitting its proposals for change to **tie's** Representative, who shall be entitled to object on the basis set out above.

71.10 For the purposes of this Clause 71 (*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.

71.11 The provisions of this Clause 71 (*Copyright and Intellectual Property*) shall apply during the continuance of this Agreement and after its termination howsoever arising.

71.12 The MUDFA Contractor shall not reproduce or publish any document or matter relating to the MUDFA Works or this Agreement, either alone or in association with any other body or person, without the prior written consent of **tie**.

72. CONFIDENTIALITY

72.1 Where it is considered necessary in the opinion of **tie**, the MUDFA Contractor shall procure that its staff or professional advisors or Sub-Contractors sign a confidentiality undertaking before commencing any work in connection with this Agreement.

72.2 The MUDFA Contractor shall not use any Confidential Information it receives from **tie** otherwise than for the purposes of this Agreement.

- 72.3 In the event that the MUDFA Contractor fails to comply with this Clause 72 (*Confidentiality*), **tie** reserves the right to terminate the Agreement by notice in writing in accordance with Clause 57 (*Default of MUDFA Contractor*).
- 72.4 The MUDFA Contractor acknowledges that **tie** is subject to the requirements of FOISA and the Environmental Information Regulations and shall assist and cooperate with **tie** (at the MUDFA Contractor'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.
- 72.5 The MUDFA Contractor shall and shall procure that the MUDFA Contractor Parties shall:
- 72.5.1 transfer the Request for Information to **tie** as soon as practicable after receipt and in any event within 2 Business Days of receiving a Request for Information;
- 72.5.2 provide **tie** with a copy of all Information in its possession or power in the form that **tie** requires within 5 Business Days (or such other period as **tie** may specify) of **tie** requesting that Information; and
- 72.5.3 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.
- 72.6 **tie** shall be responsible for determining at its absolute discretion whether the Confidential Information and/or any other Information:
- 72.6.1 is exempt from disclosure in accordance with the provisions of the Code, FOISA or the Environmental Information Regulations; and
- 72.6.2 is to be disclosed in response to a Request for Information.
- 72.7 In no event shall the MUDFA Contractor respond directly to a Request for Information unless expressly authorised to do so by **tie**.
- 72.8 The MUDFA Contractor acknowledges that **tie** may be obliged, pursuant to the Code, FOISA, or the Environmental Information Regulations to disclose Information:
- 72.8.1 without consulting with the MUDFA Contractor, or

72.8.2 following consultation with the MUDFA Contractor and having taken its views into account.

72.9 The MUDFA Contractor shall ensure that all information and deliverables produced in the course of this Agreement or relating to this Agreement are retained for disclosure and shall permit **tie** to inspect such records as requested from time to time.

72.10 Any public relations material, press releases, public presentations or conference engagements in relation to the MUDFA Works planned by the MUDFA Contractor shall require **tie's** prior written approval.

73. WAIVER

73.1 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.

73.2 The MUDFA Contractor 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 MUDFA Contractor expressly for the purpose of effecting such waiver.

73.3 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.

74. NOTICES

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

74.1.1 in writing;

74.1.2 sent by one of the following methods:

74.1.2.1 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**, 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 MUDFA Contractor from time to time for that purpose; or
- (b) in the case of notices given to the MUDFA Contractor, [**◆ specify details of address and fax number**] or such other address or fax number in the United Kingdom as the MUDFA Contractor may notify **tie** from time to time for that purpose; or
- (c) in the case of notices given to **tie's** Representative, [**◆ specify details of address and fax number**] or such other address or fax number in the United Kingdom as **tie's** Representative may notify the MUDFA Contractor from time to time for that purpose; or
- (d) in the case of notices given to MUDFA Contractor's Representative, [**◆ specify details of address and fax number**] or such other address or fax number in the United Kingdom as MUDFA Contractor's Representative may notify **tie** from time to time for that purpose; or

74.1.2.2 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 MUDFA Contractor, the MUDFA Contractor's Representative;

74.1.2.3 e-mail to:

- (a) in the case of notices given to **tie**, the **tie's** Representative; or
- (b) in the case of notices given to the MUDFA Contractor, the MUDFA Contractor's Representative;

74.1.3 be deemed duly served:

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

74.1.3.2 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

74.1.3.3 if sent via e-mail, the date of written acknowledgement by the Party to whom the notice was served.

75. ENTIRE AGREEMENT

75.1 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.

75.2 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.

75.3 Any representations or warranties other than those contained or referred to in this Agreement are superseded and extinguished by this Agreement.

75.4 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.

76. DATA PROTECTION

76.1 For the purpose of the following Clauses, the term "personal data" shall have the meaning given to it in the Data Protection Act 1998.

76.2 The MUDFA Contractor shall, in relation to any personal data in respect of which it is either the "data controller" or the "data processor" for the purposes of the Data Protection Act 1998, comply with the obligations of a "data controller" under the provisions of the seventh data protection principle as set out in Schedule 1 of that Act. In addition, the MUDFA Contractor:

- 76.2.1 shall have at all material times (and shall use its best endeavours to procure that all MUDFA Contractor Parties have or will have at all material times) the appropriate technical and organisational measures in place against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data held or processed by it;
- 76.2.2 shall (and shall use its best endeavours to procure that the MUDFA Contractor Parties shall) take at all material times, all reasonable steps to ensure the integrity of any of its staff with access to personal data processed in connection with the Edinburgh Tram Network;
- 76.2.3 shall act only on the instructions of **tie** in relation to the processing of any personal data in respect of which **tie** is the "data controller" for the purposes of that Act;
- 76.2.4 shall only obtain, hold, process, use, store and disclose such personal data as is necessary to perform its obligations under this Agreement; and
- 76.2.5 shall allow **tie** access to any relevant premises on reasonable notice to inspect its procedures referred to in Clause 76.2.1.

77. DISCRIMINATION

- 77.1 The MUDFA Contractor shall not (and the MUDFA Contractor shall insert a Clause to this effect in each contract with any Sub-Contractor) 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.

78. CONSENT AND APPROVAL

- 78.1 The giving of any consent or approval by or on behalf of **tie** shall not in any way relieve the MUDFA Contractor 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.
- 78.2 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.

79. FURTHER ASSURANCE

79.1 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.

80. VARIATIONS TO BE IN WRITING

80.1 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.

81. NO PARTNERSHIP OR AGENCY

81.1 Nothing in this Agreement shall be construed as creating a partnership between **tie** and the MUDFA Contractor.

81.2 The MUDFA Contractor shall not (and shall procure that the MUDFA Contractor 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 **tie**. The MUDFA Contractor 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 MUDFA Contractor Party shall hold itself out) as having any such authority or power.

82. INVALID TERMS

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

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

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

83. THIRD PARTY RIGHTS

83.1 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.

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

EXECUTED for and on behalf of **TIE LIMITED**

at

on

2006 by:

Authorised Signatory

Full Name

Witness Signature

Full Name

Address

.....
.....
.....
.....
.....
.....

EXECUTED for and on behalf of **[MUDFA CONTRACTOR]** at

on

2006 by:

Director/Authorised Signatory

Full Name

Witness Signature

Full Name

Address

.....
.....
.....
.....
.....

**THIS IS SCHEDULE 1 REFERRED TO IN THE FOREGOING AGREEMENT
BETWEEN TIE AND THE MUDFA CONTRACTOR**

SCHEDULE 1

SCOPE OF WORKS AND SERVICES

[NOTE TO TENDERERS: SAVED AS SEPARATE FILE ON CD]

Director/Authorised Signatory
TIE LIMITED

Director/Authorised Signatory
[MUDFA CONTRACTOR]

**THIS IS SCHEDULE 2 REFERRED TO IN THE FOREGOING AGREEMENT
BETWEEN TIE AND THE MUDFA CONTRACTOR**

SCHEDULE 2

TECHNICAL REQUIREMENTS

[NOTE TO TENDERERS: SAVED AS SEPARATE FILE ON CD]

.....
Director/Authorised Signatory
TIE LIMITED

.....
Director/Authorised Signatory
[MUDFA CONTRACTOR]

**THIS IS SCHEDULE 3 REFERRED TO IN THE FOREGOING AGREEMENT
BETWEEN TIE AND THE MUDFA CONTRACTOR**

SCHEDULE 3

SPECIFICATION

[NOTE TO TENDERERS: SAVED AS SEPARATE FILE ON CD]

Director/Authorised Signatory
TIE LIMITED

Director/Authorised Signatory
[MUDFA CONTRACTOR]

**THIS IS SCHEDULE 4 REFERRED TO IN THE FOREGOING AGREEMENT
BETWEEN TIE AND THE MUDFA CONTRACTOR**

SCHEDULE 4

BILLS OF QUANTITIES

**[NOTE TO TENDERERS: PREAMBLES AND BILLS SAVED ON SEPARATE CD. ONCE
COMPLETED, THE BILLS SUBMITTED BY THE SUCCESSFUL TENDERER AND THE
PREAMBLES, WILL BE INSERTED INTO THIS AGREEMENT]**

Director/Authorised Signatory
TIE LIMITED

Director/Authorised Signatory
[MUDFA CONTRACTOR]

**THIS IS SCHEDULE 5 REFERRED TO IN THE FOREGOING AGREEMENT
BETWEEN TIE AND THE MUDFA CONTRACTOR**

SCHEDULE 5

REVIEW PROCEDURE

1. Introduction

- 1.1 Except where otherwise agreed in writing, the provisions of this Schedule 5 (*Review Procedure*) shall apply whenever any Deliverable or course of action is required to be reviewed, approved, agreed, consented to or otherwise processed in accordance with the Agreement.
- 1.2 Each submission by the MUDFA Contractor to **tie's** Representative under the Review Procedure shall be accompanied by five copies of the proposed Deliverable (in appropriate agreed format) to be reviewed or a statement of the proposed course of action (the entire contents of a submission being referred to as a "Submitted Item"). In relation to each Submitted Item, the provisions of this Schedule 5 (*Review Procedure*) shall apply.
- 1.3 Within [twenty] Business Days of the date of receipt of a submission (or re-submission, as the case may be) of the Submitted Item to **tie's** Representative (or such other period as the Parties may agree), **tie's** Representative shall return one copy of the relevant Submitted Item to the MUDFA Contractor endorsed (subject to and in accordance with paragraph 3 (*Grounds of Objection*)) "Level A - no objection", "Level B - proceed subject to comments" or "Level C - resubmit".
- 1.4 If **tie's** Representative fails to return a copy of any Submitted Item within [twenty] Business Days (or within such other period as the Parties may agree in writing) of the date of its submission to **tie's** Representative, then the MUDFA Contractor shall re-submit the submitted item, stating that it is a resubmitted item. If **tie's** Representative fails to return a copy of any Submitted Item within [7] days of any re-submission, then **tie's** Representative shall be deemed to have returned the Submitted Item to the MUDFA Contractor endorsed "Level A - no objection".
- 1.5 If **tie's** Representative makes an objection to any Submitted Item in accordance with paragraph 3 (*Grounds of Objection*), **tie's** Representative shall state the ground upon which such objection is based and the evidence or other information necessary to substantiate that ground.

- 1.6 For the avoidance of doubt, **tie's** Representative shall be entitled to make such comments on any Submitted Item on any grounds as he sees fit but, to the extent that **tie's** Representative comments on a Submitted Item other than on the grounds specified in paragraph 3 (*Grounds of Objection*), or fails to comply with the provisions of this paragraph 1, the MUDFA Contractor may, at its discretion request written clarification of the basis for such comments and, if clarification is not received within 10 Business Days of such request by the MUDFA Contractor refer the matter for determination in accordance with the Dispute Resolution Procedure.
- 1.7 Where any information that has been provided is updated, the new issues shall be provided promptly to **tie** as soon as reasonably possible.
- 1.8 **tie's** Representative shall be entitled to instruct the MUDFA Contractor that a defined class of Deliverable or course of action may be submitted "for information" and not for review in accordance with this Schedule 5 (*Review Procedure*).
- 1.9 The MUDFA Contractor shall ensure that each Submitted Item shall contain sufficient detail and shall be accompanied by sufficient information to enable **tie's** Representative to assess the Submitted Item in accordance with this Schedule 5 (*Review Procedure*).
- 1.10 Where a revised Submitted Item is submitted, the MUDFA Contractor shall also ensure that such revision clearly identifies what revision to the Deliverable was made.

2. Further Information

- 2.1 The MUDFA Contractor shall submit any further or other information, data and documents that **tie's** Representative reasonably requires to act in accordance with this Schedule 5 (*Review Procedure*). If the MUDFA Contractor does not submit any such information, data and documents, **tie's** Representative shall be entitled to object to the Submitted Item:
 - 2.1.1 on the basis of the information, data and documents which have been provided; or
 - 2.1.2 on the grounds that insufficient information, data and documents have been provided to enable **tie's** Representative to act in accordance with this Schedule 5 (*Review Procedure*).

3. Grounds of Objection

- 3.1 **tie's** Representative may object to any Submitted Item on the grounds set out in paragraph 2 (*Further Information*) above but otherwise may make objections in relation to a Submitted Item if, on the balance of probabilities, implementation of that Submitted Item:
- 3.1.1 would not be in accordance with this Agreement; and/or
 - 3.1.2 would result in an increase to **tie's** liabilities or potential or contingent liabilities under this Agreement; and/or
 - 3.1.3 would be inefficient as to expenditure of resource/costs; and/or
 - 3.1.4 would lead to a health and safety risk to any person or property; and/or
 - 3.1.5 would lead to a breach of any Law, any Consent or the terms of any Land Consent; and/or
 - 3.1.6 would necessitate the obtaining of a new Law or the obtaining of a variation to an existing Law; and/or
 - 3.1.7 would not be in accordance with any relevant environmental requirements; and/or
 - 3.1.8 would not be in accordance with Schedule 3 (*Specification*) and/or Schedule 2 (*Technical Requirements*); and/or
 - 3.1.9 would materially adversely affect the MUDFA Contractor's ability to perform its obligations under this Agreement; and/or
 - 3.1.10 would materially adversely affect **tie's** ability to perform its obligations or enforce its rights under this Agreement; and/or
 - 3.1.11 is not in accordance with the MUDFA Contractor's quality plans; and/or
 - 3.1.12 would not be in accordance with Good Industry Practice.

4. **Effect of Review**

- 4.1 Any Submitted Item which is returned or deemed pursuant to paragraph 1.4 to have been returned by **tie's** Representative endorsed "Level A - no objection" shall be complied with and implemented by the MUDFA Contractor.
- 4.2 If **tie's** Representative returns the Submitted Item endorsed other than "Level A - no objection", the MUDFA Contractor shall:

- 4.2.1 where **tie's** Representative has endorsed the Submitted Item "Level B - proceed subject to comments", proceed with the performance of the MUDFA Works in accordance with the Programme but acknowledge and take into account **tie's** Representative's comments;
- 4.2.2 where **tie's** Representative has endorsed the Submitted Item "Level C - resubmit", not act upon the Submitted Item, amend the Submitted Item to respond to **tie's** Representative's objections and requirements, and re-submit the same to **tie's** Representative in accordance with paragraph 4.3 unless the MUDFA Contractor disputes that any such objection or proposed requirement is on grounds permitted by this Agreement, in which case the MUDFA Contractor or **tie's** Representative may refer the matter for determination in accordance with the Dispute Resolution Procedure and the MUDFA Contractor shall not act on the Submitted Item until such matter is so determined or otherwise agreed provided that any referral to the Dispute Resolution Procedure is at the risk of the MUDFA Contractor.
- 4.3 Where the Submitted Item has been endorsed "Level C", the MUDFA Contractor shall within [10] Business Days of receiving the returned Submitted Item, resubmit the Submitted Item as amended to **tie's** Representative and the provisions of paragraphs 1.2 to 4 of this Schedule 5 (*Review Procedure*) shall apply (*mutatis mutandis*) to such re-submission.
- 4.4 The return or deemed return of any Submitted Item endorsed "Level A - no objection" or otherwise endorsed in accordance with paragraph 4.2.1 ("Level B" - proceed subject to comments) shall mean that the relevant Submitted Item may be used or implemented (subject to any comments made in accordance with paragraph 4.2.1) for the purposes for which it is intended. However, the return or deemed return of any Submitted Item howsoever endorsed shall not:
- 4.4.1 relieve the MUDFA Contractor of its obligations under this Agreement; nor
- 4.4.2 constitute an acknowledgement, admission or acceptance by **tie** that the MUDFA Contractor has complied with such obligations.

5. Disclaimer

- 5.1 No review, objection, comment or silence by **tie** shall operate to (i) exclude or limit the MUDFA Contractor's obligations or liabilities under this Agreement (or **tie's**

rights under this Agreement) or (ii) fix tie with any express or implied obligations, duties or liabilities with respect to the Submitted Item.

5.2 For the avoidance of doubt, this information is supplementary to information required to be produced by the MUDFA Contractor in order to satisfy the approval requirements of and Consents from other third parties and Approval Bodies. These include those required for:

5.2.1 CEC in its capacity as planning authority, roads authority and authority responsible for environmental health matters;

5.2.2 the Utilities; and

5.2.3 the Scottish Executive.

5.3 The MUDFA Contractor shall promptly provide copies of all such submissions to tie together with the responses to them as a matter of routine.

6. Documentation Format and Management

6.1 The MUDFA Contractor shall issue five copies (in appropriate agreed format) of all Submitted Items to tie and compile and maintain a register of the date and contents of the submission for each Submitted Item.

6.2 The MUDFA Contractor shall compile and maintain a register of the date of receipt and content of all Submitted Items that are returned or deemed to be returned by tie's Representative.

6.3 All drawings shall be presented as A3 sized paper copies and drawings shall be prepared at their original size in a manner that allows them to be readily legible when reduced to A3 size. Original drawings shall not be greater than A0 in size.

7. Variations

7.1 No review, objection or comment or any failure to make objection or comment under this Schedule 5 (*Review Procedure*) by tie shall constitute a tie Change

7.2 If, having received comments from tie's Representative, the MUDFA Contractor considers that compliance with those comments would amount to a tie Change, the MUDFA Contractor shall within [7] days of any comments being received, before complying with the comments, 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 comments were complied with, **tie** may proceed with the matter in accordance with Clause 46 (*Changes*)

- 7.3 Any failure by the MUDFA Contractor to notify **tie** within [7] days of comments being received that it considers compliance with such comments of **tie's** Representative would amount to a **tie** Change shall constitute an irrevocable acceptance by the MUDFA Contractor that any compliance with **tie's** comments shall be without cost to **tie** and without any entitlement to any extension of time or other relief.

.....
Director/Authorised Signatory
TIE LIMITED

.....
Director/Authorised Signatory
[MUDFA CONTRACTOR]

**THIS IS SCHEDULE 6 REFERRED TO IN THE FOREGOING AGREEMENT
BETWEEN TIE AND THE MUDFA CONTRACTOR**

SCHEDULE 6

SUB-CONTRACTOR COLLATERAL WARRANTY

(1) [SUB-CONTRACTOR]

- and -

(2) [tie LIMITED] or [OTHER THIRD PARTY BENEFICIARY]

- and -

(3) [MUDFA CONTRACTOR]

**COLLATERAL WARRANTY IN
FAVOUR OF [[tie LIMITED] or [OTHER
THIRD PARTY BENEFICIARY] FROM
[SUB-CONTRACTOR]
relating to
THE PROVISION OF MULTI-UTILITIES
DIVERSION FRAMEWORK WORKS
FOR THE EDINBURGH TRAM
NETWORK**

AGREEMENT

BETWEEN

- (1) **[SUB-CONTRACTOR]** [(company number [◆]) whose registered office is at [◆]] *OR* [carrying on business together in partnership under the name of [◆] at [◆]] ("**Sub-Contractor**");
- (2) **[[tie LIMITED (Company Number SC230949) whose registered office is at City Chambers, High Street, Edinburgh, Midlothian, EH1 1YJ OR [[Other third party beneficiary] [(company number [◆]) whose registered office is at [◆]] OR [carrying on business together in partnership under the name of [◆] at [◆]]] ["Beneficiary"]** which expression shall include its successors and permitted assignees.; and
- (3) **[MUDFA CONTRACTOR]** (company number [◆]) whose registered office is at [◆] ("**MUDFA Contractor**").

BACKGROUND

- A By an agreement in writing dated [◆] (the "**MUDFA**"), **tie** appointed the MUDFA Contractor to provide multi-utilities diversion framework works in connection with the Edinburgh Tram Network.
- B It is a term of the MUDFA that the MUDFA Contractor shall procure that the Sub-Contractor enter into this Agreement with the Beneficiary.
- C The Sub-Contractor has been appointed by the MUDFA Contractor as [◆] in terms of the Sub-Contract (as hereinafter defined).
- D It is a term of the Sub-Contract or has otherwise been agreed that the Sub-Contractor enters into this Agreement with the Beneficiary in relation to the Sub-Contract Works.

IT IS AGREED as follows:

1. DEFINITIONS AND INTERPRETATION

In this Agreement:

- 1.1 the following words and expressions have the following meanings, unless the context requires otherwise:

"Agreement" means this document (as amended from time to time pursuant to clause 13);

"Edinburgh Tram Network" means Line One and Line Two of the Edinburgh Tram Network as described in the Tram Legislation, and as may be amended from time to time together with any modification, line extension, spur, interconnection, and any additional line;

"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 Sub-Contract Works, and seeking in good faith to comply with its contractual obligations and all duties owed by it;

"Insurance Period" means the period of 12 years from the date of issue of the last certificate of substantial completion in respect of the Sub-Contract Works, as established pursuant to and for the purposes of the Sub-Contract (or, if sooner, 12 years after termination of the employment of the Sub-Contractor under the Sub-Contract);

"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, know-how, 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;

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

"Statutory Requirements" means all general or local Acts of Parliament and the regulations and Bye-laws of any local or other statutory authority which may be applicable to the Sub-Contract Works, together with any accompanying code of

practice or guidance, and the rules and regulations of all public bodies and companies whose property or rights are or may be affected in any way by the Sub-Contract Works;

"Sub-Contract" means the sub-contract dated [◆] made between the MUDFA Contractor and the Sub-Contractor;

"Sub-Contract Works" means the works and services to be undertaken by the Sub-Contractor under the Sub-Contract;

"Sub-Contractor Deliverables" means all documents, information, reports, diagrams, records, method statements, risk assessments, manuals, schedules, databases, photographs, formulae, plans, designs, specifications, drawings, details, calculations, models and simulations, the outputs and reports based on any models, programmes and all other material created and/or provided by the Sub-Contractor (or any other third party) in the performance of the Sub-Contract Works and the Sub-Contractor's obligations under the Sub-Contract;

"TEL" means Transport Edinburgh Limited a company incorporated under the Companies Act with 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;

"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; and

1.2 unless the context requires otherwise:

1.2.1 words importing:

1.2.1.1 the singular include the plural and vice versa; and

1.2.1.2 one gender include all other genders.

1.2.2 a reference to:

1.2.2.1 persons includes firms, companies, corporations, partnerships, trusts, authorities and other incorporated and/or unincorporated bodies; and

1.2.2.2 a clause is a reference to a clause in this Agreement.

1.3 The list of contents and clause headings in this Agreement are included for convenience only and do not affect its interpretation.

1.4 Where a party comprises two or more persons:

1.4.1 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

1.4.2 references to that party shall include references to each and any of those persons.

2. **STANDARD OF CARE**

2.1 The Sub-Contractor warrants and undertakes to the Beneficiary that it has carried out and shall carry out the Sub-Contract Works and its other duties and obligations under the Sub-Contract subject to and in accordance with the terms thereof.

2.2 In addition to and without derogation from clause 2.1, the Sub-Contractor warrants to the Beneficiary that:

2.2.1 in the performance of the Sub-Contract Works and its other obligations under the Sub-Contract it shall exercise a reasonable level of professional skill, care and diligence to be expected of a properly qualified and competent contractor experienced in carrying out works and services similar to the Sub-Contract Works in connection with projects of a similar type, nature and complexity;

2.2.2 any design produced by the Sub-Contractor will satisfy in every respect any relevant performance specification or any requirement included or referred to in the Sub-Contract and will be suitable in every respect for the purposes included in or reasonably to be inferred from the Sub-Contract; and

2.2.3 any design produced by the Sub-Contractor will fully comply with Statutory Requirements.

2.3 The Sub-Contractor shall owe a duty of care to the Beneficiary in carrying out its duties and obligations under the Sub-Contract.

3. MATERIALS

- 3.1 The Sub-Contractor warrants to the Beneficiary that it has not and shall not use any materials which at the time of use:
- 3.1.1 are known to be deleterious in the particular circumstances in which they are used (either to health and safety or to the durability of any works on which the Sub-Contractor is employed by the MUDFA Contractor); or
 - 3.1.2 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
 - 3.1.3 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
 - 3.1.4 contravene Good Industry Practice.

4. COPYRIGHT LICENCE

- 4.1 The Sub-Contractor hereby grants to the Beneficiary an irrevocable, perpetual, royalty-free and non-exclusive licence to use such Intellectual Property Rights in the Sub-Contractor Deliverables as may be necessary for the Beneficiary to use in relation to the [[Edinburgh Tram Network] **OR** *[Where beneficiary is not tie an appropriate use should be included]*]. This licence shall carry the right to grant sub-licences, and be freely transferable to third parties.
- 4.2 In so far as ownership of the copyright and any other Intellectual Property Rights in any Sub-Contractor Deliverable prepared or provided by the Sub-Contractor in connection with the Edinburgh Tram Network is vested in any person other than the Sub-Contractor, the Sub-Contractor shall procure for the Beneficiary the benefit of such a licence as is referred to in clause 4.1 for the purposes referred to therein.
- 4.3 The Sub-Contractor shall, if so requested at any time, execute such documents and perform such acts as may be required fully and effectively to assure to the Beneficiary or any third party the rights referred to in this clause 4.
- 4.4 The Sub-Contractor shall provide to the Beneficiary a copy of any of the Sub-Contractor Deliverables as soon as reasonably practicable after receipt by the Sub-Contractor of a written request from the Beneficiary to do so.

4.5 The Sub-Contractor undertakes to the Beneficiary that the use by the Beneficiary of any of the Sub-Contractor Deliverables for any purpose provided for in this clause 4 shall not infringe the rights of any third party in relation to the Sub-Contractor Deliverables.

5. REQUIRED INSURANCES

5.1 The Sub-Contractor undertakes that:

5.1.1 it has maintained and shall maintain during the performance of its obligations under the Sub-Contract and the Insurance Period each of the insurances as follows:

5.1.1.1 professional indemnity insurance with an insurer authorised to carry out insurance business in the United Kingdom for an amount not less than £[◆] on an each and every claim basis and £[◆] on an aggregate basis in respect of pollution and contamination claims and date recognition claims, in respect of the legal liability of the Sub-Contractor as a result of any negligent act, error or omission in the performance of the professional activities and duties in connection with the Sub-Contract Works and in the performance of its obligations under the Sub-Contract; and

5.1.1.2 [◆] [*Detail any further insurances held by the Sub-Contractor*]

5.1.2 cover under the professional indemnity insurance is extended to include the Sub-Contractor's liabilities under this Agreement;

5.1.3 this Agreement has been disclosed to the Sub-Contractor's current professional indemnity insurers or brokers (as the case may be) and shall be disclosed to any future professional indemnity insurers or brokers providing the insurance required by this Agreement; and

5.1.4 the Sub-Contractor shall abide by the terms and conditions of insurance and not do or omit to do anything that might prejudice the cover or its right to make a claim.

5.2 As and when reasonably required by the Beneficiary, the Sub-Contractor shall produce for inspection documentary evidence that such insurance is being properly maintained.

5.3 If the insurer makes or attempts to make any material alteration or purports to withdraw the Sub-Contractor's professional indemnity cover, or if the Sub-Contractor is unable to obtain professional indemnity insurance, the Sub-Contractor shall promptly give notice of this to the Beneficiary.

6. STEP-IN

6.1 The Sub-Contractor shall not exercise nor seek to exercise any right of determination of its employment under the Sub-Contract or to rescind the Sub-Contract or to discontinue the performance of any of the Sub-Contractor's obligations in relation to the Sub-Contract by reason of breach on the part of the MUDFA Contractor (or otherwise) without giving to the Beneficiary not less than twenty one days' written notice of its intention to do so and specifying in such notice the grounds for the proposed determination. The Sub-Contractor will for the period of any such notice diligently and properly continue to perform the Sub-Contractor's obligations under the Sub-Contract.

6.2 Any period stipulated in the Sub-Contract for the exercise by the Sub-Contractor of a right of determination will nevertheless be extended as may be necessary to take account of the period of notice required under clause 6.4.

6.3 Compliance by the Sub-Contractor with the provisions of clause 6.1 will not be treated as a waiver of any breach on the part of the MUDFA Contractor giving rise to the right of determination nor otherwise prevent the Sub-Contractor from exercising its rights after the expiration of the notice unless the right of determination has ceased under the provisions of clause 6.4.

6.4 The right of the Sub-Contractor to determine its employment under the Sub-Contract or to rescind the Sub-Contract or to discontinue the performance of any of its obligations in relation to the Sub-Contract shall cease if within the period of twenty one days referred to in clause 6.1 the Beneficiary gives written notice to the Sub-Contractor:

6.4.1 requiring the Sub-Contractor to continue with the performance of all its obligations under the Sub-Contract;

6.4.2 acknowledging that the Beneficiary is assuming all the obligations of the MUDFA Contractor under the Sub-Contract; and

- 6.4.3 undertaking to the Sub-Contractor to discharge all amounts payable to the Sub-Contractor under the terms of the Sub-Contract.
- 6.5 Upon compliance by the Beneficiary with the requirements of clause 6.4 the Sub-Contract will continue in full force and effect as if the right of determination on the part of the Sub-Contractor had not arisen and in all respects as if the Sub-Contract had been made between the Beneficiary and the Sub-Contractor to the exclusion of the MUDFA Contractor.
- 6.6 Notwithstanding that as between the MUDFA Contractor and the Sub-Contractor the Sub-Contractor's right of determination of its engagement under the Sub-Contract may not have arisen the provisions of clause 6.5 shall nevertheless apply if the Beneficiary gives written notice to the Sub-Contractor and the MUDFA Contractor to that effect and the Beneficiary complies with the requirements on its part under clause 6.4.
- 6.7 The Sub-Contractor does not need to be concerned or required to enquire whether, and will be bound to assume that, as between the MUDFA Contractor and the Beneficiary, the circumstances have occurred permitting the Beneficiary to give notice under clause 6.6.
- 6.8 By acting in accordance with the provisions of this clause 6 , the Sub-Contractor will not incur any liability to the MUDFA Contractor.
- 6.9 Unless and until the Beneficiary has given notice under this clause 6:
- 6.9.1 the Beneficiary has no liability whatsoever to the Sub-Contractor in respect of amounts payable to the Sub-Contractor under the Sub-Contract; and
- 6.9.2 the Beneficiary has no authority to issue any direction or instruction to the Sub-Contractor in relation to the performance of the Sub-Contractor's duties under the Sub-Contract.
- 6.10 Without prejudice to the provisions of clauses 6.1 to 6.9 inclusive, if prior to the service of any notice under clause 6.4 the employment of the Sub-Contractor under the Sub-Contract is determined for any reason whatsoever the Sub-Contractor shall, if requested in writing so to do by the Beneficiary no later than 12 weeks after the date of such determination, forthwith enter into a new agreement with the Beneficiary in relation to the carrying out of the Sub-Contract Works on the same terms as the Sub-Contract, but with such revisions as the Beneficiary and the Sub-Contractor may

reasonably require to reflect altered circumstances and the fact that it is the Beneficiary and not the MUDFA Contractor employing the Sub-Contractor.

7. ASSIGNATION

- 7.1 The Sub-Contractor shall not assign, novate or otherwise transfer the whole or any part of the Agreement without the prior written agreement of the Beneficiary.
- 7.2 The Beneficiary shall be entitled to assign, novate or otherwise transfer the whole or any part of this Agreement:

*[[Include where the Beneficiary is **tie**]*

[7.2.1 to the Scottish Ministers, TEL, the City of Edinburgh Council or any local authority or other body with no worse financial standing than that of the Beneficiary who takes over all or substantially all the functions of the Beneficiary; or

7.2.2 to any other person whose obligations under this Agreement are unconditionally and irrevocably guaranteed (in a form acceptable to the Sub-Contractor acting reasonably) by the Beneficiary or a person falling within clause 7.2.1; or

7.2.3 with the prior written consent of the MUDFA Contractor (such consent not to be unreasonably withheld or delayed) to any person not covered by clauses 7.2.1 or 7.2.2.]

OR

[[Include where the Beneficiary is an other third party]

7.2.1 without the consent of the Sub-Contractor to any person provided that no more than two such assignments will be permitted. Any assignments by the Beneficiary to a subsidiary or associated company of the Beneficiary or a member of the same group of companies will not count as an assignment;

7.2.2 with the prior written consent of the Sub-Contractor (such consent not to be unreasonably withheld or delayed).]]

- 7.3 The Sub-Contractor undertakes to the Beneficiary not to contend in any court proceedings under this Agreement that any person to whom the Beneficiary assigns or

has assigned its rights under this Agreement or any of them in accordance with the foregoing provisions of this clause is to be precluded from recovering any loss resulting from any breach of this Agreement (whenever happening) by reason that such person is an assignee and not the original contracting party under this Agreement or by reason that the Beneficiary is named under this Agreement or any intermediate assignee of the Beneficiary escaped loss resulting from such breach by reason of the disposal of its interest in the same.

8. LIABILITY OF THE SUB-CONTRACTOR

- 8.1 No provision of this Agreement is intended to exclude any obligation or liability which would otherwise be implied whether by the law of contract, delict or otherwise.
- 8.2 The responsibility of the Sub-Contractor under this Agreement is not to be reduced or in any way released or limited by any enquiry or inspection by or on behalf of any person notwithstanding that such enquiry or inspection may give rise to a claim by the Beneficiary against a third party.
- 8.3 The rights and benefits conferred upon the Beneficiary by this Agreement are in addition to any other rights and remedies that the Beneficiary may have against the Sub-Contractor including (without prejudice to the generality of the foregoing) any remedies in delict.
- 8.4 Subject to the other provisions of this Agreement, the liability of the Sub-Contractor to the Beneficiary is to be determined in all respects in accordance with the terms of the Sub-Contract and, in the event of any claim by the Beneficiary under this Agreement, the Sub-Contractor shall be entitled to rely upon any defence, right, limitation or exclusion under the Sub-Contract as though the Beneficiary were named as the MUDFA Contractor under it, except that:
- 8.4.1 the Beneficiary shall not be affected by any subsequent variation of the Sub-Contract which would adversely affect the obligations owed by the Sub-Contractor or the waiver, compromise or withdrawal of any claim made by the MUDFA Contractor; and
- 8.4.2 the Sub-Contractor shall not be entitled to exercise any right of set-off, retention or withholding against the beneficiary to which the Sub-Contractor may be entitled against the MUDFA Contractor.

9. CONSENT OF MUDFA CONTRACTOR

9.1 The MUDFA Contractor consents to the terms of this Agreement.

10. NOTICES

10.1 Any notice required to be given under this Agreement is to be hand delivered or sent by prepaid registered or recorded delivery post to the party concerned at its address set out in this Agreement or to such other addresses as may be notified by such party for the purposes of this clause.

10.2 Any notice given pursuant to this clause, if sent by registered or recorded delivery, is deemed to have been received 48 hours after being posted.

11. RIGHTS OF THIRD PARTIES

11.1 A person who is not a party to this Agreement shall have no right to enforce any term of this Agreement.

12. INVALID TERMS

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

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

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

13. VARIATIONS AND WAIVERS TO BE IN WRITING

13.1 No variation, alteration or waiver of any of the provisions of this Agreement shall be effective unless it is in writing and signed by or on behalf of the Party against which the enforcement of such variation, alteration or waiver is sought.

14. WAIVER

14.1 Save where expressly stated, no failure or delay by either Party to exercise any right or remedy in connection with this Agreement shall operate as a waiver of it or of any other right or remedy nor shall 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.

14.2 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.

15. **JURISDICTION AND LAW**

15.1 This Agreement is governed by and is to be construed according to Scots law and the Scottish courts shall have jurisdiction in relation to all matters arising under it.

[[Include where the Beneficiary is *tie*]

15.2 The Parties agree that any dispute in relation to this Agreement shall be conducted in accordance with Clause 63 (*Dispute Resolution Procedure and Jurisdiction*) of the MUDFA and the provisions of the said Clause 63 and Schedule 10 (*Panels for the Dispute Resolution Procedure*) of the MUDFA are deemed to be incorporated mutatis mutandis in respect of this Agreement provided that any reference to "Parties" in the MUDFA shall be deemed to refer to the Beneficiary and the Sub-Contractor and the reference in the MUDFA to "Clause 74 (*Notices*)" shall mean clause 10 of this Agreement.]

IN WITNESS WHEREOF these presents on this and the preceding [◆] pages are executed as follows:

EXECUTED for and on behalf of [SUB-
CONTRACTOR] at

on 200[◆] by:

Director/Authorised Signatory

Full Name

Witness Signature

Full Name

Address

EXECUTED for and on behalf of [[*tie*
LIMITED] OR [*other third party beneficiary*]
at

on 200[◆] by:

Authorised Signatory

Full Name

Witness Signature
Full Name
Address
.....

EXECUTED for and on behalf of **[MUDFA-CONTRACTOR]** at

on 200[◆] by:
Director/Authorised Signatory
Full Name
Witness Signature
Full Name
Address
.....

.....
Director/Authorised Signatory
TIE LIMITED

.....
Director/Authorised Signatory
[MUDFA CONTRACTOR]

**THIS IS SCHEDULE 7 REFERRED TO IN THE FOREGOING AGREEMENT
BETWEEN TIE AND THE MUDFA CONTRACTOR**

SCHEDULE 7

PERFORMANCE BOND

(1) [◆] [SURETY]

- in favour of -

(2) tie

PERFORMANCE BOND

PERFORMANCE BOND

BETWEEN

- (1) [◆], a company incorporated in [◆] under company number [◆] whose registered office is at [◆] ("the Surety"); and
- (2) TIE LIMITED, a company incorporated in Scotland under number SC230949 and having its registered office at City Chambers, High Street, Edinburgh EH1 1YJ ("tie")

WHEREAS

- A. tie entered into a Multi-Utilities Diversion Framework Agreement (hereinafter referred to as the "MUDFA") dated [◆] with [◆] (the "MUDFA Contractor") to undertake a light rapid transit system in Edinburgh known as the Edinburgh Tram Network.
- B. Clause 4 (*Performance Bond, Parent Company Guarantee and Collateral Warranty*) of the MUDFA obliges the MUDFA Contractor to deliver to tie an unconditional irrevocable Performance Bond on the conditions and in the form set out in Schedule 7 (*Performance Bond*) to the MUDFA, issued by a surety acceptable to tie and callable subject only to written notification by tie.
- C. In consideration of tie accepting the Surety's obligations set out below in discharge of the MUDFA Contractor's undertaking to provide a performance bond under Clause 4 (*Performance Bond, Parent Company Guarantee and Collateral Warranty*) of the MUDFA, the Surety hereby irrevocably and unconditionally agrees and undertakes to pay to tie a sum not exceeding £5,000,000.00 (the "**Bonded Amount**") and the Surety accordingly covenants with tie and agrees as follows:
 1. Upon receipt by the Surety of a demand or demands ("**Demand Notice**") from tie certifying that tie has issued a notice to the MUDFA Contractor stating that a MUDFA Contractor Default has occurred, and without being entitled or obliged to make any enquiry or proof or contestation or impose any further conditions on tie (or the MUDFA Contractor) and without the need for tie to take any legal action against or to obtain the consent of the MUDFA Contractor and without any right of set-off, abatement or counterclaim, the Surety shall forthwith pay to tie the amount or amounts specified in such Demand Notice(s) in immediately available funds by electronic transfer to the account nominated in the Demand Notice, not exceeding in aggregate the Bonded Amount; it being confirmed that tie may make

as many separate demands hereunder as **tie** thinks fit. **tie** shall not be obliged to exercise any other right or remedy **tie** may have before making a demand under this Performance Bond.

2. A Demand Notice received from **tie** in accordance with paragraph 1 above shall be conclusive evidence of the Surety's liability to pay to **tie** and of the amount of the sum or sums which the Surety is liable to pay. The Surety's obligation to make payment under this Performance Bond shall be a primary, independent and absolute obligation and the Surety shall not be entitled to delay or withhold payment for any reason. The Surety's obligation hereunder shall not be affected by any act, omission, matter or thing which, but for this provision, might operate to release or otherwise exonerate the Surety from the obligations hereunder in whole or in part, including without limitation and whether or not known to the Surety or to **tie**:

- 2.1 any time or waiver granted to **tie** or to the MUDFA Contractor;
- 2.2 the taking, variation, compromise, renewal or release of or the refusal or neglect to perfect or to enforce any rights, remedies or securities against **tie** or the MUDFA Contractor;
- 2.3 any legal limitation, disability or incapacity relating to **tie** or the MUDFA Contractor;
- 2.4 any variation of or amendment to the MUDFA (or related documentation) or the works or services to be performed thereunder or any other document or security so that references to the MUDFA in this Performance Bond shall include each such variation and amendment;
- 2.5 any unenforceability, invalidity or frustration of any rights or obligations of **tie** or the MUDFA Contractor under the MUDFA or any other document or security; and
- 2.6 any other fact, circumstance, provision of statute or rule of law which might, were the Surety's liability to be secondary rather than primary, entitle the Surety to be released or discharged in whole or in part from the Surety's undertaking.

3. Until such time as **tie** has recovered all amounts due to it under or in connection with the MUDFA, the Surety shall not, without the prior written consent of **tie**, in respect of any payment made or liability under this Performance Bond, claim, rank or vote as a creditor in the liquidation of the MUDFA Contractor in competition with **tie**, or enforce any security over the assets of the MUDFA Contractor in respect of any such payment or liability in competition with **tie**, but this Clause 3 shall not limit or restrict the exercise or enforcement by the Surety of its rights against any other person after payment in full of the Bonded Amount.

4. The Surety shall hold in trust any sums recovered by the Surety contrary to the provisions of Clause 3:
 - 4.1 to pay to **tie** in full the unrecovered balance of any damages or other sums due from the MUDFA Contractor to **tie** under or in connection with the MUDFA, to the extent set out in Clause 3; and
 - 4.2 subject thereto, for the Surety's benefit.
5. **tie** shall be entitled to enforce the provisions of Clauses 3 and 4 only so far as required to keep itself or to put itself in the position it would occupy if the Surety had no rights of recourse against the MUDFA Contractor or its assets in respect of any payment made or liability arising under this Performance Bond, but no further; and any consent required of **tie** under Clause 3 above shall not be refused or delayed unreasonably.
6. The Surety's liability under this Performance Bond shall not be affected or reduced by the insolvency of the MUDFA Contractor or its liquidation, receivership or other like temporary or permanent status.
7. **tie** shall be at liberty to compromise, release, waive or neglect any security as it sees fit, without impairment of their rights under this Performance Bond.
8. This Performance Bond shall cease to have effect ninety days after the earlier of the date of expiry or the date of termination of the MUDFA, save in connection with any Demand Notice issued to the Surety in writing prior to the expiry of the said period of ninety days.
9. **tie** shall be entitled to assign this Performance Bond without the consent of the Surety.
10. Any notice to be served under this Performance Bond must be in writing and must be delivered by hand or by registered post or recorded delivery at [*enter branch and address*]. Service shall take effect, if given by hand, on the date of delivery. If given by post, it shall take effect 2 days after posting, excluding Saturdays, Sundays and statutory holidays.
11. This Performance Bond shall be governed by and construed in accordance with the Laws of Scotland and the Parties hereby agree to submit to the exclusive jurisdiction of the Court of Session over any claim arising out of this Performance Bond.
12. A person who is not a party to this Performance Bond shall have no right to enforce any of the terms of this Performance Bond.
13. In this Performance Bond:

13.1 the words and expressions have the same meanings as in the MUDFA and we shall be deemed to have full knowledge of the terms and conditions of the MUDFA;

13.2 "person" includes any firm and any entity having legal capacity; and

13.3 the definitions given in the recitals apply to the rest of this Performance Bond.

IN WITNESS WHEREOF

EXECUTED for and on behalf of **[THE SURETY]** at

on _____ 2005 by:

Director/Authorised Signatory

Full Name

Witness Signature

Full Name

Address

EXECUTED for and on behalf of **[TIE LIMITED]** at

on _____ 2005 by:

Director/Authorised Signatory

Full Name

Witness Signature

Full Name

Address

.....

Director/Authorised Signatory TIE LIMITED	Director/Authorised Signatory [MUDFA CONTRACTOR]
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**THIS IS SCHEDULE 8 REFERRED TO IN THE FOREGOING AGREEMENT
BETWEEN TIE AND THE MUDFA CONTRACTOR**

SCHEDULE 8

PROGRAMME

A. RE CONSTRUCTION PROGRAMME

**[Completed Pre-Construction Programme
submitted by the successful Tenderer will be inserted]**

B. CONSTRUCTION PROGRAMME

**[Completed Construction Programme
submitted by the successful Tenderer will be inserted]**

Director/Authorised Signatory
TIE LIMITED

Director/Authorised Signatory
[MUDFA CONTRACTOR]

**THIS IS SCHEDULE 9 REFERRED TO IN THE FOREGOING AGREEMENT
BETWEEN TIE AND THE MUDFA CONTRACTOR**

SCHEDULE 9

DISPUTE RESOLUTION PROCEDURE

1. The Parties agree that this Schedule 9 (*Dispute Resolution Procedure*) shall have effect for the resolution of any Dispute.
2. Any Dispute shall, in the first instance, be referred to the Internal Resolution Procedure in accordance with paragraph 10.
3. Neither Party shall commence any court proceedings until the procedures in paragraphs 10 to 57.3 have been completed, under exception that the provisions of this Schedule 9 (*Dispute Resolution Procedure*) shall not apply so as to prevent either Party seeking an interim order, or interim relief, in the Scottish courts.
4. In the event that any court proceedings whatsoever are initiated by either Party against the other, the Parties agree that the Court of Session, Scotland, shall have exclusive jurisdiction.
5. Neither Party shall be entitled to suspend the performance of its undisputed obligations under this Agreement merely by reason of the reference of any Dispute to the Dispute Resolution Procedure contained in this Schedule 9 (*Dispute Resolution Procedure*).
6. Subject to tie's discretionary rights set out in paragraphs 55 to paragraph 57.2 to require that a Dispute and a Related Dispute (as defined in paragraph 55) be dealt with together at an appropriate stage of the Dispute Resolution Procedure, the provisions of this Schedule 9 (*Dispute Resolution Procedure*) are mandatory and binding upon the Parties.
7. Unless a Party refers a Dispute to the Dispute Resolution Procedure contained in this Schedule 9 (*Dispute Resolution Procedure*) within three months of the date on which the event, matter or situation giving rise to the Dispute first occurred, such Party shall be deemed to have irrevocably waived any right to refer such Dispute to the Dispute Resolution Procedure, under exception that if such Party was not aware, and could not with reasonable diligence have been aware, that such event, matter or situation had occurred, this paragraph 7 shall have effect as if for the reference herein to the date on which such event, matter or situation occurred, there was substituted a reference to the date when such Party first became, or could with reasonable diligence have become, aware that such event, matter or situation

had occurred. This paragraph 7 is without prejudice to the right of either Party to raise in defence to any Dispute any defence (including, without prejudice to the foregoing generality, any defence of retention, compensation or set-off) which would otherwise be available to it.

8. Except in relation to the matters provided for in paragraphs 15 to 54 and subject to the provisions of paragraph 9, in the event that either Party following the timeous referral of any Dispute in accordance with paragraph 7 then pursues such Dispute under the Dispute Resolution Procedure, and in the event that such Party fails to observe any time limit or timescale provided for in this Schedule 9 (*Dispute Resolution Procedure*) in relation to the pursuit or progression of such Dispute, such Party shall, immediately upon such failure occurring, be deemed to have irrevocably waived any right to pursue or progress such Dispute any further. In that event, such Party shall be deemed to have elected not to have referred such Dispute or to have withdrawn such Dispute from the Dispute Resolution Procedure and shall be deemed to have irrevocably waived any right to refer any Dispute arising from the same or substantially the same Dispute or similar circumstances to the Dispute Resolution Procedure and shall be liable for payment of the whole fees incurred by any mediator or adjudicator who has acted in respect of such Dispute. This paragraph 8 is without prejudice to the rights of either Party to raise in defence to any Dispute any defence (including, without prejudice to the foregoing generality, any defence of retention, compensation or set-off) which would otherwise be available to it.
9. Notwithstanding the provisions of paragraph 8, in the event that a Party who pursues any Dispute under the Dispute Resolution Procedure fails to observe any time limit or timescale provided for in this Schedule 9 (*Dispute Resolution Procedure*) in relation to the pursuit or progression of the Dispute, the other Party may elect to waive such failure, in which event the time limit or timescale to which such failure relates shall be extended at the discretion of such other Party and the Dispute shall progress in accordance with the Dispute Resolution Procedure, subject that all other time limits and timescales provided for in this Schedule 9 (*Dispute Resolution Procedure*) which are affected by such extension shall be deemed to have been extended to give effect to such extension of the time limit or timescale to which such failure relates.

Internal Resolution Procedure

10. The following procedure is the Internal Resolution Procedure referred to in paragraph 2:

- 10.1 In the event of any Dispute arising, the MUDFA Contractor's Representative and tie's Representative shall seek to resolve the Dispute at a meeting to be convened within 3

Business Days of written notification by either Party to the other that it wishes to initiate the Internal Resolution Procedure in respect of that Dispute ("Notification"). Such Notification shall be given in accordance with the provisions of Clause 74 (*Notices*) of this Agreement.

- 10.2 Further meetings may follow the meeting referred to in paragraph 10.1, but in any event, if the Dispute is not resolved within 7 Business Days of Notification, each Party shall, before the expiry of the period of 10 Business Days from Notification, serve, in accordance with the provisions of Clause 74 (*Notices*) of this Agreement, a written position paper ("**Position Paper**") upon the other Party. Each Party's Position Paper shall state in reasonable detail that Party's position and required objectives in relation to the Dispute; any required redress, and, where possible, any comments on the other Party's position.
 - 10.3 Upon such service of a Position Paper by the Party initiating or pursuing the Dispute, the Chief Executive (or equivalent) of the MUDFA Contractor and the Chief Executive (or equivalent) of **tie** (or their respective deputies in the event of their unavailability) shall seek to resolve the Dispute by meeting in good faith to discuss and negotiate upon the Dispute without recourse to legal or other proceedings.
 - 10.4 In the event that resolution of the Dispute is achieved by the Chief Executive (or equivalent) of the MUDFA Contractor and the Chief Executive (or equivalent) of **tie**, the resolution shall be reduced to writing and, once it is signed by the duly authorised representatives of both Parties, shall be binding on the Parties.
 - 10.5 Unless concluded by a written legally binding agreement, all discussions and negotiations connected with the Dispute shall be conducted in confidence and without prejudice to the rights of the Parties in any future legal or other proceedings. Nor may such matters be produced or relied upon in evidence in any such proceedings.
11. In the event that any Dispute is not resolved by the Internal Resolution Procedure within a period of thirty Business Days from Notification (or longer if so agreed by the Parties) then the following provisions of this paragraph 11 shall apply;
- 11.1 The Chief Executive (or equivalent) of the MUDFA Contractor and the Chief Executive (or equivalent) of **tie** (or their respective deputies in the event of their unavailability) shall, within a further period of 5 Business Days, seek to agree that the Dispute shall be resolved by any one of the following procedures:

- 11.1.1 mediation in accordance with paragraphs 12 to 14; or
- 11.1.2 adjudication in accordance with paragraphs 15 to 54, in which event the Referring Party must give its Notice of Adjudication to the other Party within 5 Business Days of the date of expiry of the period of thirty five Business Days from Notification (or longer if so agreed by the Parties); or
- 11.1.3 litigation before the Court of Session, Scotland, in which event the Summons or Petition in any such litigation shall be signetted and served within 10 Business Days of the date of expiry of the period of thirty-five Business Days from Notification (or longer if so agreed by the Parties).

In the event that the Chief Executive (or equivalent) of the MUDFA Contractor and the Chief Executive (or equivalent) of tie (or their respective deputies in the event of their unavailability) are unable to agree that the Dispute be resolved by the procedures described in paragraphs 11.1.1, 11.1.2 or 11.1.3, the Party initiating or pursuing the Dispute shall refer the Dispute to mediation (and thereafter adjudication, if necessary) in accordance with paragraphs 12 to 14.

Mediation

12. The Parties shall attempt in good faith to resolve the Dispute by a procedure of mediation in accordance with the Centre for Effective Dispute Resolution mediation rules or Model Mediation Procedure in force at the commencement of the mediation, (or in the event that the Centre for Effective Dispute Resolution has ceased to exist as at the time of the commencement of the mediation, mediation rules or a model mediation procedure offered by any other body offering commercial mediation services which shall be selected by tie), which procedure shall be commenced within 5 Business Days of the date of expiry of the period of thirty-five Business Days from Notification (or longer if so agreed by the Parties). In the event that any provision of such mediation rules or model mediation procedure conflicts with any provision of this Schedule 9 (*Dispute Resolution Procedure*), the provisions of this Schedule 9 (*Dispute Resolution Procedure*) shall take precedence. In the event that any timescales contained in such mediation rules or model mediation procedure conflicts with the timescales referred to in this Schedule 9 (*Dispute Resolution Procedure*), the timescales contained in such mediation rules or model mediation procedure shall be amended accordingly such that the timescales referred to in this Schedule 9 (*Dispute Resolution Procedure*) shall be adhered to.

13. In the event that resolution of the Dispute is achieved in consequence of such mediation procedure, such resolution shall be reduced to writing and, once it is signed by the duly authorised representatives of both Parties, shall be binding on the Parties. Unless concluded by a written legally binding agreement, all discussions and negotiations connected with the mediation procedure referred to in paragraph 12 shall be conducted in confidence and without prejudice to the rights of the Parties in any future legal or other proceedings. Nor may such matters be produced or relied upon in evidence in any such proceedings.
14. If any Dispute to which this Schedule 9 (*Dispute Resolution Procedure*) relates is not resolved by the mediation procedure referred to in paragraphs 12 and 13 within a period of fifty five Business Days from Notification (or longer if so agreed by the Parties), the mediation procedure shall be terminated and, unless the Party initiating or pursuing the Dispute withdraws the Dispute, the Dispute shall within a further 5 Business Days, be referred to adjudication in accordance with paragraphs 15 to 54.

Adjudication

15. In the event that either Party refers a Dispute to adjudication in terms of paragraph 11.1.2 or 14, or exercises a statutory right available to it under the Housing Grants Construction and Regeneration Act 1996 to raise adjudication proceedings, such adjudication shall be conducted in accordance with paragraphs 15 to 54, wherein any reference to "days" is a reference to calendar days.

Notice of intention to seek adjudication

16. Either Party may give written notice (the "**Notice of Adjudication**") of its intention to refer the Dispute to adjudication and the Party giving such notice shall be the "**Referring Party**".
17. The Notice of Adjudication shall be given to the other Party and the Party receiving the Notice of Adjudication shall be the "**Responding Party**".
18. The Notice of Adjudication shall set out briefly:
 - 18.1 the nature and a brief description of the Dispute and of the parties involved;
 - 18.2 details of where and when the Dispute has arisen;
 - 18.3 the nature of the redress which is sought; and
 - 18.4 the names and addresses of the Parties (including the addresses which the Parties have specified for the giving of notices).

19. The adjudicator selected to consider the Dispute shall be selected from one of the panels ("**Panels**") appointed by the Parties in accordance with the following:
 - 19.1 there shall be three Panels, one in respect of legal matters, ("**Legal Panel**") one in respect of construction matters ("**Construction Panel**"), and one in respect of financial matters ("**Financial Panel**").
 - 19.2 each Panel shall be comprised of at least four members, who are listed in Schedule 10 (*Panels for the Dispute Resolution Procedure*) to the Agreement.
 - 19.3 if any member of a Panel resigns or dies or becomes incapax or ill to the extent of being unable to reasonably discharge his duties as a member of the Panel, a replacement shall be appointed by the Parties as soon as practicable. Any such replacement shall be wholly independent of **tie**, any **tie** Party, the MUDFA Contractor, any MUDFA Contractor Party, City of Edinburgh Council or any Relevant Authority, any Approval Body, the Tram Supplier, the Infraco or any equipment supplier or any party associated with the Edinburgh Tram Network, and any successor to or subsidiary or parent of any of the aforementioned parties. If the Parties are unable to agree on the identity of such replacement(s), the President or Vice President for the time being of The Chartered Institute of Arbitrators (Scottish Branch) or the Institution of Civil Engineers shall appoint such replacement(s) within thirty days of any application for such appointment by either Party.
20. The Referring Party shall at the same time as giving the Notice of Adjudication to the Responding Party, send to each of the members of the relevant Panel a copy of the Notice of Adjudication and a request that each member of the relevant Panel advises both Parties within 3 days as to whether or not he is able and willing to act. The Parties shall attempt to agree within 2 further days as to which one of the members of the relevant Panel who responded indicating that they are able and willing to act shall be requested to act as adjudicator. In the event that such agreement is reached, the Referring Party shall, within a further period of one day, request the member of the relevant Panel upon whom agreement has been reached to act as adjudicator. In the event that such agreement is not reached, the Responding Party shall, within a further period of 2 days, select one of the members of the relevant Panel who responded indicating that they are able and willing to act and the Referring Party shall request that member to act as adjudicator.
21. If no member of the relevant Panel indicates that he is able and willing to act within 3 days of receiving a request to act as adjudicator, the Referring Party shall request the President or the

Vice President for the time being of The Chartered Institute of Arbitrators (Scottish Branch) or the Institution of Civil Engineers to select a person to act as adjudicator.

22. Any person appointed, requested or selected to act as adjudicator in accordance with paragraphs 20, 21 and 24 shall be a natural person acting in his personal capacity. A person appointed, requested or selected to act as an adjudicator shall be wholly independent of **tie**, any **tie** Party, the MUDFA Contractor, any MUDFA Contractor Party, City of Edinburgh Council or any Relevant Authority, any Approval Body, the Tram Supplier, the Infraco or any equipment supplier or any party associated with the Edinburgh Tram Network, and the MUDFA Contractor Parties and any successor to or subsidiary or parent of any of the aforementioned parties.
23. The requests referred to in paragraphs 20 and 21 shall be accompanied by a copy of the Notice of Adjudication.
24. The Chartered Institute of Arbitrators (Scottish Branch) or the Institution of Civil Engineers must communicate the selection of an adjudicator to the Referring Party within 3 days of receiving a request to do so.
25. If the Chartered Institute of Arbitrators (Scottish Branch) or the Institution of Civil Engineers fails to comply with paragraph 24, the Referring Party may:
 - 25.1 agree with the other Party to the Dispute to request a specified person to act as adjudicator; or
 - 25.2 request any other adjudicator nominating body to select a person to act as adjudicator. An "adjudicator nominating body" shall mean a body (not being a natural person and not being a Party to the Dispute) which holds itself out publicly as a body which will select an adjudicator when requested to do by a Referring Party.
26. The person requested to act as adjudicator in accordance with the provisions of paragraph 20 or 21 shall indicate whether or not he is willing to act within 2 days of receiving the request
27. Where an adjudicator has been selected and appointed in accordance with paragraph 20 or 21 within 7 days of the date of the Notice of Adjudication, then the Referring Party shall refer the Dispute in writing (the "**Referral**") to the adjudicator within that seven day period. Where an adjudicator has not been selected within and appointed within 7 days of the Notice of Adjudication, then the Referral shall be made immediately upon such selection and appointment. Any failure on the part of the Referring Party to make the Referral within 7

days of the date of the date of the Notice of Adjudication shall not invalidate the decision of the adjudicator.

28. The Referral shall be accompanied by copies of, or relevant extracts from the Agreement and such other documents as the Referring Party intends to rely upon.
29. The Referring Party shall, at the same time as he sends to the adjudicator the documents referred to in paragraphs 27 and 28, send copies of those documents to the Responding Party.
30. The adjudicator may, with the consent of the parties to those Disputes, adjudicate at the same time on more than one Dispute under the Agreement.
31. The Parties may agree to extend the period within which the adjudicator may reach a decision in relation to all or any of these Disputes.
32. An adjudicator may resign at any time on giving notice in writing to the Parties.
33. An adjudicator must resign where the Dispute is the same or substantially the same as one which has previously been referred to adjudication, and a decision has been taken in that adjudication.
34. Where an adjudicator ceases to act under paragraph 32 or 33, or dies or becomes incapax or ill to the extent of being unable to reasonably discharge his duties:
 - 34.1 the Referring Party may serve a fresh notice in accordance with paragraphs 16 to 18 and shall in accordance with paragraphs 19 to 29 request an adjudicator to act; and
 - 34.2 if requested by the new adjudicator, the Parties shall supply him with copies of all documents which they had made available to the previous adjudicator.
35. The Parties to a Dispute may at any time agree to revoke the appointment of the adjudicator and in such circumstances the fees and expenses of that adjudicator shall, subject to paragraph 36, be determined and payable in accordance with paragraphs 52 and 53.
36. Where the revocation of the appointment of the adjudicator is due to the default or misconduct of the adjudicator, the Parties shall not be liable to pay the adjudicator's fees and expenses.

Powers of the Adjudicator

37. The adjudicator shall:

- 37.1 act impartially in carrying out his duties and shall do so in accordance with any relevant terms of the Agreement and shall reach his decision in accordance with Scots law; and
 - 37.2 avoid incurring unnecessary expense.
38. The adjudicator may take the initiative in ascertaining the facts and the law necessary to determine the Dispute, and shall decide on the procedure to be followed in the adjudication. In particular, he may:
- 38.1 request either Party to supply him with such documents as he may reasonably require including, if he so directs, any written statement from either Party supporting or supplementing the Referral and any other documents given under paragraphs 28 and 29;
 - 38.2 conduct the adjudication in the English language and decide whether a translation of any document is to be provided and, if so, by whom, by when, and at whose cost;
 - 38.3 meet and question either Party and their representatives;
 - 38.4 subject to obtaining any necessary consent from a third party or the Parties, make such site visits and inspections as he considers appropriate, whether accompanied by the Parties or not;
 - 38.5 subject to obtaining any necessary consent from a third party or the Parties, procure the carrying out of any tests or experiments, and make directions as to the conditions for and responsibility for the cost of the same;
 - 38.6 obtain and consider such representations and submissions as he requires, and, provided he has notified the Parties of his intention, appoint experts, assessors or legal advisers;
 - 38.7 give directions as to the timetable for the adjudication, any deadlines, or limits as to the length of written documents or oral representations to be complied with; and
 - 38.8 issue other directions relating to the conduct of the adjudication.
39. The Parties shall comply with any request or direction of the adjudicator in relation to the adjudication.

40. If, without showing sufficient cause, a Party fails to comply with any request, direction or timetable of the adjudicator made in accordance with his powers, fails to produce any document or written statement requested by the adjudicator, or in any other way fails to comply with a requirement under these provisions relating to the adjudication, the adjudicator may:
- 40.1 continue the adjudication in the absence of that Party or of the document or written statement requested;
 - 40.2 draw such inferences from that failure to comply as may, in the adjudicator's opinion, be justified in the circumstances;
 - 40.3 make a decision on the basis of the information before him, attaching such weight as he thinks fit to any evidence submitted to him outside any period he may have requested or directed;
 - 40.4 disqualify any part or parts of that Party's submissions affected by the failure to comply; and
 - 40.5 grant the other Party proper opportunity to consider and respond to any evidence or representation made late.
41. Subject to any agreement between the Parties to the contrary, either Party may be assisted by, or represented by, such advisers or representatives (whether legally qualified or not) as he considers appropriate.
42. The adjudicator shall consider any relevant information submitted to him by either Party and shall make available to them any information to be taken into account in reaching his decision.
43. The adjudicator and the Parties shall not disclose to any other person any information or document provided in connection with the adjudication which the Party supplying it has indicated is to be treated as confidential, except to the extent that disclosure is required by law or is necessary for the purposes of, or in connection with, the adjudication, or the information is already in the public domain.

Adjudicator's Decision

44. Unless otherwise agreed in accordance with paragraph 56.1 or 57.1 the adjudicator shall reach his decision not later than:

- 44.1 twenty eight days after the date of the Referral mentioned in paragraph 27;
 - 44.2 forty two days after the date of the Referral if the Referring Party so consents; or
 - 44.3 such period exceeding twenty eight days after the Referral as the Parties may, after the giving of that notice, agree.
45. Where the adjudicator fails, for any reason, to reach his decision in accordance with paragraph 44;
- 45.1 either of the Parties to the Dispute may serve a fresh notice in accordance with paragraphs 16 to 18 and shall request an adjudicator to act in accordance with paragraphs 19 to 29; and
 - 45.2 if requested by the new adjudicator the Parties shall supply him with copies of all documents which they had made available to the previous adjudicator.
46. As soon as possible after he has reached a decision, the adjudicator shall deliver a copy of that decision to each of the Parties.
47. The adjudicator shall decide the matters in Dispute and may make a decision on different aspects of the Dispute at different times.
48. The adjudicator may take into account any other matters which the Parties agree should be within the scope of the adjudication or which are matters under the Agreement which he considers are necessarily connected with the Dispute and, in particular, he may
- 48.1 open up, review and revise any decision taken or any notice certifying payment given by any person referred to in the Agreement, unless the Agreement states that the decision or notice certifying payment is final and conclusive;
 - 48.2 decide that any of the Parties to the Dispute is liable to make a payment under the Agreement (whether in sterling or some other currency) and, subject to the terms of the Agreement, when that payment is due and the final date for payment;
49. The adjudicator shall provide written reasons for his decision.

Effect of the Decision

50. In his decision, the adjudicator may, if he thinks fit, order either or both of the Parties to comply peremptorily with his decision or any part of it. In the absence of any directions by

the adjudicator relating to the time for performance of his decision, the Parties shall be required to comply with any decision of the adjudicator immediately on delivery of the decision to the Parties in accordance with paragraph 46.

51. The decision of the adjudicator shall be binding on the Parties, and they shall comply with it, until the Dispute is finally determined by legal proceedings or by agreement between the Parties.
52. The adjudicator shall be entitled to the payment of such reasonable amount as he may determine by way of fees and expenses incurred by him and the Parties shall be jointly and severally liable to pay that amount to the adjudicator.
53. Without prejudice to the right of the adjudicator to effect recovery from either Party in accordance with paragraph 52, the Parties shall each be liable to pay one-half share of the adjudicator's fees and expenses.
54. The adjudicator shall not be liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith, and any employee or agent of the adjudicator shall be similarly protected from liability.

Related Disputes

55. Notwithstanding the terms of paragraphs 2, 3 and 6 to 9 above, in the event that a dispute or potential dispute under, or in connection with any contract associated with the Edinburgh Tram Network (referred to in this Schedule 9 (*Dispute Resolution Procedure*) as "**Related Contracts**")), has arisen or arises out of substantially the same issues of fact and/or law (as the case may be) as a Dispute under the Agreement (a "**Related Dispute**"), then providing that the Related Contract contains dispute resolution provisions in terms substantially the same as set out in this Schedule 9 (*Dispute Resolution Procedure*) (save for necessary changes), **tie** may require and direct that the Dispute and the Related Dispute be dealt with together at an appropriate stage of the Dispute Resolution Procedure.
56. In the event that a Related Dispute has already been referred to the decision of an adjudicator in accordance with the provisions of the Related Contract, and **tie** is of the opinion that a Dispute is to be (but has not yet been) referred to adjudication under this Schedule 9 (*Dispute Resolution Procedure*), **tie** may refer the Dispute, or may by notice in writing to the MUDFA Contractor require that the Dispute be referred (as the case may be) to the adjudicator appointed under the Related Contract to decide upon the Related Dispute, and:

- 56.1 the adjudicator shall, if practicable, hear the Dispute at the same time as the Related Dispute and shall request such extension of time for producing his decision or award as he may require in order to reach a decision in respect of each of the Dispute and the Related Dispute at the same time. The Parties shall agree to such request for an extension of time, except in the event that the Dispute or the Related Dispute relates to "construction operations" within the meaning ascribed to that term by the Housing Grants, Construction and Regeneration Act 1996 (if applicable) (unless otherwise agreed by the Parties, all parties to the Related Dispute and the Adjudicator);
- 56.2 except in the event that the Dispute or the Related Dispute relates to "construction operations" within the meaning ascribed to that term by the Housing Grants, Construction and Regeneration Act 1996 (if applicable) (unless otherwise agreed by the Parties, all parties to the Related Dispute and the Adjudicator), the adjudicator shall have power (if so requested by **tie**) to make his decisions or awards in the Dispute and the Related Dispute in such a manner as if the rules applicable in the Court of Session, Scotland as to the joining of one or more defenders or third parties or conjoining actions were applicable to the Parties to the Dispute and the Related Dispute, and to the adjudicator; and
- 56.3 **tie** shall procure that, as soon as practicable, the other party or parties to the Related Dispute shall give the MUDFA Contractor copies of the Related Contract, the Referral Notice in the Related Dispute and any other documentation provided to the adjudicator by any party to the Related Dispute.
57. In the event that a Dispute has already been referred to the decision of an adjudicator, and **tie** is of the opinion that a Related Dispute is to be (but has not yet been) referred to adjudication, **tie** may refer the Related Dispute to the adjudicator appointed under this Schedule 9 (*Dispute Resolution Procedure*) to decide upon the Dispute, and:
- 57.1 the adjudicator shall, if practicable, hear the Related Dispute at the same time as the Dispute and shall request such extension of time for producing his decision or award as he may require in order to reach a decision in respect of each of the Dispute and the Related Dispute at the same time. The Parties shall agree to such request for an extension of time, except in the event that the Dispute or the Related Dispute relates to "construction operations" within the meaning ascribed to that term by the Housing Grants, Construction and Regeneration Act 1996 (if applicable) (unless otherwise agreed by the Parties, all parties to the Related Dispute and the adjudicator).

57.2 except in the event that the Dispute or the Related Dispute relates to "construction operations" within the meaning ascribed to that term by the Housing Grants, Construction and Regeneration Act 1996 (if applicable) (unless otherwise agreed by the Parties, all parties to the Related Dispute and the adjudicator), the adjudicator shall have power (if so requested by **tie**) to make his decisions or awards in the Dispute and the Related Dispute in such a manner as if the rules applicable in the Court of Session, Scotland as to the joining of one or more defenders or third parties or conjoining actions were applicable to the Parties to the Dispute and the Related Dispute, and to the adjudicator;

57.3 as soon as practicable, **tie** shall give to the MUDFA Contractor copies of the Related Contract, the Referral Notice in the Related Dispute and any other documentation provided to the adjudicator by any party to the Related Dispute

Director/Authorised Signatory
TIE LIMITED

Director/Authorised Signatory
[MUDFA CONTRACTOR]

**THIS IS SCHEDULE 10 REFERRED TO IN THE FOREGOING AGREEMENT
BETWEEN TIE AND THE MUDFA CONTRACTOR**

SCHEDULE 10

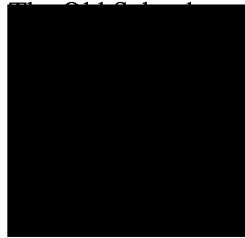
PANELS FOR DISPUTE RESOLUTION PROCEDURE

CONSTRUCTION

Alan Wilson



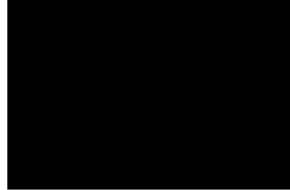
Tony Canham



Peter Chapman



Guy Cottam

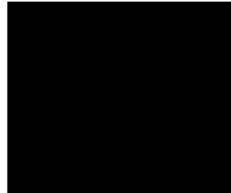


FINANCIAL

Nigel Lowe

Nigel Lowe Consulting Limited
27 Old Gloucester Street
LONDON
WC1N 3XX

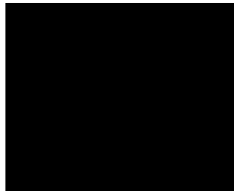
Bryan Porter



John Hunter

Hunter Consulting
Commercial Centre
Stirling Enterprise Park
STIRLING
FK7 7BF

Eric Mouzer



LEGAL

Gordon Reid, QC



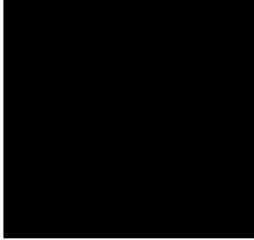
Gordon Coutts, QC



Robert Howie, QC



Angus Glennie, QC



Lord Dervaird (Prof. John Murray QC)



Director/Authorised Signatory
TIE LIMITED

Director/Authorised Signatory
[MUDFA CONTRACTOR]

**THIS IS SCHEDULE 11 REFERRED TO IN THE FOREGOING AGREEMENT
BETWEEN TIE AND THE MUDFA CONTRACTOR**

SCHEDULE 11

REQUIRED INSURANCES

Part 1

Required insurances¹⁰

1. PROFESSIONAL INDEMNITY INSURANCE

Insured Party:	The MUDFA Contractor
Coverage:	The legal liability of the MUDFA Contractor as a result of any negligent act, error, or omission in the performance of its professional activities and duties in connection with the MUDFA Works.
Limit of Indemnity:	Minimum £10,000,000 on an each and every claim basis and [£◆] on an aggregate basis in respect of pollution and contamination claims and date recognition claims.
Period of Insurance:	From the Effective Date for 12 months and thereafter each further 12 month period until the earlier of 12 years from the issue of the last Certificate of Substantial Completion or 12 years from the date of termination of this Agreement.
Extensions:	The insurance must include the following minimum extensions: [◆]
Maximum Permitted Deductible:	[◆] each and every claim.

2. THIRD PARTY LIABILITY INSURANCE

Insured Party:	The MUDFA Contractor
Coverage:	The legal liability of the MUDFA Contractor for death, injury, illness, disease contracted by third party persons or loss of or damage to property arising out of or in connection with the MUDFA Works.
Limit of Indemnity:	Minimum of £10,000,000 on an each and every claim basis in respect of third party liability and £10,000,000 any one occurrence and in the aggregate in any one 12 month period of insurance in respect of products liability, pollution and contamination claims.
Period of Insurance:	From the Effective Date the until the earlier of the date of termination of this Agreement or the issue of the Pre-Construction Completion Certificate.

¹⁰ Schedule will be amended to reflect the successful Tenderer's policy terms.

Minimum Extensions	The insurance must include the following minimum extensions: [◆]
Maximum Permitted Deductible:	[£◆] each and every loss in respect of property damage claims, nil excess for bodily injury claims.

3. EMPLOYERS LIABILITY INSURANCE

Insured Party:	The MUDFA Contractor
Coverage:	The legal liability of the MUDFA Contractor for death, injury, illness, disease contracted by employees of the MUDFA Contractor caused by or arising out of or in connection with the MUDFA Works.
Limit of Liability	Minimum limit of indemnity of £10,000,000 any one occurrence or series of occurrences arising from one original cause or event.
Period of Insurance:	From the Effective Date for 12 months and thereafter each further twelve month period until the earlier of the end of the Defects Correction Period or the date of termination of this Agreement.
Minimum Extensions	The insurance must include the following minimum extensions: [◆]
Maximum Permitted Deductible:	[◆]

4. MUDFA CONTRACTOR'S PLANT

Insured Party:	The MUDFA Contractor
Coverage:	All loss or damage from whatsoever cause arising.
Limit of Liability	The reinstatement value of any MUDFA Contractor's Equipment.
Period of Insurance:	From the Effective Date until the earlier of the end of Defects Correction Period or the date of termination of this Agreement.
Minimum Extensions	The insurance must include the following minimum extensions: [◆]
Maximum Permitted Deductible:	[◆]

5. COMPREHENSIVE MOTOR INSURANCE

Insured Party:	The MUDFA Contractor and tie
Coverage:	Comprehensive in respect of loss or damage to Own Vehicles. Legal Liability for death, injury, illness or disease or loss of or damage to Third Party Property.
Limit of Liability	Own Damage - Market Value/Cost of Repairs Third Party: Bodily Injury - Unlimited. Property Damage Cars £20,000,000 any one occurrence Commercial Vehicles £5,000,000 any one occurrence unlimited in the aggregate
Period of Insurance:	From the Effective Date for 12 months and thereafter each further twelve month period until the earlier of the end of the Defects Correction Period or the Termination Date.
Minimum Extensions	The insurance must include the following minimum extensions: [◆]
Maximum Permitted Deductible:	[◆]

Part 2

Form of Brokers Letter of Undertaking

To: [THE EMPLOYER]

Dear Sirs

We confirm in our capacity as insurance brokers that the Required Insurances specified in Clause 56 (*Required Insurances*) and Schedule 11 (*Required Insurances*) of the Agreement dated ◆ between ◆ (the “MUDFA Contractor”) and **tie** as defined therein are, as at the date hereof, in effect in respect of the risks set out in the attached cover notes.

We have arranged the Required Insurances on the basis of the information and instructions given by the MUDFA Contractor. We have not made any particular or special enquiries regarding the Required Insurances beyond those that we would normally make in the ordinary course of arranging the insurances on behalf of our insurance broking clients.

The confirmations set out in this letter are given by reference to our state of knowledge at the date hereof.

Pursuant to instructions received from the MUDFA Contractor, we hereby undertake in respect of the interests of the MUDFA Contractor and **tie** in the Required Insurances referred to in the attached cover notes:

1. to use reasonable endeavours to have endorsed on each and every policy evidencing the Required Insurances when the same is issued, endorsements substantially in the form set out in Schedule 11 (*Required Insurances*) of the Agreement;
2. to advise **tie**:
 - 2.1 promptly after receiving notice of any insurer's cancellation or suspension of any of the Required Insurances or receiving notice of the intended cancellation or suspension of any of the Required Insurances;
 - 2.2 promptly upon our receipt from the MUDFA Contractor of any notice of any changes proposed to be made to the Required Insurances which, if effected, would result in a material reduction in limits or coverage (including in respect of extensions of cover) or in an increase in deductibles, exclusions or exceptions;
 - 2.3 of any default in the payment of any premium for any of the Required Insurances;
 - 2.4 at least twenty days prior to the expiry of any of the Required Insurances if we have not received written renewal instructions from the MUDFA Contractor or if we receive written instructions to renew, to advise **tie** of the details thereof; and
 - 2.5 on receipt of notice of any act or omission of the MUDFA Contractor or any Sub-Contractor which will invalidate or render unenforceable in whole or in part, any of the Required Insurances;
3. no later than 7 days (in respect of certificates) and as soon as reasonably practicable in respect of policies and other documents, to supply you and/or your insurance advisors (or your or their authorised representative) copies of all placing slips, certificates, cover notes, renewal receipts and confirmations of renewal and payment of premiums and all policy documents (or

confirmation of the terms of such policy documents where such policy documents cannot be made available) in respect of the Required Insurances, or upon request, to make available to you the originals of any or all such documents held by us;

4. to disclose to the insurers any fact, change of circumstance or occurrence is material to the risks insured against under the Required Insurances;
5. to treat as confidential all information in relation to the Required Insurances supplied to us by the MUDFA Contractor or any Sub-Contractor or **tie** and not to disclose, without the written consent of **tie**, such information to any third party other than the insurers under the Required Insurances, unless required to do so by law or any regulatory authority; and
6. to notify **tie** as soon as reasonably practicable prior to our ceasing to act as brokers to the MUDFA Contractor, unless impracticable because of circumstances beyond our control, in which case we shall notify **tie** as soon as reasonably practicable upon becoming aware that we shall cease, or have ceased, so to act.

Where insurers wish any of the Required Insurances to be cancelled for reasons of non-payment of premium, we will request those insurers to give you a reasonable opportunity of paying such amounts outstanding before issuing notice of cancellation on behalf of such insurers.

The above undertakings are given subject to our continuing appointment for the time being as insurance brokers to the MUDFA Contractor in relation to the Required Insurances concerned and the monitoring and handling of claims in relation to the MUDFA Contractor, and our obligations set out in this letter shall automatically cease upon termination of our appointment.

For the avoidance of doubt all undertakings and other confirmations given in this letter relate solely to the Required Insurances. They do not apply to any other insurances and nothing in this letter should be taken as providing any undertakings or confirmations in relation to any other such insurance that ought to have been placed or may at some future date be placed by other brokers.

This letter is given by us on the instructions of the MUDFA Contractor and with the MUDFA Contractor's full knowledge and consent as to its terms as evidenced by the MUDFA Contractor's signature below.

This letter shall be governed by and shall be construed in accordance with Scots Law and any dispute as to its terms shall be submitted to the exclusive jurisdiction of the courts of Scotland.

Yours faithfully

.....

For and on behalf of (Insurance Broker)

.....

For and on behalf of (The MUDFA Contractor)

Part 3

Insurance Questionnaire

1.0 PUBLIC & PRODUCTS LIABILITY	
1.1 Name & Address of Insurers	
1.2 Policy Number(s)	
1.3 Renewal Date	
1.4 Limits of Indemnity in respect of (Please state whether any one occurrence or in the aggregate)	
a. Public Liability	£
b. Products Liability	£
c. Subsidence, Collapse, Vibration or Removal or Weakening of Support	£
d. Fire & Explosion	£
e. Pollution	£
f. Any other "inner" limit	£
1.5 Is the policy subject to a height warranty or condition of any sort and/or any height or depth restrictions. If so attach copies?	YES/NO
1.6 Is Contractual Liability included?	YES/NO
1.7 Does the policy include liability for damage to premises temporarily occupied for the performance of works therein or thereon?	YES/NO
1.8 Does the policy include a cross liability provision and a General Indemnity to Principals/Main Contractors Clause?	YES/NO
1.9 What limitations apply in respect of cover for loss or damage due to defective design, workmanship or materials?	
1.10 What excess(es) are applicable?	
1.11 Is the policy extended to include financial loss?	YES/NO (If YES state limit £)
1.12 Does the policy:	
a) include liability for acts of sub-contractors	YES/NO
b) Respond to judgements made outside the UK	YES/NO

1.13	Is cover subject to any material exclusions or limitations? (If YES please supply copies thereof)	YES/NO
1.14	Have you ever undertaken or are you currently undertaking work on behalf of Network Rail or British Airports Authority ? (if yes please state which or both)	YES/NO
1.15	Does your policy extend to include the minimum insurance requirements of either Network Rail or British Airports Authority? (if yes please state which or both)	YES/NO
1.16	If you are required to work on/around British Airports Authority property, will your Public Liability Policy provide you with a minimum level of cover of £50 million	YES/NO
1.17	If you are required to work on/around Network Rail property, will your Public Liability Policy provide you with a minimum level of cover of £155 million	YES/NO
2.0 EMPLOYERS LIABILITY		
2.1	Name & Address of Insurers	
2.2	Policy Number(s)	
2.3	Renewal Date	
2.4	Limit of Indemnity	£
2.5	Is the policy subject to a heat warranty or condition of any sort and/or any height or depth restrictions? If so attach copies.	YES/NO
2.6	Is Contractual Liability included?	YES/NO
2.7	What is the definition of “employee”?	
2.8	Does the policy include a cross liability provision and a General Indemnity to Principals/Main Contractors Clause?	YES/NO
2.9	Does the policy respond to judgements made outside UK?	YES/NO
3.0 PROFESSIONAL INDEMNITY		
3.1	Name & Address of Insurers	

3.2	Policy Number(s)	
3.3	Renewal Date	
3.4	Limit of Indemnity	i. any one event £ ii. in the aggregate £
3.5	Scope of professional duties insured as stated in the policy. Please confirm that all of the Investigation Works required under the Terms and Conditions of Contract are covered by your professional indemnity insurance.	
3.6	What excess(es) are applicable?	
3.7	Is cover included for sub-consultants?	YES/NO
3.8	Is cover included for the costs of mitigation of loss	YES/NO
3.9	Does the policy include a General Indemnity to Principals/Main Contractors Clause?	YES/NO
3.10	Is cover subject to any material exclusions or limitations? (If YES please supply copies thereof)	YES/NO
3.11	Does the policy respond to judgements made outside UK	YES/NO
4.0	CONTRACTORS PLANT ALL RISKS INSURANCE	
4.1	Name& Address of Insurers:	
4.2	Policy Number:	
4.3	Renewal Date:	
4.4	Sum Insured for Contractors Plant, Tools & Equipment?	YES/NO
4.5	Is cover subject to any material exclusions or limitations? (If YES please supply copies thereof). In particular are there any restrictions on working at heights or depth?	YES/NO
4.6	Is the Principal/Main Contractor named as a Joint Insured?	YES/NO
4.7	Is full Terrorism cover provided?	YES/NO

5.0	COMPREHENSIVE MOTOR INSURANCE	
5.1	Name & Address of Insurers	
5.2	Policy Number(s)	
5.3	Renewal Date	
5.4	Limits of Indemnity in respect of (Please state whether any one occurrence or in the aggregate)	£
	a. Third Party Property Damage	£
	b. Third Party Bodily Injury (if any)	£
5.5	Is the policy subject to a Deductible or excess? If so please provide details.	YES/NO
5.6	Are there any restrictions on usage or types of drivers? If so please provide details.	YES/NO
5.7	Please confirm that your policy will name tie as an additional insured.	YES/NO

DECLARATION:

We confirm that the foregoing details are accurate and that the above policies are subject to no special terms, conditions and exceptions other than those referred to above. We also confirm that all premiums due to date have been paid.

Signed

Position

Name

Date

For and on behalf of

.....
.....
.....

This form should be completed by your Insurers or your Registered Insurance Brokers ONLY.

The above information is agreed on behalf of the MUDFA Contractor by the MUDFA Contractor's authorised representative:

Name

Signed

For and on behalf of

Date

.....
Director/Authorised Signatory
TIE LIMITED

.....
Director/Authorised Signatory
[MUDFA CONTRACTOR]

**THIS IS SCHEDULE 12 REFERRED TO IN THE FOREGOING AGREEMENT
BETWEEN TIE AND THE MUDFA CONTRACTOR**

SCHEDULE 12

KEY PERSONNEL

**[TO BE COMPLETED FROM THE INFORMATION
SUBMITTED BY THE SUCCESSFUL TENDERER]**

Director/Authorised Signatory
TIE LIMITED

Director/Authorised Signatory
[MUDFA CONTRACTOR]

**THIS IS SCHEDULE 13 REFERRED TO IN THE FOREGOING AGREEMENT
BETWEEN TIE AND THE MUDFA CONTRACTOR**

SCHEDULE 13

THIRD PARTY AGREEMENTS

**[NOTE TO TENDERERS: SAVED AS A SEPARATE FILE. NEGOTIATIONS ARE STILL
CONTINUING IN RESPECT OF CERTAIN OF THE THIRD PARTY AGREEMENTS.
THEREFORE, SCHEDULE 13 IS IN DRAFT FORM AND WILL BE FINALISED DURING
THE TENDER PERIOD.]**

Director/Authorised Signatory
TIE LIMITED

Director/Authorised Signatory
[MUDFA CONTRACTOR]