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AG

(1) tie LIMITED

- and -

(2) BILFINGER BERGER (CIVIL UK) LIMITED

- and -

(3) SIEMENS plc

INFRACO CONTRACT

**RELATING TO THE
EDINBURGH TRAM
NETWORK**

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AGREEMENT

BETWEEN

- (1) **tie LIMITED** a company incorporated in Scotland under number SC230949 and having its registered office at City Chambers, High Street, Edinburgh EH1 1YJ ("**tie**") which expression shall include its successors, permitted assignees and transferees; and
- (2) **BILFINGER BERGER CIVIL UK LIMITED**, a company incorporated in England and Wales under number 02418086 and having its registered office at ~~150 Aldersgate Street, London EC1A 4EJ~~ 3rd Floor Braywick Gate, Braywick Road, Maidenhead, Berkshire, SL6 **TDA** which expression shall include its successors, permitted assignees and transferees; and
- (3) **SIEMENS PLC**, a company incorporated in England and Wales under number 00727817 and having its registered office at Faraday House, Sir William Siemens Square, Frimley, Camberley, Surrey GU16 8QD which expression shall include its successors, permitted assignees and transferees;

and (2) and (3) shall together be "**the Infraco**" and each separately an "**Infraco Member**".

WHEREAS

- A. Powers in respect of the design, construction, commissioning and operation of the Edinburgh Tram Network were conferred on CEC by the Edinburgh Tram (Line One) Act 2006 and the Edinburgh Tram (Line Two) Act 2006 which received Royal Assent on 8 May 2006 and 27 April 2006 respectively.
- B. Pursuant to a notice published in the Official Journal of the European Union on 31 January 2006 with reference 2006/S 20-021872, **tie** invited expressions of interest from appropriately qualified parties to carry out and/or manage the design, construction, installation, commissioning, tram procurement, system integration, infrastructure maintenance, tram maintenance and supply of related equipment and materials, trams and related infrastructure in respect of the Edinburgh Tram Network.
- C. By a competitive tendering process conducted in accordance with Law, **tie** has selected the Infraco to carry out the Infraco Works.
- D. Under separate agreements, **tie** has appointed the SDS Provider to provide system design services under the terms of the SDS Agreement, the Tram Supplier to supply trams, capital spares and special tools under the terms of the Tram Supply Agreement, and the Tram Maintainer to provide tram maintenance services and supply consumable spares under the terms of the Tram Maintenance Agreement. ~~E.~~ **tie**, the Infraco, and the

SDS Provider, ~~the Tram Supplier and the Tram Maintainer~~ have respectively agreed to the novation of ~~each of~~ the SDS Agreement, to the Infraco.

E. Under separate agreements CEC has appointed the Tram Supplier to supply trams, capital spares and special tools under the terms of the Tram Supply Agreement and, and the Tram Maintainer to provide tram maintenance services and supply consumable spares under the terms of the Tram Maintenance Agreement to the Infraco. Infraco and the Tram Supplier and Tram Maintainer have entered into a separate interface agreement to provide for the integration of the Trams with Initial Phase 1a.

F. It is acknowledged that this Agreement aims to achieve a project vision (the "**Project Vision**") for the Edinburgh Tram Network. This Project Vision involves the development of a tramway which will stand favourable comparison with the best in Europe. The quality of the tramway provided will be appropriate to Edinburgh's status and role as a European capital city and its city centre's designation as a World Heritage Site. The tramway will integrate as far as possible with other transport modes to serve the existing fabric of the City of Edinburgh, and promote appropriate development and social inclusion. It is intended that this goal be achieved in a spirit of partnership, utilising modern design and construction methods and standards.

NOW IT IS AGREED AS FOLLOWS

PART 1 - PRELIMINARY MATTERS

1. DEFINITIONS AND INTERPRETATION

1.1 Schedule Part 1 (*Definitions and Interpretation*) shall govern all matters concerning definitions and interpretation.

2. TERM OF THE AGREEMENT

2.1 Subject to Clause 3 (*Conditions Precedent*), this Agreement shall come into effect on the Effective Date and subject to Clauses 2.2, 2.3 and 2.4 shall continue in effect until the earlier of:

2.1.1 the Expiry Date; and

2.1.2 the Termination Date.

2.2 Not less than 180 days prior to the Expiry Date, **tie** shall be entitled to serve a notice extending the duration of this Agreement for 5 years so that the Agreement continues in effect until the earlier of:

2.2.1 the Extended Expiry Date; and

2.2.2 the Termination Date.

2.3 If **tie** serves a notice pursuant to Clause 2.2:

2.3.1 the Agreement shall continue on the same terms as are in effect at the date of serving of such notice; and

2.3.2 the value of the extension shall be determined in accordance with Clause 80 (**tie Changes**) and such extension will be a Mandatory **tie** Change.

2.4 Not less than 180 days prior to the Extended Expiry Date, **tie** shall be entitled to serve a notice proposing an extension of the Term. If **tie** serves such a notice under this Clause 2.4:

2.4.1 **tie** and the Infraco shall negotiate in good faith to agree the terms of any amendment to this Agreement which will apply with effect from the day after the Extended Expiry Date for the duration of the period of such extension; and

2.4.2 the valuation of any extension shall be determined in accordance with Clause 80 (**tie Changes**); and

2.4.3 If **tie** and the Infraco agree the matters referred to in Clause 2.4.1 prior to the date when this Agreement would otherwise have expired, the Extended Expiry Date shall be extended to such date as may be agreed between **tie** and the Infraco, and with effect from the day after the Extended Expiry Date (being the date that would have occurred but for such extension), the Infraco shall perform its obligations under the terms of this Agreement as amended pursuant to this Clause 2.4.

2.5 **tie** may serve further notices proposing extensions to the duration of this Agreement up to a maximum total duration of 30 years and the provisions of Clause 2.4 shall apply *mutatis mutandis* to such further notices and any subsequently agreed extension.

3. **CONDITIONS PRECEDENT**

3.1 Except for the provisions of this Part 1 (*Preliminary Matters*), Clause 11 (*Novation of the SDS Agreement to the Infraco*), ~~Clause 12 (*Novation of the Tram Supply Agreement to the*~~

~~Infraco), Clause 13 (Novation of the Tram Maintenance Agreement to the Infraco),~~ Clause 74 (Bond, Parent Company, Company Guarantees and Collateral Warranties), Clause 76 (Required Insurances), Clause 77 (Indemnity By Infraco, Liability and Sole Remedy), Clause 97 (Dispute Resolution Procedure), Clause 101 (Confidential Information), Clause 102 (Copyright and Intellectual Property), Clause 106 (Entire Agreement), Clause 108 (Variations to be in Writing), Clause 110 (No Partnership or Agency), Clause 111 (Notice), Clause 112 (Invalid Terms), Clause 113 (Third Parties Rights) and Clause 117 (Applicable Law), the obligations of the Parties under this Agreement shall be suspensively conditional upon the occurrence of the Commencement Date.

- 3.2 **tie** may by notice in writing to the Infraco waive any or all of the Conditions Precedent.
- 3.3 On the date that all of the Conditions Precedent (with the exception of any Conditions Precedent that have been expressly waived by **tie** in writing) have, in **tie's** opinion (acting reasonably) been satisfied, **tie** shall issue the CP Certificate.
- 3.4 The Infraco shall use its reasonable endeavours to satisfy or procure the satisfaction of the Conditions Precedent as soon as reasonably possible after the Effective Date.
- 3.5 In the event that the Commencement Date has not occurred by the date falling 3 months after the Effective Date (or such later date as may be agreed in writing between the Parties), **tie** may terminate this Agreement with immediate effect following the service of a notice to that effect on the ~~the~~ Infraco, and in which event, all provisions of this Agreement (other than Part 1 (Preliminary Matters), Clause 77 (Indemnity By Infraco, Liability and Sole Remedy), Clause 97 (Dispute Resolution Procedure), Clause 101 (Confidential Information), Clause 102 (Copyright and Intellectual Property), Clause 106 (Entire Agreement), 108 (Variations to be in Writing), 110 (No Partnership or Agency), 111 (Notices), 112 (Invalid Terms), 113 (Third Parties Rights) and Clause 117 (Applicable Law)), shall cease to have effect and such termination shall be without prejudice to any accrued rights or obligations as at that date.

4. **PRIORITY OF CONTRACT DOCUMENTS**

4.1 NOT USED

4.2 ~~In~~Without prejudice to clause 4.4 and 4.5A in the event of any ambiguity or discrepancy between any provisions in the main body of this Agreement and those in any Part of the Schedule, or between the provisions of any Schedules, **tie's** Representative shall state in writing which provision shall take priority, which shall be deemed to be instructions issued pursuant to Clause 34.1. Provided always that, unless expressly stated otherwise by **tie's** Representative the main body of the Agreement shall always take priority and the following order of priority will apply to Schedule Part 2 (Employer's Requirements) and Schedule Part 30 (Infraco's Proposals):

4.2.1 the Employer's Requirements; over

4.2.2 the Infraco's Proposals.

4.2A Notwithstanding Clause 4.2, if there is any ambiguity or discrepancy between the requirements set out in Schedule Part 44 (EAL Works) which the Infraco must comply with whilst carrying out works on the EAL Site and any provision of this Agreement the requirements set out in Schedule Part 44 (EAL Works) shall take precedence.

4.3 ~~Nothing in this Agreement shall prejudice the Infraco's right to claim additional relief or payment pursuant to Schedule Part 4 (Pricing).~~ The valuation of amounts payable to Infraco in respect of the On Street Works and its entitlement to extensions of time and prolongation costs in relation thereto shall be determined in accordance with Schedule Part 45.

4.4 The Infraco confirms that it has studied in detail the Employer's Requirements and each document comprised therein and has satisfied itself that no discrepancies or errors exist within the Employer's Requirements or between it and the Infraco's Proposals. The Infraco acknowledges that it accepts all risks arising from any discrepancies, errors or omissions that subsequently appear within or between such documents and that, ~~subject to Clause 4.2, 4.3 and 4.5,~~ it shall not be entitled to make any claim against **tie** for an extension of time, additional payment, any relief or otherwise in respect of any such errors, discrepancies or omissions. The Infraco will notify **tie** forthwith upon becoming aware of a discrepancy or error within the Employer's Requirements or between the Employer's Requirements and the Infraco's Proposals. Where there is such discrepancy or error which cannot be resolved by the provisions of the Employer's Requirements, the Infraco shall as soon as reasonably practicable, and in any event within 5 Business Days, provide **tie** with proposals for resolving such discrepancy or error which comply with this Agreement.

4.5 Unless, within 10 Business Days of receipt by **tie** of the Infraco's proposals for resolving such discrepancy or error, **tie** notifies the Infraco requiring it to resolve the discrepancy in a different manner (which ~~manner~~instructions shall be binding but shall be reasonable in time and cost having regard to the Employer's Requirements ~~and which shall be deemed to be instructions in accordance with Clause 34.1~~), the Infraco shall resolve the discrepancy in the manner proposed by it.

4.5A A notification issued by tie requiring the Infraco to resolve a discrepancy between the Employer's Requirements and the Infraco Proposals in a different manner to that proposed by Infraco shall be deemed to be an instruction issued pursuant to Clause 34.1 unless Infraco's proposal did not comply with the Employer's Requirements.

4.6 Subject to Clause 4.4, the Infraco shall review all documents, drawings or other subsequent information produced to amplify this Agreement and/or issued by **tie**, within 10 Business Days or such other period as is agreed by **tie** acting reasonably of the date of receipt of such documents, drawings or other subsequent information, and shall bring to the attention of **tie's** Representative any ambiguities or discrepancies, or requirements for further information arising from them. Save as otherwise stipulated in this Agreement and without prejudice to Infraco's express rights or remedies under this Agreement, failure to comply with this obligation shall prevent the Infraco from being entitled to an extension of time, additional payment, any relief or otherwise in respect of problems which would have been notified or requests which would have been made had this obligation been complied with. ~~Without prejudice to tie's express rights and remedies under this Agreement in relation to the consequences of the Infraco's failure to comply with this Clause 4.6, tie shall not be entitled to any remedy for breach of contract in respect of the Infraco's failure to comply with this Clause 4.6.~~

4.7 Clause 4.6 shall not apply to documents, drawings or other information to be considered under Schedule Part 14 (~~Design Review and Design Management Plan~~).

5. **PROVISION AND INTERPRETATION OF INFORMATION**

5.1 Subject to Clause ~~22 (Adverse Physical Conditions and Artificial Obstructions)~~, Clause 64 (*Relief Events*) and Clause 65 (*Compensation Events*), the Infraco shall be deemed to have inspected and examined the Site and its surroundings and to have satisfied itself before the Effective Date as to:

5.1.1 the ground conditions on the Site including the climatic, geotechnical, ecological, environmental, hydrological, sub-soil and sub-surface conditions;

5.1.2 all relevant safety requirements and environmental matters;

5.1.3 the form and nature of the Site;

5.1.4 the nature of the materials (whether natural or otherwise) to be excavated;

5.1.5 the extent and nature and difficulty of the work and materials necessary for the completion of the Infraco Works;

5.1.6 the quality of any existing structures which will form part of or be associated with or will be adjacent to ~~the Edinburgh Tram Network~~ **Phase 1a**;

5.1.7 the risk of injury or damage to property adjacent to the Site and to occupiers of such property;

5.1.8 the possibility of interference by parties other than **tie**;

5.1.9 the precautions and the times and methods of working necessary to comply with Schedule Part 3 (*Code of Construction Practice and Code of Maintenance Practice*) and, in accordance with Good Industry Practice, minimise any nuisance or interference, whether public or private, being caused to any third parties;

5.1.10 use by third parties of any of the land which will form part of or will be adjacent to ~~the Edinburgh Tram Network~~ Phase 1a;

5.1.10.1 the means of communication with and restrictions of access to the Site;

5.1.10.2 the accommodation the Infraco may require; and

5.1.10.3 in general to have obtained for itself all necessary information as to risks, contingencies and all other circumstances influencing or affecting the Infraco Works.

The Infraco shall to the extent necessary for the carrying out of the Infraco Works take due and proper account of the above risks associated with carrying out the Infraco Works and, save where provided otherwise in this Agreement, the Infraco shall not be entitled to any extension of time, relief or to any additional payment on grounds of any misunderstanding or misinterpretation of any such matter, nor shall the Infraco be released from any of the risks accepted or obligations undertaken by the Infraco under this Agreement on the ground that the Infraco did not or could not have foreseen any matter which might affect or have affected the execution of the Infraco Works.

PART 2 - GENERAL OBLIGATIONS

6. PROJECT PARTNERING

6.1 The Parties agree to work in mutual co-operation to fulfil their agreed roles and responsibilities and apply their expertise to carry out and complete the Infraco Works in accordance with this Agreement.

6.2 **tie** and the Infraco shall procure that each **tie** Party and each Infraco Party (as appropriate) shall work in accordance with the principles set out in Clause 6.1.

6.3 Subject to Clause 6.4, each Party ("**First Party**") undertakes to co-operate with the other ("**Second Party**") in order to facilitate the performance of this Agreement and in particular the First Party shall:

6.3.1 approach all Permitted Variations on a collaborative and Open Book Basis;

6.3.2 use reasonable endeavours to avoid unnecessary complaints, disputes and claims against or with the Second Party;

6.3.3 comply with the provisions of the Dispute Resolution Procedure in relation to any such complaints, disputes and claims with or against the Second Party;

6.3.4 not interfere with the rights of the Second Party in performing its obligations under this Agreement, nor in any other way hinder or prevent the Second Party from performing those obligations or from enjoying the benefits of its rights;

6.3.5 take reasonable steps to mitigate any foreseeable losses and liabilities of the Second Party which are likely to arise out of any failure by the First Party to take any of the steps referred to in Clauses 6.3.2 to 6.3.4 (inclusive); and

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

6.4 Nothing in Clause 6.3 shall:

6.4.1 interfere with the right of each of the Parties to arrange its affairs in whatever manner it considers fit (in compliance with Law) in order to exercise its rights and perform its obligations under this Agreement (in compliance with Law) and, in the case of **tie**, its duties and functions as a wholly owned subsidiary of CEC; or

6.4.2 relieve either Party from any obligation contained in this Agreement or from any obligation to pay any debt due and payable under this Agreement.

6.5 Senior representatives from the Parties shall meet on a quarterly basis (or as may be otherwise agreed by the Parties) to review:

6.5.1 any matter which has adversely affected or may adversely affect:

(a) the completion of the Infracore Works;

- (b) the performance and presentation of ~~the Edinburgh Tram Network~~Initial Phase 1a and the Trams;
- (c) the functioning of the City of Edinburgh (including other modes of transport) and the people of Edinburgh, because of the carrying out of the Infraco Works; and/or
- (d) the Infraco's ability to perform its obligations in terms of the Agreement;

6.5.2 any proposal from either Party to:

- (a) minimise costs; and/or
- (b) optimise the performance and quality of the ~~Edinburgh Tram Network~~Initial Phase 1a and the Trams.

6.6 Either Party may propose measures to address the matters set out in Clause 6.5.1 and a determination of what measures (if any) should be undertaken by the Infraco and/or **tie** to address such matters shall be considered in accordance with and subject to each Party's existing rights, obligations and the existing contractual mechanisms under this Agreement including but not restricted to the rights, obligations and contractual mechanisms set out in Clause 64 (*Relief Events*), Clause 65 (*Compensation Events*), Clause 80 (**tie** *Changes*), Clause 81 (*Infraco Changes*), Clause 82 (*Small Works Changes*), Clause 83 (*Accommodation Works Changes*) and Clause 84 (*Qualifying Changes in Law*).

6.7 Any proposal from either Party in terms of Clause 6.5.2 shall be reviewed in accordance with Clause 80 (**tie** *Changes*), Clause 81 (*Infraco Changes*) ~~or~~ Clause 82 (*Small Works Changes*) or Schedule Part X (On Street Works) (as appropriate).

6.8 As required by **tie**, the Infraco shall procure the attendance of any of the Infraco Parties at the meetings described in Clause 6.5. ~~The Infraco shall provide tie with reasonable notice of any regular progress meetings regarding performance of the Tram Supply Agreement and the Tram Maintenance Agreement and tie shall be entitled to attend such meetings where tie or tie's Representative have a right to attend such meetings (the Infraco using reasonable endeavours to secure such attendance) pursuant to the Tram Supply Agreement and the Tram Maintenance Agreement and, if~~ **If** **tie** reasonably requires to attend any other meeting, the Infraco shall use reasonable endeavours to facilitate such attendance.

6.9 ~~The Infraco shall notify tie in writing no less than five Business Days prior to making any demand on any of the performance or reliability bonds held by the Infraco from sureties in respect of the performance of the Tram Supplier and Tram Maintainer.~~

7. **DUTY OF CARE AND GENERAL OBLIGATIONS IN RELATION TO THE INFRACO WORKS**

7.1 **tie** hereby appoints the Infraco in accordance with the terms of this Agreement and the Infraco hereby accepts full responsibility and agrees to carry out and complete the Infraco Works fully and faithfully in accordance with this Agreement.

7.2 Notwithstanding the specific responsibilities set out in Clause 7.3, the Infraco undertakes to **tie** that in carrying out and completing the Infraco Works it has exercised and undertakes to continue to exercise a reasonable level of professional skill, care and diligence to be expected of a properly qualified and competent professional contractor experienced in carrying out works and services of a similar nature to the Infraco Works in connection with projects of a similar scope and complexity. The Infraco acknowledges that **tie** will rely upon the skill, care and diligence of the Infraco in connection with all matters for which the Infraco is responsible under this Agreement.

7.3 The Infraco shall (each as distinct and separate obligations), and shall procure that the Infraco Parties, carry out and complete the Infraco Works:

7.3.1 in accordance with and so as to comply in all respects with this Agreement;

7.3.2 so as to enable ~~the Edinburgh Tram Network~~ Initial Phase 1a to be designed, constructed, installed, tested and commissioned, and thereafter operated and maintained;

7.3.3 in accordance with the Infraco's quality management system and plans as developed in accordance with Clause 105 (*Health and Safety, Quality Assurance and Environmental Management System*);

7.3.4 so as to ensure compliance with the Employer's Requirements;

7.3.5 so as to ensure compliance with the Infraco's Proposals;

7.3.6 in accordance with **tie** and CEC Policies;

7.3.7 in accordance with the Code of Construction Practice,

7.3.7.1 in each Section insofar as construction, renewals and/or commissioning activities are taking place in that Section; and

7.3.7.2 in other areas where construction, renewals or commissioning activities whether relative to any Network Expansion, Permitted Variation or otherwise, are being carried out;

7.3.8 in accordance with the Code of Maintenance Practice in the undertaking of the Maintenance Services,

7.3.8.1 in each Section insofar as a Certificate of Sectional Completion has been issued which applies to that Section; and

7.3.8.2 in other areas where construction or commissioning activities whether relative to any Network Expansion, Permitted Variation or otherwise, have been completed;

7.3.9 so as to ensure compliance with the Tram Legislation;

7.3.10 so as to ensure compliance with all applicable Law, Land Consents and Consents;

7.3.11 so as to employ all reasonably practicable means to ensure that the environmental impacts are no worse than the residual impacts identified in the Environmental Statements and that such residual impacts are maintained during the Maintenance Services;

7.3.12 in compliance with all applicable environmental regulations and requirements;

7.3.13 in accordance with Good Industry Practice;

7.3.14 so as to ensure that the design of ~~the Edinburgh Tram Network~~**Phase 1a** is buildable and maintainable but in the case of Secondary Phase 1a only to the extent that buildability and maintainability can reasonably be determined from the Issued For Construction Drawings;

7.3.15 so as to assist **tie** in relation to providing information 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 respect of the carrying out of the Infraco Works;

7.3.16 in such manner as not wilfully to detract from the image and reputation of **tie**, Transport Edinburgh Limited, CEC, the Scottish Ministers, Transport Scotland or the Edinburgh Tram Network;

7.3.17 in accordance with the OGC's "Excellence in Construction" initiative;

7.3.18 so as to ensure that sustainability is considered and discussed with **tie** in relation to energy consumption and the supply of materials from

sustainable sources for ~~the Edinburgh Tram Network~~Phase 1a. The Parties acknowledge that the execution of the Infraco Works in compliance with the Infraco Proposals (in relation to sustainability) meet the requirements of this provision;

7.3.19 in a manner that is not likely to be injurious to persons or property excluding any liability for persons or property injuriously affected by ~~the Edinburgh Tram Network~~Phase 1a in so far as such liability does not arise as the result of either a breach of this Agreement or negligence on the part of the Infraco; and

7.3.20 using the Key Personnel.

7.4 The Infraco undertakes and warrants that the Infraco's Proposals shall meet the Employer's Requirements.

7.5 The Infraco shall (and shall procure that the Infraco Parties) use reasonable endeavours to ensure that in carrying out the Infraco Works, it:

7.5.1 maximises productivity by reference to Good Industry Practice as applicable to construction or maintenance as relevant;

7.5.2 minimises disruption to the city of Edinburgh;

7.5.3 maintains safety, and minimises the potential for accidents, and safeguards the Infraco Works;

7.5.4 safeguards efficiency in the obtaining of Consents; and

7.5.5 minimises costs.

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

7.7 The Infraco'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**.

7.8 The Infraco is deemed to have satisfied itself that it fully understands the scope and extent of the requirements in respect of the Infraco Works, and that it has sufficient information

or will at the relevant time have sufficient information, to enable it to carry out the Infraco Works.

Background Information

7.9 Subject to the express provisions of this Agreement, the Infraco acknowledges that certain Background Information has been made available to it in relation to this Agreement. Subject to the express provisions of this Agreement, **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 neither **tie**, any **tie** Parties, CEC, TEL nor any of their employees shall be liable to the Infraco in contract, delict (including breach of statutory duty), or otherwise as a result of:

7.9.1 any inaccuracy, error, defect, omission, unfitness for any purpose or inadequacy of any kind whatsoever in the Background Information; nor

7.9.2 any failure to make available to the Infraco any materials, documents, drawings, plans or other information relating to this Agreement;

provided that nothing in this Clause 7.9 shall exclude any liability in respect of any statements made or information provided fraudulently.

7.10 Subject to the express provisions of this Agreement, the Infraco acknowledges and confirms that it has conducted its own analysis and review of the Background Information and has before the execution of this Agreement, or upon receipt if received thereafter, satisfied itself as to the veracity, accuracy, reasonableness, scope, materiality, currency (where applicable) and completeness of all such Background Information upon which it places reliance.

Liaison

7.11 The Infraco shall (and shall procure that the Infraco Parties) liaise with **tie**, any **tie** Party, the Operator and any other parties as may reasonably be required by **tie** to facilitate the production, by such persons, of any information required from them, in order that the carrying out of the Infraco Works and its other obligations under this Agreement can be progressed according to the Programme. The Infraco shall (and shall procure that the Infraco Parties) liaise with **tie**, any **tie** Party, the Operator, and any other parties as may be reasonably required by **tie** as often as is necessary in order to ensure that the Infraco Works are carried out properly and in accordance with the terms of this Agreement.

7.12 The Infraco shall in relation to any proposed Permitted Variation, collaborate and liaise with **tie** throughout the carrying out of the Infraco Works to ensure due consideration is given to the type of materials and optimum and cost effective construction and

maintenance methods, construction and maintenance programmes, and temporary works, as appropriate.

Provision of all Labour, Goods, Materials and Services

7.13 The Infraco shall, subject to the provisions of the Agreement, provide all labour, goods, materials, Infraco'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 Infraco 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, scope and complexity as the Infraco Works.

7.14 The Infraco shall take full responsibility for the adequacy, stability and safety of all site operations and methods of construction, installation and maintenance in relation to the Infraco Works.

Prohibited Materials

7.15 The Infraco undertakes and warrants to ~~tie~~ that it has not specified for use and undertakes that it shall not specify for use and shall ensure that there shall not be used in relation to the Infraco Works, any materials which at the time of specification, installation or commencement of use (as the case may be):

7.15.1 are known to be deleterious in the particular circumstances in which they are specified to be used (either to health and safety or to the durability of the Infraco Works); or

7.15.2 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

7.15.3 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 or commencement of use; or reinstallation; or

7.15.4 contravene Good Industry Practice.

7.16 The Infraco undertakes and warrants that on the date of use or installation on ~~the~~ ~~Edinburgh Tram Network~~ Initial Phase 1a, any materials supplied as part of the Infraco Works shall be in accordance with Schedule Part 2 (*Employer's Requirements*).

Investigations and Surveys

7.17 The Infraco shall notify **tie** of any ground, physical, or geophysical investigations or archaeological or ecological surveys and other investigations or surveys which it intends to carry out before such investigations or surveys are carried out.

Abortive Works

7.18 As soon as reasonably practicable after the Infraco becomes aware that any element of the Infraco Works likely to be Abortive Work for any reason, the Infraco shall notify **tie** of:

7.18.1 the probable nature of the Abortive Work;

7.18.2 the cause of the Abortive Work being abortive;

7.18.3 the estimated effect of the Abortive Work in terms of cost, of time in completion of the Infraco Works and of any other matters in relation to the Agreement; and

7.18.4 any measures to be taken which may mitigate that effect.

7.19 The Infraco and **tie** shall jointly investigate, and **tie** shall determine the actual extent of any Abortive Work.

7.20 Payment by **tie** to the Infraco in respect of any Abortive Work which has been carried out by the Infraco shall be valued in accordance with Clause 80 (*tie Changes*) and shall be paid by **tie** in accordance with Clause 67 (*Payment in respect of Applications for Milestone Payments*) provided always that no payment shall be due for Abortive Work to the extent it has resulted from any fault of the Infraco and/or any breach by the Infraco of its obligations under this Agreement.

Advanced Works Agreement

7.21 On the Commencement Date:

7.21.1 all work performed by the Infraco under the Mobilisation and Advanced Works Agreement shall be deemed to have been performed under this Agreement and the Mobilisation and Advanced Works Agreement shall terminate; and

7.21.2 subject to Clause 7.21.3, any claims which the Parties may have against each other under the Mobilisation and Advanced Works Agreement shall be deemed to be claims available to the Parties under this Agreement; and

7.21.3 to the extent that the Infraco has any entitlement to claim any additional time or costs in respect of Compensation Event (a) - (s) and

(w) **tie** shall not be obliged in assessing such entitlements under Clause 65 (*Compensation Events*), to take account of any delay or costs to the extent that such delay or costs arose prior to the Commencement Date.

7.22 ~~7.22~~ On the Commencement Date, all work performed by the Tram Supplier under the Tram Supply Advanced Works Agreement shall be deemed to have been performed under the Tram Supply Agreement and the Tram Supply Advanced Works Agreement shall terminate.

8. **SYSTEM INTEGRATION**

8.1 The Infraco shall ensure that the following key elements of the system integration of the Infraco Works are implemented:

8.1.1 insofar as identified within Schedule Part 2 (*Employers Requirements*), compliance with sub-system performance requirements as defined in Schedule Part 2 (*Employer's Requirements*) and to the extent not so identified in Schedule Part 2 (*Employer's Requirements*), definition of sub-system performance requirements and demonstration by calculation that when such sub-systems are integrated they shall achieve the System Availability Target set out in Schedule Part 2 (*Employer's Requirements*) including the Operations Performance Specification during completion of construction, installation, re-installation or renewals;

8.1.2 management of technical interfaces including system wide issues such as electro-magnetic compatibility and stray current protection, noise, vibration and wheel/rail interface ensuring that each and every material issue arising is satisfactorily closed out following completion of construction, reinstallation or renewals and thereafter maintained as part of the Maintenance Services;

8.1.3 test management including the preparation of method statements, test scripts, the setting of pass/fail criteria, and analysis for commissioning and re-commissioning;

8.1.4 alignment of maintenance procedures with the operations procedures produced by the Operator to ensure they form a whole and safe system of work;

8.1.5 system activation following installation, reinstallation and renewals;

8.1.6 safety assurances and the Case for Safety are achieved at the issue of a Certificate of Sectional Completion and thereafter maintained and updated as required; and

8.1.7 preparation and updating of a requirements traceability matrix which shall have the ability to trace the requirements of ~~the Employer's Requirements through the design process, the testing procedures and the operation of the Edinburgh Tram Network;~~

(a) the Employer's Requirements through the design process, the testing procedures and the operation of Initial Phase 1a; and

(b) the Employer's Requirements through the design process of Secondary Phase 1a.

8.2 Save as provided in Clause 12, the Infraco shall:

8.2.1 ~~8.2 The Infraco shall~~ during the carrying out of construction, installation, reinstatement or renewals be fully responsible for ensuring that the Trams and any engineer's works vehicles are fully integrated with the Infraco Works. The Infraco shall thereafter be ~~fully~~ responsible for ~~maintaining~~ensuring that the Trams and any engineering works vehicles are fully integrated with ~~the Edinburgh Tram Network.~~Initial Phase 1a; and

8.2.2 ~~8.3 The Infraco shall~~ carry out and thereafter maintain all of the system integration activities described in Schedule Part 2 (*Employer's Requirements*) and Schedule Part 30 (*Infraco's Proposals*) the achievement of which is tracked in accordance with Clause 8.1.7.

8.3 ~~8.4~~ The Infraco shall liaise with the Operator and ~~tie~~ as instructed by ~~tie~~ in relation to:

8.3.1 ~~8.4.1~~ system operation and related design issues;

8.3.2 ~~8.4.2~~ the Systems Acceptance Tests; and

8.3.3 ~~8.4.3~~ operational defects.

8.4 ~~8.5~~ The Infraco shall be responsible for ensuring that all elements of the design (which form part of the Infraco Works) relative to ~~the Edinburgh Tram Network~~Phase 1a are compatible with system integration and the Infraco shall make qualified personnel available to ensure system integration throughout the Term.

8.5 ~~8.6~~ As part of the Infraco Works, the Infraco shall be responsible for managing the configuration control of ~~the Edinburgh Tram Network~~ Initial Phase 1a and (in relation to design only) of Secondary Phase 1a, specifically, but not exclusively controlling the introduction of software changes and hardware modifications through version control.

~~8.7 The Infraco shall procure in particular that the Tram Supplier and the Tram Maintainer comply with their obligations under the Tram Supply Agreement and the Tram Maintenance Agreement as set out in of the Schedule Part 39 (Tram Supply Agreement and Tram Maintenance Agreement Obligations) and shall notify tie of any breach of such obligations by the Tram Supplier or Tram Maintainer as soon as practicable after the Infraco becomes aware of any such breach.~~

9. TITLE

General Provisions

9.1 ~~Subject to Clauses 9.6 and 9.7, the~~ The Infraco shall transfer or ensure that it procures the transfer of title to CEC in all materials, goods, and equipment intended to form part of the completed ~~Edinburgh Tram Network~~ Initial Phase 1a and all Parts (including Spare Parts and Special Tools but excluding any parts of the Trams and such spare parts owned by Infraco and brought on to the Site for the purposes of this Agreement) supplied or provided by the Infraco pursuant to this Agreement, as the case may be, on the later of:

9.1.1 payment (less any retention applicable) by **tie** to the Infraco of the price for such materials, goods, equipment and Parts (including Spare Parts and Special Tools) in accordance with this Agreement, and

9.1.2 delivery of such item to the Depot or such other part of the Site where the Infraco Works are being carried out;

and such title shall vest in CEC free and clear of all Security Interests and other third party rights of any nature. Subject to Clause 90 (Termination on Infraco Default), **tie** shall, and shall procure that CEC shall, not take any action which would interfere with Infraco and the Infraco Parties use in the performance of the Infraco's obligations under this Agreement of the materials, goods, equipment and Parts in which title has passed to **tie** or CEC. If required, the Infraco shall at its own expense take all such steps and execute, and procure the execution of, all such instruments as **tie** may reasonably require to ensure that title so passes to CEC according to Law.

9.1.3 For the avoidance of doubt, an Insolvency Event in respect of one Infraco Member shall not absolve the other Infraco Member from its obligations in relation to the delivery of any goods, materials or equipment forming part of or required for the Infraco Works and in

respect of which **tie** has made an advance payment to the Infraco, irrespective of how the Infraco Member determined such advance payment should be deployed.

- 9.2 Any materials, goods, and equipment intended to form part of the completed ~~Edinburgh Tram Network~~Initial Phase 1a and all Parts (including Spare Parts and Special Tools) in which title has passed to CEC which are at any time removed from ~~the Edinburgh Tram Network~~Initial Phase 1a will remain the property of CEC and the Infraco undertakes (and shall procure that the Infraco Parties so undertake) to the extent reasonably practicable, to clearly identify such materials, goods, and equipment and all Parts (including Spare Parts and Special Tools) as belonging to CEC and to keep all such Parts stored separately from any third party's property. The location of all such Parts shall be tracked in the Asset Management System at all times. Where, in the Infraco's reasonable opinion, it is necessary to dispose of any such materials, goods, equipment and Parts (including Spare Parts and Special Tools), the Infraco shall notify, and obtain the consent of, **tie** (such consent not to be unreasonably withheld) prior to such disposal. **tie** shall respond within 5 Business Days of receipt of such notification. Where **tie** has not responded within 5 Business Days, the Infraco may effect such disposal.
- 9.3 The Infraco shall at all times at its own expense label or otherwise clearly identify with a unique traceable coding system as being the property of CEC (and shall procure that Infraco Parties do likewise) any materials, goods, and equipment forming or intended to form part of the completed ~~Edinburgh Tram Network~~Initial Phase 1a and all Parts (including Spare Parts and Special Tools) in the Infraco's or any Infraco Party's possession or control in relation to which advance payment has been made and/or title has vested in CEC pursuant to this Agreement and the Infraco shall ensure that such items shall at all times in the Infraco's (or any Infraco Party's) possession or control be kept separate from the Infraco's or any third party's goods all to the extent that is agreed practicable by the Parties acting reasonably.
- 9.4 The Infraco shall incorporate provisions equivalent to those provided in Clauses 9.1 to 9.2 (mutatis mutandis) in every sub-contract in order to protect **tie** and CEC's interests in all supplies, materials, goods or equipment intended for the Infraco Works.
- 9.5 **tie** shall, at Infraco's request and where **tie** is satisfied that the Infraco has no equivalent contractual remedy, procure that CEC pursues any claim which CEC may have against the supplier of faulty or defective materials, goods, equipment and Parts in which title has vested in CEC and shall reimburse to Infraco all amounts recovered as a result of such claim subject to Infraco reimbursing the reasonable and proper costs incurred by CEC in pursuing the claim.

Title in the Trams

- 9.6 ~~The Infraco shall procure that each Tram and item of Tram Related Equipment is supplied to~~
~~tie free from all Security Interests, and other third party rights of any nature.~~ **NOT USED.**
- 9.7 ~~The Infraco shall procure that the Tram Supplier shall, pursuant to the Tram Supply~~
~~Agreement, transfer title:~~ **NOT USED.**
- 9.7.1 ~~in each Tram, to CEC, on (i) delivery of that Tram to the Depot (or other designated~~
~~delivery point in Edinburgh) and on the Certificate of Tram Commissioning being~~
~~issued in respect of that Tram and in any event within twenty four hours of the~~
~~successful completion of the Tram Commissioning Tests or (ii) by exception on an~~
~~individual Tram basis, at the absolute discretion of tie and formalised in writing~~
~~when a Tram is complete and a Factory Acceptance Test Certificate (as defined in the~~
~~Tram Supply Agreement) has been issued pursuant to the Tram Supply Agreement;~~
- 9.7.2 ~~to each item of the Tram Related Equipment to CEC, on the later of delivery of each~~
~~item of the Tram Related Equipment to CEC and the Certificate of Tram~~
~~Commissioning being issued in respect of the first Tram.~~

Interoperability and Warranty

- 9.8 The Infraco undertakes that all parts, components, systems, devices, equipment, software and mechanisms incorporated in ~~the Edinburgh Tram Network~~ **Initial Phase 1a** and the Trams shall be at each Sectional Completion Date and thereafter be maintained so that they are:

9.8.1 fit for purpose, compatible and interoperable with each other; and

9.8.2 compliant with the Employer's Requirements

For the purposes of this Clause 9.8, "fit for purpose" in relation to any item means that it complies with the Employer's Requirements applicable to that item.

~~For the avoidance of doubt, this undertaking shall not apply to any items which are to be~~
~~supplied to Infraco or any Infraco Party by or on behalf of tie or any tie Party.~~ **The**
undertaking in clause 9.8 shall not require Infraco to:

(a) ensure Trams and Tram Related Equipment are fit for purpose;

(b) ensure the Trams and Tram Related Equipment are compliant with the Employer's Requirements, except to the extent Infraco has this responsibility pursuant to clause 12.

9.9 The Infraco shall ensure that:

9.9.1 the relevant parts of ~~the Edinburgh Tram Network~~Initial Phase 1a (including all fare collection equipment except any Free Issue Fare Collection Equipment) are or will be Euro Compliant before any introduction of the single European currency in the United Kingdom and ~~the Edinburgh Tram Network~~Initial Phase 1a will not be affected by the introduction of the single European currency in the United Kingdom;

9.9.2 the Infraco's own internal systems and procedures are or will be Euro Compliant before the introduction of the single European currency in the United Kingdom and the Infraco Works will not be affected by the introduction of the single European currency in the United Kingdom; and

9.9.3 the relevant parts of ~~the Edinburgh Tram Network~~Initial Phase 1a (including all fare collection equipment except any fare collection equipment which is Free Issue Fare Collection Equipment to Infraco or any Infraco Party by or on behalf of **tie** or any **tie** Party) shall at all times throughout the Term be compliant with all Law applicable in relation to the Euro in the United Kingdom, including the rules on conversion, triangulation and rounding set out in EU Regulation Number 1103/97 and any subsequent or similar regulations or Law.

9.10 For the purposes of Clause 9.9 above "**Euro Compliant**" means that (i) the introduction of the Euro within the United Kingdom or any part thereof shall not affect the performance or functionality of any relevant items nor cause such items to malfunction, end abruptly, provide invalid results or adversely affect business, and (ii) all currency reliant and currency related functions (including all calculations concerning financial data) of any relevant items to enable the introduction and operation of the Euro, and (iii) in particular (but without limitation) each and every relevant item shall, to the extent it performs or relies upon currency related functions (including all calculations concerning financial data):

9.10.1 be able to perform all such functions in both the national currency of the United Kingdom and in Euros;

9.10.2 during any transition phase applicable to the United Kingdom, be able to deal with the dual denominations of the Euro and national currency of the United Kingdom;

9.10.3 recognise, accept, display and print all the Euro currency symbols and alphanumeric codes which may be adopted by any government and other European Union body in relation to the Euro;

9.10.4 incorporate protocols for dealing with rounding and currency conversion;

9.10.5 recognise data expressed in, and express any output data in, the national currency of the United Kingdom and the Euro; and

9.10.6 permit the input of data in Euros and display an outcome in Euros where such data, supporting **tie's** normal business practices, operates in Euros and/or the national currency in the UK.

9.11 Any malfunction or non-interopability of Free Issue Fare Collection Equipment or failure of **tie** or any **tie** Party to provide such Free Issue Fare Collection Equipment in accordance with the Programme shall be a Compensation Event under this Agreement provided that, in the case of malfunction or non-interopability Infraco has installed the equipment in accordance with the Employer's Requirements and the manufacturer's specifications. For the avoidance of doubt any instruction to remove or replace Free Issue Fare Collection Equipment shall be a **tie** Change provided such malfunction or non-interopability has not been caused by the Infraco.

Availability of Trams and other goods and materials

9.12 Subject ~~to the Tram Supplier transferring title to the Trams to CEC pursuant to the Tram Supply Agreement, and subject~~ to Clause 90 (Termination on Infraco Default) **tie** shall, and shall procure that CEC shall, not take any action which would interfere with Infraco and the Infraco Parties use in the performance of the Infraco's obligations under this Agreement of the Trams and any materials, goods, and equipment in which title has passed to **tie** or CEC pursuant to this Agreement or the Tram Supply Agreement being available to the Infraco and the Infraco Parties for use in the performance of the Infraco's obligations under this Agreement.

10. DEVELOPMENT, REVIEW AND FINALISATION OF THE DELIVERABLES

10.1 The Infraco shall develop and finalise the Deliverables in accordance with the Programme and this Agreement, and **tie** shall review the Deliverables ~~and procure that CEC reviews the Deliverables (which shall include any amendment to any Submitted Item~~ (as appropriate) in accordance with Schedule Part 14 (~~Review Procedure and Design Management Plan~~).

- 10.2 ~~The Infraco shall submit any Deliverables associated with any Permitted Variations to tie's Representative for review pursuant to Schedule Part 14 (Review Procedure and Design Management Plan).~~ **NOT USED.**
- 10.3 The Infraco shall allow tie's Representative, at any reasonable time, a reasonable opportunity to view any Deliverable at any stage of development, including for the purposes of satisfying tie's obligations in regards to The Railways and Other Guided Transport Systems (Safety) Regulations 2006 (ROGS) and the Independent Competent Person (ICP), 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. tie shall be wholly responsible for the management of the ICP and to demonstrate to the ICP that the requirements of ROGS are being met. tie shall ensure that any design reviews undertaken to satisfy the ICP will be in accordance with the Programme.
- 10.4 The Infraco shall establish and maintain an extranet which tie, any tie Parties and any other party reasonably required by tie may access remotely by computer (through an appropriate login/security regime) to view any Deliverables including any drawings comprised within the Deliverables and electronically store and/or print copies of such Deliverables.
- 10.5 The Infraco shall ensure that the Programme shall set out (and shall continue to set out) the manner and timing of each phase of the development and production of the Deliverables, ~~the identity (where known) of the party producing the Deliverables, 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 onto the extranet in accordance with Clause 10.3. ~~– If at any time, tie considers that the Programme will not allow completion of the Infraco Works in accordance with this Agreement, then the Infraco shall make such adjustments as are necessary for that purpose.~~
- 10.6 ~~The Infraco 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 (or such shorter period as may be agreed between the Parties) of any revision to the periods shown in the previous Programme and the Infraco 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 Programme for that Deliverable.~~ **NOT USED.**
- 10.7 ~~Where tie's Representative does not consider that tie will be able to comply with the periods specified in Schedule Part 14 (Review Procedure and Design Management Plan) 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, either the provisions of paragraph 1.4 of Schedule Part 14 (Review Procedure and Design Management Plan) shall apply or tie may introduce an alternative timetable and the Infraco shall comply with such alternative timetable. Provided that, where tie is unable to comply with the time periods set out in Schedule Part 14 (Review Procedure and Design Management Plan) and such inability is not due to any breach of the Programme or this Agreement, omission or fault on the part of the Infraco, the introduction of an alternative timetable shall be a tie Change and the terms of Clause 80 (tie Changes) shall apply.~~**NOT USED.**

10.8 ~~During the preparation of the Deliverables, tie and/or tie's Representative shall at its absolute discretion be entitled to call for a meeting to discuss the development of any Deliverable, and the Infraco 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 Infraco will prepare and circulate to those attending the meeting, a report listing the Deliverables discussed and any comments made at such meeting.~~**NOT USED.**

10.9 If it should be found that any Deliverable does not fulfil the requirements of this Agreement, or the needs of any Approval Bodies, the Infraco shall amend the Deliverable. Such amendment shall be at the Infraco's cost except where such amendment is ~~required~~**to a design Deliverable** in order for ~~the~~**such design** Deliverable to meet the requirements of any Approval Bodies, where such requirements are: ~~the result of a tie Change in which case such amendment shall be a Mandatory tie Change. All such amendments shall be made in accordance with Schedule Part 14 (Review Procedure) and shall ensure that the Deliverable shall satisfy the requirements of this Agreement and any Approval Bodies.~~

~~10.9.1 inconsistent with or in addition to the Infraco Proposals or the Employer's Requirements;~~

~~10.9.2 not reasonable given the nature of the Approval Body; or~~

~~10.9.3 not reasonably foreseeable within the context of the Infraco's Proposals or the Employer's Requirements,~~

~~in which case such amendment shall be a Mandatory tie Change. All such amendments shall be made in accordance with Schedule Part 14 (Review Procedure and Design Management~~

~~Plan) and shall ensure that the Deliverable shall satisfy the requirements of this Agreement and any Approval Bodies.~~

- 10.10 ~~The Infraco shall provide tie with all Deliverables in accordance with the terms of this Agreement and where no timescale for provision of such Deliverables is specified in the Programme, such Deliverables shall be provided to tie as soon as reasonably practicable. The~~Where requested by tie, the Infraco shall provide to tie, at no cost to tie, five copies ~~of the agreed Deliverables~~(A3 size) of any Issued for Constructions Design Deliverable in hard copy form and one ~~copy in an agreed soft copy form (as in~~ appropriate ~~to the format of the Deliverables).~~
- 10.11 ~~In respect of any further copies of a particular Deliverable which tie may require, tie shall pay the Infraco the reasonable copying charges or other reasonable charges for the provision of the same to tie.~~NOT USED.
- 10.12 Subject to Infraco's express rights under this Agreement, the Infraco accepts all risks arising from any conflicts, ambiguities, discrepancies, errors or omissions that subsequently appear within or between any of the Deliverables, and the Infraco shall not be entitled to make any claim against tie for an extension of time, payment or otherwise in respect of any such conflicts, ambiguities, discrepancies, errors or omissions.
- 10.13 ~~The Infraco shall within 12 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 Infraco shall provide with any such 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 Infraco 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 Infraco is that no action is required or tie does not agree with the action proposed by the Infraco, tie may notify the Infraco, within 8 Business Days of the Infraco's notice, to resolve any conflicts, ambiguities, discrepancies, errors or omissions in a different manner (which notification shall be binding on the Infraco and shall be deemed to be instructions in accordance with Clause 34.1, but shall be reasonable in time and cost having regard to the Employer's Requirements).~~NOT USED.
- 10.14 The Infraco shall ensure that all Deliverables comply with the document control requirements specified at paragraph 3.1.2.1 of part A, and paragraph 3.1.2.1 of part B, of Schedule Part 3 (*Code of Construction Practice and Code of Maintenance Practice*).

10.15 The Infraco shall keep on Site or in the office or offices established pursuant to Clause 10.16 one copy (in paper or electronic format) of all drawings for construction and of all specifications and the same shall at all reasonable times be available for inspection and use by **tie's** Representative and by any other person authorised by it.

10.16 The Infraco shall establish at the Site and/or elsewhere an office or offices which shall be staffed during all normal business hours and at which shall be kept a complete, up-to-date and orderly documentary record of the performance of the Infraco Works, all transactions entered into by the Infraco in relation to any potential or actual Permitted Variations and information (including any transactional information) in relation to any claims for additional costs or expenses from the Infraco to **tie** arising in accordance with the terms of this Agreement (including Compensation Events). To the extent necessary to verify any claim made by the Infraco under this Agreement, **tie**, **tie's** Representative or their duly authorised representatives shall during all normal business hours be permitted to inspect the same and to take copies and to use such copying facilities as are maintained at the place where the records are kept.

10.17 ~~The Parties shall adhere to the requirements of the Design Management Plan in terms of timescales, packaging, sequencing and provision of information to support the design approval process.~~ **NOT USED.**

10.18 If the Parties agree to and, following such agreement, **tie** instructs an early release of Issued for Construction Drawings, any subsequent changes required to such Issued for Construction Drawings which arise from the later stages of the Review Procedure shall be instructed as necessary by **tie** and implemented by the Infraco (and the SDS Provider) without a **tie** Change, save where the aggregate costs of any such changes exceeds one million, five hundred thousand pounds (£1,500,000) in which event such change shall be instructed as a Mandatory **tie** Change (provided that there will be no such Mandatory **tie** Change or inclusion of costs in the above cap where the change to the Issued for Construction Drawings is required as a consequence of the SDS Provider or the Infraco being in breach of their obligations in respect of design content or quality pursuant to the SDS Agreement or this Agreement).

PART 3 - NOVATION OF SDS AGREEMENT, TRAM SUPPLY AGREEMENT AND TRAM MAINTENANCE AGREEMENT, AND PROVISION OF TRAM MAINTENANCE SERVICES

11. NOVATION OF THE SDS AGREEMENT TO THE INFRACO

11.1 **tie** has entered into the SDS Agreement with the SDS Provider. It is one of the conditions precedent to this Agreement coming into full effect that the Infraco shall enter into and execute a novation agreement with **tie** and the SDS Provider in the form set out in

Schedule Part 23 (*SDS Novation Agreement*). **tie** shall execute and shall procure the execution by the SDS Provider of such novation agreement.

- 11.2 On the last date of execution of the novation agreement referred to in Clause 11.1, **tie** and the Infraco shall execute a collateral warranty agreement from the SDS Provider which is in favour of **tie** in the form contained in Schedule Part 24 (*SDS Collateral Warranty in favour of tie*).
- 11.3 The Infraco shall procure that the SDS Provider shall carry out and complete the SDS Services in accordance with the SDS Agreement. To the extent that the SDS Services are and have been carried out and completed in accordance with the SDS Agreement, Infraco will be deemed to have complied with its obligations under this Agreement to procure that the SDS Provider in its capacity as an Infraco Party complies with the requirements of this Agreement.
- 11.4 The Infraco shall carry out all required management activities in order to manage the performance of the SDS Services and, subject to any express limitations or rights in relation to the performance of the SDS Services in this Agreement, the Infraco shall be wholly liable for the performance of the SDS Services.
- 11.5 The Infraco shall not amend the SDS Agreement (including the SDS Services) without the prior written approval of **tie** (such approval not to be unreasonably withheld or delayed) ~~provided that tie's consent shall be deemed to have been given in relation to any amendment to the SDS Agreement (including the SDS Services) which is directly required as a result of any Permitted Variation in so far as such amendment has been raised by the Infraco as part of the process of approving such Permitted Variation in accordance with this Agreement.~~ where such amendment would prejudice tie's ability to recover loss or damages under the warranty provided by SDS to tie dated 14 May 2008.
- 11.6 As reasonably required by **tie**, the Infraco shall procure the attendance of the SDS Provider at any meeting in relation to the Infraco Works.
- 11.7 Subject to the provisions of the SDS Agreement, the Infraco shall use reasonable endeavours to procure that the SDS Provider shall perform any additional services which may be required and specifically instructed by **tie** in respect of ~~the Edinburgh Tram Network~~ **Phase 1a** and the requirement for any additional services shall be a **tie** Change in accordance with Clause 80 (*tie Changes*).
- 11.8 The Infraco shall not terminate in full the appointment of the SDS Provider without the prior written approval of **tie**, such approval not to be unreasonably withheld. If **tie** approves any such termination, a replacement designer shall be proposed by the Infraco in accordance with Clause 28 (*Sub-Letting and the Appointment of Sub-Contractors*).

11.9 If required by **tie**, on termination or expiry of this Agreement, the Infraco shall novate, assign or otherwise transfer the whole of the SDS Agreement as directed by **tie**, to:

11.9.1 **tie**, the Scottish Ministers, TEL, CEC, Transport Scotland or their successors with no worse financial standing than that of **tie**; or

11.9.2 to any other person whose obligations under the SDS Agreement are unconditionally and irrevocably guaranteed by a person falling within Clause 11.9.1.

In the case of such a novation or assignation, the Infraco shall be entitled, and **tie** shall assist the Infraco, to obtain a collateral warranty from the SDS Provider.

12. ~~NOVATION OF THE TRAM SUPPLY AGREEMENT TO THE INFRACO~~ TRAM SUPPLY, MAINTENANCE AND INTEGRATION

~~12A tie intends to enter into or has entered into a tram supply agreement with the Tram Supplier. It is one of the conditions precedent to this Agreement coming into full effect that the Infraco shall enter into and execute a novation agreement with tie and the Tram Supplier in the form set out in Schedule Part 17 (Tram Supply Novation Agreement). tie shall execute (if not already executed), and shall procure the execution by the Tram Supplier (if not already executed) of such novation agreement and the Tram Supply Agreement.~~

12.1 ~~On the last date of execution of the novation agreement referred to in Clause 12A, tie and the Infraco shall, and the Infraco shall procure that the Tram Supplier shall, execute a collateral warranty agreement in favour of tie in the form contained in Schedule Part 18 (Tram Supply Collateral Warranty in favour of tie) and the Infraco shall provide the same as executed to tie on that date.~~ Notwithstanding any other provision of this Agreement, tie shall procure that the Tram Supplier and Tram Maintainer:

12.1.1 performs the Tram Supply Obligations and Tram Maintenance Services so as to satisfy the Tram Delivery and Maintenance Obligations; and

12.1.2 complies with all of its other obligations under the Tram Agreements (excluding, up to the Systems Acceptance Date, Tram Supplier Integration),

and Infraco shall have no responsibility under this Agreement for the performance of those obligations for which tie assumes responsibility in accordance with this Clause 12.1.

12.1A tie shall procure that, following the due dates for Tram Commissioning in the Tram Manufacturing and Delivery Programme and up to the System Acceptance Date, sufficient Trams and Relevant Tram Equipment and Documentation shall be available to Infraco at the required locations at the Site to the extent necessary for Infraco to perform the Infraco Works in accordance with the Programme. This Clause 12.1A shall impose no responsibility or liability on tie for the fitness or adequacy, for the purposes of performing and satisfying the System Acceptance Tests, of the Trams and the Relevant Tram Equipment and Documentation made available pursuant to this Clause.

12.2 ~~The Infraco shall procure that the Tram Supplier shall carry out and complete the Tram Supply Obligations in accordance with the Tram Supply Agreement.~~ Subject only to tie's obligations in Clause 12.1 and to Clause 12.3:

12.2.1 tie shall have no responsibility to the Infraco:

(a) for procuring that the Tram Supplier and Tram Maintainer complies with any of its obligations in the Tram Agreements; or

(b) for procuring the discharge of any obligations in this Agreement which purport to be obligations of the Tram Supplier or the Tram Maintainer including without limitation in Sections 23, 35 and 37 of Schedule Part 2,

in relation to Tram Supplier Integration; and

12.2.2 the Infraco assumes full responsibility for all works and services that relate to or are required for the purpose of:

(a) achieving System Integration; and

(b) enabling the System to meet the pass criteria for all the Tests.

12.3 The Infraco shall ~~carry out all required management activities in order to manage the performance of the Tram Supply Obligations subject to any express limitations in this Agreement and the Infraco shall be wholly liable for the performance of the Tram Supply Obligations.~~ have no liability to any of the Indemnified Parties in respect of a failure by the Tram Supplier and Tram Maintainer to perform or discharge its obligations in relation to Tram Supplier Integration:

(a) which takes place after the System Acceptance Date; or

(b) to the extent that such failure results in tie (or any of the Indemnified Parties) incurring any loss or liability after the System Acceptance Date.

12.4 ~~The Infraco shall not amend the Tram Supply Agreement (including the Tram Supply Obligations) without the prior written approval of tie (such approval not to be unreasonably withheld or delayed) provided that tie's consent shall be deemed to have been given in relation to any amendment to the Tram Supply Agreement (including the Tram Supply Obligations) which is directly required as a result of any Permitted Variation in so far as such amendment has been raised by the Infraco as part of the process of approving such Permitted Variation in accordance with this Agreement.~~ tie's liability to the Infraco arising from any breach by tie of clause 12.1 shall not exceed the Tram Supplier and Tram Maintainer's aggregate liability (including any liability for liquidated and ascertained damages) to CEC under the Tram Agreements for the failure or non performance under either or both of the Tram Agreements that gave rise to or resulted in such breach by tie. For the purpose of giving effect to this Clause, any loss suffered by Infraco as a result of any such breach by tie will be deemed to be a loss suffered by CEC under the Tram Agreements when calculating the Tram Supplier's and Tram Maintainer's aggregate liability. Nothing in this Clause 12.4 or in Clause 12.5 shall operate to prevent Infraco from claiming a Compensation Event;

12.4.1 to establish an extension of time and/or relief from the performance of its obligations where no further recovery can be made from tie as a result of the operation of this clause 12.4; and/or

12.4.2 to establish the additional costs arising out of any breach by tie of clause 12.1 (even where such costs are not recoverable from the Tram Supplier and/or Tram Maintainer due to any agreed limitation on the Tram Supplier and Tram Maintainer's liability under the Tram Agreements for the relevant breaches) for the purpose of calculating any payments to be made between tie and Infraco as a result of the operation of Clause 12.5,

12.4A.1 If, prior to the System Acceptance Date, the Tram Supplier is in breach of the Tram Supply Agreement, Infraco shall be entitled to notify tie in writing;

(a) giving full details of the alleged breach (a "Notified Breach"); and

(b) requiring that tie procures that CEC makes a demand on the CAF Bond.

12.4A.2 If tie does not agree that CEC is entitled to make a demand on the CAF Bond as a result of a Notified Breach, tie shall notify Infraco within ten Business Days of service of such notice. If the parties are not able to agree whether tie is entitled to make a demand under the CAF Bond as a result of the Notified Breach, the matter shall be referred to the Dispute Resolution Procedure.

12.4A.3 If it is agreed or determined that that CEC is entitled to make a demand on the CAF Bond as a result of the Notified Breach, tie shall procure that CEC makes such a demand as soon as reasonably practicable.

12.4A.4 If and to the extent the Tram Supplier successfully defends a claim by Infraco in relation to a breach by CAF of the Tram Interface Agreement solely on the basis that:

(a) CEC has made a claim under the CAF Bond in respect of such breach; and

(b) the proceeds from the CAF Bond received by CEC in respect of such claim cover in whole or in part the losses claimed by Infraco,

(the "Bond Defence").

Infraco shall, subject to clauses 12.4 and 12.5, be entitled to recover from CEC the amount that Infraco would have been entitled to have recovered from the Tram Supplier in respect of such breach but for the Bond Defence, subject always to Infraco's right of recovery under this Clause 12.4A.4 not exceeding the amount recovered by CEC under the CAF Bond in respect of the relevant breach.

~~12.5 As reasonably required by tie, the Infraco shall procure the attendance of the Tram Supplier at any meeting in relation to the Infraco Works.~~If as at the third anniversary of the System Acceptance Date (the "Cut-Off Date") taking into account only those claims which have been agreed or finally determined on or before that date, the aggregate of:

12.5.1 the Tram Supplier and Tram Maintainer's liability to the Infraco in respect of the Tram Supplier and Tram Maintainer's breaches of the Tram Interface Agreement; and

12.5.2 the Tram Supplier and Tram Maintainer's liability to CEC in respect of the Tram Supplier and Tram Maintainer's breaches of either of the Tram Agreements,

exceeds any agreed limitation on the Tram Supplier and/or Tram Maintainer's liability for the relevant breaches such that no recovery of such excess can be made from the Tram Supplier and Tram Maintainer, tie and the Infraco shall make such payments to each other as is required to ensure that each of tie and the Infraco is able to recover (taking into account any amounts recovered in respect of liquidated and ascertained damages for delay under the Tram Supply Agreement) the same proportion of the aggregate amount that is agreed or finally determined that the Tram Supplier and Tram Maintainer would have been liable to pay to each of them in respect of such claims under the Tram Agreements and the Tram Interface Agreement but for the application of any agreed limitation on the Tram Supplier and Tram Maintainer's liability. Where it is agreed or determined prior to the Cut Off Date that tie has (or would have but

for the application of Clause 12.4) any liability to the Infraco arising from a breach of Clause 12.1 or Compensation Event (g) and (h) and that, but for the application of any limitation on liability under the Tram Agreements, the Tram Supplier or Tram Maintainer has or would have a corresponding liability to CEC under the Tram Agreements, the liability of tie to Infraco shall be deemed to be a liability of the Tram Supplier and/or Tram Maintainer to Infraco for the purposes of this Clause.

12.6 Subject to ~~the provisions of the Tram Supply Agreement, the Infraco shall use reasonable endeavours to procure that the Tram Supplier shall supply any additional Trams and/or spare parts and provide any additional services, which are required by tie in respect of the Edinburgh Tram Network and the requirement for any additional supply and/or services shall be a tie Change in accordance with Clause 80 (tie Changes).~~clause 12.8, the Infraco undertakes to tie that it will perform and discharge those obligations of the Client under the Tram Agreements that are required to allow the Tram Supplier and Tram Maintainer to perform and discharge its obligations in relation to Tram Supplier Integration.

12.7 ~~Within 5 Business Days of becoming aware that the Tram Supplier's continuing defective performance under the Tram Supply Agreement entitles, or is likely to entitle, the Infraco to serve a termination notice pursuant to the Tram Supply Agreement or entitles or is likely to entitle tie to serve a termination notice pursuant to this Agreement, the Infraco shall notify tie, such notification to include:~~Subject to the other provisions of this Clause 12, tie shall procure that CEC at all times acts reasonably in issuing instructions and requests (including those requested by Infraco) under the Tram Agreements for the purpose of facilitating the performance by Infraco of its obligations under this Agreement. In addition, tie agrees to procure that CEC appoints the Infraco as the Client's Representative under the Tram Agreements in respect of those functions to be agreed by the Parties.

~~12.7.1 a statement that the Infraco has, or is likely to have, an entitlement to serve a termination notice on the Tram Supplier pursuant to the Tram Supply Agreement;~~

~~12.7.2 the basis for and an explanation of the circumstances justifying such entitlement to serve the termination notice;~~

~~12.7.3 the actions, if any, that the Infraco has been able to take to rectify the Tram Supplier's defective performance;~~

~~12.7.4 the Infraco's proposal to deliver the Infraco Works with an alternative Tram Supplier or methodology for procuring an alternative Tram Supplier; and~~

~~12.7.5 any obligations Infraco is prevented from or restricted in performing.~~

12.8 ~~tie shall review the Infraco's notification and within 5 Business Days tie shall respond to the Infraco stating that:~~ **Without prejudice to Clause 12.10, nothing in clause 12.6:**

12.8.1 ~~it consents to the termination of the Tram Supply Agreement; or~~ **will require the Infraco to make any payments to the Tram Supplier and Tram Maintainer;**

12.8.2 ~~it wishes to agree a comprehensive plan which will have as its objective sustainable rectification (measured against agreed programme and production criteria over a set period) of the Tram Supplier's poor performance (the "Tram Supply Rectification Plan").~~ **except in accordance with clause 12.9, authorises the Infraco to make or agree to any variation to the Tram Agreements; or**

12.8.3 authorises the Infraco to agree on behalf of tie or CEC to make any payments or incur any liability under either of the Tram Agreements except to the extent that the Infraco confirms in writing to tie and CEC in advance of any such agreement that such payment or liability will be recoverable by tie and/or CEC as appropriate from the Infraco under clause 12.10.

12.9 If ~~tie notifies the Infraco of its intention to agree a Tram Supply Rectification Plan in accordance with Clause 12.8 above, the Parties, in such consultation with the Tram Supplier as the Parties may agree, shall negotiate in good faith and use their reasonable endeavours to agree the Tram Supply Rectification Plan, which shall set out:~~ **the Infraco becomes aware of the need for a variation to the Tram Supply Obligations or the Tram Maintenance Services for the purpose of enabling the Infraco to perform and discharge its Systems Integration Obligations, the Infraco shall notify tie of such variation in writing. tie shall be obliged to procure the issue of the required Client Change under the Tram Agreements provided;**

12.9.1 ~~the actions required to be taken by each of tie, the Infraco and the Tram Supplier in order to achieve the sustainable rectification (measured against an agreed revised programme and production criteria over a set~~

~~period) of the Tram Supplier's poor performance;~~such variation does not require any alteration to the Employers Requirements; and

12.9.2 ~~any specific alternative terms or modifications to the terms of the Tram Supply Agreement;~~CEC is permitted to issue the required Client Change in accordance with the terms of the Tram Agreements.

~~12.9.3 any specific alternative terms or modifications to the terms of this Agreement;~~

~~such that neither Infraco or the Tram Supplier will be in breach of the Tram Supply Agreement or this Agreement if the Tram Supplier performs at that level.~~

12.10 ~~If the Parties cannot agree the Tram Supply Rectification Plan within 60 Business Days of tie notifying the Infraco under Clause 12.9, then the Infraco shall be entitled to serve a termination notice on the Tram Supplier.~~The Infraco shall indemnify the Indemnified Parties in respect of:

12.10.1 (a) all amounts payable by CEC to the Tram Supplier and/or Tram Maintainer by operation of Clause 20 of the Tram Supply Agreement and/or Clause 16 of the Tram Maintenance Agreement; and

(b) any amounts payable to the Operator and any other increased costs or liabilities incurred by tie or CEC,

as a result of or in connection with any Client Change to the Tram Agreements instructed by CEC in accordance with clause 12.9 provided, in the case of paragraph (b) above, that such costs are ascertained at the time of such variation; and

12.10.2 any payment to be made and/or liability, cost or expense incurred by any of the Indemnified Parties to the Tram Supplier and/or Tram Maintainer under either of the Tram Agreements as a result of any breach by Infraco of the obligations referred to in clause 12.6.

12.11 ~~If tie notifies Infraco that it consents to the termination of the Tram Supply Agreement the Parties shall meet and agree in good faith a plan (the "Tram Supply Termination Plan") for the procurement of a replacement Tram Supplier, including agreement in relation to:~~wishes to instruct a tie Change under the Infraco Contract, the Infraco will not be obliged to agree to implement such a tie Change unless a corresponding Client Change is instructed and agreed under the Tram Agreements where such Client Change is required so as to allow the Infraco to satisfy its obligations under Clause 12.2.2.

For the avoidance of doubt, the tie Change shall take account of any consequential impact on the Infraco Works arising from the related Client Change.

~~12.11.1 the timing of termination of the Tram Supply Agreement;~~

~~12.11.2 interim arrangements for the provision of services provided under the Tram Supply Agreement whilst a replacement Tram Supplier is being procured;~~

~~12.11.3 changes (if any) to be made to the Tram Supply Agreement for the re-procurement and consequential amendments to this Agreement as a result;~~

~~12.11.4 actions of tie and Infraco required to complete the procurement and the programme for implementing the procurement.~~

12.12 ~~If tie notifies the Infraco that it wishes to agree a Tram Supply Rectification Plan or that it consents to the termination of the Tram Supply Agreement, provided that the Infraco is not in breach of any of its obligations regarding payment for the supply of Trams, the Infraco's obligations (including the application of liquidated damages for delay in the supply of Trams or as a result of a delay in the supply of Trams) specifically relating to the supply of Trams under this Agreement or which Infraco may be prevented in performing as a result of the Tram Supplier's failure to perform under the Tram Supply Agreement shall be suspended from the date Infraco serves a notice under Clause 12.7 until the Tram Supply Rectification Plan is agreed or a replacement Tram Supplier is appointed. Negotiation and implementation of a Tram Supply Rectification Plan or Tram Supply Termination Plan, shall be a tie Change under Clause 80 (tie Changes).~~ tie undertakes to the Infraco to procure that CEC shall not instruct a Client Change or otherwise agree to any amendment or waiver to the Tram Agreements without complying with the following procedure:

12.12.1 tie shall give notice to the Infraco of such a Client Change or other amendment or waiver under the Tram Agreements and, where such Client Change will adversely affect Infraco's performance of its obligations under the Infraco Contract, tie shall issue a corresponding tie Change under the Infraco Contract; and

12.12.2 the provisions of Clause 80 shall apply in respect of such a Client Change.

For the avoidance of doubt:

- (a) tie shall procure that CEC shall not instruct a Client Change or agree to any amendments to the Tram Agreements if the Infraco is authorised to refuse to implement the related tie Change under the Infraco Contract on any of the grounds set out in Clause 80.12; and
- (b) nothing in this Agreement shall operate to prevent or restrict CEC from terminating either or both of the Tram Agreements provided that the provisions of this clause 12.12 shall apply in respect of any changes to the terms of the Tram Agreements that CEC proposes to enter into with any replacement for the Tram Supplier and Tram Maintainer,

12.13 ~~Amendments to this agreement agreed as part of a Tram Supply Rectification Plan or Tram Supply Termination Plan will be a Mandatory tie Change under this Agreement.~~ tie and the Infraco shall meet not less than monthly prior to the System Acceptance Date to discuss the progress of the Tram Supplier Integration and shall notify each other of any breaches of which either party is aware in respect of the Tram Works and the Services. tie shall also notify the Infraco at such meeting of any notices that CEC has received from the Tram Supplier and Tram Maintainer alerting CEC to any Tram Supply or Tram Maintenance Changes in Law (as defined in the Tram Agreements).

12.14 ~~Under no circumstances shall the Infraco serve any notice to terminate the Tram Supply Agreement until such time as either:~~ Nothing in this Agreement or the Tram Interface Agreement obliges tie or CEC to bring or make any claims on behalf of the Infraco against the Tram Supplier and Tram Maintainer under or in connection with the Tram Agreements. In addition, the Infraco has no right of set off or counterclaim against tie or CEC arising from any performance or non performance by the Tram Supplier and Tram Maintainer of its obligations under the Tram Interface Agreement.

~~12.14.1 tie has notified Infraco of its approval to such termination pursuant to Clause 12.8 above; or~~

~~12.14.2 the Parties have not been able to agree the Tram Supply Rectification Plan pursuant to Clause 12.9 above.~~

12.15 ~~If required by tie, on termination or expiry of this Agreement, the Infraco shall novate, assign or otherwise transfer the whole or any part of the Tram Supply Agreement, as directed by tie,~~ to: If the Tram Supplier and/or the Tram Maintainer breaches any of its obligations in relation to either or both of the Tram Agreements (including its obligations in relation to Tram Supplier Integration) which frustrates or renders it impossible for the Infraco to perform its obligations referred to in Clause 12.2, the Infraco shall be entitled to notify tie that it considers such breach by the

Tram Supplier and/or Tram Maintainer to be sufficient to justify service by CEC of a termination notice on the Tram Supplier pursuant to Clause 55.1 of the Tram Supply Agreement and/or termination notice on the Tram Maintainer pursuant to Clause 32.1 of the Tram Maintenance Agreement. Any notification given by the Infraco to tie under this Clause shall provide an explanation of the circumstances justifying the service of a termination notice.

~~12.15.1 tie, the Operator, the Scottish Ministers, TEL, CEC, Transport Scotland or their successors with no worse financial standing than that of tie; or~~

~~12.15.2 to any other person whose obligations under the Tram Supply Agreement are unconditionally and irrevocably guaranteed by a person falling within Clause 12.15.1.~~

~~In the case of such a novation or assignation, the Infraco shall be entitled, and tie shall assist the Infraco, to obtain a collateral warranty from the Tram Supplier.~~

~~13. NOVATION OF THE TRAM MAINTENANCE AGREEMENT TO THE INFRACO~~

~~13.1 tie intends to enter into or has entered into a tram maintenance agreement with the Tram Maintainer. It is one of the conditions precedent to this Agreement coming into full effect that the Infraco shall enter into and execute a novation agreement with tie, and the Tram Maintainer in the form set out in Schedule Part 20 (Tram Maintenance Novation Agreement). tie shall execute (if not already executed), and shall procure the execution by the Tram Maintainer (if not already executed) of such novation agreement and the Tram Maintenance Agreement.~~

~~13.2 On the last date of execution of the novation agreement referred to in Clause 13.1, tie and the Infraco shall, and the Infraco shall procure that the Tram Maintainer shall, execute a collateral warranty agreement in favour of tie in the form contained in Schedule Part 21 (Tram Maintenance Collateral Warranty in favour of tie) and the Infraco shall provide the same as executed to tie on that date.~~

~~13.3 The Infraco shall procure that the Tram Maintainer shall carry out and complete the Tram Maintenance Services in accordance with the Tram Maintenance Agreement.~~

~~13.4 The Infraco shall carry out all required management activities in order to manage the performance of the Tram Maintenance Services and, subject to any express limitations in this Agreement, the Infraco shall be wholly liable for the performance of the Tram Maintenance Services.~~

- ~~13.5 The Infraco shall not amend the Tram Maintenance Agreement (including the Tram Maintenance Services) without the prior written approval of tie (such approval not to be unreasonably withheld or delayed) provided that tie's consent shall be deemed to have been given in relation to any amendment to the Tram Maintenance Agreement (including the Tram Maintenance Services) which is directly required as a result of any Permitted Variation in so far as such amendment has been raised by the Infraco as part of the process of approving such Permitted Variation in accordance with this Agreement.~~
- ~~13.6 As reasonably required by tie, the Infraco shall procure the attendance of the Tram Maintainer at any meeting in relation to the Infraco Works.~~
- ~~13.7 Subject to the provisions of the Tram Maintenance Agreement, the Infraco shall use reasonable endeavours to procure that the Tram Maintainer shall supply any additional spare parts and/or perform any additional services which are required by tie in respect of the Edinburgh Tram Network and the requirement for any additional supply and/or services shall be a tie Change in accordance with Clause 80 (tie Changes).~~
- ~~13.8 Within 5 Business Days of becoming aware that the Tram Maintainer's continuing defective performance under the Tram Maintenance Agreement entitles, or is likely to entitle, the Infraco to serve a termination notice pursuant to the Tram Maintenance Agreement or entitles or is likely to entitle tie to serve a termination notice pursuant to this Agreement, the Infraco shall notify tie, such notification to include:~~
- ~~13.8.1 a statement that the Infraco has, or is likely to have, an entitlement to serve a termination notice on the Tram Maintainer pursuant to the Tram Maintenance Agreement;~~
- ~~13.8.2 the basis for and an explanation of the circumstances justifying such entitlement to serve the termination notice;~~
- ~~13.8.3 the actions, if any, that the Infraco has been able to take to rectify the Tram Maintainer's defective performance;~~
- ~~13.8.4 the Infraco's proposal to deliver the Infraco Works with an alternative Tram Maintainer or methodology for procuring an alternative Tram Maintainer; and~~
- ~~13.8.5 any obligations Infraco is prevented from or restricted in performing.~~

~~12.16~~~~13.9~~ **tie** shall review the Infraco's notification pursuant to Clause 12.15 and within 520 Business Days **tie** shall respond to the Infraco stating that:

~~12.16.1~~ ~~13.9.1~~ it ~~consents to~~ agrees with the Infraco's assessment in the notification and shall procure the termination by CEC of the Tram Supply Agreement and/or Tram Maintenance Agreement; ~~or~~

~~12.16.2~~ ~~13.9.2~~ it wishes to agree with the Tram Supplier and/or Tram Maintainer a comprehensive plan which will have as its objective sustainable rectification (measured against agreed programme and production criteria over a set period) of the Tram Supplier's or Tram Maintainer's poor performance (the "~~Tram Maintenance Rectification Plan~~");

~~13.10~~ If ~~tie~~ notifies the Infraco of its intention to agree a ~~Tram Maintenance Rectification Plan~~ in accordance with ~~Clause 13.9~~ above, the Parties, in such consultation with the ~~Tram Maintainer~~ as the Parties may agree, shall negotiate in good faith and use their reasonable endeavours to agree the ~~Tram Maintenance Rectification Plan~~, which shall set out:

~~13.10.1~~ the actions required to be taken by each of ~~tie~~, the Infraco and the ~~Tram Maintainer~~ in order to achieve the sustainable rectification (measured against an agreed revised programme and production criteria over a set period) of the ~~Tram Maintainer's~~ poor performance;

~~13.10.2~~ any specific alternative terms or modifications to the terms of the ~~Tram Maintenance Agreement~~;

~~13.10.3~~ any specific alternative terms or modifications to the terms of this Agreement;

such that neither Infraco or the ~~Tram Maintainer~~ will be in breach of the ~~Tram Maintenance Agreement~~ or this Agreement if the ~~Tram Maintainer~~ performs at that level.

~~13.11~~ If the Parties cannot agree the ~~Tram Maintenance Rectification Plan~~ within 60 Business Days of ~~tie~~ notifying the Infraco under ~~Clause 13.9~~, then the Infraco shall be entitled to serve a termination notice on the ~~Tram Maintainer~~.

~~13.12~~ If ~~tie~~ notifies Infraco that it consents to the termination of the ~~Tram Maintenance Agreement~~ the Parties shall meet and agree in good faith a plan (the "~~Tram Maintenance Termination Plan~~") for the procurement of a replacement ~~Tram Maintainer~~, including agreement in relation to:

- ~~13.12.1 the timing of termination of the Tram Maintenance Agreement;~~
- ~~13.12.2 interim arrangements for the provision of services provided under the Tram Maintenance Agreement whilst a replacement Tram Maintainer is being procured;~~
- ~~13.12.3 changes (if any) to be made to the Tram Maintenance Agreement for the re-procurement and consequential amendments to this Agreement as a result; and~~
- ~~13.12.4 actions of tie and Infraco required to complete the procurement and the programme for implementing the procurement.~~

~~13.13~~

12.16.3 it disagrees with the Infraco's assessment in the notification that such breach is sufficient to justify service of a termination notice; or

12.16.4 in the case of a notice served pursuant to Clause 12.15 relating to a breach or breaches by the Tram Supplier and/or Tram Maintainer in relation to Tram Supplier Integration prior to the System Acceptance Date, that tie, acting reasonably having regard to its statutory and common law duties as a public body, declines to take any further action in respect of the Notified Breach,

12.17 If tie notifies the Infraco that it wishes to agree a Tram ~~Maintenance Rectification Plan or that it consents to the termination of the Tram Maintenance Agreement,~~ provided that the Infraco is not in breach of any of its obligations regarding payment for the maintenance of Trams, the Infraco's obligations (including the application of liquidated damages for delay in the maintenance of Trams or as a result of a delay in the maintenance of Trams) Rectification Plan pursuant to Clause 12.16.2 or that it consents to the termination of a Tram Supply Agreement and/or the Tram Maintenance Agreement pursuant to Clause 12.16.1, the Infraco's obligations specifically relating to ~~the maintenance of Trams under this Agreement or which Infraco may be prevented in performing as a result of the Tram Maintainer's failure to perform under the Tram Maintenance~~ Tram Supplier Integration under this Agreement and the Tram Interface Agreement shall be suspended from the date the Infraco serves a notice under Clause ~~13.8 until the Tram Maintenance Rectification Plan is agreed or a replacement~~ 12.15 until either the Tram Rectification Plan has been implemented to the extent necessary to allow the Infraco to continue to perform such obligations (in the case of a notice under Clause 12.16.2) or a replacement Tram Supplier and/or

Tram Maintainer is appointed. ~~Negotiation and implementation of a Tram Maintenance Rectification Plan or Tram Maintenance Termination Plan, shall be a tie Change under Clause 80 (tie Changes).~~

~~13.14 Amendments to this agreement agreed as part of a Tram Maintenance Rectification Plan or Tram Maintenance Termination Plan will be a Mandatory tie Change under this Agreement, (in the case of a notice under Clause 12.16.1). For the avoidance of doubt, Clause 87 shall not apply in respect of any such suspension,~~

12.18 If tie notifies the Infraco in accordance with Clause 12.16.3, unless the Infraco agrees to withdraw its notice given under Clause 12.15, the matter shall be referred for determination in accordance with the Dispute Resolution Procedure. If it is finally determined in accordance with the Dispute Resolution Procedure that the breach notified by the Infraco in accordance with Clause 12.15 (the "Notified Breach") justifies termination of the Tram Supply Agreement and/or Tram Maintenance Agreement, tie shall, within 10 Business Days of such determination, issue a notification in accordance with either Clause 12.16.1 or 12.16.2 and Clause 12.17 shall apply in respect of the Infraco's obligation under this Agreement.

12.19 Where:

12.19.1 tie has served notice in accordance with Clause 12.16.3;

12.19.2 ~~13.15 Under no circumstances shall the Infraco serve any notice~~ CEC purports to terminate the Tram Supply Agreement and/or Tram Maintenance Agreement ~~until such time as either:~~ as a result of the Notified Breach by operation of Clause 12.16; and

~~13.15.1 tie has notified Infraco of its approval to such termination pursuant to Clause 13.9 above; or~~

~~13.15.2 the Parties have not been able to agree the Tram Maintenance Rectification Plan pursuant to Clause 13.10 above.~~

~~13.16 If required by tie, on termination or expiry of this Agreement, the Infraco shall novate, assign or otherwise transfer the whole or any part of the Tram Maintenance Agreement as directed by tie, to:~~

~~13.16.1 tie, the Operator, the Scottish Ministers, TEL, CEC, Transport Scotland or their successors with no worse financial standing than that of tie; or~~

~~13.16.2 to any other person whose obligations under the Tram Maintenance Agreement are unconditionally and irrevocably guaranteed by a person falling within Clause 13.16.1.~~

~~In the case of such a novation or assignation, the Infraco shall be entitled, and tie shall assist the Infraco, to obtain a collateral warranty from the SDS Provider.~~

12.19.3 it is subsequently determined that the Tram Supply Agreement and/or the Tram Maintenance Agreement has been wrongly terminated by tie,

the Infraco shall indemnify the Indemnified Parties from and against all liabilities, costs and expenses incurred by any of them as a result of such wrongful termination.

12.20 If tie notifies the Infraco in accordance with Clause 12.16.4, tie shall have no further obligations in respect of the Notified Breach and the Infraco shall seek such redress against the Tram Supplier and/or the Tram Maintainer as it wishes to pursue in accordance with the terms of the Tram Interface Agreement.

12.21 This clause shall take precedence over any other provision of this Agreement which is inconsistent with this Clause.

13. NOT USED

14. TIE'S OBLIGATIONS

tie shall carry out and complete or procure the carrying out and completion of the works set out in Schedule Part 26 (*tie Obligations*) (by no later than the date Infraco requires such works to be completed to allow it to comply with the Programme and achieve the Sectional Completion Dates by the Planned Sectional Completion Dates). ~~Should tie fail to carry out these obligations in accordance with the Programme, such failure shall be deemed to be a Notified Departure.~~

PART 4 - INTERFACES

15. LOCAL CODES OF CONSTRUCTION PRACTICE

15.1 In the event that tie requires to establish a Local Code of Construction Practice, the Infraco shall:

15.1.1 provide tie with all reasonable assistance required by tie in establishing such Local Code of Construction Practice;

15.1.2 provide **tie** with all reasonable assistance required by **tie** in the identification and settlement of any issues that such party requires **tie** to take account of in such Local Code of Construction Practice and

15.1.3 provide **tie** with method statements for the execution of the Infraco Works that are relevant to the establishment of such Local Code of Construction Practice.

15.2 If compliance with Clause 15.1.1 or 15.1.2 or implementation of the Infraco Works in accordance with any Local Code of Construction Practice, causes any delay in the completion of the Infraco Works, or disruption to the Infraco's construction methodology or the Infraco to incur additional cost, such compliance or implementation shall be a Compensation Event to which Clause 65 applies to the extent such delay or disruption applies to the Off Street Works.

15.3 If, in implementing the Infraco Works under any such Local Code of Construction Practice, the Infraco's performance against the Programme, its productivity, or its construction methodology has improved then this shall be (i) a **tie** Change under Clause 80 (**tie** Changes) to the extent it applies to the Off Street Works and (ii) a Pricing Assumption Variation to the extent it applies to the On Street Works.

16. INTERFACE WITH NETWORK RAIL

16.1A The Infraco acknowledges that **tie** will enter into the Asset Protection Agreement with Network Rail in relation to ~~the Edinburgh Tram Network~~ Initial Phase 1a.

16.1B The Infraco undertakes to comply with its obligations in relation to Clauses 16.1 to 16.73 (inclusive).

16.1 For the purposes of this Clause 16, the following expressions shall, unless the context otherwise requires, have the following meanings:

"APA Commencement Date" means the last date of execution of the Asset Protection Agreement;

"APA Consent" means all approvals, permissions, consents, licences, certificates, registrations and authorisations (whether statutory or otherwise) which are required from time to time for the purposes of carrying out the APA Works, including such required in order to comply with any law and, for the avoidance of doubt, any consent required in respect of any Regulated Change shall be a **tie** Consent whilst any consent required from any third party to enter and remain upon that third party's land shall be dealt with under Clause 18 (*Land Consents, Permanent Land and Temporary Sites*);

"APA Deliverable" means any Deliverable relating to the design and construction of the APA Works;

"APA Works Programme" means the programme for the carrying out and completion of the APA Works;

"APA Works" means that part of the Infraco Works which are included in "the Works" as defined in the Asset Protection Agreement;

"Bridge Agreement(s)" means the respective agreements to be entered into between Network Rail and CEC and/or tie relating to the maintenance and responsibility for the bridges carrying ~~the Edinburgh Tram Network~~ Phase 1a over the Network at Carrick Knowe and Edinburgh Park;

"Contractor's Assurance Case" has the meaning given to that term in standard RT/LS/P/016;

"Direct Costs" means direct costs reasonably incurred by Network Rail in relation to the ~~Edinburgh Tram Network~~ Phase 1a which, for the avoidance of doubt, excludes any loss of production, loss of profit, loss of revenue, loss of contracts or any indirect or consequential loss;

"Group Standards" means:

- (a) technical standards to which railway assets or equipment used on or as part of the Network must conform; and
- (b) operating procedures with which the operators of railway assets must comply,

in each case as issued by the Rail Safety and Standards Board Limited and authorised pursuant to the Railway Group Standard Code;

"Interfacing Project" means the Airdrie-Bathgate Railway and Linked Improvements Project, the Edinburgh to Glasgow Electrification Project and any Edinburgh to Glasgow Route Enhancements or maintenance and renewals activities on the Network adjacent to the areas of the APA Works notified by Network Rail to tie on or before the date of the Asset Protection Agreement;

"Network" means the railway network of which Network Rail is the facility owner (as defined in section 17(6) of the Act);

"Network Licence" means the licence to operate the Network granted to Network Rail pursuant to section 8 of the Act;

"**Network Operation Issue**" shall have the meaning ascribed to it in the Asset Protection Agreement;

"**Network Rail Standard**" means a standards document (or the equivalent of such document) issued by Network Rail for its own use as amended by Network Rail from time to time in relation to the Network as a whole which applies to the performance of the APA Works;

"**Possession**" means planned safety arrangements which control or prevent the normal movement of rail traffic on the Network between defined locations and for a pre-defined period (including any speed restrictions);

"**Railway**" means the Network and Network Rail's operation of it;

"**Regulated Change**" shall have the meaning ascribed to it in the Asset Protection Agreement;

"**Sector**" means any one of the sectors A to N forming part of the APA Works and identified in Schedule 1 (*Functional Specification*) of the Asset Protection Agreement;

"**Stage Gate Four**" means the approval stage reached following Network Rail's Guide to Railway Investment Projects when approval in principal is required, as may be amended from time to time;

"**Standards**" means Group Standards, Network Rail Standards and any equivalent standards or any standards replacing or superseding any of them;

"**Taking Into Use**" means the act of taking into use of the APA Works or part thereof, and the taking out of use of other assets by Network Rail on the basis that Network Rail is satisfied that the assets in question have been inspected, tested and commissioned, as applicable, in accordance with the requirements set out in the Asset Protection Agreement and "Take Into Use" and "Taken Into Use" shall be construed accordingly;

"**Works Commencement Date**" means the latest of:

- (a) the APA Commencement Date;
- (b) the date upon which all APA Consents (subject to any waivers agreed between the **tie** and Network Rail) have been obtained;
- (c) the date of completion of any preliminary works required to be carried out pursuant to Clause 3 of the Asset Protection Agreement;

- (d) the date on which all the requirements of Clauses 7.4 (other than Clauses 7.4.3 and 7.4.6 to 7.4.9) and 9.2.1 of the Asset Protection Agreement have been satisfied; and
- (e) the date of receipt of evidence confirming that CEC has taken out or has procured that **tie** has taken out the insurances required pursuant to the Asset Protection Agreement

and, for the purposes of paragraph (b) above, the requirement to obtain APA Consents in respect of the Regulated Change process is waived to the extent which will enable works commencement in respect of those Sectors which do not form part of the subject matter of the Regulated Change. Such APA Consents must be obtained prior to works commencement in respect of those Sectors which are the subject matter of the Regulated Change;

- 16.2 The Infraco acknowledges that, in relation to the APA Works, any consent, approval or agreement which is sought by or from **tie** or Network Rail shall be construed as requiring that such consent, approval or agreement shall not be unreasonably delayed or withheld. The Infraco further acknowledges that Network Rail retains all discretion in relation to safety issues, and that nothing in the Asset Protection Agreement shall require Network Rail to give or procure the giving of any consent or approvals which are contrary to safety or the efficient operation of the railway or which would put Network Rail in breach of the law, the Network Licence or any Standard (subject to Clause 16.20). Where the Infraco has acted in compliance with the terms of the Infraco Contract, any such exercise of discretion by Network Rail which causes delay to the APA Works shall be a Compensation Event.
- 16.3 For the avoidance of doubt, where an APA Consent requires that a new agreement (arising after the Effective Date) is entered into with a third party, a **tie** Change will be required where the obligations under such agreement are to be treated as Third Party Obligations;
- 16.4 The Infraco shall provide **tie** with all reasonable assistance (which, for the avoidance of doubt, shall not include the provision of any undertakings, guarantees, collateral warranties (save as otherwise required under this Agreement) or indemnities) and such documentation as may be reasonably required by **tie** in relation to any Regulated Change process in respect of the ~~Edinburgh Tram Network~~ Initial Phase 1a.
- 16.5 Prior to the commencement of the APA Works, the Infraco shall take all measures and carry out such protective works as may be necessary to protect the safety and continuity of the Railway or to protect any property belonging to Network Rail against instability or physical damage from anticipated ground movement due to the construction of the APA Works, or to prevent, address, alleviate or comply with any Network Operation Issue.
- 16.6 The Infraco shall produce construction methodology for and undertake measures during the execution of the Infraco Works which will minimise ground movement so far as is

reasonably practicable and avoid ground movement which may be anticipated to cause physical damage (other than damage of a superficial nature) to property of Network Rail. If the Infraco anticipates that any Infraco Works, including ground consolidation works or soil movement is likely to cause such damage, it shall notify **tie** accordingly. The Infraco shall consult with **tie** in respect of the measures necessary to be taken and shall implement such required measures, such implementation to be at the cost of the Infraco.

16.7 The Infraco acknowledges that Network Rail may, following any safety incident in respect of the railway, take immediate action to rectify the safety issue. The Infraco shall not impede or interrupt Network Rail from undertaking such actions where such actions are in accordance with the Asset Protection Agreement. The Infraco shall immediately notify **tie** of any Network Rail proposal, action, or attempt to interrupt the APA Works or take any such action.

16.8 Subject to Clauses 16.72, 16.73, 77.2, 77.3, 77.7 and 77.8, the Infraco shall reimburse **tie** in respect of any losses reasonably incurred as a result of the Infraco failing to adhere to the requirements of Clauses 16.4 to 16.6.

16.9 The Infraco acknowledges that Network Rail has undertaken to **tie** to provide reasonable access to land in which Network Rail has an interest prior to the APA Works Commencement Date solely for the purposes of:

16.9.1 carrying out site surveys relating to the works and any protective works required under Clause 16.4 to 16.6 above;

16.9.2 carrying out a conditions and defects survey in respect of those parts of Network Rail property which are specified by **tie**; and

16.9.3 storage of materials on those areas notified by **tie** to the Infraco.

16.10 The Infraco shall notify **tie** of any plant equipment or materials which are intended to be stored on Network Rail's land for the purposes of **tie** obtaining Network Rail's written approval to such storage. Any such storage shall be at the sole risk of the Infraco and the Infraco shall take such security measures as **tie** considers reasonably necessary to prevent such materials being used to vandalise the Railway.

16.11 Network Rail shall (save as referred to in this clause 16.11) at all times have unlimited access to the land in which it has an interest for the purposes of monitoring the APA Works or addressing Network Operation Issues. The Infraco and **tie** acknowledge that Network Rail's rights of access in terms of the Asset Protection Agreement are subject to Network Rail using reasonable endeavours not to interfere, hinder or obstruct the carrying out of the APA Works by the Infraco, and to complying with any relevant safety requirements, rules or regulations. The Infraco shall immediately notify **tie** where it considers that Network Rail is failing to adhere to any of these obligations and, upon such notification, **tie**