

65.2A1.3 what further information **tie** requires to enable evaluation (or its completion) of any element of the Infraco's Compensation Event Notice.

65.2A2 In the event that **tie** (acting reasonably) requires further information from Infraco pursuant to Clause 65.2A1.3 then Clauses 65.2A1.2 shall apply and **tie** shall complete its review of the further information and respond within 20 days of its receipt.

65.3 In the event that the Infraco has complied with its obligations under Clause 65.2.2, then (as applicable in the circumstances):

65.3.1 the Planned Service Commencement Date and/or the relevant Planned Sectional Completion Dates shall be postponed by such time; and/or

65.3.2 Infraco shall be given such relief from performance of its obligations under this Agreement

as shall be reasonable for such a Compensation Event , taking into account the likely effect of delay and on Infraco's ability to perform its obligations under this Agreement and where appropriate the Programme shall be revised by the Infraco in accordance with Clauses 60.2 to 60.5; and/or

65.3.3 the Infraco shall be paid the amount of any direct and demonstrable additional cost as may be reasonable in the circumstances of the Compensation Event (as agreed by the Parties or determined pursuant to the Dispute Resolution Procedure) , such payment to be made through the operation of Clause 67 (*Application for ~~Milestone Payment~~*) or Clause 68 (Payment in Respect of Maintenance Services) as appropriate and in relation to that proportion of the amount to which the Infraco is entitled which relates to additional costs expended in earlier Reporting Periods, payment shall be included in the next Application for ~~Milestone~~ Payment following **tie's** assessment in relation to the Infraco's entitlement to extension of time, additional costs and relief pursuant to Clause 65.2A1.2;

65.4 In the event that information required by Clause 64.2 is provided after the dates referred to in that Clause, then the Infraco will not be entitled to any relief in respect of or during the period for which the information is delayed.

65.5 The Infraco shall notify **tie** if at any time it receives or becomes aware of any further information relating to the Compensation Event, giving details of that information to the

extent that such information is new or renders information previously submitted materially inaccurate or misleading.

65.6 If, following **tie's** review and notification pursuant to Clauses 65.2A1 and 65.2A2, the Infraco disagrees with the notification that no Compensation Event has occurred, either Party may refer the matter for determination in accordance with the Dispute Resolution Procedure.

65.7 If, following **tie's** review and notification pursuant to Clauses 65.2A1 and 65.2A2, the Parties have not agreed the extent of the extension of time, relief or the additional costs assessed and notified by **tie** within 10 Business Days of notification by **tie** of its assessment that a Compensation Event has occurred, either Party may refer the matter for determination in accordance with the Dispute Resolution Procedure.

65.8 **tie** shall, in assessing any delay or extension of time or costs or relief for the purpose of this Clause 65 (*Compensation Events*)

65.8.1 not take into account any event or cause of delay or costs which is caused by any negligence, default of breach of contract or breach of statutory duty of the Infraco or any of the Infraco Parties; and;

65.8.2 take into account an event or cause of delay or costs only if and to the extent that the Infraco establishes to the satisfaction of **tie** that the Infraco has used its reasonable endeavours to adjust the order and sequence in which the Infraco proposes to execute the Infraco Works in such a manner as to minimise the effects of the delay in, or if possible to avoid altogether any delay in, the progress of the Infraco Works and mitigate the costs.

65.9 The Infraco shall not be entitled to and shall be deemed to have irrevocably waived any entitlement to any extension of time and/or additional costs in respect of any failure by the Infraco to:

65.9.1 ~~65.10.1~~ identify any long lead time works and/or order any long lead time materials; or

65.9.2 ~~65.10.2~~ identify any enabling works which are required in order to commence any part of the Infraco Works; or

65.9.3 ~~65.10.3~~ subject to Clause 19 manage the required interface with CEC in so far as this forms part of the Infraco Works; or

65.9.4 ~~65.10.4~~ subject to Clause 19 manage any required interface with any Approval Body and/or third party where consent or approval for the Infraco Works is required at any stage of such works; or

65.9.5 ~~65.10.5~~ identify any instructions which are required from **tie** in order to progress the Infraco Works in accordance with the Programme,

provided that following the occurrence of a Compensation Event nothing in this Clause ~~65.10~~**65.9** shall prevent any long lead times, enabling works, required interfaces with CEC, any Approval Body and/or third party, or instructions which are required from **tie** from being taken into account when considering extensions of time and/or additional costs in accordance with Clause 65 (*Compensation Events*).

65.10 If the Infraco Works are delayed in circumstances other than those entitling the Infraco to an extension of time or relief as set out in this Clause 65 (*Compensation Events*), the Infraco shall inform **tie** at the earliest opportunity and shall give an estimate of the likely effect upon the Programme. In such circumstances, the Infraco at its own expense shall take such acceleration measures as are necessary to achieve the requirements of the Programme.

65.11 Notwithstanding the occurrence of a Compensation Event, the Infraco shall continue to carry out the Infraco Works unless otherwise agreed in connection with this Clause 65 (*Compensation Events*).

65.12 ~~Where a claim is made under this Clause 65 as a result of the occurrence of a SDS Compensation Event:~~**NOT USED.**

~~65.12.1 Clause 65.2.3.1 shall not apply to steps which might reasonably be expected to have been taken by the SDS Provider;~~

~~65.12.2 if the SDS Compensation Event is Compensation Event (t) there shall be deducted from any additional costs which Infraco is entitled to recover pursuant to Clause 65.2 the amount of liquidated damages recoverable from the SDS Provider pursuant to Clause 27.7 of the SDS Agreement (as amended by the SDS Novation Agreement)~~

65.13 ~~If the SDS Compensation Event is Compensation Event (u), there shall be deducted from any additional costs which Infraco is entitled to recover pursuant to Clause 65.2, the full amount recoverable by Infraco (that is to say up to ten million pounds (£10,000,000) for each and every event) pursuant to the SDS Agreement and specifically Clause 27 (as amended by the SDS Novation Agreement) as a result of the occurrence of such Compensation Event.~~**NOT USED.**

PART 13 - PAYMENT AND TAXATION

66. PAYMENT OF THE CONTRACT PRICE

- 66.1 Subject to the terms of this Agreement, **tie** shall pay the Contract Price to the Infraco for the carrying out and completion of the Infraco Works.
- 66.2 ~~Any application for payments~~ Subject to clause 66.3, any Applications for Payments of sums due in respect of ~~Construction Milestones, Critical Milestones and Tram Milestones and any payment to be made in respect of Construction Milestones, Critical Milestones and Tram Milestones~~ the Contract Price shall be made in accordance with the procedure set out in ~~Clause~~ clause 67 (*Payment in Respect of Applications for ~~Milestone~~ Payments*).
- 66.3 Any application for payments of sums due in respect of the Maintenance Services and any payment to be made in respect of Maintenance Services shall be made in accordance with the procedure set out in Clause 68 (*Payment in Respect of Maintenance Services*).
- 66.4 Until the issue of the Certificate of Service Commencement, any application for payments of sums due in respect of Permitted Variations or other costs or expenses which have been expressly approved by **tie** and/or to which the Infraco is entitled in accordance with this Agreement shall be made in accordance with the procedure set out in Clause 67 (*Payment in Respect of Applications for ~~Milestone~~ MILESTONE Payments*).
- 66.5 Subject to Clause 66.6, after the issue of the Certificate of Service Commencement, any application for payments of sums due in respect of Permitted Variations or other costs or expenses which have been expressly approved by **tie** and/or to which the Infraco is entitled in accordance with this Agreement shall be made in accordance with the procedure set out in Clause 68 (*Payment in Respect of Maintenance Services*).
- 66.6 Promptly following the issue of the Certificate of Service Commencement, **tie** shall prepare and issue a statement of final account which the Parties, acting reasonably, shall use reasonable endeavours to agree within forty five days of its issue. If and to the extent that the Parties, fail to agree the statement of final account within 45 days, either Party will be entitled to refer the matter to the Dispute Resolution Procedure for determination. In the absence of manifest error, and subject to Infraco's right to apply for further payment in accordance with this Clause, the agreed statement of final account shall be conclusive and binding on the Parties as regards all amounts due and paid pursuant to this Agreement in connection with the design, construction, installation, testing, commissioning and maintenance of the Infraco Works up to the date of issue of the Certificate of Service Commencement. The Infraco shall not be entitled to apply for any further payment regarding Infraco Works completed prior to the date of the Certificate of Service Commencement after the date which falls three months after agreement of the statement of final account, ~~except to the extent such further payment relates directly to latent defects~~

~~caused by a deficiency in design produced by the SDS Provider (subject to Infraco's rights and obligations in respect of such latent defects under this Agreement)~~ or relates to payments which are the subject of formal dispute resolution process pursuant to Clause 97 (*Dispute Resolution Procedure*) commenced no later than six months from the date of issue of the statement of final account by **tie**.

67. PAYMENT IN RESPECT OF APPLICATIONS FOR MILESTONE PAYMENTS

Application for Milestone Payments

67.1 The Infraco shall submit each Application for ~~Milestone Payment, and/or an application for payment for~~ Payment, (which may include in addition to the amount claimed in respect of the percentage of each Milestone completed during the relevant Reporting Period and other amounts Infraco is entitled to include in Applications for Payment in respect of the On Street Works as set out in Appendix A of Schedule Part 45 (On Street Works) any other fees, costs and/or expenses in respect of Permitted Variations or other costs or expenses which have been expressly approved or certified by **tie** or the Certifier and/or to which the Infraco is entitled in accordance with this Agreement ~~which are being claimed by the Infraco for the previous Reporting Period,~~ to **tie's** Representative ~~within 3 Business Days following each Reporting Period End Date provided that:~~ and the Certifier not later than 7 days before the Valuation Date.

~~67.1.1 save in the case where the tie Representative has not issued a Construction Milestone Completion Certificate or a Critical Milestone Completion Certificate pursuant to Clause 41 without notifying a reason for not doing so within 10 Business Days of the date on which it is established that the relevant Construction Milestone or Critical Milestone has been achieved pursuant to Clause 41.3, the Infraco shall not submit an Application for Milestone Payment claiming payment in respect of a Construction Milestone or Critical Milestone for which tie's Representative has not issued a Construction Milestone Completion Certificate or a Critical Milestone Completion Certificate;~~

~~67.1.2 subject to Clause 67.1.1, the Infraco may submit an Application for Milestone Payment even if tie's Representative has not issued a Milestone Completion Certificate in respect of every Milestone which has been identified in that Application for Milestone Payment; and~~

~~67.1.3 NOT USED~~

~~67.1.4 subject to Clause 67.1.1, the Infraco may include an application for payment in respect of Milestones or Critical Milestones identified in a previous Application for Milestone Payment.~~

67.2 Each Application for ~~Milestone Payment shall include any amounts properly due to be paid to the SDS Provider pursuant to the SDS Agreement. For the avoidance of doubt, such Applications for Milestone Payments may also include any payments properly due under the SDS Agreement in respect of the deliverables developed by the SDS Provider pursuant to clauses 4.6 and 4.7 of the SDS Novation Agreement.~~ **Payment shall:**

67.3 NOT USED

~~67.4 Each Application for Milestone Payment and/or an application for payment for any other fees, costs and/or expenses in respect of Permitted Variations or other costs or expenses which have been expressly approved by tie and/or to which the Infraco is entitled in accordance with this Agreement shall:~~

67.2.1 ~~67.4.1 set out the Milestones and Critical Milestones progressed in that~~ **set out the percentage completion (free from defects) of each Milestone in respect of which work has been carried out during the relevant** Reporting Period and the ~~Milestone Payment~~ **payment** due in respect of the same;

67.2.2 ~~67.4.2 set out any other agreed adjustments pursuant to a Permitted Variation;~~
and

67.2.3 ~~67.4.3 any other sums due to or from the Infraco under and/or arising out of this Agreement in accordance with its terms;~~ **and**

~~(together with reasonable supporting documentation establishing the basis of such sums being claimed).~~

67.2.4 where Clause 41.3 applies, the calculation of the On Street Works Sum in accordance with Schedule Part 45 (On Street Works), Appendix A Part 2.

67.3 ~~67.5 tie shall procure that tie's Representative shall, subject to any clarifications as are in tie's opinion (acting properly and reasonably) necessary, certify by notice in writing (a "Construction Interim Certificate") to the Infraco~~ **The Parties acknowledge that the Certifier shall issue a Valuation Certificate to tie and Infraco in accordance with Clause 41. The Valuation Certificate shall be issued in accordance with Clause 41 and the Certifier Agreement and shall set out** that part of the sum claimed in the

~~application~~Application for ~~payment~~Payment which ~~is approved by tie~~the Certifier has certified and give reasons why any part of the sum claimed has not been certified and the value of the sums involved no later than ~~5 Business Days~~7 days after the ~~date on which application for payment was received by tie~~Valuation Date. If the Infraco fails to achieve the prescribed Environmental or Health and Safety Key Performance Indicators as set out in Schedule Part 40 (Environmental and Health and Safety Key Performance Indicators) in any Reporting Period, ~~tie~~the Certifier shall make a deduction of 1% (the "EHS KPI Deduction") from the value of the ~~Construction Interim~~sums certified in the Valuation Certificate save where and to the extent that the Infraco demonstrates to ~~tie~~the Certifier's satisfaction that such failure to achieve the prescribed Environmental or Health and Safety Key Performance Indicators did not result from a deficiency in either the Construction Phase Health and Safety Plan or from a failure in its management, in accordance with Good Industry Practice, of health, safety, quality or environmental aspects of the Infraco Works. ~~tie~~The Certifier shall release the EHS KPI Deduction as soon as the Infraco has satisfied ~~tie~~the Certifier that the Construction Phase Health and Safety Plan has been updated and that the cause or causes of the EHS KPI Deduction has or have been rectified.

67.4 ~~67.6~~ The Infraco shall submit a valid VAT invoice to ~~tie~~ and payment will become due to the Infraco on receipt by ~~tie~~ of such valid VAT invoice (the "**Construction Payment Due Date**"). The final date for payment by ~~tie~~ to the Infraco of a valid VAT invoice shall be the date occurring ~~15 Business Days~~14 days after the Valuation Date or the day after the Construction Payment Due Date (which ever is the later).

~~67.7~~ ~~If the Infraco is late in submitting its application for payment to tie by more than 3 Business Days after the required timescales set out in Clause 67.1, payment in respect of any amount certified in a Construction Interim Certificate shall become due to the Infraco on the date of receipt of the relevant valid VAT invoice by tie in respect of the late application for payment, and the final date for payment by tie to the Infraco of such valid VAT invoice shall be the date occurring 15 Business Days after the first date of the Reporting Period following receipt of the valid VAT invoice.~~

67.5 tie shall pay all payments due to the Infraco directly to each Infraco Member in accordance with the payment allocation set out in the relevant invoice.

67.6 The Infraco and tie acknowledge that a maximum of only one Application for Payment may be made under this Clause 67 at the end of each Reporting Period.

67.7 ~~67.8~~ NOT USED

67.8 NOT USED

67.9 ~~The Infraco and tie acknowledge that:~~**NOT USED**

~~67.9.1 a maximum of only one Application for Milestone Payment may be made under this Clause 67.9.1 in any Reporting Period; and~~

~~67.9.2 the amount to be specified for payment in any Construction Interim Certificate in respect of a Milestone or Critical Milestone shall not exceed the amount specified in Schedule Part 5 (Pricing) in relation to the achievement of the Milestone or Critical Milestone to which such Construction Interim Certificate relates.~~

Adjustment

67.10 ~~Without prejudice to Clause 67.5, any Milestone Payments or Critical Milestone Payments set out in Schedule Part 5 (Pricing) shall not be adjusted except by the express written agreement of tie or where there has been a Permitted Variation.~~**NOT USED**

67.11 NOT USED

67.12 NOT USED

67.13 NOT USED

Retention and Condition Precedent to Payment

67.14 If Infraco fails to procure a collateral warranty from a Key Sub-Contractor in accordance with Clause 28.7 (in circumstances where Clause 28.10 do not apply), tie shall be entitled to retain any payments due to be made by it to the Infraco in respect of work executed by such Key Sub-Contractor. This retention shall be released by tie upon the provision of such collateral warranty as requested by tie.

67.15 Following a request from tie in accordance with Clause 74.10, any payment to the Infraco shall (save as after mentioned) be conditional upon the Infraco having provided any collateral warranty requested by tie under Clause 74.7, provided that the inability to provide a collateral warranty pursuant to Clause 74.10 shall not be a reason for withholding payment if tie is satisfied that Infraco has used all reasonable endeavours to provide a collateral warranty as provided for in Clause 74.10.

68. PAYMENT IN RESPECT OF MAINTENANCE SERVICES

Maintenance Services Payment

68.1 Subject to the terms of this Agreement, in respect of the provision of the Maintenance Services, **tie** shall pay to the Infraco the Maintenance Services Payment calculated in accordance with Schedule Part 6 (*Maintenance Payment Regime*) together with any other fees, costs and/or expenses in respect of any repairs made pursuant to Clause 52 (*Maintenance*), adjustments pursuant to and Permitted Variations or any other sums due to the Infraco in terms of this Agreement.

Application for Payments

68.2 The Infraco shall submit each application for payment in respect of Maintenance Services or in respect of any other costs or expenses which have been expressly approved by **tie** and/or to which the Infraco is entitled in accordance with this Agreement for the previous Reporting Period, to **tie's** Representative within 3 Business Days following the Reporting Period End Date and following submission to **tie** of the Service Quality Report pursuant to Clause 56.3.

68.3 Each application for payment shall set out:

68.3.1 the Maintenance Services Payment claimed by the Infraco which has been calculated in accordance with Schedule Part 6 (*Maintenance Payment Regime*);

68.3.2 any repairs made pursuant to Clause 52 (*Maintenance*) including a breakdown of the costs;

68.3.3 any other agreed adjustments pursuant to a Permitted Variation;
and

68.3.4 any other sums due to or from the Infraco under and/or arising out of this Agreement in accordance with its terms

(together with reasonable supporting documentation establishing the basis of such sums being claimed).

68.4 **tie** shall procure that **tie's** Representative shall, subject to any clarifications as are in **tie's** opinion (acting properly and reasonably) necessary, certify by notice in writing (a "**Maintenance Services Interim Certificate**") to the Infraco that part of the sum claimed in the application for payment which is approved by **tie** and give reasons why any part of the sum claimed has not been certified in the Maintenance Services Interim Certificate and the value of the sums involved no later than 5 Business Days after the date on which application for payment was received by **tie** in accordance with Clause 68.2.

68.5 The Infraco shall submit a valid VAT invoice to **tie** and payment will become due to the Infraco upon receipt by **tie** of such valid VAT invoice (the "**Maintenance Payment Due**

Date"). The final date for payment by **tie** to the Infraco of a valid VAT invoice shall be the date occurring 15 Business Days after the Maintenance Payment Due Date.

68.6 If the Infraco is late in submitting its application for payment to **tie** by more than 3 Business Days after the required timescales set out in Clause 68.2, payment in respect of any amount certified in a Maintenance Services Interim Certificate shall become due to the Infraco on the date of receipt of the relevant valid VAT invoice by **tie** in respect of the late application for payment, and the final date for payment by **tie** to the Infraco of such valid VAT invoice shall be the date occurring 15 Business Days after the first date of the Reporting Period following receipt of the valid VAT invoice.

68.7 ~~NOT USED.~~ tie shall pay the Maintenance Services Payment and other payments due to the Infraco directly to each Infraco Member in accordance with payment allocation set out in the relevant invoice.

Adjustment

68.8 Without prejudice to Clause 68.4, any Maintenance Services Payments shall not be adjusted except by the express written agreement of **tie** or where there has been a Permitted Variation.

68.9 NOT USED

68.10 NOT USED

68.11 NOT USED

Retention and Condition Precedent to Payment

68.12 If, Infraco fails to procure a collateral warranty from a Key Sub-Contractor in accordance with Clause 28.7 (in circumstances where Clause 28.10 do not apply), **tie** shall be entitled to retain any payments due to be made by it to the Infraco in respect of work executed by such Key Sub-Contractor. This retention shall be released by **tie** upon the provision of such collateral warranty as requested by **tie**.

68.13 Following a request from **tie** in accordance with Clause 74.10, any payment to the Infraco shall (save as after mentioned) be conditional upon the Infraco having provided any collateral warranty requested by **tie** under Clause 74.7, provided that the inability to provide a collateral warranty pursuant to Clause 74.10 shall not be a reason for withholding payment if **tie** is satisfied that Infraco has used all reasonable endeavours to provide a collateral warranty as provided for in Clause 74.7.

69. **INTEREST ON LATE PAYMENTS AND SET-OFF**

Interest on late payments

- 69.1 In the event of a failure by **tie** to make payment in accordance with Clause 67 (*Payment in Respect of Applications for ~~Milestone Payments~~ MILESTONE PAYMENTS*) or Clause 68 (*Payment in Respect of Maintenance Services*), **tie** shall pay to the Infraco interest upon any payment not paid by the final date for payment at a rate per annum equivalent to 2 per cent (2%) above the base rate of The Royal Bank of Scotland plc current on the date upon which such payment first becomes overdue adjusted to reflect any changes to the rate during the period over which the payment remains overdue.
- 69.2 Pursuant to Clause 69.1 or otherwise in accordance with this Agreement, in the event that the Party to whom payment is due, suffers a demonstrable cost of currency exchange hedge as a result of an exchange rate fluctuation between the pound sterling and the Euro which is connected to late payments relating to the Tram Supply Agreement, then the Party due to make payment shall be liable for this amount to the Party to whom the payment is due.

Set-Off

- 69.3 Subject to Clause 69.4, **tie** may deduct any amount payable by the Infraco to **tie** (whether by way of damages or in respect of any loss or expense sustained by **tie** by reason of the Infraco's breach of this Agreement) from any other payment or payments due to be made to the Infraco by **tie** under this Agreement.
- 69.4 Any notice of intention to withhold payment shall be served by **tie** at least ten Business Days prior to the final date for payment calculated in accordance with Clause ~~67.6~~67.4 or Clause 68.5 (as appropriate) and such notice shall state the sums being withheld and the detailed reason or detailed reasons for such withholding. Where an effective notice of intention to withhold payment is given, but on the matter being referred to the Dispute Resolution Procedure, it is decided that the whole or part of the amount should be paid, the decision shall be construed as requiring payment not later than:

69.4.1 7 days from the date of the decision; or

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

whichever is the later.

- 69.5 The Infraco shall be entitled to payment of interest as provided in Clause 69.1 in respect of the relevant part of any payments which have been withheld in accordance with Clause 69.3 but are subsequently determined as being payable by **tie** to the Infraco either by agreement between the Parties or a decision following a referral to the Dispute Resolution Procedure. The interest shall be calculated for the period between the date when the

relevant part of the payment should have been paid but for the notice of intention to withhold payment and the date on which payment is made by **tie** in accordance with Clause 69.4.

69.6 The Infraco shall not be entitled to retain or set-off any amount owed to it by **tie** against any amount due to **tie** by it.

70. **VALUE ADDED TAX**

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

70.2 All certificates issued by **tie** or **tie's** Representative under Clauses ~~67.5~~67.4 and 68.4 shall be net of Value Added Tax. In addition to the payments due under such certificates **tie** shall separately identify and pay to the Infraco any Value Added Tax properly chargeable by the Infraco on the supply to **tie** of any goods and/or services by the Infraco under this Agreement.

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

70.4 Clause 97 (*Dispute Resolution Procedure*) shall not apply to any dispute, difference or question arising under this Clause 70 (*Value Added Tax*).

70.5 Where under this Agreement one Party is to reimburse or indemnify another Party in respect of any payment made or cost incurred by the other Party, the first Party shall also reimburse any VAT paid by the other Party in question which forms part of its payment made or cost incurred to the extent such VAT is not available for credit for the other Party in question (or for any person with whom the indemnified party is treated as a member of a group for VAT purposes) under sections 25 and 26 of the Value Added Tax Act 1994.

71. **LABOUR TAX AND LANDFILL TAX FLUCTUATIONS**

71.1 The rates and prices contained in Schedule Part 4 (*Pricing*) and the Contract Price Analysis shall be deemed to take account only of the levels and incidence in force on the Effective Date:

71.1.1 the taxes, levies, contributions, premiums or refunds (including national insurance contributions but excluding income tax and any levy payable under the Industrial Training Act 1982 or any statutory re-enactment or amendment thereof for the time being in force) which are

by law payable by or to the Infraco or anyone carrying out any part of the Infraco Works under the instruction of the Infraco in respect of their workpeople engaged on the Infraco Works;

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

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

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

71.2 If after the Effective Date there shall occur any change in the level and/or incidence of any such taxes, levies, contributions, premiums or refunds, the Infraco shall so inform **tie's** Representative and the net increase or decrease shall be taken into account in arriving at the Contract Price. The Infraco shall supply the information necessary to support any consequent adjustment to the Contract Price. All certificates for payment issued after submission of such information shall take due account of the additions or deductions to which such information relates. If the Infraco fails to advise **tie** of any increase within 3 months, the Infraco shall lose its entitlement to claim for an adjustment to the Contract Price.

72. RETURNS OF LABOUR AND INFRACO'S EQUIPMENT

72.1 Save in relation to the Tram Supply Obligations, the Infraco shall, if required by **tie's** Representative, deliver to **tie's** Representative a return in such form and at such intervals as **tie's** Representative may reasonably prescribe showing in detail the numbers of the several classes of labour from time to time employed by the Infraco on the Site and such information respecting the Infraco's Equipment as **tie's** Representative may reasonably require. The Infraco shall procure that the Sub-Contractors observe the provisions of this Clause 72 (*Returns of Labour and Infraco's Equipment*).

73. BEST VALUE

73.1 The Infraco shall, throughout the Term and to the extent consistent with its obligations under the Agreement, make arrangements to secure continuous improvement in the way

in which the Infraco Works are conducted having regard to the Project Vision and, a combination of economy, efficiency and effectiveness.

73.2 The Infraco agrees to undertake (or refrain from undertaking) such actions as **tie** shall reasonably request, and shall:

73.2.1 prepare and, support and assist **tie** (in compliance with Clause 104 (*Information and Audit Access*)) in preparing best value performance plans and conducting best value reviews in relation to the Infraco Works;

73.2.2 comply with requests for information, data or other assistance made by **tie** in pursuance of its best value assessment; and

73.2.3 comply with all requests by **tie** to procure the attendance of specific officers or employees of the Infraco or Infraco Parties at any **tie** meetings at which the Infraco Works are to be discussed.

73.3 **tie** may undertake an annual customer satisfaction survey ("**tie Customer Satisfaction Survey**") in order to:

73.3.1 assess satisfaction among the public and passengers with the quality, efficiency and effectiveness of the Maintenance Services;

73.3.2 complement preparation of the Annual Service Report; and

73.3.3 monitor compliance by the Infraco with its obligations including its management of the Maintenance Services;

and the Infraco shall provide reasonable assistance to enable **tie** to undertake the **tie** Customer Satisfaction Survey.

73.4 Without prejudice to any other provision in the Agreement (and no later than 2 Reporting Periods prior to the end of any year), the Infraco shall, at its own cost, provide a written report (the "**Annual Service Report**") which shall review the quality and performance of all Maintenance Services measured during the relevant period and show the key issues to be addressed going forward, including customer feedback, operational and maintenance issues and improvement proposals. The customer feedback shall include the results of any **tie** Customer Satisfaction Survey carried out pursuant to Clause 73.3 provided that such results have been supplied to the Infraco not less than 4 weeks prior to the date on which the Annual Service Report is to be submitted to **tie**. The Infraco shall upon written request promptly provide supporting information to verify and audit the information and other material contained in the Annual Service Report (other than the **tie** Customer Satisfaction Survey).

- 73.5 **tie** may make comments on and/or objections and specify omissions in the supporting information or the Annual Service Report and in such case shall provide the Infraco with written comments and/or objections within 30 Business Days of receipt. In the absence of such **tie** comments or objections, the supporting information (or the Annual Service Report) shall be deemed to have been accepted by **tie**.
- 73.6 The Infraco shall, within 30 Business Days of receipt of **tie** comments and/or objections under Clause 73.5, make revisions having regard to such comments and/or objections and resubmit the information and report to **tie**. If the information and reports cannot be agreed by the Parties then the matter will be determined in accordance with the Dispute Resolution Procedure.
- 73.7 If, in **tie's** reasonable opinion, the provision and performance of the Maintenance Services could be more effective, efficient and economic having regard to the Annual Service Report and the **tie** Customer Satisfaction Survey, then **tie** may serve a **tie** Notice of Change pursuant to Clause 80 (*tie Changes*) stating the desired nature and timing of the changes to the provision or performance of the Maintenance Services.
- 73.8 NOT USED
- 73.9 The preparation of best value performance plans will take into account the conclusions from the Annual Service Report and the **tie** Customer Satisfaction Surveys.

PART 14 - BOND, WARRANTIES, INSURANCES AND LIABILITIES

74. **BOND, PARENT COMPANY, COMPANY GUARANTEES AND COLLATERAL WARRANTIES**
- 74.1 On the Effective Date, Infraco shall provide to **tie** a Performance Bond at the maximum amount of £23,000,000 substantially in the form of Schedule Part 8 (*Bonds, Parent Company Guarantees and Collateral Warranties*) and issued by a surety with a credit rating by Standard & Poors of A- or higher (to be evidenced to **tie**).
- 74.2 On the date on which **tie** issues the Reliability Certificate, the Performance Bond shall be released by **tie**. In the event that the issue of the Reliability Certificate is not expected to be achieved by the date which is twelve (12) months after the currently programmed date of issue for the Reliability Certificate, no later than one month prior to its expiry date the Infraco shall arrange, upon written request by **tie**, for an extension to the validity of the Performance Bond for a period of no less than three months.
- 74.3 The Infraco shall provide to **tie** (issued by a surety with a credit rating by Standard and Poors of A- or higher (to be evidenced by **tie**) substantially in the form of Schedule Part 8 (*Bonds, Parent Company Guarantees and Collateral Warranties*), no later than:

- 74.3.1 the Effective Date, a Retention Bond in the amount of £2,000,000 (Two Million Pounds Sterling);
- 74.3.2 the date on which the Certificate of Sectional Completion for Section A is issued, a Retention Bond in the amount of £4,000,000 (Four Million Pounds Sterling);
- 74.3.3 the date on which a Certificate of Sectional Completion for Section B is issued, a Retention Bond in the amount of £6,000,000 (Six Million Pounds Sterling);
- 74.3.4 the date on which a Certificate of Sectional Completion for Section C is issued, a Retention Bond in the amount of £8,000,000 (Eight Million Pounds Sterling);
- 74.3.5 the date on which a Certificate of Sectional Completion for Section D is issued, a Retention Bond in the amount of £10,000,000 Million Pounds Sterling);
- 74.3.6 the date on which a Network Certificate is issued, a Retention Bond in the amount of £6,600,000 (Six Million, Six Hundred Thousand Pounds Sterling);
- 74.3.7 if the Reliability ~~Certificate~~Certificate has not been issued on or before such date, the date which is three months prior to the date referred to at Clause 7.1 of the Retention Bond, a replacement Retention Bond on identical terms to that being replaced, but with an expiry date no earlier than three months after the date referred to in Clause 7.1 of the Retention Bond (the "**New Expiry Date**");
- 74.3.8 if the Reliability ~~Certificate~~Certificate has not been issued on or before such date, the date which is three months prior to the New Expiry Date of any Retention Bond, a replacement Retention Bond on identical terms to that being replaced, but with an expiry date no earlier than three months after the New Expiry Date of the relevant Retention Bond (and such date shall also be deemed to be a New Expiry Date for the purposes of this Clause 74.3.8).

74.4 The Retention Bond shall only be released by **tie**, in accordance with its terms:

- 74.4.1 in the case of the Retention Bond provided in accordance with clause 74.3.1, when a Retention Bond is provided by the Infraco to **tie** in accordance with clause 74.3.2;

74.4.2 in the case of the Retention Bond provided in accordance with clause 74.3.2, when a Retention Bond is provided by the Infraco to **tie** in accordance with clause 74.3.3;

74.4.3 in the case of the Retention Bond provided in accordance with clause 74.3.3, when a Retention Bond is provided by the Infraco to **tie** in accordance with clause 74.3.4;

74.4.4 in the case of the Retention Bond provided in accordance with clause 74.3.4, when a Retention Bond is provided by the Infraco to **tie** in accordance with clause 74.3.5;

74.4.5 in the case of the Retention Bond provided in accordance with clause 74.3.5, when a Retention Bond is provided by the Infraco to **tie** in accordance with clause 74.3.6;

74.4.6 in the case of the Retention Bond provided in accordance with clause 74.3.6, on issue of a Reliability Certificate.

74.5 In the event that the credit rating of the sureties providing the Retention Bond or the Performance Bond then in force falls to BBB+ or a lower rating by Standard & Poors, **tie** shall be entitled to request the Infraco to provide a replacement for such Retention Bond or Performance Bond (as appropriate), on identical terms to the Retention Bond or Performance Bond (as appropriate) being replaced, but provided by a surety with a credit rating by Standard & Poors of A- or higher and notified to **tie**. If **tie** does not respond to such notification within 2 Business Days, the surety is deemed to be approved.

74.6 Should the Infraco fail to provide a:

74.6.1 Retention Bond pursuant to Clause 74.5; or

74.6.2 Retention Bond in accordance with any of clauses 74.3.2 to 74.3.8;
or

74.6.3 Retention Bond in accordance with Clause 74.3.1; or

74.6.4 Performance Bond in accordance with Clause 74.1; or

74.6.5 an extension of validity of any Retention Bond as per Clauses 74.3.7 or 74.3.8

such failure shall be a breach of this Agreement entitling **tie**, in the case of Clause 74.6.1 and 74.6.2, to:

74.6.6 call on the Retention Bond in force at the time of such failure by issuing a Demand Notice (as defined in the relevant Retention Bond); and

74.6.7 withhold payments due to the Infraco from **tie** under this Agreement, up to an amount equal to that amount which would have been stipulated under the relevant Retention Bond had the Infraco complied with its obligations to provide a Retention Bond under Clause 74.5 or any of Clauses 74.3.2 to 74.3.8 (as the case may be). Any sums withheld by **tie** from the Infraco pursuant to this Clause 74.6.6 will be returned by **tie** to the Infraco within 5 Business Days following compliance in full by the Infraco with its obligation to provide a Retention Bond pursuant to Clause 74.5 or any of Clauses 74.3.2 to 74.3.8 (as the case may be).

74.7 Notwithstanding the terms of the Retention Bond, any amount **tie** is entitled to demand under the Retention Bond in respect of:

74.7.1 failure by Infraco to perform or observe any of its duties and/or obligations arising under or in connection with this Agreement; and/or

74.7.2 breach of any provision of this Agreement;

will be reduced by an amount equal to the aggregate of all sums by which the Maximum Performance Payment has been reduced pursuant to the provisions of Schedule Part 6 (*Maintenance Payment Regime*) in respect of the failure or breach to which the demand under the Retention Bond relates.

74.8 ~~NOT USED~~ Infraco shall by 5pm on the 28th September 2011 procure letters (in the form agreed by the Parties) from the sureties under the bonds referred to in Clauses 74.1 and 74.3.1.

74.9 As a Condition Precedent, the Infraco shall procure the execution and delivery to **tie**, of parent company guarantees, in the form set out in part D of Schedule Part 8 (*Bonds, Parent Company Guarantees and Collateral Warranties*) and, if there is a Change in Control, the Infraco shall, subject to Clause 4.4 of Part D of Schedule Part 8 (*Bonds, Parent Company Guarantees and Collateral Warranties*) procure the provision of a substitute parent company guarantee or credit enhancement instrument satisfactory to **tie** within 7 Business Days of **tie's** request.

74.10 Within thirty days of any written request from **tie** (or such longer period as the Parties, acting reasonably, may agree), the Infraco shall execute a collateral warranty (in the form set out in Part E of Schedule Part 8 (*Bonds, Parent Company Guarantees and Collateral Warranties*) or, in respect of the EAL Works, in the form set out in Appendix 8 to Schedule

Part 44 (*EAL Works*)) or where such form is not acceptable, in a different form which is acceptable to both Parties (acting reasonably) provided that for the avoidance of doubt Infraco shall not in any circumstances be required to provide a collateral warranty with provisions relating to liability which is greater than that set out in Part E of Schedule Part 8 (*Bonds, Parent Company Guarantees and Collateral Warranties*) in favour of CEC, TEL and Network Rail, in respect of carrying out the Infraco Works and in favour of EAL in respect of carrying out the EAL Works.

75. **WARRANTIES**

75.1 Each Infraco Member hereby separately represents, warrants and undertakes to **tie** that to the best of its knowledge, information and belief:

75.1.1 the Infraco Member, the Infraco Member's Infraco Parties or any of their respective representatives or Affiliates or professional advisers or employees or anyone acting on behalf of any of them have not committed any Prohibited Act;

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

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

75.1.2.2 might, if disclosed, adversely affect the decision of anyone considering whether or not to contract with the Infraco;

75.1.3 NOT USED

75.1.4 neither the Infraco Member nor the Infraco Member's parent company is involved in any dispute with HM Revenue and Customs, the BundesFinanzAmt or LandesFinanzamt, the European Commission, the Office of Fair Trading, or any other fiscal or regulatory authority in any jurisdiction concerning any matter which could materially and adversely affect the business of the Infraco Member or its ability to perform or the Infraco Works in any way;

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

- 75.1.6 no claim is presently being assessed and no litigation, arbitration or proceeding is in progress or, to the best of the knowledge and belief of the Infraco Member pending or threatened, against the Infraco Member or any of its management or assets which might have an adverse effect on the ability of the Infraco Member or the Infraco to perform the obligations in this Agreement;
- 75.1.7 there has been no material adverse change to the financial condition of the Infraco Member or the Infraco Member's parent company guarantor since the latest audited accounts prior to the Effective Date including any matter resulting in a downgrade of the Infraco Member's or the Infraco Member's parent company guarantor's credit rating with any commercially acknowledged independent rating agency reporting the construction sector in the UK or the Federal Republic of Germany; and
- 75.1.8 the performance of the Infraco Works does not create any situation in which a conflict of interest arises for the Infraco Member.
- 75.2 Each Infraco Member hereby represents, warrants and undertakes to **tie** to the best of its knowledge and belief that the Infraco's provision of any Deliverables and the use by **tie** of any of the Deliverables provided to it as part of the Infraco Works has not infringed and shall not infringe any third party's Intellectual Property Rights;
- 75.3 Each of the warranties, representations and undertakings given under Clauses 75.1.1 to 75.2 shall be construed as a separate and independent warranty, representation and undertaking and shall not be limited or restricted by reference to or inference from any other terms of this Agreement.
- 75.4 The Infraco Member affected shall immediately disclose in writing to **tie** any event or circumstance which may arise or become known to it after the Effective Date which is materially inconsistent with any of the warranties, representations or undertakings given under Clauses 75.1.1 to 75.2 or which has or is likely to have a material adverse effect on the Infraco Works.
- 75.5 Each Infraco Member hereby separately represents, warrants and undertakes to **tie** that it:
- 75.5.1 is duly incorporated under the laws of England and Wales and has the power to own its own assets and carry on its own business; and
- 75.5.2 has full power and authority (and does not require the consent, authority or licence of any third party) to enter into and perform this

Agreement which constitutes a valid and binding obligation on the Infraco in accordance with its terms; and

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

76. REQUIRED INSURANCES

Required Insurances

76.1 Each Infraco Member shall, at its own cost, procure that each of the Required Insurances is taken out and comes into effect on the relevant date specified in each "Period of Insurance" set out in Part 1 of Schedule Part 11 (*Required Insurances*) and shall maintain the Required Insurances in full force and effect until the relevant date specified in each "Period of Insurance" set out in Part 1 of Schedule Part 11 (*Required Insurances*), provided that each such Required Insurance is available in the EU insurance market at commercially reasonable rates and on commercially reasonable terms to contractors of the same status as at the Effective Date and discipline as the Infraco Members.

76.2 Each Infraco Member shall procure that all Required Insurances shall:

76.2.1 be maintained in accordance with Part 1 of Schedule Part 11 (*Required Insurances*); and

76.2.2 be placed at all times with insurers authorised to carry out insurance business in the United Kingdom and confirmed in writing as acceptable by **tie** (such written acceptance not to be unreasonably withheld or delayed).

76.3 Neither Infraco Member shall make any material alteration to the terms of the Required Insurances (including material changes to the level of deductibles) without **tie's** prior approval (which approval shall not be unreasonably withheld). If any such material alteration to the Required Insurances is made, the Infraco shall complete the questionnaire set out in Part 3 of Schedule Part 11 (*Required Insurances*), duly endorsed by its insurance broker. If the insurer makes or attempts to make any material alteration or purports to withdraw cover, the Infraco Member shall promptly give notice of this to **tie**.

76.4 Each Infraco Member shall ensure that each of its insurance brokers gives **tie** as soon as reasonably practicable after any policy of Required Insurance is taken out, replaced or renewed, a letter of undertaking in the form set out in part 2 of Schedule Part 11 (*Required Insurances*).

76.5 Each Infraco Member shall provide satisfactory evidence to **tie** that the Required Insurances have been effected. Thereafter, each Infraco Member shall upon request produce to **tie** receipts for the payment of current insurance premiums or equivalent documentary evidence to confirm that such Required Insurances are being properly maintained, and on the anniversary of the Effective Date and on each subsequent anniversary thereof until the date of expiry or earlier termination, each Infraco Member shall complete an insurance questionnaire set out in part 3 of Schedule Part 11 (*Required Insurances*) in relation to the Required Insurances to be taken out by the Infraco and submit such completed questionnaire to **tie** as soon as reasonably practicable. If an Infraco Member defaults in insuring or continuing to maintain the Required Insurances, **tie** may insure against any risk in respect of which such default has occurred and recover any premiums from the Infraco as a debt immediately due and payable.

76.6 Each Infraco Member shall:

76.6.1 procure that the Required Insurances contain a waiver of subrogation against **tie**, any **tie** Party and the named insured parties as set out in part 1 of Schedule Part 11 (*Required Insurances*) save in respect of fraud or deliberate non-disclosure; and

76.6.2 where an Infraco Member is obliged to effect any Required Insurances, not bring any claim or action against **tie** (or any **tie** Party), in respect of any losses, damages, liabilities, costs, expenses and charges in circumstances where and to the extent that an Infraco Member could recover such losses, damages, costs, expenses and charges under such insurance, provided that, to avoid doubt, this Clause 76.6.2 shall not by itself prevent an Infraco Member from claiming against **tie** (or any **tie** Party) in respect of a breach of this Agreement by **tie** or any **tie** Party for any losses, damages, costs, expenses and charges arising from such breach not covered because of the level of deductibles under such insurance permitted by this Agreement or to the extent of such losses, damages, costs, expenses and charges exceeds the greater of the insurance placed or the minimum limit of indemnity required in respect of such insurance under part 1 of Schedule Part 11 (*Required Insurances*).

76.7 Neither Infraco Member shall take any action or fail to take any action or (insofar as it is reasonably within its power) permit or allow others to take or fail to take any action (in either case including failure to disclose any fact) as a result of which any of the Required Insurances may be rendered void, voidable, unenforceable, suspended or impaired in whole or in part or which may otherwise render any sum paid out under any relevant policy repayable in whole or in part.

76.8 The supply to **tie** of any insurance policy or insurance certificate or renewal certificate or other evidence of compliance with this Clause 76 (*Required Insurances*) shall not imply, or be taken as, acceptance by **tie** that:

76.8.1 the extent of insurance cover is sufficient and its terms are satisfactory; or

76.8.2 in respect of any interests or parties not insured or any risks not insured against, an acceptance by **tie** that the same were uninsurable.

76.9 Neither failure to comply nor full compliance with the provisions of this Clause 76 (*Required Insurances*) shall relieve the Infraco Members of their liabilities and obligations under this Agreement.

76.10 Each Infraco Member shall apply any proceeds of any policies of insurance maintained in accordance with part 1 of Schedule Part 11 (*Required Insurances*) in satisfaction of the claim, demand, proceeding or liability in respect of which such proceeds are payable (unless already paid direct to the third party or employee by the insurer).

76.11 Each Infraco Member undertakes with **tie** in relation to the Required Insurances:

76.11.1 to comply with all requirements of the insurers; and

76.11.2 to give notice to **tie** immediately upon the happening of any event which will adversely affect any policy of insurance effected in accordance with this Clause 76 (*Required Insurances*), including the downgrading of the credit rating to A- or lower by Standard & Poors of any party providing any of the Required Insurances.

76.12 ~~Save in relation to the Tram Supply Agreement and/or the Tram Maintenance Agreement in which cases Clause 76.12.1 will apply, the~~ Infraco Members shall immediately inform **tie** in writing if any of the Required Insurances cease to be maintained and/or cease to be available in the EU insurance market at commercially reasonable rates and on commercially reasonable terms to contractors of the same status as at the Effective Date, and discipline as the Infraco Members. In this event, the Parties shall meet to discuss the means by which any risks previously covered by the Required Insurances should be managed, mitigated or controlled. Any increased or additional premium required by insurers by reason of the Infraco's own claims record or other acts, omissions, matters or things particular to the Infraco Members shall be deemed to be within commercially reasonable rates and terms.

76.12.1 ~~In relation to the Tram Supply Agreement and/or the Tram Maintenance Agreement, the Infraco shall immediately inform tie in writing if any of the Required Insurances cease to be maintained and/or~~

~~cease to be available in the EU insurance market at commercially reasonable rates provided that if the Infraco is procuring that the Tram Supplier and/or the Tram Maintainer (as appropriate) is maintaining such insurance at such rates, tie shall undertake in writing to reimburse the Infraco in respect of half of the net cost of such insurance to the Tram Supplier and/or the Tram Maintainer (as appropriate) above commercially reasonable rates. If tie undertakes in writing to reimburse the Infraco in respect of half of the net cost of such insurance to the Tram Supplier and/or the Tram Maintainer (as appropriate) above commercially reasonable rates or, if the Infraco procures that the Tram Supplier or Tram Maintainer (as appropriate) effects such insurance at or above commercially reasonable rates, the Infraco shall reimburse tie in respect of what the net cost of such insurance to the Tram Supplier or Tram Maintainer (as appropriate) would have been at commercially reasonable rates and terms, and the cost of maintaining any such insurance at rates above commercially reasonable rates by the Tram Supplier or Tram Maintainer (as appropriate) or by the Infraco shall be borne in equal proportions by the Infraco and tie.~~**NOT USED.**

76.13 ~~Save in relation to the Tram Supply Agreement and/or the Tram Maintenance Agreement in which cases Clause 76.12.1 will apply, each~~ Infraco Member shall fully co-operate with any measures reasonably required by **tie**, including (without limitation) completing any proposals for insurance and associated documents or maintaining such insurance at rates above commercially reasonable rates provided that if the Infraco Members are maintaining such insurance at such rates, **tie** shall pay to the Infraco Members the sum which is half of the additional cost to Infraco Members of maintaining such insurance above commercially reasonable rates.

76.13.1 ~~Infraco shall procure that the Tram Supplier and/or the Tram Maintainer shall, fully co operate with any measures reasonably required by tie, including (without limitation) completing any proposals for insurance and associated documents or maintaining such insurance at rates above commercially reasonable rates if tie undertakes in writing to reimburse the Infraco in respect of the net cost of such insurance to the Tram Supplier and/or the Tram Maintainer (as appropriate) above commercially reasonable rates or, if the Infraco procures that the Tram Supplier or Tram Maintainer (as appropriate) effects such insurance at or above commercially reasonable rates, reimbursing the Infraco in respect~~

~~of what the net cost of such insurance to the Tram Supplier or Tram Maintainer (as appropriate) would have been at commercially reasonable rates and terms.~~ **NOT USED.**

OCIP Insurances

76.14 The Infraco acknowledges that **tie** has taken out the OCIP Insurances and agrees to comply with the requirements of the insurers with whom the OCIP Insurances are placed and Infraco acknowledges that it is on notice of the form and content of OCIP Insurances. The Infraco agrees that it will intimate to **tie** any act, occurrence or failure which may:

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

76.14.2 render any of the OCIP Insurances void, voidable, unenforceable, suspended or impaired in whole or in part or which may otherwise render any sum paid out under any relevant policy repayable in whole or in part.

76.15 The Parties shall not take any action or fail to take any reasonable action or (insofar as it is reasonably within its power) permit or allow others to take or fail to take any action (including, in either case, failure to disclose any fact) as a result of which any of the OCIP Insurances may be rendered void, voidable, unenforceable, suspended or impaired in whole or in part or which may otherwise render any sum paid out under any relevant policy repayable in whole or in part.

76.16 Subject to Clause 76.19A, the Infraco shall bear all excesses and deductibles payable in respect of claims made under the OCIP Insurances and the Additional Insurances where any claim arising is due solely to the breach of this Agreement by the Infraco or negligent act or negligent omission of the Infraco or any of the Infraco Parties.

76.17 Subject to Clause 76.19A **tie** shall bear all excesses and deductibles payable in respect of claims made under the OCIP Insurances and the Additional Insurances where any claim arising is due solely to the breach of this Agreement by **tie** or negligent act or negligent omission of **tie** and from the date of issue of the Certificate of Service Commencement **tie** shall bear all excesses and deductibles relating to claims under the OCIP and Additional Insurances where such claims do not fall under Clause 76.16. Where **tie** is responsible for such excess and deductibles, **tie** shall pay to the Infraco the amount of any such applicable excess or deductible claimed by the Infraco in accordance with Clause 67 (*Payment in Respect of Applications for Milestone Payments*) or Clause 68 (*Payment in Respect of Maintenance Services*), as appropriate.

76.18 Subject to Clause 76.19A, 76.19B and 76.19C **tie** and the Infraco shall be responsible (but only up to the date of the Certificate of Sectional Completion for each Section in respect of Infrastructure Maintenance Services) for bearing all excesses and deductibles payable in

equal proportions in respect of claims made under the OCIP Insurances and the Additional Insurances where any claim arising does not fall under Clauses 76.16 or 76.17. **tie** shall pay to the Infraco the amount of any such applicable excess or deductible claimed by the Infraco in accordance with Clause 67 (*Payment in Respect of Applications for Milestone Payments*) or Clause 68 (*Payment in Respect of Maintenance Services*).

76.19 **tie** shall maintain at its own cost the OCIP Insurances in full force and effect during the Term. If **tie** fails to maintain or makes any material alteration to the terms (including the level of deductibles) of the OCIP Insurances (or equivalent insurances) at any time during the Term, **tie** shall be responsible for funding replacement or reinstatement of the Infraco Works to the extent that such failure or alteration prevents or reduces the available insurance proceeds which would have otherwise been recoverable through a claim on the OCIP Insurances so as to fund the reinstatement and Infraco shall be relieved of any obligations regarding reinstatement until **tie** provides such funding.

76.19A If **tie** alters the OCIP Insurances so that the level of deductibles is increased under such insurance, **tie** shall in respect of any claim pay for and be responsible for any difference in the excess or deductibles arising from such alteration irrespective of the cause of the claim.

76.19B Where any excesses or deductibles occur as a result of a claim arising due to the breaches or negligent acts or omissions of both Parties, the Parties shall bear such excesses and deductibles in such portions as shall be fair and equitable in all the circumstances, including the extent to which the Parties' breaches or negligent acts or omissions contributed to such claim.

76.19C **tie** shall be liable for payment of any deductible under the OCIP Insurance and the Additional Insurance where claims are made in respect of acts of vandalism whilst Trams are stationed in the Depot or where being used for testing other than whilst under responsibility of the Tram Supplier. ~~Upon the issue of the relevant Tram Commissioning Certificate,~~ **tie** shall be responsible for all deductibles in respect of each Tram and Tram Related Equipment save where the claim arises from the breach of this Agreement or by negligence of the Infraco.

Additional Insurance

76.20 **tie** may ask the Infraco to take out and maintain any annual insurance from time to time in the names of the parties reasonably requested by **tie** (the "**Additional Insurance**"). If Additional Insurance is required, the terms of this Clause 76 (*Required Insurances*) including the provisions which are stated to apply to the "Required Insurances" shall apply with any appropriate adjustment to be agreed between the Parties. The Infraco shall, subject to Clause 76.23, procure that any Additional Insurance shall:

76.20.1 (if **tie** so requires) contain a provision that **tie** and/or any other party reasonably requested by **tie** is named as a co-insured party;

76.20.2 provide that any Additional Insurance shall continue in effect and unaltered for the benefit of the insured parties for at least ninety days after written notice by registered mail of any cancellation (including non-renewal), change, modification or lapse for any reason;

76.20.3 contain a provision that requires the insurer to send copies of all notices of cancellation or alteration or suspension or any other notices given under or in relation to the policy to **tie** promptly upon receiving any notices of cancellation or alteration or suspension or any other notices;

76.20.4 contain a provision that a notice of a claim given to the insurer by one of the insured parties under the policy shall, in the absence of manifest error, be accepted by the insurer as valid notification of a claim in respect of the interests of all insured parties;

76.20.5 contain a provision to the effect (on the basis of non-vitiating/severability) that all the provisions of any Additional Insurance shall operate as if there were a separate policy in effect (save in respect of the sums insured, limits of liability and excesses/deductibles which shall be at the levels stated) for each named insured and that non-compliance with any policy term, condition or warranty and/or misrepresentation or non disclosure of material information by the Infraco or any other co-insured will not affect the rights and/or interests of any co-insured party under any policies effected as Additional Insurance; and

76.20.6 ensure that the Additional Insurances are primary, and shall not be brought into contribution with any other policy or policies effected by or on behalf of any of the insured parties,

76.21 The Infraco shall supply **tie** with copies of every policy document, insurance certificate and renewal certificate relating to any Additional Insurance (or such other evidence of insurances as may be reasonably required by **tie**) and documentary evidence to the effect that the Required Insurances (other than any Additional Insurance) have been taken out and are being maintained as soon as it is available but in any event no later than 7 days (in respect of certificates) and sixty days (in respect of policies) after the inception of the relevant policies, together with evidence of payment of the premiums and any periodic renewal certificates.

76.22 The Infraco shall inform **tie** in writing as soon as reasonably practicable after it receives a claim or becomes aware of the occurrence of any event that may give rise to a claim under any Required Insurance (if related to ~~the Edinburgh Tram Network~~ Initial Phase 1a) or Additional Insurance and will ensure that **tie** is kept fully informed of subsequent action and developments concerning the claim; such written information shall not be required in relation to any claim of less than £50,000 (as Indexed). The Infraco shall take such steps as are necessary or appropriate to ensure that each Infraco Party, in respect of any event or claim of a like nature arising out of or relating to the operation or responsibility of that Infraco Party, or any event or claim of which they become aware, takes in relation to the Infraco like action to that which the Infraco is required to take under this Clause 76.22 in relation to **tie**, and shall inform **tie** promptly of information thus received from any Infraco Party.

76.23 At each anniversary of the Effective Date, the Infraco shall provide **tie** with a summary of all claims made under the Required Insurances, where such claims arise out of this Agreement. Such summary shall include date, circumstances, status and amounts paid and outstanding on each claim.

76.24 Without prejudice to any other provision of this Agreement, the Infraco undertakes to the extent it has the right to do so under the relevant policy that it will not (and that each of the Infraco Parties to the extent each respectively has the right to do so under the relevant policy will not) settle any OCIP Insurance or Additional Insurance claim above £50,000 (as Indexed) without the prior written agreement of **tie** (such agreement not to be unreasonably withheld or delayed).

76.25 The Infraco shall promptly inform **tie** in writing if any of the Additional Insurances cease to be maintained and/or cease to be available in the EU insurance market at commercially reasonable rates and on commercially reasonable terms to contractors of the same status, as at the date of **tie's** request to Infraco that it takes out the Additional Insurance, and discipline as the Infraco. In this event, the Parties shall meet to discuss the means by which any risks previously covered by the Additional Insurances should be managed, mitigated or controlled and any agreement shall be a **tie** Change. Any increased or additional premium required by insurers by reason of the Infraco's own claims record or other acts, omissions, matters or things particular to the Infraco shall be deemed to be within commercially reasonable rates and terms.

76.26 Any request from **tie** that Infraco maintains Additional Insurance shall be a Mandatory **tie** Change. Nothing in this Clause 76 shall oblige Infraco to maintain Additional Insurances on terms which are not available in the EU insurance market.

76.27 All insurance proceeds received under OCIP Insurance in respect of physical damage shall be applied to repair, reinstate and replace each part or parts of the Infraco Works in respect of which the proceeds were received. Subject to Clause 76.29, if such proceeds

are recovered by **tie**, **tie** shall pay to Infraco the monies recovered, within 5 Business Days of receipt of such monies from the Insurers

76.28 Where a claim is made or proceeds of insurance are received or are receivable by **tie** under any OCIP Insurance in respect of physical damage and in respect of a single event (or a series of related events) in an amount in excess of £100,000:

76.28.1 the Infraco shall deliver as soon as practicable and in any event within 15 Business Days after the making of the claim a plan prepared by the Infraco for the carrying out of the works necessary ("**Reinstatement Works**") to repair, reinstate or replace ("**Reinstatement Plan**") the Infraco Works which are the subject of the relevant claim or claims in accordance with Clause 76.27. The Reinstatement Plan shall set out the proposed terms and timetable upon which the Reinstatement Works are to be effected, the final terms of which shall be subject to the prior written approval of **tie**, which approval shall not be unreasonably delayed;

76.28.2 provided that **tie** is satisfied that the Reinstatement Plan will enable the Infraco to comply with Clause 76.27 within a reasonable timescale:

76.28.2.1 the Reinstatement Plan will be adopted;

76.28.2.2 the Infraco shall enter into the contractual arrangement to effect the Reinstatement Works;

76.28.2.3 **tie** agrees and undertakes that, subject to compliance by the Infraco with its obligations under this Clause, and provided that the Infraco procures that the Reinstatement Works are carried out and completed in accordance with the contractual arrangements referred to in Clause 76.28.2.2, it shall not exercise any right which it might otherwise have to terminate this Agreement;

76.28.2.4 **tie** undertakes to use reasonable endeavours to assist the Infraco in the carrying out of the Reinstatement Plan; and

76.29 Where insurance proceeds are to be used, in accordance with this Agreement, to repair, reinstate or replace the Infraco Works, the Infraco shall carry out the work in accordance with the Employer's Requirements so that on completion of the work, the provisions of the Agreement are complied with, unless the Infraco is otherwise instructed pursuant to a **tie** Change in which case **tie** shall retain the insurance proceeds.

76.30 Where the proper and reasonable costs of carrying out Reinstatement Works exceed the insured amount under the OCIP Insurances **tie** shall pay such excess to Infraco in accordance with Clause 67 (Payment in respect of Application for Milestone Payments) or Clause 68 (Payments in respect of Maintenance Services).

77. **INDEMNITY BY INFRACO, LIABILITY AND SOLE REMEDY**

77.1 Subject to Clauses 77.2, 77.3, 77.7 and 77.8, the Infraco shall indemnify **tie**, CEC, the Nominated Subsidiary and their respective officers, agents and employees ("**Indemnified Parties**") from and against any and all claims, suits, losses, liabilities damages, penalties, fines, forfeitures, and the costs and expenses incident thereto (including without limitation any legal costs of defence) which any of the Indemnified Parties may hereafter incur, become responsible for, or pay out as a result of:

77.1.1 any of the Infraco's or any Infraco Party's negligent or wilful acts, or negligent or wilful omissions in the performance of the Infraco Works; and/or

77.1.2 breach by Infraco of any term or provision of this Agreement including any Law;

~~Such claims, suits, losses, liabilities damages, penalties, fines, forfeitures, and the costs and expenses shall include~~ including any such claims, suits, losses, liabilities damages, penalties, fines, forfeitures, and the costs and expenses in respect of:

- (a) death or injury to any person;
- (b) loss of or damage to any property (up to OCIP cover level);
- (c) loss of or damage to any part of the Infraco Works (up to OCIP cover level);
- (d) causing **tie** and/or CEC to be in breach of any Law; or
- (e) causing **tie** and/or CEC to be in breach of any of the DPOFA (or result directly in a DPOFA Change), the Tram Inspector Agreement, the Third Party Obligations and any other undertakings which have been given by **tie** and/or CEC to any third party and which have been notified to the Infraco in writing either (i) prior to the Effective Date; or (ii) at any time as a **tie** Change;
- (f) a breach by Infraco of its obligations under Clause 18 (Land Consent, Permanent Land and Temporary Sites);
- (g) causing **tie** and/or CEC to be in breach of any Land Consent relating to the Permanent Land or the Temporary Land; or

- (h) infringement or alleged infringement of a third party's Intellectual Property Rights;
or

~~For the avoidance of doubt, Infraco shall not be liable to indemnify the Indemnified Parties in respect of any claim arising from or in connection with a third party agreement or undertaking the terms of which had not been notified to the Infraco in writing prior to the Effective Date.~~

Infraco acknowledges and agrees that:

- (I) any claims made and sums sought by tie or CEC pursuant to clause 77.1 in consequence of any actions, claims, demands or proceedings by the Tram Supplier or the Tram Maintainer shall not be excluded solely on account of the fact that the claims so made and sums so sought by tie or CEC may be considered to relate to or be Indirect Losses;
- (II) it has been provided with a copy of the Anti No Loss Agreement for review and shall be deemed to be fully aware of its terms and conditions;
- (III) failure by it to perform its obligations in accordance with the this Agreement may result in tie committing a breach or becoming liable for losses under the No Loss Agreement;
- (IV) losses incurred by tie under the No Loss Agreement are reasonably foreseeable and flow as a natural consequence of Infraco's failure to perform its obligations in accordance with this Agreement and are therefore recoverable from Infraco as direct losses and shall not be considered indirect or consequential losses,

provided that (a) without prejudice to its obligations under Clause 62, Infraco shall have no liability to any Indemnified Party in respect of any actions, claims, demands or proceedings by the Tram Supplier in respect of Qualifying Compensation Events (as such term is defined in the Tram Supply Agreement); (b) nothing in the No Loss Agreement shall make Infraco liable to any Indemnified Party for performance or non performance of its obligations under this Agreement beyond the circumstances set out in Clauses 77.1.1 and 77.1.2,

77.2 The exception referred to in Clauses 24.5, 49.2 and 77.1, which is the responsibility of tie, is death of, or injury to, persons or loss of or damage to property resulting from any act, omission, neglect, or breach of statutory duty by the Indemnified Parties or other contractors (not being employed by the Infraco or any Infraco Party) or for or in respect of any claims, suits, losses, liabilities, damages, penalties, fines, forfeitures, and the costs and expenses, demands, proceedings, damages, costs, charges and expenses in respect thereof or in relation thereto.

77.3 The Infraco's liability to indemnify the Indemnified Parties under Clause 77.1 shall be reduced in proportion to the extent that the act, omission, neglect, or breach of statutory duty of the Indemnified Party or other contractors (not being the Infraco or any Infraco Party or (in relation to any breach of any System Integration obligations of Infraco) the Tram Maintainer or Tram Supplier) may have contributed to the said death, injury, loss or damage.

77.4 Subject to Clause 78 and to the extent such liability is not insured under OCIP, the Required Insurances or the Additional Insurances, **tie** shall indemnify the Infraco against claims which arise as an unavoidable consequence of the Infraco carrying out the Infraco Works pursuant to and in full compliance with this Agreement.

77.5 The Infraco shall not be relieved of any liability under Clause 77.1 by reason of:

77.5.1 any approvals, comments, instructions, consents, attendance at meetings relating to the Infraco Works or advice from **tie** or Network Rail; or

77.5.2 the fact that any act or thing may have been done by **tie** or Network Rail themselves on behalf of the Infraco and/or in accordance with any requirement stipulated by **tie** or Network Rail.

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

77.6.1 of either Party for:

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

77.6.1.2 fraud or fraudulent misrepresentation;

77.6.2 NOT USED

provided that nothing in this Clause 77.6 shall confer on either Party rights or remedies that they would not otherwise have.

77.7 Notwithstanding anything to the contrary contained in this Agreement and/or the Retention Bond and the Performance Bond, the liability of the Infraco under or in connection with this Agreement or as a consequence of termination of this Agreement whether in contract or delict, in negligence, for breach of statutory duty or otherwise (including, for the avoidance of doubt, pursuant to any indemnity) shall (other than in respect of personal injury or death) when aggregated with:

- (i) payments (if any) made by the Guarantors (or either of them) to **tie** under the Parent Company Guarantees; and
- (ii) payments (if any) made to CEC, Network Rail, EAL and TEL under the collateral warranties or any other collateral warranty granted by Infraco in accordance with this Agreement,
- (iii) the total amount of deductions (stated as a positive amount) applied to the Maintenance Contract Price in accordance with Schedule Part 6 (*Maintenance Payment Regime*),

be limited to the Liability Cap provided always that the calculation of the quantum of such limitation

77.7.1 shall exclude the proceeds of the Retention Bond and the Performance Bond and any cash retention or proceeds of any bond provided pursuant to Clauses 96 ;and

77.7.2 shall exclude amounts paid to the Infraco under the OCIP Insurances, and/or any Additional Insurances;

77.7.3 does not relate to liabilities which are covered by the proceeds of the Required Insurances or would have been so covered had the Infraco complied with its obligations under this Agreement; and

77.7.4 does not relate to liabilities which would have been covered by the proceeds of the Required Insurances, the OCIP Insurances and/or any Additional Insurances but for the application of any deductible under such Required Insurances, the OCIP Insurances and/or any Additional Insurances.

77.8 Subject to Clause 77.6 and Clause 77.4 and save for payments expressly agreed as payable pursuant to Clause 88.8, neither Party shall be entitled to claim damages or loss (i) for breach of this Agreement (ii) in delict (including negligence), (iii) for breach of statutory duty or (iv) on any other basis whatsoever (including, for the avoidance of doubt pursuant to any indemnity) to the extent that such damages or loss claimed by that Party are for Indirect Losses suffered by that Party, any of the Indemnified Parties or an Infraco Party, as the case may be, provided that nothing in this Clause 77.8 shall affect either Party's liability to the other Party or to any of the Indemnified Parties, in respect of any claim, action, proceedings or demand against such other Party or any of the Indemnified Parties by a third party in connection with any Indirect Losses suffered by that third party, save that the Infraco shall have no liability with regard to uninsured third party economic and consequential loss. except as provided specifically pursuant to Schedule Part 43 (*Reserve Account*). **tie** shall take responsibility for any claim made for uninsured third

party economic and consequential loss against **tie** and the Indemnified Parties or made against the Infraco and the provisions of Schedule Part 43 (*Reserve Account*) shall apply.

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

77.10 The Parties acknowledge and agree that the only rights available to them to terminate this Agreement are those expressly set out in this Agreement and that neither Party shall be entitled to exercise a right to terminate or rescind or accept the repudiation of this Agreement under any other right whether arising in common law or statute or otherwise howsoever (other than for fraud or a fraudulent misrepresentation).

77.11 Both Parties acknowledge and agree that the express rights provided in this Agreement in relation to termination and the calculation and payment of amounts due following such termination are exclusive and are in place of (and not cumulative with) any other rights or remedies which might arise as a consequence of such termination or expiry. Each Party hereby waives all other rights and remedies arising from such termination, whether express or implied, arising by common law (including in delict), by statute or otherwise howsoever provided that nothing in this Clause 77.11 exclude the right of either Party to claim remedies expressly conferred on them by this Agreement.

77.12 Except in respect of usable material necessarily generated from the Permanent Land in the carrying out and completion of the Infraco Works or where otherwise stated in this Agreement the Infraco shall pay all tonnage and other royalties rent and other payments or compensation (if any) for getting stone sand, gravel, clay or other materials required for the Infraco Works.

Criminal Liability

77.13 Where the act or default of the Infraco or of any Infraco Parties, causes **tie** to commit an offence, the Infraco shall immediately take any measure necessary to ensure that that act or default, no longer causes **tie** to commit that offence.

77.14 Where **tie** reasonably suspects that such an act or default is about to take place and it reasonably believes that this will result in **tie** committing an offence, **tie** may issue an instruction to the Infraco to remedy the act or default forthwith and the Infraco shall comply with the said instruction.

Latent Defects Liability

77.15 Save in respect of any claims notified in writing to the Infraco by tie and in respect of which tie has invoked Clause 97 (*Dispute Resolution Procedure*) no later than 3 months after the expiry of the period of 12 years from the issue of the Reliability Certificate, the Parties agree that Infraco shall have no liability and no actions or proceedings shall be commenced against Infraco or either of the Infraco Members in respect of any latent defects in the Infraco Works after the period of 12 years from the issue of the Reliability Certificate.

77.16 Subject to Clause 77.17 tie shall indemnify Infraco and its respective officers, agents and employees (the "Infraco Indemnified Parties") from and against any and all claims, suits, losses, liabilities, damages, penalties, fines, forfeitures and the costs and expenses incidental thereto (including without limitation any legal costs of defence) which Infraco Indemnified Parties may hereafter incur, become responsible for, or pay out as a result of:

(i) death or injury to any person;

(ii) loss or damage to property;

which arises from:

(i) the negligent or wilful acts, or negligent or wilful omissions by the Tram Supplier, Tram Supplier Party, the Tram Maintainer or any Tram Maintainer Party;

(ii) breach by the Tram Supplier of its obligations under the Tram Supply Agreement including any Law or breach by the Tram Maintainer of its obligations under the Tram Maintenance Agreement including any Law;

(iii) any non-performance or delay in performance of the Tram Supplier of its obligations under the Tram Supply Agreement or Tram Maintainer of its obligations under the Tram Maintenance Agreement including any Law.

77.17 The exception referred to in clause 77.16, which is the responsibility of Infraco, is death of, or injury to, persons or loss of or damage to property resulting from any act, omission, neglect or breach of statutory duty by the Infraco Indemnified Parties or other contractors (not being employed by tie or any tie Party) or for or in respect of any claims, suits, losses, liabilities, damages, penalties, fines, forfeitures, and the costs and expenses, demands, proceedings, damages, costs, charges and expenses in respect thereof or in relation thereto.

77.18 tie's liability to indemnify the Infraco Indemnified Parties under Clause 77.16 shall be reduced in proportion to the extent that the act, omission, neglect or breach of statutory duty of the Infraco Indemnified Party or other contractors

(not being tie or any tie Party) may have contributed to the said death, injury, loss or damage.

77.19 tie's liability to indemnify the Infraco Parties under clause 77.16 shall be limited in accordance with clause 41 of the Tram Supply Agreement and/or clause 45 of the Tram Maintenance Agreement, as appropriate, as if tie was the Tram Supplier or Tram Maintainer, as appropriate, and otherwise mutatis mutandis.

78. **CONDUCT OF CLAIMS**

78.1 Subject always to the requirements of the Required Insurances, the OCIP Insurances and/or any Additional Insurance:

78.1.1 if **tie** receives any notice, demand, letter or other document concerning any claim from which it appears that **tie** is or may become entitled to indemnification under this Agreement ("**Claim**"), **tie** shall notify the Infraco as soon as reasonably practicable and shall supply a copy of the relevant Claim to the Infraco.

78.1.2 where it appears that **tie** is, or may become, entitled to indemnification from the Infraco in respect of the liability arising out of the act or omission which is the subject of the Claim, the Infraco shall take conduct of any defence, dispute, compromise or appeal of the Claim and of any incidental negotiations and shall be entitled to resist the Claim in the name of **tie** and **tie** will give the Infraco all reasonable co-operation, access and assistance for the purposes of considering and resisting such Claim.

78.2 In relation to any Claim subject to Clause 78.1.2:

78.2.1 the Infraco shall keep **tie** fully informed and consult with it about material elements of the conduct of the Claim;

78.2.2 the Infraco shall not bring the name of **tie** into disrepute; and

78.2.3 the Infraco shall not pay or settle such Claims without the prior written consent of **tie**, such consent not to be unreasonably withheld or delayed.

78.3 **tie** shall be free to take steps in the proceedings, pay or settle any Claim on such terms as it thinks fit (and without prejudice to its rights and remedies under this Agreement) if the Infraco fails to notify **tie** of its intention to conduct the relevant Claim within 20 Business Days of the notice from **tie** under Clause 78.1.1 above or the Infraco notifies **tie** that it does not intend to take conduct of the Claim.

78.4 NOT USED

78.5 If, in controlling and contesting any Claim, **tie** takes or fails to take any action in relation to such Claim which it might reasonably be expected to take or not take (as the case may be) which terminates or reduces any entitlement of the Infraco to recover any part of the Claim from any insurer under any of the Required Insurances, the OCIP Insurances and/or any Additional Insurance, the liability of the Infraco to indemnify **tie** in respect of such Claim shall be reduced by an amount equal to such part or, as the case may be, the amount of the reduction thereof (except in the case where **tie** could not reasonably have been expected to have known that the Infraco's entitlement could be so terminated or reduced).

78.6 If the Infraco pays to **tie** an amount in respect of an indemnity and **tie** subsequently recovers (whether by payment, discount, credit, saving, relief, other benefit or otherwise) a sum which is directly referable to the fact, matter, event or circumstances giving rise to the Claim, **tie** shall forthwith repay to the Infraco whichever is the lesser of:

78.6.1 an amount equal to the sum recovered (or the value of the saving or benefit obtained) less any out-of-pocket costs and expenses properly incurred by **tie** in recovering the same; and

78.6.2 the amount paid to **tie** by the Infraco in respect of the Claim under the relevant indemnity;

provided that **tie** shall use reasonable endeavours to pursue such recovery and provided further that the Infraco shall be repaid only to the extent that the amount of such recovery aggregated with any sum recovered from the Infraco exceeds any loss sustained by **tie** in respect of the Claim.

78.7 In the event that the Infraco is entitled to be indemnified by **tie** pursuant to Clause 77.4 in respect of a claim, the provisions of Clause 78.1, 78.2, 78.5 and 78.6 shall apply as if references to "**tie**" were references to "Infraco" and vice versa.

PART 15 - CHANGES

79. MANAGEMENT OF VARIATIONS

79.1 Any variations proposed to the Infraco Works shall be dealt with as follows:

79.1.1 **tie** Changes shall be dealt with in accordance with Clause 80 (*tie Changes*);

79.1.2 Infraco Changes shall be dealt with in accordance with Clause 81 (*Infraco Changes*);

79.1.3 Small Works Changes shall be dealt with in accordance with Clause 82 (*Small Works Changes*);

79.1.4 Accommodation Works Changes shall be dealt with in accordance with Clause 83 (*Accommodation Works Changes*);

79.1.5 Qualifying Changes in Law shall be dealt with in accordance Clause 84 (*Qualifying Changes in Law*);

79.1.6 Network Expansions shall be dealt with in accordance with Clause 86 (*Network Expansions*);

79.1.7 Labour tax and landfill tax fluctuations shall be dealt with in accordance with Clause 71 (*Labour Tax and Landfill Tax Fluctuations*);
and

79.1.8 where applicable, Schedule Part 4 (*Pricing*).

79.2 The Infraco shall maintain a change control register which shall detail the status and give summary information on all withdrawn, pending and confirmed variations under this Agreement. The Infraco shall provide a copy of the change control register to **tie** and the Infraco shall provide updates of the change control register to **tie** every Reporting Period.

79.3 No variation ordered in accordance with this Agreement shall in any way vitiate or invalidate this Agreement.

80. **TIE CHANGES**

80.1 Unless expressly stated in this Agreement or as may otherwise be agreed by the Parties, **tie** Changes shall be dealt with in accordance with this Clause 80 (*tie Changes*) save where they relate to the On Street Works in which case the provisions of Appendix B of Schedule Part 45 (On Street Works) shall apply. If **tie** requires a **tie** Change, it must serve a **tie** Notice of Change on the Infraco.

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

80.2.1 set out the proposed **tie** Change in sufficient detail to enable the Infraco to calculate and provide the Estimate in accordance with Clause 80.4 below;

80.2.2 subject to Clause 80.3, require the Infraco to provide **tie** within 18 Business Days of receipt of the **tie** Notice of Change with an Estimate, and specify whether any competitive quotes are required and;

80.2.3 set out how **tie** wishes to pay (where relevant) for the proposed **tie** Change.

80.2.4 set out any changes which **tie** believe are required to the terms of this Agreement and/or the SDS Contract to give effect to the proposed **tie** Change

80.3 If, on receipt of the **tie** Notice of Change, the Infraco considers (acting reasonably) that the Estimate required is too complex to be completed and returned to **tie** within 18 Business Days, then the Infraco shall, within 5 Business Days (during the period prior to issue of the Reliability Certificate) and within 10 Business Days (at any time after issue of the Reliability Certificate) of receipt of such **tie** Notice of Change, deliver to **tie** a request for a reasonable extended period of time for return of the Estimate, such extended period to be agreed by the Parties, both acting reasonably.

80.4 As soon as reasonably practicable, and in any event within 18 Business Days after having received a **tie** Notice of Change (or such longer period as may have been agreed by the Parties, pursuant to Clause 80.3 or as required by Clause 80.11), the Infraco shall deliver to **tie** the Estimate. The Estimate shall include the opinion of the Infraco (acting reasonably) in all cases on:

80.4.1 whether relief from compliance with any of its obligations under this Agreement is required during or as a result of the implementation of the proposed **tie** Change;

80.4.2 any impact on the performance of the Infraco Works and the performance of ~~the Edinburgh Tram Network~~Initial Phase 1a (including where reasonably practicable the Trams);

80.4.3 any impact on the Programme and any requirement for an extension of time;

80.4.4 any Consents, Land Consents and/or Traffic Regulation Orders (and/ or any amendment or revision required to existing Consents, Land Consents and/ or Traffic Regulation Orders) which are required in order to implement or as a result of the implementation of the proposed **tie** Change and any update of the Consents Programme which will be required as a result;

80.4.5 any new agreements with third parties which may be required to implement the **tie** Change;

80.4.6 any amendment required to the Agreement or the Key Subcontracts as a result of the implementation of the proposed **tie** Change;

80.4.7 the proposed method of delivery of the proposed **tie** Change;

80.4.8 proposals to mitigate the impact of the proposed **tie** Change;

80.4.9 confirmation of the changes to the terms of this Agreement and/or the SDS Contract proposed by **tie** and any further changes the terms of this Agreement and/or the SDS Contract necessary to give effect to the proposed **tie** Change; and

80.4.10 any increase or decrease in any sums due to be paid to the Infraco under this Agreement (including the value of any Milestone Payments and the scheduling of such Milestone Payments) in order to implement, and as a direct consequence of implementation of, the **tie** Change, such increase or, decrease to be calculated in accordance with this Clause 80.

80.5 Where the **tie** Change, in the opinion of the Infraco acting reasonably, impacts the ability to deliver the Maintenance Services in accordance with Clause 52 (Maintenance) the Estimate delivered pursuant to Clause 80.4 shall include any net increase or decrease in:

80.5.1 in the case of demonstrable impact (taking into account any impact of previously implemented **tie** or Infraco Changes) on routine maintenance activity:

80.5.1.1 the consequential change in labour resources and management time required for each affected maintenance element of the Infraco Works; and

80.5.1.2 the consequential change in materials, plant and equipment required; or

80.5.2 in the case of demonstrable impact (taking into account any impact of previously implemented **tie** or Infraco Changes) on renewals maintenance activity:

80.5.2.1 the scope of required renewals work or services and frequency of renewals;

80.5.2.2 the resulting change in labour resources and management time required for the renewal work; and

80.5.2.3 the resulting change in materials and plant and equipment (if any) used to effect the renewals.

80.6 The valuation of any **tie** Changes made in compliance with this Clause 80 (*tie* Changes) shall be carried out as follows and in accordance with Schedule Part 4, Appendix B (to the extent relevant):

80.6.1 by measurement and valuation at the rates and prices for similar work in Appendix ~~FA~~ to Schedule Part 4 (*Pricing*) and/or Schedule Part 7 (*Maintenance Contract Price Analysis*) as the case may be in so far as such rates and prices apply;

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

80.6.3 if such rates and prices do not apply and it is not practicable to deduce rates and prices therefrom, by measurement and/or valuation at fair rates and prices ~~in accordance with Appendix G~~ which prices shall, in relation to Civil Engineering Works, include the head office overhead and profit percentage set out in paragraph 3.1 of Appendix B of Schedule Part 4 (*Pricing*) ~~and Appendix F Schedule Part 7 (Maintenance Contract Price Analysis)~~;

80.6.4 if the value of the **tie** Change cannot properly be ascertained by measurement and/or valuation, the value of the resources and labour employed thereon, as appropriate and in accordance with paragraph 2 of Appendix GB to Schedule Part 4 (*Pricing*) ~~and Appendix F to Schedule Part 7 (Maintenance Contract Price Analysis)~~;

provided that where any **tie** Change would otherwise fall to be valued under Clauses 80.6.1 and 80.6.2 above, but the instruction therefor was issued at such a time or was of such content as to make it unreasonable for the alteration or addition to be so valued, the value of the **tie** Change shall be ascertained by measurement and/or valuation at fair rates and prices.

80.7 The Infraco shall include in the Estimate evidence demonstrating that:

80.7.1 the Infraco has used all reasonable endeavours to minimise (including by the use of competitive quotes where appropriate in the case of construction works and where reasonable in the circumstances that new or additional sub contractors are required to deliver the change in the case of Maintenance Services or where construction works are undertaken during the maintenance phase) any increase in costs and to maximise any reduction of costs ;

- 80.7.2 the Infraco has, where required by **tie** and where appropriate and practicable, sought competitive quotes from persons other than the Infraco Parties in pursuance of its obligation under Clause 80.7.1 above;
- 80.7.3 the Infraco has investigated how to mitigate the impact of the **tie** Change; and
- 80.7.4 the proposed **tie** Change will, where relevant, be implemented in the most cost effective manner (taking into account the reasonable requirements of Infraco in relation to quality) including showing where reasonably practicable that when any expenditure is incurred, relevant Changes in Law that are reasonably foreseeable at the time of consideration of the specific **tie** Change and which relate to that **tie** Change have been taken into account by the Infraco.
- 80.8 If the Infraco does not intend to use its own resources to implement any proposed **tie** Change, it shall:
- 80.8.1 demonstrate that it is appropriate to subcontract the implementation of such **tie** Change; and
- 80.8.2 comply with Good Industry Practice with the objective of ensuring that it obtains best value for money when procuring any sub-contractor or Deliverable required in relation to the proposed **tie** Change.
- 80.9 As soon as reasonably practicable after **tie** receives the Estimate, the Parties shall discuss and agree the issues set out in the Estimate. From such discussions **tie** may modify the **tie** Notice of Change, In each case the Infraco shall subject to Clause 80.11, as soon as practicable, and in any event not more than 15 Business Days after receipt of such modification, notify **tie** of any consequential changes to the Estimate.
- 80.10 Subject to Clause 80.15, if the Parties cannot agree on the contents of the Estimate, then either Party may refer the Estimate for determination in accordance with the Dispute Resolution Procedure.
- 80.11 If a **tie** Change requires a change in respect of design work to be carried out by the SDS Provider under the SDS Contract or any other change to the SDS Contract, the cost of such change will be valued in accordance with the terms of the SDS Contract and Infraco shall be allowed such time to perform its obligations under this Clause 80 as may reasonably be required to allow it to obtain information from the SDS Provider under the SDS Contract which Infraco may require in order to prepare an Estimate for such Change and any modifications thereto.
- 80.12 The Infraco shall not be obliged to implement any proposed **tie** Change where:

80.12.1 **tie** does not have the legal power or capacity to require the implementation of such proposed **tie** Change; or

80.12.2 NOT USED

80.12.3 implementation of such proposed **tie** Change would:

80.12.3.1 be contrary to Law;

80.12.3.2 not be technically feasible;

80.12.3.3 increase the risk of a non-compliance with this Agreement by the Infraco to the extent such risk is not capable of being addressed by relief from obligations given to the Infraco or by amendment to the terms of this Agreement;

80.12.3.4 be outwith the specific competence of the Infraco either in performing the activity required by the **tie** Change or in supervising an the Infraco Party to carry out the activity required by the **tie** Change;

80.12.3.5 where the **tie** Change is instructed after the completion of Section D, require Infraco to carry out work and/or services that are not transport infrastructure and maintenance related to be performed after completion of Section D; or

80.12.3.6 make the provision of the Maintenance Services by the Infraco financially unfeasible.

80.13 Subject to Clause 80.15, as soon as reasonably practicable after the contents of the Estimate have been agreed **tie** may:

80.13.1 issue a **tie** Change Order to Infraco,; or

80.13.2 except where the Estimate relates to a Mandatory **tie** Change, withdraw the **tie** Notice of Change, in which case Infraco shall be entitled to claim the reasonable additional costs incurred by the Infraco in complying with this Clause 80 in relation to that **tie** Notice of Change including the cost of any abortive works where **tie** has instructed Infraco to commence works prior to the agreement of the Estimate.

~~Subject to Clause 80.15, for the avoidance of doubt, the~~Unless otherwise instructed by
tie, Infraco shall not commence work in respect of a **tie** Change until instructed through receipt of a **tie** Change Order ~~unless otherwise directed by **tie**.~~

80.14 Subject to Clause 80.15, if **tie** does not issue a **tie** Change Order in accordance with Clause 80.13.1, within 28 Business Days of the contents of the Estimate having been agreed or determined then the **tie** Notice of Change shall be deemed to have been withdrawn except where the Estimate relates to a Mandatory **tie** Change in which case **tie** will be deemed to have issued a **tie** Change Order.

80.15 ~~Where an Estimate has been referred to the Dispute Resolution Procedure for determination, but it is deemed by **tie** (acting reasonably) that the proposed **tie** Change is urgent and/or has a potential significant impact on the Programme, subject to Infraco's right to refuse to carry out a **tie** Change under Clause 80.12 and save where such proposed **tie** Change includes work by the SDS Provider and where the valuation of such work is not agreed, **tie** may instruct Infraco to carry out the~~ **tie may instruct the Infraco to carry out a** proposed **tie** Change prior to ~~the~~**submission,** determination or agreement of ~~the Estimate~~**any Estimate in respect of such tie Change** by issuing a **tie** Change Order to that effect.

80.16 Where **tie** issues a **tie** Change Order under Clause 80.15, Infraco shall implement the **tie** Change, and prior to determination or agreement of the Estimate shall be entitled to claim Infraco's demonstrable costs in implementing the **tie** Change calculated in accordance with Clause 80.6.

80.17 As soon as reasonably practicable and in any event within 20 Business Days of issue of a **tie** Change Order, or such other period as the Parties may agree acting reasonably, Infraco shall update:-

80.17.1 the Programme in accordance with Clause 60;

80.17.2 Schedule Part 5 (Milestone Payments) in relation to Milestone Payments ~~and/or Critical Milestone Payments~~ in accordance with Clause ~~67.10~~**67**);

80.17.3 the Maintenance Services Payments in accordance with Clause 68.8;

80.17.4 the Maintenance Services Performance Plan; and

80.17.5 any other previously accepted Deliverable,

as may be required in accordance with the agreed Estimate or as may be required to implement the **tie** Change in accordance with this Agreement.

80.18 As soon as reasonably practicable and in any event within 20 Business Days of issue of a **tie** Change Order, or such other period as the Parties may agree acting reasonably, the Parties shall enter into any document to amend the terms and conditions of this Agreement as referred to in the agreed Estimate to which the **tie** Change Order relates.

Restrictions on Entitlements to Relief for tie Change

80.19 The Infraco shall not be entitled to any extension of time, payment or relief in respect of any **tie** Notice of Change affecting the construction of the Infraco Works or the delivery of the Maintenance Services if and to the extent that:

80.19.1 with regard to construction, it would be reasonable to expect Infraco to have prevented or materially reduced the requirement for such **tie** Change, given the information known to Infraco at the time;
~~and/or~~

80.19.2 with regard to Infrastructure Maintenance Services, it would have been reasonable to expect the Infraco to have foreseen that a physical deficiency or defect in the Infraco Works would, despite continual planned maintenance, lead to the requirement for a **tie** Change which could have been prevented or materially reduced by earlier intervention by **tie** and Infraco has failed to report such deficiency or defect in the Infraco Works in a timely fashion to ~~tie~~; or

80.19.3 such tie Notice of Change is required due to any negligence, breach or omission of the Infraco.

80.20 If, having received instructions from **tie** or **tie's** Representative, the Infraco consider that compliance with those instructions would amount to a **tie** Change, then the Infraco shall nevertheless as soon as reasonably practicable comply with the instruction and shall within 20 Business Days of any instructions being received, notify **tie** of the same, such notification to include an Estimate pursuant to Clauses 80.4 and 80.5. From the date of receipt by **tie** of such an Estimate, Clause ~~80.15 and~~ 80.16 shall be deemed to apply *mutatis mutandis* to the work carried out by Infraco in complying with such instruction. If it is agreed by the Parties or determined pursuant to the Dispute Resolution Procedure that the instructions amount to a **tie** Change (either Party being entitled to refer the matter to the Dispute Resolution Procedure if the matter has not been agreed within 10 Business Days of the Estimate being received by **tie**) then the provisions of this Clause 80 (*tie Changes*) shall apply to such instructions.

80.21 Any failure by the Infraco to notify **tie** within 20 Business Days of instructions being received that it considers compliance with such instructions from **tie** or **tie's** Representative would amount to a **tie** Change shall constitute an irrevocable acceptance by the Infraco that any compliance with **tie's** or **tie's** Representative's instructions shall not constitute a **tie** Change under this Agreement.

Third Party Agreements

80.22 If **tie** wishes Infraco to perform any of the obligations contained in any third party agreement which are not set out in part A of Schedule Part 13 (*Third Party Agreements*) or to be responsible for ensuring that neither **tie** or CEC will be put in breach of their obligations to third parties other than to the extent that it is responsible by virtue of the operation of Clause 18.17A **tie** shall serve a notice on the Infraco (a "**TPA Change Notice**") which notice shall comply with the requirements of Clause 80.2. Subject to Clause 80.25, the provisions of this Clause 80 shall apply *mutatis mutandis* to any TPA Change Notice served by **tie**.

80.23 Following service by **tie** of a TPA Change Notice, the Parties shall negotiate in good faith and acting reasonably to agree the adjustment to the Contract Price, if any, appropriate to compensate Infraco for the Infraco accepting any additional responsibility or risk arising from the TPA Change Notice to the extent not reflected adequately through application of Clause 80.5.

Notified Departures

80.24 ~~Where pursuant to paragraph 3.5 of Schedule Part 4 (*Pricing*) or pursuant to Clause 14 (*tie Obligations*), **tie** is deemed to have issued a **tie** Notice of Change as a result of the occurrence of a Notified Departure, the provisions of this Clause 80 (*tie Changes*) other than Clause 80.19 shall apply.~~ **NOT USED.**

81. **INFRACO CHANGES**

81.1 If the Infraco becomes aware of the need or desirability for a variation to the Infraco Works, (which does not fall within any of the other categories listed in Clause 79.1, save for Clause 79.1.2) the Infraco shall notify **tie** of the reasons for such variation and make proposals for the proposed variation in writing. **tie** shall be free to accept or reject any proposed variation as **tie** thinks fit, (other than where the Infraco Change is necessary for Infraco to comply with a Change in Law which is not a Qualifying Change in Law, in which case **tie** shall accept such proposal or such other proposal as **tie** may reasonable require which does not increase the costs to the Infraco of complying with the relevant Change in Law) and **tie** shall determine whether such proposal is dealt with in accordance with Clause 81.2 or Clause 81.3.

81.2 If **tie** wishes to proceed with a variation proposed by the Infraco, **tie** shall serve a **tie** Notice of Change on the Infraco and Clause 80 shall be adhered to by **tie** and the Infraco in respect thereof, provided that:

81.2.1 **tie** may require that there be a reduction to the Contract Price if such change will result in lower costs for the Infraco; or

81.2.2 in the event of an anticipated increase to the costs of the Infraco resulting from any change requested by the Infraco pursuant to Clause 81.1, there shall be no variation to the Contract Price unless otherwise agreed by the Parties; ~~or~~

81.2.3 Infraco shall not be entitled to any extension of time in respect of such change where it results from a Change in Law which is not a Qualifying Change in Law.

81.3 If Infraco considers that a change could effect a saving of £20,000 (as Indexed) or more, the Infraco shall propose such change in accordance with Clause 81.1 and the Infraco's proposal shall be accompanied by a value engineering report which shall include:

81.3.1 a whole life cost analysis in respect of each element of (i) the Infraco Works affected by the proposed change and/or (ii) any additional works proposed to be carried out in order to effect the proposed change;

81.3.2 option appraisals and reasoned arguments to demonstrate why any particular systems, plant, equipment, materials and the like should be selected in preference to others for incorporation into the Infraco Works, taking into account the operational life of ~~the Edinburgh Tram Network~~ **Initial Phase 1a**; or

81.3.3 the Infraco's proposals for the lump sum reduction to the Contract Price in respect of such proposal.

tie may accept such proposal at its absolute discretion and its decision in this respect shall be final and binding. If the proposed change is accepted, the reduction to the Contract Price that is anticipated as arising as a result of such change shall be shared between **tie** and the Infraco on a 50:50 basis and the Infraco's share shall be added to the Contract Price after the saving has been made.

81.4 As soon as reasonably practicable and in any event within 20 Business Days of issue of acceptance by **tie** of an Infraco Change or such other period as the Parties may agree acting reasonably, Infraco shall update:-

81.4.1 the Programme in accordance with Clause 60;

81.4.2 the Maintenance Services Performance Plan; and

81.4.3 any other previously accepted Deliverable

as may be required in accordance with the agreed Infraco Change or as may be required to implement the Infraco Change in accordance with this Agreement.

82. **SMALL WORKS CHANGES**

82.1 In the event that **tie** or **tie's** Representative, by notice in writing to the Infraco, requests the Infraco to carry out any Small Works, the Infraco shall calculate the cost of them as follows:

82.1.1 the labour element shall be calculated in accordance with Schedule Part 4 (*Pricing*) or, where such rates are not applicable, in accordance with the rates which are fair and reasonable having regard to the nature of the Small Works requested;

82.1.2 the materials element shall be charged at the cost (excluding VAT) of the materials to the Infraco (net of all discounts) plus the percentage uplift as indicated in Schedule Part 4 (*Pricing*); and

82.1.3 the plant element shall be calculated in accordance with Schedule Part 4 (*Pricing*) or, where such rates are not applicable, in accordance with the rates which are fair and reasonable having regard to the nature of the Small Works requested; and

82.1.4 the Sub-Contractor element shall be charged at the cost (excluding VAT) plus the percentage uplift as indicated in the Schedule Part 4 (*Pricing*)

and as soon as reasonably practicable and no later than 5 Business Days, the Infraco shall confirm by notice in writing to **tie** (the "**Small Works Cost Notice**") the amount of such cost and the basis for, and inputs to, such calculation.

82.2 **tie** shall not request the Infraco to carry out any Small Works, the execution of which would require input from the SDS Provider, the Tram Supplier or the Tram Maintainer.

82.3 The Infraco and **tie** or **tie's** Representative shall agree the timing of any Small Works so as to minimise any inconvenience to **tie**, the Infraco or disruption to the Programme. The Infraco shall take all reasonable steps to minimise the duration of any Small Works.

82.4 If, at any time within 5 Business Days following receipt by **tie** of a Small Works Cost Notice pursuant to Clause 82.1, **tie** notifies the Infraco in writing that **tie** or **tie's** Representative wishes the Infraco to proceed with the Small Works to which the Small Works Cost Notice relates, the Infraco shall carry out and complete such Small Works in accordance with the said Small Works Cost Notice and the relevant request pursuant to Clause 82.1 from **tie** in

accordance with any timing agreed pursuant to Clause 82.3 but otherwise as soon as reasonably practicable.

82.5 Infraco shall not be obliged to implement a Small Works Change in the circumstances where Clause 80.12 would have applied had the Small Works Change been a **tie** Change.

82.6 As soon as reasonably practicable and in any event within 20 Business Days of issue of a Small Works Change, or such other period as the Parties may agree acting reasonably, Infraco shall update:

82.6.1 the Programme in accordance with Clause 60;

82.6.2 Schedule Part ~~4~~ *(Pricing)* 5 (Milestone Payments) in relation to Milestone Payments ~~and/or Critical Milestone Payments~~ in accordance with Clause ~~67.10~~ 67;

82.6.3 the Maintenance Services Payment in accordance with Clause 68.8;

82.6.4 the Maintenance Services Performance Plan; and

82.6.5 any other previously accepted Deliverable

to take account of the Small Works Change and implement it in accordance with this Agreement.

83. **ACCOMMODATION WORK CHANGES**

83.1 In the event that **tie** or **tie's** Representative, by notice in writing to the Infraco, requests the Infraco to carry out any Accommodation Works, the Infraco shall calculate the cost of them as follows:

83.1.1 the labour element shall be calculated in accordance with Schedule Part 4 *(Pricing)* or, where such rates are not applicable, in accordance with the rates which are fair and reasonable having regard to the nature of the Accommodation Works requested;

83.1.2 the materials element shall be charged at the cost (excluding VAT) of the materials to the Infraco plus the percentage uplift as indicated in Schedule Part 4 *(Pricing)*; and

83.1.3 the plant shall be calculated in accordance with the Schedule Part 4 *(Pricing)* or, where such rates are not applicable, in accordance with the rates which are fair and reasonable having regard to the nature of the Accommodation Works requested; and

83.1.4 the Sub-Contractor element shall be charged at cost (excluding VAT) plus the percentage uplift as indicated in the Pricing Schedule

and as soon as reasonably practicable and no later than 5 Business Days, the Infraco shall confirm by notice in writing to **tie** (the "**Accommodation Works Cost Notice**") the amount of such cost and the basis for, and inputs to, such calculation.

83.2 **tie** shall not require the Infraco to carry out any Accommodation Works the execution of which would require input from the SDS Provider. Any such instruction shall be given pursuant to Clause 80 (***tie** Changes*).

83.3 The Infraco and **tie** or **tie's** Representative shall agree the timing of any Accommodation Works so as to minimise any inconvenience to **tie** and/or the Infraco and/or disruption to the Programme. The Infraco shall take all reasonable steps to minimise the duration of any Accommodation Works. For the avoidance of doubt, the timing of any agreed Accommodation Works shall not be treated as forming part of the Programme and a separate programme for the completion of such Accommodation Works shall be agreed between **tie** and the Infraco (both Parties acting reasonably). For the avoidance of doubt, if any Relief Event or Compensation Event occurs and has an impact on the progress of the Accommodation Works, then any extension of time or relief granted in accordance with Clause 64 (*Relief Events*) or Clause 65 (*Compensation Events*) shall be granted in respect of the programme for the completion of the Accommodation Works not the Programme.

83.4 If, at any time within 5 Business Days following receipt by **tie** of an Accommodation Works Cost Notice pursuant to Clause 83.1, **tie** notifies the Infraco in writing that **tie** or **tie's** Representative wishes the Infraco to proceed with the Accommodation Works to which the Accommodation Works Cost Notice relates, the Infraco shall subject to Clause 18 carry out and complete such Accommodation Works in accordance with the said Accommodation Works Cost Notice and the relevant request pursuant to Clause 83.1 from **tie** in accordance with the programme agreed pursuant to Clause 83.3 but otherwise as soon as reasonably practicable.

83.5 Infraco shall not be obliged to implement an Accommodation Works Change in the circumstances where Clause 80.12 would have applied had the Accommodation Works Change been a **tie** Change.

83.6 As soon as reasonably practicable and in any event within 20 Business Days of issue of a Accommodation Works Change, or such other period as the Parties may agree acting reasonably, Infraco shall update:

83.6.1 the Programme in accordance with Clause 60;

83.6.2 Schedule Part 5 (Milestone Payments) in relation to Milestone Payments ~~and/or Critical Milestone Payments~~ in accordance with Clause ~~67.10~~67; and

83.6.3 any other previously accepted Deliverable

to take account of the Accommodation Works Change and implement it in accordance with this Agreement.

84. **QUALIFYING CHANGES IN LAW**

84.1 If a Qualifying Change in Law occurs or is to occur, then either Party may write to the other to express an opinion on its likely effects, giving details of its opinion of:

84.1.1 any necessary change in the Infraco Works;

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

84.1.3 whether relief from compliance with any obligations under this Agreement is required as a result of the Qualifying Change in Law;

in each case giving in full detail the procedure for implementing the Qualifying Change in Law. Responsibility for any costs of such implementation shall be dealt with in accordance with Clauses 84.2 and 84.3 below.

84.2 As soon as reasonably practicable after receipt of any notice from either Party under Clause 84.1 above, the Parties shall discuss and agree the issues referred to in Clause 84.1 above and any ways in which the Infraco can mitigate the effect of the Qualifying Change in Law and the Infraco shall:

84.2.1 provide evidence to **tie** that the Infraco has used and will continue to use all reasonable endeavours (including where appropriate and practicable the use of competitive quotes) to minimise any increase in costs and maximise any reduction in costs;

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

84.2.3 demonstrate that the relevant changes will be implemented in the most cost effective manner.

84.3 As soon as reasonably practicable after the issues referred to in Clause 84.2 have been agreed between the Parties or determined pursuant to the Dispute Resolution Procedure, **tie** shall give a **tie** Notice of Change on the basis that an extension of time will be granted

to the Infraco to perform its obligations under this Agreement, to the extent that such performance is affected by the Qualifying Change in Law and that any effect on the cost to the Infraco of performing its obligations under this Agreement of any Qualifying Change in Law shall be borne by **tie** and the provisions of Clause 80 (**tie Changes**) shall apply except that the Infraco shall be obliged to implement and **tie** shall be obliged to instruct the change in all circumstances (except to the extent that such change is not necessary to implement the Qualifying Change in Law or where **tie** has instructed a **tie** Change in order to remove the requirement to comply with a Qualifying Change in Law). **tie** shall issue a **tie** Change Order once it has been agreed or determined pursuant to the Dispute Resolution Procedure. In assessing the value of any change, **tie** shall subject to Clause 84.4, pay the agreed or determined amount for each and every Qualifying Change in Law.

84.4 In accordance with Clause 84.3, payment shall be due from **tie** to the Infraco:

84.4.1 subject to Clauses 84.4.2, 84.4.3, 84.4.4 and 84.4.5, in respect of Qualifying Changes in Law the value of which when aggregated with the value of all previous Qualifying Changes in Law exceed a threshold of £150,000 in aggregate, the amount by which the value of such Qualifying Change in Law exceeds such threshold when aggregated with the value of all previous Qualifying Changes in Law;

84.4.2 where the threshold under Clause 84.4.1 has been exceeded, in respect of SDS Qualifying Changes in Law the value of which are above a threshold of £15,000 in respect of each and every event the amount by which the value of such Qualifying Change in Law exceeds such threshold;

84.4.3 ~~where the threshold under Clause 84.4.1 has been exceeded, in respect of Tram Supply Qualifying Changes in Law the value of which are above a threshold of £30,000 in respect of each and every event the amount by which the value of such Qualifying Change in Law exceeds such threshold; and~~ **NOT USED.**

84.4.4 ~~in respect of Tram Maintenance Qualifying Changes in Law, for the first 5 years following the Service Commencement Date the value of which are above a threshold of £15,000 in respect of each and every event the amount by which the value of such Tram Maintenance Qualifying Change in Law exceeds such threshold up to an aggregate of £150,000 and thereafter any Tram Maintenance Qualifying Changes in Law will be dealt with as a Mandatory **tie** Change.~~ **NOT USED.**

- 84.5 Except otherwise expressly provided in this Agreement, the Infraco shall be responsible for any increase in its costs and shall not be entitled to any relief from its obligations under this Agreement to the extent that the same is caused as a result of a General Change in Law at any time during the Term.
- 84.6 Where a General Change in Law raises a technical, design or performance issue that requires a revision of the delivery of the ~~Tram~~ Maintenance Services, the Infraco shall take all possible measures to ensure that ~~the Edinburgh Tram Network~~ Initial Phase 1a is operating in accordance with the relevant Legislation, ~~but will not be responsible for the cost and delivery implications of such General Change in Law beyond that for which the Tram Maintainer is responsible under the Tram Maintenance Agreement.~~
- 84.7 The Infraco shall be entitled to benchmark any costs and expenditure affected by a General Change in Law or likely to be affected by a forthcoming General Change in Law (the "**Benchmarking Exercise**") after the expiry of 3, 6 and 9 years following the Service Commencement Date.
- 84.8 The Benchmarking Exercise shall be undertaken by comparing the relevant elements of the costs and expenditure applicable to the Maintenance Services as set out in Schedule Part 7 (*Maintenance Contract Pricing Analysis*) prior to the affect of any General Change in Law (the "**Base Price**") with the actual or projected costs and expenditure applicable to the relevant elements of the Maintenance Services following such costs and expenditure being affected by any General Change in Law (the "**Adjusted Price**").
- 84.9 The Infraco shall provide the results of such Benchmarking Exercise to **tie** together with details of the extent to which the Adjusted Price differs from Base Price (the "**Benchmarking Information**").
- 84.10 **tie** shall agree or dispute the Benchmarking Information. **tie** may dispute the Benchmarking Information by notifying Infraco of the basis on which it disputes the Benchmark Information, including whether **tie** believes that there may be the need for a **tie** Change or other action under the Agreement to address the fact that the further provision of the Maintenance Services becoming not economically reasonable for **tie**. If notification is served by **tie**, the Parties shall use reasonable endeavours to resolve such dispute within 20 Business Days of receipt of notification by Infraco, failing which either Party will be entitled to refer the matter to the Dispute Resolution Procedure. In the event that **tie** does not agree or dispute the Benchmarking Information within 40 Business Days of receipt of the same from Infraco, **tie** shall be deemed to have agreed the Benchmarking Information.
- 84.11 Where the Benchmarking Information has been agreed or determined pursuant to Clause 84.10 and the Adjusted Price is higher than the Base Price then the relevant costs and expenditure applicable to the relevant elements of the Maintenance Service set out in

Schedule Part 7 (*Maintenance Contract Pricing Analysis*) shall be increased by the amounts set out in the Benchmarking Information and such increase shall be a Mandatory **tie** Change.

85. PHASE 1B OPTION

85.1 Not later than 31 October 2008, the Infraco acknowledges that **tie** may, by providing the Infraco with a written notice, instruct that the Infraco prepare a proposal for the implementation of the Phase 1b Works on the basis of Schedule Part 37 (*Phase 1b Works*). If so instructed by **tie**, the Infraco shall carry out the Phase 1b Works and, subject to Clause 85.2, the provisions of this Agreement shall apply to the Phase 1b Works.

85.2 Any ambiguities or discrepancies in the Agreement which arise as a result of the notice to proceed in respect of the Phase 1b Works shall be resolved in accordance with Clause 4 (*Priority of Contract Documents*), and any necessary changes to the Agreement shall be agreed between the Infraco and **tie**.

86. NETWORK EXPANSIONS

86.1 **tie** and the Infraco shall keep opportunities for Network Expansion under review throughout the Term.

86.2 From time to time during the Term, **tie** may propose to the Infraco a Network Expansion for development. To the extent that **tie** requests assistance from the Infraco in relation to the development of such Network Expansion:

86.2.1 the Infraco shall provide such services during the development of that Network Expansion and shall carry out any required design and/or any construction works and/or carry out any required maintenance, and the provisions of this Agreement and the Employer's Requirements (where applicable), shall apply to the development of that Network Expansion and any design and/or works and/or carry out any required maintenance; and

86.2.2 the carrying out of such services and any design and/or works and/or maintenance carried out by the Infraco in respect of such services shall be a **tie** Change.

86.3 **tie** may withdraw its request for the Infraco to such services and design and/or works and/or maintenance, and **tie** may continue with the development of such Network Expansion, either by itself or in conjunction with third parties.

86.4 Whether or not **tie** requests the Infraco to provide services and/or design and/or works and/or maintenance in relation to a proposed Network Expansion: