

AGREEMENT

between

THE CITY OF EDINBURGH COUNCIL, the local authority for the City of Edinburgh in terms of the Local Government etc. (Scotland) Act 1994, having its principal office at Council Headquarters, Waverley Court, East Market Street, Edinburgh, EH8 8BG, or its statutory successors (“**the Council**”)

and

TIE LIMITED, a company incorporated under the Companies Acts (registered number SC230949) and having its Registered Office at City Chambers, High Street, Edinburgh, EH1 1YJ (“**tie**”)

Whereas:-

1. The Council set up tie in May 2002 to assist the Council with implementing its local transport strategy;
 2. Powers were conferred upon the Council in relation to the design, construction, commissioning and operation of the Edinburgh Tram Network in terms of the Edinburgh Tram (Line One) Act 2006 and the Edinburgh Tram (Line Two) Act 2006 and the Council wishes to delegate certain of these powers to tie;
 3. The Council is the designated planning and roads authority for the City of Edinburgh;
 4. A general operating agreement between tie and the Council was previously entered into whereby tie agreed to provide services to the Council in developing, procuring and implementing integrated transport projects within Edinburgh, including the delivery of the proposed tram system for Edinburgh;
 5. The terms of the tram Final Business Case and the fact that tie was to enter into various agreements in relation to the Project were approved in principle by the Council on 20 December 2007 via powers delegated to various Council officials;
- and

6. The parties now wish to enter into this agreement to more particularly regulate the relationship between the parties specifically with regard to the procurement and delivery of the trams Project and to define the services tie will provide to the Council.

NOW THEREFORE THE PARTIES HAVE AGREED AND DO HEREBY AGREE AS FOLLOWS:

1 Definitions

1.1 In this Agreement the following terms and expressions shall have the following meanings:

"Agreement"	means this agreement (including the schedules to it), as it may be amended from time to time;
"Employer's Requirements"	means the employer's requirements as more particularly defined in the Infraco Contract;
"Final Business Case"	means the business case relating to the Project which was approved by the Council on 20 December 2007, as it may be amended from time to time in agreement with the Council;
"Funding Agreement"	means the Council-accepted grant offer letter from Transport Scotland to the Council relating to the Project, as it may be amended from time to time;
"Infraco Contract"	means the contract between tie and Bilfinger Berger UK Limited and Siemens plc (contracting on a joint and several liability basis)("the Infraco"), as it may be amended from

	time to time;
“Legislation”	means all rules, regulations, by-laws, directives, statutes and other binding provisions in force from time to time;
“Lothian Buses plc”	means the company incorporated under the Companies Acts and having its registered office at 55 Annandale Street, Edinburgh EH7 4AZ (Registered Number SC096849);
“MUDFA Contract”	means the agreement between Alfred Macalpine Infrastructure Services and tie dated 4 October 2006;
“Phase 1A”	means phase 1A as more particularly described in the Final Business Case;
“Phase 1B”	means phase 1B as more particularly described in the Final Business Case;
“Project”	means the procurement and delivery of a tram system for Edinburgh (Phase 1A and Phase 1B and any approved extension), as more particularly described in the Final Business Case and as approved by the Council in terms of scope;
“Services”	means all the services to be provided by tie as specified in this Agreement, including, without limitation, those specified in Schedule 1;
“Tram Acts”	means Edinburgh Tram (Line One) Act 2006 and the Edinburgh Tram (Line Two) Act 2006;
“Tram Monitoring Officer”	means the Council officer nominated by the Council to monitor tie in relation to the Project;

“Tram Supply Contract” and “Tram Maintenance Contract”	mean the contracts between tie and Construcciones y Auxiliar de Ferrocarriles S.A., as they may be amended from time to time;
“Tram Project Board” or “TPB”	means the committee of the board of TEL established to oversee the delivery of the Project; and
“Transport Edinburgh Limited” or “TEL”	means the company incorporated under the Companies Acts and having its registered office at 55 Annandale Street, Edinburgh EH7 4AZ (Registered Number SC269639).

- 1.2. Headings are included in this Agreement for ease of reference only and shall not affect the interpretation or construction of it.
- 1.3. In this Agreement, references to clauses are, unless otherwise provided, references to clauses of this Agreement and references to schedules are references to the appropriate schedules to it.
- 1.4. In this Agreement, the masculine includes the feminine and the neuter and the singular includes the plural and vice-versa.
- 1.5. Where this Agreement refers to approval being required from the Council or the Tram Monitoring Officer, the Council shall use best endeavours to procure that such approval is not unreasonably withheld or delayed.

2. tie’s Obligations

- 2.1 tie hereby agree to provide the Services to the Council throughout the duration of this Agreement in order to assist in, carry out, promote, manage and administer the Project.
- 2.2 tie shall ensure that all third party advisers and contractors engaged by it shall provide a direct duty of care to the Council in terms acceptable to the Council prior to carrying out any work in relation to the Project, failing which the appointment of any such third party will require the written approval of the Tram Monitoring Officer.

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- 2.3 tie shall use best endeavours to ensure that it delivers a tram system for Edinburgh as specified in the Final Business Case and the Infraco Contract (including the Employer's Requirements). tie shall use best endeavours to comply with all timescales and financial projections detailed in the Final Business Case.
 - 2.4 tie shall use best endeavours to ensure that it is at all times suitably resourced to carry out all the Services in relation to the Project.
 - 2.5 tie shall use best endeavours to ensure that it does not cause the Council to breach the terms of the Funding Agreement. In particular tie shall use best endeavours to ensure that the Council complies with the conditions relating to publicity in the Funding Agreement. tie will provide all reasonable assistance to the Council in relation to the Council's compliance with the terms of the Funding Agreement.
 - 2.6 tie shall use best endeavours to ensure that it complies with and, where it acts on the Council's behalf, shall use best endeavours to ensure that the Council complies with, all Legislation (including all health and safety legislation) relevant to the Project at all times.
 - 2.7 tie shall use best endeavours to ensure that all work sites related to the Project are appropriately managed and supervised at all times to ensure compliance with all health and safety Legislation.
 - 2.8 tie shall use best endeavours to ensure that it does not infringe the intellectual property rights of any third party at any time.
 - 2.9 tie shall use, and shall use best endeavours to procure that all contractors, employees and other third parties which it engages shall use, all reasonable skill, care and diligence in the provision of the Services. All work undertaken by tie shall be progressed with due expedition and without delay to achieve timeous completion of the Project.
 - 2.10 tie shall discharge all its obligations in terms of this Agreement in a proper, honest, faithful and diligent manner and shall at all times act in the best interests of the Council (to the fullest extent permitted by law).
 - 2.11 Insofar as permitted by law, tie shall at all times promptly comply with all reasonable requests made of it by the Council.
 - 2.12 tie shall at all times maintain in place appropriate policies of insurance in relation to all elements of its business and in particular the Project, provided

that each insurance is available in the United Kingdom insurance market at commercially reasonable rates and on commercially reasonable terms to businesses of the same status and discipline as tie. tie shall promptly inform the Tram Monitoring Officer in writing if any insurance ceases to be maintained and/or ceases to be available in the United Kingdom market at commercially reasonable rates and or commercially reasonable terms. In this event, the parties shall meet to discuss the means by which any risks previously covered by insurance should be managed, mitigated or controlled. tie shall provide evidence of all such insurances upon request by the Council. tie shall ensure that the Council is covered as an insured party under the Edinburgh Tram Network Owner Controlled Insurance Programme covering the material damage and third party liability sections and under all other policies of insurance which tie has arranged, where it is possible to do so at reasonable commercial cost.

- 2.13 tie shall ensure that all contractors and consultants engaged or employed by it in any capacity shall have in place a policy of insurance providing tie with appropriate indemnity for all risks relevant to their engagement provided that each insurance is available in the United Kingdom insurance market at commercially reasonable rates and on commercially reasonable terms to businesses of the same status and discipline as the contractor or consultant. tie shall promptly inform the Tram Monitoring Officer in writing if any insurance ceases to be maintained and/or ceases to be available in the United Kingdom market at commercially reasonable rates and or commercially reasonable terms. In this event, the parties shall meet to discuss the means by which any risks previously covered by insurance should be managed, mitigated or controlled.
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- 2.14 tie will ensure that the Corporate Public & Products Liability and Professional Indemnity policies are to include an indemnity to principals clause protecting the interest of the Council as principal.
- 2.15 tie shall provide to the Tram Monitoring Officer upon request, and in any event not less than annually, a report providing full details of all its insurances, including *inter alia* details of (i) the contractors or consultants providing insurance cover to tie and the Council and level of cover provided; and (ii)

- contractors or consultants not providing insurance cover and details of the authorisation obtained from the Tram Monitoring Officer in this regard.
- 2.16 tie shall use best endeavours to ensure best value when providing the Services and in the discharge of all of tie's responsibilities. tie shall use best endeavours to ensure best value in the use of funds or resources provided through or by the Council.
- 2.17 tie shall continue to apply principles of good corporate governance and to adopt and adhere to the Council's Code on Corporate Governance (approved by the Council on 29 June 2006) as it may be amended from time to time.
- 2.18 tie shall allow the Council, its auditors or the Council's other delegated appointees to examine the books, accounts and other records kept by tie (and any subsidiary undertakings of tie) and shall supply the Council with such financial and other information as it may reasonably request from time to time to keep the Council fully informed about the business of tie (and any subsidiary undertakings) and to protect the Council's interests in relation to the terms of this Agreement. tie will supply to the Tram Monitoring Officer copies of all relevant tie and other board papers in connection with the governance arrangements set out in Schedule 2.
- 2.19 tie shall use best endeavours to ensure that it and all third parties it engages and/or contracts with to carry out any works shall at all times comply with all equalities legislation and shall act in a non-discriminatory manner.
- 2.20 The parties acknowledge the terms of the governance arrangements set out in Schedule 2 and tie shall use best endeavours to comply with this governance diagram. The parties agree that where this Agreement refers to tie reporting to, or obtaining approval from, the Council or as the case may be the Tram Monitoring Officer, all such activity shall be made in accordance with this governance diagram.
- 2.21 tie shall liaise with the Tram Monitoring Officer, the Council, and any other bodies which the Council may specify, regularly and shall report to the Council on a four-weekly and annual basis with regard to financial matters and progress generally on the Project in a format acceptable to the Council.
- 2.22 **Immediately that tie becomes aware of the likelihood of delay to, or overspend in, the Project it shall notify the Tram Monitoring Officer at the earliest opportunity, informing them of the reasons for the potential delay or**

overspend and detailing any measures (together with costs) which may mitigate such potential delay or overspend.

- 2.23 Immediately tie becomes aware that it requires a decision or information essential to the continuity of the Project from the Council to achieve key dates in the Project, tie shall give notice of such requirement to the Tram Monitoring Officer with full supporting information to mitigate any delay to the Project to the fullest extent possible.
- 2.24 tie shall not settle any single claim in excess of £500,000, or series of claims in any 12 month period which would exceed in aggregate £1,000,000, without prior written approval from the Tram Monitoring Officer. In accordance with the terms of Clause 2.20, all such claims approval will be subject to the governance arrangements set out in Schedule 2.
- 2.25 tie shall procure that it develops and has approved by the tie board a remuneration policy setting out *inter alia* the benchmarks and procedures for proposed bonus achievement and the project milestone outcomes to which any such bonuses are linked. Such policy to be approved by the tie board, through its Remuneration Committee, in advance of annual reporting periods as it will apply in the succeeding annual reporting period. tie's board shall confirm annually to the Tram Monitoring Officer that tie's incentivisation arrangements are aligned to appropriate Project milestones. The remuneration package, including incentivisation arrangements, of the Executive Chairman of tie will on appointment require approval by the Chief Executive of the Council and thereafter be determined annually by the tie board through its Remuneration Committee.
- 2.26 tie will provide a business plan for approval by the Council on an annual basis.
- 2.27 tie shall use best endeavours to ensure that it and all contractors engaged by it protect the Council's reputation all at times in matters relating to the Project.
- 2.28 tie shall not novate or otherwise transfer any rights or obligations under any contractual arrangement which the Council has approved and to which tie is a party without the prior written consent of the Tram Monitoring Officer.
- 2.29 tie shall comply with the terms of all agreements to which it is a party unless authorised in writing by the Tram Monitoring Officer to do otherwise.
- 2.30 tie shall produce a communications protocol and have this approved quarterly in writing by the Tram Monitoring Officer. The communications protocol will

inter alia reflect the publicity arrangements referred to in Clause 2.5 of this Agreement.

- 2.31 tie will be subject to an independent peer review panel concerning the management of the Project (including all the contract documentation) and will implement all reasonable recommendations of the panel once approved under the governance arrangements set out in Schedule 2.
- 2.32 tie shall act as the agent of the Council in the capacity of transport authority for the purposes of the New Roads and Street Works Act 1991 and the application of the Road Works (Sharing of Costs) (Scotland) Regulations 2003.

3. Council's Obligations and Delegation

- 3.1 The Council hereby delegates to tie, such delegations confirmed for the purposes of sections 68 and 69 of the respective Tram Acts, full legal authority to (i) enter into and manage the Infraco Contract pursuant to the Council resolution dated 20 December 2007; (ii) to enter into and novate to the Infraco the Tram Supply Contract and Tram Maintenance Contract pursuant to the Council resolution dated 20 December 2007; (iii) novate to the Infraco the agreement between tie and Parsons Brinkerhoff Limited dated 19 September 2005; (iv) make such use of the agreement between tie and Transdev Edinburgh Tram Limited dated 14 May 2004 (as amended) as is deemed expedient by tie in relation to the Project; (v) act as agent for the Council under the New Roads and Street Works Act 1991 for the purposes of enabling contributions to be collected from the relevant utility companies and remitted to the Council; (vi) generally, and subject to the express provisions of this Agreement and unless otherwise instructed by the Council, to act on behalf of the Council in relation to undertaking and implementing all matters arising directly from the management and carrying out of the MUDFA Contract and the other contracts and related works and maintenance programmes detailed in (i) to (v) above; and (vii) confirms that the Council will notify the Scottish Ministers as appropriate under the Tram Acts.
- 3.2 The Council agrees to guarantee tie's financial obligations in relation to certain aspects of the Project on terms acceptable to the Council.

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- 3.3 On the basis that tie has, in the reasonable opinion of the Council, provided adequate evidence that expenditure has been properly and appropriately incurred in relation to the provision of the Services and the Project, the Council will release the funding which it has secured for such expenditure and shall pass funding to tie to allow tie to discharge its obligations in terms of this Agreement.
- 3.4 The Council will nominate a Council officer to act as a liaison point for day-to-day communication between the Company and the Council.
- 3.5 ~~The Council will appoint a Tram Monitoring Officer.~~ The first Tram Monitoring Officer will be the Director of City Development or their appointed nominee. The Council will use all reasonable endeavours to ~~procure that the Tram Monitoring Officer will be a member of the TPB and a director of TEL.~~
- 3.6 ~~The Tram Monitoring Officer will be responsible for determining what approval is required from within the Council to allow them to give any consent or recommendation required in terms of this Agreement.~~ The parties acknowledge that the Tram Monitoring Officer may require to obtain approval of their proposed actions from the full Council or from a relevant committee or sub-committee as appropriate.
- 3.7 The Council will ensure that, in the Council's opinion, adequate personnel are made available to the Project to fulfill the Council's role in relation to the Project and that all such personnel shall use reasonable skill and care in executing their responsibilities.
- 3.8 The Council acknowledges that tie continues to work on other projects in addition to the Project, but tie will use best endeavours to manage such projects in order that they do not conflict with the terms of this Agreement. Any work to be executed by tie on projects other than the Project must be approved by the Tram Monitoring Officer in advance of commitment by tie.
- 3.9 The Council agrees to waive its rights to claim against any director, officer or employee of tie, save in respect of any criminal, fraudulent or willfully negligent action of any such person. ~~This waiver shall not apply to any contractor or consultant engaged by tie operating in any such role as director or officer.~~
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- 3.10 The parties acknowledge that one of the main purposes of establishing tie and its sister company Transport Edinburgh Limited is to facilitate the integration of the operation of trams and buses in the City of Edinburgh and to assist the Council, tie, Lothian Buses plc and TEL to function as a single coordinated entity in the delivery, management, operation and ownership of an integrated transport system.

4. Term

- 4.1 This Agreement shall commence on the date of signing and shall continue until termination is agreed between the parties, unless otherwise terminated earlier in accordance with its terms.

5. Responsibility

- 5.1 Subject to the terms of any guarantee(s) given by the Council, tie shall use best endeavours to ensure that it is in a position at all times to apply the financial and other resources necessary to discharge timeously all obligations, liabilities or claims of whatsoever nature arising from the performance of the Services.

6. Termination

- 6.1 Either party may terminate this Agreement immediately by giving notice to that effect to the other if the other party is in material breach of its obligations and has failed to remedy that breach (assuming it is capable of remedy) within 14 days of receiving such notice.

7. Dispute Procedure

- 7.1 Any dispute or difference between the parties as to the meaning or intent of this Agreement or the implementation thereof or as to any other matter in any way arising out of or in connection with this Agreement shall be referred to the decision of an Arbiter to be mutually agreed between the parties or, failing

agreement, to be appointed by the President for the time being of the Law Society of Scotland. The decision of such Arbitrator shall be final and binding on both parties. The application of Section 3 of the Administration of Justice (Scotland) Act 1972 is hereby expressly excluded.

8. Transfer and Sub-contracting

- 8.1 This Agreement is personal to tie and tie shall not assign, novate, sub-contract or otherwise transfer by any means whatsoever any right or interest or obligation which it may have in or under this Agreement without the prior written consent of the Tram Monitoring Officer.
- 8.2 For the avoidance of doubt, the Council shall be entitled to assign, novate or otherwise dispose of its rights and obligations under this Agreement.

9. Notices

- 9.1 Any notice given under this Agreement by either party to the other must be in writing and may be delivered personally, by fax or first class post or by email. In the case of posting, such notice will be deemed to have been given three working days after the date of posting; in the case of fax or email, the next working day; and in the case of personal delivery, at the time of delivery. Notices will be delivered or sent to the addresses of the parties on the first page of this Agreement or at any other address or fax number notified in writing by either party to the other for the purpose of receiving notices after the date of this Agreement. All email notices shall be sent to either the Executive Chairman of tie or the Tram Monitoring Officer at the Council or such email notified in writing by either party to the other for the purpose of receiving emails after the date of this Agreement .

10. Freedom of Information

- 10.1 The parties acknowledge that they will fully comply with, and will assist each other in complying with, the terms of the Freedom of Information (Scotland) Act 2002.

11. Nature of Relationship

- 11.1 tie and CEC both agree that, for the purposes of s.47 VATA 1994, tie is acting as agent of the Council in respect of the Infraco Contract, the Tram Supply Contract, the Tram Maintenance Contract, the MUDFA Contract and other related contracts. tie will enter into such contracts in its own name, but will be acting on behalf of the Council. tie will not own or use any of the goods or services bought on behalf of the Council. tie will not alter the nature or value of any of the supplies made between the Council and the relevant contracting parties in relation to such contracts.
- 11.2 Nothing in this Agreement shall create a relationship of agency (save where the Council expressly authorises tie to act as its agent, including the terms of Clause 11.1) or partnership between the parties with regard to its subject matter.
- 11.3 Save as otherwise provided, nothing in the Agreement shall prejudice or affect the Council's rights, powers, duties and obligations in the exercise of its functions as a local authority or in terms of any Legislation or relieve tie from obtaining any approvals or consents required from the Council in any capacity in terms of any Legislation.

12. Entire Agreement and Variations

- 12.1 This Agreement and the attached schedules constitute the entire agreement between the parties in relation to their subject matter. Each party confirms that it has not relied upon any representation, undertaking or warranty not recorded in this document in entering into this Agreement. No variation of this Agreement shall be effective unless confirmed in writing and signed by authorised signatories of both parties to this Agreement. The terms of this agreement supersede the terms of any prior agreement between the parties, but only in relation to its subject matter, including for the avoidance of doubt the agreement referred to in preamble 4 to this Agreement.

12.2 If any ambiguity or conflict arises between the terms of this Agreement and those of tie's articles of association then, to the fullest extent permitted by law, the terms of this Agreement shall prevail.

13. **Severability**

13.1 If any term of this Agreement shall be held to be illegal, invalid or unenforceable, in whole or in part, under any enactment or rule of law, such term or part shall to that extent be deemed not to form part of this Agreement but the legality, validity or enforceability of the remainder of this Agreement shall not be affected.

14. **Waiver**

14.1 The failure to exercise or delay in exercising a right or remedy provided by this Agreement or by law does not constitute a waiver of the right or remedy or a waiver of other rights or remedies. A waiver of a breach of any of the terms of this Agreement or of a default under this Agreement does not constitute a waiver of any other breach or default and shall not affect the other terms of this Agreement. A waiver of a breach of any of the terms of this Agreement or of a default under this Agreement will not prevent a party from subsequently requiring compliance with the waived obligation. The rights and remedies provided by this Agreement are cumulative and (subject as otherwise provided for in this Agreement) are not exclusive of any rights or remedies provided by law.

15. **Governing Law and Jurisdiction**

15.1 This Agreement is governed by the Laws of Scotland and, subject to the terms of clause 7, the parties submit to the exclusive jurisdiction of the Scottish Courts.

IN WITNESS WHEREOF this Agreement consisting of this and the preceding fourteen pages and the attached Schedules are executed as follows:

Subscribed for and on behalf of The City of Edinburgh Council at _____ on
day of _____ 2008

Witness.....

Full Name..... Proper Officer

Address.....

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Subscribed for and on behalf of tie Limited at _____ on _____ day of
2008

Director.....

Director/Secretary.....

SCHEDULE 1

Scope of Services

1.	Procurement and contract award of all contracts required to deliver the tram project, including the Council's obligations
2.	Provide accurate and current information to Tram Project Board, Transport Edinburgh Limited and the Council for appropriate decision making and approvals
3.	Provide efficient and effective project management services for the Project including cost, financial programme, risk, contract and change management
4.	Provide traffic management expertise to effectively implement and manage both temporary and permanent traffic management alterations, including the Traffic Regulation Order process
5.	Comply with Health and Safety requirements and act as the Construction Design Management Regulations co-ordinator, provide Health, Safety, Quality and Environmental management and expertise to ensure effective approvals through the The Railways and Other Guided Transport Systems (Safety) Regulations process. This should include protecting the Council's interests
6.	Ensure the design is assured, and provide the necessary quality of design for technical and prior approvals in a timeous manner
7.	Develop and agree a communication strategy with the Council and provide effective communications, consistent with this strategy
8.	Provide and demonstrate to the Council that appropriate site management services are in place to ensure quality is delivered
9.	Ensure a continued focus on value engineering and deliver any agreed initiatives
10.	Manage the interface with TEL in order to deliver a smooth handover for operations
11.	Manage project land in accordance with the tie/CEC licence
12.	Ensure and demonstrate to the Council that all contracting parties meet their obligations (including protocols, traffic management, contract conditions, employers requirements, site supervision and testing etc)
13.	Manage all third-party agreements in an effective manner and demonstrate that they are in the Council's interest
14.	Carry out other duties as instructed by the Council in relation to the Project
15.	Act on efficiently and effectively all formal instructions issued by the Council in relation to the tram project

Schedule 2
Governance Diagram

GOVERNANCE STRUCTURE

