



SCOOP

DRAFT INFRACO CONTRACT

EDINBURGH TRAM NETWORK

ALLOCATION OF CONTRACTUAL RISKS IN THE DRAFT CONTRACT

24 SEPTEMBER 2007

(Based on 8 March 2007 Version of the Infraco Contract as negotiated by tie)

Risk : General Obligations NOTE: Scoop has placed a general reservation against all time limits in the Contract. Contracting Entity: Scoop is an unincorporated JV. Joint and several liability will be required.	Allocation			tie comments
	Public Sector	Private Sector	Shared	
[3.5] Termination due to failure to satisfy a CP within 3 months of Effective Date which tie does not waive.		✓		Costs recovered from Infraco up to the cap. Possible need to re-procure. In practice we would revert to reserve bidder. There would be a residual risk of delay to programme and damage to reputation. This is of a very low probability given the financial penalty to Infraco.
[3.5] Termination due to failure to satisfy a CP within 6 months of the Effective Date which tie does not waive.	✓			Costs recovered from Infraco up to the cap. Possible need to re-procure. In practice we would revert to reserve bidder. There would be a

				residual risk of delay to programme and damage to reputation. This is of a very low probability given the financial penalty to Infraco.
[4.4] Discrepancies, errors or omissions in, or between the Infraco Proposals and, the Employers Requirements		✓		
[4.4] Failure to bring discrepancies or requirements for further information in relation to documents to the attention of <b>tie's</b> Representative		✓		
[5] Failure to adequately inspect the Site and to take due and proper account of the risks listed below in carrying out the Infraco Works		✓		
[5.1.1] the ground conditions on the Site		✓		
[5.1.2] all relevant safety requirements and environmental matters		✓		
[5.1.3] the form and nature of the Site		✓		
[5.1.4] the nature of the materials to be excavated		✓		
[5.1.5] the extent, nature and difficulty of the work and materials necessary for the completion of the Infraco Works.		✓		
[5.1.6] the quality of any existing structures which will form part of, be adjacent to or be associated with the Infraco Works		✓		
[5.1.7] injury or damage to property adjacent to the Site and to occupiers of such property		✓		
[5.1.8] interference from parties other than <b>tie</b> .		✓		
[5.1.9] the precautions, times and methods of working necessary to comply with the Code of Construction Practice and Code of Maintenance Practice and to minimise and nuisance or interference		✓		
[5.1.10] use of land, which will form part of or be associated with or will be adjacent to the ETN, by third parties		✓		
[5.1.11] means of communication with and restrictions of access to the Site		✓		

[5.1.12] accommodation required by Infraco		✓		
[5.1.13] generally to obtain all necessary information as to risks, contingencies and other circumstances influencing or affecting the Infraco Works with respect to Site conditions		✓		
[6.3] Failure to cooperate in order to facilitate carrying out the Infraco Works <sup>1</sup>			✓	
[6.3.1] Failure to approach all Permitted Variations on a collaborative and Open Book Basis			✓	
[6.3.2] Failure to use reasonable endeavours to avoid unnecessary complaints, disputes and claims against the other Party			✓	
[6.3.3] Failure to comply with Dispute Resolution Procedure in relation to any such complaints, disputes and claims with or against the other Party			✓	
[6.3.4] Interference with the rights of the other Party in performing its obligations under the Infraco Contract, or in any other way hindering or preventing the other Party from performing those obligations or from enjoying the benefits of its rights			✓	
[6.3.5] Failure to take reasonable steps to mitigate any costs, unnecessary acts, foreseeable losses and liabilities of the other Party which are likely to arise out of any failure by the non complying party to take the steps listed in Cl. 6.3.1 to 6.3.4 above			✓	
[6.3.6] Failure to take reasonable steps to manage, minimise and mitigate all costs			✓	
[6.8] Failure to procure the attendance of any of the Key Sub-Contractors as required by <b>tie</b> at quarterly meetings		✓		
[7.1] Failure to perform the Infraco Works in accordance with the Infraco Contract		✓		
Failure to carry out the works in accordance with:				

**Comment [MH1]:** Relates to project partnering and mutual cooperation. No material risk provided tie acts reasonably

<sup>1</sup> Clause 6.3 contains partnering obligations

<ul style="list-style-type: none"> <li>• [7.2] a reasonable level of professional skill, care and diligence to be expected of a properly qualified and competent professional contractor experienced in carrying out works and services of a similar nature to the Infraco Works</li> </ul>	✓		
<ul style="list-style-type: none"> <li>• [7.3.1] the Infraco Contract</li> </ul>	✓		
<ul style="list-style-type: none"> <li>• [7.3.2] enabling the ETN to be designed, constructed, installed, tested and commissioned, and thereafter operated and maintained</li> </ul>	✓		
<ul style="list-style-type: none"> <li>• [7.3.3] the Infraco's quality management system and plans.</li> </ul>	✓		
<ul style="list-style-type: none"> <li>• [7.3.4] the Employer's Requirements</li> </ul>	✓		
<ul style="list-style-type: none"> <li>• [7.3.5] <b>tie</b> and CEC policies</li> </ul>	✓		
<ul style="list-style-type: none"> <li>• [7.3.6] the Code of Construction Practice</li> </ul>	✓		
<ul style="list-style-type: none"> <li>• [7.3.7] the Code of Maintenance Practice</li> </ul>	✓		
<ul style="list-style-type: none"> <li>• [7.3.8] the Tram Legislation</li> </ul>	✓		
<ul style="list-style-type: none"> <li>• [7.3.9] applicable Laws, Land Consents and Consents</li> </ul>	✓		
<ul style="list-style-type: none"> <li>• [7.3.10] using reasonably practicable means to ensure impacts are no worse than residual impacts as identified in the Environmental Statements</li> </ul>	✓		
<ul style="list-style-type: none"> <li>• [7.3.11] environmental regulations and requirements</li> </ul>	✓		
<ul style="list-style-type: none"> <li>• [7.3.12] Good Industry Practice</li> </ul>	✓		
<ul style="list-style-type: none"> <li>• [7.3.13] the requirement that the design of the ETN is buildable</li> </ul>	✓		
<ul style="list-style-type: none"> <li>• [7.3.14] the requirement to provide assistance to <b>tie</b> in ensuring best value</li> </ul>	✓		
<ul style="list-style-type: none"> <li>• [7.3.15] the requirement not to wilfully detract from image of <b>tie</b>, TEL, CEC, the Scottish Ministers, Transport Scotland or the ETN</li> </ul>	✓		
<ul style="list-style-type: none"> <li>• [7.3.16] OGC's "Excellence in Construction" initiative</li> </ul>	✓		

<ul style="list-style-type: none"> <li>[7.3.17] the requirement to ensure sustainability of the ETN in relation to energy consumption and the supply of materials from sustainable resources</li> </ul>		✓		
<ul style="list-style-type: none"> <li>[7.3.18] the requirement not to carry out works in a manner likely to be injurious to persons or property</li> <li>[7.3.19] the requirement to use Key Personnel</li> <li>[7.3.20] the Infraco Proposals</li> </ul>		✓		
[7.4.1] Failure to use reasonable endeavours to maximise construction productivity by reference to international best practice		✓		
[7.4.2] Failure to use reasonable endeavours to minimise disruption to the city of Edinburgh		✓		
[7.4.3] Failure to use reasonable endeavours to maintain safety and minimise the potential for accidents and safeguards the Infraco Works		✓		
[7.4.4] Failure to use reasonable endeavours to safeguard the efficiency in the obtaining of Consents		✓		
[7.4.5] Failure to use reasonable endeavours to minimise costs		✓		
[7.5] Failure to keep itself fully informed about current professional and technical standards and about all matters relating to, or which might have a bearing on, the Infraco Works.		✓		
[7.7] Failure to fully understand the scope and extent of requirements and sufficiency of information to complete the Infraco Works		✓		
[7.8/7.9] Content of Background Information supplied by <b>tie</b> or any of its stakeholders		✓		
[7.10] Failure to liaise with any party, as reasonably required, to produce information required so that the Infraco Works can be progressed properly, according to Programme and in accordance with the Infraco Contract			✓	
[7.11] Failure to liaise with regard to material types, methods and programmes, cost effectiveness and temporary works in respect of any Permitted Variation		✓		

[7.12] Failure to provide all labour, goods, materials, Infraco's Equipment, Temporary Works, transport to and from the Site and everything else of a temporary or permanent nature required in respect of the Infraco Works which is either required in the infraco Contract or could have been reasonably foreseen by an experienced contractor.		✓		
[7.13] Failure to ensure the adequacy, stability and safety of all site operations and methods of construction		✓		
[7.14] Use or specification of "prohibited" materials which are known to be deleterious or contravene any relevant standard or code of practice (including Over Arup guidance or Good Industry Practice)		✓		
[7.15] Failure to notify <b>tie</b> of any ground, geophysical or other surveys which the Infraco intends to carry out		✓		
[7.17] Failure to notify <b>tie</b> of any Abortive Work		✓		
[26.17] Failure to comply with all regulatory requirements, any rules, regulations and instructions from <b>tie's</b> representative and <b>tie's</b> Drug and Alcohol Policy		✓		
<b>Risk : System Integration</b>	<b>Allocation</b>			<b>Status on Tram Project Risk Register</b>
	<b>Public Sector</b>	<b>Private Sector</b>	<b>Shared</b>	
Failure to implement: <ul style="list-style-type: none"> <li>• [8.1.1] work to define sub-system performance and demonstrate that the System Availability Target can be met</li> <li>• [8.1.2] management of technical interfaces including system wide issues such as electro-magnetic compatibility and stray current protection, noise, vibration and wheel/rail interface</li> <li>• [8.1.3] test management, including the preparation of method statements, test scripts, the setting of pass/fail criteria, and analysis</li> <li>• [8.1.4] alignment of operations and maintenance procedures</li> <li>• [8.1.5] system activation</li> </ul>		✓		

<ul style="list-style-type: none"> <li>[8.1.6] safety assurances and the Case for Safety</li> <li>[8.1.7] a requirements traceability matrix</li> </ul>		✓		
[8.2] Failure to ensure that Trams and engineers works vehicles are fully integrated with the Infraco Works		✓		
[8.3] Failure to carry out all of the system integration activities described in the Employer's Requirements and Infraco's Proposals		✓		
[8.4] Failure to liaise with the Operator and <b>tie</b> in respect of system operation and related design, Systems Acceptance Tests and operational defects		✓		
[8.5] Failure to ensure that design is in accordance with system integration		✓		
[8.6] Failure to manage configuration control of the Infraco Works		✓		
<b>Risk : Infrastructure and Equipment</b>	<b>Allocation</b>			<b>Status on Tram Project Risk Register</b>
	<b>Public Sector</b>	<b>Private Sector</b>	<b>Shared</b>	
[9.1] Failure to pay the Infraco resulting in the title in all materials, goods and equipment not transferring to CEC	✓			Treatment: Project financial reporting will provide CEC with advance notice of payment drawdown requirement. CEC to effect treasury management to support the payment requirements.
[9.6.1] Failure of <b>tie</b> to issue the Certificate of Tram Commissioning (due to <b>tie</b> default or due to tests not having been passed)			✓	Risk is that title does not pass after the project has paid for all or part of the tram vehicle and Infraco becomes insolvent. This may not be an issue as may be resolved in TSA.
[9.7] Compatibility of all infrastructure, equipment and systems and fitness for purpose		✓		
[9.8/9.9] Euro Compliance of equipment		✓		
<b>Risk : Bonds, Guarantees and Collateral Warranties<sup>2</sup></b>	<b>Allocation</b>			<b>Status on Tram Project Risk Register</b>

<sup>2</sup> Subject to agreement of values and form.

	Public Sector	Private Sector	Shared	
[74.1] Failure to provide an adjudication performance bond for the required amount		✓		
[74.3] Failure to provide a retention bond for the required amount		✓		
[74.4] Failure to provide a handback bond for the required amount		✓		
[74.5] Downgrading of bond surety to A- rating or below by Standard & Poor's		✓		
[74.6] Failure to provide an Infraco parent company guarantee		✓		
[74.7] Failure to provide an Infraco collateral warranty in favour of CEC, Transport Scotland, Network Rail and any other party at <b>tie's</b> reasonable request		✓		
Risk : Deliverables	Allocation			Status on Tram Project Risk Register
	Public Sector	Private Sector	Shared	
[10.1] Failure to prepare Deliverables in accordance with the Infraco Contract and Programme		✓		
[10.2] Failure to submit any Deliverables associated with any Permitted Variations to <b>tie's</b> Representative for review pursuant to the Review Procedure		✓		
[10.3] Failure to allow <b>tie's</b> Representative reasonable opportunity to review any Deliverable at any stage of development		✓		
[10.4/10.6] Failure to provide Deliverables in format required for <b>tie</b> extranet and in the numbers required by <b>tie</b>		✓		
[10.5] Failure to prepare a Submittal Programme which meets the Programme		✓		
[10.6/10.7] Failure to comply with the Submittal Programme timescales	✓	✓		Risk is that tie do not review submissions within prescribed timescales and lose the ability to mitigate failures and any deficiencies in the contractor's submissions.



				Another risk is that tie could lose the ability to manage the interfaces with third parties under tie responsibility. Mitigation is to plan for tie and external resources to respond within agreed timescales.
[10.7] Introduction of alternative Submittal Programme where <b>tie</b> cannot comply with the original programme (not arising from Infraco default)	✓			See 10.6
[10.8] Failure to give due consideration to <b>tie</b> or <b>tie's</b> Representative at a meeting called by <b>tie</b> or <b>tie's</b> Representative to discuss the development of a Deliverable		✓		
[10.9] Amendment to a Deliverable where such Deliverable does not meet the requirements of the Infraco Contract or any Approval Bodies		✓		
[10.12/10.13] Risks from conflicts, ambiguities, discrepancies, errors or omissions in or between Deliverables		✓		
[54.4] Failure to provide Technical Records in a format reasonably specified by <b>tie</b>		✓		
[54.5] Maintenance, security, bugs etc in relation to the Infraco's computer systems and equipment		✓		
<b>Risk : Novation and Other Key Interfaces<sup>3</sup></b>	<b>Allocation</b>			<b>Status on Tram Project Risk Register</b>
	<b>Public Sector</b>	<b>Private Sector</b>	<b>Shared</b>	
[11.1] Failure to execute the novation agreement by the SDS Provider or the Infraco		✓		

<sup>3</sup> Scoop position on all novations is subject to due diligence and negotiation.

[11.1] Failure of <b>tie</b> to create the novation agreement – risk is pre-award in that Infraco refuses to accept the novation of SDS.	✓			<p>Mitigation is Infraco agrees to accept novation under preferred bidder terms – risks to this managed by facilitated negotiations.</p> <p><b>Risk Id 286</b></p> <p>Infraco refuses to accept or fully engage in novation of SDS.</p> <p><b>Assessment</b></p> <p>8 week programme delay</p> <p><b>Treatment</b></p> <ol style="list-style-type: none"> <li>1. Introduce and engage Infraco bidders to SDS as early as possible</li> <li>2. Consult with legal on options relating to due diligence to be carried out on design and availability of consents</li> <li>3. Complete designs and allow due diligence to be undertaken by bidders</li> </ol>
[11.2] Failure of the Infraco to procure a collateral warranty from the SDS provider		✓		
[11.3] Failure to procure that the SDS Provider carries out and completes the SDS Services		✓		
[11.4] Management of the performance of the SDS Services and liability for them		✓		
[11.5] Amendment of the SDS Agreement without the consent of <b>tie</b>		✓		
[11.6] Failure to procure the attendance of the SDS Provider at any meeting in relation to the Infraco Works		✓		

[11.7] Failure to procure services required from the SDS Provider following a request from <b>tie</b>		✓		
[11.8] Termination of the SDS Agreement without the consent of <b>tie</b>		✓		
[12.1] Failure to enter into a novation agreement with <b>tie</b> and the Tram Supplier – pre-award risk		✓		Should be public sector risk – see 11.1 <b>DLA comment - no, correct as private sector risk (PB status lost)</b>
[12.2] Failure to procure that the Tram Supplier enters into a collateral warranty in favour of <b>tie</b>		✓		
[12.3] Failure to procure that the Tram Supplier carries out and completes the Tram Supply Obligations in accordance with the Tram Supply Agreement		✓		
[12.4] Management of the performance of the Tram Supply Obligations and liability for them		✓		
[12.5] Making amendment to the Tram Supply Agreement (including the Tram Supply Obligations) without the prior approval of <b>tie</b>		✓		
[12.6] Failure to procure the attendance of the Tram Supplier at any meeting in relation to the Infraco Works		✓		
[12.7] Failure to procure supply of additional Trams, spare parts and services following a request from <b>tie</b>		✓		
[12.8] Determination of the appointment of the Tram Supplier without the prior written approval of <b>tie</b>		✓		
[12.9] Failure, if required by <b>tie</b> , on termination or expiry of the Infraco Contract, to assign or otherwise transfer the Tram Supply Agreement to <b>tie</b> , the Operator, the Scottish Ministers, TEL, CEC, Transport Scotland or any local authority with no worse financial standing than <b>tie</b> or to any other person whose obligations are unconditionally guaranteed under the Tram Supply Agreement by such a person		✓		
[13.1] Failure to enter into a novation agreement with <b>tie</b> and the Tram Maintainer – pre-award risk		✓		As 11.1 and 12.1 [Not agreed - DLA]
[13.2] Failure to procure that the Tram Maintainer enters into a collateral warranty in favour of <b>tie</b>		✓		

[13.3] Failure to procure that the Tram Maintainer carries out and completes the Tram Maintenance Services in accordance with the Tram Maintenance Agreement		✓		
[13.4] Management of the performance of the Tram Maintenance Services and liability for them		✓		
[13.5] Amendment of the Tram Maintenance Agreement without the prior written approval of <b>tie</b>		✓		
[13.6] Failure to procure the attendance of the Tram Maintainer at any meeting in relation to the Infraco Works		✓		
[13.7] Failure to procure that the Tram Maintainer shall supply any additional spare parts and/or perform any additional services which are required by <b>tie</b> in respect of the ETN		✓		
[13.8] Determination of the appointment of the Tram Maintainer without the prior written approval of <b>tie</b>		✓		
[13.9] Failure, if required by <b>tie</b> , on termination or expiry of the Infraco Contract, to assign or otherwise transfer the Tram Maintenance Agreement to <b>tie</b> , the Operator, the Scottish Ministers, TEL, CEC, Transport Scotland or any local authority with no worse financial standing than <b>tie</b> or to any other person whose obligations are unconditionally guaranteed under the Tram Maintenance Agreement by such a person		✓		
[14.1] Failure to enter into a sub-contract with the Infrastructure Maintainer <sup>4</sup>		✓		
[14.2] Failure to procure that the Infrastructure Maintainer enters into a collateral warranty in favour of <b>tie</b>		✓		
[14.3] Failure to procure that the Infrastructure Maintainer carries out and completes the Infrastructure Maintenance Services		✓		
[14.4] Management of the performance of the Infrastructure Maintenance Services and liability for them		✓		

<sup>4</sup> Clause to be revised by **tie**.

[14.5] Amendment of the Infrastructure Maintenance Agreement (including the Infrastructure Maintenance Services) without the prior written approval of <b>tie</b>		✓		
[14.6] Failure to procure the attendance of the Infrastructure Maintainer at any meeting in relation to the Infraco Works		✓		
[14.7] Failure to procure that the Infrastructure Maintainer shall perform any additional services which are required by <b>tie</b> in respect of the ETN			✓	
[14.8] Determination of the appointment of the Infrastructure Maintainer without the prior written approval of <b>tie</b>		✓		
[14.9] Failure, if required by <b>tie</b> , on termination or expiry of the Infraco Contract or at any time during the term, to assign or otherwise transfer the Infrastructure Maintenance Agreement to <b>tie</b> , the Operator, the Scottish Ministers, TEL, CEC, Transport Scotland or any local authority with no worse financial standing than <b>tie</b> or to any other person whose obligations are unconditionally guaranteed under the Infrastructure Maintenance Agreement by such a person		✓		
[15.1] Risks arising through the Roads Demarcation Agreement NOTE: There is no RDA; <b>tie</b> will carry this risk into PB negotiations.	✓			To be finally assessed on completion of RDA. Mitigated by inclusion of RDA responsibilities matrix in Employer's Requirements.
[16.2] Risks arising through the Asset Protection Agreement			✓	To be finally assessed on completion of APA. Mitigated by inclusion of APA responsibilities matrix in Employer's Requirements.
<b>Risk : Operator Interface</b>	<b>Allocation</b>			<b>Status on Tram Project Risk Register</b>
	<b>Public Sector</b>	<b>Private Sector</b>	<b>Shared</b>	
[17.2/17.6] Occurrence, delay and costs to the Infraco of an Operator to the extent the Infraco has not materially contributed to, and has suffered a significant adverse impact	✓			In the circumstances where the operator causes a delay costs recovered from operator under the DPOFA up to £10m.  Mitigation: Manage the operator's interface with Infraco to avoid culpable delay.
[17.3/17.4] Failure to mitigate or maintain reports of an Operator		✓		

Event				
[17.9-17.13] Failure to co-operate with the Operator in respect the Operator Maintenance Plan and Maintenance Services to ensure that all parts of the ETN are constantly available and unrestricted for Transport Services		✓		
[17.20] DPOFA Changes – <del>17.14 – 17.16?</del>	✓			Mitigation: tie to effectively project manage interface between DPOFA and Infraco
[17.20] Failure to provide DPOFA Change Response when required by <b>tie</b>		✓		
[17.24.1.1/51.2] Failure to liaise with HMRI and the emergency services		✓		
[17.24.1.2] Failure to develop and implement the Infraco Safety Management System		✓		
[17.26/17.27] Failure to complete safety and service readiness verification each morning to the satisfaction of the Operator		✓		
[17.28] Failure to liaise with the Operator in the co-ordination of health and safety issues at the Depot		✓		
[17.29] Failure to give the Operator and <b>tie</b> a minimum of one month's notice of any planned lifecycle maintenance forming part of the Maintenance Services to be carried out on any part of the ETN		✓		
[17.30] Failure to provide <b>tie</b> and the Operator with a combined maintenance plan not less than 6 months prior to the Planned Service Commencement Date		✓		
[17.31/17.32] Failure to provide reasonable technical advice, information and access (regarding Maintenance) to <b>tie</b> and to the Operator.		✓		
[17.34] Damage, other than fair wear and tear, to the Infraco Works and/or the ETN caused by the Operator or <b>tie</b>	✓			Loss covered by OCIP. Where operator culpable for damage, OCIP excess recovered from operator.
[17.35] Failure to liaise with the Operator to complete the System Acceptance Tests and related obligations on testing and commissioning		✓		

Comment [MH2]: Check clause number

<p>Failure to work collaboratively with the Operator to:</p> <ul style="list-style-type: none"> <li>[17.37.1] maximise productivity during the Infraco Works and minimise disruption for the public and third parties</li> <li>[17.37.2] ensure the delivery of complete system integration</li> <li>[17.37.3] maintain the highest standards achievable with regard to the provision of Transport Services</li> <li>[17.37.4] minimise and give reasonable advance notice of interruption to Transport Services</li> <li>[17.31.5] safeguard proper performance of the Project Development Services, Project Operations and obligations under the Infraco Contract</li> <li>[17.37.6] support adherence to timetables and the Programme and share information and Deliverables</li> <li>[17.37.7] report promptly any proposed change permitted under the Infraco Contract and related mitigation</li> <li>[17.37.8] use reasonable endeavours to minimise interface disputes</li> <li>[17.38] failure to procure the operator's provision of the services in Schedule [◆] and to liaison with the Infraco on a reciprocal basis.</li> </ul>	<p>✓</p>	<p>✓</p> <p>✓</p> <p>✓</p> <p>✓</p> <p>✓</p> <p>✓</p> <p>✓</p> <p>✓</p>		<p>Where the operator refuses to provide the services then cost consequences recovered from DPOFA up to value of the bond. Mitigation: Operator Services Schedule agreed with Operator [REDACTED] effective project management.</p>
<p><b>Risk : Land Issues and Consents</b></p>	<p><b>Allocation</b></p>			<p><b>Status on Tram Project Risk Register</b></p>
	<p><b>Public Sector</b></p>	<p><b>Private Sector</b></p>	<p><b>Shared</b></p>	

[18.1/18.20] Failure to provide licence to enter land and the necessary Land Consents <sup>5</sup>	✓			Consequences: Delay to progress of works with consequential additional project and Infracos costs. Mitigation: Obtain confirmation from Infracos that land secured is adequate to deliver the works. Release land to Infracos in accordance with agreed schedule. Ensure lease for NR land is in place prior to commencement of Infraco works.
[18.2] Encroachment on land outside of the Permanent Land and Temporary Sites		✓		
[18.3/18.6/18.17] Breach of a Land Consent or use of Temporary Sites or Permanent Land outside that specified in the Acts		✓		
[18.4] Failure to give <b>tie</b> not less than 40 days' notice where access is required to any Temporary Site for the purposes of carrying out the Infraco Works		✓		
[18.5/18.13] Failure to provide access to the Temporary Sites following 40 days' notice having been given by the Infraco	✓			Consequences: Delay to progress of works with consequential additional project and Infracos costs. Mitigation: Infraco to confirm requirement for temporary sites.
[18.7/18.8] Failure to minimise period of possession of Temporary Site, or remain in possession of such Temporary Site after 28 days following the completion of the Infraco Works to such Temporary Site		✓		
[18.9] Failure to give notice of the vacation of a Temporary Site		✓		
[18.10] Failure to remove all temporary works from a Temporary Site and restore the land to the reasonable satisfaction of the land owner		✓		
[18.10.1] Demolition of a building or any part thereof without the consent of <b>tie</b>		✓		

<sup>5</sup> "Land Consents" means all licences to occupy land, wayleaves, and any other licences, permissions, rights of access and related consents in respect of the land required for the Infraco Works;



[18.10.2] Failure to provide <b>tie</b> with sufficient evidence (including a detailed record of the condition of the land both before and after the occupation of the Temporary Site) to show that restoration obligations have been complied with		✓		
[18.12] Failure to provide notice of temporary possession for maintenance purposes		✓		
[18.13] Temporary possession for maintenance purposes in breach of:				
the Acts		✓		
[18.14.1] requirement to be less than 20m away from Infraco Works		✓		
[18.14.2] reasonable requirements in connection with maintenance		✓		
[18.14.3] requirement to avoid possession of houses or gardens		✓		
[18.14.3] requirement to avoid possession of occupied buildings		✓		
[18.15/18.21] Provision of land and/or Land Consents which are required by the Infraco and are outside the Permanent and Temporary Land			✓	Consequences: Delay to works. Mitigations: tie to afford reasonable endeavours to help Infraco obtain land consents. Infraco to provide details of land consents required before contract award.
[18.16] Failure to use reasonable endeavours to provide assistance to <b>tie</b> in the provision and amendment of Land Consents		✓		
[18.19] Breach of Schedule 13 (Third Party Agreements)		✓		
[19.1] Failure to obtain, maintain and implement all Consents which may be required to carry out and complete the Infraco Works <sup>6</sup>		✓		
[19.2] Failure to provide copies of Consents to <b>tie's</b> Representative		✓		

<sup>6</sup> "Consents" means, without limitation, all permissions, consents, approvals, non objections, certificates, permits, licences, agreements, statutory agreements and authorisations, Planning Permissions, temporary traffic regulation orders, building fixing agreements, building control approvals, building warrants, Access Permits, Permits to Work and all other necessary consents and agreements from the Approval Bodies or any other relevant third parties whether required by Law or the Tram Legislation or under contract provided that, subject to Clause 18.17 [of the Infraco Contract], "Consents" shall not include any Land Consents and any Traffic Regulation Orders;

[19.4] Consequences of not obtaining and maintaining in effect the Traffic Regulation Orders	✓			Consequences: Inability to deliver Tram network in to operation. Mitigation: See K Rimmer Board papers on TROs
[19.5] Failure to provide reasonable assistance to <b>tie</b> in obtaining and maintaining in effect the Traffic Regulation Orders		✓		
[19.6] Failure to update the Consents Programme by each Reporting Period End Date and to obtain any new Consents		✓		
[19.9] Failure to give all notices and pay all fees required to be given or paid by Law in relation to the Infraco Works		✓		
[19.10] Failure to comply with Special Requirements of any Approval Bodies affected by the Infraco Works <sup>7</sup>		✓		
[20.1] Failure to submit the Proposals <sup>8</sup> to <b>tie</b> at least 6 months prior to the date on which the Infraco proposes to install, maintain, modify or replace any relevant supporting infrastructure and to obtain <b>tie</b> 's consent to the Proposals		✓		<b>NOTE (DLA): tie to redraft this clause in its entirety.</b>
[20.2] Failure to obtain all necessary Consents or approvals from the relevant planning authority and to obtain any Building Fixing Agreement		✓		
[20.3.1.1/20.3.2] Where a building fixing agreement is to be used, the cost of securing the consent of the Heritable Proprietor and any other relevant party to allow the Infraco to carry out a survey and the cost of securing the agreement of the Heritable Proprietor to allow the setting of such building fixings			✓	Consequences: Delay to completion of works Mitigation: Obtain agreement to the alternative of poles to building fixes. SDS obligated to obtain all consents required for building fixings.
[20.3.1/20.11] Survey in respect of building fixings and costs of any proposed course of action arising therefrom			✓	
[20.4] Failure to inform <b>tie</b> of failure to obtain the consent of the relevant Heritable Proprietor		✓		

<sup>7</sup> Costs of compliance with Special Requirements are borne by **tie**.

<sup>8</sup> "Proposals" means, in relation to each section of OLE forming part of the Edinburgh Tram Network, the Infraco's proposals for the type of supporting infrastructure to be installed in relation thereto, together with any information or documentation which would be reasonably required by **tie** in order to properly evaluate such proposals

[20.5] Where necessary due to the Heritable Proprietor withholding its consent to building fixings, the cost of the procedure of application to the sheriff pursuant to the Acts or submittal of alternative plans	✓			As above
[20.6] Failure by tie to respond within 10 days stating its preferred method for supporting the OLE	✓			As above
[20.7] Failure to procure that CEC uses all reasonable endeavours to assist the Infraco in the procedure for application to the sheriff pursuant to the Acts <sup>9</sup>	✓			As above
[20.9] Failure to obtain any necessary Consent required in relation to the sitting of a building fixing and to enter into a Building Fixing Agreement with the relevant heritable proprietor		✓		
[20.10] Cost of removal of a building fixing	✓			Consequence: Additional cost to project Mitigations: Use pole in place of building fixing. Probability is low, additional cost also comparatively low
[21.4] Failure to obtain any street works licence, road opening permit and any other consent, licence or permission (other than any Land Consents) that may be required for the Infraco Works		✓		
[21.5] Failure to give notice to a relevant authority of its proposal to commence any work		✓		
[22.1] Adverse physical conditions and artificial obstructions <sup>10</sup>		✓		

<sup>9</sup> Note that although tie shall procure that CEC offers assistance, this will be at Infraco's cost

<sup>10</sup> Save in respect of unidentified utilities, contaminated land or unexploded ordnance

[22.5] Reasonable extra costs, suspension and/or a variation in dealing with unexploded ordnance, unidentified utility apparatus or unidentified contaminated land	✓			Mitigation: Unexploded Ordnance – emergency services to remove. Programme Manager to arrange alternative work area.  Utilities – surveys undertaken and utility data from Mudfa works to be provided to Infraco  Contaminated land – SDS has undertaken surveys. Surveys to be provided to Infraco
[23] Failure to provide <b>tie</b> and <b>tie's</b> Representative and any person authorised by <b>tie</b> or <b>tie's</b> Representative with access at all reasonable times to any site, workshop or facility etc.		✓		
[24] Failure to execute the Depot Licence and comply with the terms thereof		✓		
<b>Risk : Sub-Contracting and Personnel</b>	<b>Allocation</b>			<b>Status on Tram Project Risk Register</b>
	<b>Public Sector</b>	<b>Private Sector</b>	<b>Shared</b>	
[28.2] Sub-contracting of part of the Infraco Works without <b>tie's</b> consent except in respect of SDS Provider, Tram Supplier, Tram Maintainer, the Infrastructure Maintainer and any approved sub-contractor and/or trades		✓		
[28.4] Failure to incorporate required contract terms into subcontracts to be entered into by agreed "Key Sub-Contractors"		✓		
[28.5] Failure to provide such skilled technical assistants and labour as required for execution of the Infraco Works		✓		

[28.6] Removal of a sub-contractor or employee of a sub-contractor who misconducts himself or is incompetent		✓		
[28.7] Failure to provide Key Sub-Contractor collateral warranties <sup>11</sup> to <b>tie</b> in favour of <b>tie</b> and/or in favour of CEC, Transport Scotland, TEL and any other party at <b>tie</b> 's reasonable request		✓		
[28.8] Failure to use reasonable endeavours to procure that any Sub-Contractor shall within 40 business days of any reasonable request by <b>tie</b> provide to <b>tie</b> a collateral warranty		✓		
[28.9] Failure in performance by Sub-Contractors		✓		
<b>Risk : Performance of the Works</b>	<b>Allocation</b>			<b>Status on Tram Project Risk Register</b>
	<b>Public Sector</b>	<b>Private Sector</b>	<b>Shared</b>	
[25.1] Failure to observe the reasonable instructions of <b>tie</b> 's Representative		✓		
[26] Acts or omissions of the Infraco's Representative		✓		
[26.1] Failure to provide sufficient superintendence to the Infraco Works		✓		
[26.2/26.5/26.7] Failure to obtain/retain <b>tie</b> 's approval of the Infraco's Representative or his deputy		✓		
[26.10] Failure to provide sufficient staff and involve the Key Personnel		✓		
[26.12] Failure to ensure that there are no changes to the Key Personnel without <b>tie</b> 's prior written consent and that any replacement persons shall be of at least equivalent status an ability to the person whom they replace		✓		

<sup>11</sup> Scoop position reserved on the form of Collateral Warranty.

[26.13] Failure to use all reasonable endeavours to ensure the continuity of the personnel assigned to perform the Infraco Works and to carefully select Key Personnel having careful regard to their existing work load and other planned commitments		✓		
[26.14] Failure to ensure that Key Personnel have the requisite level of skill, experience and authority		✓		
[26.16] Contracting of or retention of as an adviser or consultant any person currently or previously employed or engaged in the previous 3 months by <b>tie</b> without the prior written approval by <b>tie</b>		✓		
[26.17] Failure of Key Personnel and other staff to comply with regulatory requirements, <b>tie's</b> drug and alcohol policy and any rules and regulations from <b>tie's</b> Representative		✓		
[26.18] Allowing the consumption of, or work of under, the influence of alcohol or drugs or the giving, selling or bartering of the same		✓		
[27.1] Failure to employ careful, skilled and experienced staff or site supervisors with CSCS (or equivalent) certification		✓		
[27.2] The removal of any person employed on the Infraco Works who misconducts himself or is incompetent or negligent		✓		
<b>Risk : Construction</b>	<b>Allocation</b>			<b>Status on Tram Project Risk Register</b>
	<b>Public Sector</b>	<b>Private Sector</b>	<b>Shared</b>	
[29.1] Errors in the position, levels, dimensions or alignment of any setting out of the Infraco Works during progress of Infraco Works		✓		
[30.1] Failure to have full regard to safety of all persons entitled to be on Site and to keep the Site in an orderly state to avoid danger to such persons		✓		
[30.2] Failure to provide required lights, guards, fencing etc		✓		
[30.3] Failure to comply with health and safety legislation and requirements		✓		
[30.4] Failure to undertake instruction and training and provide and issue passes for admission to the Site		✓		

[30.8] Failure to ensure that the Infraco Parties are confined only to that portion of the Site necessary to enable them to carry out the Infraco Works		✓		
[30.9] Failure to keep the Site secure		✓		
[30.10] Failure to take reasonable steps to prevent unauthorised persons being admitted to the Site		✓		
[31.1] Failure to take full responsibility for the care of the Infraco Works and the ETN and any work, materials, plant and equipment for incorporation therein from the Effective Date until the Expiry Date while such Infraco Works, ETN and materials are under the Infraco's control.		✓		
[32.1] Failure to comply with requirements in Schedule 3 ( <i>Code of Construction Practice and Code of Maintenance Practice</i> ) as to maintenance of access to properties, bus stops and bus services and the closure of roads		✓		
[32.2] Failure to comply with requirements in Schedule 3 ( <i>Code of Construction Practice and Code of Maintenance Practice</i> ) and to minimise nuisance, inconvenience or interference to the business or operations of the owners, tenants or occupiers of the Site		✓		
[32.3] Failure to use reasonable endeavours to obtain written consent of adjoining or neighbouring landowners with regard to interference with their rights		✓		
[32.4] Consequences of interference with rights of adjoining landowners.	✓			Consequences: Additional cost of paying 3 <sup>rd</sup> party compensation  Mitigation: Infraco to identify at an early stage, prior to commencement of works, locations where they are likely to interfere with rights of adjacent landowners.
[33.1] Failure to use reasonable means to prevent "extraordinary traffic" caused by vehicles related to the ETN.		✓		
[33.1] Failure to select routes and use vehicles to as far as possible avoid unnecessary damage to roads and bridges.		✓		

[33.2] Strengthening bridges or altering or improving any highway connecting with the Site to facilitate movement of plant		✓		
[33.3] Claims for damage to highways or bridges		✓		
[34.1] Failure to keep materials, Infraco's equipment, labour, mode and manner of construction in accordance with the Infraco Contract		✓		
[39. 6] Discovery of Fossils etc on Site <sup>12</sup>	✓			<p><b>Risk Id 105</b></p> <p><b>Assessment</b></p> <p>Probability – 85%</p> <p>Minimum Cost - £0</p> <p>Most Likely - £150k</p> <p>Maximum - £500k</p> <p><b>Treatment</b></p> <ol style="list-style-type: none"> <li>1. Identify hotspots</li> <li>2. Agree Protocol</li> <li>3. Review Infraco programme regarding archaeological hotspots and ensure adequate programme float</li> </ol> <p>Risk Allocation - £240k</p>
<b>Risk: Maintenance</b>	<b>Allocation</b>			<b>Status on Tram Project Risk Register</b>
	<b>Public Sector</b>	<b>Private Sector</b>	<b>Shared</b>	
Failure, in performing the Maintenance Services, to:				

<sup>12</sup> Works required to be carried out in relation to the discovery of fossils and antiquities is deemed to be a tie Change (clause 39.6)



<ul style="list-style-type: none"> <li>• [52.1.1] Maintain the ETN in accordance with the Maintenance Programme and the Maintenance Plan</li> <li>• [52.1.2] meet the requirements of the Maintenance Specifications</li> <li>• [52.1.3] Comply with the Operator Procedures</li> <li>• [52.1.4] Provide that no maintenance or repair work shall prejudice to the Case for Safety or impact negatively on the performance of the system</li> <li>• [52.1.5] Protect health and safety and not unreasonably interfere with the duties of other parties in relation to health and safety legislation</li> <li>• [52.1.6] Provide that the ETN is available only insofar as this relates to Maintenance Services in accordance with the Employer's Requirements and the Maintenance Payment Regime</li> <li>• [52.1.7] Hand back of the ETN in a condition complying with Clause 52 (<i>Maintenance</i>) without requiring: 1) replacements as a result of fair wear and tear or expiry of working life or 2) repairs which could disrupt services for 24 hours or more</li> </ul>	✓		
[52.2/52.3] Failure to work with Operator in respect of daily handover, comments and checklist	✓		
[52.4] Failure to support, assist and co-operate with <b>tie</b> Parties as <b>tie</b> may reasonably require from time to time.	✓		
[52.5] Failure to carry out Mobilisation Services on or before the appropriate Mobilisation Milestone Dates	✓		
[52.6] Safety and efficiency of the Maintenance Services, so that the ETN is capable of being operated in a safe and efficient manner and free of any reasonably avoidable risk of pollution, nuisance, interference or hazard	✓		
[52.7] Failure to employ and train all staff necessary to perform the Maintenance Services in accordance with the Infraco Contract	✓		

[52.8] Failure to provide and employ all staff necessary to perform the Mobilisation Services in accordance with the Infraco Contract		✓		
[52.9] Failure to supply only new materials and goods (save for repaired inventory)		✓		
[52.10-52.13] The provision of all Spare Parts and Special Tools required for the Maintenance Services		✓		
[52.14] Review of the level of Minimum Spare Parts Pool			✓	Consequences: Potential additional costs Mitigation: Agree spare parts pool with operator at early stage
[52.14] Variation of the Minimum Spare Parts Pool <sup>13</sup>	✓			
[52.15] Effecting repairs of all defects in, failures or damage to the ETN irrespective of cause.		✓		
[52.16] Cost of repairs referred to in 52.15 above where any damage to the ETN is caused by: 1) a breach of the Infraco Contract by Infraco; or 2) any negligent act or omission by the Infraco or any Infraco Party		✓		
[52.17] The costs of any damage to the ETN which is NOT caused by 1) a breach of the Infraco Contract by Infraco; or 2) any negligent act or omission by the Infraco or any Infraco Party <sup>14</sup>	✓			Covered under OCIP. Allowance for deductibles in estimate
[52.19] Temporary Repairs and obtaining approvals thereafter		✓		
[52.20/52.21] Failure to provide assistance, information and advice to <b>tie</b> which is reasonably required in the case of incidents or failures and reporting thereon		✓		
[52.23] Failure to report and propose a solution to defects or, in the case of reporting or control systems, an excess of alarms and fault annunciation in the ETN which may prejudice safety or reliable operation of the ETN		✓		

<sup>13</sup> Variation to the Minimum Spare Parts Pool shall be treated as a **tie** Change.

<sup>14</sup> Such costs shall be treated as a **tie** Change.

[52.24] Failure to provide Additional systems availability requested by tie		✓		
[52.25] Failure to keep up to date and supply an operations and maintenance manual, electronically and free of charge, to tie's representative		✓		
[52.26] Failure to provide efficient and immediate communication of information, CCTV images and data between the Control Room and CEC's traffic and information centre		✓		
[53] Use of Hazardous Materials		✓		
<b>Risk : Quality, Testing and Examination</b>	<b>Allocation</b>			<b>Status on Tram Project Risk Register</b>
	<b>Public Sector</b>	<b>Private Sector</b>	<b>Shared</b>	
[35.1] Testing and examination of the quality, weight or quantity of any materials used before use in the Infraco Works		✓		
[35.2] Costs of samples		✓		
[35.3/41.2/44.2/47.2] Costs of any tests			✓	Mitigation: ERs include tests required and these have been priced accordingly. Additional tests will be in response to particular circumstances and may be at Infraco's cost or a tie change. Construction supervision will reduce the likelihood of additional tests.
[36.1] Failure to give 48 hours notice to allow examination of work prior to covering up		✓		
[36.2] Cost of uncovering where Infraco Works <u>are</u> found to be in accordance with Agreement	✓			Construction supervision will reduce the likelihood of additional tests.
[36.2] Cost of uncovering where Infraco Works are found <u>not</u> to be in accordance with Agreement, and associated delay.		✓		
[38.3] Urgent repairs carried out by tie which the Infraco was liable to carry out under the Agreement		✓		
[38.4] Urgent repairs carried out by the Infraco (except to the extent such work results from Infraco's default)	✓			Mitigation: Covered by OCIP – Infraco liable for deductible if they are at fault. Budget allowance

				for tie deductibles.
[37.1] Unsatisfactory work or materials		✓		
[37.5] Costs of opening up and testing for unsatisfactory work and materials where order from <b>tie's</b> Representative is reasonable in the circumstances (Relief: time but no costs)			✓	Position as 35.3
[40] Errors or omissions in the Infraco Works		✓		
[40.5] Rectification of Latent Defects appearing within 5 years from Service Commencement		✓		NOTE: Latent defect liability is restricted to five years post service commencement.
[43.5] Compliance with obligations in the Tram Inspector Agreement			✓	Majority of risk lies with Infraco. Minor risk to tie. In responding promptly to any approval process.
[43.10] Costs of appointment and services of the Tram Inspector	✓			Tram Inspector costs included in budget.
[44.3] Failure to substantially complete, test and commission a Section		✓		
[46.2] Carrying out of Snagging		✓		
[47.2/47.4] Failure to satisfy <b>tie</b> that T4/T5 are complete and that a Network Certificate/Reliability Certificate should be issued		✓		
[48] Tests, surveys, trials or searches at <b>tie's</b> request where the defect is one for which the Infraco is NOT liable under the Agreement.	✓			Position as 35.3
[48] Tests, surveys, trials or searches at <b>tie's</b> request where the defect is one for which the Infraco is liable under the Agreement.		✓		
[55.3] Costs associated with surveys which do not show non-compliance by the Infraco	✓			Position as 35.3
[55.4] Costs associated with surveys which show substantive non-compliance by the Infraco		✓		
[56.1] SERVICE, PERFORMANCE AND QUALITY MONITORING – MAINTENANCE - Failure of the Infraco, <b>tie</b> and the Operator to comply with Schedule 6 Maintenance Payment Regime			✓	Performance and payment regime mirrored in DPOFA contract. Mitigation: To apply performance management during maintenance phase
[56.3-56.5] Failure to submit Service Quality Reports, Annual Service Reports and Self-Monitoring Plans at the required times		✓		

[56.6] Failure to provide particulars of failed performance with respect to Maintenance Services to <b>tie's</b> Representative as soon as reasonably practicable, and to assist <b>tie</b> in respect of monitoring procedures		✓		
[56.8] Increased monitoring as a result of Underperformance Warning Notices being issued		✓		
[57] Resetting of performance criteria [Scoop awaiting a redraft from <b>tie</b> ]			✓	<b>Mitigation: Performance criteria tested during trial running phase – this reduces the likelihood of a requirement for change</b>
[105.1.2] Failure to operate a quality management system in accordance with BS EN 150 9001:2000		✓		
Risk : Programme	Allocation			Status on Tram Project Risk Register
	Public Sector	Private Sector	Shared	
[60.1/60.9/61.1] Failure to progress Infraco Works with due expedition and in a timely and efficient manner in accordance with the Programme and to mitigate any delays		✓		
[60.4] Deemed acceptance of a revised programme due to failure by <b>tie's</b> Representative to accept, reject or request further information within 10 Business Days in respect of revised programmes proposed by the Infraco	✓			Programme is produced for the purposes of project management of Infraco. Does not entitle extensions of time however material inaccuracies in programme could affect defence of claims for extension of time. Mitigation: Apply effective project management.
[60.2/60.5/60.7] Failure to update and to provide further information in respect of the revised programme proposed by Infraco		✓		
[61.2] Right to accelerate the works at cost to overcome Relief or Compensation Event delay/cost.	✓			
[62.1] Failure to achieve substantial completion triggering LADs		✓		

[62.6] Failure to deliver a Tram to the Depot by the Agreed Delivery Date <sup>15</sup>		✓		
[62.11] Tram exceeding Maximum Tram Weight, LADs applied.		✓		NOTE: Scoop seeks relief for rejection of tram.
[87.1] Suspension on instructions of <b>tie's</b> Representative in circumstances not provided below	✓			Clause is to protect tie for necessary suspension due to unforeseeable events. Good planning by tie and CEC should avoid need to apply this suspension.
[87.1.1] Suspension provided for in the Agreement		✓		
[87.1.2] Suspension necessary by reason of default of the Infraco		✓		
[87.1.3] Suspension necessary for the safety of the Infraco Works		✓		
[87.2] Occurrence of termination or omission of Infraco Works if permission to resume not granted by <b>tie</b> within 6 months	✓			Position as 87.1
<b>Risk : Relief Events (time) and Compensation Events (time and/or costs)</b>	<b>Allocation</b>			<b>Status on Tram Project Risk Register</b>
	<b>Public Sector</b>	<b>Private Sector</b>	<b>Shared</b>	
[18.20] Definition of Compensation Event] Occurrence of any delay caused by <b>tie</b> failing to give possession or access	✓			Mitigation: Agree Land Release schedule with Infraco prior to contract award. Note all GVDs issued
[18.20/definition of Compensation Event] Occurrence of any delay caused by <b>CEC</b> stopping up streets	✓			Mitigation: To agree full on-street construction works methodology prior to contract award. This gives CEC clear understanding of sequence and timing of Infraco works. CEC where possible to schedule other work around Tram. To be monitored on a monthly basis.

<sup>15</sup> Subject to review of TSA.

[Definition of Compensation Event] Occurrence of any delay caused by Utilities Works, MUDFA Works, breach by Third Party of Third Party Agreements, Unplanned City Events, New Utilities, Operator Event, Fossils and Antiquities and/or any other event referred to as a Compensation Event	✓			Construction programme has been sequenced and interleaved with that of Infraco's. Infraco programme to be shared with CEC and significant third parties and monitored on a period by period basis to avoid programme clashes.
[Definition of Compensation Event] Delay caused by breach by <b>tie</b> which materially and adversely affects the performance of the Infraco Works	✓			Mitigation: Apply effective project management
[Definition of Compensation Event] Delay caused by Employer's Dependencies <sup>16</sup>				Industry standard protocol for resolving concurrent delays
[Definition of Compensation Event] Delay caused by discovery of unexploded ordnance, utility apparatus or contaminated land which did not at the time of such discovery form part of the Infraco Works	✓			See Clause 22
[34.2] Occurrence of any referable delay caused by instructions from <b>tie's</b> Representative pursuant to the Agreement	✓			Mitigation: Apply effective project management
[37.5/Definition of Compensation Event] Occurrence of any referable delay caused by orders or directions from <b>tie's</b> Representative in respect of the removal of unsatisfactory work or materials	✓			Mitigation: Apply effective project management
[49.1/49.3] Failure to remove materials and equipment at the correct time		✓		
[63.2/63.7] Cost of repairing or making good any damage to property or personal injury or death suffered on the Site caused by Protestor Action except where such Protestor Action is directed at <b>tie/CEC</b> "personally" and not at the project.		✓		

<sup>16</sup> Schedule to be agreed.

[Definition of Relief Event] Delay caused by fire, flood (other than flood caused by bursting, overflowing of apparatus and pipes or weather (except exceptional inclement weather <sup>17</sup> ), explosion, lightning, tempest or earthquakes, power failure or failure of operators or pipes			✓	Covered under OCIP in respect of works. Allowance for deductibles in estimate. Contractor bears own costs for Relief Event
[Definition of Relief Event] Any accidental loss or damage to the Edinburgh Tram Network NOTE: Scoop seek this to be a Compensation Event			✓	Covered under OCIP. Allowance for deductibles in estimate. Contractor bears own costs for Relief Event
[Definition of Relief Event] Delay caused by terrorism NOTE: Scoop seeks physical damage from terrorism as a Compensation Event			✓	Covered under OCIP. Allowance for deductibles in estimate. Contractor bears own costs for Relief Event
[Definition of Relief Event] Delay caused by strike or industrial dispute in construction, engineering or transit industries in which Infraco or Infraco parties' employers participate			✓	Principally Infraco risk unless national strike, refer to general delay risk item
[Definition of Relief Event] Delay caused by a Force Majeure Event NOTE: Scoop seek this as a Compensation Event.			✓	Parties responsible for own costs, refer to general delay risk item
[61.1] Increase to rate of progress where no entitlement to extension of time		✓		
[61.6] Acceleration measures required by tie to accelerate programme not arising out of any default by the Infraco	✓			Apply timely decision making and anticipate potential problems to minimize need for any acceleration. Assess the requirement for any acceleration on a business case basis

<sup>17</sup> The definition currently proposed by Scoop is problematic



[63.1] Delay caused by Protestor Action until Service Commencement <b>Note: Scoop propose this to be a Relief Event</b>			✓	Only a public sector risk to the extent that it is not caused by/directed at Infraco
[63.3] Removal of protestors from the ETN until Service Commencement <sup>18</sup>		✓		
[63.10] Protestor Action directed at <b>tie</b> or the ETN or because of <b>tie</b> breach	✓			Mitigation: manage stakeholders
[64/65.8.1] Failure to identify long lead time works <sup>19</sup>		✓		
[64/65.8.2] Failure to identify enabling works required <sup>20</sup>		✓		
[64/65.8.3] Failure to manage interface with CEC <sup>21</sup>		✓		
[64/65.8.4] Failure to manage interface with third party consent provider <sup>22</sup>		✓		
[64/65.8.5] Failure to identify required instructions <sup>23</sup>		✓		
[64/65.9] Any other cause of delay not being a Relief Event or Compensation Event or caused by Infraco breach		✓		
[64.7/65.7] Concurrent delay		✓		
[80.14/80.17] Delay/costs due to a <b>tie</b> Change (save where the Infraco could have prevented the need for the <b>tie</b> change) <sup>24</sup> NOTE: Scoop wishes to remove carve-out.	✓			Mitigation: Apply effective project management and minimize need for changes
[87.1] Occurrence of any referable delay/costs caused by suspension by <b>tie's</b> Representative	✓			Mitigation: Apply effective project management and minimize need for changes
<b>Risk : Payment and Measurement</b>		<b>Allocation</b>		<b>Status on Tram Project Risk Register</b>

<sup>18</sup> Note that Infraco may request the assistance of tie to remove protestors where Infraco can show, to tie's satisfaction, that the legal remedies available to Infraco have been exhausted or are unsuitable (clause 63.4). However, Infraco will indemnify tie in respect of any costs incurred in providing such assistance (clause 63.7).

<sup>19</sup> To be redrafted by Scoop as non-Relief Events.

<sup>20</sup> To be redrafted by Scoop as non-Relief Events.

<sup>21</sup> To be redrafted by Scoop as non-Relief Events.

<sup>22</sup> To be redrafted by Scoop as non-Relief Events.

<sup>23</sup> To be redrafted by Scoop as non-Relief Events.

<sup>24</sup> Clause to be redrafted.

	Public Sector	Private Sector	Shared	
[41.3] Failure to establish the achievement of a milestone (including a critical milestone)		✓		
[66.6] <b>tie</b> provides financial guarantee of payment [Form to be agreed]	✓			
[67.6/67.8] Failure to submit valid VAT invoice on time		✓		
[69.1] Late Payment <sup>25</sup>		✓		Mitigation: as 9.1
[69.3] Failure to issue a notice of withholding within the prescribed time period	✓			
[70.1] Payment of tax on any taxable supplies to <b>tie</b>		✓		

Risk : Warranties	Allocation			Status on Tram Project Risk Register
	Public Sector	Private Sector	Shared	
[75] Breach of corporate warranties		✓		
Risk : Required Insurances <sup>26</sup>	Allocation			Status on Tram Project Risk Register
	Public Sector	Private Sector	Shared	
[76.1] Failure to procure and maintain Required Insurances		✓		
[76.11] Failure to comply with the terms of the Required Insurances or OCIP Insurances		✓		
[76.13] Commercially unreasonable rates and terms of insurance			✓	Mitigation: monitor market but dealing with major firms that should be able to get reasonable terms

<sup>25</sup> Interest is payable for late payment at 2% over the base rate of the Royal Bank of Scotland plc.

<sup>26</sup> Subject to finalisation of Insurance Requirements.

[76.14] Failure to obtain or maintain OCIP Insurances	✓			OCIP in place, premiums to maintain in budget
[76.16] Excesses/deductibles under OCIP Insurances or Additional Insurances to the extent that the claim is due to acts or omissions of the Infraco		✓		
<b>Risk : Indemnities, liability and sole remedy<sup>27</sup></b>	<b>Allocation</b>			<b>Status on Tram Project Risk Register</b>
	<b>Public Sector</b>	<b>Private Sector</b>	<b>Shared</b>	
[49.2] Loss or damage to Infraco's Equipment, Temporary Works, goods or materials, Trams, engineers works vehicles, Spare Parts, Special Tools (except as stated in Clause 77.1)		✓		
[77.1] The Infraco to indemnify the 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) as a result of the Infraco's negligence or breach of the Agreement		✓		
[77.2] Death of, or injury to, persons or loss of or damage to property resulting from any act, neglect, or breach of statutory duty by <b>tie</b> , its agents, servants or other contractors (not being employed by the Infraco or any Infraco Party) or for or in respect of any claims, demands, proceedings, damages, costs, charges and expenses	✓			Covered by OCIP Mitigation: apply safety management system
[77.9] Cap on liability [Remains under negotiation]				
[77.10] Indirect Losses sustained by third parties claiming against <b>tie</b> or Infraco, or because of Third Party Agreements or Land Consents	✓	✓		Infraco bears losses in relation to Third Parties where cause by their failure. tie bears losses where due to tie failure. Mitigation: agree programme and methodologies

<sup>27</sup> Subject to further negotiation with Scoop.

Risk : Changes	Allocation			Status on Tram Project Risk Register
	Public Sector	Private Sector	Shared	
[79.2] Failure to maintain a change control register and provide a copy (and updates) to <b>tie</b>		✓		
[80] <b>tie</b> Change	✓			Mitigation: apply effective project management to minimize changes
[80.4/80.8] Failure comply with Estimate time limits		✓		
[80.6/80.14] Failure to include attempt to minimise costs, need for, and impact of the <b>tie</b> Change		✓		
[80.7] Failure to demonstrate that it is appropriate to subcontract for the <b>tie</b> Change and obtain best value for money		✓		
[80.8] Failure to agree the Estimate			✓	Mitigation: apply effective project management. tie can still instruct in circumstances of failure to agree and set estimate but goes to DRP if Infraco does not agree
[80.13] Deemed withdrawal of a <b>tie</b> Change due to failure to issue <b>tie</b> Change Order within 30 days of agreement on Estimate			✓	Lapses
[80.15-80.17] Failure by the Infraco to notify <b>tie</b> within 10 Business Days of matters which may constitute a <b>tie</b> Change <sup>28</sup>		✓		
[82.2] Failure to take reasonable steps to minimise the duration of any Small Works		✓		
[82.3] Failure to carry out and complete any Small Works in accordance with Small Works Cost Notice		✓		
[82.4] Payment of costs in Small Works Cost Notice	✓			Mitigation: apply effective project management to minimize changes

<sup>28</sup> Clause 80.17 may be deleted.

[83.2] Failure to take reasonable steps to minimise the duration of any Accommodation Works		✓		
[83.3] Failure to carry out and complete any Accommodation Works in accordance with Accommodation Works Cost Notice		✓		
[83.4] Payment of costs in Accommodation Works Cost Notice	✓			Mitigation: apply effective project management to monitor provisional sum
[84] Qualifying Changes in Law <sup>29</sup> NOTE: Scoop has proposed £75k QCL during the Term; (£155k proposed). General Change in Law without cap for a period (seeking approval). No acceptance of SDS or TSA QCL costs. <ul style="list-style-type: none"> <li>[84.2.1] failure to use all reasonable endeavours to minimise increase in costs</li> <li>[84.2.2-3] failure to mitigate effects and implement changes in most cost effective manner</li> </ul>		✓	✓	Mitigation for Qualifying Change in Law is to deliver within current requirements but threshold as noted below
[84.3] Failure to implement the change in all circumstances(except to the extent that such change is not necessary to implement the Qualifying Change in Law)		✓		
[84.4.1] Payment in respect of Qualifying Changes in Law which exceed a threshold of £75,000.	✓			See above
[84.4.2] Payment in respect of SDS Qualifying Changes in Law are above a threshold of £15,000 aggregate.	✓			See above
[84.4.3] Where the limit of £75,000 in aggregate has been exceeded, payment in respect of Tram Supply Qualifying Changes in Law which are above a threshold in respect of £30,000 aggregate	✓			See above

<sup>29</sup> "Qualifying Change in Law" means:

(a) a Discriminatory Change in Law ("Discriminatory Change in Law" means a Change in Law, the terms of which apply expressly to: (a) the ETN; and/or (b) the Infraco and not to other persons); and/or

(b) a Specific Change in Law ("Specific Change in Law" means any Change in Law which specifically applies to the same as or similar to the Infraco Works but excluding the making, amendment or revocation of any traffic regulation order)

[84.4.4] Where the limit of £75,000 in aggregate has been exceeded, payment in respect of Tram Maintenance Qualifying Changes which are above a threshold of £15,000 aggregate.	✓			See above
[84.5] General Change In Law until Service Commencement		✓		
[85.1] The cost of any Phase 1b option <sup>30</sup>	✓			
[86.2.2] The cost of any Network Expansions	✓			Separate business case and funding would be required
<b>Risk : Termination</b>	<b>Allocation</b>			<b>Status on Tram Project Risk Register</b>
	<b>Public Sector</b>	<b>Private Sector</b>	<b>Shared</b>	
[87] Suspension of Work (unless provided for in the Agreement, necessary by reason of some default on the part of Infraco or is necessary for proper construction and safety reasons) for 6 months			✓	
[88] Termination on <b>tie</b> Default, <b>tie</b> pays value of work done, prelims, supplies goods committed to, demobilisation (and materials removal), 15% as profit loss on all payments	✓			
[89] Voluntary Termination by <b>tie</b> three years after the issue of the first certificate of Service Commencement <sup>31</sup> . Scoop would like to review this provision.		✓		
[90] Termination for Infraco Default on 7 days notice subject to 30 day period for rectification if remedy is possible or 30 days to produce rectification plan pursued diligently		✓		
[91] Termination by reason of Force Majeure. <b>tie</b> is responsible for termination costs on basis of Clause 88.			✓	

<sup>30</sup> Subject to review of Phase 1b Schedule.

<sup>31</sup> Scoop would like to review this provision

[92] Termination for Corrupt Gifts and Fraud, Prohibited Act is committed by Infraco Senior Management (or with their knowledge). If employee commits the Prohibited Act then that individual to be removed. Compensation as for Clause 90.		✓		
[93] Infraco's persistent breach of its obligations <sup>32</sup>		✓		
<p>Risk of termination due to: (see definition of Infraco Default)</p> <ul style="list-style-type: none"> <li>• [Definition] Infraco insolvency event</li> <li>• [Definition] breach of provision of the Agreement which materially and adversely affects the Infraco Works</li> <li>• [Definition] conduct incompatible with the performance of the Infraco Works or wilful detraction to image and reputation of tie, CEC, the Scottish Ministers or any project related to the Infraco Works<sup>33</sup></li> <li>• [Definition] Infraco's failure to take out and maintain the Required Insurances</li> <li>• [Definition] failure to achieve the Service Commencement Date on or before the date falling [12 months] after the Planned Service Commencement Date for reasons attributable to the Infraco under the Agreement</li> <li>• [Definition] Infraco's breach of confidentiality</li> <li>• [Definition] Infraco's failure to resolve a conflict of interest</li> <li>• [Definition] Change in legal status or control of the Infraco which is materially prejudicial to carrying out and completing the Infraco Works</li> <li>• [Definition] Abandonment without due cause of the whole of the Infraco Works or a material part of them</li> </ul>		<ul style="list-style-type: none"> <li>✓</li> <li>✓</li> <li>✓</li> <li>✓</li> <li>✓</li> <li>✓</li> <li>✓</li> <li>✓</li> <li>✓</li> </ul>		

<sup>32</sup> Scoop has stated Schedule 6 (Maintenance Regime) is not to be included under this because of KPI regime(?)

<sup>33</sup> Possible inclusion of materiality concept or deletion.

<ul style="list-style-type: none"> <li>• [Definition] Infraco's failure to commence Works within 90 days of Commencement Date</li> <li>• [Definition] Infraco's continued suspension of works for 15 days after a written notice to proceed</li> <li>• [Definition] The issue of 3 or more underperformance Warning Notices in any 12 month period<sup>34</sup></li> <li>• [Definition of <b>tie</b> Default] <b>tie's</b> failure to make payment due under Interim Certificates exceeding, in aggregate, 5% of the Contract Price</li> <li>• [Definition or <b>tie</b> Default] <b>tie's</b> breach of obligation under the Agreement which materially and adversely affects the carrying out/completion of the Infraco Works<sup>35</sup></li> <li>• Insolvency (<b>tie</b>)</li> <li>• Breach of Clause 98 (Assignment)</li> <li>• expropriation/requisitioning of the Works</li> </ul>	✓	✓	✓	<p>Mitigation: provide forecasts, updated on a four weekly period basis. CEC to manage treasury</p> <p>Mitigation: apply effective project management</p>
<b>Risk : Miscellaneous</b>	<b>Allocation</b>			<b>Status on Tram Project Risk Register</b>
	<b>Public Sector</b>	<b>Private Sector</b>	<b>Shared</b>	
[50.3] Failure in role as Principal Contractor under CDM where such action results from any default on the part of the Infraco.		✓		
[51.1] Failure to report accidents to HSE <sup>36</sup>		✓		
[58.9] Costs of compliance with TUPE provisions	✓			Would be dealt with in any business case for taking maintenance in-house. Contractual protections for frustrations of transfer to new maintainer

<sup>34</sup> Scoop to redraft.

<sup>35</sup> Possible reinstatement of time period.

<sup>36</sup> **tie** reviewing



[59.5] Costs arising and steps being required following a step in for Health and Safety and Environmental reason		✓		
[71.2] Labour related tax or Landfill tax fluctuations where <b>tie</b> is informed of such increase within 3 months	✓			Applies to national insurance
[71.2] Labour related tax or Landfill tax fluctuations where <b>tie</b> is NOT informed of such increase within 3 months		✓		
[73] Failure to provide reasonable assistance to <b>tie</b> in respect of best value performance and improvement		✓		
[95.3/95.4/95.5] Failure to provide continuity services following termination		✓		
[98.1-98.2] Unauthorised Assignment <sup>37</sup>			✓	Mitigation: follow contract
[98.3 & 98.4] Failure to inform <b>tie</b> of any change in legal status/control		✓		
[99] Occurrence of a Conflict of Interest		✓		
[101.2] Unauthorised disclosure of confidential information		✓		
[101.7] Breach of terms of FOISA <sup>38</sup> [Infraco not supporting <b>tie</b> ]		✓		
[102] Unauthorised use of Project IPR NOTE: This provision remains under negotiation.	✓			Mitigation: don't sell Project IPR for general commercial gain
[102.9] Failure to procure the grant of a sub-licence for any relevant Third Party Software		✓		
[103] Breach of data controller obligations		✓		
[105.3] Failure to comply with the HSQE system		✓		
[115] Breach of discrimination legislation		✓		

<sup>37</sup> Note: authorised assignation by **tie** requires the financial guarantee to follow to assignee.

<sup>38</sup> Infraco acknowledges that **tie** is subject to the requirements of the FOISA and the Infraco undertakes to assist and cooperate with **tie** (at Infraco's expense) with such compliance. However, it is still **tie** that has the obligation to comply.

Risk : Dispute Resolution	Allocation			Status on Tram Project Risk Register
	Public Sector	Private Sector	Shared	
[Schedule 9 paragraph 7] Loss of right to dispute due to failure to raise dispute within 3 months	✓	✓		Mitigation: apply effective contract management
[Schedule 9 paragraph 9] Loss of right to dispute due to failure to meet any timescales prescribed in DRP (Other than in respect of the adjudication provisions)	✓	✓		Mitigation: apply effective contract management