

[insert tie logo]

**(1) tie LIMITED**

**- and -**

**(2) [◆] LIMITED**

**INFRACO CONTRACT  
RELATING TO THE  
EDINBURGH TRAM NETWORK  
REVISED VERSION  
8 MARCH 2007**

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## AGREEMENT

### BETWEEN

- (1) **tie LIMITED** a company incorporated in Scotland under number SC230949 and having its registered office at City Chambers, High Street, Edinburgh EH1 1YJ ("**tie**") which expression shall include its successors, permitted assignees and transferees; and
- (2) [**◆**] **LIMITED**, a company incorporated in [**◆**] under number [**◆**] and having its registered office at [**◆**] ("**the Infraco**") which expression shall include its successors, permitted assignees and transferees.

### WHEREAS

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

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

## NOW IT IS AGREED AS FOLLOWS

### PART 1 - PRELIMINARY MATTERS

#### 1. DEFINITIONS AND INTERPRETATION

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

#### 2. TERM OF THE AGREEMENT

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

2.1.1 the Expiry Date; and

2.1.2 the Termination Date.

2.2 Not less than 90 days prior to the Expiry Date, **tie** shall be entitled to serve a notice proposing an extension of the Term. If **tie** serves such a notice under this Clause 2.2:

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

2.2.2 the valuation of any extension shall be determined in accordance with Clause 80.5 and, if required by **tie**, the Infraco shall seek competitive quotes in respect of any such extension; and

2.2.3 if **tie** and the Infraco agree the matters referred to in Clause 2.2.1 prior to the date when this Agreement would otherwise have expired, the original Expiry Date shall be extended to such date as may be agreed between **tie** and the Infraco, and with effect from the day after the original Expiry Date, the Infraco shall perform its obligations under the terms of this Agreement as amended pursuant to this Clause 2.2.

2.3 **tie** may serve further notices proposing extensions to the Term of this Agreement up to a maximum total Term of 30 years and the provisions of Clause 2.2 shall apply *mutatis mutandis* to such further notices and any subsequently agreed extension.

### 3. CONDITIONS PRECEDENT

3.1 Except for the provisions of this Part 1 (*Preliminary Matters*), Clause 11 (*Novation of the SDS Agreement to the Infraco*), Clause 12 (*Novation of the Tram Supply Agreement to the Infraco*), Clause 13 (*Novation of the Tram Maintenance Agreement to the Infraco*), Clause 14 (*Provision of Infrastructure Maintenance Services*), Clause 74 (*Bond, Parent Company Guarantee and Collateral Warranties*), Clause 76 (*Required Insurances*), Clause 77 (*Indemnity by Infraco, Liability and Sole Remedy*), Clause 97 (*Dispute Resolution Procedure*), Clause 101 (*Confidential Information*), Clause 102 (*Copyright and Intellectual Property*), 106 (*Entire Agreement*), 108 (*Variations to be in Writing*), 110 (*No Partnership or Agency*), 111 (*Notices*), 112 (*Invalid Terms*), 113 (*Third Parties Rights*) and Clause 117 (*Applicable Law*), the obligations of the Parties under this Agreement shall be conditional upon the occurrence of the Commencement Date.

3.2 **tie** may by notice in writing to the Infraco waive any or all of the Conditions Precedent.

3.3 On the date that all of the Conditions Precedent (with the exception of any Conditions Precedent that have been expressly waived by **tie** in writing) have, in **tie's** opinion (acting reasonably) been satisfied, **tie** shall issue the CP Certificate.

3.4 The Infraco shall use its reasonable endeavours to satisfy or procure the satisfaction of the Conditions Precedent as soon as reasonably possible after the Effective Date.

3.5 In the event that the Commencement Date has not occurred by the date falling 3 months after the Effective Date (or such later date as may be agreed in writing

between the Parties), **tie** may terminate this Agreement with immediate effect or in the event that the Commencement Date has not occurred by the date falling 6 months after the Effective Date (or such later date as may be agreed in writing between the Parties), the Infraco may terminate this Agreement with immediate effect, and in either event, all provisions of this Agreement (other than Part 1 (*Preliminary Matters*), Clause 77 (*Indemnity by Infraco, Liability and Sole Remedy*), Clause 97 (*Dispute Resolution Procedure*), Clause 101 (*Confidential Information*), Clause 102 (*Copyright and Intellectual Property*), 106 (*Entire Agreement*), 108 (*Variations to be in Writing*), 110 (*No Partnership or Agency*), 111 (*Notices*), 112 (*Invalid Terms*), 113 (*Third Parties Rights*) and Clause 117 (*Applicable Law*)), shall cease to have effect and such termination shall be without prejudice to any accrued rights or obligations as at that date.

#### 4. PRIORITY OF CONTRACT DOCUMENTS

- 4.1 Subject to Clauses 4.2 to 4.5, the several documents forming this Agreement are to be taken as mutually explanatory of one another and in case of ambiguities or discrepancies the same shall be explained and adjusted by **tie** who shall thereupon issue to the Infraco appropriate instructions in writing which shall be regarded as instructions issued in accordance with Clause 34 (*Work to be to Satisfaction of tie*).
- 4.2 In the event of any ambiguity or discrepancy between any provisions in the main body of this Agreement and those in any Schedule, or between the provisions of any Schedules, **tie's** Representative shall state in writing which provision shall take priority. Provided always that, unless expressly stated otherwise by **tie's** Representative the main body of the Agreement shall always take priority and the following order of priority will apply to Schedule 2 (*Employer's Requirements*) and Schedule 33 (*Infraco's Proposals*):
  - 4.2.1 the Employer's Requirements; over
  - 4.2.2 the Infraco's Proposals.
- 4.3 In the event of any inconsistency or conflict between the main body of this Agreement and the Schedules and the Formal Offer and/or the Letter of Appointment, the main body of this Agreement and the Schedules shall prevail to the extent of any such inconsistency or conflict over the Formal Offer and/or the Letter of Appointment unless expressly stated otherwise by **tie**.

4.4 The Infraco confirms that it has studied in detail the Employer's Requirements and each document comprised therein and has satisfied itself that no discrepancies or errors exist within the Employer's Requirements or between it and the Infraco's Proposals. The Infraco acknowledges that it accepts all risks arising from any discrepancies, errors or omissions that subsequently appear within or between such documents and that it shall not be entitled to make any claim against **tie** for an extension of time, additional payment, any relief or otherwise in respect of any such errors, discrepancies or omissions. The Infraco will notify **tie** forthwith upon becoming aware of a discrepancy or error within the Employer's Requirements or between the Employer's Requirements and the Infraco's Proposals. Where there is such discrepancy or error which cannot be resolved by the provisions of the Employer's Requirements, the Infraco shall as soon as reasonably practicable, and in any event within 5 Business Days, provide **tie** with proposals for resolving such discrepancy or error which comply with this Agreement. Unless, within 10 Business Days of receipt by **tie** of the Infraco's proposals for resolving such discrepancy or error, **tie** notifies the Infraco requiring it to resolve the discrepancy in a different manner (which manner shall be binding but shall be reasonable in time and cost having regard to the Employer's Requirements), the Infraco shall resolve the discrepancy in the manner proposed by it.

4.5 Subject to Clause 4.4, the Infraco shall review all the documents forming the Agreement, and all documents, drawings or other subsequent information produced to amplify the documents forming the Agreement and/or issued by **tie**, within 10 Business Days of the date of receipt of such documents, drawings or other subsequent information, and shall bring to the attention of **tie's** Representative any ambiguities or discrepancies, or requirements for further information arising from them. Failure to comply with this obligation shall prevent the Infraco from being entitled to an extension of time, additional payment, any relief or otherwise in respect of problems which would have been notified or requests which would have been made had this obligation been complied with.

## **5. PROVISION AND INTERPRETATION OF INFORMATION**

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

- 5.1.1 the ground conditions on the Site including the climatic, geotechnical, ecological, environmental, hydrological, sub-soil and sub-surface conditions;
- 5.1.2 all relevant safety requirements and environmental matters;
- 5.1.3 the form and nature of the Site;
- 5.1.4 the nature of the materials (whether natural or otherwise) to be excavated;
- 5.1.5 the extent, nature and difficulty of the work and materials necessary for the completion of the Infraco Works;
- 5.1.6 the quality of any existing structures which will form part of or be associated with or will be adjacent to the Edinburgh Tram Network;
- 5.1.7 the risk of injury or damage to property adjacent to the Site and to occupiers of such property;
- 5.1.8 the possibility of interference by parties other than **tie**;
- 5.1.9 the precautions and the times and methods of working necessary to comply with Schedule 3 (*Code of Construction Practice and Code of Maintenance Practice*) and minimise any nuisance or interference, whether public or private, being caused to any third parties;
- 5.1.10 use by third parties of any of the land which will form part of or be associated with or will be adjacent to the Edinburgh Tram Network;
- 5.1.11 the means of communication with and restrictions of access to the Site;
- 5.1.12 the accommodation the Infraco may require; and
- 5.1.13 in general to have obtained for itself all necessary information as to risks, contingencies and all other circumstances influencing or affecting the Infraco Works.

The Infraco shall to the extent necessary for the carrying out of the Infraco Works take due and proper account of the above risks associated with carrying out the Infraco Works and the Infraco shall not be entitled to any extension of time, relief or to any additional payment on grounds of any misunderstanding or misinterpretation

of any such matter, nor shall the Infraco be released from any of the risks accepted or obligations undertaken by the Infraco under this Agreement on the ground that the Infraco did not or could not have foreseen any matter which might affect or have affected the execution of the Infraco Works.

## PART 2 - GENERAL OBLIGATIONS

### 6. PROJECT PARTNERING

- 6.1 The Parties agree to work in mutual co-operation to fulfil their agreed roles and responsibilities and apply their expertise to carry out and complete the Infraco Works in accordance with this Agreement.
- 6.2 **tie** and the Infraco shall procure that each **tie** Party and each Infraco Party (as appropriate) shall work in accordance with the principles set out in Clause 6.1.
- 6.3 Subject to Clause 6.4, each Party ("**First Party**") undertakes to co-operate with the other ("**Second Party**") in order to facilitate the performance of this Agreement and in particular the First Party shall:
- 6.3.1 approach all Permitted Variations on a collaborative and Open Book Basis;
  - 6.3.2 use reasonable endeavours to avoid unnecessary complaints, disputes and claims against or with the Second Party;
  - 6.3.3 comply with the provisions of the Dispute Resolution Procedure in relation to any such complaints, disputes and claims with or against the Second Party;
  - 6.3.4 not interfere with the rights of the Second Party in performing its obligations under this Agreement, nor in any other way hinder or prevent the Second Party from performing those obligations or from enjoying the benefits of its rights;
  - 6.3.5 take reasonable steps to mitigate any foreseeable losses and liabilities of the Second Party which are likely to arise out of any failure by the First Party to take any of the steps referred to in Clauses 6.3.2 to 6.3.4 (inclusive); and
  - 6.3.6 take all reasonable steps to manage, minimise and mitigate all costs.
- 6.4 Nothing in Clause 6.3 shall:
- 6.4.1 interfere with the right of each of the Parties to arrange its affairs in whatever manner it considers fit (in compliance with Law) in order to exercise its rights and perform its obligations under this Agreement (in compliance with

Law) and, in the case of **tie**, its duties and functions as a wholly owned subsidiary of CEC; or

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

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

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

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

6.5.2 any proposal from either Party to:

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

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

- 6.7 Any proposal from either Party in terms of Clause 6.5.2 shall be reviewed in accordance with Clause 80 (*tie Changes*), Clause 81 (*Infraco Changes*) or Clause 82 (*Small Works Changes*) (as appropriate).
- 6.8 As required by **tie**, the Infraco shall procure the attendance of any of the Infraco Parties at the meetings described in Clause 6.5.

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

- 7.1 **tie** hereby appoints the Infraco in accordance with the terms of this Agreement and the Infraco hereby accepts full responsibility and agrees to carry out and complete the Infraco Works fully and faithfully in accordance with this Agreement.
- 7.2 Notwithstanding the specific responsibilities set out in Clause 7.3, the Infraco warrants to **tie** that in carrying out and completing the Infraco Works it has exercised and shall continue to exercise a reasonable level of professional skill, care and diligence to be expected of a properly qualified and competent professional contractor experienced in carrying out works and services of a similar nature to the Infraco Works in connection with projects of a similar scope and complexity. The Infraco acknowledges that **tie** will rely upon the skill, care and diligence of the Infraco in connection with all matters for which the Infraco is responsible under this Agreement.
- 7.3 The Infraco shall (each as distinct and separate obligations), and shall procure that the Infraco Parties, carry out and complete the Infraco Works:
- 7.3.1 in accordance with and so as to comply in all respects with this Agreement;
  - 7.3.2 so as to enable the Edinburgh Tram Network to be designed, constructed, installed, tested and commissioned, and thereafter operated and maintained;
  - 7.3.3 in accordance with the Infraco's quality management system and plans as developed in accordance with Clause 105 (*Health and Safety, Quality Assurance and Environmental Management System*);
  - 7.3.4 so as to ensure compliance with the Employer's Requirements;
  - 7.3.5 so as to ensure compliance with the Infraco's Proposals;

- 7.3.6 in accordance with **tie** and CEC Policies;
- 7.3.7 in accordance with the Code of Construction Practice,
  - 7.3.7.1 in each Section insofar as construction and/or commissioning activities are taking place in that Section; and
  - 7.3.7.2 in other areas where construction or commissioning activities whether relative to any Network Expansion, Permitted Variation or otherwise, are being carried out;
- 7.3.8 in accordance with the Code of Maintenance Practice,
  - 7.3.8.1 in each Section insofar as a Certificate of Service Commencement has been issued which applies to that Section; and
  - 7.3.8.2 in other areas where construction or commissioning activities whether relative to any Network Expansion, Permitted Variation or otherwise, have been completed;
- 7.3.9 so as to ensure compliance with the Tram Legislation;
- 7.3.10 so as to ensure compliance with all applicable Law, Land Consents and Consents;
- 7.3.11 so as to employ all reasonably practicable means to ensure that the environmental impacts are no worse than the residual impacts identified in the Environmental Statements;
- 7.3.12 in compliance with all applicable environmental regulations and requirements;
- 7.3.13 in accordance with Good Industry Practice;
- 7.3.14 so as to ensure that the design of the Edinburgh Tram Network is buildable;
- 7.3.15 so as to assist **tie** in relation to providing information that best value (pursuant to the Local Government (Scotland) Act 1973 as amended by the Local Government in Scotland Act 2003) has been secured in respect of the carrying out of the Infraco Works;

- 7.3.16 in such manner as not wilfully to detract from the image and reputation of **tie**, Transport Edinburgh Limited, CEC, the Scottish Ministers, Transport Scotland or the Edinburgh Tram Network;
- 7.3.17 in accordance with the OGC's "Excellence in Construction" initiative;
- 7.3.18 so as to ensure that sustainability is considered and discussed with **tie** in relation to energy consumption and the supply of materials from sustainable sources for the Edinburgh Tram Network;
- 7.3.19 in a manner that is not likely to be injurious to persons or property; and
- 7.3.20 using the Key Personnel.
- 7.4 The Infraco warrants that the Infraco's Proposals shall meet the Employer's Requirements.
- 7.5 The Infraco shall (and shall procure that the Infraco Parties) use reasonable endeavours to ensure that in carrying out the Infraco Works, it:
  - 7.5.1 maximises construction productivity by reference to Good Industry Practice;
  - 7.5.2 minimises disruption to the city of Edinburgh;
  - 7.5.3 maintains safety, and minimises the potential for accidents, and safeguards the Infraco Works;
  - 7.5.4 safeguards efficiency in the obtaining of Consents; and
  - 7.5.5 minimises costs.
- 7.6 The Infraco shall at all times keep itself fully informed about current professional and technical standards and about all matters relating to, or which might have a bearing on, the carrying out of the Infraco Works.
- 7.7 The Infraco's duties and obligations under or pursuant to this Agreement will not be released, diminished or in any other way affected by any independent inquiry into any matter which may be made or carried out by **tie** or by any firm, company or party on **tie's** behalf nor by any action or omission of any such firm, company or party

whether or not such action or omission might give rise to any independent liability of such firm, company or party to **tie**.

- 7.8 The Infraco is deemed to have satisfied itself that it fully understands the scope and extent of the requirements in respect of the Infraco Works, and that it has sufficient information or will at the relevant time have sufficient information, to enable it to carry out the Infraco Works.

### **Background Information**

- 7.9 The Infraco acknowledges that certain Background Information has been made available to it in relation to this Agreement. The Infraco further acknowledges that **tie** does not give any warranty or undertaking as to the completeness, currency, accuracy or fitness for any purpose of any of the Background Information and, subject to the express provisions of this Agreement, neither **tie**, any **tie** Parties, CEC, nor any of their employees shall be liable to the Infraco in contract, delict (including breach of statutory duty), or otherwise as a result of:

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

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

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

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

### **Liaison**

- 7.11 The Infraco shall (and shall procure that the Infraco Parties) liaise with **tie**, any **tie** Party, the Operator and any other parties as may reasonably be required by **tie** to facilitate the production, by such persons, of any information required from them, in order that the carrying out of the Infraco Works and its other obligations under this

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

- 7.12 The Infraco has in relation to the Infraco Works and shall in relation to any proposed Permitted Variation, collaborate and liaise with **tie** throughout the carrying out of the Infraco Works to ensure due consideration is given to the type of materials and optimum and cost effective construction and maintenance methods, construction and maintenance programmes, and temporary works, as appropriate.

#### **Provision of all Labour, Goods, Materials and Services**

- 7.13 The Infraco shall, subject to the provisions of the Agreement, provide all labour, goods, materials, Infraco's Equipment, Temporary Works, transport to and from and in or about the Site, services and everything whether of a temporary or permanent nature required in and for the execution and completion of the Infraco Works so far as the necessity for providing the same is specified in the Agreement or could be reasonably foreseen therefrom by a contractor experienced in work of a similar nature, scope and complexity as the Infraco Works.
- 7.14 The Infraco shall take full responsibility for the adequacy, stability and safety of all site operations and methods of construction, installation and maintenance in relation to the Infraco Works.

#### **Prohibited Materials**

- 7.15 The Infraco warrants to **tie** that it has not specified for use and shall not specify for use and shall ensure that there shall not be used in relation to the Infraco Works, any materials which at the time of specification or use (as the case may be):
- 7.15.1 are known to be deleterious in the particular circumstances in which they are specified to be used (either to health and safety or to the durability of the Infraco Works); or
- 7.15.2 contravene any relevant standard or code of practice issued from time to time by the BSI Group or under a European directive relating to standards; or

7.15.3 do not accord with the guidelines contained in the edition of the publication "Good Practice in Selection of Construction Materials" (Ove Arup & Partners) current at the date of specification or use; or

7.15.4 contravene Good Industry Practice.

7.16 The Infraco shall warrant that any materials supplied as part of the Infraco Works shall be in accordance with Schedule 2 (*Employer's Requirements*).

### **Investigations and Surveys**

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

### **Abortive Works**

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

7.18.1 the probable nature of the Abortive Work;

7.18.2 the cause of the Abortive Work being abortive;

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

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

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

7.20 Payment by **tie** to the Infraco in respect of any Abortive Work which has been carried out by the Infraco shall be valued in accordance with Clause 80.5 and shall be paid by **tie** in accordance with Clause 67 (*Payment in respect of Applications for Milestone Payments*) or Clause 68 (*Payment in respect of Maintenance Services*) (as appropriate) provided always that no payment shall be due for Abortive Work to the

extent it has resulted from any fault of the Infraco and/or any breach by the Infraco of its obligations under this Agreement.

## 8. SYSTEM INTEGRATION

- 8.1 The Infraco shall ensure that the following key elements of the system integration of the Infraco Works are implemented:
  - 8.1.1 definition of sub-system performance requirements and demonstration by calculation that when such sub-systems are integrated they shall achieve the System Availability Target set out in Schedule 2 (*Employer's Requirements*) including the Operations Performance Specification;
  - 8.1.2 management of technical interfaces including system wide issues such as electro-magnetic compatibility and stray current protection, noise, vibration and wheel/rail interface ensuring that each and every material issue arising is satisfactorily closed out;
  - 8.1.3 test management including the preparation of method statements, test scripts, the setting of pass/fail criteria, and analysis;
  - 8.1.4 alignment of operations and maintenance procedures to ensure they form a whole and safe system of work;
  - 8.1.5 system activation;
  - 8.1.6 safety assurances and the Case for Safety; and
  - 8.1.7 preparation and updating of a requirements traceability matrix which shall have the ability to trace the requirements of the Employer's Requirements through the design process, the testing procedures and the operation of the Edinburgh Tram Network.
- 8.2 The Infraco shall be fully responsible for ensuring that the Trams and any engineers works vehicles are fully integrated with the Infraco Works.
- 8.3 The Infraco shall carry out all of the system integration activities described in Schedule 2 (*Employer's Requirements*) and Schedule 33 (*Infraco's Proposals*).
- 8.4 The Infraco shall liaise with the Operator and **tie** as instructed by **tie** in relation to:

- 8.4.1 system operation and related design issues;
  - 8.4.2 the Systems Acceptance Tests; and
  - 8.4.3 operational defects.
- 8.5 The Infraco shall be responsible for ensuring that all elements of the design (which form part of the Infraco Works) relative to the Edinburgh Tram Network are compatible with system integration and the Infraco shall make qualified personnel available to ensure system integration throughout the Term.
- 8.6 As part of the Infraco Works, the Infraco shall be responsible for managing the configuration control of the Edinburgh Tram Network, specifically, but not exclusively controlling the introduction of software changes and hardware modifications through version control.

## 9. TITLE

### General Provisions

- 9.1 Subject to Clause 9.6, the Infraco shall transfer the title to all materials, goods, and equipment intended to form part of the completed Edinburgh Tram Network and all Parts (including Spare Parts and Special Tools) supplied or provided by the Infraco pursuant to this Agreement, on payment by **tie** to the Infraco of the agreed price for such materials, goods, equipment, and Parts (including Spare Parts and Special Tools) in accordance with this Agreement, and such title shall vest in CEC free and clear of all Security Interests, and other third party rights of any nature. If required, the Infraco shall at its own expense take all such steps and execute, and procure the execution of, all such instruments as **tie** may reasonably require to ensure that title so passes to CEC according to Law.
- 9.2 Any materials, goods, and equipment intended to form part of the completed Edinburgh Tram Network and all Parts (including Spare Parts and Special Tools) which are at any time removed from the Edinburgh Tram Network will remain the property of CEC and the Infraco undertakes (and shall procure that the Infraco Parties so undertake) to the extent reasonably practicable, to clearly identify such materials, goods, and equipment and all Parts (including Spare Parts and Special Tools) as belonging to CEC and to keep all such Parts stored separately from any third party's

property. The location of all such Parts shall be tracked in the Asset Management System at all times.

- 9.3 To the extent reasonably practicable, the Infraco shall at its own expense label or otherwise clearly identify with a unique traceable coding system at all times as being the property of CEC any materials, goods, and equipment forming or intended to form part of the completed Edinburgh Tram Network and all Parts (including Spare Parts and Special Tools) in the Infraco's or any Infraco Party's possession or control in relation to which title has vested in CEC pursuant to this Agreement and the Infraco shall ensure that such items shall at all times in the Infraco's (or any Infraco Party's) possession or control be kept separate from the Infraco's or any third party's goods.
- 9.4 The Infraco shall incorporate provisions equivalent to those provided in Clauses 9.1 to 9.3 (*mutatis mutandis*) in every sub-contract.

#### **Title in the Trams**

- 9.5 The Infraco shall procure that each Tram is supplied to **tie** free from all Security Interests, and other third party rights of any nature.
- 9.6 The Infraco shall procure that the Tram Supplier shall, pursuant to the Tram Supply Agreement, transfer title:
- 9.6.1 in each Tram, to CEC, on the Certificate of Tram Commissioning being issued in respect of that Tram;
- 9.6.2 to each item of the Tram Related Equipment to CEC, on the later of delivery of each item of the Tram Related Equipment to **tie** and the Certificate of Tram Commissioning being issued in respect of the first Tram.

#### **Interoperability and Warranty**

- 9.7 The Infraco warrants that all parts, components, systems, devices, equipment, software and mechanisms incorporated in the Edinburgh Tram Network and the Trams are:
- 9.7.1 fit for purpose, compatible and interoperable with each other; and
- 9.7.2 compliant with the Employer's Requirements.

- 9.8 The Infraco shall ensure that<sup>1</sup>:
- 9.8.1 the relevant parts of the Edinburgh Tram Network (including all fare collection equipment) are or will be Euro Compliant before any introduction of the single European currency in the United Kingdom and the Edinburgh Tram Network will not be affected by the introduction of the single European currency in the United Kingdom;
  - 9.8.2 the Infraco's own internal systems and procedures are or will be Euro Compliant before the introduction of the single European currency in the United Kingdom and the Infraco Works will not be affected by the introduction of the single European currency in the United Kingdom; and
  - 9.8.3 the relevant parts of the Edinburgh Tram Network (including all fare collection equipment) shall at all times throughout the Term be compliant with all Law applicable in relation to the Euro in the United Kingdom, including the rules on conversion, triangulation and rounding set out in EU Regulation Number 1103/97 and any subsequent or similar regulations or Law.
- 9.9 For the purposes of Clause 9.8 above "**Euro Compliant**" means that (i) the introduction of the Euro within the United Kingdom or any part thereof shall not affect the performance or functionality of any relevant items nor cause such items to malfunction, end abruptly, provide invalid results or adversely affect business, and (ii) all currency reliant and currency related functions (including all calculations concerning financial data) of any relevant items to enable the introduction and operation of the Euro, and (iii) in particular (but without limitation) each and every relevant item shall, to the extent it performs or relies upon currency related functions (including all calculations concerning financial data):
- 9.9.1 be able to perform all such functions in both the national currency of the United Kingdom and in Euros;
  - 9.9.2 during any transition phase applicable to the United Kingdom, be able to deal with the dual denominations of the Euro and national currency of the United Kingdom;

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<sup>1</sup> Technical discussions are ongoing - bidders will be advised of the outcome of these discussions in due course.

- 9.9.3 recognise, accept, display and print all the Euro currency symbols and alphanumeric codes which may be adopted by any government and other European Union body in relation to the Euro;
- 9.9.4 incorporate protocols for dealing with rounding and currency conversion;
- 9.9.5 recognise data expressed in, and express any output data in, the national currency of the United Kingdom and the Euro; and
- 9.9.6 permit the input of data in Euros and display an outcome in Euros where such data, supporting **tie's** normal business practices, operates in Euros and/or the national currency in the UK.

## **10. DEVELOPMENT, REVIEW AND FINALISATION OF THE DELIVERABLES**

- 10.1 The Infraco shall develop and finalise the Deliverables in accordance with the Programme (including the Submittal Programme) and this Agreement, and **tie** shall be entitled to review the Deliverables (which shall include any amendment to any Submitted Item) in accordance with Schedule 14 (*Review Procedure*).
- 10.2 The Infraco shall submit any Deliverables associated with any Permitted Variations to **tie's** Representative for review pursuant to Schedule 14 (*Review Procedure*).
- 10.3 The Infraco shall allow **tie's** Representative, at any reasonable time, a reasonable opportunity to view any Deliverable at any stage of development, and this opportunity shall be made available to **tie's** Representative as soon as reasonably practicable following receipt of any written request from **tie's** Representative.
- 10.4 The Infraco shall establish and maintain an extranet which **tie**, any **tie** Parties and any other party reasonably required by **tie** may access remotely by computer (through an appropriate login/security regime) to view any Deliverables including any drawings comprised within the Deliverables and electronically store and/or print copies of such Deliverables.
- 10.5 The Infraco shall ensure that the Submittal Programme shall set out (and shall continue to set out) the manner and timing of each phase of the development and production of the Deliverables, the identity (where known) of the party producing the Deliverables, the order in which each Deliverable is to be submitted for review in accordance with the Review Procedure and the programme for uploading the

Deliverables onto the extranet in accordance with Clause 10.4. The Infraco shall ensure that the Submittal Programme shall be consistent with the Programme and, if at any time, **tie** considers that the Submittal Programme will not allow completion of the Infraco Works in accordance with this Agreement, then the Infraco shall make such adjustments as are necessary for that purpose.

- 10.6 The Infraco may, as necessary, update such Submittal Programme and shall submit the same from time to time to **tie's** Representative so that **tie** has at least 10 Business Days' notice of any revision to the periods shown in the previous Submittal Programme and the Infraco shall submit to **tie's** Representative five copies of each draft Deliverable in hard copy form and one copy in agreed soft copy form (as appropriate to the format of the deliverable) no later than the end of the period shown in the Submittal Programme for that Deliverable.
- 10.7 Where **tie's** Representative does not consider that **tie** will be able to comply with the periods specified in Schedule 14 (*Review Procedure*) for indicating 'no objection' status or the making of objections in relation to any Deliverable because of the volume of documents to be received in accordance with the Submittal Programme, either the provisions of paragraph 1.4 of Schedule 14 (*Review Procedure*) shall apply or **tie** may introduce an alternative timetable and the Infraco shall comply with such alternative timetable. Provided that, where **tie** is unable to comply with the time periods set out in Schedule 14 (*Review Procedure*) and such inability is not due to any breach of the Submittal Programme or this Agreement, omission or fault on the part of the Infraco, the introduction of an alternative timetable shall be treated as a **tie** Change and the terms of Clause 80 (*tie Changes*) shall apply.
- 10.8 During the preparation of the Deliverables, **tie** and/or **tie's** Representative shall at its discretion be entitled to call for a meeting to discuss the development of any Deliverable, and the Infraco shall give due consideration to any comments made by **tie** or **tie's** Representative at any such meetings. As soon as reasonably practicable following any such meeting, the Infraco will prepare and circulate to those attending the meeting, a report listing the Deliverables discussed and any comments made at such meeting.
- 10.9 If it should be found that the Deliverables do not fulfil the requirements of this Agreement, or the needs of any Approval Bodies, the Infraco shall at its own expense amend the Deliverable. Such amendment shall be made in accordance with Schedule

14 (*Review Procedure*) and such amendment and rectification shall ensure that the Deliverable shall satisfy the requirements of this Agreement and any Approval Bodies.

- 10.10 The Infraco shall provide **tie** with all Deliverables in accordance with the terms of this Agreement and where no timescale for provision of such Deliverables is specified in the Submittal Programme, such Deliverables shall be provided to **tie** as soon as reasonably practicable. The Infraco shall provide to **tie**, at no cost to **tie**, five copies of the agreed Deliverables in hard copy form and one copy in an agreed soft copy form (as appropriate to the format of the Deliverables).
- 10.11 In respect of any further copies of a particular Deliverable which **tie** may require, **tie** shall pay the Infraco the reasonable copying charges or other reasonable charges for the provision of the same to **tie**.
- 10.12 The Infraco accepts all risks arising from any conflicts, ambiguities, discrepancies, errors or omissions that subsequently appear within or between any of the Deliverables, and the Infraco shall not be entitled to make any claim against **tie** for an extension of time, payment or otherwise in respect of any such conflicts, ambiguities, discrepancies, errors or omissions.
- 10.13 The Infraco shall within 10 Business Days notify **tie** upon becoming aware of any conflicts, ambiguities, discrepancies, errors or omissions within or between any of the Deliverables. Where there are any conflicts, ambiguities, discrepancies, errors or omissions, the Infraco shall provide with any such notification, its proposals for resolving such conflicts, ambiguities, discrepancies, errors or omissions in compliance with this Agreement. Such proposals could include the suggestion that no action is required. The Infraco shall proceed with its proposals to resolve any such conflicts, ambiguities, discrepancies, errors or omissions as soon as reasonably practicable. If the proposal from the Infraco is that no action is required or **tie** does not agree with the action proposed by the Infraco, **tie** may notify the Infraco, within 10 Business Days of the Infraco's notice, to resolve any conflicts, ambiguities, discrepancies, errors or omissions in a different manner (which notification shall be binding on the Infraco but shall be reasonable in time and cost having regard to the Employer's Requirements).

- 10.14 The Infraco shall ensure that all Deliverables comply with the document control requirements specified at paragraph 3.2.2.1 of part A, and 3.1.2.1 of part B, of Schedule 3 (*Code of Construction Practice and Code of Maintenance Practice*).
- 10.15 The Infraco shall keep on Site or in the office or offices established pursuant to Clause 10.16 one copy (in paper or electronic format) of all drawings for construction and of all specifications and the same shall at all reasonable times be available for inspection and use by **tie's** Representative and by any other person authorised by it.
- 10.16 The Infraco shall establish at the Site and/or elsewhere an office or offices which shall be staffed during all normal business hours and at which shall be kept a complete, up-to-date and orderly documentary record of the performance of the Infraco Works, all transactions entered into by the Infraco in relation to any potential or actual Permitted Variations and information (including any transactional information) in relation to any claims for additional costs or expenses from the Infraco to **tie** arising in accordance with the terms of this Agreement (including Compensation Events). To the extent necessary to verify any claim made by the Infraco under this Agreement, **tie**, **tie's** Representative or their duly authorised representatives shall during all normal business hours be permitted to inspect the same and to take copies and to use such copying facilities as are maintained at the place where the records are kept.

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

**11. NOVATION OF THE SDS AGREEMENT TO THE INFRACO**

- 11.1 **tie** has entered into the SDS Agreement with the SDS Provider. Unless waived by **tie** in accordance with Clause 3.2, it is one of the conditions precedent to this Agreement coming into full effect and it shall further be a condition precedent to Clauses 11.2 to 11.9 coming into full effect, that the Infraco shall enter into and execute a novation agreement with **tie** and the SDS Provider in the form set out in Schedule 23 (*SDS Novation Agreement*). Unless such condition precedent is waived by **tie** in accordance with Clause 3.2, **tie** shall execute and shall procure the execution by the SDS Provider of such novation agreement.
- 11.2 On the last date of execution of the novation agreement referred to in Clause 11.1, **tie** and the Infraco shall, and the Infraco shall, procure that the SDS Provider shall execute a collateral warranty agreement in favour of **tie** in the form contained in Schedule 24 (*SDS Collateral Warranty in favour of tie*) and the Infraco shall provide the same as executed to **tie** on that date.
- 11.3 The Infraco shall procure that the SDS Provider shall carry out and complete the SDS Services in accordance with the SDS Agreement.
- 11.4 The Infraco shall carry out all required management activities in order to manage the performance of the SDS Services and, subject to any express limitations in this Agreement, the Infraco shall be wholly liable for the performance of the SDS Services.
- 11.5 The Infraco shall not amend the SDS Agreement (including the SDS Services) without the prior written approval of **tie** (such approval not to be unreasonably withheld or delayed) provided that **tie's** consent shall be deemed to have been given in relation to any amendment to the SDS Agreement (including the SDS Services) which is directly required as a result of any Permitted Variation in so far as such amendment has been raised by the Infraco as part of the process of approving such Permitted Variation in accordance with this Agreement.
- 11.6 As reasonably required by **tie**, the Infraco shall procure the attendance of the SDS Provider at any meeting in relation to the Infraco Works.

- 11.7 Subject to the provisions of the SDS Agreement, the Infraco shall procure that the SDS Provider shall perform any additional services which are required by **tie** in respect of the Edinburgh Tram Network and the requirement for any additional services shall be treated as a **tie** Change in accordance with Clause 80 (**tie** *Changes*).
- 11.8 The Infraco shall not determine the appointment of the SDS Provider without the prior written approval of **tie**. If **tie** approves any such determination, a replacement designer shall be proposed by the Infraco in accordance with Clause 28 (*Sub-Letting and the Appointment of Sub-Contractors*).
- 11.9 If required by **tie**, on termination or expiry of this Agreement or at any time during the Term, the Infraco shall assign or otherwise transfer the whole or any part of the SDS Agreement as directed by **tie**, to:
- 11.9.1 **tie**, the Scottish Ministers, TEL, CEC, Transport Scotland or any local authority with no worse financial standing than that of **tie**; or
- 11.9.2 to any other person whose obligations under the SDS Agreement are unconditionally and irrevocably guaranteed by a person falling within Clause 11.9.1.

## 12. NOVIATION OF THE TRAM SUPPLY AGREEMENT TO THE INFRACO

- 12.1 **tie** intends to enter into or has entered into a tram supply agreement with the Tram Supplier. Unless waived by **tie** in accordance with Clause 3.2, it is one of the conditions precedent to this Agreement coming into full effect and it shall further be a condition precedent to Clauses 12.2 to 12.9 coming into full effect that the Infraco shall enter into and execute a novation agreement with **tie** and the Tram Supplier in the form set out in Schedule 17 (*Tram Supply - Novation Agreement*). Unless such condition precedent is waived by **tie** in accordance with Clause 3.2, **tie** shall execute (if not already executed), and shall procure the execution by the Tram Supplier (if not already executed) of such novation agreement and the Tram Supply Agreement.
- 12.2 On the last date of execution of the novation agreement referred to in Clause 12.1, **tie** and the Infraco shall, and the Infraco shall procure that the Tram Supplier shall execute a collateral warranty agreement in favour of **tie** in the form contained in Schedule 18 (*Tram Supply - Collateral Warranty in favour of tie*) and the Infraco shall provide the same as executed to **tie** on that date.

- 12.3 The Infraco shall procure that the Tram Supplier shall carry out and complete the Tram Supply Obligations in accordance with the Tram Supply Agreement.
- 12.4 The Infraco shall carry out all required management activities in order to manage the performance of the Tram Supply Obligations subject to any express limitations in this Agreement and the Infraco shall be wholly liable for the performance of the Tram Supply Obligations.
- 12.5 The Infraco shall not amend the Tram Supply Agreement (including the Tram Supply Obligations) without the prior written approval of **tie** (such approval not to be unreasonably withheld or delayed) provided that **tie's** consent shall be deemed to have been given in relation to any amendment to the Tram Supply Agreement (including the Tram Supply Obligations) which is directly required as a result of any Permitted Variation in so far as such amendment has been raised by the Infraco as part of the process of approving such Permitted Variation in accordance with this Agreement..
- 12.6 As reasonably required by **tie**, the Infraco shall procure the attendance of the Tram Supplier at any meeting in relation to the Infraco Works.
- 12.7 Subject to the provisions of the Tram Supply Agreement, the Infraco shall procure that the Tram Supplier shall supply any additional Trams and/or spare parts and provide any additional services, which are required by **tie** in respect of the Edinburgh Tram Network and the requirement for any additional supply and/or services shall be treated as a **tie** Change in accordance with Clause 80 (**tie** *Changes*).
- 12.8 The Infraco shall not determine the appointment of the Tram Supplier without the prior written approval of **tie**. If **tie** approves any such determination, a replacement tram supplier shall be proposed by the Infraco in accordance with Clause 28 (*Sub-Letting and the Appointment of Sub-Contractors*).
- 12.9 If required by **tie**, on termination or expiry of this Agreement or at any time during the Term, the Infraco shall assign or otherwise transfer the whole or any part of the Tram Supply Agreement as directed by **tie**, to:
- 12.9.1 **tie**, the Operator, the Scottish Ministers, TEL, CEC, Transport Scotland or any local authority with no worse financial standing than that of **tie**; or

12.9.2 to any other person whose obligations under the Tram Supply Agreement are unconditionally and irrevocably guaranteed by a person falling within Clause 12.9.1.

### 13. NOVIATION OF THE TRAM MAINTENANCE AGREEMENT TO THE INFRACO

- 13.1 **tie** intends to enter into or has entered into a tram maintenance agreement with the Tram Maintainer. Unless waived by **tie** in accordance with Clause 3.2, it is one of the conditions precedent to this Agreement coming into full effect and it shall further be a condition precedent to Clauses 13.2 to 13.9 coming into full effect that the Infraco shall enter into and execute a novation agreement with **tie**, and the Tram Maintainer in the form set out in Schedule 20 (*Tram Maintenance - Novation Agreement*). Unless such condition precedent is waived by **tie** in accordance with Clause 3.2, **tie** shall execute (if not already executed), and shall procure the execution by the Tram Maintainer (if not already executed) of such novation agreement and the Tram Maintenance Agreement.
- 13.2 On the last date of execution of the novation agreement referred to in Clause 13.1, **tie** and the Infraco shall, and the Infraco shall procure that the Tram Maintainer shall execute a collateral warranty agreement in favour of **tie** in the form contained in Schedule 21 (*Tram Maintenance - Collateral Warranty in favour of tie*) and the Infraco shall provide the same as executed to **tie** on that date.
- 13.3 The Infraco shall procure that the Tram Maintainer shall carry out and complete the Tram Maintenance Services in accordance with the Tram Maintenance Agreement.
- 13.4 The Infraco shall carry out all required management activities in order to manage the performance of the Tram Maintenance Services and, subject to any express limitations in this Agreement, the Infraco shall be wholly liable for the performance of the Tram Maintenance Services.
- 13.5 The Infraco shall not amend the Tram Maintenance Agreement (including the Tram Maintenance Services) without the prior written approval of **tie** (such approval not to be unreasonably withheld or delayed) provided that **tie's** consent shall be deemed to have been given in relation to any amendment to the Tram Maintenance Agreement (including the Tram Maintenance Services) which is directly required as a result of any Permitted Variation in so far as such amendment has been raised by the Infraco

as part of the process of approving such Permitted Variation in accordance with this Agreement.

- 13.6 As reasonably required by **tie**, the Infraco shall procure the attendance of the Tram Maintainer at any meeting in relation to the Infraco Works.
- 13.7 Subject to the provisions of the Tram Maintenance Agreement, the Infraco shall procure that the Tram Maintainer shall supply any additional spare parts and/or perform any additional services which are required by **tie** in respect of the Edinburgh Tram Network and the requirement for any additional supply and/or services shall be treated as a **tie** Change in accordance with Clause 80 (**tie** *Changes*).
- 13.8 The Infraco shall not determine the appointment of the Tram Maintainer without the prior written approval of **tie**. If **tie** approves any such determination, a replacement tram maintainer shall be proposed by the Infraco in accordance with Clause 28 (*Sub-Letting and the Appointment of Sub-Contractors*).
- 13.9 If required by **tie**, on termination or expiry of this Agreement or at any time during the Term, the Infraco shall assign or otherwise transfer the whole or any part of the Tram Maintenance Agreement as directed by **tie**, to:
- 13.9.1 **tie**, the Operator, the Scottish Ministers, TEL, CEC, Transport Scotland or any local authority with no worse financial standing than that of **tie**; or
- 13.9.2 to any other person whose obligations under the Tram Maintenance Agreement are unconditionally and irrevocably guaranteed by a person falling within Clause 13.9.1.

#### 14. **PROVISION OF INFRASTRUCTURE MAINTENANCE SERVICES**

- 14.1 Unless waived by **tie** in accordance with Clause 3.2, it is one of the conditions precedent to this Agreement coming into full effect and it shall further be a condition precedent to Clauses 14.2 to 14.9 coming into full effect that the Infraco shall enter into and execute a sub-contract with the Infrastructure Maintainer in the form set out in Schedule 25 (*Infrastructure Maintenance Agreement*).
- 14.2 On the last date of execution of the sub-contract referred to in Clause 14.1, the Infraco and **tie** shall, and the Infraco shall procure that the Infrastructure Maintainer shall execute a collateral warranty in favour of **tie** in the form set out in Schedule 26

*(Infrastructure Maintenance - Collateral Warranty in favour of tie)* and provide the same as executed to tie on that date.

- 14.3 The Infraco shall procure that the Infrastructure Maintainer shall carry out and complete the Infrastructure Maintenance Services in accordance with the Infrastructure Maintenance Agreement.
- 14.4 The Infraco shall carry out all required management activities in order to manage the performance of the Infrastructure Maintenance Services and, subject to any express limitations in this Agreement, the Infraco shall be wholly liable for the performance of the Infrastructure Maintenance Services.
- 14.5 The Infraco shall not amend the Infrastructure Maintenance Agreement (including the Infrastructure Maintenance Services) without the prior written approval of tie (such approval not to be unreasonably withheld or delayed) provided that tie's consent shall be deemed to have been given in relation to any amendment to the Infrastructure Maintenance Agreement (including the Infrastructure Maintenance Services) which is directly required as a result of any Permitted Variation in so far as such amendment has been raised by the Infraco as part of the process of approving such Permitted Variation in accordance with this Agreement.
- 14.6 As reasonably required by tie, the Infraco shall procure the attendance of the Infrastructure Maintainer at any meeting in relation to the Infraco Works.
- 14.7 Subject to the provisions of the Infrastructure Maintenance Agreement, the Infraco shall procure that the Infrastructure Maintainer shall perform any additional services which are required by tie in respect of the Edinburgh Tram Network and the requirement for any additional services shall be treated as a tie Change in accordance with Clause 80 (*tie Changes*).
- 14.8 The Infraco shall not determine the appointment of the Infrastructure Maintainer without the prior written approval of tie. If tie approves any such determination, a replacement maintainer shall be proposed by the Infraco in accordance with Clause 28 (*Sub-Letting and the Appointment of Sub-Contractors*).
- 14.9 If required by tie, on termination or expiry of this Agreement or at any time during the Term, the Infraco shall assign or otherwise transfer the whole or any part of the Infrastructure Maintenance Agreement as directed by tie, to:

14.9.1 **tie**, the Operator, the Scottish Ministers, TEL, CEC, Transport Scotland or any local authority with no worse financial standing than that of **tie**; or

14.9.2 to any other person whose obligations under the Infrastructure Maintenance Agreement are unconditionally and irrevocably guaranteed by a person falling within Clause 14.9.1.

## PART 4 - INTERFACES

### 15. INTERFACE WITH CEC AS ROADS AUTHORITY<sup>2</sup>

15.1 It is a condition precedent to this Agreement coming into full effect that the Infraco shall enter into and execute the roads demarcation agreement with **tie** and CEC in the form set out in Schedule 29 (*Roads Demarcation Agreement*).

### 16. INTERFACE WITH NETWORK RAIL<sup>3</sup>

16.1 The Infraco acknowledges that **tie** has entered into the Asset Protection Agreement with Network Rail in relation to the Edinburgh Tram Network and that in relation to design, **tie** has certain specific obligations owed to Network Rail by virtue of the framework agreement between Transport Scotland and Network Rail.

16.2 The Infraco shall comply with the Asset Protection Agreement as if it were **tie**. **tie** hereby delegates to the Infraco and the Infraco shall carry out all of the obligations set out in the Asset Protection Agreement which are expressed to be carried out by **tie**.

16.3 The Infraco warrants that it shall not put **tie** in breach of either the Asset Protection Agreement or the framework agreement between Transport Scotland and Network Rail and shall indemnify **tie** in full in respect of any such breach.

### 17. INTERFACE WITH THE OPERATOR

#### Operator Events

17.1 Nothing in this Clause 17 (*Interface with the Operator*) shall modify or dilute the general or specific obligations of the Infraco which concern interface or co-operation with the Operator.

17.2 Subject to Clauses 17.3 and 17.4 in the event that any of the events or circumstances defined as Operator Events occur and to the extent that the Infraco can demonstrate to **tie's** satisfaction, **tie** acting reasonably, that:

17.2.1 there has been a resultant material adverse effect on the Infraco's ability to perform any of its obligations or exercise any of its rights pursuant to this Agreement; and

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<sup>2</sup> RDA to be provided to bidders in due course.

<sup>3</sup> APA and Framework Agreement to be provided to bidders in due course.

17.2.2 the Infraco has neither predominantly caused nor materially contributed to the occurrence, effect or duration of the Operator Event,

the Infraco shall be entitled to relief and/or compensation on the basis set out in Clause 65 (*Compensation Events*), subject to Clause 17.6.

17.3 If any Operator Event occurs, the Infraco shall:

17.3.1 notify **tie** and the Operator as soon as practicable (and in any case no later than 4 hours after being on notice of the Operator Event) of the occurrence of the Operator Event and, as soon as reasonably practicable after such notification from the Infraco (and in any case no later than 2 Business Days after such notification), the Infraco shall notify **tie** and the Operator of the likely occurrence, severity and duration of the Operator Event and any impact on the ability of the Infraco and/or any Infraco Party to perform its obligations in relation to the Infraco Works;

17.3.2 shall, where required by **tie**, respond to and mitigate the effect of the Operator Event; and

17.3.3 be responsible for recording the effects of the Operator Event on the ability of the Infraco and/or any Infraco Party to perform its obligations in relation to the Infraco Works and for providing **tie** with an accurate and comprehensive report on such effects of the Operator Event within 5 Business Days of the Operator Event, such report to detail mitigation measures, emerging additional costs and expected (or actual) duration of this Operator Event.

17.4 The Infraco shall take all reasonable measures to prevent and to mitigate any Operator Event from materially adversely affecting the proper performance of the Infraco Works (including the Maintenance Services), including measures which may be advisable in order to exclude any reoccurrence.

17.5 **tie** shall arrange a meeting with the Operator, the Infraco, **tie** and **tie's** Representative to discuss and agree a plan for corrective measures necessary to address any Operator Event and to permit the Infraco to resume unrestricted (or the best, even if restricted, level of) performance of the Infraco Works within the shortest practicable time period. It shall be the **tie's** responsibility to obtain the Operator's support for, the use of any corrective measures taken by the Infraco, whether temporary or permanent.

- 17.6 The Infraco shall be entitled to reimbursement of its demonstrable additional costs directly attributable to (i) managing and mitigating the impact of the Operator Event, (ii) the carrying out of any remedial or rectification works to the Edinburgh Tram Network to correct damage to the Infraco Works or the Edinburgh Tram Network caused directly by the Operator, for the avoidance of doubt, other than through fair wear and tear and use of the system in accordance with the Operations and Maintenance Manual and, (iii) any additional Infraco Works or any abortive Infraco Works (including Design) which require reworking or repetition or supplemental Maintenance Services, in each case caused by an Operator Event.
- 17.7 The Infraco shall be under a continuing obligation to report promptly to the Operator and to **tie** any incident, matter or operational irregularity which may precede the occurrence or indicate the existence of an Operator Event.

### **Design Input and Technical Requirements**

- 17.8 In accordance with Schedule 9 (*Review Procedure*), the Infraco shall take account of any comments from **tie** in relation to operational issues when refining its Design, Maintenance Plans, standards, procedures and safety documentation in accordance with Schedule 2 (*Employer's Requirements*) and when ensuring system integration in accordance with Clause 8 (*System Integration*). The Infraco shall comment on functional and maintainability issues to **tie** during the design and construction process, seeking to optimise the whole life asset cost. These comments shall be deliverable to the Operator in addition to **tie**.

### **Operation and Maintenance Procedures**

- 17.9 The Infraco acknowledges that the Operator shall be responsible for Operator Maintenance of the Edinburgh Tram Network and in relation to such maintenance, the Infraco shall at all times liaise with the Operator in its performance of the responsibilities set out in the Operator Maintenance Plan and co-ordinate such performance with the carrying out of the Infraco Works. The Infraco and **tie** agree to work in mutual cooperation to allow the Operator to perform such maintenance in accordance with the terms of the Operator Maintenance Plan with a view to ensuring that the Edinburgh Tram Network as a whole and each part of it are continuously available for the provision of Transport Services.

17.10 **tie** and the Operator may agree from time to time the extent to which the exercise of **tie's** contractual rights under this Agreement are delegated to the Operator and upon written notification of such delegation from **tie**, the Infraco shall accept and act upon instructions from the Operator in respect of all matters related to such rights including safety management, possession co-ordination and maintenance interaction.

17.11 The Infraco shall work together with the Operator with the continual objective that the Transport Services be delivered in accordance with the Employer's Requirements without interruption. Without limitation:

17.11.1 the Infraco shall respond (or shall procure that the Tram Maintainer or the Infrastructure Maintainer (as appropriate) shall respond) promptly and in compliance with the timing commitments set out in this Agreement (or the Tram Maintenance Agreement or the Infrastructure Maintenance Agreement (as appropriate)) to any notification by the Operator that there is a requirement for Maintenance Services of which the Operator becomes aware;

17.11.2 the Infraco shall promptly notify the Operator and **tie** of any requirement for Operator Maintenance of which the Infraco becomes aware;

17.11.3 the Infraco shall co-operate with the Operator in relation to the planning and execution of Operator Maintenance and Maintenance Services;

17.12 If, at any time after the Service Commencement Date, it appears likely to the Infraco that any planned works or activities (including Maintenance Services) to be carried out by the Infraco will necessitate interruption to or restriction of the Transport Services on the Edinburgh Tram Network, the Infraco (as appropriate) shall:

17.12.1 notify **tie** and the Operator not less than 42 days prior to such planned works or activities, and take all reasonable steps to support **tie** in notifying passengers as soon as reasonably practicable in advance of the carrying out of such planned works or activities, of the nature of such work and the likely disruption or restriction of the Transport Services; and

17.12.2 take all steps which are reasonably practicable to minimise the adverse consequences of such works or activities to passengers.

17.13 In the event of any unplanned works or activities (including Maintenance Services) to be carried out by the Infraco as a result of a system failure, breakdown or an emergency, the Infraco shall:

17.13.1 notify **tie** and the Operator as soon as possible of the nature of such works or activities and the likely disruption or restriction of the Transport Services;

17.13.2 take all reasonable steps to support **tie** in notifying passengers as soon as reasonably practicable of the nature of such works and activities and the likely disruption or restriction of the Transport Services; and

17.13.3 take all steps which are reasonably practicable to minimise the adverse consequences of such works and activities to passengers. Where the Operator considers that such works and activities will result in the Transport Services not being provided in accordance with the DPOFA for any period, the Infraco shall take such steps that shall include support and compensation to the Operator in providing an alternative means of transportation being in service as soon as reasonably practicable. For the purposes of this Clause 17.13.3, the Parties acknowledge that it will generally be reasonably practicable for the Operator to arrange for an alternative means of transportation to be in service within 90 minutes of becoming aware of the requirement for it.

#### **DPOFA Changes**

17.14 If required by **tie**, the Infraco shall respond with comments ("**DPOFA Change Response**") within 10 Business Days of being notified by **tie** of any proposed variation under DPOFA (a "**DPOFA Change**").

17.15 In the event that the DPOFA Change Response from the Infraco proposes a modification to the proposed DPOFA Change in order to avoid or mitigate a potential or actual Operator Event or a **tie** Change, the Infraco shall provide **tie** and the Operator with a written report within 10 Business Days of provision of comments under Clause 17.14, setting out how the DPOFA Change will affect the Infraco Works, Infraco Maintenance and/or the Edinburgh Tram Network.

17.16 **tie** shall review the DPOFA Change Response in accordance with Schedule 14 (*Review Procedure*) and if **tie** is satisfied that modification to the proposed DPOFA

Change is required to address any issue arising from the DPOFA Change Response, **tie** shall instruct such modification under the change provisions of the DPOFA and any change required to the Infraco Works shall be deemed to be a **tie** Change pursuant to Clause 80 (**tie** *Changes*).

17.17 Failure by the Infraco to respond as stipulated in Clauses 17.14, 17.15 and 17.16 shall be a bar to any claim for relief or compensation under the change procedure or otherwise.

### **Safety**

17.18 The Infraco shall provide a permanent representative for the Operational Safety Group who shall be responsible for the Infraco's mandatory participation in and technical contribution to the Operational Safety Group's output and the discharge of its responsibilities.

17.18.1 The Infraco's obligations shall encompass at a minimum:

- 17.18.1.1 participation on a compulsory basis in all liaison meetings with HMRI and emergency services;
- 17.18.1.2 the development and implementation of a safety management system (the "**Infraco Safety Management System**") which shall address without limitation:
  - (i) Infraco staff competency and its continual assessment;
  - (ii) training on all safety related issues;
  - (iii) safety procedures;
  - (iv) record keeping and audit;
  - (v) certification of materials and equipment;
  - (vi) frequency and mode of audit by **tie** of the Infraco Safety Management System;
  - (vii) incident response and management; and

(viii) continual improvement and best practice.

- 17.19 **tie** and the Operator shall be entitled to review the Infraco Safety Management System (and its implementation) at any time upon a maximum of 3 days notice.
- 17.20 It shall be the responsibility of the Infraco to undertake and complete verification, through agreed procedure, of the safety and service readiness of the Edinburgh Tram Network prior to service start-up every morning no later than one hour prior to Transport Services commencing each day and to certify this status to **tie** and to the Operator in an agreed form.
- 17.21 In the event that the Operator can demonstrate to the Infraco that the Edinburgh Tram Network is not ready for service start up, the Infraco shall notify **tie** and the Infraco shall rectify any deficiency in accordance with this Agreement which is preventing the commencement of Transport Services in accordance with this Agreement.
- 17.22 The Infraco shall liaise effectively with the Operator in co-ordination of health and safety issues at the Depot in accordance with the Depot Licence.

#### **Lifecycle Maintenance**

- 17.23 The Infraco shall give the Operator and **tie** a minimum of one month's prior notice in outline of any planned lifecycle maintenance forming part of the Maintenance Services to be carried out on any part of the Edinburgh Tram Network, such initial notice to be followed by at least 14 days notice in detail and 7 days notice of individual method statements relating to such works or activities anywhere on the Edinburgh Tram Network.
- 17.24 Not less than 6 months prior to the Planned Service Commencement Date, the Infraco shall provide **tie** and the Operator with a combined maintenance plan demonstrating how the effects of planned lifecycle maintenance on the provision of Transport Services in accordance with Timetable shall be minimised, based upon the Maintenance Plan and the Operator Maintenance Plan. **tie** shall review such combined maintenance plan in accordance with Schedule 14 (*Review Procedure*).

#### **Operational Interface and Operator Mobilisation**

- 17.25 Following the first Service Commencement Date, the day-to-day operation of the Edinburgh Tram Network shall be the responsibility of the Operator. To enable the

efficient operation of the Edinburgh Tram Network, the Infraco shall provide technical advice free of charge to **tie** and to the Operator regarding the operational deployment and integration of the various components of the Edinburgh Tram Network and any other information regarding their design, construction, standards, integration, operation and maintenance which the Operator and **tie** may reasonably request provided that the Infraco shall not be required to provide more than [◆] hours of advice to the Operator in any one month for no cost.

### **Facilities and Access**

17.26 The Infraco shall at all times provide to the Operator and **tie** such access to the Site, the places where the Infraco Works are being performed and the Tram testing facilities during the construction of the Infraco Works as the Operator may reasonably require and in accordance with Clause 17.27.

17.27 The Infraco acknowledges that the Operator and **tie** will require access to the Site, the places where the Infraco Works are being performed and the Tram testing facilities in order to prepare for the operation of the Edinburgh Tram Network from the Service Commencement Date. The Infraco agrees:

17.27.1 that it will co-operate with the Operator and **tie** and plan to avoid any interference with mobilisation by the Operator; and

17.27.2 that the presence of the Operator and **tie** on the Site will not in any circumstances be treated as partial completion of the Infraco Works;

provided that such access shall not disrupt or interfere with the performance by Infraco or any Infraco Party of the Infraco Works and **tie** shall, and shall procure that the Operator shall, during any period when it or they have access to the Site, the Infraco Works and the Tram testing facilities, comply with all rules and regulations applicable to working at those premises for the safety of persons and convenience of the public.

17.28 **tie** agrees that where any damage is caused to the Infraco Works by the Operator or by **tie**, the repair of such damage shall not be part of the Infraco's obligations under this Agreement but where **tie** requires the Infraco to repair such damage, it will issue a **tie** Notice of Change in respect of such repair works.

## **System Acceptance**

- 17.29 The Infraco shall ensure that at all times it works closely and effectively with the Operator in the performance of both the Operator and the Infraco's obligations pursuant to the Systems Acceptance Tests and the associated obligations on testing and commissioning set out in Schedule 2 (*Employer's Requirements*).
- 17.30 In the event that as a direct consequence of an Operator Event, the Infraco is unable to progress or is hindered in the performance of its obligations pursuant to the Systems Acceptance Tests and the associated obligations on testing and commissioning set out in Schedule 2 (*Employer's Requirements*), it shall notify **tie** and the Operator in writing as soon as practicable stating the reasons and the action required in order to remedy the situation.

## **Partnering**

- 17.31 The Infraco shall use reasonable endeavours to work collaboratively with the Operator at all times in order to:
- 17.31.1 maximise productivity during the Infraco Works and minimise disruption for the public and third parties;
  - 17.31.2 ensure the effective discharge of the Infraco's obligation to deliver complete system integration throughout the Infraco Works in accordance with Clause 8 (*System Integration*);
  - 17.31.3 maintain the highest standards achievable with regard to the provision of the Transport Services;
  - 17.31.4 minimise and give best advance notice to one another and to **tie** of any interruption to Transport Services caused by any Operator Event or Infraco Default, maintenance (planned or unplanned) or third party incident;
  - 17.31.5 safeguard proper performance of the Project Development Services, the Project Operations and all obligations under this Agreement;
  - 17.31.6 mutually support adherence to the Programme and all related timelines and programmes and to share with the Operator on a systematic basis Deliverables and key information connected with such adherence;

17.31.7 report promptly to one another and to **tie** any proposed change permitted under the DPOFA or this Agreement which is likely to or will have a material impact on the performance of any obligations owed to **tie** or the exercise of rights under this Agreement and/or the DPOFA (as appropriate) by the Infraco and/or the Operator during design, construction, operation or maintenance of the Edinburgh Tram Network, and to jointly inform **tie** regarding measures proposed to avoid or mitigate such impact; and

17.31.8 to use best endeavours to agree and implement whenever appropriate measures to minimise the likelihood of disputes or claims arising from or in connection with the interface between the Operator's rights and obligations and the Infraco's rights and obligations pursuant to DPOFA and this Agreement respectively.

## **PART 5 - LAND ISSUES, CONSENTS AND SITE**

### **18. LAND CONSENTS, PERMANENT LAND AND TEMPORARY SITES**

18.1 Subject to the express terms of this Agreement, **tie**:

18.1.1 hereby grants a non-exclusive licence to the Infraco to enter and remain upon the Permanent Land for the duration of the Term; and

18.1.2 shall provide the Infraco with all necessary Land Consents in relation to the Permanent Land,

in either case only in so far as the same is required for the purposes of carrying out the Infraco Works. For the avoidance of doubt, the rights provided to the Infraco pursuant to this Clause 18.1 shall not confer nor be deemed to confer upon the Infraco a right of ownership, a lease or any other interest in the Permanent Land other than a right of access, egress or occupancy as is required for the purposes of carrying out the Infraco Works.

18.2 Subject to any rights to enter upon any Temporary Sites pursuant to Clauses 18.4 to 18.10 (inclusive), the Infraco shall not design or construct any part of the Edinburgh Tram Network upon or otherwise encroach upon any land outwith the Permanent Land for the purposes of carrying out the Infraco Works without the prior written consent of **tie**.

18.3 In relation to the parts of the Permanent Land referred to in schedule 6 to each of the Edinburgh Tram (Line One) Act 2006 and the Edinburgh Tram (Line Two) Act 2006, the Infraco shall use such sites for the purposes set out in relation thereto in the said schedule 6.

18.4 Where the Infraco requires access to any Temporary Site for the purposes of carrying out the Infraco Works, it shall give **tie** not less than 40 days notice and at the same time as providing such notice, shall be required to provide to **tie**:

18.4.1 an estimate as to the amount of time that the Infraco will occupy such site; and

18.4.2 a breakdown of the use of such site in the form of a detailed programme of works.

- 18.5 **tie** shall, within 40 days of the notice issued by the Infraco pursuant to Clause 18.4 (or such longer period as may be referred to in such notice) provide access to the Infraco to the relevant Temporary Site for the purpose referred to in Clause 18.6, including the provision of any necessary Land Consents in relation thereto.
- 18.6 Without prejudice to any other term of this Agreement, the Infraco shall comply with the terms of schedule 7 of each of the Edinburgh Tram (Line One) Act 2006 and the Edinburgh Tram (Line Two) Act 2006 in relation to the purpose for which possession of any Temporary Site can be taken in accordance with Clauses 18.4 to 18.10 (inclusive).
- 18.7 The Infraco's possession of any Temporary Site pursuant to Clauses 18.4 to 18.10 (inclusive) shall be subject to an overriding obligation to minimise the period of any such possession.
- 18.8 Without prejudice to Clause 18.7, the Infraco shall not, without the prior written agreement of **tie**, remain in possession of any Temporary Site after the end of the period of 28 days following completion of the Infraco Works to that Temporary Site.
- 18.9 The Infraco shall provide **tie** with as much notice as is reasonably practicable of its vacation of any Temporary Site in relation to which it has taken possession.
- 18.10 Before giving up possession of any Temporary Site, the Infraco shall remove all temporary works and restore the land to the reasonable satisfaction of the land owner (as notified to the Infraco by **tie**), provided that the Infraco shall not be required to replace a building removed on any Temporary Site in accordance with the Tram Legislation. For the avoidance of doubt, the Infraco shall:
- 18.10.1 not demolish a building or any part thereof without the consent of **tie**; and
- 18.10.2 provide **tie** 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 it has complied with its restoration obligations under this Clause 18.10.
- 18.11 For the avoidance of doubt, possession of the Permanent Land or any Temporary Site by the Infraco pursuant to this Clause 18 (*Land Consents, Permanent Land and Temporary Sites*) shall be subject to the requirements of Schedule 13 (*Third Party Agreements*).

- 18.12 For the purposes of performing the Maintenance Services, the Infraco shall provide **tie** and any relevant land owner with not less than 40 days notice of its intention to enter upon and take temporary possession of any land outwith the Permanent Land, provided that, the Infraco may not be entitled to request any land which is referred to in Clause 18.14 below.
- 18.13 On the expiry of the 40 days notice referred to in Clause 18.12 above (or such longer notice period as is provided by the Infraco in the said notice), the Infraco shall be entitled to take possession of such land in accordance with section 27(1) of either the Edinburgh Tram (Line One) Act 2006 or the Edinburgh Tram (Line Two) Act 2006 (as appropriate).
- 18.14 For the avoidance of doubt, the Infraco shall not be entitled to take possession of any land pursuant to Clause 18.12 where such land:
- 18.14.1 is more than 20 metres from any Infraco Works;
- 18.14.2 is not reasonably required for the purposes of, or in connection with the Maintenance Services;
- 18.14.3 involves taking possession of any house or garden belonging to a house; or
- 18.14.4 involves taking possession of any building (other than a house) if it is for the time being occupied.
- 18.15 Without prejudice to the obligations of **tie** to provide access to the Permanent Land or any Temporary Site to the extent set out in this Clause 18 (*Land Consents, Permanent Land and Temporary Sites*), the Infraco shall notify **tie** as soon as reasonably practicable on becoming aware of any Land Consents which may be required in order to carry out and complete the Infraco Works. For the avoidance of doubt, the Infraco shall be responsible for obtaining, at its own cost, any Land Consents required outwith the Permanent Land or Temporary Sites as aforesaid and, **tie** shall use reasonable endeavours to assist the Infraco to obtain such Land Consents provided that the costs of such assistance shall be paid by the Infraco to **tie**.
- 18.16 As required by **tie**, the Infraco shall use reasonable endeavours to assist **tie** to obtain any Land Consents, any amendments to existing Land Consents and any new Land Consents in respect of the Permanent Land and the Temporary Sites, including providing works programmes, providing any relevant information, and notifying land

owners. Any reasonable costs associated with assisting **tie** shall be paid by **tie** to the Infraco.

- 18.17 The Infraco warrants that it shall not breach the terms of any Land Consent in respect of the Permanent Land or any Temporary Site with which it is issued by **tie** in accordance with this Agreement. If the Infraco breaches any term of any Land Consent, the Infraco shall be required to seek any amendment to the existing Land Consent or new Land Consent which may be required in order to carry out and complete the relevant Infraco Works. In the circumstances where a breach of the Land Consent has arisen because of the breach of this Agreement by the Infraco or a wilful act or wilful omission by the Infraco, the Infraco shall not be entitled to apply for an extension of time or any payment. If the Infraco does not obtain the required amendment or new Land Consent, **tie** shall be entitled to recover the costs from the Infraco which are associated with **tie** obtaining such amendment or new Land Consent.
- 18.18 The Infraco acknowledges that **tie** and/or CEC have entered into agreements with third parties with regard to land access and other issues.
- 18.19 The Infraco shall comply with its obligations under Schedule 13 (*Third Party Agreements*) and the Infraco warrants that it shall not breach the terms of Schedule 13 (*Third Party Agreements*).
- 18.20 If the Infraco suffers delay from failure on the part of **tie** to give possession or access in accordance with the terms of this Clause 18 (*Land Consents, Permanent Land and Temporary Sites*), such failure shall, subject to the terms of Clause 65 (*Compensation Events*), be a Compensation Event and the terms of Clause 65 (*Compensation Events*) shall apply.
- 18.21 The Infraco shall provide or acquire at its own cost any additional access, land, rights or facilities outside the Permanent Land and the Temporary Sites being provided by **tie** in accordance with this Clause 18 (*Land Consents, Permanent Land and Temporary Sites*) for the purposes of the Infraco Works.

## 19. CONSENTS AND TRAFFIC REGULATION ORDERS

- 19.1 The Infraco shall (at its own cost and expense):

- 19.1.1 obtain and maintain in effect all Consents which may be required for the construction, installation, commissioning, completion, opening, maintenance, use or modification of the Edinburgh Tram Network; and
- 19.1.2 implement each Consent within the period of its validity and in accordance with its terms.
- 19.2 The Infraco shall provide copies of such Consents to **tie's** Representative. At the request of the Infraco, **tie** shall use reasonable endeavours to render appropriate assistance, without any obligation, in relation to obtaining any Consent provided that the costs of such assistance shall be paid by the Infraco to **tie**.
- 19.3 Acknowledgement by **tie** of the copies of Consents provided to them pursuant to Clause 19.2 shall not in any way affect the Infraco's obligations or relieve the Infraco from its obligations pursuant to this Clause 19 (*Consents and Traffic Regulation Orders*) or otherwise.
- 19.4 **tie** shall (at its own cost and expense) obtain and maintain in effect the Traffic Regulation Orders as may be required for the purposes of the Infraco Works.
- 19.5 Infraco shall provide such reasonable information and assistance to **tie** as **tie** may reasonably request to assist **tie** in obtaining and maintaining in effect the Traffic Regulation Orders.
- 19.6 The Infraco shall update the Consents Programme by each Reporting Period End Date showing progress and any new Consents to be obtained. **tie** shall be entitled to request information in relation to the progress of the application for any such Consent and the Consent itself and the Infraco shall provide the same at no cost to **tie**.
- 19.7 The Infraco shall notify CEC and any relevant Approval Bodies of the dates and times when the Infraco will require their services on the Site and shall be responsible for the co-ordination of their works if necessary with the remainder of the Infraco Works.
- 19.8 Where **tie's** authorisation or completion of documentation in respect of compliance with any Law is required, the Infraco shall furnish the relevant documentation to **tie** and, where possible, permit **tie** a period of 10 Business Days to authorise or complete it.

- 19.9 Except where otherwise provided in this Agreement, the Infraco shall give all notices and pay all fees required to be given or paid by any Law and by the rules and regulations of all public bodies and companies whose property or rights are or may be affected in any way by the Infraco Works, in relation to the construction, installation, commissioning, completion, opening, maintenance, use and modification of the Edinburgh Tram Network.
- 19.10 The Infraco shall consult with any Approval Bodies affected by the Infraco Works and shall comply with the Special Requirements of any such Approval Bodies affected by the Infraco Works which parties may include:
- 19.10.1 Scottish Environment Protection Agency;
  - 19.10.2 Coal Authority;
  - 19.10.3 Historic Scotland;
  - 19.10.4 Scottish Natural Heritage;
  - 19.10.5 BAA;
  - 19.10.6 Utilities;
  - 19.10.7 Network Rail; and
  - 19.10.8 The Scottish Executive Rural Affairs Department.
- 19.11 The Infraco shall liaise with the relevant Approval Bodies to ensure that the Infraco has obtained these Special Requirements as updated and amended from time to time.
- 19.12 Compliance with such Special Requirements by the Infraco shall not relieve the Infraco of any of its obligations and liabilities under the Agreement and fulfilment of such other obligations and liabilities shall not relieve the Infraco of its responsibilities to comply with the said Special Requirements.

## **20. BUILDING FIXING AGREEMENTS<sup>4</sup>**

- 20.1 The Infraco shall submit the Proposals to **tie** at least 6 months prior to the date on which the Infraco proposes to install, maintain, modify or replace any relevant

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<sup>4</sup> Trigger for **tie** Change in certain circumstances is to be further developed.

supporting infrastructure. The Infraco shall, prior to taking any action under Clause 20.2 or otherwise in relation to the installation, maintenance, modification or replacement of any relevant infrastructure, obtain **tie's** consent to the Proposals referred to in this Clause 20.1, which consent may be given or withheld at **tie's** absolute discretion.

20.2 In the event that **tie** gives its consent to the Proposals referred to in Clause 20.1, the Infraco shall not install, maintain or modify the relevant supporting infrastructure unless:

20.2.1 it has obtained all necessary Consents or approvals from the relevant planning authority; and

20.2.2 where it is agreed that a building fixing is to be used, modified or replaced, it has obtained a Building Fixing Agreement or variation to the existing Building Fixing Agreement or a new Building Fixing Agreement in accordance with this Clause 20 (*Building Fixing Agreements*).

20.3 Where it is agreed, pursuant to Clause 20.1, that a building fixing is to be used, modified or replaced, the Infraco shall:

20.3.1 at its own cost:

20.3.1.1 secure the consent of the Heritable Proprietor and any other relevant party to allow the Infraco to carry out a survey in order to ascertain whether the relevant building may safely support the loadings which will be imposed upon it by the building fixings (or modification or replacement thereof) to be attached thereto for as long as may be required in connection with the Edinburgh Tram Network; and

20.3.1.2 carry out the relevant survey;

before entering into or varying a Building Fixing Agreement with the Heritable Proprietor under Clause 20.3.2; and

20.3.2 at its own cost, by the date falling 90 days before the date on which the building fixing (or modification or replacement thereof) is scheduled to be affixed in accordance with the Programme, secure the agreement of the

Heritable Proprietor to allow the siting, modification or replacement (as the case may be) of building fixings in such locations as the Infraco has set out in the Proposals issued pursuant to Clause 20.1, which agreement shall be documented and set out in the form of a Building Fixing Agreement or a variation to the existing Building Fixing Agreement or in the form of a new Building Fixing Agreement, subject to any amendments that **tie** may agree.

- 20.4 The Infraco shall notify **tie** if, following an attempt by the Infraco to obtain the consent of the relevant Heritable Proprietor, such Heritable Proprietor withholds consent to the affixation, modification or replacement of a building fixing to his property.
- 20.5 Without prejudice to Clauses 20.1 and 20.2.1, if any Heritable Proprietor withholds consent as envisaged by Clause 20.4, **tie** may, within 10 Business Days of receiving the notice referred to in Clause 20.4, require the Infraco to:
- 20.5.1 at the Infraco's cost, utilise the procedure for application to the sheriff pursuant to section 16(4) of either the Edinburgh Tram (Line One) Act 2006 or the Edinburgh Tram (Line Two) Act 2006 (as appropriate); or
- 20.5.2 submit alternative plans for affixation of building fixings to alternative buildings at or around the same location; or
- 20.5.3 submit alternative plans for the use of other methods of supporting the OLE which forms part of the Edinburgh Tram Network at that location.
- 20.6 Where **tie** fails to respond within 10 Business Days as set out in Clause 20.5, the Infraco shall, subject to Clauses 20.1 and 20.2.1, be entitled to select the method for supporting the OLE at that location.
- 20.7 Where the Infraco is instructed to use the procedure referred to in Clause 20.5.1 or where the Infraco otherwise elects to use such procedure in accordance with Clause 20.6, **tie** will procure, at the Infraco's cost, that CEC uses all reasonable endeavours to assist the Infraco in such proceedings.
- 20.8 Subject to compliance by the Infraco with Clauses 20.1 and 20.2.1, where a relevant Heritable Proprietor, has not responded within the 28 day period referred to in section 16(3)(b) of either the Edinburgh Tram (Line One) Act 2006 or the Edinburgh Tram (Line Two) Act 2006 (as appropriate), the Infraco shall be entitled to proceed with

the affixation of the relevant building fixings (or modification or replacement thereof) in accordance with section 16 of either the Edinburgh Tram (Line One) Act 2006 or the Edinburgh Tram (Line Two) Act 2006 (as appropriate).

20.9 Without prejudice to Clause 20.2.1, if **tie** obtains the agreement of any Heritable Proprietor to the siting of a building fixing, the Infraco shall (at its own cost) and at the request of **tie**, forthwith obtain any necessary Consent required in relation thereto and enter into an agreement with the relevant Heritable Proprietor in the form of a Building Fixing Agreement, subject to such amendments **tie** may agree.

20.10 If a relevant Heritable Proprietor or other appropriate party serves notice on the Infraco prior to the Expiry Date pursuant to Law or pursuant to a Repairs Notice or Redevelopment Notice under a Building Fixing Agreement (each as defined therein), requiring the temporary removal of a building fixing, the Infraco shall (at its own cost) remove the relevant building fixing or any part thereof as required by the terms of the relevant notice and shall be entitled to support the OLE at that location by erecting a temporary pole provided that the Infraco has obtained necessary Consents in relation thereto, and provided further that as soon as reasonably practicable upon completion of the third party's works in respect of which the notice was served the Infraco shall (at its own cost):

20.10.1 remove any temporary pole; and

20.10.2 thereafter support the OLE forming part of the Edinburgh Tram Network at that location by way of a building fixing and not by any other method.

20.11 If having undertaken a survey pursuant to Clause 20.3.1, the Infraco is reasonably of the opinion that the building to which a building fixing is to be attached, modified or replaced cannot safely support the loadings which will be imposed upon it by such building fixing (or modification or replacement thereof) for as long as may be required in connection with the Edinburgh Tram Network and there is no alternative building at or around the same location to which the building fixing could reasonably be attached, and the Infraco submits to **tie** the report upon which such opinion is based and either:

20.11.1 **tie** confirms in writing to the Infraco that it does not dispute such opinion; or

20.11.2 it is determined by the Dispute Resolution Procedure that such opinion is correct,

then the Infraco shall be entitled (at its own cost) to select the method for supporting the OLE at that location (subject to Clauses 20.1 and 20.2.1).

## **21. NEW ROADS AND STREET WORKS ACT 1991 AND TRAM LEGISLATION**

21.1 In this Clause 21 (*New Roads and Street Works Act 1991 and Tram Legislation*) "**the Acts**" shall mean the New Roads and Street Works Act 1991 and/or the Tram Legislation (as appropriate).

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

21.3 All other expressions common to the Acts and to this Clause 21 (*New Roads and Street Works Act 1991 and Tram Legislation*) shall have the same meaning as those assigned to them by the Acts.

21.4 The Infraco shall obtain any street works licence, road opening permits and any other consent, licence or permission (other than any Land Consents) under the Acts that may be required for the carrying out of the Infraco Works and shall supply **tie** with copies thereof including details of any conditions or limitations imposed. Provided that where the licence contains a prohibition against assignation which is notified to the Infraco then the Infraco shall give **tie** all notices required to be given by the undertaker and shall indemnify **tie** from and against all costs and charges which may arise from any failure by it so to do.

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

## **22. ADVERSE PHYSICAL CONDITIONS AND ARTIFICIAL OBSTRUCTIONS**

22.1 Subject to Clause 22.5, the risk of encountering adverse physical conditions and artificial obstructions during the course of the execution of the Infraco Works shall be borne by the Infraco.

- 22.2 If during the carrying out of the Infraco Works, the Infraco discovers unexploded ordinance, utility apparatus or contaminated land which did not at the time of such discovery form part of the Infraco Works, the Infraco shall as early as practicable give written notice thereof to **tie**.
- 22.3 When giving written notice in accordance with Clause 22.2, the Infraco shall give details of any anticipated effects of the unexploded ordinance, utility apparatus or contaminated land, the measures it has taken, is taking or is proposing to take, the associated estimated costs and the extent of the anticipated delay in or interference with the carrying out of the Infraco Works.
- 22.4 **tie's** Representative shall:
- 22.4.1 require the Infraco to investigate and report upon the practicality, cost and timing of alternative measures which may be available; and/or
  - 22.4.2 give written consent to the measures notified by the Infraco under Clause 22.3 with or without modification; and/or
  - 22.4.3 give written instructions as to how the unexploded ordinance, utility apparatus or contaminated land are to be dealt with; and/or
  - 22.4.4 order a suspension under Clause 87 (*Suspension of Work*) or a variation under Clause 80 (**tie** *Changes*).
- 22.5 Notwithstanding the provisions of Clause 5 (*Provision and Interpretation of Information*) and Clause 22.1, the risk of encountering unexploded ordinance, unidentified utility apparatus or unidentified contaminated land during the course of the execution of the Infraco Works shall not be borne by the Infraco, and the Infraco shall, subject to Clause 22.4, be able to make a claim for an extension of time and additional payment for any reasonable, demonstrable and direct additional costs incurred in relation to such unidentified utility apparatus or unidentified contaminated land under Clause 65 (*Compensation Events*) provided that:
- 22.5.1 the Infraco demonstrates to the reasonable satisfaction of **tie's** Representative that the Infraco has used its best endeavours to adjust the order and sequence in which the Infraco proposes to execute the Infraco Works in order to minimise the effects of the delay in, or if possible to avoid altogether any delay in, the progress by the Infraco of the Infraco Works; and

- 22.5.2 the Infraco demonstrates to the reasonable satisfaction of **tie's** Representative that the Infraco has used its best endeavours to minimise and mitigate any extra costs incurred in relation to such unexploded ordinance, unidentified utility apparatus or unidentified contaminated land; and
- 22.5.3 the Infraco demonstrates to the reasonable satisfaction of **tie's** Representative that any extra costs incurred were not already included within the Contract Price included within the tender total submitted by the Infraco as part of the procurement competition in relation to this Agreement; and
- 22.5.4 the Infraco demonstrates to the reasonable satisfaction of **tie's** Representative that any claim for additional time relates to timing implications which exceed those that were contained within the final tender programme submitted by the Infraco before the Effective Date as part of the procurement competition in relation to this Agreement.

**23. ACCESS TO THE INFRACO WORKS, THE SITE AND WORKSHOPS ETC.**

- 23.1 **tie**, **tie's** Representative and any person authorised by **tie** or **tie's** Representative shall at all times have access to the areas where the Infraco Works are being carried out and to the Site and to all workshops and places where work is being prepared or whence materials, manufactured articles, machinery and equipment (including the Trams) are being obtained for the Infraco Works (including the premises of any Infraco Party) and the Infraco shall afford every facility for and every assistance in obtaining such access or the right to such access provided that such access shall not disrupt or interfere with the performance by Infraco or any Infraco Party of the Infraco Works and **tie** shall, and shall procure that **tie's** Representative and any person authorised by **tie** or **tie's** Representative shall, during any period when it or they have access to the Site, the Infraco Works and the Tram testing facilities, comply with all rules and regulations applicable to working at those premises for the safety of persons and convenience of the public.

**24. USE OF THE DEPOT**

- 24.1 On completion of the construction of the Depot, the Infraco shall enter into and execute the Depot Licence in the form set out in Schedule 35 (*Depot Licence*).

- 24.2 Subject to the Infraco executing the Depot Licence and complying with and procuring the Infraco Parties' compliance with the obligations in this Clause 24 (*Use of the Depot*) and the Depot Licence, the Infraco and the Infraco Parties shall have the right to access and use those parts of the Depot which the Infraco and the Infraco Parties properly require to so use for the purpose of carrying out the Infraco Works (including the Maintenance Services) in accordance with this Agreement.
- 24.3 The Infraco agrees that:
- 24.3.1 the right to access and use the Depot granted pursuant to this Clause 24 (*Use of the Depot*) and the Depot Licence shall terminate on the earlier of the Termination Date or the Expiry Date; and
- 24.3.2 the Infraco's and the Infraco Parties' right to use such parts of the Depot shall not create any relationship of landlord and tenant.
- 24.4 **tie** gives no warranty as to the condition or fitness for purpose of the Depot.
- 24.5 Subject to the exception set out in Clause 77.2, **tie** shall not be liable for the death of or injury to or damage to any property or for any losses, claims, demands, actions, proceedings, damages, costs or expenses or other liability incurred by the Infraco and/or the Infraco Parties or any person in the use of the Depot.
- 24.6 Nothing in this Clause 24 (*Use of the Depot*) or the Depot Licence shall restrict **tie's** absolute right of access to any part of the Depot at any time.

## **PART 6 - PERSONNEL**

### **25. TIE'S REPRESENTATIVE**

25.1 Subject to Clause 25.2, **tie's** Representative may exercise the authority specified in the Agreement. **tie's** Representative shall:

25.1.1 be responsible for the day to day monitoring of the Infraco Works to be performed by the Infraco;

25.1.2 exercise such functions and powers of **tie** under this Agreement as **tie** may notify in writing to the Infraco from time to time; and

25.1.3 be the primary point of contact for the Infraco with **tie**;

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

25.2 **tie** may by notice in writing to the Infraco from time to time, restrict the authority of **tie's** Representative and/or require **tie's** Representative to obtain the specific approval of **tie** before exercising any such authority. In the event of such restriction or requirement, the Infraco shall look to **tie** to exercise the relevant authority or to confirm that **tie** has given the relevant approval.

25.3 Except as expressly stated in the Agreement, **tie's** Representative shall have no authority to amend the Agreement nor to relieve the Infraco of any of its obligations under the Agreement.

25.4 **tie** may by notice in writing to the Infraco change the identity of **tie's** Representative. **tie** shall consult with the Infraco prior to the appointment of any replacement for **tie's** Representative, taking account of the need for liaison and continuity in respect of this Agreement. Such change shall have effect on the date specified in the written notice.

25.5 During any period when a **tie's** Representative has not been appointed (or when **tie's** Representative is unable through illness, incapacity or any other reason whatsoever to

carry out or exercise his functions under this Agreement), **tie** shall carry out the functions which would otherwise be performed by **tie's** Representative.

25.6 No decision, act or omission of **tie** or **tie's** Representative shall, except as otherwise expressly provided in this Agreement:

25.6.1 in any way relieve or absolve the Infraco from, modify, or act as a waiver or personal bar of, any liability, responsibility, obligation or duty under this Agreement;

25.6.2 in the absence of an express written instruction or authorisation issued by **tie** under Clause 80 (**tie Changes**) constitute or authorise a variation; or

25.6.3 be construed as restricting or binding **tie** in any way save with regard to the specific project matters to which it relates.

25.7 Where **tie's** Representative is not a single named individual, **tie's** Representative shall within 7 days of the Effective Date notify to the Infraco in writing the name of the individual who will act on its behalf and assume the full responsibilities of **tie's** Representative under the Agreement. **tie's** Representative shall thereafter in like manner notify the Infraco of any replacement of the named individual.

25.8 **tie's** Representative may from time to time delegate any of the duties and authorities vested in **tie's** Representative, and **tie's** Representative may at any time revoke such delegation. Any such delegation:

25.8.1 shall be in writing and shall not take effect until such time as a copy thereof has been delivered to the Infraco or the Infraco's Representative; and

25.8.2 shall continue in force until such time as **tie's** Representative shall notify the Infraco in writing that the same has been revoked.

25.9 Instructions given by **tie's** Representative or by any person exercising delegated duties and authorities under Clause 25.8 shall be in writing. Provided that if for any reason it is considered necessary to give any such instruction orally the Infraco shall comply therewith.

25.10 Any such oral instruction shall be confirmed in writing as soon as is possible under the circumstances. Provided that if the Infraco confirms in writing any such oral

instruction which confirmation is not contradicted in writing by **tie's** Representative forthwith it shall be deemed to be an instruction in writing by **tie's** Representative.

- 25.11 Upon the written request of the Infraco, **tie's** Representative or the person exercising delegated duties or authorities under Clause 25.8 shall specify in writing under which of his duties and authorities the instruction is given.

## 26. INFRACO'S SUPERINTENDENCE AND KEY PERSONNEL

- 26.1 The Infraco shall provide all necessary superintendence during the construction and completion of the Infraco Works. Such superintendence shall be given by sufficient persons having adequate knowledge of the operations to be carried out (including the methods and techniques required, the hazards likely to be encountered and methods of preventing accidents) for the satisfactory and safe construction of the Infraco Works.
- 26.2 The Infraco's senior representative on the Site ("**Infraco's Representative**") must be approved by **tie**, for which purpose the Infraco shall first provide **tie** with full details of the experience and qualifications of the Infraco's Representative.
- 26.3 The Infraco shall ensure that, so long as the Infraco's Representative remains an employee or servant of the Infraco and is not incapacitated by illness or otherwise nor absent in consequence of his reasonable holiday entitlement, the Infraco's Representative shall undertake overall supervision of the Infraco Works for whatever time may be required to ensure the completion of the Infraco Works in accordance with the Agreement. The Infraco's Representative shall be responsible for the safety of all Infraco Works.
- 26.4 The Infraco's Representative shall:
- 26.4.1 act as the principal point of contact for **tie**, and **tie's** Representative in relation to all matters related to this Agreement;
  - 26.4.2 have full authority to act on behalf of the Infraco for all purposes of this Agreement, and **tie** and **tie's** Representative shall be entitled to treat all instructions and directions of the Infraco's Representative as those of the Infraco; and

- 26.4.3 manage and co-ordinate the provision of the Infraco Works by the Infraco (and any Sub-Contractor) and the integration of provision of the Infraco Works with the tasks being performed by **tie's** internal team and the other advisers and contractors appointed by **tie** (where such tasks have been notified to the Infraco), and liaise with **tie's** Representative in relation to matters arising in relation to the Infraco Works.
- 26.5 The Infraco's Representative shall not be changed by the Infraco without the consent of **tie** to such change (which consent shall not be unreasonably withheld or delayed) and the Infraco shall provide **tie's** Representative with full details of the experience and qualifications of the proposed substitute Infraco's Representative. The Infraco shall take account of the need for liaison and continuity in respect of the provision of the Infraco Works in accordance with the Programme when any change is proposed.
- 26.6 The Infraco shall also nominate a deputy to the Infraco's Representative. During any period when the Infraco's Representative is unable through illness, incapacity, annual leave or any other reason whatsoever to carry out or exercise his functions under this Agreement, such deputy shall carry out the functions which would otherwise be performed by the Infraco's Representative.
- 26.7 **tie** may at any time request the removal from the Infraco Works of the Infraco's Representative or his deputy for reasons of incompetence or gross misconduct and request the prompt appointment of a satisfactory substitute, approved by **tie** and the Infraco shall provide **tie's** Representative with full details of the experience and qualifications of the proposed substitute.
- 26.8 Any costs incurred by the Infraco in replacing the Infraco's Representative (in any circumstances) shall be borne by the Infraco.
- 26.9 The Infraco shall ensure that the Key Personnel shall have day-to-day responsibility for and be involved in the performance of the Infraco Works.
- 26.10 In addition to the Key Personnel, there shall at all times be a sufficient number of staff (including all relevant grades of supervisory staff) available for the provision of the Infraco Works in accordance with this Agreement. This obligation shall include ensuring that there are sufficient staff to cover periods of holiday, sickness and other absences, and anticipated and actual peaks in servicing the requirements for the Infraco Works.

- 26.11 The Infraco shall locate staff at such locations as the Infraco considers convenient for the Infraco Works, provided that:
- 26.11.1 the Infraco acknowledges that it will not be entitled to any reimbursement from **tie** in relation to the travel of any person to or from Edinburgh, or for the accommodation or subsistence of any person visiting Edinburgh; and
- 26.11.2 **tie** will require the Infraco to make the Key Personnel available for meetings in Edinburgh at such times as **tie** may, in its sole discretion, direct subject to, where practicable, reasonable advance notice of such meetings being given by **tie** to the Infraco.
- 26.12 The Infraco shall ensure that there are no changes to the Key Personnel without **tie's** prior written consent (such consent not to be unreasonably withheld or delayed) and that any replacement persons shall be of at least equivalent status and ability to the person whom they replace.
- 26.13 The Infraco shall use all reasonable endeavours to ensure the continuity of the personnel assigned to perform the Infraco Works and shall select Key Personnel having careful regard to those persons' existing work load and other planned commitments.
- 26.14 The Infraco shall ensure that its Key Personnel shall:
- 26.14.1 have the level of skill, experience and authority appropriate to (i) the Infraco Works to which such staff are allocated, and (ii) the standards to be achieved pursuant to this Agreement; and
- 26.14.2 receive such training and supervision as is necessary to ensure the proper performance of this Agreement and compliance with all regulatory requirements appropriate to and required for the performance of the Infraco Works in accordance with this Agreement.
- 26.15 All Key Personnel should have a nominated deputy who shall be capable of fulfilling the duties of the person to whom they are deputising in the event of their absence and who shall be kept fully informed of project status in the relevant area.
- 26.16 The Infraco shall not, during the period of this Agreement, contract or retain as an adviser or consultant, any person currently or previously employed or engaged as

appropriate in the previous 3 months by **tie** unless the prior written approval of **tie** has been obtained. For the avoidance of doubt, this Clause 26.16 shall not apply to the SDS Provider, the Tram Supplier, the Tram Maintainer and the Infrastructure Maintainer.

26.17 The Infraco shall (and shall procure that the Key Personnel, its staff employed in the performance of the Infraco Works and the Infraco Parties) comply with all regulatory requirements appropriate to and required for the performance of the Infraco Works, **tie's** Drug and Alcohol Policy and any rules, regulations and instructions from **tie's** Representative.

26.18 The Infraco shall not at the Depot or at any premises from where any Infraco Parties carry out the Infraco Works and/or any obligations under this Agreement at any time allow the consumption of, or work under, the influence of alcoholic liquors or drugs or give, sell or barter any alcoholic liquors or drugs or permit or suffer any such gift, sale or barter to be made by any Infraco Party.

## **27. REMOVAL OF INFRACO'S EMPLOYEES**

27.1 The Infraco shall employ or cause to be employed in and about the construction and completion of the Infraco Works and in the superintendence thereof only persons who are careful, skilled and experienced in their several trades and callings. The Infraco shall ensure that its site supervisors and operatives who are involved in carrying out the Infraco Works shall have CSCS (or equivalent) certification, if relevant to the works they are performing.

27.2 Notwithstanding the provisions of paragraph 6 of parts A and B of Schedule 3 (*Code of Construction Practice and Code of Maintenance Practice*), **tie's** Representative shall be at liberty to object to and require the Infraco to remove or cause to be removed from the Infraco Works any person employed thereon who in the opinion of **tie's** Representative mis-conducts himself or is incompetent or negligent in the performance of his duties or fails to conform with any particular provisions with regard to safety which may be set out in this Agreement or persists in any conduct which is prejudicial to safety or health, and such persons shall not be again employed upon the Infraco Works without the permission of **tie's** Representative.

27.3 Any costs incurred by the Infraco in removing, or causing to be removed, a person in accordance with this Clause 27 (*Removal of Infraco's Employees*) shall be borne by the Infraco.

## 28. SUB-LETTING AND THE APPOINTMENT OF SUB-CONTRACTORS

28.1 The Infraco shall not sub-contract the whole of the Infraco Works.

28.2 Subject to Clauses 28.3 and 28.4, the Infraco may sub-contract part of the Infraco Works with the prior written approval of **tie**, to a sub-contractor, supplier, sub-consultant, specialist and/or other party for performance of that specific part of the Infraco Works. The consent of **tie** shall be deemed to have been given to the appointment of the Tram Supplier, the SDS Provider, the Tram Maintainer and the Infrastructure Maintainer. The consent of **tie** shall also be deemed to have been given to the appointment of the sub-contractors listed in Schedule 43 (*Approved Sub-Contractors and Trades*) and the listed aspects of the Infraco Works and/or trades required for the Infraco Works in respect of which the Infraco may appoint a sub-contractor, sub-consultant, specialist and/or other party.

28.3 In respect of the Key Sub-Contractors not already approved and listed in Schedule 43 (*Approved Sub-Contractors and Trades*), the Infraco shall supply a reasonable level of relevant information (including curriculum vitae, information on relevant experience and technical capacity, insurance details and the methodology for provision of the sub-let works) required by **tie** to enable a decision to be made by **tie** on the suitability of the proposed Key Sub-Contractors to perform the relevant part of the Infraco Works. **tie's** decision on the use of and identity of any sub-contractor, supplier, sub-consultant, specialist and/or other party shall be final but shall not be unreasonably withheld or delayed.

28.4 The form of sub-contract for any work which is to be sub-contracted to each Key Sub-Contractor shall be consistent with this Agreement and in such form as is approved by **tie** in advance of execution of each such sub-contract (such approval not to be unreasonably withheld or delayed).

28.5 The Infraco shall and shall procure that every Sub-Contractor shall, provide and employ in connection with the execution of the Infraco Works:

- 28.5.1 only such technical assistants as are skilled, experienced and assessed as competent for undertaking a specified range of activities in their respective occupations and, as appropriate, such sub-agents, foremen and leading hands as are competent to give proper supervision to the work they are required to supervise; and
- 28.5.2 such skilled, semi-skilled and unskilled labour as is necessary for the proper and timely execution of the Infraco Works.
- 28.6 Notwithstanding the provisions of paragraph 6 of parts A and B of Schedule 3 (*Code of Construction Practice and Code of Maintenance Practice*), **tie's** Representative shall be at liberty after due warning in writing to require the Infraco to remove from the Infraco Works any Sub-Contractor (and/or employee of such Sub-Contractor) who mis-conducts itself or is incompetent or negligent in the performance of its duties or fails to conform with any particular provisions with regard to safety which may be set out in the Agreement or persists in any conduct which is prejudicial to safety or health and such Sub-Contractor (and/or employee of such Sub-Contractor) shall not be again employed upon the Infraco Works without the permission of **tie's** Representative.
- 28.7 The Infraco shall procure that every Key Sub-Contractor within 10 Business Days of any request by **tie**, provide to **tie** a collateral warranty:
- 28.7.1 in favour of **tie** in the form set out in Schedule 7 (*Sub-Contractor Collateral Warranty*) with only such amendments as **tie** may approve; and/or
- 28.7.2 in favour of CEC, Transport Scotland, TEL, Network Rail and any other party at **tie's** reasonable request, in respect of carrying out the Infraco Works in the form set out in Schedule 7 (*Sub-Contractor Collateral Warranty*) or where such form is not acceptable, in a different form which is acceptable to both Parties (acting reasonably).
- 28.8 If **tie** requires any further collateral warranties from any Sub-Contractor other than the Key Sub-Contractors, the Infraco shall use reasonable endeavours to procure that any such Sub-Contractor shall within 40 Business Days of any reasonable request by **tie**, provide to **tie** a collateral warranty on the terms described in Clauses 28.7.1 and/or 28.7.2.

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

## PART 7 - GENERAL CONSTRUCTION AND MAINTENANCE OBLIGATIONS

### 29. SETTING-OUT

- 29.1 The Infraco shall be responsible for the accurate setting-out of the Infraco Works and for the correctness of the position, levels, dimensions and alignment of all parts of the Infraco Works and for the provision of all necessary instruments, appliances and labour in connection therewith.
- 29.2 If at any time during the progress of the Infraco Works, any error shall appear or arise in the position, levels, dimensions or alignment of any part of the Infraco Works, the Infraco, on being required so to do by **tie's** Representative, shall at its own cost rectify such error to the satisfaction of **tie's** Representative (acting reasonably).
- 29.3 The checking of any setting-out or of any line or level by **tie's** Representative shall not in any way relieve the Infraco of its responsibility for the correctness thereof and the Infraco shall carefully protect and preserve all bench-marks, sight rails, pegs and other things used in setting out the Infraco Works.

### 30. SAFETY AND SECURITY

- 30.1 The Infraco shall throughout the execution and completion of the Infraco Works have full regard for the safety of all persons entitled to be upon the Site and shall keep the Site (so far as the same is under its control) and the Infraco Works, in an orderly state appropriate to the avoidance of danger to such persons.
- 30.2 The Infraco shall provide and maintain at its own cost all lights, guards, fencing, warning signs and watching when and where necessary, or required by **tie's** Representative (acting reasonably), or required in accordance with Schedule 3 (*Code of Construction Practice and Code of Maintenance Practice*), and/or in accordance with Good Industry Practice or by any statutory or other competent authority for the protection of the Infraco Works or for the safety and convenience of the public or others.
- 30.3 The Infraco shall comply with, shall procure that the Infraco Parties shall, and shall use reasonable endeavours to procure that others on the Site shall comply with all their respective duties and obligations under all Law and requirements having the force of law relating to the health, safety and conduct of construction or maintenance operations.

- 30.4 **tie** requires the Infraco to undertake instruction and training, and provide and issue passes for the admission of any person having business on the Site, including persons who are not employees of the Infraco or any Sub-Contractor, to the Site or to any part thereof as specified in Schedule 3 (*Code of Construction Practice and Code of Maintenance Practice*). In such event any person who fails to show his pass on demand to any duly authorised employee or agent of the Infraco or **tie** may be refused admission or asked to vacate the Site. The Infraco shall procure the return of any pass so used at any time on the demand of **tie** or on the cessation of the bearer's employment on the Infraco Works.
- 30.5 Passes and the procedure for their use shall be subject to **tie's** approval (which shall not be unreasonably withheld or delayed) and requirements which may be varied from time to time.
- 30.6 If required by **tie**, the Infraco shall submit a list of the names of all workers requiring passes, together with two photographs of each person and shall satisfy **tie** of their identity before passes are issued.
- 30.7 If and when instructed by **tie**, the Infraco shall give to **tie** a list of names and addresses of all persons who are or and may be at any time concerned with the Infraco Works or any part thereof, specifying the capacities in which they are so concerned, and giving such other particulars as **tie** may reasonably require.
- 30.8 Except with the written permission of **tie** to be given when necessary for the execution of the Infraco Works and subject to such terms as may be imposed, the employees of the Infraco and any Sub-Contractor shall not be permitted to enter any part of the Site under the control of other contractors or of **tie** or any other owner, and the Infraco shall warn its employees and sub-contractors that any person found within those areas without such authority, is liable to be removed from the Infraco Works.
- 30.9 The Infraco shall ensure that the Infraco Parties and others on the Site are confined to only that portion of the Site necessary to enable them to carry out the Infraco Works.
- 30.10 The Infraco shall ensure that the Infraco Works and any part of the Site (including any Work Site) upon which the Infraco Works are being carried out shall be kept secure at all times.

- 30.11 The Infraco shall take all reasonable steps to prevent unauthorised persons being admitted to any part of the Site (including any Work Site) upon which the Infraco Works are being carried out. If tie gives the Infraco notice that any person is not to be admitted to such part of the Site, the Infraco shall take all reasonably practicable steps to prevent that person being admitted.

### **31. CARE OF THE INFRACO WORKS**

- 31.1 The Infraco shall take full responsibility for the care of the Infraco Works and the Edinburgh Tram Network (in so far as is compatible with the Infraco's obligations under this Agreement, including, for the avoidance of doubt, the Trams and the Tram Related Equipment) and any work, materials, plant and equipment for incorporation within the Infraco Works and the Edinburgh Tram Network from the Effective Date until the Expiry Date.

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

31.2.1 the Infraco Works or part thereof;

31.2.2 the Edinburgh Tram Network or part thereof;

31.2.3 the Trams or the Tram Related Equipment; and

31.2.4 any materials, plant or equipment for incorporation therein;

while the Infraco is responsible for the care thereof, the Infraco shall at its own cost rectify such loss or damage so that the Infraco Works and/or the Edinburgh Tram Network (in so far as is compatible with the Infraco's obligations under this Agreement including the Trams and the Tram Related Equipment) conform in every respect with the provisions of this Agreement.

### **32. INTERFERENCE WITH TRAFFIC AND ADJOINING PROPERTIES**

- 32.1 The Infraco shall comply with the requirements of Schedule 3 (*Code of Construction Practice and Code of Maintenance Practice*) with regard to the maintenance of access to properties, bus stops and bus services and the closure of roads.

- 32.2 The Infraco shall at all times seek to minimise any nuisance or inconvenience to or interference with the business or operations of the owners, tenants or occupiers of the Site or other premises upon or in the locality of the Site, to TEL's bus operations and

to the public generally, including measures to reduce the nuisance from noise, dust, smell, fumes and vibration during the carrying out of the Infraco Works. The Infraco shall comply with the requirements of Schedule 3 (*Code of Construction Practice and Code of Maintenance Practice*) in this regard.

- 32.3 Without prejudice to the Infraco's obligations under Clauses 32.1 and 32.2 and subject to **tie's** obligation to provide Land Consents in relation to the Permanent Land and the Temporary Sites pursuant to Clauses 18.1 and 18.5, if the carrying out of the Infraco Works or the remedying of any defects therein is likely to necessitate any interference with the rights of adjoining or neighbouring landowners, tenants or occupiers, then the Infraco shall without cost to **tie** use reasonable endeavours to obtain the prior written agreement of such landowners, tenants and/or occupiers, and such agreement shall be subject to the approval of **tie** before execution (such approval not to be unreasonably withheld or delayed). The Infraco shall comply in every respect with any conditions contained in any such agreement.

### **33. AVOIDANCE OF DAMAGE TO ROADS AND BRIDGES**

- 33.1 The Infraco shall use every reasonable means to prevent any of the roads or bridges communicating with or on the route to the Site from being subjected to extraordinary traffic within the meaning of the Roads (Scotland) Act 1984 by any traffic of the Infraco or any Infraco Party.

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

- 33.2 The Infraco shall be responsible for and shall pay the cost of strengthening any bridges or altering or improving any road communicating with or on the route to the Site to facilitate the movement of the Trams, the Infraco's Equipment or Temporary Works required in the carrying out of the Infraco Works. The Infraco shall indemnify and keep indemnified **tie** against all claims for damage to any road or bridge communicating with or on the route to the Site caused by such movement including such claims as may be made by any competent authority directly against **tie** and/or

CEC pursuant to any Act of Parliament or other Statutory Instrument and shall negotiate and pay all claims arising solely out of such damage.

- 33.3 If, notwithstanding Clause 33.1, any damage occurs to any bridge or road communicating with or on the route to the Site arising from the transport of the Trams, materials or manufactured or fabricated articles being or intended to form part of the Infraco Works and/or the Temporary Works, the Infraco shall notify **tie's** Representative as soon as the Infraco becomes aware of such damage or as soon as the Infraco receives any claim from the authority entitled to make such claim. **tie** shall not be liable for any costs, charges or expenses in respect thereof in relation thereto.

#### **34. WORK TO BE TO SATISFACTION OF TIE**

- 34.1 The Infraco shall construct and complete the Infraco Works in strict accordance with the Agreement to the satisfaction of **tie** (acting reasonably) and shall comply with and adhere strictly to **tie** and **tie's** Representative's instructions on any matter connected therewith (whether mentioned in the Agreement or not). The Infraco shall take instructions only from **tie**, **tie's** Representative or, subject to Clause 25.8, from **tie's** Representative's duly appointed delegate.
- 34.2 The whole of the materials, Infraco's Equipment and labour to be provided by the Infraco under Clause 7 (*Duty of Care and General Obligations in relation to the Infraco Works*) and the mode, manner and speed of construction of the Infraco Works are to be in accordance with this Agreement.
- 34.3 If in pursuance of Clause 34.1, **tie's** Representative shall issue instructions which involve the Infraco in delay or disrupt its arrangements or methods of construction so as to cause the Infraco to incur cost beyond that reasonably to have been foreseen by an experienced contractor then **tie's** Representative shall take such delay into account in determining any claim for an extension of time and additional payment for any reasonable, demonstrable and direct additional costs incurred in relation to such instructions under Clause 65 (*Compensation Events*) except to the extent that such delay and/or extra cost result from the Infraco's default or result from the Infraco's failure to use its best efforts to minimise the consequences, in terms of cost or delay, of the relevant instruction. If such instructions require any variation to any part of the

Infraco Works, the same shall be deemed to have been given pursuant to Clause 80 (*tie Changes*).

### **35. QUALITY OF MATERIALS AND WORKMANSHIP, SAMPLES AND TESTS**

35.1 All materials and workmanship shall be the respective kinds described in this Agreement or where the Agreement is silent, to the standard proposed by the Infraco and reviewed in accordance with Schedule 14 (*Review Procedure*) and/or in accordance with *tie's* Representative's instructions. All materials and workmanship shall be subjected from time to time to such tests as *tie's* Representative may direct at the place of manufacture or fabrication or preparation or on the Site or such other place or places as may be specified in the Agreement. The Infraco shall undertake such testing and provide such assistance, instruments, machines, stores, labour and materials as are normally required for examining, measuring and testing any work and the quality, weight or quantity of any materials used, and shall supply samples of materials before incorporation or use in the Infraco Works for testing as may be selected and required by *tie's* Representative.

35.2 All samples shall be supplied by the Infraco at its own cost.

35.3 The costs of making any test identified in this Agreement shall be borne by the Infraco. The reasonable, proper and demonstrable costs incurred by the Infraco in making any other test which is not identified in this Agreement but is required by *tie* in accordance with Clause 35.1 shall be borne by *tie* provided that such costs will not be paid by *tie* where such tests are for the Infraco's own audit and/or where the result of such other test demonstrates that the relevant materials and/or workmanship is not in accordance with this Agreement.

### **36. EXAMINATION OF WORK BEFORE COVERING UP**

36.1 No work shall be covered up or put out of view without the consent of *tie's* Representative (acting reasonably), and the Infraco shall afford full opportunity for *tie's* Representative and any other parties authorised by *tie* to examine any work which is about to be covered up or put out of view and to examine foundations before permanent work is placed thereon. The Infraco shall give 48 hours notice to *tie's* Representative whenever any such work or foundations are ready or about to be ready for examination and *tie's* Representative shall within 48 hours of such notice, unless

he considers it unnecessary and advises the Infraco accordingly, attend for the purpose of examining such work or of examining such foundations.

36.2 The Infraco shall uncover any part or parts of the Infraco Works or make openings in or through the same as **tie's** Representative may from time to time direct and shall reinstate and make good such part or parts to the satisfaction of **tie's** Representative (acting reasonably). If any such part or parts have been covered up or put out of view after compliance with the requirements of Clause 36.1 and are found to have been carried out in accordance with the Agreement, the cost of uncovering, making openings in or through, reinstating and making good the same shall be borne by **tie** but in any other case all such costs shall be borne by the Infraco.

### 37. REMOVAL OF UNSATISFACTORY WORK AND MATERIALS

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

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

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

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

37.1.3.1 materials or workmanship; or

37.1.3.2 design by the Infraco for which the Infraco is responsible;

is not in the opinion of **tie's** Representative (acting reasonably) in accordance with the Agreement. After consultation with the Infraco and with the agreement of **tie**, **tie's** Representative may allow all or any of such materials, workmanship or design to remain and confirm this in writing to the Infraco (which shall not constitute a **tie** Change under Clause 80 (**tie** Changes)).

37.2 In the case of default on the part of the Infraco in carrying out such instruction, **tie** shall be entitled to carry out or procure the carrying out of such instruction, and all

costs and expenses properly incurred by **tie** in relation to such default shall be recoverable from the Infraco by **tie** and may be deducted by **tie** from any monies due or to become due to the Infraco.

- 37.3 Failure of **tie** or **tie's** Representative to disapprove any work or materials shall not prejudice the power of **tie** or **tie's** Representative subsequently to take action under this Clause 37 (*Removal of Unsatisfactory Work and Materials*).
- 37.4 If any workmanship or materials are not in accordance with this Agreement, **tie's** Representative may issue such orders or directions under Clauses 35 (*Quality of Materials and Workmanship, Samples and Tests*) or 36 (*Examination of Work before Covering Up*) to test or open up for inspection as are reasonable in the circumstances to establish to the satisfaction of **tie's** Representative (acting reasonably) the likelihood or extent, as appropriate to the circumstances, of any further similar non-compliance.
- 37.5 To the extent that such orders or directions are reasonable in the circumstances, whatever the results of the test or opening up, and notwithstanding Clauses 35.3, 36.2 and 48 (*Infraco to Search*), the cost of such test or opening up shall be borne by the Infraco. The orders or directions shall not constitute **tie** Changes under Clause 80 (**tie** Changes) but shall, unless the test or inspection showed that the workmanship or materials were not in accordance with the Agreement, constitute a cause of delay for the purposes of Clause 64 (*Relief Events*).

## **38. URGENT REPAIRS AND EMERGENCIES**

- 38.1 In accordance with the provisions of paragraph 6 of parts A and B of Schedule 3 (*Code of Construction Practice and Code of Maintenance Practice*), if, in the opinion of **tie's** Representative (acting reasonably), any remedial or other work or repair is necessary by reason of any emergency, accident or failure or other event occurring to, in or in connection with the Infraco Works or any part thereof, during the carrying out of the Infraco Works, **tie's** Representative shall so inform the Infraco with confirmation in writing.
- 38.2 Thereafter, if the Infraco is unable or unwilling to carry out such work or repair in accordance with the appropriate time period identified in paragraph 6 of parts A and B of Schedule 3 (*Code of Construction Practice and Code of Maintenance Practice*), **tie** may itself carry out or procure the carrying out of the said work or repair.

- 38.3 If the work or repair so carried out by **tie** is work, which in the opinion of **tie's** Representative, acting reasonably, the Infraco was liable to carry out at its own expense under the Agreement, all costs and expenses properly incurred by **tie** in relation to such work shall be recovered from the Infraco by **tie** and may be deducted from any monies due or to become due to the Infraco.
- 38.4 If the Infraco carries out such work or repair, the Infraco shall be paid in accordance with Clause 67 (*Payment in respect of Applications for Milestone Payments*) or Clause 68 (*Payment in respect of Maintenance Services*) the amount of any direct and demonstrable costs as may be reasonable except to the extent that such extra cost results from the Infraco's default or results from the Infraco's failure to use reasonable endeavours to minimise the consequences, in terms of cost of the emergency, accident, failure or other event.

### 39. FOSSILS AND ANTIQUITIES

- 39.1 As between the Parties, all fossils, antiquities, and other objects having artistic, historic or monetary value and human remains which may be found on or at the Site are or shall become, upon discovery, the absolute property of CEC.
- 39.2 Upon discovery of any such item during the course of the Infraco Works, the Infraco shall:
- 39.2.1 immediately inform **tie's** Representative of such discovery;
  - 39.2.2 take all steps not to disturb the object and, if necessary, cease any Infraco Works in so far as the carrying out of such Infraco Works would endanger the object or prevent or impede its excavation; and
  - 39.2.3 take all necessary steps to preserve the object in the same position and condition in which it was found.
- 39.3 **tie** shall procure that **tie's** Representative promptly, and in any event within 3 Business Days of notice being given by the Infraco pursuant to Clause 39.2.1, issues an instruction to the Infraco specifying what action **tie's** Representative requires the Infraco to take in relation to such discovery.
- 39.4 The Infraco shall promptly and diligently comply with any instruction issued by **tie's** Representative referred to in Clause 39.3 (except and to the extent that such

instruction constitutes a **tie** Change pursuant to Clause 39.6 in respect of which case the provisions of Clause 80 (**tie Changes**) apply), at its own cost.

- 39.5 If directed by **tie's** Representative, the Infraco shall allow representatives of **tie** to enter the Sites for the purposes of removal or disposal of such discovery provided that such entry shall be subject to **tie** complying with all relevant safety procedures, which shall include the Infraco's Site Rules and any reasonable directions with regard to site safety that may be issued by or on behalf of the Infraco's Representative from time to time.
- 39.6 If any steps taken by the Infraco under Clauses 39.2.2 or 39.2.3, and/or any instruction referred to in Clause 39.3 includes a requirement for the Infraco to carry out works (being any work of alteration, addition, demolition or extension or variation in the Infraco Works) which are not works which would be necessary for the purpose of compliance with Law or any Consents, such works shall be deemed to be a **tie** Change and the provisions of Clause 80 (**tie Changes**) shall apply.

#### **40. ERRORS AND/OR OMISSIONS IN THE INFRACO WORKS**

- 40.1 If during the carrying out of the Infraco Works and/or where the Infraco has completed the Infraco Works, **tie** becomes aware of any error or omission in the carrying out of the Infraco Works or of any other breach of this Agreement, **tie** shall notify the Infraco, who shall, at its own expense and in liaison with **tie** and/or any other party or parties nominated by **tie**, rectify any error or omission or breach, or where this is agreed by **tie** to be impracticable or undesirable, take such other agreed steps to address the error or omission.
- 40.2 Any direct costs to **tie** associated with the Infraco remedying any such errors or omissions or breaches shall be paid by the Infraco to **tie**.
- 40.3 These arrangements shall in no respect diminish **tie's** ability to recover damages from the Infraco for losses incurred by **tie** consequent upon the error or omission or breach in question.
- 40.4 If and to the extent that the Infraco fails to carry out the necessary rectification and/or other agreed steps in accordance with Clause 40.1 to **tie's** reasonable satisfaction and/or within a reasonable period of time, **tie** shall be entitled to carry out such rectification and/or other agreed steps itself, or procure the carrying out by a third

party of such rectification and/or other agreed steps at the Infraco's expense and shall recover any costs from the Infraco as a debt.

## PART 8 - MILESTONE COMPLETION, TESTING AND COMMISSIONING

### 41. COMPLETION OF CONSTRUCTION MILESTONES AND CRITICAL MILESTONES

- 41.1 The Infraco shall give **tie's** Representative not less than 14 Business Days notice of the date upon which the Infraco considers that any of the Construction Milestones or Critical Milestones will be achieved and the associated tests to be undertaken in accordance with the Employer's Requirements carried out. **tie's** Representative shall be entitled to inspect the Infraco Works on the date or dates reasonably specified by the Infraco in accordance with this Clause 41.1, and to attend any of the tests to be carried out. The Infraco shall procure that such of its staff as **tie** may reasonably request shall accompany **tie's** Representative on any such inspection.
- 41.2 Within 7 Business Days of any inspection made pursuant to Clause 41.1, **tie's** Representative shall notify the Infraco of any outstanding matters (including further evidence of achievement of the Construction Milestone or Critical Milestone and the repetition of any of the tests which are required to be carried out and passed in accordance with the Employer's Requirements) which must be attended to before the relevant Construction Milestone or Critical Milestone can be considered to have been achieved in accordance with this Agreement. The Infraco shall attend to all such matters and shall, if necessary, give **tie** further notices in accordance with Clause 41.1 (but dealing only with matters raised in the notification under this Clause 41.2) so that the procedures in Clause 41.1 and this Clause 41.2 are repeated as often as may be necessary to ensure that all outstanding matters in relation to the Construction Milestone or Critical Milestone are attended to. Conduct of all tests, including repetitions, in accordance with the Employer's Requirements shall be at the cost and under the responsibility of the Infraco.
- 41.3 When it is satisfied that a Construction Milestone or a Critical Milestone has been achieved in accordance with this Agreement, **tie's** Representative shall issue the relevant Construction Milestone Completion Certificate or Critical Milestone Completion Certificate (as appropriate) to that effect stating the date upon which, in its opinion, the Construction Milestone or Critical Milestone was achieved. The issue of a Construction Milestone Completion Certificate or Critical Milestone Completion Certificate shall, in the absence of manifest error, bad faith or fraud, be conclusive evidence for the purpose only of ascertaining that the Actual Milestone Date has occurred on the date stated in such certificate.

41.4 For the avoidance of doubt, the issue of any Construction Milestone Completion Certificate or Critical Milestone Completion Certificate pursuant to this Clause 41 (*Completion of Construction Milestones and Critical Milestones*) shall be conditional upon **tie** being satisfied that all Consents in relation to the relevant part of the Infraco Works have been obtained, are in full force and effect and are unconditional.

## 42. COMPLETION AND CERTIFICATION OF TRAM MILESTONES

42.1 [Drafting to follow after intended re-issue of the Tram Supply Agreement]

## 43. TRAM INSPECTOR

43.1 The Infraco shall procure the appointment of the Tram Inspector and the Parties shall agree the identity of such Tram Inspector prior to the execution of the Tram Inspector Agreement.

43.2 It is a condition precedent to this Agreement coming into full effect that the Infraco shall enter into and execute the Tram Inspector Agreement with **tie** and the Tram Inspector in the form set out in Schedule 37 (*Tram Inspector Agreement*).

43.3 In the event that the Parties fail to agree the identity and/or terms of the Tram Inspector in accordance with Clause 43.1, then either Party may refer the matter for determination under the Dispute Resolution Procedure.

43.4 Neither **tie** nor the Infraco shall, without the other's prior written approval (not to be unreasonably withheld or delayed);

43.4.1 terminate, repudiate or discharge the Tram Inspector Agreement or treat the same as having been terminated, repudiated or otherwise discharged;

43.4.2 waive, settle, compromise or otherwise prejudice any rights or claims which the other may from time to time have against the Tram Inspector; or

43.4.3 vary the terms of the Tram Inspector Agreement or the service performed or to be performed by the Tram Inspector.

43.5 The Parties shall comply with and fulfil their respective duties and obligations arising under the Tram Inspector Agreement.

- 43.6 The Parties agree to co-operate with each other generally in relation to all matters within the scope of or in connection with the Tram Inspector Agreement. All instructions and representations issued or made by either of the Parties to the Tram Inspector shall be simultaneously copied by that Party to the other and both Parties shall be entitled to attend all inspections undertaken by or meetings involving the Tram Inspector Agreement.
- 43.7 In the event of the Tram Inspector's appointment being terminated otherwise than following full performance, the Parties shall liaise and co-operate with each other in order to appoint a replacement consultant to act as the Tram Inspector as soon as reasonably practicable. The identity of any such replacement shall be as agreed by the Parties and the terms of his appointment shall, unless otherwise agreed, be as set out in the Tram Inspector Agreement.
- 43.8 In the event that, pursuant to Clause 43.7, it is necessary to appoint a replacement consultant, the Parties shall as soon as reasonably practicable, in compliance with all Law relating to procurement which is applicable to either Party, appoint a suitably qualified and experienced consultant to act as the Tram Inspector for the purpose of this Agreement.
- 43.9 In the event that the Parties fail to agree the identity and/or terms of a replacement Tram Inspector in accordance with Clause 43.7, within 60 days of the previous Tram Inspector's appointment being terminated, then either Party may refer the matter for determination under the Dispute Resolution Procedure.
- 43.10 The Infraco shall be responsible for the cost of the appointment and services of the Tram Inspector.

#### **44. NOTIFICATION OF SECTIONAL COMPLETION OF SECTIONS A, B AND C**

- 44.1 The Infraco shall give **tie's** Representative not less than 14 Business Days notice of the dates when the relevant Sectional Completion Tests are to be carried out and the date upon which the Infraco considers that each of Section A, Section B and Section C will be substantially completed, commissioned and will have satisfactorily passed the relevant Sectional Completion Tests. **tie's** Representative shall be entitled to inspect the Infraco Works on the date or dates reasonably specified by the Infraco in accordance with this Clause 44.1 and to attend any of the tests to be carried out. The

Infraco shall procure that such of its staff as **tie** may reasonably request shall accompany **tie's** Representative on any such inspection.

- 44.2 Within 7 Business Days of any inspection made pursuant to Clause 44.1, **tie's** Representative shall notify the Infraco of any outstanding matters (including further evidence of achievement of substantial completion or commissioning and the repetition of any of the relevant Sectional Completion Tests which are required to be carried out and passed in accordance with the Employer's Requirements) which must be attended to before the Section can be considered to have been substantially completed, tested and commissioned in accordance with this Agreement. The Infraco shall attend to all such matters and shall, if necessary, give **tie** further notices in accordance with Clause 44.1 (but dealing only with matters raised in the notification under this Clause 44.2) so that the procedures in Clause 44.1 and this Clause 44.2 are repeated as often as may be necessary to ensure that all outstanding matters in relation to the Section are attended to. Conduct of all tests, including repetitions, in accordance with the Employer's Requirements shall be at the cost and under the responsibility of the Infraco.
- 44.3 When it is satisfied that a Section has been substantially completed, tested and commissioned in accordance with this Agreement, **tie's** Representative shall issue a Certificate of Sectional Completion to that effect stating the date upon which, in its opinion, the Section was substantially completed, tested and commissioned provided always that a Certificate of Sectional Completion shall not be issued:
- 44.3.1 in respect of Section B, unless a Certificate of Sectional Completion has already been issued in respect of Section A; and
- 44.3.2 in respect of Section C, unless a Certificate of Sectional Completion has already been issued in respect of Section A and Section B.
- 44.4 The issue of a Certificate of Sectional Completion shall, in the absence of manifest error, bad faith or fraud, be conclusive evidence for the purpose only of ascertaining that the Sectional Completion Date has occurred on the date stated in such certificate.
- 44.5 For the avoidance of doubt, the issue of any Certificate of Sectional Completion pursuant to this Clause 44 (*Notification of Sectional Completion*) shall be conditional upon **tie** being satisfied that all Consents in relation to the relevant part of the Infraco Works have been obtained, are in full force and effect and are unconditional.

44.6 For the purposes of this Clause 44 (*Notification of Sectional Completion*), 'substantial completion' shall mean successful testing and commissioning of the Section in accordance with the relevant Sectional Completion Tests and the provision of all relevant documents all in accordance with Schedule 2 (*Employer's Requirements*). **tie's** Representative may at his discretion issue a Certificate of Sectional Completion notwithstanding that minor items of work ("**Snagging**") remain to be completed, in which event such incomplete work and/or commissioning and/or adjustment shall be completed by the Infraco in accordance with the provisions of Clause 46 (*Snagging*). **tie** shall identify any such Snagging on a Snagging List.

#### 45. NOTIFICATION OF SERVICE COMMENCEMENT

45.1 The Infraco shall give **tie's** Representative not less than 14 Business Days notice of the dates when T1, T2 and T3 are to be carried out and the date upon which the Infraco considers that Section D will be substantially completed, commissioned and will have satisfactorily passed T1, T2 and T3. **tie's** Representative shall be entitled to inspect the Infraco Works on the date or dates reasonably specified by the Infraco in accordance with this Clause 45.1 and to attend any of the tests to be carried out. The Infraco shall procure that such of its staff as **tie** may reasonably request shall accompany **tie's** Representative on any such inspection.

45.2 Within 7 Business Days of any inspection made pursuant to Clause 45.1, **tie's** Representative shall notify the Infraco of any outstanding matters (including further evidence of achievement of substantial completion or commissioning and the repetition of any of the Systems Acceptance Tests which are required to be carried out and passed in accordance with the Employer's Requirements) which must be attended to before Section D can be considered to have been substantially completed, tested and commissioned in accordance with this Agreement. The Infraco shall attend to all such matters and shall, if necessary, give **tie** further notices in accordance with Clause 45.1 (but dealing only with matters raised in the notification under this Clause 45.2) so that the procedures in Clause 45.1 and this Clause 45.2 are repeated as often as may be necessary to ensure that all outstanding matters in relation to Section D are attended to. Conduct of all tests, including repetitions, in accordance with the Employer's Requirements shall be at the cost and under the responsibility of the Infraco.

- 45.3 When it is satisfied that Section D has been substantially completed, tested and commissioned in accordance with this Agreement, **tie's** Representative shall issue a Certificate of Service Commencement to that effect stating the date upon which, in its opinion, Section D was substantially completed, tested and commissioned provided always that a Certificate of Service Commencement shall not be issued until tie has issued to the Infraco a Certificate of Sectional Completion in relation to each of Section A, Section B, Section C and Section D.
- 45.4 The issue of a Certificate of Service Commencement shall, in the absence of manifest error, bad faith or fraud, be conclusive evidence for the purpose only of ascertaining that the Service Commencement Date has occurred on the date stated in such certificate.
- 45.5 For the avoidance of doubt, the issue of any Certificate of Service Commencement pursuant to this Clause 45 (*Notification of Service Commencement*) shall be conditional upon **tie** being satisfied that all Consents in relation to the relevant part of the Infraco Works have been obtained, are in full force and effect and are unconditional.
- 45.6 For the purposes of this Clause 45 (*Notification of Service Commencement*), 'substantial completion' shall mean successful testing and commissioning of Section D in accordance with T1, T2 and T3, the provision of all required Spares, relevant documents and that the maintenance staff have been trained, all in accordance with Schedule 2 (*Employer's Requirements*). **tie's** Representative may at his discretion issue a Certificate of Service Commencement notwithstanding that minor items of work ("**Snagging**") remain to be completed, in which event such incomplete work and/or commissioning and/or adjustment shall be completed by the Infraco in accordance with the provisions of Clause 46 (*Snagging*). **tie** shall identify any such Snagging on a Snagging List.

#### 46. SNAGGING

- 46.1 Any Snagging on a Snagging List shall be completed by the Infraco within 20 Business Days of receipt by the Infraco of such Snagging List. The scheduling of carrying out such Snagging shall be agreed with the Operator and **tie** and, if the Snagging cannot be completed within the said 20 Business Days, then **tie** (acting reasonably) shall determine a longer period to enable completion.

- 46.2 All Snagging shall be carried out by the Infraco, at its own expense. In so far as this creates additional workload or support from the Operator, then any reasonable, direct costs associated with such additional workload or support shall be paid by the Infraco.
- 46.3 If the Infraco fails to carry out any such Snagging, **tie** shall be entitled to carry out that Snagging itself or by using other contractors and **tie** shall be entitled to recover all costs and expenses properly incurred by **tie** in relation to such work from the Infraco and **tie** may deduct the same from any monies that are or may become due to the Infraco. For the avoidance of doubt, this shall not provide any relief to the Infraco from any liability of this Agreement.
- 46.4 When all Snagging has been completed, **tie's** Representative shall issue to the Infraco a Snagging Rectification Certificate stating the date on which the Infraco shall have completed its obligations to carry out such Snagging to **tie's** Representative's satisfaction.
- 46.5 The issue of a Snagging Rectification Certificate shall not be taken as relieving the Infraco from any liability arising out of or in any way connected with the performance of its obligations under the Agreement.

#### **47. ISSUE OF NETWORK CERTIFICATE AND RELIABILITY CERTIFICATE**

- 47.1 The Infraco shall give **tie's** Representative not less than fourteen Business Days notice of the dates when T4 and T5 are to be carried out. **tie's** Representative shall be entitled to inspect the Infraco Works on the date or dates reasonably specified by the Infraco in accordance with this Clause 47.1 and to attend any of the tests to be carried out. The Infraco shall procure that such of its staff as **tie** may reasonably request shall accompany **tie's** Representative on any such inspection.
- 47.2 Within 7 Business Days of any inspection made pursuant to Clause 47.1, **tie's** Representative shall notify the Infraco of any outstanding matters (including further evidence of achievement of T4 and T5 (as appropriate) and the repetition of T4 and T5 (as appropriate) which must be attended to before T4 and T5 (as appropriate) can be considered to have been passed in accordance with this Agreement. The Infraco shall attend to all such matters and shall, if necessary, give **tie** further notices in accordance with Clause 47.1 (but dealing only with matters raised in the notification under this Clause 47.2) so that the procedures in Clause 47.1 and this Clause 47.2 are

repeated as often as may be necessary to ensure that all outstanding matters in relation to T4 and T5 (as appropriate) are attended to. Conduct of all tests, including repetitions, in accordance with the Employer's Requirements shall be at the cost and under the responsibility of the Infraco.

- 47.3 When it is satisfied that T4 has been passed in accordance with this Agreement, **tie's** Representative shall issue a Network Certificate to that effect stating the date upon which, in its opinion, T4 was passed. The issue of a Network Certificate shall, in the absence of manifest error, bad faith or fraud, be conclusive evidence for the purpose only of ascertaining that T4 was passed on the date stated in such certificate.
- 47.4 When it is satisfied that T5 has been passed in accordance with this Agreement, **tie's** Representative shall issue a Reliability Certificate to that effect stating the date upon which, in its opinion, T5 was passed. The issue of a Reliability Certificate shall, in the absence of manifest error, bad faith or fraud, be conclusive evidence for the purpose only of ascertaining that T5 was passed on the date stated in such certificate.
- 47.5 For the avoidance of doubt, the issue of a Network Certificate and/or Reliability Certificate pursuant to this Clause 47 (*Issue of Network Certificate and Reliability Certificate*) shall be conditional upon **tie** being satisfied that all Consents in relation to the relevant part of the Infraco Works have been obtained, are in full force and effect and are unconditional.

#### **48. INFRACO TO SEARCH**

- 48.1 The Infraco shall, if required by **tie's** Representative in writing during the carrying out of the Infraco Works, carry out such surveys, searches, tests or trials as may be necessary to determine the cause of any defect, imperfection or fault under the directions of **tie's** Representative. Unless the defect, imperfection or fault is one for which the Infraco is liable under the Agreement, the cost of the surveys, searches, tests or trials carried out by the Infraco as aforesaid shall be borne by **tie**. If the defect, imperfection or fault is one for which the Infraco is liable, the cost of the surveys, searches, tests or trials carried out as aforesaid shall be borne by the Infraco and the Infraco shall in such case repair, rectify and make good such defect, imperfection or fault at its own expense.

**49. NON-REMOVAL OF MATERIALS AND CONTRACTOR'S EQUIPMENT**

- 49.1 No Trams, engineers works vehicles, Spare Parts, Special Tools, Infraco's Equipment, Temporary Works, materials for Temporary Works or other goods or materials owned by the Infraco and brought on to the Site for the purposes of the Agreement shall be removed without the written consent of **tie's** Representative which consent shall not unreasonably be withheld.
- 49.2 Subject to the exception set out in Clause 77.2, **tie** shall not at any time be liable for the loss of or damage to any Trams, engineers works vehicles, Spare Parts, Special Tools, Infraco's Equipment, Temporary Works, goods or materials.
- 49.3 If the Infraco fails to remove any of the said Infraco's Equipment, Temporary Works, goods or materials in accordance with Schedule 3 (*Code of Construction Practice and Code of Maintenance Practice*) from a Section within such reasonable time after the issue of a Certificate of Service Commencement in respect of that Section as **tie's** Representative may allow, then **tie** may sell or otherwise dispose of such items. From the proceeds of the sale of any such items, **tie** shall be entitled to retain any costs or expenses incurred in connection with their sale and disposal before paying the balance (if any) to the Infraco.

## PART 9 - SAFETY

### 50. CDM REGULATIONS 2007

50.1 In this Clause 50 (*CDM Regulations 2007*):

**"Regulations"** means the Construction (Design and Management) Regulations 2007 or any statutory re-enactment or amendment thereof for the time being in force;

**"CDM Coordinator"** and **"Principal Contractor"** mean the persons so described in regulation 14 of the Regulations;

**"Health and Safety Plan"** means the plan prepared by virtue of regulation 20(2) of the Regulations.

50.2 Where and to the extent that the Regulations apply to the Infraco Works,

50.2.1 **tie's** Representative is appointed CDM Coordinator and/or;

50.2.2 the Infraco is appointed Principal Contractor in respect of the Infraco Works;

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

50.3 Any action under the Regulations taken by either the CDM Coordinator or the Principal Contractor and in particular any alteration or amendment to the Health and Safety Plan shall be deemed to be a **tie's** Representative's instruction pursuant to Clause 34 (*Work to be to Satisfaction of tie*) provided that the Infraco shall in no event be entitled to any additional payment and/or extension of time in respect of any such action to the extent that it results from any action, lack of action or default on the part of the Infraco.

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

50.5 The Infraco shall continue to carry out its role as Principal Contractor notwithstanding that any other works are being carried out at the same time as the Infraco Works.

50.6 The Infraco shall comply with the Health and Safety Plan, and the instructions of the CDM Coordinator and shall provide any information required by the CDM Coordinator in relation to the CDM Regulations within 3 Business Days of any request, or sooner where reasonably practicable.

## **51. NOTICE OF ACCIDENTS AND LIAISON WITH THE EMERGENCY SERVICES**

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

51.2 The Infraco shall liaise regularly with the Emergency Services, during the design, construction, testing and commissioning, operation and maintenance of the Edinburgh Tram Network. In particular, such regular liaison will include:

51.2.1 notification and clearance for temporary traffic management arrangements;

51.2.2 Edinburgh Tram Network design and implementation; and

51.2.3 training for a reasonable number of emergency personnel (to be provided by the Infraco free of charge) to effect rescue procedures during construction, operation and maintenance.

## PART 10 - MAINTENANCE SERVICES

### 52. MAINTENANCE<sup>5</sup>

52.1 During the Term, the Infraco shall carry out all maintenance, repair, renewals and remedial works to the Edinburgh Tram Network as is necessary to:

52.1.1 maintain the Edinburgh Tram Network in accordance with the Maintenance Programme and the Maintenance Plan;

52.1.2 ensure that all the requirements of the Maintenance Specification are met at all times;

52.1.3 comply with those Operator Procedures that apply to the Maintenance Services;

52.1.4 to ensure that no design work, redesign work, or modifications to, the Edinburgh Tram Network, Parts, Spare Parts or Special Tools shall prejudice the Case for Safety and/or may impact negatively on the performance of the system;

52.1.5 to ensure that no maintenance or repair work to the Edinburgh Tram Network, Spare Parts or Special Tools shall prejudice the Case for Safety;

52.1.6 protect the health or safety of or not unreasonably interfere with the proper performance of the duties of **tie** and Operator employees and third parties or otherwise expose **tie** or the Operator to liability under the Health and Safety at Work etc. Act 1974 or the Transport and Works Act 1992 or any other legislation relating to health and safety;

52.1.7 ensure on a continuing basis that (and shall ensure that its maintenance and lifecycle replacement are sufficient to make certain that) the Edinburgh Tram Network as a whole and each part of it is Available in accordance with Schedule 2 (*Employer's Requirements*) and Schedule 6 (*Maintenance Payment Regime*);

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<sup>5</sup> Reflects the equivalent provisions in the IMA.

- 52.1.8 maintain the design intention of the Edinburgh Tram Network to continue to meet in form and to function for not less than the design life periods set out in the Employer's Requirements;
- 52.1.9 the Edinburgh Tram Network is handed back to **tie** on the Expiry Date or the Termination Date (whichever is earlier) in a condition complying with the requirements of this Clause 52 (*Maintenance*) without the need to
- (a) replace any part thereof as a result of fair wear and tear, technological obsolescence or expiry of working life, or
  - (b) undertake any repair to any part thereof requiring suspension of all Transport Services on any part of the Edinburgh Tram Network for 24 hours or more; and
- 52.2 The Infraco shall work with the Operator to ensure the daily handover of the Edinburgh Tram Network to the Operator for operation which shall include the completion of a handover checklist confirming the Availability of the Edinburgh Tram Network.
- 52.3 The Infraco shall work with the Operator to ensure the daily handback of all or part of the Edinburgh Tram Network from the Operator to the Infraco following operation of the Edinburgh Tram Network and take into account any comments received from the Operator on the performance or condition of the Edinburgh Tram Network.
- 52.4 The Infraco shall provide such support, assistance and co-operation to the **tie** Parties in relation to the Edinburgh Tram Network as **tie** may reasonably request from time to time.
- 52.5 The Infraco shall, during the Mobilisation Period, carry out or procure that the Mobilisation Services are carried out on or before the appropriate Mobilisation Milestone Dates;
- 52.6 The Infraco shall carry out (or shall procure the carrying out of) all Maintenance Services in a safe manner and so that the Edinburgh Tram Network is capable of being operated in a safe and efficient manner free from any unreasonable risk to the health and well being of persons using or maintaining it and free from any reasonably avoidable risk of pollution, nuisance, interference or hazard.

- 52.7 During the Term, the Infraco shall be responsible for, without limitation providing, employing and training all staff necessary to perform the Maintenance Services in accordance with this Agreement and the total cost of providing those staff, the Maintenance Services (including the total cost of providing Spare Parts and Special Tools) is included in the Contract Price.
- 52.8 During the Mobilisation Period, the Infraco shall be responsible for, without limitation, providing and employing all staff necessary to perform the Mobilisation Services in accordance with this Agreement, and the total cost of providing the Mobilisation Services is included in the Contract Price.
- 52.9 The Maintenance Services shall comprise only materials and goods which are of satisfactory quality and unless otherwise agreed in writing, the Infraco shall supply only new materials and goods.

#### **Spare Parts and Special Tools**

- 52.10 The Infraco shall be responsible for the provision of all Spare Parts and Special Tools necessary or required for the Maintenance Services. All such Spare Parts shall meet the technical and safety requirements of the Maintenance Specification. Special Tools to be provided pursuant to this Clause 52.10 shall, as a fundamental condition of this Agreement, be provided with a valid certificate of calibration (where appropriate).
- 52.11 The Infraco shall also ensure that throughout the term of this Agreement all Special Tools which require calibration or testing in order that they shall be fit for their intended purpose shall have a valid test and/or calibration certificate (where appropriate), and the Infraco shall give to **tie** within 5 Business Days of any request by **tie** a copy of the current test or calibration certificate (where appropriate).
- 52.12 The Infraco shall acquire adequate stocks of such Spare Parts and Special Tools to ensure that there is always a Minimum Spare Parts Pool at the Depot and, in any case, sufficient Spare Parts and Special Tools to enable the Infraco to carry out (or procure the carrying out of) the Maintenance Services in accordance with this Agreement and manage reorder levels and lead times such that the stock of Spare Parts or Special Tools are maintained above the level of the Minimum Spare Parts Pool.
- 52.13 The Infraco shall acquire such Spare Parts and Special Tools on behalf of CEC.

52.14 Every Reporting Period, the Infraco and **tie** shall review the level of the Minimum Spare Parts Pool in light of the requirements for Spare Parts in delivering the Maintenance Services pursuant to this Agreement and the Infraco shall make recommendations to **tie** in relation to any adjustments to be made to the Minimum Spare Parts Pool either in relation to the extent of the Minimum Spare Parts Pool or the quantity of any of the Spare Parts required to meet the Minimum Spare Parts Pool. **tie** shall review the Infraco's recommendations and where necessary consult further with the Infraco as to the adequacy of the Minimum Spare Parts Pool in the light of ongoing maintenance pursuant to the Maintenance Services and, subject to Clause 52.12 and the Infraco having taken such steps as are possible to rectify the situation, if **tie**, in its absolute discretion, is of the opinion that it would be appropriate to vary the Minimum Spare Parts Pool then this shall be treated as an **tie** Change and the terms of Clause 80 (*tie* Changes) shall apply.

### **Repairs**

52.15 The Infraco shall effect the repair of all defects in, failures of or damage to the Edinburgh Tram Network irrespective of cause. The Infraco shall effect all such repairs in a manner consistent with its obligations under this Agreement and in a manner which causes the minimum disruption to the operation of the Edinburgh Tram Network and to enable the Edinburgh Tram Network to be Available.

52.16 The Infraco shall bear all of the costs of complying with Clause 52.15 where any damage to the Edinburgh Tram Network is caused by:

52.16.1 a breach of this Agreement by the Infraco;

52.16.2 any failure by the Infraco or an Infraco Party to perform the Maintenance Services; or

52.16.3 the performance of the Maintenance Services by the Infraco or an Infraco Party; or

52.16.4 any negligent act or negligent omission by the Infraco or any Infraco Party.

52.17 Where any damage to the Edinburgh Tram Network is not caused by:

52.17.1 a breach of this Agreement by the Infraco; or

52.17.2 any failure by the Infraco or an Infraco Party to perform the Maintenance Services; or

52.17.3 the performance of the Maintenance Services by the Infraco or an Infraco Party ; or

52.17.4 any negligent act or negligent omission by the Infraco or any Infraco Party,

then **tie** shall bear the necessary, reasonable and demonstrable costs of the Infraco repairing such damage and any repairs in respect of such damage shall be treated (as appropriate ) as a **tie** Change and the terms of Clause 80 (*tie Changes*) shall apply or as a Small Works Change and the terms of Clause 82 (*Small Works Changes*) shall apply

52.18 All repairs to and replacements of the Edinburgh Tram Network shall be carried out to a standard that restores the defective, failed or damaged part of the Edinburgh Tram Network to a condition which meets the requirements of the Maintenance Specification (subject to normal wear and tear) and enables the Infraco to comply with its obligations under this Clause 52 (*Maintenance*).

52.19 Where necessary the Infraco shall be entitled to carry out temporary repairs to the Edinburgh Tram Network subject to obtaining the prior approval of HMRI, the Operator, **tie** and all appropriate regulatory authorities. All temporary repairs shall be fully repaired at the earliest opportunity and in any event forthwith upon receipt of written notice from HMRI, **tie** or the Operator (as the case may be) stating that it no longer considers such temporary repairs to be safe and/or fit for their purpose.

52.20 In respect of any incident or failure, the Infraco shall provide such assistance, information and advice as the **tie** or Operator shall reasonably require, including such assistance as **tie** or Operator shall reasonably require in:

52.20.1 the Infraco attending the site of the occurrence to assess the cause of the problem, with a required response time of no more than 15 minutes from **tie's** or the Operator's request for attendance to a representative of the Infraco departing the Depot to attend;

52.20.2 rectifying the problem;

52.20.3 implementing measures to overcome and/or mitigate the effect on operation of the Edinburgh Tram Network;

52.20.4 implementing temporary repairs; and

52.20.5 recovering any part of the Edinburgh Tram Network (including the Trams) for repair (where such part of the Edinburgh Tram Network is moveable).

52.21 As soon as practicable following the completion of the repair, the Infraco shall prepare and provide a report which summarises the causes of such incident or failure and providing recommendations where applicable to avoid the repetition of such occurrence.

52.22 Where the most efficient manner of dealing with such failure would be for repairs to be effected at the site of the failure, the Infraco shall have available competent resources to carry out such repairs as can safely be carried out at the site.

52.23 If the Infraco reasonably believes or becomes aware that there is or may be:

52.23.1 a defect or in the case of reporting or control systems an excess of alarms and fault annunciation in a Part which has been fitted in the Edinburgh Tram Network (including a Tram) whether or not as part of the Maintenance Services; or

52.23.2 any other defect in relation to the Edinburgh Tram Network (including a Tram);

which may prejudice the safe or reliable operation of the Edinburgh Tram Network, the Infraco shall immediately on becoming aware of such defect notify **tie**, and the Operator of such defect and provide a proposal as to the most effective course of action by which such defect can be rectified. The Infraco shall quarantine those parts in the store and repair cycle which are believed or likely to have the defect, until such time as they are rectified. Replacement parts or modifications shall be provided at the Infraco's cost.

#### **Additional System Availability**

52.24 In circumstances where **tie** requires any additional systems availability for its own use, including but not limited to the training of drivers and extended hours of

operation for special events, it shall notify the Infraco of its requirements on not more than one week's notice. The amount of additional systems availability that **tie** can request for any period shall be limited as follows:

Period	Maximum Additional Systems Availability
Weekday	10 nights per Reporting Period
Weekend	4 nights per Reporting Period

The Infraco shall ensure that it makes Available to the Infraco any additional systems availability requested by **tie** and such additional systems availability shall be at the Infraco's cost.

### **Maintenance Manual**

52.25 The Infraco shall maintain and keep up to date the Maintenance Manual and associated documentation. The Infraco shall provide to **tie's** Representative an electronic copy of such manual and each successive update, free of charge, as soon as reasonably practicable after their production. The Infraco shall provide to **tie's** Representative integrated manuals of description and maintenance of all Edinburgh Tram Network components not less than 90 days before the part of the Edinburgh Tram Network into which they are incorporated commences public service. The Infraco shall keep such manuals up to date and provide to **tie's** Representative a copy of each successive update as soon as reasonably practicable after their production.

### **Control Room**

52.26 The Infraco shall provide the facility for efficient and immediate communication of information, CCTV images and data from the Control Room to both TEL and CEC's bus control room and traffic and information centre respectively, such facility to be acceptable to the Infraco and to enable:

- 52.26.1 information exchange;
- 52.26.2 the provision of public transport data;
- 52.26.3 the provision of real-time passenger information;

- 52.26.4 road traffic monitoring;
- 52.26.5 incident detection and emergency diversions management;
- 52.26.6 co-ordination of traffic signals;
- 52.26.7 co-ordination of variable message signs;
- 52.26.8 dissemination of travel news to the media;
- 52.26.9 dissemination of information via the internet; and
- 52.26.10 journey planning.

### 53. HAZARDOUS MATERIALS<sup>6</sup>

- 53.1 The Infraco undertakes that it is and will remain during the term of this Agreement, or that any relevant Infraco Party is and will remain during the Term, appropriately qualified and experienced in and accredited for the purposes of carrying out work of the scope, type and complexity that is required in carrying out the Maintenance Services involving the handling of any Hazardous Materials incorporated in the Edinburgh Tram Network or any Part thereof.
- 53.2 The Infraco shall not use any Hazardous Materials in performing the Maintenance Services except where expressly permitted to do so by the Maintenance Specification, Law and Good Industry Practice, or otherwise with the express prior written consent of **tie**. If Hazardous Materials are used other than expressly in accordance with the Maintenance Specification, Law and Good Industry Practice, or with the prior written consent of **tie**, the Infraco shall ensure that all such Hazardous Materials used in the provision of the Maintenance Services are expressly identified in writing to **tie** and the Operator by reference to this Clause 53 (*Hazardous Materials*) with reference to the hazards attached to them and the procedures that the Infraco has for managing such hazards.
- 53.3 The Infraco shall ensure that all Maintenance Services performed under this Agreement which involve Hazardous Materials, including the removal, handling and disposal of those materials, is carried out in such a manner as to ensure compliance with all Law (including any advisory literature provided by the Health and Safety

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<sup>6</sup> Reflects the equivalent provision in the IMA.

Commission or Executive). The Infraco shall inform **tie's** Representative of any Hazardous Materials, which do not form part of the Maintenance Services or which are encountered in the course of the Maintenance Services and shall submit its proposed method of operation and the precautions to be taken before commencing any work involving such Hazardous Materials. Such submission shall be treated as a **tie** Change and the terms of Clause 80 (*tie Changes*) shall apply. If the Infraco proposes to use such Hazardous Materials, it shall comply with Law (including any advisory literature provided by the Health and Safety Commission or Executive) and any additional precautions specified by **tie's** Representative as to their use, handling, storage and disposal.

53.4 The Infraco acknowledges that it is aware that various health hazards may be encountered in performing the Maintenance Services (which may not be immediately apparent as deliberate and malicious concealment of such hazards may take place). The Infraco shall take all reasonably practicable precautions for the protection of the Infraco Parties, the **tie** Parties and any other person who may be affected by the Maintenance Services.

#### **54. RECORDS AND COMPUTER SYSTEMS<sup>7</sup>**

54.1 All the Technical Records for any Part installed, replaced, overhauled or inspected by the Infraco or an Infraco Party must be:

54.1.1 written up, maintained and kept up to date at all times by the Infraco in hard copy form in accordance with the requirements of the Maintenance Specification and/or the Employer's Requirements;

54.1.2 retained by the Infraco for the longer of:

54.1.2.1 the Term; or

54.1.2.2 6 years from the date on which the Maintenance Services to which such Technical Records relate are provided;

54.1.3 given to **tie** within 7 days of a request by **tie** for such Technical Records

and **tie** will be entitled from time to time to inspect and audit such Technical Records following reasonable notice to the Infraco.

- 54.2 Further, for each part of the Edinburgh Tram Network the following details shall be retained by the Infraco for not less than 6 years after completion of the Maintenance Services and such details provided to **tie** in accordance with the provisions of this Clause 54.2
- 54.2.1 the change control register maintained pursuant to Clause 79.2; and
- 54.2.2 all other quality control activity records as agreed with **tie** from time to time.
- 54.3 The Technical Records will be written up and maintained by the Infraco in respect of all Maintenance Services in accordance with this Agreement and Good Industry Practice. Such Technical Records will, subject to Clause 54.4 be stored in [**format to be specified by the Tenderer**].
- 54.4 Upon any request by **tie** for any Technical Record, or upon handover of the Technical Records pursuant to Clause 95.1, the Infraco shall provide such Technical Records in any suitable non-proprietary format as may be reasonably specified by **tie**;
- 54.5 The Infraco shall ensure that:
- 54.5.1 the computer systems, equipment and other systems of the Infraco used by the Infraco in carrying out the Maintenance Services including the Asset Management System, any computer systems, equipment, other systems and parts supplied by the Infraco, are at all times free from disabling or destructive programs or devices including, without limitation, bugs, virus or logic bombs, trojan horses and analogous macros, programs or sub-routines; and
- 54.5.2 appropriate security systems are implemented and maintained to protect the integrity and security of the Asset Management System and such computer systems, equipment and other systems from security and IT risks including, without limitation, unauthorised access (both by persons external to the Infraco and the Infraco's employees, agents and subcontractors).
- 54.6 In the event of a breach of Clause 54.5, the Infraco shall conduct a full and complete review of its computer systems, equipment and other systems (including the security arrangements relating to such systems) to identify the source of such disabling or

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<sup>7</sup> Reflects the equivalent provision in the IMA.

destructive program or device and, at its own costs and with the prior written approval of the Infraco (such approval not to be unreasonably withheld or delayed) take such action as may be necessary to immediately remedy the breach and additionally to ensure that such breach does not re-occur.

**55. SURVEYS OF THE EDINBURGH TRAM NETWORK AND AUDITS OF MAINTENANCE PROCEDURES**

55.1 If **tie** reasonably believes that the Infraco is in breach of its obligations under Clause 52 (*Maintenance*), then **tie** may carry out (or procure) a survey of any of the assets forming part of the Edinburgh Tram Network to assess whether the Infraco has complied and is complying with its obligations under Clause 52 (*Maintenance*).

55.2 **tie** shall notify the Infraco in writing a minimum of 5 Business Days in advance of the date on which **tie** wishes to carry out a survey under Clause 55.1.

55.3 When carrying out any survey or audit under Clause 55.1, **tie** shall (or shall procure that the surveyor shall) use reasonable endeavours to minimise any disruption caused to the provision of the Maintenance Services by the Infraco. The cost of such survey shall, except where Clause 55.4 applies, be borne by **tie**. The Infraco shall give **tie** and the surveyor (free of charge) any reasonable assistance required by **tie** during the carrying out of any such survey and/or audit.

55.4 If any survey shows that the Infraco has not complied or is not complying with its obligations under Clause 52 (*Maintenance*), **tie** shall:

55.4.1 notify the Infraco of the condition that the Edinburgh Tram Network should be in to comply with its obligations under Clause 52 (*Maintenance*);

55.4.2 specify a reasonable period within which the Infraco must carry out such rectification and/or maintenance work as may be necessary to comply with Clause 52 (*Maintenance*); and

55.4.3 be entitled to be reimbursed by the Infraco for the cost of the survey.

55.5 The Infraco shall carry out such rectification and/or maintenance work within the period specified pursuant to Clause 55.4.2 and any costs it incurs in carrying out such rectification and/or maintenance work shall be at its own expense.

55.6 If and to the extent that the Infraco fails to carry out the necessary rectification and/or maintenance work to **tie's** reasonable satisfaction within the specified period, **tie** shall be entitled to carry out such rectification and/or maintenance work themselves, or procure the carrying out by a third party of such rectification and/or maintenance work at the Infraco's expense and shall recover any costs from the Infraco as a debt.

## 56. SERVICE PERFORMANCE AND QUALITY MONITORING

56.1 The Infraco shall comply with the provisions of Schedule 6 (*Maintenance Payment Regime*).

56.2 In addition to the provisions set out in Schedule 6 (*Maintenance Payment Regime*), the Infraco shall send such representatives as **tie** may reasonably require to a performance meeting every Reporting Period (which will be convened on not less than 2 Business Days' notice by **tie**) and such other meetings as **tie** may reasonably require from time to time to discuss the performance of the Maintenance Services in accordance with the Agreement.

56.3 The Infraco shall submit a Service Quality Report to **tie** no later than 3 Business Days following each Reporting Period End Date. For the avoidance of doubt, **tie** shall not be obliged to process an invoice submitted by the Infraco in the absence of the Service Quality Report pertaining to the relevant Reporting Period. The Infraco shall be responsible for ensuring that the data contained in the Service Quality Report is generated automatically and, to the extent practicable, electronically.

56.4 In addition to the Service Quality Reports to be submitted by the Infraco pursuant to the Clause above, the Infraco shall prepare and submit to **tie** an Annual Service Report pursuant to Clause 73 (*Best Value*).

56.5 The Infraco shall monitor its compliance with this Agreement in respect of the Maintenance Services, and the Parties shall comply with the following provisions:

56.5.1 no later than 3 months before each Planned Service Commencement Date and on each anniversary thereafter, the Infraco shall provide to **tie's** Representative its proposed Self-Monitoring Plan for the ensuing 12 months;

56.5.2 the Self-Monitoring Plan shall be designed to underpin **tie's** best value obligations and the Infraco shall have full regard to the requirements of Clause 73 (*Best Value*) when preparing its Self-Monitoring Plan;

56.5.3 no later than the date falling 20 Business Days after receipt by **tie's** Representative of such proposed Self-Monitoring Plan, **tie** shall notify the Infraco in writing as to whether or not it considers the Self-Monitoring Plan to be acceptable for the purposes of this Agreement; and

56.5.4 where **tie** considers the relevant Self-Monitoring Plan to be acceptable, then the Self-Monitoring Plan shall be implemented by the Infraco for the relevant 12 months; or

56.5.5 where **tie** do not consider the relevant Self-Monitoring Plan to be acceptable, then the Parties shall use all reasonable endeavours to reach agreement as to the contents of the Self-Monitoring Plan; and

56.5.6 until such time as the Self-Monitoring Plan has been accepted by **tie**, the previous year's Self-Monitoring Plan shall remain in effect;

or, in default of such agreement, either Party may refer the matter for determination under the Dispute Resolution Procedure, and the Infraco shall implement the Self-Monitoring Plan as so agreed or determined.

56.6 The Infraco shall as soon as reasonably practicable provide **tie's** Representative with relevant particulars of any aspects of its performance which fail to meet the requirements of this Agreement. The Infraco shall co-operate with **tie** and provide such access as **tie** may reasonably require to enable **tie** at all reasonable times to observe, inspect and satisfy themselves (including by carrying out sample checks) as to the adequacy of the monitoring procedures implemented by the Infraco and the Infraco's compliance with this Agreement.

56.7 Without prejudice to **tie's** other rights under this Agreement, if at any time the Infraco has:

56.7.1 failed to comply with any of its obligations pursuant to Clause 56.5; or

56.7.2 committed any material breach of its obligations under this Agreement;

then **tie** may give an Underperformance Warning Notice to the Infraco setting out in detail the matter or matters giving rise to such notice and containing a reminder to the Infraco of the implications of such notice. No error or incompleteness in the reminder shall affect the validity of the Underperformance Warning Notice.

56.8 Without prejudice to **tie's** other rights under this Agreement, if the Infraco receives three or more Underperformance Warning Notices in any twelve (12) month period, **tie** may by notice to the Infraco increase the level of either **tie's** monitoring of the Infraco (including the employment by **tie** of additional performance monitoring officers), or (at **tie's** option) of the Infraco's monitoring of the Infraco's performance of its obligations under this Agreement, until such time as the Infraco shall have demonstrated to the reasonable satisfaction of **tie** that it will perform (and is capable of performing) its obligations under this Agreement, in which case the following provisions shall apply:

56.8.1 any such notice to the Infraco shall specify in reasonable detail the additional measures to be taken by **tie** or by the Infraco (as the case may be) in monitoring the performance of the Infraco;

56.8.2 if the Infraco (acting reasonably) objects to any of the specified measures on the grounds that they are excessive, it shall notify **tie** in writing, within 2 Business Days of the receipt of the notice, of the measures objected to (and of any changes necessary in order to prevent prejudice to the Infraco's performance of its obligations under this Agreement);

56.8.3 the measures to be taken by **tie** and the Infraco (as the case may be) shall be agreed between the Parties or, in the absence of agreement within 3 Business Days of **tie's** receipt of the Infraco's objection, be determined, at the referral of either Party, pursuant to the Dispute Resolution Procedure and on a basis which the relevant adjudicator considers reasonable having regard to the nature and seriousness of the breaches of this Agreement or circumstances leading to the issue of such Underperformance Warning Notices which have occurred, the likelihood of such breaches or circumstances recurring, the risks which would arise if such breaches or circumstances recurred, the level of culpability of the Infraco in relation to such breaches and circumstances and the actions being taken by the Infraco to prevent breaches of this Agreement or circumstances entitling **tie** to issue further Underperformance Warning Notices recurring; and

56.8.4 the Infraco shall bear its own costs and indemnify and keep indemnified **tie** on demand at all times from and against all reasonable costs and expenses incurred by or on behalf of **tie** in relation to such increased level of

monitoring (including an appropriate sum in respect of general staff costs and overheads).

**57. PERFORMANCE REVIEW<sup>8</sup>**

- 57.1 Following the end of each Performance Review Period, **tie** shall review and assess the performance of the Infraco.
- 57.2 **tie** shall review the following:
- 57.2.1 the Infraco's historic performance under Schedule 6 (*Maintenance Payment Regime*);
  - 57.2.2 whether the Infraco has complied with all of its obligations under this Agreement (and whether **tie** reasonably considers any breach(es) to have been both minor and infrequent);
  - 57.2.3 the Infraco's business plan for the next Performance Review Period to assess whether it is sufficiently robust to satisfy **tie**, acting reasonably, that the Infraco will remain solvent for the next Performance Review Period;
  - 57.2.4 whether the Maintenance Services Payment is comparable to the price being paid by other parties for services similar to the Maintenance Services;
- 57.3 If any of the criteria set out at Clause 57.2 are not satisfied then **tie** may specify particular requirements in respect of those areas where the criteria set out at Clause 57.2 have not been satisfied, to be met by the Infraco by a specified date prior to the next Performance Review Date. If **tie** specifies such interim date then the provisions of this Clause 57 (*Performance Review*) will apply at the interim date, *mutatis mutandis*, as if that date was the original Performance Review Date (and as if the criteria set out at Clause 57.2 were the requirements specified by **tie** pursuant to this Clause 57.3).
- 57.4 Following a Performance Review Date, **tie** and the Infraco shall discuss whether it is appropriate to reset any criteria within this Agreement from a date twelve months following the Performance Review Date. If and to the extent that **tie** considers it reasonable to do so, any reset shall be carried out in accordance with and subject to the following provisions:

57.4.1 in determining what adjustment (if any) it requires to be made, **tie** shall have regard to:

57.4.1.1 the performance of maintainers on other tram networks in the UK;

57.4.1.2 the fact that **tie** would not expect to adjust the level of any such criteria unless it was reasonably satisfied that the revised standard would be consistent with sustainable levels of performance by the Infraco and any Infraco Party;

together with any other matters or circumstances which were not known or reasonably foreseeable at the time such criteria were last reset or determined;

57.4.2 **tie** and the Infraco shall discuss any proposed adjustment in accordance with Clause 80 (*tie Changes*). and if the Parties cannot agree such adjustment, the criteria will remain the same for the following Performance Review Period.

## 58. TUPE AND HANDOVER

58.1 In this Clause 58 (*TUPE and Handover*) and Schedule 39 (*TUPE Information*) the following definitions shall apply:

**"Infraco Employees"** means any employee of the Infraco or any affiliate of the Infraco;

**"TUPE Employees"** any person whose contract of employment may be transferred to a successor contractor, operator or maintainer by virtue of the operation of Law (including the TUPE Regulations) or in respect of whom liabilities arising from the contract of employment or employment relationship may be transferred;

**"TUPE Information"** the information in relation to the TUPE Employees specified in Schedule 39 (*TUPE Information*);

**"the TUPE Regulations"** means the Transfer of Undertakings (Protection of Employment) Regulations 2006.

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<sup>8</sup> Reflects the equivalent provision in the IMA.

58.2 Where reference is made in this Clause 58 (*TUPE and Handover*) to the last 12 months of this Agreement, such period shall be deemed to commence on the following dates (except and until the actual date of termination or expiry of this Agreement is known):

58.2.1 where this Agreement is terminated in accordance with Clause 90 (*Termination on Infraco Default*), Clause 92 (*Termination for Corrupt Gifts and Fraud*) or Clause 93 (*Persistent Breach*) the date which is 12 months, as the case may be, prior to the date of termination of this Agreement; or

58.2.2 where this Agreement is terminated in accordance with Clause 88 (*Termination or Suspension for tie Default*), Clause 89 (*Voluntary Termination by tie*) or Clause 91 (*Termination by Reason of Force Majeure*), on the date on which notice is given to or by the Infraco under Clause 88.1 or 91.2 respectively.

Any such period (which may be longer or shorter than 12 months, as the case may be) shall expire on the Expiry Date or the date of termination of this Agreement or, if earlier, in the case of periods commencing under Clause 58.2.2, the date falling 12 months after the date of any notice under Clause 58.2.2 or, in each case, such earlier date as **tie** may determine.

58.3 The Infraco shall not, without the prior consent of **tie** (which shall not be unreasonably withheld or delayed), vary or purport or promise to vary, the terms or conditions (as amended from time to time) of employment of any Infraco Employee (including any promise to make any additional payment or provide any additional benefit) where such variation or addition:

58.3.1 takes effect in the last 12 months of this Agreement unless it is in the ordinary course of business; or

58.3.2 results in any such employment not being lawfully terminable by the employer within six months of the termination or expiry of this Agreement; or

58.3.3 relates to or introduces a payment or the provision of a benefit triggered by termination of employment; or

- 58.3.4 relates to a payment or the provision of a benefit which any such employee will or may have a contractual right to receive after the termination or expiry of this Agreement; or
- 58.3.5 prevents, restricts or hinders any such employee from working for a successor contractor, operator or maintainer or from performing the duties such employee performed for the Infraco.
- 58.4 The Infraco shall not, without the prior consent of **tie** (which shall not be unreasonably withheld or delayed), create or grant, or promise to create or grant, terms or conditions of employment for any Infraco Employee (including any person who would become an Infraco Employee) where such employment may commence during the last 12 months of this Agreement if and to the extent that:
- 58.4.1 such terms and conditions are materially different to the terms or conditions of employment of equivalent or nearest equivalent Infraco Employees at the date of commencement of employment of such new Infraco Employee; and
- 58.4.2 if such terms or conditions were granted to such equivalent Infraco Employee already employed by the Infraco by way of variation to their terms or conditions of employment, Infraco would be in breach of Clause 58.3.
- 58.5 Subject to Clause 58.6, the Infraco shall at the request of **tie** in the last 12 months of this Agreement provide the TUPE Information within 15 Business Days of such request and thereafter until termination or expiry of this Agreement update such information in accordance with the reasonable requests of **tie** subject to the Infraco's common law duties to their employees or under the Data Protection Act 1998.
- 58.6 The Infraco shall use its reasonable endeavours to ensure that it will be in a position to provide TUPE Information pursuant to Clause 58.5 in respect of the TUPE Employees who are not also Infraco Employees but, subject to the Infraco having used such reasonable endeavours, the Infraco's obligation to provide TUPE Information pursuant to Clause 58.5 in respect of such TUPE Employees shall be limited to the TUPE Information covering such TUPE Employees actually in the possession of or reasonably obtainable by the Infraco.

### **Establishment of hand-over procedure**

58.7 With as much notice as reasonably practicable prior to any Termination Date or 12 months before the Expiry Date, the Infraco and **tie** both acting diligently and in good faith with a view to ensuring that there shall be no material deterioration or break in the provision of Maintenance Services, shall establish appropriate handover procedures.

### **Training**

58.8 Commencing six months prior to the Expiry Date or with as much notice as reasonably practicable prior to any Termination Date, the Infraco shall conduct an appropriate training programme for various categories of persons nominated by **tie** who will be responsible for the relevant Maintenance Services following the termination or expiry of this Agreement to ensure the successful continuation of the Maintenance Services. The content and style of and programme for the training shall be submitted to **tie** by the Infraco for review nine months prior to the Expiry Date or with as much notice as reasonably practicable prior to any Termination Date, and the Infraco shall comply with **tie's** reasonable requirements in relation thereto. The training shall be supported by appropriate documentation and training manuals and shall include practical fieldwork or "on-the-job" training in addition to classroom lessons.

### **Continued technical support**

58.9 For a period of two years after termination or expiry of this Agreement, the Infraco shall provide **tie** with such access as **tie** may reasonably require to persons having the appropriate knowledge and experience of the history of the Maintenance Services and associated technical matters for the following purposes:

58.9.1 general technical advice on subjects for which the Infraco was responsible pursuant to this Agreement; and

58.9.2 interpretation of maintenance history data, drawing modifications, regulations and the like.

**tie** shall reimburse the Infraco in respect of all reasonable and proper costs and expenses incurred directly by the Infraco in complying with this Clause 58 (*TUPE and Handover*)

## Manuals and documents

58.10 Upon termination or expiry of this Agreement, the Infraco shall procure that **tie** is provided with all manuals and documentation used by the Infraco in connection with the supply of the Maintenance Services (including Technical Records) and thereafter shall procure that so far as they relate to safety, **tie** receives any updates and/or amendments to such manuals and documentation which may be relevant to the continued maintenance of the Edinburgh Tram Network and the Trams.

## 59. STEP-IN FOR HEALTH AND SAFETY AND ENVIRONMENTAL REASONS

59.1 The provisions of Clauses 59.2 to 59.6 (inclusive) shall apply if the Infraco is in breach of its obligations to provide the Maintenance Services under this Agreement, and **tie**, acting reasonably, considers action is required in connection with Maintenance Services because as a result of such breach (i) a serious risk exists to health or safety of persons or to the environment; or (ii) the safety of the general public is compromised.

59.2 If the circumstances set out in Clause 59 (*Step-In for Health and Safety and Environmental Reasons*) apply, **tie**, acting reasonably, may (without prejudice to its other rights under this Agreement) either:

59.2.1 if **tie** considers that there is sufficient time and that it is likely that the Infraco will be willing and able to provide assistance, require the Infraco by written notice to take such steps as **tie** consider necessary or expedient to mitigate or rectify such circumstances and the Infraco shall use its best endeavours to comply with **tie's** requirements as soon as reasonably practicable; and/or

59.2.2 if **tie** considers there is not sufficient time, or that the Infraco is not likely to be willing and/or able to take the necessary steps, take such steps as are necessary to remove or reduce such risk (either themselves or by engaging others to take any such steps).

59.3 If the Infraco:

59.3.1 does not confirm within 5 Business Days of a notice served pursuant to Clause 59.2.1 (or such shorter period as is specified by **tie** in the notice where **tie** (acting reasonably) considers there to be an emergency), that it is willing to take such steps as are referred to in Clause 59.2.1; or

59.3.2 fails to take the steps notified to it by **tie** pursuant to Clause 59.2.1 within such time as **tie**, acting reasonably, shall think fit,

then (without prejudice to Clause 59.2.2) **tie**, acting reasonably, may itself take, or engage others to take, such steps as they consider appropriate.

59.4 Where **tie** considers it to be necessary or expedient to do so, the steps which **tie** may take pursuant to this Clause 59 (*Step-in for Health and Safety and Environmental Reasons*) shall include the partial or total suspension of the right and obligation of the Infraco to perform the Maintenance Services but only for so long as the circumstances referred to in Clause 59 (*Step-in for Health and Safety and Environmental Reasons*) subsist.

59.5 Any costs, losses, expenses or damages incurred by the Infraco in taking such steps as are required by **tie** pursuant to this Clause 59 (*Step-In for Health and Safety and Environmental Reasons*) shall be borne by the Infraco.

59.6 The Infraco shall reimburse **tie** for any costs and expenses incurred by **tie** in acting pursuant to this Clause 59 (*Step-In for Health and Safety and Environmental Reasons*) where such action is necessary by reason of the Infraco's failure to act pursuant to Clause 59.3 or its breach of this Agreement and **tie** shall be entitled to deduct any such amounts from any amount payable to the Infraco under the provisions of this Agreement.

## PART 11 - PROGRAMME

### 60. PROGRAMME

- 60.1 The Infraco shall progress the Infraco Works with due expedition and in a timely and efficient manner without delay, to achieve timeous delivery and completion of the Infraco Works (or any part thereof) and its other obligations under this Agreement in accordance with the Programme. Notwithstanding the generality of the foregoing, the Infraco shall complete the Infraco Works in each Section so as to enable the Certificate of Sectional Completion or Certificate of Service Commencement (as appropriate) in respect of each Section to be issued in accordance with Clause 44 (*Notification of Sectional Completion*) by the relevant Planned Service Commencement Date.
- 60.2 The Infraco shall update the Programme in accordance with the requirements of Schedule 2 (*Employer's Requirements*).
- 60.3 The Infraco shall submit to **tie's** Representative for his acceptance any change to the Programme showing the revised order or manner in which the Infraco proposes to carry out the Infraco Works.
- 60.4 **tie's** Representative shall within 10 Business Days after receipt of any revised programme from the Infraco:
- 60.4.1 accept the revised programme in writing; or
  - 60.4.2 reject the revised programme in writing with reasons; or
  - 60.4.3 request the Infraco to supply further information to clarify or substantiate the revised programme or to satisfy **tie's** Representative as to its reasonableness having regard to the Infraco's obligations under the Agreement.

Provided that if none of the above actions is taken within the said period of 10 Business Days, the Infraco shall issue a reminder to **tie** and if **tie** does not take any of the above actions within 10 Business Days of **tie's** receipt of such reminder, then **tie's** Representative shall be deemed to have accepted the revised programme as submitted.

- 60.5 The Infraco shall within 5 Business Days after receiving from **tie's** Representative any request under Clause 60.4.3 or within such further period as **tie's** Representative may allow, provide the further information requested, failing which the revised programme shall be deemed to be rejected.
- 60.6 Upon receipt of such further information, **tie's** Representative shall within a further 5 Business Days accept or reject the revised programme in accordance with Clauses 60.4.1 or 60.4.2. In the event that the revised programme is accepted, the revised programme shall form and become the Programme.
- 60.7 Should it appear to **tie's** Representative at any time that the actual progress of the Infraco Works does not conform with the Programme, **tie's** Representative shall be entitled to require the Infraco to produce a revised programme showing such modifications to the Programme as may be necessary to ensure completion of the Infraco Works in each section by the relevant Planned Service Commencement Date. In such event the Infraco shall submit its revised programme within 10 Business Days or within such further period as **tie's** Representative may allow. Thereafter the provisions of Clauses 60.4 and 60.5 shall apply.
- 60.8 Acceptance by **tie's** Representative of the Infraco's programme in accordance with Clauses 60.4, 60.5 and 60.7 shall not relieve the Infraco of any of its duties or responsibilities under the Agreement.
- 60.9 The Infraco shall take all reasonable steps to mitigate the effects of any delay to the progress of the Infraco Works.

## **61. RATE OF PROGRESS AND ACCELERATION**

### **Rate of Progress**

- 61.1 If for any reason which does not entitle the Infraco to an extension of time, the rate of progress of the Infraco Works is at any time, in the reasonable opinion of **tie's** Representative, too slow to ensure substantial completion of any section by the Planned Service Commencement Date for that Section, or any previously agreed revised time for completion agreed under Clause 61.2, **tie's** Representative shall notify the Infraco in writing and the Infraco shall thereupon take such steps as are necessary and to which **tie's** Representative may consent to expedite the progress so as substantially to complete the Section by the Planned Service Commencement

Date, such consent not to be unreasonably delayed or withheld. The Infraco shall not be entitled to any additional payment for taking such steps.

### **Acceleration**

61.2 Where **tie** desires either:

61.2.1 a date for completion earlier than any Planned Service Commencement Date current at the date of issue of the preliminary instruction under Clause 61.3;  
or

61.2.2 to have a Section or Sections completed by the relevant Planned Service Commencement Date or Dates where, following delays or stoppage to programme for whatever reason, the Infraco Works would not be so completed in the absence of any acceleration or resequencing arrangements;  
or

61.2.3 to obviate the necessity for, or to order the cancellation of, or a reduction in the length of, any extension of time being fixed under Clause 64 (*Relief Events*) so that either the Planned Service Commencement Date current at the date of preliminary instruction under Clause 61.3 is not extended or is not extended by the length of the extension of time that would otherwise have been given under Clause 64 (*Relief Events*);

**tie's** Representative may issue a preliminary instruction under Clause 61.3.

61.3 If **tie's** Representative issues a preliminary instruction to the Infraco to accelerate the carrying out or alter the sequence and timing of any work to be executed under the provisions of the Agreement, **tie's** Representative shall in such instruction set out the exact nature of the requirements of **tie** in regard to the Planned Service Commencement Date as referred to in Clause 61.2 for which the preliminary instruction has been issued.

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

61.5 As soon as reasonably practicable after receipt of the preliminary instruction (or after receipt of a preliminary instruction re-issued under Clause 61.4) the Infraco shall inform **tie's** Representative in writing in respect of the proposed instruction:

61.5.1 of the amount of any additional cost to which the Infraco should be entitled as a result of compliance with the instruction when issued by **tie's** Representative subject to Clause 61.3; or

61.5.2 that it is not reasonably practicable to state such a sum and that the cost to **tie** of compliance by the Infraco will therefore have to be ascertained in accordance with Clause 80 (**tie Changes**); and

61.5.3 of the earlier date for completion which can become the planned service commencement date for all the purposes of the Agreement; or

61.5.4 of the extent to which an extension of time that would otherwise be fixed under Clause 64 (*Relief Events*) can be cancelled or reduced and the date for completion which as a result will be or become the planned service commencement date for all the purposes of the Agreement.

61.6 If on receipt of the information given to **tie's** Representative under Clause 61.5 **tie** wishes to pay the amount referred to in Clause 61.5.1 and to accept the new planned service commencement date stated by the Infraco pursuant to Clause 61.5.3, **tie** shall cause **tie's** Representative to issue an instruction:

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

61.6.2 fixing the new planned service commencement date and the amount to which Clause 61.5.1 refers shall be included as if it were a variation.

61.7 Following any instruction under Clause 61.6 the Infraco shall revise the Programme in accordance with the terms of Clause 60 (*Programme*).

## **62. LIQUIDATED AND ASCERTAINED DAMAGES**

62.1 If the Infraco fails to achieve substantial completion of any Section by the Planned Service Commencement Date for that Section, the Infraco shall pay to **tie** the sum prescribed in Clause 62.2 for that Section for every week (or pro-rated for each calendar day) which shall elapse between the date on which the Planned Service

Commencement Date expired and the date on which that Section is substantially completed in accordance with this Agreement.

62.2 The liquidated and ascertained damages in respect of each Section are as follows:<sup>9</sup>

62.2.1 Section A £[◆];

62.2.2 Section B £[◆];

62.2.3 Section C £[◆]; and

62.2.4 Section D £[◆].

62.3 The total amount of any liquidated and ascertained damages payable by the Infraco under this Clause 62 (*Liquidated and Ascertained Damages*) shall be limited to 10% of the Contract Price and such cap shall exclude any liquidated and ascertained damages which are recovered by **tie** under Clauses 62.6, 62.7, 62.9 and/or 62.11.

62.4 **tie** may:

62.4.1 deduct and retain the amount of any liquidated and ascertained damages becoming due under the provisions of Clause 62.1 from any sums due or which become due to the Infraco; or

62.4.2 require the Infraco to pay such amount to **tie** forthwith.

If upon a subsequent or final review of the circumstances causing delay, **tie's** Representative grants a relevant extension or further extension of time in respect of the Planned Service Commencement Date for the appropriate Section, **tie** shall no longer be entitled to liquidated and ascertained damages in respect of the period of such extension. Any sum in respect of such period which may already have been recovered under this Clause 62 (*Liquidated and Ascertained Damages*) shall be reimbursed forthwith to the Infraco. Interest shall not be payable by **tie** on any amounts so reimbursed at a rate per annum equivalent to 2% above the base rate of The Royal Bank of Scotland plc current on the date upon which the liquidated and ascertained damages were paid by the Infraco to **tie** adjusted to reflect any changes to the rate during which the period over which the liquidated and ascertained damages were retained by **tie**.

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<sup>9</sup> New level of LADs will be issued to the bidders in due course.

62.5 If after liquidated and ascertained damages have become payable under Clause 62.1, **tie's** Representative orders a variation under Clause 80 (**tie Changes**) or any other situation outside the Infraco's control arises any of which in **tie's** Representative's opinion results in further delay to that part of the Infraco Works:

62.5.1 **tie's** Representative shall so notify the Infraco and **tie** in writing; and

62.5.2 **tie's** further entitlement to liquidated and ascertained damages in respect of that part of the Infraco Works shall be suspended until **tie's** Representative notifies the Infraco and **tie** in writing that the further delay has come to an end.

Such suspension shall not invalidate any entitlement to liquidated and ascertained damages which accrued before the period of further delay started to run and, subject to any subsequent or final review of the circumstances causing delay, any monies already deducted or paid as liquidated and ascertained damages under the provisions of this Clause 62 (*Liquidated and Ascertained Damages*) may be retained by **tie**.

#### **Retention and Liquidated and Ascertained Damages for Delay**

62.6 Subject to Clause 62.10, if any Tram is not delivered to the Depot by the Agreed Delivery Date for such Tram the Infraco shall pay to **tie** (or **tie** shall be entitled to retain from payments to the Infraco) a sum equal to 1% of the Tram Price in respect of such Tram payable ("**Delivery Retention**");

62.7 Subject to Clause 62.10, if:

62.7.1 the first Tram to be issued with a Certificate of Tram Commissioning is not issued with such certificate by the Agreed Commissioning Date the Infraco shall pay liquidated damages to **tie** at the rate of 1% of the Tram Price for each period of seven days (with an apportionment on a time basis for each part period) by which the issue of such Certificate of Tram Commissioning is delayed after the Agreed Commissioning Date and until such a Certificate of Tram Commissioning is issued in respect of such Tram; and

62.7.2 any other Tram to be issued with a Certificate of Tram Commissioning is not issued with such certificate by the Agreed Commissioning Date the Infraco shall, in respect of each such Tram, pay liquidated and ascertained damages to **tie** at the rate of 0.5% of the Tram Price for each period of seven days

(with an apportionment on a time basis for each part period) by which the issue of such Certificate of Tram Commissioning is delayed after the Agreed Commissioning Date and until such a Certificate of Tram Commissioning is issued in respect of such Tram;

- 62.8 If any Tram in respect of which a Delivery Retention has been made pursuant to Clause 62.6 is issued with a Certificate of Tram Commissioning on or before the Agreed Commissioning Date for such Tram then **tie** shall release the Delivery Retention in respect of such Tram to the Infraco ("**Delivery Retention Repayment**") in accordance with Clause [◆];
- 62.9 If liquidated and ascertained damages are payable pursuant to Clause 62.7 in respect of a Tram which has had a Delivery Retention made in respect of it, then:
- 62.9.1 the liquidated and ascertained damages payable in respect of such Tram shall be initially payable from the Delivery Retention until such Delivery Retention is exhausted or the full quantum of Liquidated Damages has been paid to **tie**;
- 62.9.2 any outstanding Liquidated Damages shall remain payable by the Infraco to **tie**;
- 62.9.3 if, following the payment of Liquidated Damages in accordance with sub-Clause 62.9.1 any of the sums retained as a Delivery Retention in respect of such Tram remains then such sum shall be repaid to the Infraco as a Delivery Retention Repayment.
- 62.10 The aggregate amount of Liquidated Damages that the Infraco shall be obliged to pay pursuant to Clause 62.7 shall be capped at 10% of the Aggregate Tram Price;

#### **Liquidated Damages for Weight**

- 62.11 If a Tram exceeds the Maximum Tram Weight, as calculated in accordance with part 2 of schedule 5 of the Tram Supply Agreement, then the Infraco shall pay liquidated damages in respect of each such Tram of an amount calculated in accordance with said part 2 of schedule 5 provided that if the amount that a Tram is overweight is equal to or more than an amount equal to five per cent of the Maximum Tram Weight, **tie** shall without prejudice to its other rights or remedies be entitled to reject the Tram.

## General

- 62.12 The parties hereby acknowledge and confirm that the liquidated and ascertained damages payable pursuant to this Clause 62 (*Liquidated and Ascertained Damages*) at the rate pre-agreed in this Clause 62 (*Liquidated and Ascertained Damages*) represent a genuine pre-estimate of the loss that is anticipated to be suffered by **tie** consequent to a failure by the Infraco to comply with those obligations under this Agreement to which they relate.
- 62.13 All sums payable by the Infraco to **tie** pursuant to this Clause 62 (*Liquidated and Ascertained Damages*) shall be paid as liquidated and ascertained damages for delay and not as a penalty.
- 62.14 The recovery by **tie** of liquidated and ascertained damages under this Clause 62 (*Liquidated and Ascertained Damages*) shall not in any way relieve the Infraco from its obligation to complete the Infraco Works, nor from any of its other obligations or liabilities under the Agreement.

**PART 12 - PROTESTOR ACTION, EXTENSIONS OF TIME AND COMPENSATION EVENTS**

**63. PROTESTOR ACTION**

- 63.1 The Infraco shall take whatever action and measures as are necessary to protect the Infraco Works from protestor action and, subject to Clause 63.9, the Infraco shall not be entitled to any additional costs or extension of time as a result of any such protestor action.
- 63.2 The Infraco shall be responsible, at its own cost, for repairing, reinstating or making good any damage to property (including the Infraco Works) on the Site which is caused by or results from protestor action.
- 63.3 If the Edinburgh Tram Network or any part thereof is occupied by protestors at any time during the term of this Agreement, then the Infraco shall:
- 63.3.1 notify **tie** as soon as reasonably practicable of this occurrence; and
- 63.3.2 use any legal remedies available to the Infraco to remove such protestors.
- 63.4 The Infraco may request the assistance of **tie** to remove protestors where the Infraco can demonstrate to **tie**'s reasonable satisfaction that the legal remedies available to the Infraco have been exhausted or are not suitable in the circumstances (whether by reason of timescale or otherwise).
- 63.5 Within 10 Business Days of any request in accordance with Clause 63.4, **tie** shall notify the Infraco whether **tie** can provide any assistance as **tie** (acting reasonably) considers reasonable and appropriate in relation to the removal of such protestors.
- 63.6 If, in accordance with Clause 63.5, **tie** has notified the Infraco that **tie** (as appropriate) is willing to instigate and conduct legal action to secure the lawful eviction of protestors, then such legal action will be reasonable and properly conducted on the basis of any legal advice given to **tie** by its respective legal advisors.
- 63.7 Where the Infraco is given assistance by **tie** in accordance with Clause 63.5 or legal action is raised in accordance with Clause 63.6 then, in respect of any protestor action (not including any Protestor Action), the Infraco will indemnify **tie** (as appropriate) in respect of any costs, losses, liabilities, expenses and claims suffered by them as a

result of or in connection with the provision of such assistance and/or raising of such legal action.

- 63.8 Where it is in the interests of the Edinburgh Tram Network to deal expeditiously with any protestor action, **tie** will use all reasonable endeavours to expedite its decision making process under Clause 63.5 and its action under Clause 63.6.
- 63.9 In respect of any Protestor Action, if compliance with this Clause 63 (*Protestor Action*) involves the Infraco in any delay, **tie's** Representative shall take such delay into account in determining any extension of time to which the Infraco is entitled under Clause 64 (*Relief Events*) provided that **tie** shall not take into account any delay to the extent that the impact of such Protestor Action on the progress of the Infraco Works has been caused by a breach of this Agreement by the Infraco and/or such impact could have been mitigated by the Infraco.

#### 64. RELIEF EVENTS

- 64.1 If and to the extent that a Relief Event is the direct cause of a delay in achievement of the issue of a Certificate of Sectional Completion on or before the Planned Sectional Completion Date for a Section or a Certificate of Service Commencement on or before the Planned Service Commencement Date for a Section (as appropriate), then the Infraco shall be entitled to apply for an extension of time. The Infraco's sole right to such extension of time in connection with a Relief Event shall be as set out in this Clause 64 (*Relief Events*).
- 64.2 To obtain such extension of time, the Infraco must, as soon as practicable, and in any event within 10 Business Days after it first became aware that the Relief Event had caused or is likely to cause delay:
- 64.2.1 give to **tie** a notice of its claim for an extension of time and full details of the nature of the Relief Event, the date of occurrence and its likely duration;
  - 64.2.2 include in any notice given under Clause 64.2.1 full details of the extension of time claimed including:
    - 64.2.2.1 the Infraco's estimate of the likely effect of such delay upon the Programme;
    - 64.2.2.2 mitigation measures adopted and why unsuccessful; and

- 64.2.2.3 any acceleration measures which the Infraco could take to mitigate the effects of such delay and, where applicable, an estimate of the costs thereof;
- 64.2.3 demonstrate to the reasonable satisfaction of **tie** that:
  - 64.2.3.1 Infraco and the Infraco Parties could not have foreseen the occurrence or consequences of the relevant Relief Event and could not have avoided such occurrence or consequences by steps which they might reasonably be expected to have taken;
  - 64.2.3.2 the Relief Event is the direct cause of the delay; and
  - 64.2.3.3 the Infraco is using best endeavours to perform its obligations under this Agreement.
- 64.3 In the event that the Infraco has complied with its obligations under Clause 64.2 and **tie** is satisfied as to the matters specified in Clause 64.2.3, then (as applicable in the circumstances) the Planned Service Commencement Date shall be postponed by such time as shall be reasonable for such a Relief Event, taking into account the likely effect of delay and the Programme shall be revised by the Infraco in accordance with Clauses 60.3 to 60.5. For the avoidance of doubt, the Infraco shall be deemed to have irrevocably waived any entitlement to an extension of time unless the Infraco has submitted a notice under Clause 64.2 within 10 Business Days.
- 64.4 Nothing in this Clause 64 (*Relief Events*) shall affect any entitlement to allow **tie** to make deductions pursuant to Schedule 6 (*Maintenance Payment Regime*) during the period in which the Relief Event is subsisting.
- 64.5 The Infraco shall notify **tie** if at any time it receives or becomes aware of any further information relating to the Relief Event, giving details of that information to the extent that such information is new or renders information previously submitted materially inaccurate or misleading.
- 64.6 If the Parties cannot agree the extent of the extension of time required or **tie** disagrees that a Relief Event has occurred (or as to its consequences) or that the Infraco is entitled to any extension of time, either Party may refer the matter for determination in accordance with the Dispute Resolution Procedure.

64.7 **tie** shall, in assessing any delay or extension of time for the purpose of this Clause 64 (*Relief Events*):

64.7.1 not take into account:

64.7.1.1 any event or cause of delay which is in any way consequent upon or necessitated by any negligence, omission, default, breach of contract or breach of statutory duty of the Infraco or any Infraco Parties; or

64.7.1.2 any delay which is concurrent with another delay for which the Infraco is responsible;

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

64.7.3 take into account only those events or causes of delay which appear to **tie** to be likely to result in the eventual delay in completion of the Infraco Works in accordance with the Agreement.

64.8 The Infraco shall not be entitled to and shall be deemed to have irrevocably waived any entitlement to any extension of time in respect of any failure by the Infraco to:

64.8.1 identify any long lead time works and/or order any long lead time materials; or

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

64.8.3 manage any required interface with CEC in so far as this forms part of the Infraco Works; or

64.8.4 manage the required interface with any Approval Body and/or third party where consent or approval for the Infraco Works is required at any stage of such works; or

64.8.5 identify any instructions which are required from **tie** in order to progress the Infraco Works in accordance with the Programme.

64.9 If the Infraco Works are delayed in circumstances other than those entitling the Infraco to an extension of time as set out in this Clause 64 (*Relief Events*), the Infraco shall inform **tie** at the earliest opportunity and shall give an estimate of the likely effect upon the Programme. In such circumstances, the Infraco at its own expense shall take such acceleration measures as are necessary to achieve the requirements of the Programme.

64.10 Notwithstanding the occurrence of a Relief Event, the Infraco shall continue to carry out the Infraco Works unless otherwise agreed in connection with this Clause 64 (*Relief Events*).

## 65. COMPENSATION EVENTS

65.1 If and to the extent that a Compensation Event:

65.1.1 is the direct cause of delay in achievement of the issue of a Certificate of Sectional Completion on or before the Planned Sectional Completion Date for a Section or a Certificate of Service Commencement on or before the Planned Service Commencement Date for a Section (as appropriate); and/or

65.1.2 causes the Infraco to incur costs beyond such costs which were reasonably anticipated to be incurred by the Infraco;

then the Infraco shall be entitled to apply for an extension of time and/or claim costs under this Agreement. The Infraco's sole right to an extension of time and/or to claim costs in connection with a Compensation Event shall be as set out in this Clause 65 (*Compensation Events*).

65.2 To obtain such extension of time and/or claim costs, the Infraco must, as soon as practicable, and in any event within 10 Business Days after it first became aware that the Compensation Event had caused or is likely to cause delay or the Infraco to incur additional costs:

- 65.2.1 give to **tie** a notice of its claim for an extension of time and/or costs and full details of the nature of the Compensation Event, the date of occurrence and its likely duration;
- 65.2.2 include in any notice given under Clause 65.2.1 full details of the extension of time and/or any costs claimed including:
  - 65.2.2.1 the Infraco's estimate of the likely effect of such delay upon the Programme;
  - 65.2.2.2 details of the costs;
  - 65.2.2.3 mitigation measures adopted and why unsuccessful; and
  - 65.2.2.4 any acceleration measures which the Infraco could take to mitigate the effects of such delay and, where applicable, an estimate of the costs thereof;
- 65.2.3 demonstrate to the reasonable satisfaction of **tie** that:
  - 65.2.3.1 Infraco and the Infraco Parties could not have foreseen the occurrence or consequences of the relevant Compensation Event and could not have avoided such occurrence or consequences by steps which they might reasonably be expected to have taken;
  - 65.2.3.2 the Compensation Event is the direct cause of the delay and/or the additional costs; and
  - 65.2.3.3 the Infraco is using best endeavours to perform its obligations under this Agreement.
- 65.3 In the event that the Infraco has complied with its obligations under Clause 65.2 and **tie** is satisfied as to the matters specified in Clause 65.2.3, then (as applicable in the circumstances):
  - 65.3.1 the Planned Service Commencement Date shall be postponed by such time as shall be reasonable for such a Compensation Event, taking into account the likely effect of delay and the Programme shall be revised by the Infraco in accordance with Clauses 60.3 to 60.5; and/or

65.3.2 the Infraco shall be paid the amount of any direct and demonstrable cost as may be reasonable in the circumstances of the Compensation Event;

For the avoidance of doubt, the Infraco shall be deemed to have irrevocably waived any entitlement to an extension of time unless the Infraco has submitted a notice under Clause 65.2 within 10 Business Days.

65.4 Nothing in this Clause 65 (*Compensation Events*) shall affect any entitlement to allow **tie** to make deductions pursuant to Schedule 6 (*Maintenance Payment Regime*) during the period in which the Compensation Event is subsisting.

65.5 The Infraco shall notify **tie** if at any time it receives or becomes aware of any further information relating to the Compensation Event, giving details of that information to the extent that such information is new or renders information previously submitted materially inaccurate or misleading.

65.6 If the Parties cannot agree the extent of the extension of time required or the additional costs claimed or **tie** disagrees that a Compensation Event has occurred (or as to its consequences) or that the Infraco is entitled to any extension of time and/or additional costs, either Party may refer the matter for determination in accordance with the Dispute Resolution Procedure.

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

65.7.1 not take into account:

65.7.1.1 any event or cause of delay or costs which is in any way consequent upon or necessitated by any negligence, omission, default, breach of contract or breach of statutory duty of the Infraco or any Infraco Parties; or

65.7.1.2 any delay which is concurrent with another delay for which the Infraco is responsible;

65.7.2 take into account an event or cause of delay or costs only if and to the extent that the Infraco establishes to the satisfaction of **tie** that the Infraco has used its best endeavours to adjust the order and sequence in which the Infraco proposes to execute the Infraco Works in such a manner as to minimise the

effects of the delay in, or if possible to avoid altogether any delay in, the progress of the Infraco Works and mitigate the costs; or

65.7.3 take into account only those events or causes of delay which appear to **tie** to be likely to result in the eventual delay in completion of the Infraco Works in accordance with the Agreement.

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

65.8.1 identify any long lead time works and/or order any long lead time materials;  
or

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

65.8.3 manage the required interface with CEC in so far as this forms part of the Infraco Works; or

65.8.4 manage any required interface with any Approval Body and/or third party where consent or approval for the Infraco Works is required at any stage of such works; or

65.8.5 identify any instructions which are required from **tie** in order to progress the Infraco Works in accordance with the Programme.

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

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

## **PART 13 - PAYMENT AND TAXATION**

### **66. PAYMENT OF THE CONTRACT PRICE**

- 66.1 Subject to the terms of this Agreement, **tie** shall pay the Contract Price to the Infraco for the carrying out and completion of the Infraco Works.
- 66.2 Any application for payments of sums due in respect of Construction Milestones, Critical Milestones, Tram Milestones and/or SDS Milestones and any payment to be made in respect of Construction Milestones, Critical Milestones, Tram Milestones and/or SDS Milestones shall be made in accordance with the procedure set out in Clause 67 (*Payment in respect of Applications for Milestone Payments*).
- 66.3 Any application for payments of sums due in respect of the Maintenance Services and any payment to be made in respect of Maintenance Services shall be made in accordance with the procedure set out in Clause 68 (*Payment in respect of Maintenance Services*).
- 66.4 Until the issue of the Certificate of Service Commencement, any application for payments of sums due in respect of Permitted Variations or other costs or expenses which have been expressly approved by **tie** and/or to which the Infraco is entitled in accordance with this Agreement shall be made in accordance with the procedure set out in Clause 67 (*Payment in respect of Applications for Milestone Payments*).
- 66.5 After the issue of the Certificate of Service Commencement, any application for payments of sums due in respect of Permitted Variations or other costs or expenses which have been expressly approved by **tie** and/or to which the Infraco is entitled in accordance with this Agreement shall be made in accordance with the procedure set out in Clause 68 (*Payment in respect of Maintenance Services*).

### **67. PAYMENT IN RESPECT OF APPLICATIONS FOR MILESTONE PAYMENTS**

#### **Application for Milestone Payments**

- 67.1 The Infraco shall submit each Application for Milestone Payment, and any other fees, costs and/or expenses in respect of Permitted Variations or as otherwise agreed in accordance with this Agreement which are being claimed by the Infraco for the previous Reporting Period, to **tie's** Representative within 3 Business Days following each Reporting Period End Date provided that:

67.1.1 the Infraco shall not submit an Application for Milestone Payment if **tie's** Representative has not issued a Critical Milestone Completion Certificate in respect of the Critical Milestone or Critical Milestones which has or have been identified in that Application for Milestone Payment;

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

67.1.3 subject to 67.1.1, the Infraco may include an application for payment in respect of a Milestone or Critical Milestone identified in a subsequent Application for Milestone Payment provided that **tie's** Representative has issued a Milestone Completion Certificate or a Critical Milestone certificate in respect of those Milestones or Critical Milestones, and the cumulative value of the Application for Milestone Payment and the additional application for payment under this Clause 67.1.3 do not exceed the total value stated in Schedule 5 (*Pricing Schedules*) for the Application for Milestone Payment for the Reporting Period;

67.1.4 subject to 67.1.1, the Infraco may include an application for payment in respect of Milestones or Critical Milestones identified in a previous Application for Milestone Payment provided that **tie's** Representative has issued a Milestone Completion Certificate or a Critical Milestone Completion Certificate in respect of those Milestones or Critical Milestones .

67.2 [The Infraco acknowledges that each Application for Milestone Payment may include Milestones or Critical Milestones in respect of one or more of the Sections. The Infraco may make Applications for Milestone Payment in respect of those Milestones or Critical Milestones for each Section up to a cumulative value of [◆]% of the total value of the Milestones and Critical Milestones in each Section. In respect of the remaining [◆]% of the total value of the Milestones and Critical Milestones in each Section (the "**Retention**"), the Infraco may make applications for payment in respect of one third of the Retention, following the issue of a Certificate of Service Commencement/Certificate of Sectional Completion for the relevant Section.]<sup>10</sup>

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<sup>10</sup> Drafting to be further revised by **tie** to reflect the table entitled "Infraco - Protection Measures".

- 67.3 [In respect of the remaining two thirds of the Retention for every Section (the "**Network Retention**"), the Infraco may make an application for payment:
- 67.3.1 in respect of one half of the Network Retention following the issue of a Network Certificate in accordance with this Agreement; and
  - 67.3.2 in respect of the remaining half of the Network Retention following the issue of a Reliability Certificate in accordance with this Agreement.]<sup>11</sup>
- 67.4 Each Application for Milestone Payment shall:
- 67.4.1 set out the Milestones and Critical Milestones completed in that Reporting Period and the Milestone Payment due in respect of the same, together with the appropriate Milestone Completion Certificates and Critical Milestone Completion Certificates;
  - 67.4.2 set out any other agreed adjustments pursuant to a Permitted Variation; and
  - 67.4.3 any other sums due to or from the Infraco under and/or arising out of this Agreement in accordance with its terms,
- (together with reasonable supporting documentation establishing the basis of such sums being claimed).
- 67.5 **tie** shall procure that **tie's** Representative shall, subject to any clarifications as are in **tie's** opinion (acting properly and reasonably) necessary, certify by notice in writing (a "**Construction Interim Certificate**") to the Infraco that part of the sum claimed in the application for payment which is approved by **tie** and give reasons why any part of the sum claimed has not been certified and the value of the sums involved no later than 10 Business Days after the date on which application for payment was received by **tie**. If the Infraco fails to achieve the prescribed Environmental or Health and Safety Key Performance Indicators in any Reporting Period, **tie** shall make a deduction of 1% (the "**EHS KPI Deduction**") from the value of the Construction Interim Certificate. **tie** shall release the EHS KPI Deduction as soon as the Infraco has satisfied **tie** that the HSQE Plan has been updated and that the cause or causes of the EHS KPI Deduction has or have been rectified.

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<sup>11</sup> Drafting to be further revised by **tie** to reflect the table entitled "Infraco - Protection Measures".

- 67.6 The Infraco shall submit a valid VAT invoice to **tie** within 7 days of the date of the Construction Interim Certificate. Payment will become due to the Infraco on the date of issue of the said Construction Interim Certificate by **tie** and, subject to Clause 67.7, the final date for payment by **tie** of such valid VAT invoice shall be 28 days from the date of issue of the Construction Interim Certificate by **tie**.
- 67.7 If the Infraco is late in submitting its application for payment to **tie** by more than 3 Business Days after the required timescales set out in Clause 67.1, payment in respect of any amount certified in a Construction Interim Certificate shall become due to the Infraco on the date of receipt of the relevant valid VAT invoice by **tie** in respect of the late application for payment, and the final date for payment of such valid VAT invoice shall be made by **tie** to the Infraco within 28 days of the first date of the Reporting Period following receipt of the valid VAT invoice.
- 67.8 If the Infraco is late in supplying a valid VAT invoice to **tie** by more than 3 Business Days after the required timescales set out in Clause 67.6, payment in respect of any amount certified in a Construction Interim Certificate shall become due to the Infraco on the date of receipt of the relevant valid VAT invoice by **tie** in respect of the late application for payment, and the final date for payment of such valid VAT invoice to be made by **tie** to the Infraco shall be within 28 days of the first date of the Reporting Period following receipt of the late valid VAT invoice.
- 67.9 The Infraco and **tie** acknowledge that:
- 67.9.1 a maximum of only one Application for Milestone Payment may be made under this Clause 67.9.1 in any Reporting Period; and
- 67.9.2 the amount to be specified for payment in any Construction Interim Certificate in respect of a Milestone or Critical Milestone shall not exceed the amount specified in Schedule 5 (*Pricing Schedules*) in relation to the achievement of the Milestone or Critical Milestone to which such Construction Interim Certificate relates.

### **Adjustment**

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

### **Payments to Sub-Contractors**

- 67.11 Where, with the agreement of **tie**, the Infraco has appointed any Sub-Contractors, no additional payments shall be made over and above the Milestone Payments or Critical Milestone Payments set out in Schedule 5 (*Pricing Schedules*), unless expressly agreed by **tie** in writing.
- 67.12 Where **tie** has expressly agreed in writing that payment shall be made by **tie** for the services of any Sub-Contractor, the Infraco shall apply for such payment in accordance with Clause 67.1.
- 67.13 No additional payments shall be made over and above the Milestone Payments or Critical Milestone Payments set out in Schedule 5 (*Pricing Schedules*) in respect of the SDS Services, the Tram Supply Obligations, the Tram Maintenance Services and the Infrastructure Maintenance Services.

### **Condition Precedent to Payment**

- 67.14 Following a request from **tie** in accordance with Clause 28.7 or Clause 74.7, it shall be a condition precedent to any payment to the Infraco that the Infraco shall provide any collateral warranty requested by **tie** within the time prescribed within those said Clauses

## **68. PAYMENT IN RESPECT OF MAINTENANCE SERVICES**

### **Maintenance Services Payment**

- 68.1 Subject to the terms of this Agreement, in respect of the provision of the Maintenance Services, **tie** shall pay to the Infraco the Maintenance Services Payment calculated in accordance with Schedule 6 (*Maintenance Payment Regime*).

### **Application for Payments**

- 68.2 The Infraco shall submit each application for payment in respect of Maintenance Services in accordance with this Agreement for the previous Reporting Period, to **tie's** Representative within 3 Business Days following the Reporting Period End Date and following submission to **tie** of the Service Quality Report pursuant to Clause 56.3.
- 68.3 Each application for payment shall set out:

- 68.3.1 the Maintenance Services Payment claimed by the Infraco which has been calculated in accordance with Schedule 6 (*Maintenance Payment Regime*);
- 68.3.2 set out any repairs made pursuant to Clause 52 (*Maintenance*) including a breakdown of the costs;
- 68.3.3 set out any other agreed adjustments pursuant to a Permitted Variation; and
- 68.3.4 any other sums due to or from the Infraco under and/or arising out of this Agreement in accordance with its terms;

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

- 68.4 **tie** shall procure that **tie's** Representative shall, subject to any clarifications as are in **tie's** opinion (acting properly and reasonably) necessary, certify by notice in writing (a "**Maintenance Services Interim Certificate**") to the Infraco that part of the sum claimed in the application for payment which is approved by **tie** and give reasons why any part of the sum claimed has not been certified in the Maintenance Services Interim Certificate and the value of the sums involved no later than 10 Business Days after the date on which application for payment was received by **tie**.
- 68.5 The Infraco shall submit a valid VAT invoice to **tie** within 7 days of the date of the Maintenance Services Interim Certificate. Payment will become due to the Infraco on the date of issue of the said Maintenance Services Interim Certificate by **tie** and, subject to Clause 68.6, the final date for payment by **tie** of such valid VAT invoice shall be 28 days from the date of issue of the Maintenance Services Interim Certificate by **tie**.
- 68.6 If the Infraco is late in submitting its application for payment to **tie** by more than 3 Business Days after the required timescales set out in Clause 68.2, payment in respect of any amount certified in a Maintenance Services Interim Certificate shall become due to the Infraco on the date of receipt of the relevant valid VAT invoice by **tie** in respect of the late application for payment, and the final date for payment of such valid VAT invoice shall be made by **tie** to the Infraco within 28 days of the first date of the Reporting Period following receipt of the valid VAT invoice.
- 68.7 If the Infraco is late in submitting a valid VAT invoice to **tie** by more than 3 Business Days after the required timescales set out in Clause 68.5, payment in respect of any

amount certified in a Maintenance Services Interim Certificate shall become due to the Infraco on the date of receipt of the relevant valid VAT invoice by **tie** in respect of the late application for payment, and the final date for payment of such valid VAT invoice shall be made by **tie** to the Infraco within 28 days of the first date of the Reporting Period following receipt of the late valid VAT invoice.

### **Adjustment**

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

### **Payments to Sub-Contractors**

68.9 Where, with the agreement of **tie**, the Infraco has appointed any Sub-Contractors, no additional payments shall be made over and above the Maintenance Services Payments unless expressly agreed by **tie** in writing.

68.10 Where **tie** has expressly agreed in writing that payment shall be made by **tie** for the services of any Sub-Contractor, the Infraco shall apply for such payment in accordance with Clause 68.2.

68.11 No additional payments shall be made over and above the Maintenance Service Payments in respect of the SDS Services, the Tram Supply Obligations, the Tram Maintenance Services and the Infrastructure Maintenance Services.

### **Condition Precedent to Payment**

68.12 Following a request from **tie** in accordance with Clause 28.7 or Clause 74.7, it shall be a condition precedent to any payment to the Infraco that the Infraco shall provide any collateral warranty requested by **tie** within the time prescribed within those said Clauses.

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

### **Interest on late payments**

69.1 In the event of a failure by **tie** to make payment in accordance with Clause 67 (*Payment in respect of Applications for Milestone Payments*) or Clause 68 (*Payment in respect of Maintenance Services*), **tie** shall pay to the Infraco interest upon any

payment not paid by the final date for payment at a rate per annum equivalent to 2 per cent. above the base rate of The Royal Bank of Scotland plc current on the date upon which such payment first becomes overdue adjusted to reflect any changes to the rate during the period over which the payment remains overdue.

### **Set-Off**

69.2 Subject to Clause 69.3, **tie** may deduct any amount payable by the Infraco to **tie** whether by way of damages or in respect of any loss of expense sustained by **tie** by reason of the Infraco's breach of this Agreement from any other payment or payments due to be made to the Infraco by **tie** under this Agreement.

69.3 Any notice of intention to withhold payment shall be served by **tie** at least three days prior to the final date for payment calculated in accordance with Clause 67.6 or Clause 68.5 (as appropriate) and such notice shall state the sums being withheld and the detailed reason or detailed reasons for such withholding. Where an effective notice of intention to withhold payment is given, but on the matter being referred to the Dispute Resolution Procedure, it is decided that the whole or part of the amount should be paid, the decision shall be construed as requiring payment not later than:

69.3.1 7 days from the date of the decision; or

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

whichever is the later.

69.4 The Infraco shall be entitled to payment of interest as provided in Clause 69.1 in respect of the relevant part of any payments which have been withheld in accordance with Clause 69.2 but are subsequently determined as being payable by **tie** to the Infraco either by agreement between the Parties or a decision following a referral to the Dispute Resolution Procedure. The interest shall be calculated for the period between the date when the relevant part of the payment should have been paid but for the notice of intention to withhold payment and the date on which payment is made by **tie** in accordance with Clause 69.3.

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

## **70. VALUE ADDED TAX**

- 70.1 The Infraco shall be deemed to have allowed in its tender for the tax payable by it as a taxable person to the Commissioners of Customs and Excise being tax chargeable on any taxable supplies to **tie** which are to be made under the Agreement.
- 70.2 All certificates issued by **tie** or **tie's** Representative under Clauses 67.5 and 68.4 shall be net of Value Added Tax. In addition to the payments due under such certificates **tie** shall separately identify and pay to the Infraco any Value Added Tax properly chargeable by the Infraco on the supply to **tie** of any goods and/or services by the Infraco under this Agreement.
- 70.3 If any dispute, difference or question arises between either **tie** or the Infraco and the Commissioners of Customs and Excise in relation to any tax chargeable or alleged to be chargeable in connection with this Agreement or the Infraco Works, each shall render to the other such support and assistance as may be necessary to resolve the dispute, difference or question.
- 70.4 Clause 97 (*Dispute Resolution Procedure*) shall not apply to any dispute, difference or question arising under this Clause 70 (*Value Added Tax*).

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

- 71.1 The rates and prices contained in the Pricing Schedules and the Contract Price Analysis shall be deemed to take account only of the levels and incidence in force on the Effective Date:
- 71.1.1 the taxes, levies, contributions, premiums or refunds (including national insurance contributions but excluding income tax and any levy payable under the Industrial Training Act 1982 or any statutory re-enactment or amendment thereof for the time being in force) which are by law payable by or to the Infraco or anyone carrying out any part of the Infraco Works under the instruction of the Infraco in respect of their workpeople engaged on the Infraco Works;
- 71.1.2 any landfill tax payable by the Infraco or anyone carrying out any part of the Infraco Works under the instruction of the Infraco pursuant to the Finance Act 1996 (Sections 39-71 and Schedule 5) and the Landfill Tax Regulations

1996 or any statutory re-enactment or amendment thereof for the time being in force;

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

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

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

## **72. RETURNS OF LABOUR AND INFRACO'S EQUIPMENT**

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

## **73. BEST VALUE**

73.1 The Infraco shall, throughout the Term and to the extent consistent with its obligations under the Agreement, make arrangements to secure continuous improvement in the way in which the Infraco Works are conducted having regard to the Project Vision and, a combination of economy, efficiency and effectiveness.

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

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

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

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

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

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

73.3.2 complement preparation of the Annual Service Report; and

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

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

73.4 Without prejudice to any other provision in the Agreement (and no later than 2 Reporting Periods prior to the end of any year), the Infraco shall, at its own cost, provide a written report (the "**Annual Service Report**") which shall review the quality and performance of all Maintenance Services measured during the relevant period and show the key issues to be addressed going forward, including customer feedback, operational and maintenance issues and improvement proposals. The customer feedback shall include the results of any **tie** Customer Satisfaction Survey carried out pursuant to Clause 73.3. The Infraco shall upon written request promptly provide supporting information to verify and audit the information and other material contained in the Annual Service Report.

- 73.5 **tie** may make comments on and/or objections and specify omissions in the supporting information or the Annual Service Report and in such case shall provide the Infraco with written comments and/or objections within 30 Business Days of receipt. In the absence of such **tie** comments or objections, the supporting information (or the Annual Service Report) shall be deemed to have been accepted by **tie**.
- 73.6 The Infraco shall, within 30 Business Days of receipt of **tie** comments and/or objections under Clause 73.5, make revisions having regard to such comments and/or objections and resubmit the information and report to **tie**. If the information and reports cannot be agreed by the Parties then the matter will be determined in accordance with the Dispute Resolution Procedure.
- 73.7 If, in **tie's** reasonable opinion, the provision and performance of the Maintenance Services could be more effective, efficient and economic having regard to the Annual Service Report and the **tie** Customer Satisfaction Survey, then **tie** may serve a **tie** Notice of Change pursuant to Clause 80 (*tie Changes*) stating the desired nature and timing of the changes to the provision or performance of the Maintenance Services or delivery of the Transport Services (or the relevant part thereof).
- 73.8 The Infraco shall, in conjunction with **tie**, develop Best Value Improvement Plans setting out mutually agreed tasks between the Infraco and **tie** to improve the delivery of the Maintenance Services, and demonstrate continuous improvement in the Maintenance Services, and the achievement of the Project Vision.
- 73.9 The preparation of Best Value Improvement Plans will take into account the conclusions from the Annual Service Report and the **tie** Customer Satisfaction Surveys.

## PART 14 - BOND, WARRANTIES, INSURANCES AND LIABILITIES

### 74. BOND, PARENT COMPANY GUARANTEE AND COLLATERAL WARRANTIES<sup>12</sup>

- 74.1 As a condition precedent to the Commencement Date, the Infraco shall provide to **tie** an adjudication bond in accordance with Clause 74.2 and in the form of part A of Schedule 8 (*Bonds, Parent Company Guarantee and Collateral Warranty*) which has been issued by a surety approved in advance by **tie**.
- 74.2 The Adjudication Bond shall be for an initial amount of [£♦] sterling provided that:
- 74.2.1 on issue of the Certificate of Sectional Completion for Section A, the amount of the Adjudication Bond shall be reduced to [£♦] sterling;
- 74.2.2 on issue of the Certificate of Sectional Completion for Section B, the amount of the Adjudication Bond shall be reduced to [£♦] sterling;
- 74.2.3 on issue of the Certificate of Sectional Completion for Section C, the amount of the Adjudication Bond shall be reduced to [£♦] sterling;
- 74.2.4 on issue of the Certificate of Sectional Completion for Section D, the amount of the Adjudication Bond shall be reduced to [£♦] sterling;
- 74.2.5 on issue of a Network Certificate, the amount of the Adjudication Bond shall be reduced to [£♦] sterling; and
- 74.2.6 on issue of the Reliability Certificate, the amount of the Adjudication Bond shall be reduced to [£♦] sterling.
- 74.3 As a condition precedent to the commencement of T1, T2 and T3 in respect of Section D, the Infraco shall provide to **tie** a retention bond in the amount of [£♦] sterling and in the form of part B of Schedule 8 (*Bonds, Parent Company Guarantee and Collateral Warranty*) which has been issued by a surety approved in advance by **tie**.
- 74.4 As a condition precedent to the release of the Retention Bond, the Infraco shall provide to **tie** a handback bond in the amount of [£♦] sterling and in the form of part C of Schedule 8 (*Bonds, Parent Company Guarantee and Collateral Warranty*) which has been issued by a surety approved in advance by **tie**.

- 74.5 In the event the credit rating of the sureties referred to in Clauses 74.1, 74.3 or 74.4 is downgraded to A- or a lower rating by Standard & Poors, **tie** shall be entitled to request the Infraco to procure a substitute bond on identical terms from a surety approved in advance by **tie**.
- 74.6 As a Condition Precedent, the Infraco shall procure the execution and delivery to **tie**, of a parent company guarantee, in the form set out in part D of Schedule 8 (*Bonds, Parent Company Guarantee and Collateral Warranty*).
- 74.7 Within thirty days of any written request from **tie** (or such longer period as the Parties, acting reasonably, may agree), the Infraco shall execute a collateral warranty (in the form set out in part E of Schedule 8 (*Bonds, Parent Company Guarantee and Collateral Warranty*)) or where such form is not acceptable, in a different form which is acceptable to both Parties (acting reasonably) in favour of CEC, Transport Scotland, TEL, Network Rail and any other party at **tie's** reasonable request, in respect of carrying out the Infraco Works.

## 75. WARRANTIES

75.1 The Infraco hereby represents, warrants and undertakes to **tie** that:

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

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

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

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

75.1.3 the Infraco:

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<sup>12</sup> Drafting to be further revised by **tie** to reflect the table entitled "Infraco - Protection Measures".

- 75.1.3.1 is duly incorporated under the laws of [◆] and has the power to own its own assets and carry on its own business; and
- 75.1.3.2 has full power and authority (and does not require the consent, authority or licence of any third party) to enter into and perform this Agreement which constitutes a valid and binding obligation on the Infraco in accordance with its terms; and
- 75.1.3.3 will not, by performing its obligations under this Agreement, be in breach of any undertaking, agreement or legal obligation of any nature in respect of any third party or of any applicable law so as to have a material adverse effect on its ability to discharge its obligations under this Agreement;
- 75.1.4 the Infraco [and the Infraco's parent company] is not involved in any dispute with HM Revenue and Customs, the European Commission, the Office of Fair Trading, or any other fiscal or regulatory authority in any jurisdiction concerning any matter which could materially and adversely affect the business of the Infraco or the Infraco Works in any way;
- 75.1.5 the Infraco does not use any processes and is not engaged in any activities which involve the misuse of any confidential or proprietary information belonging to any third party;
- 75.1.6 no claim is presently being assessed and no litigation, arbitration or proceeding is in progress or, to the best of the knowledge and belief of the Infraco pending or threatened, against the Infraco or any of its management or assets which might have an adverse effect on the ability of the Infraco to perform the obligations in this Agreement;
- 75.1.7 the Infraco's provision of any Deliverables and the use by **tie** of any of the Deliverables provided to it as part of the Infraco Works has not infringed and shall not infringe any third party's Intellectual Property Rights;
- 75.1.8 there has been no material adverse change to the financial condition of the Infraco [or the Infraco's immediate parent company] since the audited accounts for the financial year [◆] including any matter resulting in a downgrade of the Infraco's] [or the Infraco's immediate parent company's]

credit rating with any commercially acknowledged independent rating agency reporting the construction sector; and

75.1.9 the performance of the Infraco Works does not create any situation in which a conflict of interest arises for the Infraco.

75.2 Each of the warranties, representations and undertakings given under Clauses 75.1.1 to 75.1.9 shall be construed as a separate and independent warranty, representation and undertaking and shall not be limited or restricted by reference to or inference from any other terms of this Agreement.

75.3 The Infraco shall immediately disclose in writing to **tie** any event or circumstance which may arise or become known to it after the Effective Date which is materially inconsistent with any of the warranties, representations or undertakings given under Clauses 75.1.1 to 75.1.9 or which has or is likely to have a material adverse effect on the Infraco Works.

## **76. REQUIRED INSURANCES**

### **Required Insurances**

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

76.2 The Infraco shall procure that all Required Insurances shall:

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

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

- 76.3 The Infraco shall not make any material alteration to the terms of the Required Insurances (including material changes to the level of deductibles) without **tie's** prior approval (which approval shall not be unreasonably withheld). If any such material alteration to the Required Insurances is made, the Infraco shall complete the questionnaire set out in part 3 of Schedule 11 (*Required Insurances*), duly endorsed by its insurance broker. If the insurer makes or attempts to make any material alteration or purports to withdraw cover, the Infraco shall promptly give notice of this to **tie**.
- 76.4 The Infraco shall ensure that each of its insurance brokers gives **tie** as soon as reasonably practicable after any policy of Required Insurance is taken out, replaced or renewed, a letter of undertaking in the form set out in part 2 of Schedule 11 (*Required Insurances*).
- 76.5 The Infraco shall provide satisfactory evidence to **tie** that the Required Insurances have been effected. Thereafter, the Infraco shall upon request produce to **tie** receipts for the payment of current insurance premiums or equivalent documentary evidence to confirm that such Required Insurances are being properly maintained, and on the anniversary of the Effective Date and on each subsequent anniversary thereof until the date of expiry or earlier termination, the Infraco shall complete an insurance questionnaire set out in part 3 of Schedule 11 (*Required Insurances*) in relation to the Required Insurances to be taken out by the Infraco and submit such completed questionnaire to **tie** as soon as reasonably practicable. If the Infraco defaults in insuring or continuing to maintain the Required Insurances, **tie** may insure against any risk in respect of which such default has occurred and recover any premiums from the Infraco as a debt immediately due and payable.
- 76.6 The Infraco shall:
- 76.6.1 procure that the Required Insurances contain a waiver of subrogation against **tie**, any **tie** Party and the named insured parties as set out in part 1 of Schedule 11 (*Required Insurances*) save in respect of fraud or deliberate non-disclosure; and
- 76.6.2 where the Infraco is obliged to effect any Required Insurances, not bring any claim or action against **tie** (or any **tie** Party), in respect of any losses, damages, liabilities, costs, expenses and charges in circumstances where and

to the extent that the Infraco could recover such losses, damages, costs, expenses and charges under such insurance (whether or not such insurance has in fact been effected or, if effected, has been vitiated as a result of any act or omission of the Infraco (or any Infraco Party), including but not limited to non-disclosure or under-insurance), provided that, to avoid doubt, this Clause 76.6.2 shall not by itself prevent the Infraco from claiming against **tie** (or any **tie** Party) in respect of a breach of this Agreement by **tie** or any **tie** Party for any losses, damages, costs, expenses and charges arising from such breach not covered because of the level of deductibles under such insurance permitted by this Agreement or to the extent of such losses, damages, costs, expenses and charges exceeds the greater of the insurance placed or the minimum limit of indemnity required in respect of such insurance under part 1 of Schedule 11 (*Required Insurances*).

- 76.7 The Infraco shall not take any action or fail to take any action or (insofar as it is reasonably within its power) permit or allow others to take or fail to take any action (in either case including failure to disclose any fact) as a result of which any of the Required Insurances may be rendered void, voidable, unenforceable, suspended or impaired in whole or in part or which may otherwise render any sum paid out under any relevant policy repayable in whole or in part.
- 76.8 The supply to **tie** of any insurance policy or insurance certificate or renewal certificate or other evidence of compliance with this Clause 76 (*Required Insurances*) shall not imply, or be taken as, acceptance by **tie** that:
- 76.8.1 the extent of insurance cover is sufficient and its terms are satisfactory; or
- 76.8.2 in respect of any interests or parties not insured or any risks not insured against, an acceptance by **tie** that the same were uninsurable.
- 76.9 Neither failure to comply nor full compliance with the provisions of this Clause 76 (*Required Insurances*) shall relieve the Infraco of its liabilities and obligations under this Agreement.
- 76.10 The Infraco shall apply any proceeds of any policies of insurance maintained in accordance with part 1 of Schedule 11 (*Required Insurances*) in satisfaction of the claim, demand, proceeding or liability in respect of which such proceeds are payable (unless already paid direct to the third party or employee by the insurer).

- 76.11 The Infraco undertakes with **tie** in relation to the Required Insurances:
- 76.11.1 to comply with all requirements of the insurers; and
- 76.11.2 to give notice to **tie** immediately upon the happening of any event which will adversely affect any policy of insurance effected in accordance with this Clause 76 (*Required Insurances*), including the downgrading of the credit rating to A- or lower by Standard & Poors of any party providing any of the Required Insurances.
- 76.12 The Infraco shall immediately inform **tie** in writing if any of the Required Insurances cease to be maintained and/or cease to be available in the EU insurance market at commercially reasonable rates and on commercially reasonable terms to contractors of the same status as at the Effective Date, and discipline as the Infraco. In this event, the Parties shall meet to discuss the means by which any risks previously covered by the Required Insurances should be managed, mitigated or controlled. Any increased or additional premium required by insurers by reason of the Infraco's own claims record or other acts, omissions, matters or things particular to the Infraco shall be deemed to be within commercially reasonable rates and terms.
- 76.13 The Infraco shall fully co-operate with any measures reasonably required by **tie**, including (without limitation) completing any proposals for insurance and associated documents or maintaining such insurance at rates above commercially reasonable rates provided that if the Infraco is maintaining such insurance at such rates, **tie** shall undertake in writing to reimburse the Infraco in respect of half of the net cost of such insurance to the Infraco above commercially reasonable rates. If **tie** undertakes in writing to reimburse the Infraco in respect of half of the net cost of such insurance to the Infraco above commercially reasonable rates or, if **tie** effects such insurance at or above commercially reasonable rates, the Infraco shall reimburse **tie** in respect of what the net cost of such insurance to the Infraco would have been at commercially reasonable rates and terms, and the cost of maintaining any such insurance at rates above commercially reasonable rates by the Infraco or by **tie** shall be borne in equal proportions by the Infraco and **tie**.

#### **OCIP Insurances**

- 76.14 The Infraco acknowledges that **tie** has taken out the OCIP Insurances and agrees to comply with the requirements of the insurers with whom the OCIP Insurances are

placed. The Infraco agrees that it will intimate to **tie** any act, occurrence or failure which may:

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

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

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

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

#### **Additional Insurance**

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

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

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

- 76.17.3 contain a provision that requires the insurer to send copies of all notices of cancellation or alteration or suspension or any other notices given under or in relation to the policy to **tie** promptly upon receiving any notices of cancellation or alteration or suspension or any other notices;
- 76.17.4 contain a provision that a notice of a claim given to the insurer by one of the insured parties under the policy shall, in the absence of manifest error, be accepted by the insurer as valid notification of a claim in respect of the interests of all insured parties;
- 76.17.5 contain a provision to the effect (on the basis of non-vitiation/severability) that all the provisions of any Additional Insurance shall operate as if there were a separate policy in effect (save in respect of the sums insured, limits of liability and excesses/deductibles which shall be at the levels stated) for each named insured and that non-compliance with any policy term, condition or warranty and/or misrepresentation or non disclosure of material information by the Infraco or any other co-insured will not affect the rights and/or interests of any co-insured party under any policies effected as Additional Insurance; and
- 76.17.6 ensure that the Additional Insurances are primary, and shall not be brought into contribution with any other policy or policies effected by or on behalf of any of the insured parties.
- 76.18 The Infraco shall supply **tie** with copies of every policy document, insurance certificate and renewal certificate relating to any Additional Insurance (or such other evidence of insurances as may be reasonably required by **tie**) and documentary evidence to the effect that the Required Insurances (other than any Additional Insurance) have been taken out and are being maintained as soon as it is available but in any event no later than 7 days (in respect of certificates) and sixty days (in respect of policies) after the inception of the relevant policies, together with evidence of payment of the premiums and any periodic renewal certificates.
- 76.19 The Infraco shall inform **tie** in writing as soon as reasonably practicable after it receives a claim or becomes aware of the occurrence of any event that may give rise to a claim under any Required Insurance (if related to the Edinburgh Tram Network) or Additional Insurance and will ensure that **tie** is kept fully informed of subsequent

action and developments concerning the claim; such written information shall not be required in relation to any claim of less than £50,000 (as Indexed). The Infraco shall take such steps as are necessary or appropriate to ensure that each Infraco Party, in respect of any event or claim of a like nature arising out of or relating to the operation or responsibility of that Infraco Party, or any event or claim of which they become aware, takes in relation to the Infraco like action to that which the Infraco is required to take under this Clause 76.19 in relation to **tie**, and shall inform **tie** promptly of information thus received from any Infraco Party.

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

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

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

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

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

77.1.2 breach of any term or provision of this Agreement including any Law.

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

- (a) death or injury to any person;
- (b) loss of or damage to any property;
- (c) loss of or damage to any part of the Infraco Works;
- (d) causing **tie** and/or CEC to be in breach of any Law; or
- (g) causing **tie** and/or CEC to be in breach of any of the Asset Protection Agreement, the DPOFA, the Roads Demarcation Agreement, the Tram Inspector Agreement, the Third Party Agreements and any other undertakings which have been given by **tie** and/or CEC to any third party and which have been notified to the Infraco; or
- (h) causing **tie** and/or CEC to be in breach of any Land Consent, Permanent Land or the Temporary Land; or
- (i) infringement or alleged infringement of a third party's Intellectual Property Rights; or
- (j) making alternative arrangements, procuring or commissioning a bespoke "fix" or replacement system(s) and the management time reasonably incurred in making such arrangements) of whatsoever nature suffered or incurred by **tie** by reason of or in connection with any and all breaches by the Infraco of Clause 54.5.

77.2 The exception referred to in Clause 77.1, which is the responsibility of **tie**, is death of, or injury to, persons or loss of or damage to property resulting from any act, neglect, or breach of statutory duty by **tie**, 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 in respect thereof or in relation thereto.

77.3 The Infraco's liability to indemnify **tie** under Clause 77.1 shall be reduced in proportion to the extent that the act or neglect of **tie**, its agents, servants or other

contractors (not being employed by the Infraco or any Sub-Contractor) may have contributed to the said death, injury, loss or damage.

77.4 Notwithstanding the generality of Clause 77.1, the Infraco shall indemnify **tie** from all loss, costs, claims, expenses and damages that may arise directly or indirectly as a result of any adverse impact or effect which the Infraco Works may have upon the property interests, liabilities and statutory obligations of Forth Ports:

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

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

77.5 Notwithstanding the generality of Clause 77.1, the Infraco shall indemnify **tie** from all loss, costs, claims, damages and expenses that may arise as a result of any adverse impact or effect which the Infraco Works may have upon the property interests, liabilities and obligations of Stakis:-

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

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

77.6 Notwithstanding the generality of Clause 77.1, the Infraco shall indemnify **tie** from all loss, costs, claims, damages, expenses and liabilities incurred by **tie** pursuant to the Network Rail Agreement in relation to:

77.6.1 the exercise of powers under the Tram Legislation (in so far as the same are to be carried out by the Infraco pursuant to this Agreement) including the construction and maintenance activities associated with the Infraco Works; or

77.6.2 any act or omission of the Infraco whilst engaged upon the Infraco Works.

77.7 The Infraco shall not be relieved of any liability under Clause 77.6 by reason of:

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

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

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

77.8.1 of either Party for:

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

77.8.1.2 fraud or fraudulent misrepresentation;

77.8.2 subject to Clause 77.9, of the Infraco, for any breach of this Agreement or any delict (including negligence) or other liability arising prior to termination of this Agreement;

provided that nothing in this Clause 77.8 shall confer on either Party rights or remedies that they would not otherwise have.

77.9 Notwithstanding anything to the contrary contained in this Agreement and/or the Adjudication Bond, Retention Bond or Handback Bond, the liability of the Infraco under or in connection with this Agreement whether in contract or delict, in negligence for breach of statutory duty or otherwise (other than in respect of personal injury or death) shall be limited to 15% of the Contract Price provided always that the calculation of the quantum of such limitation:

77.9.1 shall exclude the proceeds of the Adjudication Bond, Retention Bond and Handback Bond; and

77.9.2 does not relate to liabilities which are or should have been covered by the proceeds of the Required Insurances, the OCIP Insurances, and/or any Additional Insurances.

- 77.9.3 does not relate to liabilities which would have been covered by the proceeds of the Required Insurances, the OCIP Insurances and/or any Additional Insurances but for the application of any deductible under such Required Insurances, the OCIP Insurances and/or any Additional Insurances.
- 77.10 Subject to Clause 77.8, neither party shall be entitled to claim damages for breach of this Agreement, in delict (including negligence), breach of statutory duty or on any other basis whatsoever to the extent that such damages claimed by that Party are for Indirect Losses suffered by that Party provided that for the avoidance of doubt, nothing in this Clause 77.10 shall affect either Party's liability to the other Party, in respect of any claim, action, proceedings or demand against such other Party by a third party in connection with any Indirect Loss suffered. Such claim, action, proceedings or demand shall include any claim, action, proceedings or demand received by **tie** and/or CEC in relation to any breach of the Asset Protection Agreement, the DPOFA, the Roads Demarcation Agreement, the Tram Inspector Agreement, the Third Party Agreements, the Permanent Land, the Temporary Land or the Land Consents.
- 77.11 The Infraco shall not be relieved or excused of any responsibility, liability or obligation under this Agreement by the appointment of any Infraco Party. The Infraco shall, as between itself and **tie**, be responsible for the selection, pricing, performance, acts, defaults, omissions, breaches, delict and offences of any Infraco Party. All references in this Agreement to any act, default, omission, breach, delict or offence of the Infraco shall be construed to include any such act, default, omission, breach or delict of any Infraco Party.
- 77.12 The Parties acknowledge and agree that the only rights available to them to terminate this Agreement are those expressly set out in this Agreement and that neither Party shall be entitled to exercise a right to terminate or rescind or accept the repudiation of this Agreement under any other right whether arising in common law or statute or otherwise howsoever (other than for fraud or a fraudulent misrepresentation).
- 77.13 The Infraco acknowledges and agrees that the express rights provided in this Agreement in relation to termination and the calculation and payment of amounts due following such termination are exclusive and are in place of (and not cumulative with) any other rights or remedies which might arise as a consequence of such termination. The Infraco hereby waives all other rights and remedies arising from

such termination, whether express or implied, arising by common law (including in delict), by statute or otherwise howsoever provided that nothing in this Clause 77.13 exclude the right of the Infraco to claim remedies expressly conferred on them by this Agreement.

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

### **Criminal Liability**

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

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

### **78. CONDUCT OF CLAIMS**

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

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

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

- 78.2 In relation to any Claim subject to Clause 78.1.2:
- 78.2.1 the Infraco shall keep **tie** fully informed and consult with it about material elements of the conduct of the Claim;
- 78.2.2 the Infraco shall not bring the name of **tie** into disrepute; and
- 78.2.3 the Infraco shall not pay or settle such Claims without the prior written consent of **tie**, such consent not to be unreasonably withheld or delayed.
- 78.3 **tie** shall be free to take steps in the proceedings, pay or settle any Claim on such terms as it thinks fit (and without prejudice to its rights and remedies under this Agreement) if the Infraco fails to notify **tie** of its intention to conduct the relevant Claim within 20 Business Days of the notice from **tie** under Clause 78.1.1 above or the Infraco notifies **tie** that it does not intend to take conduct of the Claim.
- 78.4 **tie** shall be free at any time to give notice to the Infraco that it is retaining or taking over (as the case may be) the conduct of any defence, dispute, compromise or appeal of any Claim (or of any incidental negotiations) to which Clause 78.1.2 applies. On receipt of such notice the Infraco shall promptly take all steps necessary to transfer the conduct of such claim to **tie** and shall provide to **tie** all reasonable co-operation, access and assistance for the purposes of considering and resisting such Claim. If **tie** gives any notice pursuant to this Clause 78.4, then the Infraco shall not be released from any liability under the relevant indemnity in respect of such Claim. **tie** shall keep the Infraco reasonably informed as to the progress and status of any such Claim until such Claim is settled, withdrawn, discontinued or otherwise disposed of.
- 78.5 If, in controlling and contesting any Claim, **tie** takes or fails to take any action in relation to such Claim which it might reasonably be expected to take or not take (as the case may be) which terminates or reduces any entitlement of the Infraco to recover any part of the Claim from any insurer under any of the Required Insurances, the OCIP Insurances and/or any Additional Insurance, the liability of the Infraco to indemnify **tie** in respect of such Claim shall be reduced by an amount equal to such part or, as the case may be, the amount of the reduction thereof (except in the case where **tie** could not reasonably have been expected to have known that the Infraco's entitlement could be so terminated or reduced).

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

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

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

provided that there shall be no obligation on **tie** to pursue such recovery and that the Infraco is repaid only to the extent that the amount of such recovery aggregated with any sum recovered from the Infraco exceeds any loss sustained by **tie** in respect of the Claim.

## PART 15 - CHANGES

### 79. MANAGEMENT OF VARIATIONS

- 79.1 Any variations proposed to the Infraco Works shall be dealt with as follows:
- 79.1.1 **tie** Changes shall be dealt with in accordance with Clause 80 (*tie Changes*);
  - 79.1.2 Infraco Changes shall be dealt with in accordance with Clause 81 (*Infraco Changes*);
  - 79.1.3 Small Works Changes shall be dealt with in accordance with Clause 82 (*Small Works Changes*);
  - 79.1.4 Accommodation Works Changes shall be dealt with in accordance with Clause 83 (*Accommodation Works Changes*);
  - 79.1.5 Qualifying Changes in Law shall be dealt with in accordance Clause 84 (*Qualifying Changes in Law*);
  - 79.1.6 Network Expansions shall be dealt with in accordance with Clause 85 (*Network Expansions*);
  - 79.1.7 Labour tax and landfill tax fluctuations shall be dealt with in accordance with Clause 71 (*Labour Tax and Landfill Tax Fluctuations*); and
  - 79.1.8 any instructions relating to the expenditure of any provisional sums contained in Schedule 4 (*Contract Price Analysis*) shall be dealt with as **tie** Changes in accordance with Clause 80 (**tie Changes**) provided that the instruction of such provisional sums shall not give rise to any entitlement to any extension of time under Clause 80.4.3.
- 79.2 The Infraco shall maintain a change control register which shall detail the status and give summary information on all withdrawn, potential and confirmed variations under this Agreement. The Infraco shall provide a copy of the change control register to **tie** and the Infraco shall provide updates of the change control register to **tie** every Reporting Period.
- 79.3 No variation ordered in accordance with this Agreement shall in any way vitiate or invalidate this Agreement.

## 80. TIE CHANGES

- 80.1 Unless expressly stated in this Agreement or as may otherwise be agreed by the Parties, **tie** Changes shall be dealt with in accordance with this Clause 80 (*tie Changes*). If **tie** requires a **tie** Change, it must serve a **tie** Notice of Change on the Infraco.
- 80.2 A **tie** Notice of Change shall:
- 80.2.1 set out the proposed **tie** Change in sufficient detail to enable the Infraco to calculate and provide the Estimate in accordance with Clause 80.4 below;
  - 80.2.2 require the Infraco to provide **tie** within 18 Business Days of receipt of the **tie** Notice of Change with an Estimate, and specify whether any competitive quotes are required; and
  - 80.2.3 set out how **tie** wishes to pay (where relevant) for the proposed **tie** Change.
- 80.3 If, on receipt of the **tie** Notice of Change, the Infraco considers (acting reasonably) that the Estimate required is too complex to be completed and returned to **tie** within 18 Business Days, then the Infraco shall, within 5 Business Days of receipt of such **tie** Notice of Change, deliver to **tie** a request for a reasonable extended period of time for return of the Estimate, such extended period to be agreed by the Parties, both acting reasonably.
- 80.4 As soon as reasonably practicable, and in any event within 18 Business Days after having received a **tie** Notice of Change (or such longer period as may have been agreed by the Parties, pursuant to Clause 80.3), the Infraco shall deliver to **tie** the Estimate. The Estimate shall include the opinion of the Infraco (acting reasonably) on:
- 80.4.1 whether relief from compliance with any of its obligations under this Agreement is required during or as a result of the implementation of the proposed **tie** Change;
  - 80.4.2 any impact on the performance of the Infraco Works and the performance of the Edinburgh Tram Network;
  - 80.4.3 any impact on the Programme and any requirement for an extension of time;

- 80.4.4 any Consents which are required as a result of the implementation of the proposed **tie** Change;
- 80.4.5 any amendment required to the Agreement as a result of the implementation of the proposed **tie** Change;
- 80.4.6 the proposed method of delivery of the proposed **tie** Change;
- 80.4.7 proposals to mitigate the impact of the proposed **tie** Change; and
- 80.4.8 any increase or decrease in any sums due to be paid to the Infraco (including the value of any Milestone Payments and the scheduling of such Milestone Payments) as a result of the implementation of the proposed **tie** Change.
- 80.5 The valuation of any **tie** Changes made in compliance with this Clause 80 (*tie Changes*) shall be added to or deducted from the sums due to be paid to the Infraco as the case may be, and shall be ascertained by **tie** as follows:
- 80.5.1 by measurement and valuation at the rates and prices for similar work in Schedule 5 (*Pricing Schedules*) in so far as such rates and prices apply;
- 80.5.2 if such rates and prices do not apply, by measurement and valuation at rates and prices deduced therefrom insofar as it is practical to do so;
- 80.5.3 if such rates and prices do not apply and it is not practicable to deduce rates and prices therefrom, by measurement and/or valuation at fair rates and prices; or
- 80.5.4 if the value of the **tie** Change cannot properly be ascertained by measurement and/or valuation, the value of the resources and labour employed thereon, as appropriate, in accordance with the basis of rates for provisional work set out in Schedule 5 (*Pricing Schedules*);
- provided that where any **tie** Change would otherwise fall to be valued under Clauses 80.5.1 and 80.5.2 above, but **tie's** Representative is of the opinion that the instruction therefor was issued at such a time or was of such content as to make it unreasonable for the alteration or addition to be so valued, the value of the **tie** Change shall be ascertained by measurement and/or valuation at fair rates and prices.
- 80.6 The Infraco shall include in the Estimate evidence demonstrating that:

- 80.6.1 the Infraco has used all reasonable endeavours to minimise (including by the use of competitive quotes where appropriate) any increase in costs and to maximise any reduction of costs;
- 80.6.2 the Infraco has, where required by **tie** and practicable, sought competitive quotes from persons other than the Infraco Parties in pursuance of its obligation under Clause 80.6.1 above;
- 80.6.3 the Infraco has investigated how to mitigate the impact of the **tie** Change; and
- 80.6.4 the proposed **tie** Change will, where relevant, be implemented in the most cost-effective manner, including showing, where reasonably practicable, that when any expenditure is incurred, relevant Changes in Law that are foreseeable at the time of consideration of the specific **tie** Change and which relate to that **tie** Change have been taken into account by the Infraco.
- 80.7 If the Infraco does not intend to use its own resources to implement any proposed **tie** Change, it shall:
- 80.7.1 demonstrate that it is appropriate to subcontract the implementation of such **tie** Change; and
- 80.7.2 comply with Good Industry Practice with the objective of ensuring that it obtains best value for money when procuring any sub-contractor or Deliverable required in relation to the proposed **tie** Change.
- 80.8 As soon as reasonably practicable after **tie** receives the Estimate, the Parties shall discuss and agree the issues set out in the Estimate. From such discussions **tie** may modify the **tie** Notice of Change, and **tie** may require the Infraco to seek and evaluate competitive tenders. In each case the Infraco shall, as soon as practicable, and in any event not more than 14 Business Days after receipt of such modification, notify **tie** of any consequential changes to the Estimate.
- 80.9 Subject to Clause 80.10, if the Parties cannot agree on the contents of the Estimate, then either Party may refer the Estimate for determination in accordance with the Dispute Resolution Procedure.
- 80.10 Where the Parties cannot agree on the content of an Estimate, and it is deemed by **tie** (acting reasonably) that the proposed **tie** Change is urgent and/or has a potential

significant impact on the Programme, **tie** shall determine a provisional Estimate and the Infraco shall, subject to Clause 80.11, carry out the proposed **tie** Change in accordance with such provisional Estimate and a **tie** Change Order shall be deemed to have been served on the Infraco by **tie**. Either Party may refer the provisional Estimate for determination in accordance with the Dispute Resolution Procedure provided that such referral shall not allow the Infraco to refuse to carry out such proposed **tie** Change in accordance with the provisional Estimate.

80.11 The Infraco shall not be obliged to implement any proposed **tie** Change where:

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

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

80.11.2.1 be contrary to Law;

80.11.2.2 not be technically feasible;

80.11.2.3 substantially and materially increase the probability of a substantial non-compliance with this Agreement by the Infraco; or

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

80.12 Subject to Clause 80.10, as soon as reasonably practicable after the contents of the Estimate have been agreed or determined pursuant to the Dispute Resolution Procedure **tie** shall:

80.12.1 issue a **tie** Change Order; or

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

Subject to Clause 80.10, for the avoidance of doubt, the Infraco shall not commence work until instructed through receipt of a **tie** Change Order.

- 80.13 Subject to Clause 80.10, if **tie** does not issue a **tie** Change Order within 30 days of the contents of the Estimate having been agreed or determined pursuant to Clause 80.9, then the **tie** Notice of Change shall be deemed to have been withdrawn.

#### **Restrictions on Entitlements to Relief for tie Change**

- 80.14 The Infraco shall not be entitled to any extension of time, payment or relief in respect of any **tie** Notice of Change if and to the extent that the Infraco could (where such action is within the power of the Infraco and the Infraco could be reasonably expected to take such action, having regard to the scope and nature of the Infraco Works), by the exercise of reasonable foresight and diligence, have prevented or materially reduced the requirement for such **tie** Change.
- 80.15 If, having received instructions from **tie** or **tie's** Representative, the Infraco consider that compliance with those instructions would amount to a **tie** Change, the Infraco shall within 10 Business Days of any instructions being received, notify **tie** of the same and, if it is agreed by the parties or determined pursuant to the Dispute Resolution Procedure that a **tie** Change would arise if the instructions were complied with, **tie** may proceed with the instruction in accordance with this Clause 80 (*tie Changes*).
- 80.16 Any failure by the Infraco to notify **tie** within 10 Business Days of instructions being received that it considers compliance with such instructions from **tie** or **tie's** Representative would amount to a **tie** Change shall constitute an irrevocable acceptance by the Infraco that any compliance with **tie's** or **tie's** Representative comments shall be without cost to **tie** and without any entitlement to any extension of time or other relief.
- 80.17 Any failure by the Infraco to notify **tie** within 10 Business Days of becoming aware of any other matter or occurrence which could amount to a **tie** Change, shall constitute an irrevocable acceptance by the Infraco that in being instructed to deal with such matter or occurrence as a **tie** Change, the Infraco shall not be entitled to any costs, extension of time or other relief, in respect of such **tie** Change.

### **81. INFRACO CHANGES**

- 81.1 Within 10 Business Days of the Infraco becoming aware of the need or desirability for a variation to the Infraco Works, the Infraco shall notify **tie** of the reasons for

such variation and make proposals for the proposed variation in writing. **tie** shall be free to accept or reject any proposed variation as **tie** thinks fit, and the **tie** shall determine whether such proposal is dealt with in accordance with Clause 81.2 or Clause 81.3.

81.2 If **tie** wishes to proceed with a variation proposed by the Infraco, **tie** shall serve a **tie** Notice of Change on the Infraco and Clauses 80.2 to 80.13 shall be adhered to by **tie** and the Infraco, provided that:

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

81.2.2 in the event of an anticipated increase to the costs of the Infraco resulting from any change requested by the Infraco pursuant to Clause 81.1, there shall be no variation to the Contract Price.

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

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

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

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

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

## 82. SMALL WORKS CHANGES

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

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

82.1.2 the materials element shall be charged at the cost (excluding VAT) of the materials to the Infraco or to the Sub-Contractor carrying out the work (net of all discounts) plus the percentage uplift as indicated in the Schedule of Rates; and

82.1.3 no other costs, expenses, margins, overheads, supervisory costs, commissions or other amounts shall be included

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

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

82.3 If, at any time within 5 Business Days following receipt by **tie** of a Small Works Cost Notice pursuant to Clause 82.1, **tie** notifies the Infraco in writing that **tie** or **tie's** Representative wishes the Infraco to proceed with the Small Works to which the Small Works Cost Notice relates, the Infraco shall carry out and complete such Small Works in accordance with the said Small Works Cost Notice and the relevant request pursuant to Clause 82.1 from **tie** in accordance with any timing agreed pursuant to Clause 82.2 but otherwise as soon as reasonably practicable.

82.4 Following completion of any Small Works by the Infraco in accordance with this Clause 82 (*Small Works Changes*), **tie** shall make payment to the Infraco of the costs included in the relevant Small Works Cost Notice in accordance with Clause 67

*(Payment in respect of Applications for Milestone Payments) or Clause 68 (Payment in respect of Maintenance Services) as relevant.*

### **83. ACCOMMODATION WORKS CHANGES**

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

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

83.1.2 the materials element shall be charged at the cost (excluding VAT) of the materials to the Infraco or to the Sub-Contractor carrying out the work (net of all discounts) plus the percentage uplift as indicated in the Schedule of Rates; and

83.1.3 no other costs, expenses, margins, overheads, supervisory costs, commissions or other amounts shall be included

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

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

- 83.3 If, at any time within 5 Business Days following receipt by **tie** of an Accommodation Works Cost Notice pursuant to Clause 83.1, **tie** notifies the Infraco in writing that **tie** or **tie's** Representative wishes the Infraco to proceed with the Accommodation Works to which the Accommodation Works Cost Notice relates, the Infraco shall carry out and complete such Accommodation Works in accordance with the said Accommodation Works Cost Notice and the relevant request pursuant to Clause 83.1 from **tie** in accordance with the programme agreed pursuant to Clause 83.2 but otherwise as soon as reasonably practicable.
- 83.4 Following completion of any Accommodation Works by the Infraco in accordance with this Clause 83 (*Accommodation Works Changes*), **tie** shall make payment to the Infraco of the costs included in the relevant Accommodation Works Cost Notice in accordance with Clause 67 (*Payment in respect of Applications for Milestone Payments*) or Clause 68 (*Payment in respect of Maintenance Services*) as relevant.

#### **84. QUALIFYING CHANGES IN LAW**

- 84.1 If a Qualifying Change in Law occurs or is to occur, then either Party may write to the other to express an opinion on its likely effects, giving details of its opinion of:
- 84.1.1 any necessary change in the Infraco Works;
  - 84.1.2 whether any changes are required to the terms of this Agreement to deal with the Qualifying Change in Law; or
  - 84.1.3 whether relief from compliance with any obligations under this Agreement is required as a result of the Qualifying Change in Law;
- in each case giving in full detail the procedure for implementing the Qualifying Change in Law. Responsibility for any costs of such implementation (and any resulting variation to payments due under this Agreement or other payment method at **tie's** discretion) shall be dealt with in accordance with Clauses 84.2 and 84.3 below.
- 84.2 As soon as reasonably practicable after receipt of any notice from either Party under Clause 84.1 above, the Parties shall discuss and agree the issues referred to in Clause 84.1 above and any ways in which the Infraco can mitigate the effect of the Qualifying Change in Law and the Infraco shall:

- 84.2.1 provide evidence to **tie** that the Infraco has used and will continue to use all reasonable endeavours (including where appropriate and practicable the use of competitive quotes) to minimise any increase in costs and maximise any reduction in costs;
- 84.2.2 demonstrate how the effects of the Qualifying Change in Law will be mitigated;
- 84.2.3 demonstrate that the relevant changes will be implemented in the most cost effective manner, including showing, where reasonably practicable, that when any expenditure is incurred, relevant Changes in Law that are foreseeable at the time of consideration of the specific Qualifying Change in Law and which relate to that Qualifying Change in Law have been taken into account by the Infraco; and
- 84.2.4 give evidence, where reasonably practicable, as to how the Qualifying Change in Law has affected the fees and/or costs of similar contractors.
- 84.3 As soon as reasonably practicable after the issues referred to in Clause 84.2 have been agreed between the Parties or determined pursuant to the Dispute Resolution Procedure, **tie** shall give a **tie** Notice of Change and the provisions of Clause 80 (*tie Changes*) shall apply except that the Infraco shall be obliged to implement the change in all circumstances (except to the extent that such change is not necessary to implement the Qualifying Change in Law). **tie** shall issue a **tie** Change Order once it has been agreed or determined pursuant to the Dispute Resolution Procedure. In assessing the value of any change, **tie** shall subject to Clause 84.4, pay the agreed amount for each and every claim. **tie** will, at its sole discretion, determine the scope of each and every event.
- 84.4 In accordance with Clause 84.3, payment shall be due from **tie** to the Infraco:
- 84.4.1 subject to Clauses 84.4.2, 84.4.3, 84.4.4 and 84.4.5, in respect of Qualifying Changes in Law which exceed a threshold of £150,000 in aggregate;
- 84.4.2 where the threshold under Clause 84.4.1 has been exceeded, in respect of SDS Qualifying Changes in Law which are above a threshold of £15,000 in respect of each and every event;

84.4.3 where the threshold under Clause 84.4.1 has been exceeded, in respect of Tram Supply Qualifying Changes in Law which are above a threshold of £30,000 in respect of each and every event;

84.4.4 where the threshold under Clause 84.4.1 has been exceeded, in respect of Tram Maintenance Qualifying Changes in Law which are above a threshold of £15,000 in respect of each and every event; and

84.4.5 where the threshold under Clause 84.4.1 has been exceeded, in respect of Infrastructure Maintenance Qualifying Changes in Law which are above a threshold of £75,000 in respect of each and every event.

84.5 Except otherwise expressly provided in this Agreement, the Infraco shall be responsible for any increase in its costs and shall not be entitled to any relief from its obligations under this Agreement to the extent that the same is caused as a result of a General Change in Law.

## **85. PHASE 1B OPTION**

85.1 Not later than [31 March 2009], the Infraco acknowledges that **tie** may, by providing the Infraco with a written notice, instruct that the Phase 1b Works are to be carried out by the Infraco. If so instructed by **tie**, the Infraco shall carry out the Phase 1b Works and, subject to Clause 85.3, the provisions of this Agreement shall apply to the Phase 1b Works.

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

85.3 In the event that **tie** gives the instruction to the Infraco to carry out the Phase 1b Works under Clause 85.1, the provisions set out in Schedule 42 (*Phase 1b Provisions*) shall come into force and this Agreement shall be amended as set out therein.

## **86. NETWORK EXPANSIONS**

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

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

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

86.2.2 the costs of any Network Expansion in respect of such services and any design and/or works and/or maintenance shall be valued in accordance with Clause 80 (*tie Changes*).

86.3 If **tie** and the Infraco are unable to agree the costs of any Network Expansion pursuant to Clause 86.2.2, **tie** may withdraw its request for the Infraco to such services and design and/or works and/or maintenance, and **tie** may continue with the development of such Network Expansion, either by itself or in conjunction with third parties.

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

86.4.1 the Infraco shall provide access to such information, documents and records as may be reasonably requested by **tie** or the **tie** Parties in relation to the development of the proposed Network Expansion; and

86.4.2 **tie** and the Infraco will negotiate in good faith in relation to agreeing any amendments to this Agreement that are necessary in respect of the Network Expansion.

## PART 16 - SUSPENSION, TERMINATION, EXPIRY AND HANDBACK

### 87. SUSPENSION OF WORK

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

87.1.1 otherwise provided for in the Agreement;

87.1.2 necessary by reason of weather conditions or by some default on the part of the Infraco; or

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

then if compliance with **tie's** Representative's instructions under this Clause 87 (*Suspension of Work*) involves the Infraco in delay or extra cost, **tie's** Representative shall take such delay into account in determining any extension of time or costs to which the Infraco is entitled under Clause 65 (*Compensation Events*).

87.2 If the progress of the Infraco Works or any part thereof is suspended on the written order of **tie's** Representative and if permission to resume work is not given by **tie's** Representative within a period of six months from the date of suspension then the Infraco may unless such suspension is otherwise provided for in the Agreement or continues to be necessary by reason of some default on the part of the Infraco serve a written notice on **tie's** Representative requiring permission within 20 Business Days from the receipt of such notice to proceed with the Infraco Works or that part thereof in regard to which progress is suspended. If within the said 20 Business Days **tie's** Representative does not grant such permission, the Infraco by a further written notice so served may (but is not bound to) elect to treat the suspension where it affects part only of the works as an omission of such part under Clause 80 (*tie Changes*) or where it affects the whole Infraco Works as an abandonment of the Agreement by **tie**.

87.3 Upon termination of the Infraco's employment pursuant to Clause 87.2:

87.3.1 **tie** shall be under the same obligations with regard to payment as if termination on the grounds of **tie** default had occurred in accordance with the provisions of Clause 88 (*Termination or Suspension for tie Default*); and

87.3.2 the Infraco shall comply with Clause 94 (*Effects of Termination or Expiry*) and Clause 95 (*Transition on Termination or Expiry*).

## **88. TERMINATION OR SUSPENSION FOR TIE DEFAULT**

88.1 If a **tie** Default has occurred and the Infraco wishes to terminate this Agreement the Infraco must serve a termination notice on **tie** within thirty days of becoming aware of the **tie** Default. Failure to do so shall be a waiver of the right to terminate.

88.2 The Infraco shall specify in the termination notice the type of the **tie** Default which has occurred entitling the Infraco to terminate.

88.3 Provided the Infraco has complied with Clauses 88.1 and 88.2, this Agreement shall terminate on the day falling sixty days after the date on which **tie** receives the termination notice, unless **tie** rectifies the **tie** Default within sixty days of receipt of the termination notice.

88.4 The Infraco shall not be entitled to, and shall not purport to, terminate this Agreement or accept any repudiation of this Agreement, except as expressly provided in this Clause 88 (*Termination or Suspension for tie Default*) or Clause 91 (*Termination by Reason of Force Majeure*).

88.5 Upon expiry of the sixty days notice referred to in Clause 88.3 and notwithstanding the provisions of Clause 49 (*Non-Removal of Materials and Contractor's Equipment*) the Infraco shall with all reasonable despatch remove from the Site all Infraco's Equipment. In the event of any failure so to do **tie** shall have like powers to those contained in Clause 49.3 to dispose of any Infraco's Equipment.

88.6 No compensation shall be payable by **tie** to the Infraco for termination of this Agreement in terms of this Clause 88 (*Termination or Suspension for tie Default*) whether under contract, delict (including negligence), breach of (or compliance with) statutory duty, restitution or otherwise but without prejudice to payments due under Clause 88.8.

88.7 On termination of this Agreement in terms of this Clause 88 (*Termination or Suspension for tie Default*), the Infraco shall comply with Clause 94 (*Effects of Termination or Expiry*) and Clause 95 (*Transition on Termination or Expiry*).

88.8 Upon termination of the Infraco's employment pursuant to Clause 88.3 and following receipt of a valid VAT invoice, **tie** shall pay the Infraco (in so far as such amounts or items have not already been covered by payments on account made to the Infraco) the value of all work carried out prior to the date of termination and in addition:

88.8.1 the amounts payable in respect of any preliminary items so far as the work or service comprised therein has been carried out or performed and a proper proportion of any such items which have been partially carried out or performed;

88.8.2 the cost of materials or goods reasonably ordered for the Infraco Works which have been delivered to the Infraco or of which the Infraco is legally liable to accept delivery (such materials or goods becoming the property of **tie** upon such payment being made to the Infraco);

88.8.3 the reasonable cost of removal under Clause 88.5; and

88.8.4 all other expenses properly, demonstrably and reasonably incurred by the Infraco arising from the termination of this Agreement.

Provided that the Infraco shall use all reasonable endeavours to minimise and mitigate any costs referred to in this Clause 88.8 and **tie** shall not be liable to pay the Infraco for such costs to the extent that the Infraco has failed to minimise or mitigate such costs or to the extent that such costs have arisen out of the Infraco's breach of this Agreement or any negligent or wilful act or omission by the Infraco. Any payment to be made under this Clause 88.8 shall be treated as a final account and payment shall be made by **tie** in accordance with Clause 67 (*Payment in respect of Applications for Milestone Payments*) or Clause 68 (*Payment in respect of Maintenance Services*) (as appropriate).

88.9 If **tie** shall fail to pay the Infraco in full any amount properly due and payable under this Agreement by the final date for payment in accordance with the requirements of Clause 67 (*Payment in respect of Applications for Milestone Payments*) or Clause 68 (*Payment in respect of Maintenance Services*) (as appropriate) and no effective notice

to withhold payment has been given by **tie** to the Infraco, the Infraco may, after giving **tie** ninety days' notice in writing of the same, stating the ground or grounds on which it is intended to suspend performance, suspend the performance of the Infraco Works until payment in full is made by **tie**.

**89. VOLUNTARY TERMINATION BY TIE**

89.1 Three years after the issue of the first Certificate of Service Commencement, **tie** may terminate this Agreement at any time and for whatever reason upon giving written notice to the Infraco that this Agreement shall terminate on the date falling six months after the date of service of such written notice.

89.2 Upon termination of the Infraco's employment pursuant to Clause 89.1,

89.2.1 **tie** shall be under the same obligations with regard to payment as if termination on the grounds of **tie** Default had occurred in accordance with the provisions of Clause 88 (*Termination or Suspension for tie Default*); and

89.2.2 the Infraco shall comply with Clause 94 (*Effects of Termination or Expiry*) and Clause 95 (*Transition on Termination or Expiry*).

**90. TERMINATION ON INFRACO DEFAULT**

90.1 In the event that an Infraco Default occurs then **tie** may after giving 7 days notice in writing to the Infraco specifying the event relied on, determine the Infraco's employment under this Agreement (in whole or in part thereof), and/or enter upon the Infraco Works and any other parts of the Site and expel the Infraco therefrom without thereby avoiding the Agreement or releasing the Infraco from any of its obligations or liabilities under the Agreement.

90.2 Where **tie** has entered upon the Infraco Works and any other parts of the Site as set out in Clause 90.1, **tie** may:

90.2.1 complete the Infraco Works itself; or

90.2.2 employ any other contractor to complete the Infraco Works;

and in either case may use for such completion any of the Infraco's Equipment, Temporary Works, goods and materials on any part of the Site. For this purpose **tie**

shall continue to enjoy its right to copy and use all drawings specifications and other documents made by or on behalf of the Infraco.

- 90.3 **tie** may at any time sell any of the said Infraco's Equipment, Temporary Works and unused goods and materials and apply the proceeds of sale in or towards the satisfaction of any sums due or which may become due to it from the Infraco under the Agreement.
- 90.4 Where **tie** has entered upon the Infraco Works and any other parts of the Site, the Infraco shall, if so instructed by **tie's** Representative in writing within 7 days of such entry, assign to **tie** any agreement which the Infraco may have entered into for the supply of any goods or materials and/or for the carrying out of any work for the purposes of the Agreement.
- 90.5 The Infraco shall comply with Clause 94 (*Effects of Termination or Expiry*) and Clause 95 (*Transition on Termination or Expiry*).
- 90.6 No compensation shall be payable by **tie** to the Infraco for termination under this Clause 90 (*Termination on Infraco Default*) whether under contract, delict (including negligence), breach of (or compliance with) statutory duty, restitution or otherwise but without prejudice to payments due under Clause 90.10.
- 90.7 As soon as may be practicable after any such entry and expulsion by **tie**, **tie's** Representative shall fix and determine as at the time of such entry and expulsion:
- 90.7.1 the amount (if any) which has been reasonably earned by the Infraco in respect of work actually done by it under the Agreement; and
- 90.7.2 the value of any unused or partially used goods and materials which are under the control of **tie**;
- and shall certify accordingly.
- 90.8 If **tie** enters upon the Infraco Works and any other parts of the Site and expels the Infraco in accordance with this Clause 90 (*Termination on Infraco Default*), **tie** shall not be liable to pay the Infraco any money under the Agreement (whether in respect of amounts certified by **tie's** Representative or otherwise) including any sums determined under Clause 90.7 unless or until **tie's** Representative certifies that an amount is due to the Infraco under Clause 90.9.

- 90.9 **tie's** Representative shall certify the difference between:
- 90.9.1 such sum as would have been due to the Infraco if the Infraco had completed the Infraco Works together with any proceeds of sale under Clause 90.2; and
- 90.9.2 the costs of completing the Infraco Works (whether or not the Infraco Works are completed under a separate contract) damages for delay (if any) and all other expenses properly incurred by **tie**.
- 90.10 Such difference as is certified by **tie's** Representative in Clause 90.9 shall be a debt due to **tie** or the Infraco as the case may be.
- 90.11 If **tie's** Representative is satisfied at any time prior to the completion of the Infraco Works that such sum as calculated under Clause 90.9.2 exceeds such sum as calculated under Clause 90.9.1, **tie's** Representative may issue an interim certificate to that effect notwithstanding that the Infraco Works have not been completed and such interim certificate shall be considered a debt due from the Infraco to **tie**.
- 90.12 Every certificate issued by **tie's** Representative pursuant to this Clause 90 (*Termination on Infraco Default*) shall be sent to the Infraco with such detailed explanation as may be necessary.
- 90.13 The provisions of this Clause 90 (*Termination on Infraco Default*) are without prejudice to any other rights and remedies of **tie**.
- 90.14 The Infraco shall immediately notify **tie** of:
- 90.14.1 any resolution or decision by the Infraco or the board of directors of the Infraco or a decision by any director of the Infraco to seek legal or financial advice pertaining to the solvency of the Infraco; and/or
- 90.14.2 any presentation of any petition for the purpose of winding up the Infraco or any petition for an administration order.

**91. TERMINATION BY REASON OF FORCE MAJEURE**

- 91.1 Neither Party shall be entitled to bring a claim for a breach of obligations under this Agreement by the other Party or incur any liability to the other Party for any losses or damages incurred by that other Party to the extent that a Force Majeure Event occurs and such party is directly prevented from carrying out such obligations by that Force

Majeure Event provided that such prohibition on bringing a claim and exclusion of liability shall not operate if and to the extent that:

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

91.1.2 the Affected Party could, whether before or after the occurrence of the Force Majeure Event, have reduced or eliminated the resulting breach of its obligations under this Agreement by taking reasonable steps.

91.2 On the occurrence of a Force Majeure Event, the Affected Party shall notify the other Party as soon as reasonably practicable, specifying details of the Force Majeure Event and providing evidence of its effect on the obligations of the Affected Party and any action proposed to remove or mitigate its effect.

91.3 The Parties shall enter into *bona fide* discussions with a view to alleviating the effects of such Force Majeure Event as soon as reasonably practicable, and if the terms or measures to remove the effect of the Force Majeure Event cannot be agreed on or before the date falling 12 months after the date of the commencement of the Force Majeure Event or by the end of such longer period as the Parties may have agreed, or such Force Majeure Event is continuing or its consequence remains such that the Affected Party is unable to comply with all or a material part of its obligations under this Agreement for a period of more than 12 months after the date of the commencement of the Force Majeure Event or by the end of such longer period as the Parties may have agreed, either Party shall have the option to terminate this Agreement by written notice to the other.

91.4 The Parties shall at all times following the occurrence of a Force Majeure Event use all reasonable endeavours to prevent and mitigate the effects of any delay to the performance of the Infraco Works and the Infraco shall at all times during which a Force Majeure Event is subsisting take all steps in accordance with Good Industry Practice to overcome or minimise the consequences of the Force Majeure Event.

91.5 The Affected Party shall notify the other party as soon as reasonably practicable after the Force Majeure Event ceases or no longer causes the Affected Party to be unable to comply with its obligations under this Agreement. Following such notification,

this Agreement shall continue to be performed on the terms existing immediately prior to the occurrence of the Force Majeure Event.

91.6 The effects of a Force Majeure Event shall be dealt with under Clause 64 (*Relief Events*).

91.7 No compensation shall be payable by **tie** to the Infraco for termination of this Agreement in terms of this Clause 91 (*Termination by Reason of Force Majeure*) whether under contract, delict (including negligence), breach of (or compliance with) statutory duty, restitution or otherwise but without prejudice to payments due under Clause 91.8.

91.8 Upon termination of the Infraco's employment pursuant to Clause 91.3,

91.8.1 **tie** shall be under the same obligations with regard to payment as if termination on the grounds of **tie** default had occurred in accordance with the provisions of Clause 88 (*Termination or Suspension for tie Default*); and

91.8.2 the Infraco shall comply with Clause 94 (*Effects of Termination or Expiry*) and Clause 95 (*Transition on Termination or Expiry*).

## **92. TERMINATION FOR CORRUPT GIFTS AND FRAUD**

92.1 The Infraco or anyone employed by it or acting on its behalf (including any Infraco Parties) shall not commit any Prohibited Act.

92.2 If the Infraco, or anyone employed by it or acting on its behalf (including any Infraco Parties), commits any Prohibited Act, then **tie** shall be entitled to act in accordance with this Clause 92 (*Termination for Corrupt Gifts and Fraud*).

92.3 If a Prohibited Act is committed by the Infraco or by an employee of the Infraco not acting independently of the Infraco, then **tie** may terminate this Agreement by giving notice to the Infraco.

92.4 If a Prohibited Act is committed by an employee of the Infraco acting independently of the Infraco, then **tie** may give notice to the Infraco of termination and this Agreement will terminate, unless within thirty days of receipt of such notice the Infraco terminates that employee's employment and (if necessary) procures the performance of the relevant part of the Infraco Works by another person.

- 92.5 If a Prohibited Act is committed by anyone acting on behalf of the Infraco (excluding employees of the Infraco but including any Infraco Party, and their employees) and not acting independently of the Infraco, then **tie** may give notice to the Infraco of termination and this Agreement will terminate.
- 92.6 If a Prohibited Act is committed by anyone acting on behalf of the Infraco (excluding employees of the Infraco but including any Infraco Party and their employees) and acting independently of the Infraco, then **tie** may give notice to the Infraco of termination and this Agreement will terminate, unless within thirty days of receipt of such notice the Infraco terminates that party's employment and procures the performance of the relevant part of the Infraco Works by another person.
- 92.7 Any notice of termination under this Clause 92 (*Termination for Corrupt Gifts and Fraud*) shall specify:
- 92.7.1 the nature of the Prohibited Act;
- 92.7.2 the identity of the person whom **tie** believes has committed the Prohibited Act; and
- 92.7.3 the date on which this Agreement will terminate, in accordance with the applicable provision of this Clause 92 (*Termination for Corrupt Gifts and Fraud*).
- 92.8 No compensation shall be payable by **tie** to the Infraco for termination of this Agreement in terms of this Clause 92 (*Termination for Corrupt Gifts and Fraud*) whether under contract, delict (including negligence), breach of (or compliance with) statutory duty, restitution or otherwise but without prejudice to payments due under Clause 92.9.
- 92.9 Upon termination of the Infraco's employment pursuant to this Clause 92 (*Termination for Corrupt Gifts and Fraud*),
- 92.9.1 **tie** shall be under the same obligations with regard to payment as if termination on the grounds of Infraco Default had occurred in accordance with the provisions of Clause 90 (*Termination on Infraco Default*).
- 92.9.2 the Infraco shall comply with Clause 94 (*Effects of Termination or Expiry*) and Clause 95 (*Transition on Termination or Expiry*).

### 93. PERSISTENT BREACH

- 93.1 If a breach by the Infraco of any of its obligations under this Agreement has occurred more than once then **tie** may serve a notice ("**Persistent Breach Notice**") on the Infraco:
- 93.1.1 specifying that it is a Persistent Breach Notice;
  - 93.1.2 giving reasonable details of the breach; and
  - 93.1.3 stating that such breach is a breach which, if it recurs frequently or continues, may result in a termination of this Agreement.
- 93.2 If, following service of such a Persistent Breach Notice, the breach specified has continued or occurred once again after the date falling 30 days after the date of service of the Persistent Breach Notice and before the date falling 365 days after the date of service of such notice, then **tie** may serve another notice ("**Final Persistent Breach Notice**") on the Infraco:
- 93.2.1 specifying that it is a Final Persistent Breach Notice;
  - 93.2.2 stating that the breach specified has been the subject of a prior Persistent Breach Notice within the period of 365 days prior to the date of service of the Final Persistent Breach Notice; and
  - 93.2.3 stating that if such failure is not remedied within seven days or is remedied and occurs once or more within the 180 day period after the date of service of the Final Persistent Breach Notice, this Agreement may be terminated with immediate effect.
- 93.3 No compensation shall be payable by **tie** to the Infraco for termination of this Agreement in terms of this Clause 93 (*Persistent Breach*) whether under contract, delict (including negligence), breach of (or compliance with) statutory duty, restitution or otherwise.
- 93.4 Upon termination of the Infraco's employment pursuant to this Clause 93 (*Persistent Breach*),

93.4.1 **tie** shall be under the same obligations with regard to payment as if termination on the grounds of Infraco Default had occurred in accordance with the provisions of Clause 90 (*Termination on Infraco Default*); and

93.4.2 the Infraco shall comply with Clause 94 (*Effects of Termination or Expiry*) and Clause 95 (*Transition on Termination or Expiry*).

#### **94. EFFECT OF TERMINATION OR EXPIRY**

94.1 Subject to the provisions of Clauses 88 (*Termination or Suspension for tie Default*), 91 (*Termination by Reason of Force Majeure*) and Clause 94.3, the Infraco shall not have any other right or remedy against **tie** on termination of this Agreement.

94.2 Subject to any exercise by **tie** of its rights to perform, or to procure a third party to perform, the obligations of the Infraco and subject to the right of the Infraco to suspend pursuant to Clause 88.9, the Parties shall continue to perform their obligations under this Agreement, notwithstanding the giving of any notice of default or breach or termination notice, until the termination of this Agreement becomes effective.

94.3 Any termination or expiry of this Agreement shall not prejudice or affect the accrued rights or claims of either Party, save for any documents which are required to be retained by the Infraco as a matter of Law.

94.4 On expiry of this Agreement or any earlier termination of this Agreement for whatever reason, all Deliverables and any information provided by **tie** to the Infraco shall be returned to **tie**.

94.5 This Agreement shall terminate automatically on the expiry of this Agreement unless it shall have been terminated earlier in accordance with the provisions of this Agreement. The Infraco shall not be entitled to any compensation on expiry of the Agreement.

94.6 Expiry or termination of the Agreement shall not affect the Infraco's obligations under Clauses 7 (*Duty of Care and General Obligations in relation to the Infraco Works*), Clause 67 (*Payment in respect of Applications for Milestone Payments*), Clause 68 (*Payment in respect of Maintenance Services*), Clause 69 (*Interest on Late Payments and Set-Off*), Clause 76 (*Required Insurances*), Clause 77 (*Indemnity by Infraco, Liability and Sole Remedy*), Clause 90 (*Termination on Infraco Default*),

Clause 91 (*Termination by Reason of Force Majeure*), Clause 92 (*Termination for Corrupt Gifts and Fraud*), Clause 94 (*Effects of Termination or Expiry*), Clause 95 (*Transition on Termination or Expiry*), Clause 96 (*Surveys prior to Expiry Date*), Clause 97 (*Dispute Resolution Procedure*), Clause 101 (*Confidential Information*), Clause 102 (*Copyright and Intellectual Property*) and Clause 104 (*Information and Audit Access*) and those obligations shall continue in full force and effect.

## 95. TRANSITION ON TERMINATION OR EXPIRY

95.1 12 months before the Expiry Date and again, as updated, on the Expiry Date or upon termination (in whole or in part thereof), the Infraco shall provide to **tie** the following information ("**Handback Package**"), which shall promptly be updated with any changes to the same, as and when the same occur:

95.1.1 a list of all contracts, permits, licences, Consents or other documents which are material to the operation of the Edinburgh Tram Network or which have a value in excess of £50,000 (as Indexed) showing (as appropriate) the contract account number, name, address and telephone number of the parties, contract price, value, term and notice period for termination or expiry date;

95.1.2 a list of all computer systems used for the maintenance of the Edinburgh Tram Network together with a description of the systems and master passwords where applicable;

95.1.3 the Technical Records, any other operational and maintenance data, spare parts usage and other technical records;

95.1.4 a list of assets forming part of the Edinburgh Tram Network with a value of more than £25,000 (as Indexed) or which are otherwise key to the operation of the business;

95.1.5 the names and addresses of all insurers providing the Required Insurances along with the applicable policy members and other references;<sup>13</sup>

95.1.6 a letter, in a form reasonably satisfactory to **tie**, authorising **tie** and its agents to request and to receive from the relevant insurers details of all claims paid or outstanding under the Required Insurances;<sup>14</sup> and

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<sup>13</sup> Requirement for this information is to be reviewed by **tie**.

95.1.7 the TUPE Information.

95.2 **tie** shall not disclose the terms of the Handback Package to any third party, other than:

95.2.1 to the extent in the public domain, or as required by the Law or in the course of conducting, prosecuting or defending any Dispute, or following a Termination Notice; or

95.2.2 for the purpose of seeking offers from third parties for the provision of any of the Tram Maintenance Services and/or the Infrastructure Maintenance Services or like services following the termination or expiry of this Agreement; or

95.2.3 to a Successor Infraco or its sub-contractors for the purpose of ensuring or assisting with continuity of the Tram Maintenance Services and/or the Infrastructure Maintenance Services following termination or expiry of this Agreement provided that the Successor Infraco is required to comply with confidentiality obligations equivalent to those set out in Clause 101 (*Confidential Information*).

95.3 The Infraco shall maintain and manage the business of providing the Tram Maintenance Services and the Infrastructure Maintenance Services with the intent that **tie** or any Successor Infraco would be able to take over that business and secure continuity of the Tram Maintenance Services and/or the Infrastructure Maintenance Services on a going concern basis at any time following a Termination Notice.

95.4 Accordingly, following the service of a Termination Notice or in the twelve month period preceding any anticipated termination or expiry of this Agreement, the Infraco shall (and shall procure that the Infraco Parties shall):

95.4.1 take all reasonable steps and co-operate fully with **tie** and any Successor Infraco so that continuation of the Tram Maintenance Services and/or the Infrastructure Maintenance Services after such termination or expiry is achieved with the minimum disruption and so as to prevent or mitigate any inconvenience or risk to health or safety of any **tie** Parties and members of the public;

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<sup>14</sup> Requirement for this information is to be reviewed by **tie**.

- 95.4.2 liaise with **tie** and any Successor Infraco and provide reasonable assistance and advice concerning the Tram Maintenance Services and/or Infrastructure Maintenance Services and their transfer to **tie** or to such Successor Infraco;
- 95.4.3 allow **tie** and any Successors Infraco access (at reasonable times and on reasonable notice) to each part of the Edinburgh Tram Network;
- 95.4.4 provide to **tie** and to any Successor Infraco such information concerning the Edinburgh Tram Network and the Tram Maintenance Services and/or Infrastructure Maintenance Services which is reasonably required for the efficient transfer of responsibility for performance of the Tram Maintenance Services and/or Infrastructure Maintenance Services;
- 95.4.5 at the request of **tie** and/or the Successor Infraco, assign any sub-contracts, guarantees and/or warranties;
- 95.4.6 allow, or procure that the Infraco Parties shall allow, **tie** and any Successor Infraco such access to any employees engaged by the Infraco or such Infraco Party in the provision of the Tram Maintenance Services and/or Infrastructure Maintenance Services as **tie** or such Successor Infraco shall reasonably require for the purpose of informing and consulting with such employees over the terms and conditions on which their employment will be transferred (to the extent this is the case) to **tie** or any Successor Infraco or sub-contractor engaged by the Successor Infraco; and
- 95.4.7 on request, make the Handback Package available to **tie** or any Successor Infraco.
- 95.5 The Infraco shall use best endeavours to facilitate the transfer of responsibility for the Tram Maintenance Services and/or Infrastructure Maintenance Services to a Successor Infraco or to **tie**, as the case may be, and the Infraco shall take no action at any time which is calculated or intended to prejudice or frustrate or make more difficult such transfer. In particular, but without limitation to the generality of the foregoing, the Infraco shall, during the final twelve months of the Term (where this expires by effluxion of time) or during the period following service of a Termination Notice, and whilst the same remains outstanding:

- 95.5.1 without prejudice to Clause 52.12, not allow levels of stocks and Spare Parts, Special Tools and other spares to fall to the level which might reasonably be expected to prejudice the continuing efficient operation and maintenance of the Edinburgh Tram Network in accordance with Good Industry Practice;
- 95.5.2 observe and perform the provisions of Clause 58 (*TUPE and Handover*).
- 95.6 As soon as reasonably practicable after service of a Termination Notice or at least 90 days prior to the Expiry Date, the Infraco shall, by notice in writing to **tie**, provide (or procure that the relevant Infraco Parties provide) to **tie** and any nominated Successor Infraco an inventory of all Spare Parts, Special Tools, other spares, consumables and other items used in the Maintenance Services which do not form part of the Edinburgh Tram Network and permit **tie** or any Successor Infraco to inspect and examine the same. The Infraco shall (or shall procure that the relevant Infraco Party which owns the same shall) with effect from the Termination Date or Expiry Date or, if later, within 2 Business Days of being so required to do by notice from **tie**, transfer to **tie**, or as it may nominate in writing to the Infraco, all such Spare Parts, Special Tools, and other spares, consumables and other items as may be specified by a notice in writing from **tie** to the Infraco (other than those consumed or used in the normal course of the Tram Maintenance Services and/or Infrastructure Maintenance Services prior to such transfer).
- 95.7 Subject to Clause 95.8, following the transfer of any Spare Parts, Special Tools, and other spares, consumables or other items pursuant to Clause 95.6, the Infraco and **tie** shall seek to agree the price for the spares, consumables and other items transferred under Clause 95.6 but in the event of failure to agree such a price the same shall be determined by reference to the Dispute Resolution Procedure.
- 95.8 The Infraco acknowledges that all of the Assets have been funded by CEC. Accordingly the Infraco:
- 95.8.1 shall as directed by **tie** handover the Assets to CEC, **tie** or a Successor Infraco, such handover to be in a timely and orderly fashion so as to preserve the technical and commercial integrity and goodwill and value of the Edinburgh Tram Network and to enable an efficient handover of the Infraco Works; and

95.8.2 shall not be entitled to any payment in respect of the handover or any relinquishment of licence to use the Assets or perform the Infraco Works.

95.9 **tie** may request to purchase any assets owned by the Infraco which have been used in the performance of the Infraco Works or used in relation to the Edinburgh Tram Network. If the Parties agree a fair market value for any such assets, **tie** shall pay the agreed sum to the Infraco and the Infraco shall deliver such assets to **tie** as soon as reasonably practicable.

## 96. SURVEYS PRIOR TO EXPIRY DATE

96.1 Without prejudice to Clause 55 (*Surveys of the Edinburgh Tram Network and Audits of Maintenance Procedures*), at any time after the date falling three years prior to the Expiry Date (and, if required by **tie** at a date falling in the mid-term of the Maintenance Services), **tie** shall be entitled to carry out or procure a survey ("**Expiry Survey**") of the Edinburgh Tram Network to assess to what extent it has been and is being maintained by the Infraco in accordance with this Agreement, and in particular under Clause 52 (*Maintenance*), Schedule 2 (*Employer's Requirements*), Schedule 21 (*Tram Maintenance Agreement*) and Schedule 25 (*Infrastructure Maintenance Agreement*); and

96.2 **tie** shall notify the Infraco in writing a minimum of 10 Business Days in advance of the date they wish to commence an Expiry Survey (or elements of such survey). **tie** shall consider in good faith any reasonable written request by the Infraco for the relevant Expiry Survey to be carried out on a different date or dates if such request is made at least 5 Business Days prior to the notified date and the Infraco (acting reasonably) is able to demonstrate that carrying out the relevant Expiry Survey on the notified date would materially prejudice the Infraco's ability to provide the Maintenance Services.

96.3 When carrying out a relevant Expiry Survey, **tie** shall (or shall procure that the surveyor shall) use reasonable endeavours to minimise any disruption caused to the provision of the Maintenance Services by the Infraco. The Infraco shall afford **tie** and the surveyor (free of charge) any reasonable assistance required by **tie** and/or the surveyor during the carrying out of the relevant Expiry Survey. Subject to Clause 96.4, the cost of an Expiry Survey shall be borne by **tie**.

- 96.4 If, in the reasonable opinion of **tie**, an Expiry Survey shows that the Infraco has not complied with or is not complying with its obligations under Clause 52 (*Maintenance*):
- 96.4.1 **tie** shall notify the Infraco of the rectification and/or maintenance work which it considers is required to bring the condition of the Edinburgh Tram Network to the standard it would have been in if the Infraco had complied or was complying with its obligations under this Agreement, in particular under Clause 52 (*Maintenance*);
- 96.4.2 **tie** shall specify a reasonable period within which the Infraco must carry out such rectification and/or maintenance work; and
- 96.4.3 **tie** shall be entitled to recover the cost of the relevant Expiry Survey which relates to non-compliance by the Infraco from the Infraco as a debt.
- 96.5 The Infraco shall carry out such rectification and/or maintenance work to **tie's** reasonable satisfaction within the period specified and any costs it incurs in carrying out such rectification and/or maintenance work shall be to its own expense.
- 96.6 If and to the extent that the Infraco fails to carry out the necessary rectification and/or maintenance work to **tie's** reasonable satisfaction within the specified period, **tie** shall be entitled to carry out such rectification and/or maintenance work themselves, or procure the carrying out by a third party of such rectification and/or maintenance work at the Infraco's expense and shall recover any costs from the Infraco as a debt.
- 96.7 On or following the Expiry Date, if:
- 96.7.1 all the necessary rectification and/or maintenance work has been carried out to **tie's** reasonable satisfaction;
- 96.7.2 all maintenance activities are in date and the workbank is at a stable and routine level; and
- 96.7.3 all such work has been paid for by the Infraco,
- then after a period of 90 days, **tie** shall release the Infraco from the Handback Bond.

## PART 17 - MISCELLANEOUS

### 97. DISPUTE RESOLUTION PROCEDURE

97.1 The Parties agree that any Dispute shall be dealt with in accordance with the provisions set out in Schedule 9 (*Dispute Resolution Procedure*).

### 98. ASSIGNATION, CHANGE IN LEGAL STATUS AND CHANGES IN CONTROL

98.1 Without prejudice to Clause 28 (*Sub-Letting and the Appointment of Sub-Contractors*), the Infraco shall not assign, novate or otherwise transfer the whole or any part of the Agreement without the prior written agreement of **tie**.

98.2 In addition to and without prejudice to Clause 11 (*Novation of the SDS Agreement to the Infraco*), Clause 12 (*Novation of the Tram Supply Agreement to the Infraco*), Clause 13 (*Novation of the Tram Maintenance Agreement to the Infraco*) and Clause 14 (*Provision of Infrastructure Maintenance Services*), **tie** shall be entitled to assign, novate or otherwise transfer the whole or any part of this Agreement:

98.2.1 to the Scottish Ministers, TEL, CEC, Transport Scotland or any local authority; or

98.2.2 to any body with no worse financial standing than that of **tie** who takes over all or substantially all of the functions of **tie**; or

98.2.3 to any other person whose obligations under this Agreement are unconditionally and irrevocably guaranteed (in a form reasonably acceptable to the Infraco acting reasonably) by **tie** or a person falling within Clause 98.2.1; or

98.2.4 with the prior written consent of the Infraco (such consent not to be unreasonably withheld or delayed) to any person not covered by Clauses 98.2.1, 98.2.2 or 98.2.3 whose on-going financial standing is no worse than that of **tie**.

98.3 If the legal status of the Infraco shall change in any material way, **tie** shall be informed by the Infraco in writing, immediately.

98.4 If there is a Change in Control in the Infraco, **tie** shall be informed immediately by the Infraco in writing.

**99. CONFLICT OF INTEREST**

99.1 The Infraco shall (and shall procure that its Infraco Parties shall):

99.1.1 be responsible for ensuring that no Conflict of Interest arises in respect of its duties under this Agreement;

99.1.2 make all possible enquiries to ensure that there is no Conflict of Interest prior to its assuming the duties required of it under the terms of the Agreement; and

99.1.3 consult and advise **tie** if the Infraco considers that a Conflict of Interest arises or if it considers that a Conflict of Interest may exist or may arise or may be foreseeable and shall furnish **tie** with such information as shall enable **tie** to determine whether or not a Conflict of Interest has arisen.

**100. SECURITY INTERESTS**

100.1 The Infraco shall not create or agree to create any Security Interest over the Edinburgh Tram Network or any Assets or over this Agreement.

100.2 The Infraco shall not dispose of any right in respect of or interest in any Asset used in the Infraco Works or relating to the Edinburgh Tram Network if to do so would have a material adverse effect upon either the Edinburgh Tram Network, the rights in the Assets held by CEC, or the position of **tie** under this Agreement, whether or not this Agreement has terminated or expired provided always that restrictions in this Clause 100 (*Security Interests*) shall not apply in the case of:

100.2.1 disposals of redundant or obsolete assets not required for the Edinburgh Tram Network provided that **tie** has procured CEC consent to such disposal, and CEC receives any proceeds associated with such disposal; or

100.2.2 disposals of property or assets where such property or assets are replaced by other property or assets comparable or superior as to type and function.

**101. CONFIDENTIAL INFORMATION**

101.1 Each Party:

101.1.1 shall treat all Confidential Information belonging to the other Party as confidential and safeguard it accordingly; and

101.1.2 shall not disclose any Confidential Information belonging to the other Party to any other person without the prior written consent of the other Party, or except to such persons and to such extent as may be necessary for the performance of this Agreement or except where disclosure is otherwise expressly permitted by the provisions of this Agreement.

101.2 The Infraco shall take all necessary precautions to ensure that all Confidential Information obtained from **tie** under or in connection with the Agreement:

101.2.1 is given only to such of the staff and professional advisors and/or the Infraco Parties in connection with this Agreement as is strictly necessary for the carrying out by the Infraco of the Infraco Works;

101.2.2 is treated as confidential and not disclosed (without prior approval) or used by any such staff, professional advisors and/or the Infraco Parties otherwise than for the purposes of the Agreement.

101.3 Where it is considered necessary in the opinion of **tie**, the Infraco shall ensure that its staff, professional advisors or the Infraco Parties sign a confidentiality undertaking before commencing work in connection with the Agreement.

101.4 The Infraco shall not use any Confidential Information it receives from **tie** otherwise than for the purposes of the Agreement.

101.5 The provisions of Clauses 101.1 and 101.4 shall not apply to:

101.5.1 any information which is or becomes public knowledge (otherwise than by breach of this Clause 101 (*Confidential Information*));

101.5.2 any information which was in the possession of the receiving Party, without restriction as to its disclosure, before receiving it from the disclosing Party;

101.5.3 any information which is received from a third party who lawfully acquired it and who is under no obligation restricting its disclosure;

- 101.5.4 any information which is independently developed without access to the Confidential Information;
- 101.5.5 any disclosure pursuant to a statutory, legal or parliamentary obligation placed upon the Party making the disclosure, including any requirements for disclosure under FOISA, the Code, or the Environmental Information Regulations pursuant to Clauses 101.7 and 101.11 (inclusive);
- 101.5.6 any disclosure by **tie** of this Agreement and any related information to any **tie** Party, the MUDFA Contractor and/or the Operator;
- 101.5.7 any information which is required to be disclosed to that Party's insurers and/or legal advisers subject to Clauses 101.2 and 101.3;
- 101.5.8 any registration of information in respect of the Consents and any property registration required;
- 101.5.9 any disclosure of information by **tie** to TEL, CEC, Partnerships UK Limited, any department, office or agency of the Scottish Executive, the Scottish Ministers, Transport Scotland or the UK government;
- 101.5.10 any disclosure for the purpose of:
- 101.5.10.1 the examination and certification of **tie's**, or the Infraco's accounts; or
  - 101.5.10.2 any examination (pursuant to applicable Law) of the economy, efficiency and effectiveness with which **tie** has used its resources or funding made available to it including any examination pursuant to the Local Government (Scotland) Act 1973 as amended by the Local Government in Scotland Act 2003 of whether **tie** has secured best value in the performance of its functions;
- 101.5.11 any disclosure of Confidential Information obtained from the Infraco to any government department or any other local government authority or public authority equivalent in status to **tie**. All

government departments or any other local government authority or public authority equivalent in status to **tie** receiving such Confidential Information shall be entitled to further disclose the Confidential Information to other government departments or any other local government authority or public authority equivalent in status to **tie** on the basis that the information is confidential and is not to be disclosed to a third party which is not part of any government department or any other local government authority or public authority equivalent in status to **tie** provided that in disclosing information under this Clause 101 (*Confidential Information*) **tie** discloses only the information which is necessary for the purpose concerned and requires that the information is treated in confidence and that a confidentiality undertaking is given where appropriate.

- 101.6 Nothing in this Clause 101 (*Confidential Information*) shall prevent either Party from using any techniques, ideas or know-how gained during the performance of this Agreement in the course of its normal business, to the extent that this does not result in a disclosure of Confidential Information or an infringement of Intellectual Property Rights including those rights expressed in Clause 102 (*Copyright and Intellectual Property*).
- 101.7 The Infraco acknowledges that **tie** is subject to the requirements of FOISA and the Environmental Information Regulations and shall assist and cooperate with **tie** (at the Infraco's expense) to enable **tie** to comply with any Information disclosure requirements. **tie** agrees that it shall comply with the terms of the Code in respect of the discharge of its obligations under FOISA.
- 101.8 The Infraco shall, and shall procure that the Infraco Parties shall:
- 101.8.1 transfer any Request for Information to **tie** as soon as practicable after receipt and in any event within 2 Business Days of receiving any Request for Information;
- 101.8.2 provide **tie** with a copy of all Information in its possession or power in the form that **tie** requires within 5 Business Days (or such other period as **tie** may specify) of **tie** requesting that Information; and

101.8.3 provide all necessary assistance as reasonably requested by **tie** to enable **tie** to respond to a Request for Information within the time for compliance set out in section 10 of FOISA or regulation 5 of the Environmental Information Regulations.

101.9 **tie** shall be responsible for determining at its absolute discretion whether the Confidential Information and/or any other Information:

101.9.1 is exempt from disclosure in accordance with the provisions of the Code, FOISA or the Environmental Information Regulations; and

101.9.2 is to be disclosed in response to a Request for Information.

101.10 In no event shall the Infraco respond directly to a Request for Information unless expressly authorised to do so by **tie**.

101.11 The Infraco acknowledges that **tie** may be obliged, pursuant to the Code, FOISA, or the Environmental Information Regulations to disclose Information:

101.11.1 without consulting with the Infraco; or

101.11.2 following consultation with the Infraco and having taken its views into account.

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

101.13 The Infraco acknowledges that any lists or schedules provided by it outlining Confidential Information are of indicative value only and that **tie** may nevertheless be obliged to disclose Confidential Information in accordance with Clause 101.7.

101.14 Any public relations material, press releases, public presentations or conference engagements in relation to this Agreement planned by the Infraco requires **tie's** prior written approval.

## **102. COPYRIGHT AND INTELLECTUAL PROPERTY**

102.1 All the Infraco IPR shall continue to be owned by the Infraco.

102.2 The Infraco hereby:

102.2.1 assigns by way of future assignation to **tie** with full title guarantee the Project IPR which is created by it and shall procure that Project IPR created by any Infraco Party is also so assigned, for all of the residue of the term of such rights and all renewals or extensions thereof and together with all accrued causes of action in respect thereof;

102.2.2 grants to **tie** a non-exclusive perpetual irrevocable royalty free licence to use such Infraco IPR as may be necessary for **tie** to use in relation to the Edinburgh Tram Network and any projects associated with or forming part of the Edinburgh Tram Network;

102.2.3 grants to **tie** the right to grant non-exclusive non-assignable sub-licences to third parties for such lengths of time as **tie** may reasonably require and otherwise on the same terms as the licence granted to **tie** pursuant to Clause 102.2.2 above, to use the Infraco IPR referred to in that clause (other than in relation to Third Party Software which is subject to the provisions of Clause 102.9) in so far as is necessary or desirable for such third party to use such Infraco IPR in relation to the Edinburgh Tram Network and any projects associated with the Edinburgh Tram Network.

102.3 For the avoidance of doubt, the persons to whom **tie** may grant sub-licences pursuant to Clause 102.2.3 above shall include:

102.3.1 any **tie** Party;

102.3.2 CEC, Transport Scotland and TEL;

102.3.3 the SDS Provider, the Tram Maintainer and the Tram Supplier;

102.3.4 the Operator and any party other than the Operator providing support to **tie** in relation to the Edinburgh Tram Network;

102.3.5 any Successor Infraco and any party providing maintenance in relation to the Edinburgh Tram Network; and

102.3.6 any assignee or transferee under this Agreement.

- 102.4 **tie** hereby grants to the Infraco a non-exclusive revocable royalty free licence for the duration of this Agreement to use such Project IPR as is owned by **tie** as may be necessary for the Infraco to use solely and exclusively for the purpose of carrying out the Infraco Works.
- 102.5 The copyright of this Agreement and any data or software supplied to the Infraco by **tie**, shall remain solely with **tie**.
- 102.6 The Infraco shall at any time and from time to time hereafter at the request of **tie**, execute all such documents and do all such further acts as may be required in order to vest the rights referred to in Clause 102.2.1 in **tie**.
- 102.7 The Infraco waives any and all moral rights held or to be held by the Infraco in the Deliverables and the Project IPR and shall procure that all of the Infraco Parties who are authors of the whole or any part of the Deliverables or the Project IPR waive and abandon in writing all moral rights.
- 102.8 The Infraco agrees that all rights in the Project IPR shall remain the property of **tie** and the Infraco shall retain no rights to the Project IPR beyond the licence granted in Clause 102.4 above. The Infraco shall be entitled to use such Project IPR only on the terms set out herein and solely for the purpose of carrying out the Infraco Works. In particular, otherwise as permitted in this Agreement, the Infraco shall not disclose, assign, sub-licence, lease, rent or otherwise dispose of the Project IPR.
- 102.9 To the extent that any of the Deliverables are generated by or maintained on a computer or similar system, the Infraco shall use all reasonable endeavours to procure for the benefit of **tie**, at no charge or at the lowest reasonable fee, the grant of a licence or sub-licence for any relevant Third Party Software on the same terms as the Infraco Software is licensed to **tie**, to enable **tie** or its nominee to access and otherwise use (subject to the payment by **tie** of the relevant fee, if any) such Deliverables in connection with this Agreement. As an alternative, the Infraco may provide such Deliverables in a format which may be read by software generally available at reasonable prices in the market at the relevant time or in hard copy format.
- 102.10 The Infraco shall ensure the back-up and storage in safe custody of the Deliverables in accordance with Good Industry Practice. Without prejudice to this obligation, the Infraco shall submit to **tie's** Representative for approval, its proposals for the back-up

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

102.11 For the purposes of this Clause 102 (*Copyright and Intellectual Property*), "use" shall include the acts of copying, modifying, adapting or translating the material in question and/or incorporating them with other materials and the term "the right to use" shall be construed accordingly.

102.12 The provisions of this Clause 102 (*Copyright and Intellectual Property*) shall apply during the continuance of this Agreement and after its termination howsoever arising, and immediately following termination howsoever arising, the Infraco shall provide **tie** with:

102.12.1 a copy of the object code for the Third Party Software and the Infraco Software on media that is acceptable to **tie** (acting reasonably);

102.12.2 a copy of the source code for the Specially Written Software on media that is acceptable to **tie** (acting reasonably); and

102.12.3 a copy of all documentation, manuals and other technical information relating to the Third Party Software, the Specially Written Software and the Infraco Software that is reasonably required by **tie** to operate, manage and support the Third Party Software, the Specially Written Software and the Infraco Software.

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

### **103. DATA PROTECTION**

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

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

103.2.1 shall have at all material times (and shall use its reasonable endeavours to procure that all the Infraco Parties have or will have at all material times) the appropriate technical and organisational measures in place against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data held or processed by it;

103.2.2 shall (and shall use its reasonable endeavours to procure that the Infraco Parties shall) take at all material times, all reasonable steps to ensure the integrity of any of its staff with access to personal data processed in connection with the Infraco Works;

103.2.3 shall act only on the instructions of **tie** in relation to the processing of any personal data in respect of which **tie** is the "data controller" for the purposes of that Act;

103.2.4 shall only obtain, hold, process, use, store and disclose such personal data as is necessary to perform its obligations under this Agreement; and

103.2.5 shall allow **tie** access to any relevant premises on reasonable notice to inspect its procedures referred to in Clause 103.2.1.

#### **104. INFORMATION AND AUDIT ACCESS**

104.1 The Infraco shall, in accordance with Good Industry Practice, keep and maintain:

104.1.1 all Deliverables;

104.1.2 detailed records regarding the Infraco Works including breakdowns of costs;

104.1.3 proper books, vouchers, accounts and records relating to the Infraco Works;  
and

104.1.4 all invoices, timesheets and expense claims for which the Infraco has sought or is seeking reimbursement under the provisions of this Agreement;

and shall keep the above items for at least six years following expiry or termination of this Agreement.

- 104.2 The items referred to in Clause 104.1 shall be kept in good order and in such form so as to be capable of audit (including by electronic means) by **tie's** Representative, **tie**, CEC, **tie's** auditors or CEC's auditors or any other third party. The Infraco shall make such records available for inspection by or on behalf of **tie's** Representative, **tie**, CEC, **tie's** auditors or CEC's auditors or any other third party at all reasonable times.
- 104.3 In addition to the requirements of Clause 104.1 and 104.2, the Infraco shall provide to **tie's** Representative, **tie**, CEC, **tie's** auditors or CEC's auditors or any other third party, any other information, documents, records and the like in the possession of, or available to the Infraco (and to this end, the Infraco shall use all reasonable endeavours to procure that all such items in the possession of the Infraco Parties shall be available to it) as may be reasonably requested by **tie's** Representative, **tie**, CEC, **tie's** auditors or CEC's auditors or any other third party for any purpose in connection with this Agreement and/or the Edinburgh Tram Network.
- 104.4 The Infraco shall provide and shall procure that the Infraco Parties shall provide such assistance as **tie** may reasonably require from time to time, to enable **tie** and CEC to meet their obligations to provide reports and returns pursuant to Law, directions and guidance applicable to the passenger transport sector, and to carry out audits.
- 104.5 The Infraco shall comply, at its own cost, with any request by **tie** in respect of the recording, storage, keeping, disclosure, organisation, use, processing, dissemination, deletion or destruction of any records, data or information obtained by the Infraco as a result of carrying out the Infraco Works.
- 104.6 **tie** shall provide to the Infraco (subject to reasonable notice and relevant undertaking as to costs) such information within its possession or control with respect to the Edinburgh Tram Network as the Infraco may reasonably request to enable it to perform its obligations under this Agreement, provided that **tie** shall have no obligation to provide information with respect to which it is subject to an obligation of confidentiality (whether under any Law, at contract or otherwise).

104.7 The provisions of this Clause 104 (*Information and Audit Access*) shall apply during the continuance of this Agreement and after its expiry or termination howsoever arising.

**105. HEALTH AND SAFETY, QUALITY ASSURANCE AND ENVIRONMENTAL MANAGEMENT SYSTEM**

105.1 The Infraco shall operate:

105.1.1 a health and safety management system, the standard of which shall comply with OHSAS 18001 or HSG65;

105.1.2 a quality management system, the standard of which shall comply with BS EN ISO 9001:2000; and

105.1.3 an environmental management system, the standard of which shall comply with BS EN ISO 14001:2004;

which shall be known together as the "**HSQE System**".

105.2 The Infraco shall (and shall procure that the Infraco Parties) comply with the HSQE System and the Infraco shall develop appropriate management plans so as to ensure such compliance with the HSQE System.

105.3 If in the opinion of **tie's** Representative (acting reasonably), the Infraco Works (including any Deliverable) has not been prepared in accordance with the HSQE System or with any other provision of the Agreement, **tie's** Representative shall so inform the Infraco in writing giving reasons. Such non-compliance shall be treated as an error or omission in carrying out the Infraco Works and the Infraco shall not be entitled to make any claim against **tie** for an extension of time or payment in respect of such error or omission.

105.4 Compliance with the HSQE System shall not relieve the Infraco from any of its other duties, obligations or liabilities under this Agreement.

105.5 The Infraco shall appoint (or shall procure the appointment of) an HSQE Manager as soon as reasonably practicable following the Effective Date. The identity of the HSQE Manager (and any replacement) shall be subject to the approval of **tie's** Representative (such approval not to be unreasonably withheld or delayed).

105.6 The HSQE Manager shall:

105.6.1 ensure the effective operation of the HSQE System described in this Clause 105 (*Health and Safety, Quality Assurance and Environmental System*);

105.6.2 audit the HSQE System at regular intervals and report the findings of such audit to **tie's** Representative;

105.6.3 review the HSQE System at intervals agreed with **tie's** Representative to ensure its continued suitability and effectiveness; and

105.6.4 liaise with **tie's** Representative on all matters relating to the HSQE System.

## **106. ENTIRE AGREEMENT**

106.1 Except where expressly provided otherwise in this Agreement, this Agreement constitutes the entire agreement between the Parties in connection with its subject matter and supersedes all prior representations, communications, negotiations and understandings concerning the subject matter of this Agreement.

106.2 Each of the Parties confirms to the other that it has neither been induced to enter into this Agreement in reliance on, nor has it made, any representation or warranty except those contained or referred to in this Agreement.

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

106.4 Each Party irrevocably and unconditionally waives all rights and remedies which it might otherwise have had in relation to any representations or warranties other than those contained or referred to in this Agreement save in respect of any fraudulent misrepresentation.

## **107. FURTHER ASSURANCE**

107.1 Each Party shall at the reasonable request and cost of the other (save where it is expressly provided that the cost of such act or execution shall be for that Party's account) do any act or execute any document that may be necessary to give full effect to this Agreement.

**108. VARIATIONS TO BE IN WRITING**

108.1 No variation or alteration of any of the provisions of this Agreement shall be effective unless it is in writing and signed by both Parties.

**109. WAIVERS**

109.1 Save where expressly stated, no failure or delay by either Party to exercise any right or remedy in connection with this Agreement will operate as a waiver of it or of any other right or remedy nor will any single or partial exercise preclude any further exercise of the same, or of some other right or remedy. A waiver of any breach of this Agreement shall not be deemed to be a waiver of any subsequent breach.

109.2 The Parties agrees that no waiver shall occur or be deemed to have occurred unless or until clear and unequivocal express waiver of a clearly identified default is contained in a written notice by the waiving Party to the other Party expressly for the purpose of effecting such waiver.

109.3 The Parties' rights and remedies under this Agreement are, except where provided otherwise in this Agreement, independent, cumulative and do not operate to exclude one another or any rights or remedies provided by Law.

**110. NO PARTNERSHIP OR AGENCY**

110.1 Nothing in this Agreement shall be construed as creating a partnership between **tie** and the Infraco.

110.2 The Infraco shall not (and shall procure that the Infraco Parties shall not) act or purport to act as agent for **tie** in relation to any matter unless specifically authorised in writing under this Agreement by **tie**. The Infraco shall not be entitled to bind **tie** in any way or to create any liability or cause of action against **tie** and shall not hold itself out (and shall procure that no Infraco Party shall hold itself out) as having any such authority or power.

**111. NOTICES**

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

111.1.1 in writing;

111.1.2 sent by one of the following methods:

111.1.2.1 pre-paid special or recorded delivery post or facsimile transmission addressed to the Party to which it is given at:

- (i) in the case of notices given to **tie**: **tie** Limited, Verity House, Haymarket Yards, Edinburgh, EH12 5BH, fax number 0131 622 8301 attention: Tram Project Director, or such other address or fax number in the United Kingdom as **tie** may notify the Infraco from time to time for that purpose; or
- (ii) in the case of notices given to the Infraco: [◆], [address, fax number], attention [◆], or such other address or fax number in the United Kingdom as the Infraco may notify **tie** from time to time for that purpose; or

111.1.2.2 facsimile transmission addressed to the **tie's** Representative or the Infraco's Representative (as appropriate) at a facsimile number notified to the giving Party by the receiving Party for the service of notices under this Agreement from time to time; or

111.1.2.3 personal delivery into the hands of:

- (i) in the case of notices given to **tie**, **tie's** Representative; or
- (ii) in the case of notices given to the Infraco, the Infraco Representative;

111.1.3 be deemed duly served:

111.1.3.1 if sent by pre-paid special or recorded delivery post on proof of delivery; or

111.1.3.2 if sent via facsimile transmission or personal delivery, on the day of issue of the relevant fax confirmation receipt or such

personal delivery (as appropriate), unless that day is not a Business Day or such delivery or transmission is made after 5:00pm on a Business Day in which case it shall be deemed duly served on the next Business Day thereafter.

## **112. INVALID TERMS**

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

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

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

112.2 Without prejudice to any other terms of this Agreement, the Parties shall promptly consult in good faith with a view to agreeing as soon as reasonably practicable one or more provisions in lieu of the invalid provision such as will, so far as is possible under any applicable Law, have the same commercial effect as the invalid provision would have had if it had not been illegal, unenforceable or invalid.

## **113. THIRD PARTIES RIGHTS**

113.1 Subject to any other express provision of this Agreement, a person who is not party to this Agreement shall have no right to enforce any term of this Agreement.

## **114. CONSENT AND APPROVAL**

114.1 The giving of any consent or approval by or on behalf of **tie** shall not in any way relieve the Infraco of any of its obligations under this Agreement or of its duty to ensure the correctness, accuracy or suitability of the matter or thing which is the subject of the consent or approval.

114.2 Failure by **tie** to disapprove or object to any matter or thing shall not prejudice its power subsequently to take action under this Agreement in connection therewith.

**115. DISCRIMINATION**

115.1 The Infraco shall not (and the Infraco shall insert a clause to this effect in each contract with any Infraco Party) unlawfully discriminate within the meaning and scope of the provisions of the Equal Pay Act 1970, the Sex Discrimination Act 1975, the Race Relations Act 1976, the Disability Discrimination Act 1995, the Employment Equality (Sexual Orientation) Regulations 2003 and the Employment Equality (Religion or Belief) Regulations 2003.

**116. DEROGATIONS**

116.1 The Infraco shall not, without the prior written consent of tie's Representative, apply for any exemption or derogation from or dispensation under any applicable Law which would otherwise apply to the Infraco Works and including, without limitation, any exemption order under Section 47(3) of the Disability Discrimination Act 1995 or dispensations under the provisions of Section 10 of the Railways and Other Passenger Transport Systems (Approval of Works, Plant and Equipment) Regulations 1994 or any provisions which may replace, modify or supersede such provisions.

**117. APPLICABLE LAW**

117.1 This Agreement, any document completed or to be a completed in accordance with its provisions and any matter arising from this Agreement or any such document shall be governed by and construed in accordance with Scots law.

117.2 Subject to Clause 97 (*Dispute Resolution Procedure*), the Parties hereby irrevocably submit to the exclusive jurisdiction of the Court of Session in relation to this Agreement, any such document and any such matter.

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

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

at

on \_\_\_\_\_ 2007 by:

Authorised Signatory .....

Full Name .....

Witness Signature .....

Full Name .....

Address .....

.....

**EXECUTED** for and on behalf of **[INFRACO]**

at

on 2007 by:

Authorised Signatory .....

Full Name .....

Witness Signature .....

Full Name .....

Address .....

.....

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

**SCHEDULE 1  
DEFINITIONS AND INTERPRETATION**

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

"**AAIB**" means Air Accidents Investigation Branch;

"**Abortive Work**" means any work which cannot be used in relation to the Edinburgh Tram Network (but not including work occurring as part of the iterative process of design);

"**AC**" means alternating current;

"**Access Permit**" has the meaning given in paragraph 3.4.1 of part A of Schedule 3 (*Code of Construction Practice and Code of Maintenance Practice*);

"**Access Permit Form**" has the meaning given in paragraph 3.4.2 of part A of Schedule 3 (*Code of Construction Practice and Code of Maintenance Practice*);

"**Accommodation Works**" means any works arising out of the compulsory purchase process (including the reinstatement of boundary walls, fences) or any other works for third parties associated with the Edinburgh Tram Network;

"**Accommodation Works Change**" means any Accommodation Works instructed by tie in accordance with Clause 83 (*Accommodation Works*) including any works listed in Schedule 27 (*Schedule of Accommodation Works*);

"**Accommodation Works Cost Notice**" has the meaning given in Clause 83.1;

"**Acts**" has the meaning given in Clause 21.1;

"**Actual Milestone Date**" means the date on which a certificate in respect of a Milestone is issued in accordance with this Agreement;

"**Additional Insurance**" has the meaning given in Clause 76.17;

"**ADI**" means approved driving instructor;

"**Adjudication Bond**" means the adjudication bond described in Clause 74.1 (*Bond, Parent Company Guarantee and Collateral Warranties*);

"**ADSL**" means asymmetric digital subscriber line;

"**AFC**" means automatic fare collection;

"**Affected Party**" means a Party that is unable to comply with all or a material part of its obligations under this Agreement as a direct result of a Force Majeure Event;

"**Affiliates**" means, in relation to any person, any holding company or subsidiary of that person or any subsidiary of such holding company and "holding company" and "subsidiary" shall have the meaning given to them in section 736 of the Companies Act 1985;

"**Agreement**" means Clauses 1 to 115 (inclusive) together with the Schedules, the Formal Offer, and the Letter of Appointment all as may be amended from time to time in accordance with this Agreement;

"**AiD**" means approval in detail;

"**AiP**" means approval in principle;

"**ALARP**" means as low as reasonably practicable;

"**Annual Service Report**" means the Annual Service Report to be prepared and submitted by the Infraco in accordance with Clause 56.4;

"**Application for Milestone Payment**" means the applications for payment from the Infraco to **tie** in respect of specific identified Milestones and specific identified Critical Milestones. Such applications for payment together with specific identified Milestones and Critical Milestones are set out for each Reporting Period in part [◆] of Schedule 5 (*Pricing Schedules*);

"**Approval Bodies**" means any Relevant Authorities, Utilities, planning authorities, roads authorities, HMRI, BAA, Network Rail and other parties who are to issue Consents which may be required for the construction, installation, commissioning, completion, opening, maintenance, use or modification of the Edinburgh Tram Network;

"**AQMA**" means air quality management area;

"Assets" means all assets and rights to enable CEC or another party to own, operate and maintain the Edinburgh Tram Network in accordance with this Agreement, including:

- (a) any equipment;
- (b) any books and records (including the Operating and Maintenance Manual, health and safety manuals and other know-how);
- (c) any Trams, Spare Parts, Special Tools and other assets (together with any warranties in respect of assets being transferred);
- (d) any contractual rights; and
- (e) any Intellectual Property Rights

but excluding any assets and rights in respect of which **tie** is full, legal and beneficial owner;

"Asset Management System" means the asset maintenance management and recording system described in Schedule 2 (*Employer's Requirements*);

"Asset Protection Agreement" means the agreement included in Schedule 28 (*Asset Protection Agreement and Network Rail Standards*);

"BAA" means BAA plc, a company incorporated under the Companies Act with registration number 1970855 and having its registered office at 130 Wilton Road, London, SW1V 1LQ which expression shall include its successors in title and assignees and any of its associated or subsidiary companies with interests at Edinburgh International Airport;

"Background Information" means all and any materials, documents, drawings, plans or other information in paper, electronic or any other form, relating in any way to this Agreement or the Tram Legislation (and the parliamentary process) and made available to the Infraco by **tie**, CEC and/or any of their respective members, officers, agents and/or advisers during the procurement competition relative to this Agreement or thereafter;

"Base Case RPIX" means RPIX as at 1 January [◆] equal to [◆];

"Best Value Improvement Plan" means the plan referred to in Clause 73.8;

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

**"Building Fixing Agreement"** means the agreement in the form set out in Schedule 36 (*Building Fixing Agreement*);

**"Case for Safety"** means all necessary documentation, information and other requirements for the issue of a safety certificate or a safety authorisation (as appropriate) by the Office of the Rail Regulator pursuant to the Railways and Other Guided Transport Systems (Safety) Regulations 2006;

**"Cast slab"** means a form of construction which relies on concrete being poured in-situ onto a prepared base with supported sides. In these circumstances used as support for track form or structure;

**"CAA"** means the Civil Aviation Authority;

**"CBS"** means cost breakdown structure;

**"CDM Regulations"** means the Construction (Design and Management) Regulations 2007 (SI 2007/320);

**"CEC"** means the City of Edinburgh Council;

**"Certificate of Sectional Completion"** means any certificate issued by **tie** in accordance with Clause 44.3;

**"Certificate of Service Commencement"** means any certificate issued by **tie** in accordance with Clause 45.3;

**"Certificate of Tram Commissioning"** means the certificate to be issued by the Tram Inspector in accordance with Clause [◆];

**"Cess"** means a safe area at the side of the tramway or railway;

**"Change Control Register"** means the change control register to be maintained by the Infraco in accordance with Clause 79.1;

**"Change in Control"** means any sale or disposal of any legal, beneficial or equitable interest in share capital comprising 30% of a corporation, or the transfer or acquisition of the ability to direct the management and control of the corporation;

**"Change in Law"** means the coming into effect after the [insert date of submission of final pricing proposals from the preferred bidder] of:

- (a) Legislation, other than any Legislation which on the [insert date of submission of final pricing proposals from the preferred bidder] has been published:
  - (i) in a draft Bill as part of a Scottish Executive/Scottish Parliament or United Kingdom Government consultation paper;
  - (ii) in a Bill;
  - (iii) in draft subordinate Legislation within the meaning of section 21(1) of the Interpretation Act 1978; or
  - (iv) as a proposal in the Official Journal of the European Union.
- (b) any Guidance (other than Guidance which on the [insert date of submission of final pricing proposals from the preferred bidder] has been published (in draft or otherwise) in any Scottish Executive, Scottish Parliament or United Kingdom Government consultation paper and/or on any Scottish Executive, Scottish Parliament or United Kingdom Government internet site); or
- (c) any applicable judgement of a relevant court of law which changes a binding precedent;

**"CIS"** means customer information system;

**"Claim"** shall have the meaning given in Clause 78.1.1;

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

**"Code of Construction Practice" or CoCP** means the code of maintenance practice set out at part A of Schedule 3 (*Code of Maintenance Practice and Code of Construction Practice*);

**"Code of Maintenance Practice"** means the code of maintenance practice set out at part B of Schedule 3 (*Code of Maintenance Practice and Code of Construction Practice*);

"**Code**" means the Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002 as the same may be amended, varied or replaced from time to time;

"**Commencement Date**" means the first date on which all of the Conditions Precedent have been satisfied or waived pursuant to Clause 3 (*Conditions Precedent*) and the CP Certificate has been issued;

"**Compensation Event**" means:

- (a) a breach by **tie** of any of its obligations under this Agreement which materially and adversely affects the performance of the Infraco Works;
- (b) discovery of unexploded ordinance, utility apparatus or contaminated land which did not at the time of such discovery form part of the Infraco Works which are referable to Clause 65 (*Compensation Events*) in accordance with Clause 22.5;
- (c) the failure of **tie** to give possession or access as referred to in Clause 18.20;
- (d) the exercise by CEC of its discretion to temporarily stop up streets where the exercise of such discretion materially and adversely affects the Infraco's performance of its obligations under this Agreement; or
- (e) execution of any Utilities Works or MUDFA Works.

"**Compound**" means the Infraco's on-site temporary office; stores and workshops etc. which will be removed on completion of the ETN;

"**Conditions Precedent**" means the conditions specified in Schedule 30 (*Conditions Precedent*);

"**Confidential Information**" means any information which has been designated as confidential by either Party in writing or that ought to be considered as confidential (however it is conveyed or on whatever media it is stored) including information which relates to the business, affairs, properties, assets, trading practices, goods, services, developments, trade secrets, Intellectual Property Rights, know-how, personnel of either Party, all personal data and sensitive personal data within the meaning of the Data Protection Act 1998;

**"Conflict of Interest"** means a situation where a fair minded and informed observer would conclude that the Infraco's ability to carry out the Infraco Works, and advise and/or act for **tie** properly and impartially in accordance with this Agreement is inhibited because of:

- (a) the best advice not being given to **tie** by the Infraco; and/or
- (b) advice which is given by the Infraco, being different to that which would have been given if the Infraco had only been acting for **tie**;

which results in an adverse outcome for **tie**;

**"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, "Consents" shall not include any Land Consents and any Traffic Regulation Orders;

**"Consents Programme"** means the programme for submitting Consents as may be amended from time to time in accordance with this Agreement;

**"Construction Contract Price"** means the construction contract price included in Schedule 4 (*Contract Price Analysis*) as may be varied from time to time in accordance with this Agreement;

**"Construction Interim Certificate"** means any certificate to be issued by **tie** in accordance with Clause 67.5;

**"Construction Milestone"** means any milestone (other than any Critical Milestone) which has been identified and defined as a construction milestone in part [◆] of Schedule 5 (*Pricing Schedules*);

**"Construction Milestone Completion Certificate"** means any certificate in respect of achievement of a Construction Milestone issued by **tie's** Representative in accordance with Clause 41.3;

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

"**Contract Price**" means the Construction Contract Price and the Maintenance Contract Price included in Schedule 4 (*Contract Price Analysis*) as may be varied from time to time in accordance with this Agreement;

"**Contract Price Analysis**" means the analysis set out in Schedule 4 (*Contract Price Analysis*);

"**Control Centre**" means the control centre for the Edinburgh Tram Network to be provided by the Infraco pursuant to this Agreement and operated by the Operator pursuant to the DPOFA;

"**COSHH**" means control of substances hazardous to health;

"**CP Certificate**" means the certificate to be issued by **tie** in accordance with Clause 3.3, indicating that each of the Conditions Precedent have been waived or satisfied;

"**Critical Milestone**" means any milestone which has been identified and defined as "critical" in respect of an Application for Milestone Payment in part [◆] of Schedule 5 (*Pricing Schedules*);

"**Critical Milestone Completion Certificate**" means any certificate in respect of achievement of a Critical Milestone issued by **tie's** Representative in accordance with Clause 41.3;

"**Critical Milestone Payment**" means the payment to be made against the achievement of a Critical Milestone for an amount set out in Schedule 5 (*Pricing Schedules*);

"**CRT**" means cathode ray tube;

"**CSTCS**" means Central Scotland Transport corridor studies;

"**CWR**" means continuously welded rail;

"**DB**" means distribution board;

"**DC**" means direct current;

"**DCCB**" means direct current circuit breaker;

"**DDA**" means Disability Discrimination Act 1996;

**"Deliverables"** means all documents, information, reports, diagrams, pricing schedules, records, method statements, risk assessments, manuals, schedules, databases, reinforcement details, photographs, formulae, plans, designs, specifications, drawings (including as-built drawings), details, calculations, transport and other models and simulations, the outputs and reports based on any models, programmes and all other material created and/or provided by Infraco (and/or any Infraco Party or any other third party) in relation to the Infraco Works;

**"DELTA"** means land use model;

**"Depot"** means the depot at Gogar comprising maintenance facilities, stabling facilities, sidings, operations, cleaning, the Control Centre, storage facilities and accommodation for operational and maintenance staff;

**"Depot Licence"** means the licence in the form set out in Schedule 35 (*Depot Licence*) as executed by the Infraco

**"Design"** means the design of the Edinburgh Tram Network;

**"Design Manual"** means the design manual issued by CEC from time to time;

**"DfT"** means Department for Transport;

**"DNO"** means district network operator;

**"DRP"** means Dispute Resolution Procedure;

**"Discriminatory Change in Law"** means a Change in Law, the terms of which apply expressly to:

- (a) the Edinburgh Tram Network; and/or
- (b) the Infraco and not to other persons;

**"Dispute"** means any dispute, difference or unresolved claim between the Parties in connection with or arising from this Agreement;

**"Dispute Resolution Procedure"** means the procedure set out in Schedule 9 (*Dispute Resolution Procedure*);

**"DPOFA"** means the development, partnering and operating franchise agreement between **tie** and the Operator dated 14 May 2004;

"**DPOFA Change**" has the meaning given in Clause 17.14;

"**DPOFA Change Response**" has the meaning given in Clause 17.14;

"**DPOFA Infraco Event**" means any breach or underperformance of the obligations (including any delictual liability and/or breach of statutory duty) set out in this Agreement which results or is likely to result in (i) the Operator asserting any claim against **tie** for relief, compensation, indemnification, waiver, release or relaxation of any of its obligations owed to **tie** pursuant to the DPOFA including in respect of delay in completion of system acceptance, testing and commissioning or the need to retest Infraco Works; prolongation of the Operator's mobilisation and shadow running activities pursuant to the DPOFA; change in mobilisation scope or its acceleration or (ii) a **tie** DPOFA Change;

"**Drawings**" means those drawings prepared by the Infraco and included in Schedule 34 (*Drawings*);

"**EALI**" means economic activity and location impact;

"**EARL**" means Edinburgh Airport Rail Link;

"**ECML**" means east coast main line;

"**Edinburgh Tram Network**" means the tramway which is to be designed, constructed and maintained in Edinburgh pursuant to this Agreement in Phase 1a (forming part of Line One and Line Two as described in the Tram Legislation), or either of them (as may be amended from time to time together with the Phase 1b Works and any Network Expansion, modification, line extension, spur, interconnection and any additional line which may be instructed), together with all associated works and facilities including all civil engineering and track works, Trams, infrastructure, plant, machinery and equipment installed or used for such tramway;

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

"**E&G**" means Edinburgh and Glasgow railway;

"**EIA**" means environmental impact assessment;

"**E&M**" means electrical and mechanical;

"**EMC**" means electro magnetic current;

**"Emergency Services"** means Lothian and Borders Police, Lothian and Borders Fire Brigade, Scottish Ambulance Services and HM Coastguard;

**"Employer's Requirements"** means the specification or specifications set out in Schedule 2 (*Employer's Requirements*) and any modification thereof or addition thereto as may from time to time be approved in writing by **tie** or **tie's** Representative;

**"Environmental Information Regulations"** means the Environmental Information (Scotland) Regulations 2004, Scottish SI 2004/520;

**"Environmental Statements"** means the environmental statements supporting the Tram Legislation;

**"E&P"** means electrification and power;

**"ES"** means engineering supervisor;

**"Estimate"** means the estimate to be provided by the Infraco pursuant to Clause 80.4;

**"Euro Compliant"** has the meaning given in Clause 9.9;

**"EWS"** means English, Welsh and Scottish railway;

**"Expiry Date"** means (subject to **tie's** right to extend in accordance with Clause 2.2) the date falling 15 years from the issue of the Certificate of Service Commencement;

**"Expiry Survey"** has the meaning given in Clause 86.1;

**"FAT"** means factory acceptance test;

**"Final Buildability Report"** means the report to be prepared by the Infraco and submitted for approval in accordance with Schedule 2 (*Employer's Requirements*);

**"Final Persistent Breach Notice"** means a notice served by **tie** pursuant to Clause 93.2;

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

**"First Party"** has the meaning given in Clause 6.3;

**"First Scotrail"** means First Scotrail Limited, a company incorporated under the Companies Acts with registered number SC185018 and having its registered office at 395 King Street, Aberdeen, AB24 5RP;

**"Fishplate joint"** means mechanical joint which bolts rail ends together using (fish)plates;

**"Flash butt weld"** means the technique of joining two rail ends together by using high voltage and current to melt rails which are "fed" together;

**"FOC"** means freight (train) operating company;

**"FOISA"** means the Freedom of Information (Scotland) Act 2002 and any subordinate legislation made under this Act from time to time together with any guidance and/or codes of practice issued by the Scottish Information Commissioner in relation to such legislation;

**"Force Majeure Event"** means the occurrence after the Effective Date of:

- (a) war, civil war or armed conflict in the United Kingdom;
- (b) nuclear, chemical or biological contamination unless the source of the contamination is the result of actions by the Infraco or any Infraco Party; or
- (c) pressure waves caused by devices travelling at supersonic speeds;

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

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

**"Forth Ports Site"** means those areas of ground in the City of Edinburgh identified in the parliamentary drawing numbers 6 to 12 inclusive as annexed to the Edinburgh Tram (Line One) Act 2006 as either limits of land to be acquired or used or limits of deviation and which are as at the Effective Date within the ownership of Forth Ports;

**"FRS"** means financial reporting standards;

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

**"GI Survey"** means ground investigation surveys;

"**Good Industry Practice**" means using standards, practices, methods and procedures conforming to Law and exercising that degree of skill, care, diligence, prudence and foresight that would reasonably be expected from a large, reputable, professionally qualified, competent and skilled organisation experienced in carrying out activities of a similar nature, scope and complexity to those comprised in the Infraco Works and seeking in good faith to comply with its contractual duties and all duties owed by it;

"**GNER**" means Great North Eastern Railway Limited;

"**GPRS**" means general package radio service;

"**Green Zone Working**" means the term applied to those works carried out on Network Rail infrastructure while traffic is still operating and staff are protected by means other than look-out;

"**GSM**" means global system for mobile communications;

"**GSM-R**" means global system for mobile communications for railways;

"**GSN**" means global structured notation for safety cases;

"**GUI**" means graphic user interface;

"**Guidance**" means any applicable guidance, policy, direction or determination issued by any regulatory body with which **tie**, CEC, the Operator, the Infraco and/or the Infraco Parties are bound to comply, and shall include the **tie** and CEC Policies and the Special Requirements;

"**Handback Bond**" means the handback bond described in Clause 74.4 (*Bond, Parent Company Guarantee and Collateral Warranties*);

"**Handback Package**" means the information referred to in Clause 95 (*Transition on Termination or Expiry*), as updated by the Infraco from time to time in accordance with the provisions of Clause 95 (*Transition on Termination or Expiry*);

"**Hazardous Materials**" means any materials, Parts or systems generally known and accepted at the time of their use by the Infraco or any Infraco Party in performing the Maintenance Services to comprise or contain a toxic or other hazard to the safety or health of persons or safety of property;

"**HAZOP**" means hazard and operability study;

**"Heritable Proprietor"** means the heritable proprietor of a building, or where such building consists of a tenement or other flatted dwellinghouses, the heritable proprietor of each flat or sub-unit;

**"HIRA"** means hazard identification risk assessment;

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

**"HMRI"** means Her Majesty's Railway Inspectorate;

**"HS"** means Historic Scotland;

**"HSE"** means Health and Safety Executive;

**"HSQE Manager"** means the manager appointed in accordance with Clause 105.5;

**"HSQE System"** has the meaning given in Clause 105.1;

**"HV"** means high voltage;

**"HVAC"** means heating ventilation and air conditioning;

**"ICE"** means Institution of Civil Engineers;

**"IEC"** means International Electrotechnical Commission;

**"IEE"** means Institution of Electrical Engineers;

**"ILT or IoLT"** means Institute of Logistics and Transport;

**"Indemnified Parties"** has the meaning given to it in Clause 77.1;

**"Indexed"** means in relation to an amount, that amount to be multiplied by the value of RPIX at the Point of Indexation, divided by the Base Case RPIX to generate a percentage movement;

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

**"Information"** shall have the meaning given to it in Section 73 of FOISA;

**"Infraco Change"** means a change proposed by the Infraco in accordance with Clause 81.1 and approved by **tie** in accordance with Clause 80 (*tie Changes*) or Clause 81 (*Infraco Changes*);

**"Infraco Default"** means one of the following events:<sup>15</sup>

- (a) a breach by the Infraco of any of its obligations under this Agreement which materially and adversely affects the carrying out and/or completion of the Infraco Works;
- (b) the occurrence of an Insolvency Event;
- (c) the Infraco fails to commence the Infraco Works within 90 days of the Commencement Date or abandons (which shall include the failure to proceed with the Infraco Works with due diligence) the Infraco Works (or a material part of them) at any time;
- (d) the Service Commencement Date or Sectional Completion Date (as appropriate) in respect of a Section is not achieved or is forecast to not be achieved on or before the date falling [12 months] after the Planned Service Commencement Date or Planned Sectional Completion Date (as appropriate);
- (e) the cap on liquidated and ascertained damages expressed in Clause 62.3 is exceeded or is forecast to be exceeded;
- (f) a breach by the Infraco of its obligations to take out and maintain the Required Insurances;
- (g) the issue of three or more Underperformance Warning Notices in any 12 month period;
- (h) the Infraco conducts itself in a manner which **tie** considers to be incompatible with the performance of the Infraco Works and/or in such a manner so as to wilfully detract from the image and reputation of **tie**, CEC, Transport Edinburgh Limited, Transport Scotland, the Scottish Ministers or any project related to the performance of the Infraco Works;

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<sup>15</sup> To be further reviewed by **tie**.

- (i) the Infraco breaches Clauses 101.1, 101.2 101.3, 101.7, or 101.10;
- (j) the Infraco fails to resolve a Conflict of Interest in accordance with Clause 99 (*Conflict of Interest*) to the reasonable satisfaction of **tie**; or
- (k) the Infraco has reported a change in the legal status of the Infraco or a Change in Control of the Infraco which is materially prejudicial to carrying out and completing the Infraco Works; or
- (l) has suspended the progress of the Infraco Works without due cause for 15 Business Days after receiving from **tie's** Representative written notice to proceed.

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

**"Infraco IPR"** means:

- (a) all Intellectual Property Rights (including Intellectual Property Rights in relation to the Infraco Software) which the Infraco can demonstrate by documentary evidence were already existing and owned by, or licensed to, the Infraco prior to the Effective Date including, without limitation, any asset management system and/or works programming system operated by the Infraco which is not comprised within the Project IPR; and
- (b) any modifications or developments of any of the Intellectual Property Rights referred to in paragraph (a) above which are generic in nature and not specific to the carrying out of the Infraco Works.

**"Infraco Party"** means each and any of the Infraco's employees, directors, officers, agents, professional advisors, consultants and contractors and its or their sub-contractors (of any tier) including the Sub-Contractors and shall include its or their directors, officers and employees as they are involved in relation to the Infraco Works and "Infraco Parties" shall be construed accordingly;

**"Infraco's Proposals"** means the Infraco's proposals for implementation of the Infraco Works included in Schedule 33 (*Infraco's Proposals*) (which shall include the supply of the Trams, Design, the Drawings, the pricing schedules, the Contract Price Analysis, the

Maintenance Plan, the Maintenance Programme, the Spare Parts, Special Tools and the Programme) as amended from time to time in accordance with this Agreement;

**"Infraco's Representative"** shall have the meaning given to it in Clause 26.2;

**"Infraco Safety Management System"** has the meaning given in Clause 17.18.1.2;

**"Infraco's Site Rules"** means the site rules prepared by the Infraco which are relevant to the Infraco Works;

**"Infraco Software"** means programs, the Intellectual Property Rights in which are:

- (a) owned by the Infraco; and
- (b) used by the Infraco to carry out its obligations under this Agreement.

**"Infraco Works"** means, as the context requires, all or any of the works to be constructed and completed and/or services to be provided and/or the plant, machinery and equipment to be supplied and installed by the Infraco in accordance with this Agreement and which are necessary to deliver a fully functional tram system in Edinburgh, and to subsequently maintain such system all in accordance with the Employer's Requirements. This shall include all design work, obtaining all Consents and approvals, providing Trams, any Temporary Works, the SDS Services, the Tram Supply Obligations, the Tram Maintenance Services and the Infrastructure Maintenance Services, and/or all other obligations which the Infraco is required to comply with and which are set out in this Agreement;

**"Infrastructure Maintainer"** means the party appointed to carry out the Infrastructure Maintenance Services in accordance with the Infrastructure Maintenance Agreement;

**"Infrastructure Maintenance Agreement"** means the agreement awarded to the Infrastructure Maintainer in respect of the Infrastructure Maintenance Services set out in Schedule 22 (*Infrastructure Maintenance Agreement*) as may be amended from time to time with the approval of **tie** in accordance with this Agreement;

**"Infrastructure Maintenance Qualifying Change in Law"** means a Qualifying Change in Law pursuant to the Infrastructure Maintenance Agreement;

**"Infrastructure Maintenance Services"** means the ongoing maintenance of the Edinburgh Tram Network (excluding the Trams), supply of spares, Special Tools and the provision of

any associated services and other obligations incumbent on the Infrastructure Maintainer as described in the Infrastructure Maintenance Agreement;

**"Infrastructure Maintenance Services Payment"** means the payment to be made to the Infraco in respect of the performance of the Infrastructure Maintenance Services in accordance with this Agreement. This payment shall be based on the sums set out in Schedule 4 (*Contract Price Analysis*) and the final amount to be paid in each Reporting Period to the Infraco shall be calculated in accordance with Clause 68 (*Payment in Respect of Maintenance Services*) and part A of Schedule 6 (*Maintenance Payment Regime*).

**"Infrastructure Maintenance Plan"** means the maintenance plan to be prepared by the Infrastructure Maintainer in accordance with the Infrastructure Maintenance Agreement;

**"Initial Buildability Report"** means the report to be prepared by the Infraco in accordance with Schedule 2 (*Employer's Requirements*);

**"Insolvency Event"** means any of the following events:

- (a) the Infraco is unable to pay its debts as they fall due or is insolvent or admits (in writing) its inability to pay its debts as they fall due;
- (b) the Infraco suspends for a period of two months making payments on all or any class of its debts or a moratorium is declared by the Infraco in respect of its indebtedness;
- (c) the Infraco ceases business or announces an intention to do so;
- (d) the following are entered into:
  - (i) a voluntary arrangement (other than a solvent one) for a composition of debts of the Infraco;
  - (ii) a scheme of arrangement in respect of the Infraco pursuant to the Insolvency Act 1986 or the Companies Act 1985; or
  - (iii) a material composition or arrangement (other than a solvent one) with the Infraco's creditors;
- (e) either of the following:

- (i) the winding-up of the Infraco (including passing a shareholders' resolution or the presentation of a petition by the Infraco for the purpose of winding up the Infraco); or
  - (ii) its administration (including where an application is made by the Infraco or petition is presented by the Infraco for, or any meeting of its directors or members resolves to make an application for, an administration order);
- (f) an order for the winding-up or administration of the Infraco is made;
- (g) any liquidator, judicial custodian, receiver, administrative receiver, administrator or the like is appointed in respect of the Infraco or any material part of the Infraco's assets;
- (h) possession is taken of, or any distress, execution or other process (other than on the dependence of inhibition) is levied or enforced upon, any material part of the property (whether real or personal) of the Infraco by or on behalf of any creditor or encumbrancer of the Infraco; or
- (i) anything analogous to any of the events mentioned in paragraphs (a) to (h) above occurs in relation to the Infraco under the law of any relevant jurisdiction;

**"Intellectual Property Rights"** means any rights in or to any patent, design right, utility model, trade mark, brand name, service mark, trade name, business name, logo, invention (whether registered or unregistered), domain name, semi-conductor right, topography right, software designs and/or other materials, source code, copyright, moral right, know-how or rights in databases and any other rights in respect of any industrial or intellectual property, whether capable of being registered or not, including all rights to apply for any of the foregoing rights or for an extension, revival or renewal of any of the foregoing rights and any similar or analogous rights to any of the above, whether arising or granted under the law of Scotland or of any other jurisdiction;

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

**"IP"** means ingress protection;

**"IPR"** means intellectual property rights;

"ISDN" means integrated services digital network;

"Joint Revenue Committee" means the consultant or consultants appointed by tie to perform transport modelling functions in relation to the Edinburgh Tram Network;

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

"Key Sub-Contractor" means [◆] [*To be agreed during the negotiations with the Tenderers*];

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

"Last Tram" means each of the timetabled Trams which are the last to operate in passenger service on each route in each direction prior to the Edinburgh Tram Network shutting down for the night;

"Late Tram" means either:

- (i) a Tram:
  - (a) that is in passenger carrying service; and
  - (b) is arriving at Edinburgh Airport or departing from any other Monitoring Point; and
  - (c) when its actual departure time from the Monitoring Point is compared to the Timetable it is either more than 2 minutes late or more than 1 minute early or in the case of Edinburgh Airport its actual arrival time is when compared to the Timetable more than 2 minutes late; or
- (ii) a timetabled time at a Monitoring Point for which there is no Tram running in service;

"Late Last Tram" means a Last Tram which is also an Infraco Late Tram;

"Law" means:

- (a) any applicable Legislation;

- (b) any applicable Guidance; and
- (c) any applicable judgment of a relevant court of law which is a building precedent;

in each case in force in Scotland;

"LBS" means location breakdown structure;

"LCC" means life cycle cost;

"LCD" means liquid crystal display;

"LED" means light emitting diode;

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

"Legislation" means any Act or instruments of the Scottish Parliament or the United Kingdom Parliament or subordinate legislation within the meaning of section 21(1) of the Interpretation Act 1978, any exercise of the Royal Prerogative, and any enforceable community right within the meaning of section 2 of the European Communities Act 1972, and any bye-laws of any local or other statutory authority;

"LEIM" means local economic impact model;

"Letter of Appointment" means the letter from tie to the Infraco dated ♦] [*To be completed with the successful Tenderer*] accepting the Formal Offer;

"Line One" means the tramway works as authorised by the Edinburgh Tram (Line One) Act 2006;

"Line Two" means the tramway works as authorised by the Edinburgh Train (Line Two) Act 2006;

"LLAU" means the limits of land to be temporarily acquired and used for the Edinburgh Tram Network;

"LLPA" means long line public address;

"LOD" means the limits of deviation for the Edinburgh Tram Network;

"LRT" means light rapid transit;

"LTS" means local transport strategy;

"LUTI" means land use/transport interaction model;

"LV" means low voltage;

"LWR" means long welded rail;

"**Maintenance Contract Price**" means the maintenance contract price in respect of the Infrastructure Maintenance Services and the Tram Maintenance Services included in Schedule 4 (*Contract Price Analysis*) as may be varied from time to time in accordance with this Agreement;

"**Maintenance Plan**" means the Infrastructure Maintenance Plan and the Tram Maintenance Plan and/or the Tram Maintainer's proposals for implementation of the Infrastructure Maintenance Services or Tram Maintenance Services respectively;

"**Maintenance Programme**" means the programme for carrying out the Maintenance Services as developed by the Infraco and extended from time to time in accordance with this Agreement;

"**Maintenance Services**" means the Infrastructure Maintenance Services and the Tram Maintenance Services;

"**Maintenance Services Interim Certificate**" means any certificate to be issued by tie in accordance with Clause 68.4;

"**Maintenance Services Payment**" means the Infrastructure Maintenance Services Payment and/or the Tram Maintenance Services Payment;

"**Maintenance Specification**" means the specification or specifications in respect of Trams, infrastructure and equipment set out in Schedule 2 (*Employer's Requirements*) and any modification thereof or addition thereto as may from time to time be approved in writing in accordance with this Agreement;

"M&E" means mechanical and electrical;

"**Microwave**" means form of wireless communication;

"**Milestone**" means a Construction Milestone, a Critical Milestone, a Mobilisation Milestone and/or an SDS Milestone;

"**Milestone Completion Certificate**" means a Construction Milestone Completion Certificate, Mobilisation Milestone Completion Certificate and/or Tram Milestone Completion Certificate and/or an SDS Milestone Completion Certificate;

"**Milestone Payment**" means the payment to be made against the achievement of a Milestone for an amount set out in Schedule 5 (*Pricing Schedules*);

"**Minimum Spare Parts Pool**" means the minimum level of each Spare Part or Special Tool to be held in the Spare Parts Pool as specified in the Infraco's Proposals;

"**MMI**" means man machine interface;

"**Mobilisation Milestone**" means any milestone relative to the Infrastructure Maintenance Services which has been identified and defined as a mobilisation milestone in part [◆] of Schedule 5 (*Pricing Schedules*);

"**Mobilisation Milestone Completion Certificate**" means any certificate in respect of achievement of a Mobilisation Milestone issued by **tie's** Representative in accordance with Clause 41.3;

"**Mobilisation Period**" means the period commencing on the Effective Date and ending on the [◆];

"**Monitoring Point**" means the locations where the arrival or departure of Trams is recorded for the purpose of calculating Tram punctuality for the purpose of part A of Schedule 6 (*Maintenance Payment Regime*), being:

- (i) **Phase 1A:** for the purposes of monitoring arrival and departure: Edinburgh Airport;
- (ii) **Phase 1A:** for the purposes of measuring departure only:
  - (a) Edinburgh Park Station;
  - (b) Haymarket;
  - (c) Foot of the Walk;
  - (d) Leith [Newhaven or Ocean Terminal- to be determined]; and

- (e) Picardy Place;
- (iii) **Phase 1B:** for the purposes of measuring departure only:
  - (a) Crewe Toll (northbound only); and
  - (b) Granton Square;

"**MTBF**" means mean time between failure;

"**MTTR**" means, mean time to repair;

"**MUDFA Contractor**" means the multi-utilities diversion framework agreement contractor to be appointed or appointed by **tie**, to carry out utilities diversions in respect of the Edinburgh Tram Network;

"**MUDFA Works**" means the utilities diversions works in relation to the Edinburgh Tram Network which are being carried out by the contractor appointed by **tie**;

"**Network Certificate**" means a certificate issued in accordance with Clause 47.3;

"**Network Expansion**" means any expansion beyond Phase 1a and Phase 1b;

"**Network Rail**" means Network Rail Infrastructure Limited, a Company incorporated under the Companies Act with registered number 2904587 and having its registered office at 40 Melton Street, London, NW1 2EE;

"**Network Rail Agreement**" means the protective provisions agreement entered into among **tie**, CEC and Network Rail and dated 17 and 21 June 2005;

"**Network Retention**" has the meaning given in Clause 67.3;

"**Neutral section**" means the term describing a short un-powered section of the OLE system usually between electrical sections controlled by different (but adjacent) electrical sub-stations;

"**NICEIC**" means National Inspection Council for Electrical Installation Contracting;

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

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

"**NO<sub>x</sub>**" means nitrogen oxides;

"**NPV**" means net present value;

"**NR**" means Network Rail;

"**NTI**" means next train indicator;

"**NTP**" means network termination point;

"**OCIP Insurances**" means the insurances referred to in Clause 76 (*Required Insurances*) and set out in part 4 of Schedule 11 (*Required Insurances*) which shall be amended and notified (as required) to the Infraco from time to time;

"**ODN**" means operational data network;

"**OGC**" means the Office of Government Commerce, an independent office of the Treasury which was established in April 2001 and having its principal office at Rosebury Court, St. Andrew's Business Park, Norwich, Norfolk, NR7 0HS;

"**OHLE**" or "**OLE**" means overhead line equipment;

"**OLG**" means operators liaison group;

"**Open Book Basis**" means the availability and disclosure (consistent with operation of Clause 104 (*Information and Audit Access*)) of a reasonable level of data and calculations used by the Infraco to create and justify costings and financial analysis presented to **tie** which shall include any management costs, profit element and overhead being charged by the Infraco to **tie**;

"**Operational Safety Group**" shall include representatives from **tie**, Transport Edinburgh Limited, CEC in its capacity as roads authority, the Infraco, the Operator, Lothian Buses, the SDS Provider, the Tram Supplier and the Tram Maintainer;

"**Operations and Maintenance Manual**" means the manual to be prepared by the Infraco in accordance with this Agreement;

**"Operations Performance Specification"** means the specification included within Schedule 2 (*Employer's Requirements*);

**"Operator"** means Transdev Edinburgh Tram Limited, a company incorporated in Scotland under registered number SC267598 and having its registered office at Level 2, Saltire Court, 20 Castle Terrace, Edinburgh EH1 2ET, appointed by **tie** as operator under the DPOFA or such successor operator of the Edinburgh Tram Network as may be appointed from time to time;

**"Operator Event"** means:

- (a) any delay by the Operator in the performance of its obligations or exercise of its rights pursuant to DPOFA or in responding to any request from the Infraco to assist in relation to unforeseen damage to or interference with the Transport Services or minor obstruction on the Edinburgh Tram Network caused by any third party in so far as forming part of the Operator's responsibilities under DPOFA;
- (b) any material failure or omission in the provision of the Project Development Services or the performance of the Project Operations by the Operator;
- (c) any damage to or deficiencies in the Infraco Works caused directly and predominantly by the Operator;
- (d) any act or omission by the Operator which:
  - (i) prevents or interfere with the design, installation, integration, system acceptance, testing, commissioning, operation or maintenance of the Edinburgh Tram Network;
  - (ii) increases the Contract Price;
  - (iii) requires the Infraco to apply for a variation to the Infraco Works in accordance with Clause 81 (*Infraco Changes*);
  - (iv) adversely impacts on the Infraco Works, the Maintenance Services, the Edinburgh Tram Network and/or whole life costs or Handback obligations.

**"Operator Maintenance"** means the maintenance of the Edinburgh Tram Network to be carried out by the Operator in accordance with the DPOFA;

**"Operator Maintenance Plan"** means the plan to be prepared by the Operator in relation to the performance of the Operator Maintenance;

**"Operator Procedures"** means those procedures in place to ensure the safe and efficient maintenance operation of the Edinburgh Tram Network;

**"Operator's Case for Safety"** means the case for safety that the Operator is required to maintain in respect fo the operation of the Edinburgh Tram Network;

**"Optical fibre"** means a form of data or telecommunications transmission infrastructure;

**"Original Expiry Date"** means the date falling 15 years from the issue of the Certificate of Service Commencement;

**"ORS"** means Operational Radio System;

**"P3e"** means Primavera 3e;

**"PA"** means public address;

**"Pan"** means pantograph;

**"Panels"** has the meaning given to it in paragraph 19 of Schedule 9 (*Dispute Resolution Procedure*);

**"PARAMICS"** means a microsimulation modelling software package;

**"Part"** means any component or furnishing or equipment furnished within or relating to the Edinburgh Tram Network whether or not the same is installed on the Edinburgh Tram Network (including any Tram);

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

**"PCC"** means point control cabinet;

**"PCU"** means passenger car unit;

**"PDFH"** means passenger demand forecasting handbook;

**"Performance Review Date"** means the date 3, 8, and 13 years after the Service Commencement Date;

**"Performance Review Period"** means the period between each Performance Review Date (and the period between the Service Commencement Date and the first Performance Review Date);

**"Permanent Land"** means the land shown outlined with a pink broken line on the plans set out in Schedule 40 (*Site Plans*);

**"Permits to Work"** means the permits to work issued by **tie** in accordance with paragraph 3.5 of part A, and 3.4 of part B, of Schedule 3 (*Code of Construction Practice and Code of Maintenance Practice*);

**"Permitted Variation"** means a **tie** Change, a Small Works Change, an Accommodation Works Change and/or an Infraco Change which has been authorised to proceed in accordance with the provisions of this Agreement;

**"Persistent Breach Notice"** means a notice served by **tie** pursuant to Clause 93 (*Persistent Breach*);

**"Phase 1a"** means Edinburgh Airport to Newhaven (inclusive), together with the Depot at Gogar and the spur at Roseburn Junction;

**"Phase 1b"** means Roseburn Junction to Granton Square (inclusive);

**"Phase 1b Works"** means as the context requires, all or any of the works to be constructed and completed and/or services to be provided and/or the plant, machinery and equipment to be supplied and installed by the Infraco in accordance with this Agreement and which are necessary to deliver Phase 1b, and to subsequently maintain Phase 1b all in accordance with the Employer's Requirements. This shall include all design work, obtaining all Consents and approvals, providing Trams, any Temporary Works, the SDS Services, the Tram Supply Obligations, the Tram Maintenance Services and the Infrastructure Maintenance Services, and/or all other obligations which the Infraco is required to comply with and which are set out in this Agreement;

**"PHC"** means point heating cabinet;

**"PHP"** means passenger help point;

"PLC" means programmable logic controller;

"PID" means passenger information display;

"PIS" means passenger information system;

**"Planned Sectional Completion Date"** means each of the following programmed dates of sectional completion for the relevant Section in accordance with this Agreement of the Edinburgh Tram Network as may be amended from time to time in accordance with this Agreement:

(a) Section A [◆];

(b) Section B [◆]; and

(c) Section C [◆];

*[The dates proposed by the successful Tenderer in its Tender Submission as accepted by **tie** shall be inserted.];*

**"Planned Service Commencement Date"** means [◆], which is the programmed date of service commencement of Sections A, B, C and D, as may be amended from time to time in accordance with this Agreement ;

*[The date proposed by the successful Tenderer in its Tender Submission as accepted by **tie** shall be inserted.]*

**"Planning Permission"** means any planning permission, planning approval, approval of reserved matters, listed building consent, conservation areas consent and/or other consent or approval;

**"Point of Indexation"** shall be January each year to be applied annually as of 1<sup>st</sup> April each year;

**"Position Paper"** has the meaning given in paragraph 10.2 of Schedule 9 (*Dispute Resolution Procedure*);

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

**"Pricing Schedules"** means Schedule 5 (*Pricing Schedules*);

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

**"Programme"** means the programme set out in Schedule 15 (*Programme*) as developed and extended from time to time in accordance with this Agreement which shall include, the Maintenance Programme, the Submittal Programme and the Consents Programme but shall exclude any programme developed in respect of the completion of any Accommodation Works Changes;

**"Prohibited Act"** means:

- (a) offering, giving or agreeing to **tie**, the Scottish Executive, Transport Scotland, the Scottish Ministers, CEC or any **tie** Party or any other public body or any person owned or employed by any of them any gift or consideration of any kind as an inducement or reward:
  - (i) for doing or not doing (or for having done or not having done) any act in relation to the obtaining or performance of this Agreement; or
  - (ii) for showing or not showing favour or disfavour to any person in relation to this Agreement;
- (b) paying commission or agreeing to pay commission to any person in connection with the award of this Agreement;
- (c) committing any offence:
  - (i) under the Prevention of Corruption Acts 1889-1916 or section 68(2) of the Local Government (Scotland) Act 1973;
  - (ii) under any Law creating offences in respect of fraudulent acts; or
  - (iii) at common law in respect of fraudulent acts in relation to this Agreement or any other relevant agreement with **tie**, the Scottish Executive, Transport Scotland, the Scottish Ministers, CEC or any other public body; or
- (d) defrauding or attempting to defraud or conspiring to defraud **tie**, CEC, the Scottish Executive, Transport Scotland, the Scottish Ministers or any other public body;

Any references within this Agreement to any "Prohibited Act" shall include acts outwith the United Kingdom and the references within the definition "Prohibited Act" to UK legislation

shall be deemed to be amended to refer to legislation in other jurisdictions outside of the United Kingdom;

**"Project Development Services"** means the services to be provided by the Operator to **tie** pursuant to and described in the DPOFA as may be amended from time to time;

**"Project IPR"** means all Intellectual Property Rights in the Deliverables and the Specially Written Software and any other Intellectual Property Rights created in the performance of the Infraco Works, which are specific to the nature of the performance of the Infraco Works;

**"Project Operations"** means the performance of:

- (a) the Transport Services on the Edinburgh Tram Network (including the operation of the Control Centre);
- (b) the Operator Maintenance of the Edinburgh Tram Network; and
- (c) all other obligations of the Operator under the DPOFA from time to time;

as may be varied from time to time;

**"Project Vision"** has the meaning given in Recital F of this Agreement;

**"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;

**"Protestor Action"** means any action taken or threatened to be taken by any person or persons protesting against the carrying out of any part of the Infraco Works or the construction of the Edinburgh Tram Network (or any part thereof) or other protestor action which directly or indirectly affects the performance of the Infraco Works other than any action (a) directed at the Infraco (or any Infraco Party) that is not directed at the Edinburgh Tram Network or (b) which arises out of a breach of this Agreement by the Infraco or (c) which arises out of a complaint about the Infraco or an Infraco Party by a third party.

**"PSR"** means public service requirement;

**"P-Way"** means rails, sleepers and other supports such as ballast, cast slab, the drainage system, the solum etc. and the track;

**"Qualifying Change in Law"** means:

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

**"RAMS"** means reliability, maintainability and safety;

**"RCD"** means residual current device;

**"REB"** means relocatable equipment building;

**"REC"** means regulated electricity company;

**"Redevelopment Notice"** has the meaning given in the Building Fixing Agreement;

**"Red Zone Working"** means the term applied to those works carried out on Network Rail infrastructure while traffic is still operating and staff are protected by look-out;

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

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

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

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

**"Relevant Authority"** means any court with the relevant jurisdiction and any local authority, national authority or supra national agency, inspectorate, minister, Scottish Executive, Scottish Ministers, Transport Scotland, body, official or public or statutory person of the government of Scotland or the United Kingdom or of the European Union and "Relevant Authorities" shall be construed accordingly;

**"Reliability Certificate"** means a certificate issued by **tie** in accordance with Clause 47.4;

**"Relief Event"** means unless any of the following events arise (directly or indirectly) as a result of any act or omission of the Infraco and/or an Infraco Party:

- (a) fire, explosion, lightning, tempest, flood (other than flood caused by bursting or overflowing of apparatus or pipes), or earthquakes. For avoidance of doubt "flood" shall exclude flooding affecting any part of the Edinburgh Tram Network caused by weather or local conditions against which the Infraco, acting prudently and reasonably and in accordance with Good Industry Practice, should have protected the Edinburgh Tram Network;
- (b) power failure or bursting or overflowing of apparatus or pipes except in each case where such failure, bursting or overflowing arises from the operations of the Infraco or from a failure of the Infraco's and/or an Infraco Party's plant or equipment and/or any part of the Edinburgh Tram Network itself;
- (c) failure by any Utility to carry out works or provide services which they would ordinarily provide, save to the extent such failure arises from an exercise of rights by such party pursuant to an agreement with the Infraco;
- (d) any accidental loss of or damage to a material part of the Edinburgh Tram Network;
- (e) the occurrence of any Protestor Action;
- (f) any official or unofficial strike, lockout, go-slow or other industrial dispute generally affecting the construction and civil engineering industry in the United Kingdom in which a substantial number of the Infraco's employees participate;
- (g) the discovery on, under or at the Site of any fossil, antiquity or other item requiring action pursuant to Clause 39 (*Fossils and Antiquities*) but only to the extent that the presence of such fossil, antiquity or other item was not evident from any archaeological survey of which the Infraco was aware;
- (h) the discovery on, under or at the Site of any human remains;
- (i) orders or directions from **tie's** Representative in respect of the removal of unsatisfactory work or materials referred to in Clause 37.5, which are referable to Clause 64 (*Relief Events*);
- (j) the occurrence of a Force Majeure Event; or
- (k) an act of terrorism.

**"Repairs Notice"** has the meaning given in the Building Fixing Agreement;

**"Reporting Period"** means a period of 28 days;

**"Reporting Period End Date"** means any of the dates set out in Schedule 38 (*Reporting Period End Dates*);

**"Request for Information"** shall have the meaning set out in FOISA and shall include any apparent request for information under FOISA, the Environmental Information Regulations or the Code;

**"Required Insurances"** means the insurances set out in part 1 of Schedule 11 (*Required Insurances*) as may be amended from time to time in accordance with this Agreement;

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

**"Retention"** has the meaning given in Clause 67.2;

**"Retention Bond"** means the retention bond described in Clause 74.3 (*Bond, Parent Company Guarantee and Collateral Warranties*);

**"Review Procedure"** means the review procedure set out in Schedule 14 (*Review Procedure*);

**"Roads Demarcation Agreement"** means the agreement among the Infracore, tie and CEC set out in Schedule 29 (*Roads Demarcation Agreement*) as may be amended from time to time;

**"RPIX"** means the general index of retail prices for all items excluding mortgage interest payments (Office of National Statistics: Series Identifier: CHMK) as published or any replacement thereof or, in the event such index ceases to exist, such other similar index as the Parties shall agree from time to time (or, if the Parties cannot so agree, as determined under the Dispute Resolution Procedure on the referral of either Party) provided that, if the basis of computation of such index shall have changed between the two relevant months, any official reconciliation between the two bases of computation published by a United Kingdom government department shall be binding on the Parties and, in the absence of such official reconciliation, such adjustment shall be made to the figure of such index for the second of those months to make it correspond as nearly as possible to the method of computation for the first of those months and such adjusted figure shall be considered for the purpose of this Agreement to the exclusion of the actual published figure;

"RSPG" means railway safety principles and guidance;

"RSSB" means railway standards and safety board;

"RTPI" means Royal Town Planning Institute;

"RTS" means regional transport strategy;

"RVAR" means Rail Vehicle Accessibility Regulations;

"S&C" means switch and crossings;

"S&T" means signalling and telecommunications;

"SAPT" means Scottish Association for Public Transport;

"SCADA" means supervisory control and data acquisition system;

"SCDI" means Scottish Council for Development and Industry;

"Schedule of Rates" means the rates specified in Schedule 5 (*Pricing Schedules*);

"Schedules" means Schedule 1 (*Definitions and Interpretation*), Schedule 2 (*Employer's Requirements*), Schedule 3 (*Code of Construction Practice and Code of Maintenance Practice*), Schedule 4 (*Contract Price Analysis*), Schedule 5 (*Pricing Schedules*), Schedule 6 (*Maintenance Payment Regime*), Schedule 7 (*Sub-Contractor Collateral Warranty*), Schedule 8 (*Bonds, Parent Company Guarantee and Collateral Warranty*), Schedule 9 (*Dispute Resolution Procedure*), Schedule 10 (*Panels for Dispute Resolution Procedure*), Schedule 11 (*Required Insurances*), Schedule 12 (*Key Personnel*), Schedule 13 (*Third Party Agreements*), Schedule 14 (*Review Procedure*), Schedule 15 (*Programme*), Schedule 16 (*Tram Supply Agreement*), Schedule 17 (*Tram Supply - Novation Agreement*), Schedule 18 (*Tram Supply - Collateral Warranty in favour of tie*), Schedule 19 (*Tram Maintenance Agreement*), Schedule 20 (*Tram Maintenance - Novation Agreement*), Schedule 21 (*Tram Maintenance - Collateral Warranty in favour of tie*), Schedule 22 (*SDS Agreement*), Schedule 23 (*SDS Novation Agreement*), Schedule 24 (*SDS Collateral Warranty in favour of tie*), Schedule 25 (*Infrastructure Maintenance Agreement*), Schedule 26 (*Infrastructure Maintenance - Collateral Warranty in favour of tie*), Schedule 27 (*Schedule of Accommodation Works*), Schedule 28 (*Asset Protection Agreement and Network Rail Standards*), Schedule 29 (*Roads Demarcation Agreement*), Schedule 30 (*Conditions Precedent*), Schedule 31 (*Certificates*), Schedule 32 (*tie and CEC Policies*), Schedule 33 (*Infraco's Proposals*), Schedule 34

(Drawings) and Schedule 35 (Depot Licence), Schedule 36 (Building Fixing Agreement), Schedule 37 (Tram Inspector Agreement), Schedule 38 (Reporting Period End Dates), Schedule 39 (TUPE Information), Schedule 40 (Site Plans), Schedule 41 (Defects), Schedule 42 (Phase 1b Provisions) and Schedule 43 (Approved Sub-Contractors and Trades) as the same may be amended from time to time in accordance with this Agreement;

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

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

**"SDS Agreement"** means the agreement between the SDS Provider and **tie** dated 19 September 2005 set out in Schedule 22 (SDS Agreement) as may be amended from time to time with the approval of **tie** in accordance with this Agreement;

**"SDS Milestone"** means any milestone (other than any Critical Milestone) which has been identified and defined as a milestone pertaining to the SDS Services in part [◆] of Schedule 5 (Pricing Schedules);

**"SDS Milestone Completion Certificate"** means a certificate to be issued in respect of a milestone completed by the SDS Provider;

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

**"SDS Qualifying Change in Law"** means a Qualifying Change in Law pursuant to the SDS Agreement;

**"SDS Services"** means those services to be provided by the SDS Provider in terms of the SDS Agreement; and shall exclude any design provided to the MUDFA Contractor in respect of utilities diversions;

**"Second Party"** has the meaning given in Clause 6.3

**"Section"** means any of Section A, Section B, Section C or Section D, all as may be amended from time to time by **tie** in accordance with this Agreement;

**"Section A"** means Depot;

**"Section B"** means test track;

**"Section C"** means the carrying out and completion of Phase 1a;

**"Section D"** means the carrying out and completion of T1, T2 and T3 in respect of Phase 1a;

**"Section E"** completion of Phase 1b;

**"Section F"** means the carrying out and completion of T1, T2 and T3 in respect of Phase 1b;

**"Sectional Completion Tests"** means [to be defined in the Employer's Requirements];

**"Sectional Completion Date"** means the date of issue of a Certificate of Sectional Completion for the relevant Section in accordance with this Agreement;

**"Security Interest"** means any mortgage, pledge, lien, hypothecation, security interest or other charge or encumbrance or any other agreement or arrangement having substantially the same economic effect and includes any Security as defined in section 248(b) of the Insolvency Act 1986;

**"Self-Monitoring Plan"** means a detailed plan produced by the Infraco pursuant to Clause 56 setting out how it proposes to monitor its compliance with the Employer's Requirements and its obligations under this Agreement in a way which will enable (i) the Infraco to produce the Service Quality Reports; (ii) **tie** to satisfy itself as to the level of the Infraco's compliance with the Employer's Requirements and its obligations under this Agreement in all respects; and (iii) the Parties to perform their respective responsibilities pursuant to and as described in Clause 103 (*Best Value*);

**"Service Commencement Date"** means the date of issue of the first Certificate of Service Commencement in accordance with this Agreement;

"**Service Quality Report**" means the report to be submitted by the Infraco pursuant to Clause 56 (*Service Performance and Quality Monitoring*) in a form developed and containing the information agreed by the Parties;

"**SESTRAN**" means South East Scotland Transport Partnership;

"**SIT**" means systems integration testing;

"**SSAP**" means statements of standard accounting practice;

"**Site**" means the lands or places on, under, in, or through which the Infraco Works are to be constructed including the Permanent Land and the Temporary Sites, any other lands or places covered by the Land Consents and/or land provided by **tie** for the purposes of the Agreement or any additional land or facilities provided by the Infraco pursuant to Clause 18.21, together with such other places as may be designated in the Agreement or subsequently agreed by **tie's** Representative as forming part of the Site;

"**Small Works**" means any change to the Infraco Works or additional works of a similar nature to, or related to, the Infraco Works having an individual cost not exceeding £10,000 (as Indexed) or as otherwise agreed between the Parties from time to time;

"**Small Works Change**" means any Small Works instructed in accordance with Clause 82 (*Small Works Changes*);

"**Small Works Cost Notice**" has the meaning given in Clause 82.1;

"**Snagging**" has the meaning given in Clause 44.6;

"**Snagging List**" means the list issued by **tie** in accordance with Clause 44.6;

"**Snagging Rectification Certificate**" means a certificate issued under Clause 46 (*Snagging*);

"**Spare Parts**" means such components, parts, consumables, equipment and furnishings as may reasonably be required from time to time to maintain, repair or replace any part of the Edinburgh Tram Network (including the Trams) or to keep it compliant (including any Tram) with the Maintenance Specification and the Employer's Requirements for the duration of its operational life;

"**Spare Parts Pool**" the pool of Spare Parts and Special Tools owned by **tie** and to be maintained by the Infraco in accordance with Clause 52 (*Maintenance*);

**"Special Requirements"** means those requirements described in Clause 19.10;

**"Special Tools"** means the special tools, hand tools and test equipment required to carry out maintenance of the Edinburgh Tram Network, listed in the Infraco's Proposals as the same may be varied from time to time by written agreement of the parties (such agreement not to be unreasonably withheld or delayed);

**"Specially Written Software"** means programs which are written by or on behalf of the Infraco specifically to enable the Infraco to carry out its obligations under this Agreement;

**"Specific Change in Law"** means any Change in Law which specifically applies to the provision of works the same as or similar to the Infraco Works but excluding the making, amendment or revocation of any Traffic Regulation Order;

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

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

**"Stakis Site"** means those subjects forming part of the Stakis Property and which, for the purposes of the Edinburgh Tram (Line Two) Act 2006 comprise Plot Numbers 329, 330, 333 and 334 on parliamentary drawing number 20 as annexed to the Tram Legislation, but only to the extent the same are let to Stakis as the Stakis Property;

**"Sub-Contractor"** any sub-contractor, sub-consultant, supplier, specialist and/or other party appointed in accordance with Clause 28 (*Subletting and the Appointment of Sub-Contractors*), or otherwise approved by tie, and "Sub-Contract" is to be interpreted accordingly;

**"Submittal Programme"** means the programme submitted by the Infraco in accordance with Clause 10.5 and set out in part B of Schedule 14 (*Review Procedure*) as amended from time to time in accordance with this Agreement;

"**Submitted Item**" has the meaning given in paragraph 1.2 of Schedule 14 (*Review Procedure*);

"**Successor Infraco**" means any person or persons notified by **tie** to the Infraco as having been, or intended to be, appointed to complete any part of the Infraco Works and/or maintain any part of the Edinburgh following termination or expiry of this Agreement;

"**Systems Acceptance Tests**" includes T1, T2, T3, T4 and/or T5, and the other testing and commissioning activities described in Schedule 2 (*Employer's Requirements*);

"**Systems Availability Target**" has the meaning given in Schedule 2 (*Employer's Requirements*);

"**T&E**" means twin & earth;

"**TAP**" means transport advisory panel;

"**TBC**" means traction brake controller;

"**TDR**" means transport delivery report;

"**Technical Records**" means the technical records in respect of the Edinburgh Tram Network to be retained and updated in accordance with the Maintenance Specification and the Employer's Requirements;

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

"**Temporary Sites**" means any of the sites shown outlined with a purple broken line on the plans set out in Schedule 40 (*Site Plans*);

"**Term**" means the period from (and including) the Effective Date until (and including) the earlier of the Termination Date and the Expiry Date;

"**Termination Date**" means the date of early termination of this Agreement in accordance with Clauses 3 (*Conditions Precedent*), 88 (*Termination or Suspension for tie Default*), 89 (*Voluntary Termination by tie*), 90 (*Termination on Infraco Default*), 91 (*Termination by Reason of Force Majeure*), 92 (*Termination for Corrupt Gifts and Fraud*) or 93 (*Persistent Breach*);

"**Termination Notice**" means a notice to terminate this Agreement served by either Party in accordance with the terms of this Agreement;

"**T1**" means the post commissioning test described in Schedule 2 (*Employer's Requirements*);

"**T2**" means performance test 1 described in Schedule 2 (*Employer's Requirements*);

"**T3**" means the pre-operations test described in Schedule 2 (*Employer's Requirements*);

"**T4**" means the network performance test described in Schedule 2 (*Employer's Requirements*);

"**T5**" means the network reliability test described in Schedule 2 (*Employer's Requirements*);

"**Test Track**" means that portion of the works that will be utilised by the successful bidder to test run trams and systems and to train drivers and other staff;

"**Thermit weld**" means site based (usually) technique of joining two rails together using chemical based weld;

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

"**Third Party Software**" means programs, the Intellectual Property Rights in which are:

- (a) owned by a third party; and
- (b) used by the Infraco to carry out its obligations under this Agreement;

"**tie and CEC Polices**" means the policies included in Schedule 32 (*tie and CEC Polices*);

"**tie Change**" means any addition, modification, reduction or omission in respect of the Infraco Works or any other term of this Agreement instructed in accordance with Clause 80 (*tie Changes*) which shall not include any Small Works Change or any Accommodation Works Change;

"**tie Change Order**" means the written confirmation issued by **tie** to proceed with a **tie Change** on the basis of an Estimate (as modified, if required);

**"tie Customer Satisfaction Survey"** means the customer satisfaction survey produced annually (or with such other frequency as may be agreed between the Infraco and tie) in accordance with Clause 73.3;

**"tie Default"** means one of the following events:

- (a) a failure by tie to make payment of any amount of money that is certified in any Construction Interim Certificates and/or Maintenance Services Interim Certificates as due and payable by tie to the Infraco under this Agreement exceeding 10% of the value of the Infraco Works to be carried out under this Agreement (as such value is determined in accordance with this Agreement); or
- (b) a breach by tie of any of its material obligations under this Agreement which substantially frustrates or renders it impossible for the Infraco to perform its obligations under this Agreement for a continuous period of 90 days;

**"tie DPOFA Change"** means a change proposed by tie in accordance with the DPOFA;

**"tie's Drug and Alcohol Policy"** means the policy included in Schedule 32 (*tie and CEC Policies*);

**"tie Notice of Change"** means a notice service by tie pursuant to Clause 80 (*tie Changes*), setting out the matters referred to in Clause 80.2;

**"tie Party"** means any advisers appointed by tie and/or any of tie's employees, agents, contractors and sub-contractors and its or their directors, officers and employees (but excluding the Infraco and/or any Infraco Party);

**"tie's Representative"** means the person or persons appointed by tie from time to time and notified to the Infraco;

**"Timetable"** means the timetable which is developed in accordance with Schedule 2 (*Employer's Requirements*) as may be amended from time to time;

**"TMS"** means Transport Model for Scotland;

**"TOC"** means (passenger) training operating company;

**"Touch screen"** means technology which allows operators to control functions via a computer screen as opposed to physical switches/controls;

"TPDS" means tram position and detection systems;

"Traffic Regulation Orders" means [◆];

"Trams" means all or any of the tram vehicles for the Edinburgh Tram Network to be provided under the Tram Supply Agreement and maintained under the Tram Maintenance Agreement;

"Tramstop" means the places (including termini) at which fare paying passengers are permitted to board and/or leave Trams;

"Tram Inspector" means the person specified as such in the Tram Inspector Agreement or such other person as tie may notify the Infraco in writing from time to time;

"Tram Inspector Agreement" means the agreement between the Tram Inspector, tie and the Infraco for the inspection and certification of Trams which shall be substantially in the form set out in Schedule 37 (*Tram Inspector Agreement*);

"Tram Legislation" means the Edinburgh Tram (Line One) Act 2006 and the Edinburgh Tram (Line Two) Act 2006, which received Royal Assent on 8 May 2006 and 27 April 2006 respectively and which confer on CEC all requisite authorities and statutory powers to procure the construction, operation and maintenance of the Edinburgh Tram Network;

"Tram Maintainer" means the party appointed to carry out the Tram Maintenance Services in accordance with the Tram Maintenance Agreement;

"Tram Maintenance Agreement" means the agreement awarded to the Tram Maintainer in respect of the Tram Maintenance Services set out in Schedule 19 (*Tram Maintenance Agreement*) as may be amended from time to time with the approval of tie in accordance with this Agreement;

"Tram Maintenance Plan" means the maintenance plan to be prepared by the Tram Maintainer in accordance with the Tram Maintenance Agreement;

"Tram Maintenance Qualifying Change in Law" means a Qualifying Change in Law pursuant to the Tram Maintenance Agreement;

"Tram Maintenance Services" means the ongoing maintenance of the Trams, supply of consumable spares for the Trams, the provision of any associated services and other

obligations incumbent on the Tram Maintainer (excluding the Tram Supply Obligations) as described in the Tram Maintenance Agreement;

**"Tram Maintenance Services Payment"** means the payment to be made to the Infraco in respect of the performance of the Tram Maintenance Services in accordance with this Agreement. This payment shall be based on the sums set out in Schedule 4 (*Contract Price Analysis*) and the final amount to be paid in each Reporting Period to the Infraco shall be calculated in accordance with Clause 68 (*Payment in Respect of Maintenance Services*) and part B of Schedule 6 (*Maintenance Payment Regime*).

**"Tram Milestone"** means any milestone which has been identified and defined as a "tram milestone" in part [◆] of Schedule 5 (*Pricing Schedules*);

**"Tram Milestone Completion Certificate"** means a certificate to be issued in respect of a milestone completed by the Tram Supplier;

**"Tram Supplier"** means the party appointed by tie to carry out the Tram Supply Obligations in accordance with the Tram Supply Agreement;

**"Tram Supply Agreement"** means the agreement awarded by to the Tram Supplier in respect of the Tram Supply Obligations set out in Schedule 16 (*Tram Supply Agreement*) as may be amended from time to time with the approval of tie in accordance with this Agreement;

**"Tram Supply Qualifying Change in Law"** means a Qualifying Change in Law pursuant to the Tram Supply Agreement;

**"Tram Supply Obligations"** means the design, manufacture and supply of the Trams, and supply of documentation, capital spares, special tools and any associated equipment, the provision of services and other obligations incumbent on the Tram Maintainer (excluding the Tram Maintenance Services) as described in the Tram Supply Agreement;

**"Transport Edinburgh Limited"** or **"TEL"** means Transport Edinburgh Limited a company incorporated under the Companies Act with registered number SC269639 and having its registered office at 55 Annandale Street, Edinburgh, EH7 4AZ;

**"Transport Scotland"** means an agency within the Scottish Executive Enterprise, Transport and Lifelong Learning Department which was established in January 2006 and having its principal office at Buchanan House, 58 Port Dundas Road, Glasgow, H4 0HF;

"**Transport Services**" means the public passenger transport services to be provided by the Operator on the Edinburgh Tram Network (or any part thereof) in accordance with the DPOFA;

"**TRTS**" means tram ready to start;

"**TTROs**" means temporary traffic regulation orders;

"**TUPE Information**" has the meaning given in Clause 58.1

"**TVM**" means ticket vending machine (automatic or manual);

"**Underperformance Warning Notice**" means a notice issued to the Infraco by **tie** in accordance with 56.7;

"**UPS**" means uninterruptible power supply;

"**UTC**" means urban traffic control;

"**Utilities**" means BT, Easynet, NTL, Scottish Water, Scotland Gas Networks, Thus and "**Utility**" shall be construed accordingly;

"**Utilities Works**" means any works carried out, or to be carried out, by the Utilities or any other public utility company under contract with **tie** relative to the MUDFA Works;

"**UTX**" means urban traffic controller drive or under track crossing;

"**WEBS**" means West of Edinburgh bus system;

"**Works Breakdown Structure**" or "**WBS**" means the works breakdown structure set out in Schedule 2 (*Employer's Requirements*);

"**Work Site**" means any work site within any part of the Infraco Works;

"**Work Site Completion Certificate**" has the meaning given in paragraph 3.7.1 of part A of Schedule 3 (*Code of Construction Practice and Code of Maintenance Practice*); and

"**4ft**" means the name given to the area between inner faces of the running rails of the track (derived from the nominal actual distance);

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

2. Unless the context requires otherwise:

2.1 words importing gender include masculine, feminine and neuter;

2.2 the singular includes the plural, and vice versa;

2.3 a reference to any Clause, Sub-Clause or Schedule is, except where it is expressly stated to the contrary, a reference to such Clause, Sub-Clause or Schedule to this Agreement;

2.4 a reference in any Schedule to any part, paragraph or sub-paragraph is, except where it is expressly stated to the contrary, a reference to such part, paragraph or sub-paragraph of that Schedule (as the case may be);

2.5 any reference to this Agreement or to any other document shall include any variation, amendment, or supplement to this Agreement or such other document as expressly permitted under the terms of this Agreement;

2.6 any reference to any enactment, draft enactment, order, regulation or other similar instrument (including any EU instrument) (whether specifically named or not) shall be construed as a reference to the enactment, order, regulation or instrument as amended, replaced, consolidated or re-enacted and shall include any orders, consents, regulations, legally binding codes of practice or subordinate legislation (within the meaning of section 21(1) of the Interpretation Act 1978) made thereunder;

2.7 a reference to a person includes individuals, firms, partnerships, bodies corporate, joint ventures, government departments and any organisation capable of suing or being sued and references to any of the same include the others and their successors and assignees and transferees;

2.8 the *ejusdem generis* rule does not apply and the meaning of general words is not to be restricted by any particular examples preceding or following those general words;

2.9 a reference to a time of day is a reference to the time in Scotland;

2.10 subject to the restrictions imposed by this Agreement on subcontracting, an obligation to do something includes an obligation to procure it to be done;

- 2.11 an obligation not to do something includes an obligation not to wilfully allow it to be done;
  - 2.12 the word "including" means "including without limitation";
  - 2.13 a reference to "consent" shall mean consent in writing;
  - 2.14 the headings and marginal notes in the Agreement shall not be deemed to be part thereof or be taken into consideration in the interpretation or construction thereof or of the Agreement;
  - 2.15 the word "cost" when used in the Agreement means all expenditure properly incurred or to be incurred whether on or off the Site including overheads, finance and other charges properly allocatable thereto but does not include any allowance for profit, and the value of any additional costs claimed by the Infraco in accordance with this Agreement, shall be determined in accordance with Clause 80.5;
  - 2.16 communications which under the Agreement are required to be "in writing" may be handwritten, typewritten or printed and sent by hand, post, email, facsimile or other means resulting in a permanent record;
  - 2.17 any reference to any Deliverable or course of action being reviewed, approved, agreed, consented to or otherwise processed in accordance with this Agreement, means that the provisions of Schedule 14 (*Review Procedure*) shall apply except where otherwise agreed in writing by **tie**; and
  - 2.18 references to "traffic management" and "Temporary Traffic Regulation Orders" (TTROs) shall be deemed to include the requirements of BAA, Forth Ports and any other third party relating to road closures and procedures.
3. Where a party comprises two or more persons:
    - 3.1 any obligations on the part of that party contained or implied in this Agreement are deemed to be joint and several obligations on the part of those persons; and
    - 3.2 references to that party include references to each and any of those persons.
  4. The language of this Agreement is English. All operating and maintenance instructions, identification labels and other written and printed matter required in respect of the Infraco

Works and the subsequent operation and maintenance of the Edinburgh Tram Network which are to be provided by the Infraco in accordance with this Agreement, shall be in English.