

(1) TIE LIMITED

- and -

(2) [◆]

PROVISION OF SYSTEM DESIGN
SERVICES

relating to

THE EDINBURGH TRAM NETWORK

ITT VERSION: 25 APRIL 2005 FINAL
VERSION: [◆] 1 APRIL 2005

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AGREEMENT

BETWEEN

- (1) **TIE LIMITED** a company incorporated under the Companies Act with registration number SC230949 and having its registered office at City Chambers, High Street, Edinburgh, Midlothian, EH1 1YJ (the "Client") which expression shall include its successors in title and permitted assignees; and
- (2) [◆] [a company incorporated under the Companies Act with registration number [◆] and having its registered office at [◆] [a partnership with a place of business at [◆] [a limited liability partnership with a place of business at [◆] [◆ trading as ◆ with a place of business at ◆] (the "SDS Provider") which expression shall include its permitted assignees.

WHEREAS

- A. **tie** requires a SDS Provider consultant to perform the Services (as hereinafter defined) in respect of the Edinburgh Tram Network (as hereinafter defined).
- B. Pursuant to a notice published in the Official Journal of the European Union on 28 December 2004 with reference 2004/S252-217951, **tie** invited expressions of interest from appropriately qualified parties for the performance of the Services.
- C. By competitive procurement process, conducted in accordance with Law, **tie** has selected the SDS Provider to perform the Services in accordance with this Agreement.
- D. **tie** has issued a Letter of Appointment (as hereinafter defined) in response to the SDS Provider's Formal Offer (as hereinafter defined).
- E. **tie** intends to appoint an infrastructure provider (the "**Infraco**") to complete the design, and carry out the construction, installation, commissioning and maintenance planning in respect of the Edinburgh Tram Network. It is further intended that the contract which the infrastructure provider will enter into with **tie** will require the infrastructure provider to accept responsibility for design and other work carried out by the SDS Provider for **tie** under the terms of this Agreement.
- F. If required by **tie**, **tie** and the SDS Provider have agreed to the novation of this Agreement upon and subject to the terms of this Agreement to the infrastructure provider to be appointed by **tie**.

NOW IT IS HEREBY AGREED AS FOLLOWS:

1. DEFINITIONS AND INTERPRETATION

- 1.1 In this Agreement (including the recitals and the Schedules), save as otherwise expressly stated or as the context otherwise requires, the following words and expressions shall have the meanings hereby ascribed to them:

"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);

"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;

"Agreement" means the main body of this document (as may be amended from time to time in accordance with this Agreement) together with the Schedules, and the Formal Offer, and the Letter of Appointment;

"ALARP" means as low as reasonably practicable;

"Approval Bodies" means any Relevant Authorities, planning authorities, roads authorities, HMRI, Network Rail and any other parties who are to issue Consents which may be required for the construction, installation, commissioning, completion and opening of the Edinburgh Tram Network;

"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;

"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 and the Tram Legislation (and the parliamentary process) and made available to the SDS Provider 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;

"Business Day" means any day other than a Saturday, Sunday or a public holiday recognised by CEC;

"CCTV" means closed circuit television;

"CDM Regulations" means the Construction (Design and Management) Regulations 1994 (S.I. 1994/3140) ~~or any Regulations superceding these;~~

"CEC" means the City of Edinburgh Council and its successors and assignees whomsoever;

"Cess" means safe area at the side of the tram track;

"Change in Control" means any sale or disposal of any legal, beneficial or equitable interest in any or all of the share capital of a corporation or the control over the exercise of voting rights in a corporation or the control over the right to appoint or remove directors of a corporation;

"Change in Law" means the coming into effect after the last date of execution of this Agreement of:

- (a) Legislation, other than any Legislation which on the date of this Agreement 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 (including the Tram Bills);
 - (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 Communities;

- (b) any Guidance (other than Guidance which on the date of this Agreement 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;

"Civils" means civil engineering;

"Client Change" means any addition, modification, reduction or omission in respect of the Services or any other term of this Agreement instructed in accordance with Clause 7.2, Clause 15 (*Changes*) or Clause 29 (*Novation*);

"Client Change Order" means the written confirmation issued by the Client to proceed with a Client Change on the basis of an Estimate (as modified, if required);

"Client Default" means one of the following events:

- (a) a failure by the Client to make payment of any amount of money that is certified in an Interim Certificate as due and payable by the Client to the SDS Provider under this Agreement exceeding 5% of the value of the Services to be performed under this Agreement (as such value is determined in accordance with this Agreement); or
- (b) a breach by the Client of any of its material obligations under this Agreement which substantially frustrates or renders it impossible for the SDS Provider to perform its obligations under this Agreement for a continuous period of 90 days;

"Client Notice of Change" means a notice served by the Client pursuant to Clause 15.1, setting out the matters specified in Clause 15.2;

"Client Party" means any advisers appointed by the Client or any of the Client's employees, agents, contractors and sub-contractors of any tier and its or their directors, officers and employees (excluding the SDS Provider or any SDS Provider Party);

"Client's Representative" means the person or persons appointed by the Client from time to time and notified to the SDS Provider;

"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;

"Code of Construction Practice" means the code which has been developed in conjunction with all relevant parties with regard to construction practices, environmental issues, safety issues and other aspects relative to the construction, installation and commissioning of the Edinburgh Tram Network ;

"Commercially Sensitive Information" means the subset of Confidential Information listed in Schedule 5 (*Commercially Sensitive Information*) comprised of information:

- (a) which is provided by the SDS Provider to the Client in confidence for the period set out in that schedule; and/or
- (b) that constitutes a trade secret;

"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, and the Commercially Sensitive Information;

"Consents" means without limitation all permissions, consents, approvals, non-objections, certificates, permits, licences, agreements, statutory agreements and authorisations, Planning Permissions, traffic regulation orders, building fixing agreements, building control approvals, building warrants, and all other necessary consents and agreements from the Approval Bodies, or any Relevant Authority, any other relevant third parties whether required by Law or the Tram Legislation or under contract;

"Construction Panel" has the meaning given to it in Clause 28.19.1;

"Construction Proposals" means the proposals for the construction, installation and commissioning of the Edinburgh Tram Network to be developed by the Infraco;

"Control Room" means a centralised control room within the Depot which will facilitate tram servicing and maintenance;

"CPO" means Compulsory Purchase Order;

"Data Radio" means a system that allows two way data communication for monitoring, control and recording between the Control Room and remote equipment eg trams, TPDS, PCC, PHC, sub-station equipment, TVM, PID, UTX and signals;

"DCCB" means direct current circuit breaker;

"DDA" means the Disability Discrimination Act 1995;

"Deliverables" means the Functional Requirements Specifications, the Technical Specifications and the items listed in Appendix 3 to Schedule 1 (*Scope of the Services*), and all other documents, information, reports, diagrams, bills of quantities, records, manuals, schedules, databases, reinforcement details, photographs, formulae, consultation materials, 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 the SDS Provider (and/or any SDS Provider Party or any other third party) in the performance of the Services and the SDS Provider's other obligations under this Agreement;

"Depot" has the meaning given in paragraph 1.1.4 of Schedule 11 (*Requirements Specification for Overall System Operational and Performance Requirements*);

"Design Manual" means the design manual issued by CEC as may be amended from time to time;

"Design and Technical Gateway Process" means the process set out in Clause 7.3 of this Agreement;

"Design and Technical Services" means those services described in paragraph 2 of Schedule 1 (Scope of Services) as may be amended from time to time in accordance with this Agreement;

"Detailed Design Phase" means the phase described in paragraph 2.6 of Schedule 1 (*Scope of Services*);

"Detailed Design Phase Milestone Payment" means the sum of money identified in respect of the milestone payment for Detailed Design Phase in Schedule 3 (*Pricing Schedule*) as may be adjusted from time to time in accordance with this Agreement;

"Detailed Design Phase Sub-Milestones" means the sub-milestones identified as occurring during the Detailed Design Phase in Schedule 3 (*Pricing Schedule*) as may be adjusted from time to time in accordance with this Agreement;

"Detailed Design Phase Sub-Milestone Payments" means the sum of money identified in respect of each Detailed Design Phase Sub-Milestone in Schedule 3 (*Pricing Schedule*) as may be adjusted from time to time in accordance with this Agreement;

"DfT" means the Department for Transport;

"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 SDS Provider 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 Clause 28 (*Dispute Resolution Procedure*);

"DKE" means developed kinematic envelope;

"DNO" means district network operator;

"DPOFA" means the development partnering and operating franchise agreement between **tie** and the Operator dated 14 May 2004;

"Edinburgh Tram Network" means Line One and Line Two or either of them, as may be amended from time to time, together with any modification, line extension, spur, interconnection and any additional line which may be instructed by **tie**;

"Effective Date" shall have the meaning given in Clause 2.1;

"E&M" means electrical and mechanical;

"EMC" means electro magnetic current;

"Environmental Statement" means the environmental statements supporting each of the Tram Bills;

"Environmental Information Regulations" means the Environmental Information (Scotland) Regulations 2004 Scottish SI 2004/520;

"E & P" means electrification and power;

"Estimate" means the estimate to be provided by the SDS Provider pursuant to Clause 15.3;

"Final Persistent Breach Notice" has the meaning given in Clause 24.2;

"Financial Panel" has the meaning given to it in Clause 28.19.1;

"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, armed conflict or terrorism; or
- (b) nuclear, chemical or biological contamination unless the source of the contamination is the result of actions by the SDS Provider or any SDS Provider Party; or
- (c) pressure waves caused by devices travelling at supersonic speeds.

"Formal Offer" shall mean the tender for the Services issued by the SDS Provider and dated [◆];

"4ft" means the distance between inner sides of the two running rails of the track;

"Functional Requirements Specifications" means the Requirements Specification for Civil Engineering Works, the Requirements Specification for Overall System and Performance Requirements, the Requirements Specification for Supervision, Command and Control Suite of Systems, the Requirements Specification for Electrification and Power, the Requirements Specification for Tram Vehicle, and the System-Wide Non-Functional Requirements as may be amended and developed from time to time;

"Funder's Direct Agreement" means the direct agreement to be entered between any funder and the SDS Provider in relation to the Infraco Contract;

"General Change in Law" means a Change in Law which is not a Discriminatory Change in Law or a Specific Change in Law;

"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 Services, and seeking in good faith to comply with its contractual obligations and all duties owed by it;

"GSN" means global structured notation for safety cases;

"Guidance" means the any applicable guidance, direction or determination issued by any regulatory body with which the Client and/or the SDS Provider is bound to comply;

"HCI" means human computer interface;

"HF" means human factors;

"HMRI" means Her Majesty's Railway Inspectorate;

"HSAW" means the Health & Safety at Work Act;

"HSE" means Health & Safety Executive;

"HVAC" means heating, ventilation and air conditioning;

"IEC" means International Electrotechnical Commission;

"Indemnified Liabilities" means actions, claims (including third party claims), demands, proceedings, losses, damages, liabilities, costs and expenses (including reasonable legal fees and expert witness fees);

"Indemnified Parties" has the meaning given in Clause 27.1;

"Indirect Loss" means any business interruption, loss of profits, loss of business, loss of business opportunity, loss of or damage to or corruption of data or loss of management time or time of other employees;

"Information" has the meaning given under section 73 of FOISA;

"Infraco" means the infrastructure provider to be appointed or appointed by **tie** in relation to the Edinburgh Tram Network;

"Infraco Contract" means the contract to be entered into or entered into by **tie** with the Infraco in relation to the completion of the design, and carrying out the construction, commissioning and maintenance planning of the Edinburgh Tram Network;

"Insolvency Event" means any of the following events:

- (a) the SDS Provider is unable to pay its debts as they fall due or is insolvent or admits in writing inability to pay its debts as they fall due;
- (b) the SDS Provider suspends for a period of two months making payments on all or any class of its debts or a moratorium is declared by the SDS Provider in respect of its indebtedness;
- (c) the SDS Provider ceases business or announces an intention to do so;
- (d) the SDS Provider (being an individual), such expression to include single members of a partnership (whether limited or not) becomes bankrupt or

makes composition or arrangement with its creditors, or is the subject of an application to the Court for an interim order under the Insolvency Act 1986,

- (e) the following are entered into:
 - (i) a voluntary arrangement (other than a solvent one) for a composition of debts of the SDS Provider;
 - (ii) a scheme of arrangement in respect of the SDS Provider 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 SDS Provider's creditors;
- (f) either of the following:
 - (i) the winding-up of the SDS Provider (including passing a shareholders' resolution or the presentation of a petition by the SDS Provider for the purpose of winding up the SDS Provider); or
 - (ii) its administration (including where an application is made by the SDS Provider, or petition is presented by the SDS Provider for or any meeting of its directors or members resolves to make an application for an administration order);
- (g) an order for the winding-up or administration of the SDS Provider is made;
- (h) any liquidator, judicial custodian, receiver, administrative receiver, administrator or the like is appointed in respect of the SDS Provider or any material part of the SDS Provider's assets;
- (i) possession is taken of, or any execution or other process (other than on the dependence or inhibition) is levied or enforced upon, any material part of the property (whether real or personal) of the SDS Provider by or on behalf of any creditor or encumbrancer of the SDS Provider; or
- (j) anything analogous to any of the events mentioned in paragraphs (a) to (h) above occurs in relation to the SDS Provider 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, 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;

"Interim Certificate" means any notice to be issued by the Client in accordance with Clause 12.3;

"Internal Resolution Procedure" means the procedure described in Clause 28.10;

"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 specified as such in Schedule 2 (*Key Personnel*);

"Law" means:

- (a) any applicable Legislation;
- (b) any applicable Guidance; and
- (c) any applicable judgment of a relevant court of law which is a binding precedent,

in each case in force in Scotland;

"Legal Panel" has the meaning given to it in Clause 28.19.1;

"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;

"Letter of Appointment" means the letter from the Client to the SDS Provider dated [◆] accepting the SDS Provider's Formal Offer;

"Line One" means Sectors DHY6 (excluding the tramstop at Murrayfield and the alignment between that tramstop and the junction at Roseburn), HOT1, HOT2, HOT3, HOT4, HOT5, HOT6, HCT1, CTO1 and CTO2 as may be amended from time to time;

"Line Two" means Sectors ARP1, DHY1, DHY2, DHY3, DHY4, DHY5, DHY6 (excluding the tramstop at Haymarket and the alignment between that tramstop and the junction at Roseburn), and GNB1 as may be amended from time to time;

"Line One and Line Two" means Sectors ARP1, DHY1, DHY2, DHY3, DHY4, DHY5, DHY6, HOT1, HOT2, HOT3, HOT4, HOT5, HOT6, HCT1, CTO1, CTO2 and GNB1 as may be amended from time to time;

"Management Fees" means the sum of money identified in respect of management fees in Schedule 3 (*Pricing Schedule*) as may be adjusted from time to time in accordance with this Agreement;

"Master Project Programme" means the project programme to be prepared, maintained, updated and amended from time to time by ~~tie the Client~~ and notified to the SDS Provider and as may be extended in accordance with Clause 7.5 of this Agreement;

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"M & E" means mechanical and electrical;

"Milestone Completion Certificate" means the certificate to be issued by the Client in accordance with Clause 7.3 in relation to the completion of the Requirements Definition Phase, the System-Wide Preliminary Design Requirements, the Preliminary Design Phase and the Detailed Design Phase;

"Network Diagram" means the diagram identified in the Requirements Specification for Overall System Operational and Performance Requirements;

"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 which shall include its successors in title and assignees;

"Notice of Adjudication" has the meaning given in Clause 28.16;

"Notification" has the meaning given in Clause 28.10.1;

"Novation Agreement" means the novation agreement to be entered into among **tie**, the SDS Provide and the Infraco in the form set out in Schedule 8 (*Novation Agreement*);

"OLE" means overhead line equipment;

"Open Book Basis" means the availability and disclosure (consistent with operation of Clause 14 (*Audit*)) of all underlying data and calculations used by the SDS Provider to create and justify costings and financial analysis presented to the Client;

"Operations Panel" has the meaning given to it in Clause 28.19.1;

"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;

"ORS" means operational radio system;

"OS" means Ordnance Survey;

"Overview Display" means a plasma or equivalent display to be provided in the Control Room such that it can be seen by all Control Room staff to manage the Edinburgh Tram Network effectively;

"PA" means public address;

"Panels" has the meaning given to it in Clause 28.19;

"Parliamentary Undertakings" means any undertaking given to a Parliamentary Committee during the passage of the Tram Bills through the Scottish Parliament, and any undertaking or agreement given to any person in consideration of his refraining from opposition to the Tram Bills through the Scottish Parliament;

"Party" means each and any of the parties to this Agreement and "Parties" shall be construed accordingly;

"P3e" means Primavera 3e;

"PCC" means point control cabinet;

"Permitted Variation" means a Client Change, a Small Works Change, a change proposed by the SDS Provider or a Qualifying Change in Law, as agreed or determined to proceed in accordance with this Agreement;

"Persistent Breach Notice" has the meaning given in Clause 24.1;

"PHC" means point heating cabinet;

"PHP" means passenger help point;

"PID" means passenger information display;

"Planned Service Commencement Date" means the programmed date of service commencement of 31 December 2009 as may be amended from time to time by **tie** and notified to the SDS Provider;

"Planning Permission" means any planning permission, planning approval, approval of reserved matters, listed building consent, conservation areas consent and/or other consent or approval;

"Position Paper" has the meaning given in Clause 28.10.2;

"Preliminary Design Phase" means the phase described in paragraph 2.4 of Schedule 1 (*Scope of Services*);

"Preliminary Design Phase Milestone Payment" means the sum of money identified in respect of the milestone payment for Preliminary Design Phase in Schedule 3 (*Pricing Schedule*) as may be adjusted from time to time in accordance with this Agreement;

"Preliminary Design Phase Sub-Milestones" means the sub-milestones identified as occurring during the Preliminary Design Phase in Schedule 3 (*Pricing Schedule*) as may be adjusted from time to time in accordance with this Agreement;

"Preliminary Design Phase Sub-Milestone Payments" means the sum of money identified in respect of each Preliminary Design Phase Sub-Milestone in Schedule 3 (*Pricing Schedule*) as may be adjusted from time to time in accordance with this Agreement;

"Programme" means the programme set out in Schedule 4 (*Programme*) (as maintained, updated and amended from time to time by the SDS Provider in accordance with this Agreement) as may be extended in accordance with Clause 7.5 of this Agreement which shall include the Programme Phasing Structure;

"Programme Phasing Structure" means the programme set out in Appendix 2 of Schedule 1 (*Scope of Services*) as may be amended by **tie** from time to time and notified to the SDS Provider;

"Prohibited Act" means:

- (a) offering, giving or agreeing to give to **tie**, the Scottish Executive, 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, CEC or any other public body; or
- (d) defrauding or attempting to defraud or conspiring to defraud **tie**, CEC, the Scottish Executive 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 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 Services which are specific in nature to the performance of the Services;

"P & R" means park and ride;

"Qualifying Change in Law" means:

- (a) a Discriminatory Change in Law; and/or
- (b) a Specific Change in Law;

"Referral Notice" has the meaning given in Clause 28.27;

"Referring Party" has the meaning given in Clause 28.16;

"Related Contract" has the meaning given in Clause 28.55;

"Related Dispute" has the meaning given in Clause 28.55;

"Relevant Authority" means any court with the relevant jurisdiction and any local authority, national authority or supra national agency, inspectorate, minister, Scottish Executive, body, official or public or statutory person of the government of the United Kingdom or of the European Union and "Relevant Authorities" shall be construed accordingly;

"Requests for Information" shall have the meaning set out in FOISA or 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 6 (*Required Insurances*) as may be amended from time to time in accordance with this Agreement;

"Requirements Definition Phase" means the phase described in paragraph 2.3 of Schedule 1 (*Scope of Services*);

"Requirements Definition Phase Milestone Payment" means the sum of money identified in respect of the milestone payment for the Requirements Definition Phase

in Schedule 3 (*Pricing Schedule*) as may be adjusted from time to time in accordance with this Agreement;

"Requirements Definition Phase Sub-Milestones" means the sub-milestones identified as occurring during the Requirements Definition Phase in Schedule 3 (*Pricing Schedule*) as may be adjusted from time to time in accordance with this Agreement;

"Requirements Definition Phase Sub-Milestone Payments" means the sum of money identified in respect of each Requirements Definition Phase Sub-Milestone in Schedule 3 (*Pricing Schedule*) as may be adjusted from time to time in accordance with this Agreement;

"Requirements Specification for Civil Engineering Works" means the specification set out in Schedule 12 to the Agreement as may be amended and developed from time to time in accordance with this Agreement;

"Requirements Specification for Electrification and Power" means the specification set out in Schedule 14 to the Agreement as may be amended from time to time in accordance with this Agreement;

"Requirements Specification for Overall System Operational and Performance Requirements" means the specification set out in Schedule 11 to the Agreement as may be amended and developed from time to time in accordance with this Agreement;

"Requirements Specification for Supervision, Command and Control Suite of Systems" means the specification set out in Schedule 13 to the Agreement as may be amended and developed from time to time in accordance with this Agreement;

"Requirements Specification for Tram Vehicle" means the specification set out in Schedule 15 to the Agreement as may be amended and developed from time to time in accordance with this Agreement;

"Responding Party" has the meaning given in Clause 28.17;

"Retention" has the meaning given in Clause 12.7.1;

"Review Procedure" means the review procedure set out in Schedule 9 (*Review Procedure*);

"RSPG" means Railway Safety Principles and Guidance, issued by HMRI under HSE;

"RVAR" means Rail Vehicle Accessibility Regulations;

"SCADA" means supervisory control and data acquisition system;

"SCC" means supervisory, control and communications system;

"Schedules" means Schedule 1 (*Scope of Services*), Schedule 2 (*Key Personnel*), Schedule 3 (*Pricing Schedule*), Schedule 4 (*Programme*), Schedule 5 (*Commercially Sensitive Information*), Schedule 6 (*Required Insurances*), Schedule 7 (*Draft Collateral Warranties*), Schedule 8 (*Novation Agreement*), Schedule 9 (*Review Procedure*), Schedule 10 (*Panels for the Dispute Resolution Procedure*), Schedule 11 (*Requirements Specification for Overall System Operational and Performance Requirements*), Schedule 12 (*Requirements Specifications for Civil Engineering*

Works), Schedule 13 (*Requirements Specification for Supervision, Command and Control Suite of Systems*), Schedule 14 (*Requirements Specification for Electrification and Power*), Schedule 15 (*Requirements Specification for Tram Vehicle*), Schedule 16 (*System-Wide Non-Functional Requirements*), and Schedule 17 (*Agreement between the SDS Provider and the Joint Revenue Committee*), as the same may be amended from time to time in accordance with the terms of this Agreement;

"SDS Provider Default" means the events set out in Clause 19.1;

"SDS Provider IPR" means:

- (a) all Intellectual Property Rights (including Intellectual Property Rights in relation to the SDS Provider Software) which the SDS Provider can demonstrate by documentary evidence were already existing and owned by or licensed to the SDS Provider prior to the Effective Date; and
- (b) any modifications or developments of any of the rights listed in paragraph (a) above which are generic in nature and not specific to the performance of the Services;

"SDS Provider Party" means any sub-consultant, supplier, sub-contractor, specialist and/or any other party appointed by the SDS Provider in accordance with Clause 9 (*Sub-Letting and the Appointment of SDS Provider Parties*) to perform any part of the Services (and "SDS Provider Parties" will be construed accordingly);

"SDS Provider Software" means programs, the Intellectual Property Rights in which are (a) owned by the SDS Provider; and (b) used by the SDS Provider to carry out its obligations under this Agreement;

"SDS Provider's Representative" shall have the meaning given to it in Clause 10.8;

"SDS-JRC Modelling Suite" has the meaning given in paragraph 3.5.1 of Schedule 1 (*Scope of Services*);

"Sector" means each sector identified in the Programme Phasing Structure;

"Services" shall mean those services to be performed by the SDS Provider which are set out in Schedule 1 (*Scope of Services*) and for the avoidance of any doubt, shall include any variations pursuant to the provisions of this Agreement, and shall also include the other obligations which the SDS Provider is required to carry out as expressed under this Agreement;

"Service Commencement Date" means the date the Edinburgh Tram Network goes into passenger carrying service;

"Small Works Change" means any small works change instructed under the Infraco Contract;

"Specially Written Software" means programs which are written by or on behalf of the SDS Provider specifically to enable the SDS Provider to carry out its obligations under this Agreement;

"Specific Change in Law" means any Change in Law which specifically applies to the provision of a service the same as or similar to the Services (but not to the provision of other services) but excluding the making, amendment or revocation of any traffic regulation order;

"Stage Build" means part of the Edinburgh Tram Network that once commissioned can be opened for Trial Operation;

"Sub-Milestones" means those sub-milestones identified in Schedule 3 (*Pricing Schedule*) as may be adjusted from time to time in accordance with this Agreement;

"Submitted Item" has the meaning given in paragraph 1.2 of Schedule 9 (*Review Procedure*);

"Sub-Sector" means each sub-sector identified in the Programme Phasing Structure;

"System-Wide Preliminary Design Requirements" means those high level requirements for the whole of the Edinburgh Tram Network described in paragraph 2.4 of Schedule 1 (*Scope of Services*);

"System-Wide Non-Functional Requirements" means the requirements set out in Schedule 16 to the Agreement as may be amended and developed from time to time in accordance with this Agreement;

"TBC" means traction/brake controller;

"Technical Specifications" are the specifications to be prepared by the SDS Provider to describe the technical aspects of each part of the Edinburgh Tram Network which shall meet the Functional Requirements Specifications and shall allow all aspects of the Edinburgh Tram Network to be procured, constructed, installed, commissioned and maintained;

"Termination Date" means the date of termination expressed in a notice served in accordance with Clauses 19 (*Termination for SDS Provider Default*), 20 (*Termination, Abandonment or Suspension of the Services by the Client*), 21 (*Termination for the Client Default*), 22 (*Termination for Corrupt Gifts and Payments*), 23 (*Termination by Reason of Force Majeure*) or 24 (*Persistent Breach*) (as appropriate);

"Third Party Software" means programs, the Intellectual Property Rights in which are (a) owned by a third party and (b) used by SDS Provider to carry out its obligations under this Agreement;

"tie" means a company incorporated under the Companies Act with registered number SC230949 and having its registered office at City Chambers, High Street, Edinburgh, Midlothian, EH1 1YJ which shall include its successors in title and permitted assignees;

"tie Party" means any advisers appointed by tie or any of tie's agents, employees, contractors and sub-contractors of any tier and its or their directors, officers and employees (but excluding the SDS Provider, any SDS Provider Party) and statutory undertakers and utilities;

"TLA" means three letter acronym;

"Topics Register" means the central project register of all known issues relating to the design, construction, testing, commissioning, operation and maintenance of the Edinburgh Tram Network;

"TPDS" means tram position and detection system;

"Tram Bills" means the Edinburgh Tram (Line One) Bill and the Edinburgh Tram (Line Two) Bill,

"Tram Legislation" means the Edinburgh Tram (Line One) Bill and the Edinburgh Tram (Line Two) Bill, and after such Bills are enacted means the Edinburgh Tram (Line One) Act, the Edinburgh Tram (Line Two) Act and such other legislation relative to the Edinburgh Tram Network as may be enacted from time to time;

"Tram Supplier" means the tram supplier to be procured by **tie** in relation to the supply of trams for the Edinburgh Tram Network;

"Tram Supply Contract" means the contract to be entered into by **tie** or other party with the Tram Supplier in relation to the supply of trams for the Edinburgh Tram Network;

"Transport Edinburgh Limited" means Transport Edinburgh Limited, (registered number SC269639) and having its registered office at City Chambers, High Street, Edinburgh, Midlothian, EH1 1YJ which shall include its successors in title and permitted assignees;

"Trial Operation" means the timetabled operation by the Operator of the Edinburgh Tram Network prior to the Service Commencement Date;

"TRO" means Traffic Regulation Orders;

"TRTS" means tram ready to start;

"TSS Provider" means the technical support services provider to be appointed by **tie**;

"TVM" means automatic ticket vending machine;

"UPS" means uninterruptible power supply;

"UTC" means urban traffic control;

"UTX" means urban traffic controller device;

"VDV" means vibration dose value;

"Voice Radio" means a system that allows two way voice communication between two points (eg Control Room, trams, mobile radio handsets, public address system and passenger help points);

"WBS" means work breakdown structure;

"WHT" means World Heritage Trust;

"Wireless Telecomms" means a system that allows two way data and/or video communication for monitoring, control and recording between the Control Room and remote equipment eg CCTV.

1.2 Unless the context requires otherwise:

- 1.2.1 words importing gender include masculine, feminine and neuter;
 - 1.2.2 the singular includes the plural and vice versa;
 - 1.2.3 a reference to any part, Clause, sub-clause or Schedule is, except where it is expressly stated to the contrary, a reference to such part, Clause or sub-clause of or Schedule to this Agreement;
 - 1.2.4 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);
 - 1.2.5 any reference to this Agreement or to any other document shall include any variation, amendment, or supplement to this Agreement or such document as expressly permitted under the terms of this Agreement;
 - 1.2.6 any reference to any 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;
 - 1.2.7 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 to the extent that such assignment and transfer are expressly permitted under the terms of this Agreement;
 - 1.2.8 headings and the contents list are for convenience of reference only and do not affect the interpretation of this Agreement;
 - 1.2.9 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;
 - 1.2.10 a reference to a time of day is a reference to the time in Scotland;
 - 1.2.11 subject to the restrictions imposed by this Agreement on subcontracting, an obligation to do something includes an obligation to procure it to be done;
 - 1.2.12 an obligation not to do something includes an obligation not to wilfully allow it to be done;
 - 1.2.13 the word "including" means "including without limitation";
 - 1.2.14 a reference to "consent" shall mean consent in writing;
 - 1.2.15 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 9 (*Review Procedure*) shall apply except where otherwise agreed in writing by the Client.
- 1.3 This Agreement shall be interpreted and construed as a whole provided that in the event of any inconsistency or conflict between:

1.3.1 the main body of this Agreement and the Schedules, the main body of this Agreement shall prevail to the extent of any such inconsistency or conflict over the Schedules

1.3.2 the main body of this Agreement and the Schedules and the Formal Offer and/or the Letter of Appointment, the main body of the 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 the Client.

1.4 In the case of any inconsistency or conflict between or in any of the documents forming the Agreement, or any inconsistency or conflict between the Agreement and any instructions from the Client or the Client's Representative, the SDS Provider shall notify the Client immediately within 3 Business Days and the Client, subject to Clause 1.3, shall issue in writing such further instructions as the Client considers appropriate in its absolute discretion to resolve the inconsistency or conflict.

1.5 Where a party ~~Party~~ comprises two or more persons:

1.5.1 any obligations on the part of that party ~~Party~~ contained or implied in this Agreement are deemed to be joint and several obligations on the part of those persons; and

1.5.2 references to that party include references to each and any of those persons.

2. TERM OF THIS AGREEMENT

2.1 This Agreement shall come into effect on the last date of execution of this Agreement and shall continue in effect until the date on which the SDS Provider is notified by the Client that the defects liability period for the Infraco Contract is confirmed by tie to have ended (unless otherwise amended by tie) has ended in accordance with the terms of the Infraco Contract provided always that the Parties may agreed to extend the term of this Agreement.

3. DUTY OF CARE, STANDARDS AND THE SERVICES TO BE PROVIDED

General

3.1 The Client hereby appoints the SDS Provider in accordance with the terms of this Agreement and the SDS Provider hereby accepts full responsibility and agrees to perform the Services and its other obligations under this Agreement fully and faithfully in the best interests of the Client.

3.2 The SDS Provider warrants to the Client that, in the performance of the Services and its other obligations under this Agreement it shall exercise a reasonable level of professional skill, care and diligence to be expected of a properly qualified and competent system design services provider experienced in performing services similar to the Services in connection with projects of a similar size, scope and complexity.

3.3 The SDS Provider shall (each as distinct and separate obligations) perform the Services and its other obligations under this Agreement (exercising the level of skill, care and diligence set out in Clause 3.2):

3.3.1 so as to comply in all respects with this Agreement;

- 3.3.2 so as to enable the Edinburgh Tram Network to be procured, constructed, installed, tested and commissioned, and thereafter operated and maintained;
 - 3.3.3 in accordance with the SDS Provider's quality management system and plans;
 - 3.3.4 so as to ensure compliance with the Functional Requirements Specifications and the Technical Specifications (as applicable);
 - 3.3.5 in accordance with the Design Manual;
 - 3.3.6 so as to ensure compliance with the Tram Legislation;
 - 3.3.7 so as to ensure compliance with all applicable Law and Consents;
 - 3.3.8 in accordance with the Parliamentary Undertakings;
 - 3.3.9 in compliance with the Environmental Statements, and all other applicable environmental regulations and requirements;
 - 3.3.10 so as to permit compliance with the Code of Construction Practice and with the Construction Proposals;
 - 3.3.11 in accordance with Good Industry Practice;
 - 3.3.12 to ensure that the design of the Edinburgh Tram Network is buildable;
 - 3.3.13 to assist **tie** in ensuring 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 the performance of the Services;
 - 3.3.14 in such manner so as not wilfully to detract from the image and reputation of **tie**, Transport Edinburgh Limited, CEC, the Scottish Executive or any project related to the performance of the Services;
 - 3.3.15 in a manner that is not likely to be injurious to persons or property; and
 - 3.3.16 using the Key Personnel and such other staff as may be approved by the Client for that type of work.
- 3.4 The SDS Provider shall to the extent necessary for the performance of its Services and its other obligations under this Agreement assume the risks associated with the Edinburgh Tram Network arising from:
- 3.4.1 ground conditions (including climatic, geotechnical, ecological, environmental, hydrological and sub-surface conditions, any contamination and any archaeological finds);
 - 3.4.2 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;
 - 3.4.3 the quality of any existing structures;
 - 3.4.4 the obligations assumed or the undertakings given in any Parliamentary Undertakings relative to this Agreement; and
 - 3.4.5 safety requirements and environmental matters.

- 3.5 The SDS Provider shall ensure that the design of the Edinburgh Tram Network:
- 3.5.1 maximises construction productivity by reference to international best practice;
 - 3.5.2 minimises disruption to the city of Edinburgh;
 - 3.5.3 ~~safeguarding safeguards~~ efficiency in the obtaining of Consents; and
 - 3.5.4 optimises the Infraco's compliance with the Construction Code of Practice
- 3.6 The SDS Provider shall at all times keep itself fully informed about current professional standards and about all matters relating to, or which might have a bearing on, the performance of the Services and its other obligations under this Agreement.
- 3.7 The SDS Provider'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 the Client or by any firm, company or party on the Client'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 the Client.
- 3.8 The SDS Provider is deemed to have satisfied itself that it fully understands the scope and extent of the Services and its other obligations under this Agreement, and that it has sufficient information or will at the relevant time have sufficient information, to enable it to perform the Services and its other obligations under this Agreement.
- 3.9 The SDS Provider acknowledges that the Client will rely upon the skill and judgement of the SDS Provider in connection with all matters for which the SDS Provider is responsible under this Agreement.

Background Information

- 3.10 The SDS Provider acknowledges that certain Background Information has been made available to it in relation to this Agreement. The SDS Provider 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, nor any of its or their employees shall be liable to the SDS Provider in contract, delict (including breach of statutory duty), or otherwise as a result of:
- 3.10.1 any inaccuracy, error, defect, omission, unfitness for any purpose or inadequacy of any kind whatsoever in the Background Information; nor
 - 3.10.2 any failure to make available to the SDS Provider any materials, documents, drawings, plans or other information relating to this Agreement;
- provided that nothing in this Clause 3.10 shall exclude any liability in respect of any statements made or information provided fraudulently.
- 3.11 The SDS Provider acknowledges and confirms that as part of the Services 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 fully as to the veracity, accuracy, reasonableness, scope, materiality, currency (where applicable) and completeness of all such Background Information upon which it places reliance.

Liasion and Compliance with Master Project Programme and Budget

- 3.12 The SDS Provider shall liaise with the Client, any Client Party, ~~tie~~, any tie Party, the Tram Supplier, and any other parties as may be required by the Client or ~~tie~~ to facilitate the production, by such persons, of any information required from them, in order that the Services and its other obligations under this Agreement can be progressed according to the Master Project Programme and the Programme. The SDS Provider shall liaise with the Client, any Client Party, ~~tie~~, any tie Party, the Tram Supplier, and any other parties as may be required by the Client or ~~tie~~ as often, as is necessary, in order to ensure that the Services and its other obligations under this Agreement are performed properly and in accordance with the terms of this Agreement.
- 3.13 The SDS Provider shall collaborate and liaise with the Client throughout the performance of the Services, inter alia, to ensure due consideration is given to the type of materials and optimum and cost effective construction methods, construction programme and temporary works, as appropriate.
- 3.14 Where the Client, or other bodies or persons involved in related works or services appoint other consultants or use their own staff for purposes related to the Services or the SDS Provider's other obligations under this Agreement, the SDS Provider shall ~~have a duty of liaison with such bodies or persons~~ use all reasonable endeavours (including the use of liaison with such other bodies or persons) to ensure that the Services, the SDS Provider's other obligations under this Agreement and these related works are carried out together with the greatest economy and in accordance with the Master Project Programme and the Programme.
- 3.15 In performing the Services and its other obligations under this Agreement, the SDS Provider will have regard to the constraints imposed by the Master Project Programme and the Programme and to the objective of keeping the overall costs of the Services and its other obligations under this Agreement within any budgetary constraints agreed with the Client. If the SDS Provider considers that there may be a conflict between its obligations under this Clause 3.15 and the performance of the Services and/or the performance of any of the SDS Provider's obligations under this Agreement, it will immediately ~~within 3 Business Days~~ give written notice of the same to the Client.

Provision of all labour, goods, materials and services

- 3.16 The SDS Provider shall provide all labour, goods, materials and services whether of a temporary or permanent nature required in and for the execution of the Services and its other obligations under this Agreement so far as the necessity for providing the same is specified in this Agreement or could reasonably be ~~inferred~~ foreseen therefrom by a system design services provider experienced in work of similar nature and scope as the Services.

Prohibited Materials

- 3.17 The SDS Provider warrants to the Client that it has not specified for use and shall use the standard of skill and care provided for in Clause 3.2 not to specify for use and shall use such skill and care consistent with any supervisory and inspection responsibilities to be undertaken as part of the Services to see that there shall not be used, any materials which at the time of specification or use (as the case may be):
- 3.17.1 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 any works on which the SDS Provider is employed by the Client); or

- 3.17.2 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
- 3.17.3 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 of use; or
- 3.17.4 contravene Good Industry Practice.

CDM Regulations

- 3.18 The SDS Provider warrants to the Client that it shall carry out and fulfil the responsibilities of a "Designer" imposed by the CDM Regulations and shall co-operate with and supply any required information to any planning supervisor appointed by the Client or the Infraco (as appropriate) in the performance by the planning supervisor of its obligations under the CDM Regulations. The SDS Provider shall notify the Client as soon as it becomes aware, or reasonably anticipates that it shall have insufficient resources or the necessary competence to comply with its obligations under the CDM Regulations.

Mitigation and Open Book Accounting

- 3.19 The SDS Provider undertakes to co-operate with the Client in order to facilitate the performance of this Agreement and in particular will:
 - 3.19.1 approach all pricing, estimating and budgeting functions on a collaborative and Open Book Basis;
 - 3.19.2 use reasonable endeavours to avoid unnecessary complaints, disputes and claims against or with the Client;
 - 3.19.3 not interfere with the rights of the Client in performing its obligations under this Agreement, nor in any other way hinder or prevent the Client from performing those obligations or from enjoying the benefits of its rights;
 - 3.19.4 take reasonable steps to mitigate any costs, unnecessary acts, foreseeable losses and liabilities of the Client; and
 - 3.19.5 take all reasonable steps to manage, minimise and mitigate all costs.

Investigations and Surveys

- 3.20 The SDS Provider shall notify the Client of any ground, physical, geophysical investigations or archaeological or ecological surveys or any other investigations or surveys which it intends to carry out.

Procurement Support

- 3.21 The SDS Provider shall make suitable facilities and resources available upon reasonable notice from the bidders for the Infraco Contract and the Tram Supply Contract to permit and facilitate the ability of these bidders to thoroughly examine, check and satisfy themselves as to the adequacy, correctness and suitability of the Deliverables which have been created by the SDS Provider and which the Infraco and the Tram Supplier will be adopting and making use of respectively in the Infraco Contract and the Tram Supply Contract. No additional costs shall be paid to the SDS Provider in respect of the provision of such suitable facilities and resources or the supply to bidders of any Deliverables as part of the procurement process.

3.22 The SDS Provider shall permit the bidders for the Infraco Contract and the Tram Supply Contract to carry out a due diligence exercise on this Agreement (including any commercial terms) prior to the award of the Infraco Contract and the Tram Supply Contract provided that **tie** shall procure that such bidders are required to enter into a confidentiality agreement or other agreement incorporating provisions on confidentiality.

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3.23 The SDS Provider agrees to adhere to the bidding protocols be developed and issued by **tie** relative to the procurement of the Infraco Contract and the Tram Supply Contract which shall cover issues including interaction with the bidders, limits of assistance to be given to the bidders, confidentiality, collusion, development of the design and continuing performance of the Services.

Defects Rectification

3.24 The SDS Provider shall assist the Infraco as appropriate in the design and execution of any defects rectification relative to the Edinburgh Tram Network, and in obtaining a defects rectification certificate from **tie**.

System Integration

3.25 The SDS Provider shall liaise with the Operator as instructed by Infraco ~~the Client~~ in relation to:

3.25.1 system operation and related design issues;

3.25.2 commissioning and Trial Operation; and

3.25.3 operational defects.

3.26 The SDS Provider shall be responsible for ensuring that all elements of the design relative to the Edinburgh Tram Network are compatible with system integration and the SDS Provider shall make qualified personnel available to support the ~~Infraco the Client~~ in the discharge of its responsibilities to ensure system integration.

Traffic Management Protocol

3.27 The SDS Provider shall undertake the development of a traffic management protocol (with a view to this document becoming part of the Infraco Contract), and shall attend all meetings with ~~the Client, tie~~, CEC, any other Relevant Authorities and the Operator to discuss traffic management issues.

4. DEVELOPMENT, REVIEW, FINALISATION AND DELIVERY OF THE DELIVERABLES

4.1 The SDS Provider shall develop and finalise the Deliverables in accordance with this Agreement, and the Client shall be entitled to review the Deliverables in accordance with Schedule 9 (*Review Procedure*).

4.2 The SDS Provider shall submit the design of any changes and any other Deliverables associated with any changes developed pursuant to Clause 15 (*Changes*) to the Client's Representative for review pursuant to Schedule 9 (*Review Procedure*).

4.3 The SDS Provider shall allow the Client's Representative, at any time, a reasonable opportunity to view any Deliverable at any stage of development, and this opportunity shall be made available to the Client's Representative as soon as reasonably practicable following receipt of any written request from the Client's Representative.

- 4.4 The SDS Provider shall establish and maintain a computerised design database which the Client and the Client's Representative may access remotely by computer to view drawings comprised within the Deliverables and electronically store and/or print copies of such Deliverables.
- 4.5 The SDS Provider shall, as soon as reasonably practicable after the Effective Date, submit to the Client's Representative a submittal programme setting out the order in which each Deliverable is to be submitted. The SDS Provider may, as necessary, update such programme and shall submit the same from time to time to the Client's Representative so that the Client has at least 14 days' notice of any revision to the periods shown in the previous submittal programme and the SDS Provider shall submit to the Client's Representative five copies of each Deliverable no later than the end of the period shown in the submittal programme for that Deliverable.
- 4.6 Where the Client's Representative does not consider that the Client will be able to comply with the periods specified in Schedule 9 (*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, the Client's Representative may introduce an alternative timetable and the SDS Provider shall comply with such alternative timetable. Provided that, where the Client is unable to comply with the time periods set out in Schedule 9 (*Review Procedure*) and such inability is not due to any breach of this Agreement, omission or fault on the part of the SDS Provider, the introduction of an alternative timetable shall be treated as a Client Change and the terms of Clause 15 shall apply.
- 4.7 During the preparation of the Deliverables, the Client and/or the Client's Representative shall at its discretion be entitled to call for a meeting to discuss the development of any Deliverable, and the SDS Provider shall give due consideration to any comments made by the Client or the Client's Representative at any such meetings. As soon as reasonably practicable following any such meeting, the SDS Provider will prepare and circulate to those attending the meeting a report listing the Deliverables discussed and any comments made at such meeting.
- 4.8 If it should be found that the Deliverables do not fulfil the requirements of this Agreement or the needs of any Approval Bodies, the SDS Provider shall at its own expense amend the Deliverable. Such amendment shall be made in accordance with Schedule 9 (*Review Procedure*) and such amendment and rectification shall ensure that the Deliverable shall satisfy the requirements of this Agreement and any Approval Bodies.
- 4.9 The SDS Provider shall provide the Client with all Deliverables in accordance with the terms of this Agreement and where no timescale for provision of such Deliverables is specified, such Deliverables shall be provided to the Client as soon as reasonably practicable. The SDS Provider shall provide to the Client, at no cost to the Client, five copies of the Deliverables in hard copy form and one copy in an agreed soft copy form (as appropriate to the format of the Deliverables). In respect of any further copies of a particular Deliverable, the Client may require or which ~~tie~~ may require, the SDS Provider agrees to absorb the reasonable copying charges or other reasonable charges for provision of the same to the Client as the Client requires and for the purposes of achieving all Consents.
- 4.10 In addition to the requirements of Clause 4.9, the SDS Provider shall provide to the Client, at no cost to the Client, five copies in hard copy form and one copy in an agreed soft copy form of the as-built drawings and any manuals prepared.
- 4.11 The SDS Provider accepts all risks arising from any conflicts, ambiguities, discrepancies, errors or omissions that subsequently appear within or between any of the Functional Requirements Specifications, the Technical Specifications and any of

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the other Deliverables, and the SDS Provider shall not be entitled to make any claim against the Client for an extension of time, payment or otherwise in respect of any such conflicts, ambiguities, discrepancies, errors or omissions.

- 4.12 The SDS Provider shall immediately within 3 Business Days notify the Client upon becoming aware of any conflicts, ambiguities, discrepancies, errors or omissions within or between any of the Functional Requirements Specifications, the Technical Specifications, and any of the other Deliverables. Where there are any conflicts, ambiguities, discrepancies, errors or omissions, the SDS Provider shall provide with any notification its the Client with a notice of such conflicts, ambiguities, discrepancies, errors or omissions and the 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 SDS Provider 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 SDS Provider is that no action is required or the Client does not agree with the action proposed by the SDS Provider, the Client may notify the~~ Unless within 10 Business Days of the SDS Provider's notice, the Client notifies the SDS Provider, within 10 Business Days of the SDS Provider's notice, to resolve any conflicts, ambiguities, discrepancies, errors or omissions in a different manner (which notification shall be binding on the SDS Provider), ~~the SDS Provider shall resolve any such conflicts, ambiguities, discrepancies, errors or omissions in the manner provided by it.~~
- 4.13 The SDS Provider shall develop the Functional Requirements Specifications and the Technical Specifications using innovative solutions which are in accordance with Good Industry Practice.

5. CONSENTS

- 5.1 The SDS Provider shall (at its own cost and expense):
- 5.1.1 obtain and maintain in effect all Consents which may be required for the construction, installation, commissioning, completion and opening of the Edinburgh Tram Network as is consistent with, required by or contained within the Services; and
 - 5.1.2 implement each Consent within the period of its validity and in accordance with its terms.
- 5.2 The SDS Provider shall provide copies of such Consents to the Client's Representative. At the request of the SDS Provider, the Client may at their discretion render appropriate assistance, without any obligation, in relation to obtaining any Consent.
- 5.3 Acknowledgement by the Client of the copies of Consents provided to them pursuant to Clause 5.2 shall not in any way affect the SDS Provider's obligations or relieve the SDS Provider from its obligations pursuant to this Clause 5 (*Consents*) or otherwise.
- 5.4 The SDS Provider shall provide the Client with a programme of Consents to be obtained within 30 days of the Effective Date and shall update the programme on a monthly basis showing progress and any new Consents to be obtained. The Client shall be entitled to request information in relation to the progress of the application for any such Consent and the Consent itself and the SDS Provider shall provide the same at no cost to the Client.

6. QUALITY ASSURANCE

- 6.1 The SDS Provider shall operate a quality management system, and comply with such system. Such quality management system shall be reflected in appropriate quality management plans, the standard of which shall comply with BS EN 150 9001:2000. Such plans shall be developed in accordance with the Review Procedure.
- 6.2 If in the opinion of the Client, any Deliverable is not prepared in accordance with the SDS Provider's quality management system or with any other provision of the Agreement, the Client shall so inform the SDS Provider in writing giving reasons. Such non-compliance shall be treated as an error or omission in the performance of the Services and the provisions of Clause 18 (*Errors and/or Omissions in the Services*) shall apply.
- 6.3 Compliance with any such approved quality management system shall not relieve the SDS Provider from any of its other duties, obligations or liabilities under this Agreement.

7. PROGRESS

7.1 Master Project Programme, Programme Phasing Structure and Programme

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7.1.1 The SDS Provider shall progress the Services with due expedition and in a timely and efficient manner without delay, to achieve timeous completion of the Services (or any part thereof) and its other obligations under this Agreement in accordance with the Master Project Programme and unless otherwise agreed with the Client, the SDS Provider shall adhere to that Master Project Programme with due diligence.

7.1.2 Within 30 days of the Effective Date, the SDS Provider shall update the Programme with detailed programme information and shall thereafter maintain update and amend the Programme in accordance with the requirements set out in paragraph 4 of Schedule 1 (*Scope of the Services*) and/or at additional or other intervals as may be reasonably required by the Client. Any updates or amendments to the Programme shall be approved by the Client in accordance with the Review Procedure or as may be otherwise agreed in writing by the Client.

7.2 The SDS Provider shall carry out the Services required in respect of the Requirements Definition Phase, the System-Wide Preliminary Design Requirements, the Preliminary Design Phase, and the Detailed Design Phase in the order of "criticality" (with "A" being the most critical), sequence and dates shown in the Programme Phasing Structure PROVIDED ALWAYS that the Client may at any time require the SDS Provider to stop, amend and/or accelerate such order of performance in respect of the whole or any part of the Requirements Definition Phase, the System-Wide Preliminary Design Requirements, the Preliminary Design Phase and/or the Detailed Design Phase. Any such stop, amendment or acceleration shall be complied with as soon as reasonably practicably by the SDS Provider at no cost to the Client subject to the following procedure (unless otherwise agreed by the Parties):

7.2.1 the SDS Provider shall provide an Estimate to the Client for any required stop, amendment or acceleration within 5 Business Days of any request from the Client;

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7.2.2 any Estimate provided by the SDS Provider shall include the opinion of the SDS Provider (acting reasonably) on the following matters:

7.2.2.1 whether relief from compliance with any of its obligations under this Agreement is required as a result of the required stop, amendment or acceleration;

7.2.2.2 any impact on the performance of the Services;

7.2.2.3 any impact on the Master Project Programme and the Programme, and any requirement for an extension of time;

7.2.2.4 any amendment required to the Agreement as a result of the required stop, amendment or acceleration;

7.2.2.5 the proposed method of delivery of the required stop, amendment or acceleration;

7.2.2.6 proposals to mitigate the impact of the required stop, amendment or acceleration; and

7.2.2.7 any increase or decrease in any sums due to be paid to the SDS Provider (including any milestone payments and lump sum payments) as a result of the required stop, amendment or acceleration.

7.2.3 the valuation of any required stop, amendment or acceleration shall be added to or deducted from the sums due to be paid to the SDS Provider as the case may be and shall be ascertained, by the Client as follows:

7.2.3.1 by measurement and valuation at the rates and prices for similar work in Schedule 3 (*Pricing Schedule*) insofar as such rates and prices apply;

7.2.3.2 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;

7.2.3.3 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

7.2.3.4 if the value of the required stop, amendment or acceleration 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 3 (*Pricing Schedule*);

provided that where any required stop, amendment or acceleration would otherwise fall to be valued under Clauses 7.2.3.1 and 7.2.3.2 above, but the Client'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 required stop, amendment or acceleration shall be ascertained by measurement and/or valuation at fair rates and prices.

7.2.4 The SDS Provider shall include in the Estimate evidence demonstrating that:

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7.2.4.1 the SDS Provider has used all reasonable endeavours to minimise (including by the use of competitive quotes) any increase in costs and to maximise any reduction of costs;

7.2.4.2 the SDS Provider has, where required by the Client, sought competitive quotes from persons other than the SDS Provider Parties in pursuance of its obligation under Clause 7.2.4.1 above;

7.2.4.3 the SDS Provider has investigated how to mitigate the impact of the required stop, amendment or acceleration; and

7.2.4.4 the required stop, amendment or acceleration will, where relevant, be implemented in the most cost-effective manner.

7.2.5 As soon as reasonably practicable after the Client receives the Estimate, the Parties shall discuss and agree the issues set out in the Estimate. From such discussions the Client may modify its original instruction in relation to the required stop, amendment or acceleration, and the Client may require the SDS Provider to seek and evaluate competitive tenders. In each case, the SDS Provider shall, as soon as practicable, and in any event not more than 14 days after receipt of such instruction, notify the Client of any consequential changes to the Estimate.

7.2.6 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

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7.2.7 As soon as reasonably practicable after the contents of the Estimate have been agreed or determined pursuant to the Dispute Resolution Procedure the Client shall:

7.2.7.1 confirm its instruction in relation to the required stop, amendment or acceleration; or

7.2.7.2 withdraw its instruction in relation to the required stop, amendment or acceleration.

7.2.8 If the Client does not confirm its instruction in relation to the required stop, amendment or acceleration within 30 days of the contents of the Estimate having been agreed or determined pursuant to Clause 7.2.7, then the instruction in relation to the required stop, amendment or acceleration shall be deemed to have been withdrawn.

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7.3 Design and Technical Gateway Process

Gateway from the Requirements Definition Phase to the preparation of the System-Wide Preliminary Design Requirements

7.3.1 The SDS Provider shall, within 3 Business Days, immediately notify the Client when the SDS Provider considers that it has completed each of the Services to be carried out pursuant to the Requirements Definition Phase and that all matters to be agreed during the Requirements Definition Phase have been agreed between the SDS Provider and the Client. Without limitation, the SDS Provider shall not serve such notice until the Services described in paragraph 2.3 of Schedule 1 (*Scope of Services*) have been completed.

7.3.2 If the Client agrees that all of such Services have been completed and/or the relevant matters agreed, the Client shall issue a Milestone Completion Certificate and notify the SDS Provider in writing within 10 Business Days that the preparation of the System-Wide Preliminary Design Requirements can commence. Subject to Clause 7.2 and notwithstanding that a Milestone Completion Certificate may have been issued by the Client, the SDS Provider shall not commence the Detailed Design Phase in respect of such

Sub-Sector or Sector (as appropriate) until the Client shall have confirmed such commencement by notice in writing to the SDS Provider.

- 7.3.3 To the extent that the Client considers that any Services have not been completed by the SDS Provider and/or the relevant matters agreed, the Client shall within 10 Business Days notify the SDS Provider in writing accordingly, including details of the further activities to be carried out by the SDS Provider in order to complete such Services.
- 7.3.4 After receiving any notification from the Client under Clause 7.3.3, the SDS Provider shall ~~immediately~~ within 3 Business Days re-notify the Client when the SDS Provider considers that it has completed each of the Services to be carried out pursuant to the Requirements Definition Phase and that all matters to be agreed during the Requirements Definition Phase have been agreed between the SDS Provider and the Client, and the provisions of Clauses 7.3.1 to 7.3.3 shall apply mutatis mutandis to such re-notification.
- 7.3.5 To the extent that some but not all of the Services in respect of the Requirements Definition Phase have been completed and/or relevant matters agreed, the Client may, in its sole discretion, notify the SDS Provider in writing that the preparation of the System-Wide Preliminary Design Requirements shall commence and in such circumstances:

7.3.5.1 the Client may direct that some or all of the preparation of the System-Wide Preliminary Design Requirements shall be commenced; and

7.3.5.2 the SDS Provider shall continue to provide the Services in respect of the Requirements Definition Phase until (i) the relevant Services have been completed, and (ii) all matters to be agreed during Requirements Definition Phase have been agreed between the SDS Provider and the Client, or until the Client otherwise directs;

PROVIDED ALWAYS that the Client shall not issue a Milestone Completion Certificate in respect of the Requirements Definition Phase until all of the Services have been completed and/or the relevant matters agreed.

Gateway from the preparation of the System-Wide Preliminary Design Requirements to the Preliminary Design Phase in respect of each Sub-Sector

- 7.3.6 The SDS Provider shall ~~immediately~~ within 3 Business Days notify the Client when the SDS Provider considers that it has completed each of the Services to be carried out pursuant to the preparation of the System-Wide Preliminary Design Requirements and that all matters to be agreed in respect of the preparation of the System-Wide Preliminary Design Requirements have been agreed between the SDS Provider and the Client. Without limitation, the SDS Provider shall not serve such notice until the relevant Services described in paragraph 2.4 of Schedule 1 (*Scope of Services*) have been completed to a high level for the whole System.
- 7.3.7 If the Client agrees that all of such Services have been completed and/or the relevant matters agreed, the Client shall issue a Milestone Completion Certificate and notify the SDS Provider in writing within 10 Business Days that the Preliminary Design Phase in respect of each Sub-Sector can commence. Subject to Clause 7.2 and notwithstanding that a Milestone Completion Certificate may have been issued by the Client, the SDS Provider shall not commence the Detailed Design Phase in respect of such

Sub-Sector or Sector (as appropriate) until the Client shall have confirmed such commencement by notice in writing to the SDS Provider.

- 7.3.8 To the extent that the Client considers that any Services have not been completed by the SDS Provider and/or the relevant matters agreed, the Client shall within 10 Business Days notify the SDS Provider in writing accordingly, including details of the further activities to be carried out by the SDS Provider in order to complete such Services.
- 7.3.9 After receiving any notification from the Client under Clause 7.3.8, the SDS Provider shall ~~immediately~~ within 3 Business Days re-notify the Client when the SDS Provider considers that it has completed each of the Services to be carried out pursuant to the System-Wide Preliminary Design Requirements and that all matters to be agreed during the System-Wide Preliminary Design Requirements have been agreed between the SDS Provider and the Client, and the provisions of Clauses 7.3.6 to 7.3.9 shall apply mutatis mutandis to such re-notification.
- 7.3.10 To the extent that some but not all of the Services in respect of the preparation of the System-Wide Preliminary Design Requirements have been completed and/or the relevant matters agreed, the Client may, in its sole discretion, notify the SDS Provider in writing that the Preliminary Design Phase in respect of each Sub-Sector or Sector (as appropriate) shall commence and in such circumstances:
- 7.3.10.1 the Client may direct that some or all of the Services in respect of the Preliminary Design Phase shall be commenced; and
- 7.3.10.2 the SDS Provider shall continue to provide the Services in respect of the preparation of the System-Wide Preliminary Design Requirements until (i) the relevant Services have been completed, and (ii) all matters to be agreed in respect of the preparation of the System-Wide Preliminary Design Requirements have been agreed between the SDS Provider and the Client, or until the Client otherwise directs.

PROVIDED ALWAYS that the Client shall not issue a Milestone Completion Certificate in respect of the preparation of the System-Wide Preliminary Design Requirements until all of the Services have been completed and/or the relevant matters agreed.

Gateway from the Preliminary Design Phase in respect of each Sub-Sector or Sector (as appropriate) to the Detailed Design Phase in respect of each Sub-Sector or Sector (as appropriate)

- 7.3.11 In respect of each Sub-Sector or Sector (as appropriate), the SDS Provider shall ~~immediately~~ within 3 Business Days notify the Client when the SDS Provider considers that it has completed each of the Services to be carried out pursuant to the Preliminary Design Phase in respect of each Sub-Sector or Sector (as appropriate) and that all matters to be agreed in respect of the Preliminary Design Phase in respect of each Sub-Sector or Sector (as appropriate) have been agreed between the SDS Provider and the Client. Without limitation, the SDS Provider shall not serve such notice until the Services described in paragraph 2.4 of Schedule 1 (*Scope of Services*) have been completed.
- 7.3.12 If the Client agrees that all of such Services have been completed and/or the relevant matters agreed in respect of a Sub-Sector or Sector (as

appropriate), the Client shall issue a Milestone Completion Certificate within 10 Business Days. Subject to Clause 7.2 and notwithstanding that a Milestone Completion Certificate may have been issued by the Client, the SDS Provider shall not commence the Detailed Design Phase in respect of such Sub-Sector or Sector (as appropriate) until the Client shall have confirmed such commencement by notice in writing to the SDS Provider.

- 7.3.13 To the extent that the Client considers that any Services have not been completed by the SDS Provider and/or the relevant matters agreed, the Client shall within 10 Business Days notify the SDS Provider in writing accordingly, including details of the further activities to be carried out by the SDS Provider in order to complete such Services.
- 7.3.14 After receiving any notification from the Client under Clause 7.3.13, the SDS Provider shall ~~immediately~~ within 3 Business Days re-notify the Client when the SDS Provider considers that it has completed each of the Services to be carried out pursuant to the Preliminary Design Phase in respect of such Sub-Sector or Sector (as appropriate) and that all matters to be agreed during the Preliminary Design Phase in respect of such Sub-Sector or Sector (as appropriate) have been agreed between the SDS Provider and the Client, and the provisions of Clauses 7.3.11 to 7.3.13 shall apply mutatis mutandis to such re-notification.
- 7.3.15 To the extent that some but not all of the Services to be carried out pursuant to the Preliminary Design Phase in respect of a Sub-Sector or Sector (as appropriate) have been completed and/or the relevant matters agreed, the Client may, in its sole discretion, notify the SDS Provider in writing that the Detailed Design Phase in respect of such Sub-Sector or Sector (as appropriate) shall commence and in such circumstances:
- 7.3.15.1 the Client may direct that some or all of the Services to be performed pursuant to the Detailed Design Phase in respect of such Sub-Sector or Sector (as appropriate) shall be commenced; and
- 7.3.15.2 the SDS Provider shall continue to provide the Services to be carried out pursuant to Preliminary Design Phase in respect of such Sub-Sector or Sector (as appropriate) until (i) the relevant Services have been completed, and (ii) all matters to be agreed in respect of the Preliminary Design Phase in respect of such Sub-Sector or Sector (as appropriate) have been agreed between the SDS Provider and the Client, or until the Client otherwise directs.

PROVIDED ALWAYS that the Client shall not issue a Milestone Completion Certificate in respect of the Detailed Design Phase for such Sub-Sector or Sector (as appropriate) until all of the Services have been completed and/or the relevant matters agreed.

Completion of the Detailed Design Phase in respect of each Sub-Sector or Sector (as appropriate)

- 7.3.16 In respect of each Sub-Sector or Sector (as appropriate), the SDS Provider shall ~~immediately~~ within 3 Business Days notify the Client when the SDS Provider considers that it has completed each of the Services to be carried out pursuant to the Detailed Design Phase in respect of each Sub-Sector or Sector (as appropriate) and that all matters to be agreed in respect of the Detailed Design Phase in respect of each Sub-Sector or Sector (as

appropriate) have been agreed between the SDS Provider and the Client. Without limitation, the SDS Provider shall not serve such notice until the Services described in paragraph 2.6 of Schedule 1 (*Scope of Services*) have been completed.

- 7.3.17 If the Client agrees that all of such Services have been completed and/or the relevant matters agreed in respect of a Sub-Sector or Sector (as appropriate), the Client shall issue a Milestone Completion Certificate within 10 Business Days.
- 7.3.18 To the extent that the Client considers that any Services have not been completed by the SDS Provider and/or the relevant matters agreed, the Client shall within 10 Business Days notify the SDS Provider in writing accordingly, including details of the further activities to be carried out by the SDS Provider in order to complete such Services.
- 7.3.19 After receiving any notification from the Client under Clause 7.3.18, the SDS Provider shall ~~immediately~~ within 3 Business Days re-notify the Client when the SDS Provider considers that it has completed each of the Services to be carried out pursuant to the Detailed Design Phase in respect of such Sub-Sector or Sector (as appropriate) and that all matters to be agreed during the Detailed Design Phase in respect of such Sub-Sector or Sector (as appropriate) have been agreed between the SDS Provider and the Client, and the provisions of Clauses 7.3.16 to 7.3.18 shall apply mutatis mutandis to such re-notification.

7.4 Delays

- 7.4.1 Immediately the SDS Provider is aware of the likelihood of delay to the performance of any element of the Services such that the Master Project Programme and the Programme are unlikely to be met, the SDS Provider shall notify the Client, informing the Client of the reasons, the likely delay and any measures, with estimated costs, which may mitigate the delay.
- 7.4.2 Following such notification, the SDS Provider shall promptly provide the Client with all necessary information to enable the Client to approve any amendments to the Master Project Programme and the Programme which the SDS Provider wishes to make in accordance with Clause 7.4.1.
- 7.4.3 If the Client instructs the SDS Provider to mitigate the delay, any such mitigation shall be at the SDS Provider's expense if the delay was the fault of the SDS Provider, otherwise any costs associated with such instruction will be dealt with as a variation in accordance with Clause 15 (*Changes*).

7.5 Extensions of Time

- 7.5.1 If for any other reason outwith the control of the SDS Provider and not arising out of the SDS Provider's breach of this Agreement or the SDS Provider's negligent or wilful act or omission, the SDS Provider considers that the SDS Provider is entitled to an extension of time for completion of the Services, the SDS Provider shall within 10 Business Days of becoming aware of such possible entitlement to an extension of time, request an extension of time from the Client stating the reason for the request and clearly indicating the length and basis of calculation of the extension of time requested.
- 7.5.2 Subject to Clause 7.5.3, within 10 Business Days of receipt of such notice the Client shall respond, either:

- (i) agreeing to the extension of time and consequent amendment of the Programme or the Master Project Programme; or
- (ii) granting an amended extension of time and consequent amendment of the Programme or the Master Project Programme; or
- (iii) clearly stating the further information required before reaching a decision; or
- (iv) rejecting the request, clearly stating the Client's reason for doing so.

7.5.3 The SDS Provider shall not be entitled to any extension of time if and to the extent that the SDS Provider could (where such action is within the power of the SDS Provider and the SDS Provider could be reasonably expected to take such action, having regard to the scope and nature of the Services), by the exercise of reasonable foresight and diligence, have prevented or reduced the requirement for such extension of time.

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7.6 Client Decisions & Information

- 7.6.1 Immediately the SDS Provider finds that a Client decision or information essential to the continuity of the Services or to achieving the Master Project Programme and the Programme is likely to be required, the SDS Provider shall give notice of that requirement to the Client with full supporting information including the date by which such decision or information is required to ensure that there is no delay to the continuity of the Services.
- 7.6.2 The Client shall within 7 days, in liaison with the SDS Provider, determine and notify the SDS Provider in writing of the date by which the decision is to be made or the information is to be provided.
- 7.6.3 In the event that the Client's notified date or the Client's actual decision or provision of information results in delay to the continuity of Services the matter shall be treated as an extension of time in accordance with Clause 7.5.
- 7.6.4 Where the SDS Provider makes any recommendation to the Client requiring the decision and agreement of the Client to proceed, any foreseeable consequential effect of the application of that recommendation not fully described and evaluated to the Client at the time of the recommendation or earlier shall be the full responsibility of the SDS Provider.

7.7 Abortive Work

- 7.7.1 Immediately that the SDS Provider becomes aware that any element of Services is likely to be Abortive Work for any reason, the SDS Provider shall notify the Client of:
 - (i) the probable nature of the Abortive Work;
 - (ii) the cause of the Abortive Work being abortive;
 - (iii) the estimated effect of the Abortive Work in terms of cost, of time in completion of the Services and of any other matters in relation to the Agreement; and
 - (iv) any measures to be taken which may mitigate that effect.

- 7.7.2 The SDS Provider and the Client shall jointly investigate, and the Client shall determine the actual extent of any Abortive Work.
- 7.7.3 Payment by the Client to the SDS Provider in respect of any Abortive Work which has been carried out by the SDS Provider shall be determined as a variation in accordance with Clause 15 (*Changes*) of this Agreement provided always that no payment shall be due for Abortive Work which has resulted from any fault of the SDS Provider and/or any breach by the SDS Provider of its obligations under this Agreement.

8. KEY PERSONNEL, STAFF AND PROVISION OF ACCOMMODATION FOR THE CLIENT IN EDINBURGH

- 8.1 The SDS Provider shall ensure that:
 - 8.1.1 the Key Personnel shall have day-to-day responsibility for and be involved in the performance of the Services; and
 - 8.1.2 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 Services 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 Client's requirements for the Services.
- 8.2 The SDS Provider shall locate staff at such locations as the SDS Provider considers convenient for the Project, provided that:
 - 8.2.1 the SDS Provider acknowledges that it will not be entitled to any reimbursement from the Client in relation to the travel of any person to or from Edinburgh, or for the accommodation or subsistence of any person visiting Edinburgh; and
 - 8.2.2 the Client will require the SDS Provider to make the Key Personnel available for meetings in Edinburgh at such times as the Client may, in its sole discretion, direct; and
 - 8.2.3 the SDS Provider's Representative and other members of the SDS Provider's staff (as the Client may reasonably require) shall be required to be located in Edinburgh or such other location as may be reasonably required by the Client.
- 8.3 The SDS Provider shall ensure that there are no changes to the Key Personnel without the Client's prior written consent (such consent not to be unreasonably withheld or delayed in the case of a change necessitated by sickness or reasonable annual, maternity, paternity or compassionate leave or where one of the Key Personnel's employment ceases) and that any replacement persons shall be of at least equivalent status and ability to the person whom they replace.
- 8.4 The SDS Provider shall use all reasonable endeavours to ensure the continuity of the personnel assigned to perform the Services and shall select Key Personnel having careful regard to those persons' existing work load and other planned commitments.
- 8.5 The SDS Provider shall ensure that its Key Personnel and staff shall:
 - 8.5.1 have the level of skill, experience and authority appropriate (i) to the Services to which such staff are allocated and (ii) the standards to be achieved pursuant to this Agreement; and

- 8.5.2 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 Services in accordance with this Agreement.
- 8.6 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.
- 8.7 The SDS Provider shall not, during the period of this Agreement, contract or retain as an adviser or SDS Provider consultant, any person currently or previously employed by the Client unless the prior written approval of the Client has been obtained.
- 8.8 The Client shall be at liberty to object to and require the SDS Provider to remove from the performance of the Services any person employed by the SDS Provider (including any person from any permitted SDS Provider Party) who in the reasonable opinion of the Client misconducts itself or is incompetent or negligent in the performance of its duties or persists in any conduct which is prejudicial to safety or health, and such persons shall not be again employed upon the Services without the permission of the Client. No compensation shall be payable by the Client in respect of such objection and removal.
- 8.9 If the Client gives the SDS Provider notice that any member of staff should be removed from involvement in the Services, the SDS Provider shall immediately comply with such notice.
- 8.10 The SDS Provider shall (and shall procure that the Key Personnel, its staff employed in the performance of the Services and the SDS Provider Parties) comply with all regulatory requirements appropriate to and required for the performance of the Services and any rules, regulations and instructions from the Client's Representative.
- 8.11 Unless co-located with **tie**, the SDS Provider shall provide a dedicated office space at the offices of the SDS Provider for four **tie** personnel with a meeting table for six, desks, chairs, storage, phones, use of printers, photocopiers, fax, an independent IT connection with a dedicated separate line and the usual welfare facilities.

9. SUB-LETTING AND THE APPOINTMENT OF SDS PROVIDER PARTIES

- 9.1 The SDS Provider shall not sub-let the whole of the Services.
- 9.2 Subject to Clause 9.3, the SDS Provider may sub-let part of the Services with the prior written approval of the Client to a sub-consultant, supplier, sub-contractor, specialist and/or other party for performance of that specific part of the Services.
- 9.3 The SDS Provider shall supply all relevant information (including curriculum vitae, financial and legal information, information on relevant experience and technical capacity, insurance details and the methodology for provision of the sub-let services) required by the Client to enable a decision to be made by the Client on the suitability of the proposed sub-consultant, supplier, sub-contractor, specialist and/or other party to perform the relevant part of the Services. The Client's decision on the use of any sub-consultant, supplier, sub-contractor, specialist and/or other party shall be final.
- 9.4 The SDS Provider shall be wholly responsible for the performance of the Services including any part of the Services carried out by any SDS Provider Party appointed by the SDS Provider.
- 9.5 Within 14 days of any written request from ~~the Client~~ **tie** the Client, the SDS Provider shall procure the execution of a collateral warranty by any SDS Provider Party in the

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Client's or tie's favour or in favour of such other party as may be reasonably required by the Client, and in a form acceptable to the Client (acting reasonably).

10. MANAGEMENT OF THE SERVICES

10.1 The Client's Representative shall:

10.1.1 be responsible for the day to day supervision of the Services to be performed by the SDS Provider;

10.1.2 exercise the functions and powers of the Client in relation to the Project which are identified in this Agreement;

10.1.3 exercise such other functions and powers of the Client under this Agreement as the Client may notify to the SDS Provider from time to time; and

10.1.4 be the primary point of contact for the SDS Provider with the Client;

and the SDS Provider shall observe, and shall procure that any SDS Provider Parties observe, all reasonable instructions of the Client and the Client's Representative in relation to this Agreement. The SDS Provider shall not and shall procure that any SDS Provider Parties shall not act upon any instruction from any other party unless confirmed by the Client or the Client's Representative in writing. If the SDS Provider or any SDS Provider Parties shall receive any such instructions, the SDS Provider shall notify the Client or the Client's Representative immediately.

10.2 The Client's Representative shall be entitled at any time, by notice in writing to the SDS Provider, to authorise any other persons to exercise the functions and powers of the Client delegated to him, either generally or specifically. Until further notice from the Client, any act of any such person shall, for the purposes of this Agreement, constitute an act of the Client's Representative and all references to "the Client's Representative" in this Agreement (apart from this Clause 10 (*Management of the Services*)) shall be taken as references to such person so far as they concern matters within the scope of such person's authority.

10.3 The Client may by notice in writing to the SDS Provider change the identity of the Client's Representative. The Client shall consult with the SDS Provider prior to the appointment of any replacement for the Client'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.

10.4 During any period when a Client's Representative has not been appointed (or when the Client's Representative is unable through illness, incapacity or any other reason whatsoever to carry out or exercise his functions under this Agreement), the Client shall carry out the functions which would otherwise be performed by the Client's Representative.

10.5 No decision, act or omission of the Client, or the Client's Representative shall, except as otherwise expressly provided in this Agreement:

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

10.5.2 in the absence of an express written instruction or authorisation issued by the Client under Clause 15 (*Changes*), constitute or authorise a variation; or

- 10.5.3 be construed as restricting or binding the Client in any way save with regard to the specific project matters to which it relates.
- 10.6 The SDS Provider shall be entitled to treat all instructions and directions of the Client's Representative as those of the Client provided always that such instructions or directions of the Client's Representative are in writing, are not in conflict with or are inconsistent with this Agreement or any other express instructions or directions of the Client, and the SDS Provider shall not be required to determine whether an express authority has in fact been given. The SDS Provider shall, as soon as reasonably practicable, bring to the attention of the Client any instructions or directions that are given to the SDS Provider that are ambiguous or in conflict or are inconsistent, and the Client will verify such instructions in writing.
- 10.7 If for any reason the Client's Representative considers it necessary to give any instructions or directions orally, then, provided that the Client confirms such instruction or direction the SDS Provider shall within no more than five Business Days confirm the same in writing to the Client, and if such confirmation is not contradicted by the Client within five Business Days, then such oral instruction or direction shall be deemed to be an express instruction or direction of the Client.
- 10.8 The SDS Provider shall appoint a representative ("SDS Provider's Representative") who shall:
- 10.8.1 act as the principal point of contact for the Client, and the Client's Representative in relation to all matters related to this Agreement;
 - 10.8.2 have full authority to act on behalf of the SDS Provider for all purposes of this Agreement, and the Client and the Client's Representative shall be entitled to treat all instructions and directions of the SDS Provider's Representative as those of the SDS Provider.;
 - 10.8.3 manage and co-ordinate the provision of the Services by the SDS Provider (and any SDS Provider Party) and the integration of provision of the Services with the tasks being performed by the Client's internal team and the other advisers appointed by the Client; and
 - 10.8.4 liaise with the Client's Representative in relation to various matters including, the scope of the Services to be carried out from time to time.
- 10.9 The SDS Provider may by written notice to the Client change the identity of the SDS Provider's Representative. Where the SDS Provider wishes to do so, it shall by written notice to the Client propose a substitute for approval, taking account of the need for liaison and continuity in respect of the provision of the Services and the Master Project Programme and the Programme when the change is proposed. Such appointment shall be subject to the prior written approval of the Client (not to be unreasonably withheld or delayed).
- 10.10 The SDS Provider shall also nominate a deputy to the SDS Provider's Representative. During any period when the SDS Provider'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 SDS Provider's Representative.

11. METHODS OF PAYMENT

- 11.1 The fees for the performance of the Services shall be a combination of:

- 11.1.1 milestone payments incorporating sub-milestone payments, as set out in Schedule 3 (*Pricing Schedule*), or as may be otherwise agreed by the Client in accordance with this Agreement;
- 11.1.2 a fixed lump sum or sums as set out in Schedule 3 (*Pricing Schedule*), or as may be otherwise agreed by the Client in accordance with this Agreement; and/or
- 11.1.3 a time based fee as may be agreed by the Client in accordance with this Agreement and in accordance with the relevant rates set out in Schedule 3 (*Pricing Schedule*) to this Agreement.
- 11.2 Any applications for payments for sums due under this Agreement shall be made in accordance with the procedure set out in Clause 12 (*Arrangements for Invoicing and Payment*) and any payment which is due to the SDS Provider shall be paid by the Client in accordance with the procedure set out in Clause 12 (*Arrangements for Invoicing and Payment*) provided always that between 1 April 2005 and 31 March 2006, the SDS Provider shall not make any application for payment where the cumulative total of all applications for payment made by the SDS Provider has exceeded the sum of £7,000,000. Where the cumulative total of such applications for payment has exceeded this said sum, the SDS Provider shall make any applications for payment which have not been made between 1 April 2005 and 31 March 2006 on the next date following 31 March 2006, within 3 Business Days after 30 April 2006.
- 11.3 During the Requirements Definition Phase, the SDS Provider shall make applications for Requirements Definition Phase Sub-Milestone Payments in accordance with Clause 12 (*Arrangements for Invoicing and Payment*) for completed Requirements Definition Phase Sub-Milestones up to a cumulative value of fifty per cent (50%) of the total value of the Requirements Definition Phase Milestone Payment. The SDS Provider shall not make application for payment for any incomplete Requirements Definition Phase Sub-Milestones and the Client's decision as to whether any Requirements Definition Phase Sub-Milestone is complete shall be final. The SDS Provider shall make an application for payment of the remaining fifty per cent (50%) of the total value of the Requirements Definition Phase Milestone Payment following the issue of the Milestone Completion Certificate by the Client in respect of the Requirements Definition Phase.
- 11.4 The SDS Provider shall make an application for payment in respect of the System-Wide Preliminary Design in accordance with Clause 12 (*Arrangements for Invoicing and Payment*) following the issue of the Milestone Completion Certificate by the Client for the System-Wide Preliminary Design.
- 11.5 During the Preliminary Design Phase, the SDS Provider shall make applications for Preliminary Design Phase Sub-Milestone Payments in accordance with Clause 12 (*Arrangements for Invoicing and Payment*) for completed Preliminary Design Phase Sub-Milestones in respect of each Sub-Sector or Sector (as appropriate) up to a cumulative value of eighty per cent (80%) of the total value of the Preliminary Design Phase Milestone Payment for the relevant Sub-Sector or Sector (as appropriate). The SDS Provider shall not make application for payment for any incomplete Preliminary Design Phase Sub-Milestones and the Client's decision as to whether any Preliminary Design Phase Sub-Milestone is complete shall be final. The SDS Provider shall make an application for payment in respect of the remaining twenty per cent (20%) of the total value of the Preliminary Design Phase Milestone Payment for the relevant Sub-Sector or Sector (as appropriate) following the issue of the Milestone Completion Certificate by the Client in respect of the Preliminary Design Phase for the relevant Sub-Sector or Sector (as appropriate).

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- 11.6 During the Detailed Design Phase, the SDS Provider shall make applications for Detailed Design Phase Sub-Milestone Payments in accordance with Clause 12 (*Arrangements for Invoicing and Payment*) for completed Detailed Design Phase Sub-Milestones in respect of each Sub-Sector or Sector (as appropriate) up to a cumulative value of eighty per cent (80%) of the total value of the Detailed Design Phase Milestone Payment for the relevant Sub-Sector or Sector (as appropriate). The SDS Provider shall not make application for payment for any incomplete Detailed Design Phase Sub-Milestones and the Client's decision as to whether any Detailed Design Phase Sub-Milestone is complete shall be final. The SDS Provider shall make an application for payment in respect of the remaining twenty per cent (20%) of the total value of the Detailed Design Phase Milestone Payment for the relevant Sub-Sector or Sector (as appropriate) following the issue of the Milestone Completion Certificate by the Client in respect of the Detailed Design Phase for the relevant Sub-Sector or Sector (as appropriate).
- 11.7 The SDS Provider shall make applications for payment in respect of any fixed lump sum or sums in accordance with Clause 12 (*Arrangements for Invoicing and Payment*) up to the agreed value of the fixed lump sum or sums and the Client shall not be liable to pay the SDS Provider any additional sum of money in relation to the Services to which the fixed lump sum or sums relates, unless agreed expressly in writing by the Client in accordance with this Agreement.

12. ARRANGEMENTS FOR INVOICING AND PAYMENT

- 12.1 Subject to Clause 11 (Methods of Payment), the SDS Provider shall submit each application for payment in respect of any sub-milestones, milestones, fixed lump sum or sums and any other fees, costs and/or expenses agreed in accordance with this Agreement, which are being claimed by the SDS Provider for the previous calendar month, to the Client's Representative within three Business Days following the final date of each calendar month
- 12.2 Each application for payment shall:
- 12.2.1 set out the sub-milestone payments claimed;
 - 12.2.2 set out the milestone payments claimed;
 - 12.2.3 include any Milestone Completion Certificates;
 - 12.2.4 set out the proportion of any fixed lump sum or sums claimed in an updated cost loaded programme in electronic form (P3e) together with two hard copies of all supporting documentation
 - 12.2.5 set out the proportion of Management Fees claimed in an updated cost loaded programme in electronic form (P3e) together with two hard copies of all supporting documentation;
 - 12.2.6 set out any other fees claimed in an updated cost loaded programme in electronic form (P3e) together with two hard copies of all supporting documentation;
 - 12.2.7 set out any other costs and/or expenses where it has been agreed in writing that such costs and/or expenses shall be charged to the Client;
 - 12.2.8 a forecast of the fees and any associated costs and/or expenses which the SDS Provider estimates could be claimed for the next two months following the month which is the subject of the application for payment, together with a breakdown of the tasks and workstreams which relate to such forecast.

- 12.3 The Client shall procure that the Client's Representative shall, subject to any clarifications as are in the Client's opinion (acting properly and reasonably) necessary, certify by notice in writing (an "Interim Certificate") to the SDS Provider that part of the sum claimed in the application for payment which is approved by the Client 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 the Client.
- 12.4 Subject to Clause 12.7, the SDS Provider shall submit a VAT invoice to the Client within seven days of the date of the Interim Certificate and to the value of the said Interim Certificate. Payment will become due to the SDS Provider on the date of issue of said Interim Certificate by the Client and subject to Clause 12.5 the final date for payment by the Client of such valid VAT invoice shall be 30 days from the date of issue of the Interim Certificate by the Client.
- 12.5 If the SDS Provider is late in submitting its application for payment to the Client by more than three Business Days after the required timescales in Clause 12.1, payment in respect of any amount certified in an Interim Certificate, shall become due to the SDS Provider on the date of receipt of the relevant valid VAT invoice by the Client in respect of the late application for payment, and the final date for payment of such valid VAT invoice shall be made by the Client to the SDS Provider within 30 days of the first date of the calendar month following receipt of the valid VAT invoice.
- 12.6 If the SDS Provider is late in submitting a valid VAT invoice to the Client by more than three Business Days after the required timescales in Clause 12.4, payment in respect of any amount certified in an Interim Certificate, shall become due to the SDS Provider on the date of late receipt of the relevant valid VAT invoice by the Client and the final date for payment of such late valid VAT invoice shall be made by the Client to the SDS Provider within 30 days of the first date of the calendar month following receipt of the late valid VAT invoice.

12.7 **Retention**

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- 12.7.1 Prior to the date of execution of the Novation Agreement by the SDS Provider and the date of execution of the Funder's Direct Agreement by the SDS Provider, the SDS provider shall submit a VAT invoice to **tie** for ninety seven per cent (97%) of the sum certified in each relevant Interim Certificate. **tie** shall retain three per cent (3%) of such sums certified in each relevant Interim Certificate (the "**Retention**"). Payment will become due to the SDS Provider on the date of issue of such Interim Certificate by **tie** and subject to Clauses 12.5 and 12.6, the final date for payment of such valid VAT invoice shall be 30 days from the date of issue of the Interim Certificate.
- 12.7.2 Within 30 Business Days of the date of execution of the Novation Agreement and the date of execution of the Funder's Direct Agreement by the SDS Provider by the SDS Provider or the SDS Provider being notified in writing by **tie** that the Novation Agreement is not to be executed by the SDS Provider and/or that that the Funder's Direct Agreement is not to be executed by the SDS Provider, the SDS Provider shall issue a valid VAT invoice to **tie** for one hundred per cent (100%) of the total of all Retentions retained in accordance with Clause 12.7.1.
- 12.7.3 Payment will become due to the SDS Provider on the date of receipt of the valid VAT invoice by **tie** and the final date for payment of such valid VAT invoice by **tie** shall be 30 days from the date of receipt of such valid VAT invoice.

12.8 **Adjustments to the Milestone Payments, Lump Sums and Rates**

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12.8.1 Without prejudice to Clause 12.3, any milestone payments, and/or lump sum or sums payments, or other sums set out in Schedule 3 (*Pricing Schedule*) to this Agreement or agreed in accordance with this Agreement will not be adjusted except by the express written agreement of the Client where there has been a variation of the Services in accordance with Clause 15 (*Changes*);

12.8.2 The rates set out in Schedule 3 (*Pricing Schedule*) to this Agreement shall not be adjusted;

12.9 **Payments to SDS Provider Parties**

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12.9.1 Where, with the agreement of the Client, the SDS Provider has appointed any SDS Provider Parties, no additional payments shall be made over and above any fixed lump sum or sums, and/or any milestone payments and/or sub-milestone payments, or the rates set out in Schedule 3 (*Payment Schedule*) to this Agreement, unless expressly agreed by the Client in writing.

12.9.2 Where the Client has expressly agreed in writing that payment shall be made by the Client for the services of SDS Provider Parties, the SDS Provider shall apply for such payment in accordance with Clause 12.1.

12.10 **Interest on Late Payments**

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12.10.1 In the event of failure of the Client to make payment in accordance with this Clause 12 (*Arrangements for Invoicing and Payment*), the Client shall pay to the SDS Provider 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 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.

12.11 **SDS Provider to remain responsible;**

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12.11.1 The final payment for any Services shall not be interpreted as being the satisfaction of the Client that the Services have been performed in accordance with the Agreement.

12.11.2 The responsibility of the SDS Provider for the Services shall not come to an end solely by reason of the making of any payment therefor.

13. **SET-OFF**

13.1 Subject to Clause 13.2, the Client may deduct any amount payable by the SDS Provider to the Client whether by way of damages or in respect of any loss or expense sustained by the Client by reason of the SDS Provider's breach of this Agreement from any other payment or payments due to be made to the SDS Provider by the Client under this Agreement.

13.2 Any notice of intention to withhold payment shall be served by the Client at least three days prior to the final date for payment calculated in accordance with Clause 12 (*Arrangements for Invoicing and Payment*) 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:

13.2.1 7 days from the date of the decision, or

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

whichever is the later.

14. AUDIT

14.1 The SDS Provider shall produce to the Client any documents or provide any information relevant to the performance of the Services or any part thereof as the Client's auditors may require and shall provide any documents or information reasonably required by the Client in respect of any SDS Provider Parties.

14.2 Proper books, vouchers, accounts and records relating to the Services and any services being performed by SDS Provider Parties shall be maintained by the SDS Provider at its place of business and shall be available for inspection by the Client or any officer authorised by the Client at all reasonable times during the duration of the Agreement and for six years after the termination or expiry of this Agreement.

15. CHANGES

Client Changes

15.1 Unless expressly stated in this Agreement or as may otherwise be agreed by the Parties, Client Changes shall be dealt with in accordance with this Clause 15 (*Changes*). If the Client requires a Client Change, it must serve a Client Notice of Change on the SDS Provider.

15.2 A Client Notice of Change shall:

15.2.1 set out the proposed Client Change in sufficient detail to enable the SDS Provider to calculate and provide the Estimate in accordance with Clause 15.3 below;

15.2.2 require the SDS Provider to provide the Client within 18 days of receipt of the Client Notice of Change with an Estimate, and specify whether any competitive quotes are required; and

15.2.3 set out how the Client wishes to pay (where relevant) for any proposed Client Change.

15.3 As soon as is reasonably practicable, and in any event within 18 days after having received a Client Notice of Change, the SDS Provider shall deliver to the Client the Estimate. The Estimate shall include the opinion of the SDS Provider (acting reasonably) on:

15.3.1 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 Client Change;

15.3.2 any impact on the performance of the Services;

15.3.3 any impact on the Master Project Programme and the Programme, and any requirement for an extension of time;

- 15.3.4 any amendment required to the Agreement as a result of the implementation of the proposed Client Change,
 - 15.3.5 the proposed method of delivery of the proposed Client Change;
 - 15.3.6 proposals to mitigate the impact of the proposed Client Change; and
 - 15.3.7 any increase or decrease in any sums due to be paid to the SDS Provider (including any milestone payments and lump sum payments) as a result of the implementation of the proposed Client Change.
- 15.4 The valuation of any Client Changes made in compliance with this Clause 15 (*Changes*) shall be added to or deducted from the sums due to be paid to the SDS Provider as the case may be, and shall be ascertained by the Client as follows:
- 15.4.1 by measurement and valuation at the rates and prices for similar work in Schedule 3 (*Pricing Schedule*) insofar as such rates and prices apply;
 - 15.4.2 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;
 - 15.4.3 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
 - 15.4.4 if the value of the Client 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 3 (*Pricing Schedule*);
- provided that where any Client Change would otherwise fall to be valued under Clauses 15.4.1 and 15.4.2 above, but the Client'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 Client Change shall be ascertained by measurement and/or valuation at fair rates and prices.
- 15.5 The SDS Provider shall include in the Estimate evidence demonstrating that:
- 15.5.1 the SDS Provider has used all reasonable endeavours to minimise (including by the use of competitive quotes) any increase in costs and to maximise any reduction of costs;
 - 15.5.2 the SDS Provider has, where required by the Client, sought competitive quotes from persons other than the SDS Provider Parties in pursuance of its obligation under Clause 15.5.1 above;
 - 15.5.3 the SDS Provider has investigated how to mitigate the impact of the Client Change; and
 - 15.5.4 the proposed Client Change will, where relevant, be implemented in the most cost-effective manner, including showing that when such expenditure is incurred Changes in Law that are foreseeable at that time have been taken into account by the SDS Provider.
- 15.6 If the SDS Provider does not intend to use its own resources to implement any proposed Client Change, it shall:

- 15.6.1 demonstrate that it is appropriate to subcontract the implementation of such Client Change; and
 - 15.6.2 comply with Good Industry Practice with the objective of ensuring that it obtains best value for money when procuring any SDS Provider Party or Deliverable required in relation to the proposed Client Change.
 - 15.7 As soon as reasonably practicable after the Client receives the Estimate, the Parties shall discuss and agree the issues set out in the Estimate. From such discussions the Client may modify the Client Notice of Change, and the Client may require the SDS Provider to seek and evaluate competitive tenders. In each case the SDS Provider shall, as soon as practicable, and in any event not more than 14 days after receipt of such modification, notify the Client of any consequential changes to the Estimate.
 - 15.8 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 provided that the SDS Provider shall not be obliged to implement any proposed Client Change where:
 - 15.8.1 the Client does not have the legal power or capacity to require the implementation of such proposed Client Change; or
 - 15.8.2 implementation of such proposed the Client Change would
 - 15.8.2.1 be contrary to Law;
 - 15.8.2.2 not be technically feasible;
 - 15.8.2.3 substantially and materially increases the probability of a substantial non-compliance with this Agreement by the SDS Provider; or
 - 15.8.2.4 be outwith the specific competence of the SDS Provider either in performing the activity required by the Client Change or in supervising a SDS Provider Party to carry out the activity required by the Client Change.
 - 15.9 As soon as reasonably practicable after the contents of the Estimate have been agreed or determined pursuant to the Dispute Resolution Procedure the Client shall:
 - 15.9.1 issue a Client Change Order ; or
 - 15.9.2 withdraw the Client Notice of Change.
- ~~For the avoidance of doubt, the SDS Provider shall not commence work until instructed through receipt of a Client Change Order.~~
- 15.10 If the Client does not issue a Client Change Order within 30 days of the contents of the Estimate having been agreed or determined pursuant to Clause 15.9, then the Client Notice of Change shall be deemed to have been withdrawn.

Restrictions on Entitlements to Relief for a Client Change

- 15.11 The SDS Provider shall not be entitled to any extension of time, payment or relief in respect of any Client Change if and to the extent that the SDS Provider could ~~(where such action is within the power of the SDS Provider and the SDS Provider could be reasonably expected to take such action, having regard to the scope and nature of~~

the Services), by the exercise of reasonable foresight and diligence, have prevented or materially reduced the requirement for such Client Change.

15.12 If, having received instructions from the Client or the Client's Representative, the SDS Provider considers that compliance with those instructions would amount to a Client Change, the SDS Provider shall within seven days 10 Business Days of any instructions being received, notify the Client of the same and, if it is agreed by the parties or determined pursuant to the Dispute Resolution Procedure that a Client Change would arise if the instructions were complied with, the Client may proceed with the instruction in accordance with this Clause 15 (Changes).

15.13 Any failure by the SDS Provider to notify the Client within seven days 10 Business Days of instructions being received that it considers compliance with such instructions from the Client or the Client's Representative would amount to a Client Change shall constitute an irrevocable acceptance by the SDS Provider that any compliance with the Client's or the Client Representative's comments shall be without cost to the Client and without any entitlement to any extension of time or other relief.

15.14 Any failure by the SDS Provider to notify the Client within seven days 10 Business Days of becoming aware of any other matter or occurrence which could amount to a Client Change shall constitute an irrevocable acceptance by the SDS Provider that in being instructed to deal with such matter or occurrence as a Client Change, the SDS Provider shall not be entitled to any costs, extension of time or other relief. in respect of such Client Change.

Changes proposed by the SDS Provider

15.15 Within 7 days 10 Business Days of the SDS Provider becoming aware of the need or desirability for a variation to the Services, the SDS Provider shall notify the Client of the reasons, consequential effects including any increase or reduction in costs, and options available to mitigate these effects with a recommendation for action by the Client.

15.16 If the Client wishes to proceed with a variation proposed by the SDS Provider, the Client shall serve a Client Notice of Change on the SDS Provider and Clauses 15.2 to 15.11 shall be adhered to by the Client and the SDS Provider.

Small Works Changes

~~15.17 In so far as is relevant to the performance of the Services or the SDS Provider's obligations under this Agreement, the SDS Provider shall assist the Client with carrying out any Small Works Changes and shall provide any information relating to any Small Works Changes as may be reasonably required by the Client.~~

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Change Control Register

~~15.18 15.17 The SDS Provider shall maintain a change control register which shall detail the status and gives summary information on all withdrawn, potential and confirmed variations under this Agreement.~~

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16. QUALIFYING CHANGE IN LAW

16.1 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:

16.1.1 any necessary change in the Services;

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

16.1.3 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 the Client's discretion) shall be dealt with in accordance with Clauses 16.2 and 16.3 below.

16.2 As soon as reasonably practicable after receipt of any notice from either Party under Clause 16.1 above, the Parties shall discuss and agree the issues referred to in Clause 16.1 above and any ways in which the SDS Provider can mitigate the effect of the Qualifying Change in Law and the SDS Provider shall:

16.2.1 provide evidence to the Client that the SDS Provider 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;

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

16.2.3 demonstrate that the relevant changes will be implemented in the most cost-effective manner, including showing that when expenditure is incurred or has been incurred, foreseeable Changes in Law at that time have been taken into account by the SDS Provider; and

16.2.4 give evidence as to how the Qualifying Change in Law has affected the fees and/or costs of similar consultants.

16.3 As soon as reasonably practicable after the issues referred to in Clause 16.2 have been agreed between the Parties or determined pursuant to the Dispute Resolution Procedure, the Client shall give a Client Notice of Change and the provisions of Clause 15 (*Changes*) shall apply except that the SDS Provider 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), ~~and with insurers authorised to carry out insurance business in the United Kingdom.~~ The Client shall issue a Client Change Order once it has been agreed or determined pursuant to the Dispute Resolution Procedure. In assessing the value of the change, the Client shall pay the agreed amount less the agreed threshold of £5015,000 for each and every event. ~~The Client will, at its sole discretion, determine the scope of each and every event.~~

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16.4 Except as otherwise expressly provided in this Agreement, the SDS Provider 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.

17. REQUIRED INSURANCES

17.1 The SDS Provider shall, at its own cost, procure that each of the Required Insurances is taken out, comes into effect and is maintained ~~with reputable insurers authorised to carry out insurance business in the United Kingdom and otherwise~~ in accordance with the requirements of Schedule 6 (*Required Insurances*).

- 17.2 The Required Insurances referred to in this Clause 17 shall be effected with insurers approved by the Authority, such approval not to be unreasonably withheld or delayed. The SDS Provider shall not make any material alteration to the terms of the Required Insurances without the Client's prior approval (which approval shall not be unreasonably withheld). If the insurer makes or attempts to make any material alteration or purports to withdraw cover, or if the SDS Provider is unable to obtain professional indemnity insurance, the SDS Provider shall promptly give notice of this to the Client.
- 17.3 The SDS Provider shall ensure that its insurance broker gives the Client as soon as reasonably practicable after any of the Required Insurances is taken out, replaced or renewed, a letter of undertaking in the form set out in Part 2 of Schedule 6 (*Required Insurances*).
- 17.4 The SDS Provider shall provide satisfactory evidence to the Client that the Required Insurances have been effected. The SDS Provider shall upon request produce to the Client receipts for the payment of current insurance premiums.
- 17.5 The SDS Provider shall confirm to the Client in writing on or around the date of the first and each subsequent anniversary of the Effective Date that the Required Insurances continue to be maintained. The SDS Provider shall, when required by the Client, make available for inspection by the Client, documentary evidence that such Required Insurances are being properly maintained. For the avoidance of doubt, the Client acknowledges that there may be a delay between the renewal date and issue of such evidence and such delay will not be deemed to be a failure of the SDS Provider to provide evidence of cover.
- 17.6 If the SDS Provider shall fail upon request to produce to the Client satisfactory evidence that there is in force the Required Insurances referred to in this Clause 17 (*Required Insurances*) or is otherwise in breach of this Clause 17 (*Required Insurances*), the Client may, on behalf of the SDS Provider, effect and keep in force any such insurance and pay such premium or premiums as may be necessary for that purpose and from time to time deduct the amount so paid by the Client as aforesaid from any monies due or which may become due to the SDS Provider.
- 17.7 The SDS Provider shall increase the limit of indemnity and amend the terms of the third party liability insurance set out in Schedule 6 (*Required Insurances*) if required by the Client in order to meet the requirements of any third party including Network Rail and BAA with regard to any of the Services to be performed by the SDS Provider in accordance with this Agreement. Any costs associated with such increase and/or amendment shall be paid by the SDS Provider.
- 17.8 The SDS Provider 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 failure to disclose any fact) as a result of which any of the Required Insurances may be rendered void, voidable, unenforceable or 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.
- 17.9 The supply to the Client of any insurance policy or insurance certificate or renewal certificate or other evidence of compliance with this Clause 17 (*Required Insurances*) shall not imply, or be taken as, acceptance by the Client that:
- 17.9.1 the extent of insurance cover is sufficient and its terms are satisfactory; or
- 17.9.2 in respect of any risks not insured against, insurable interests or parties not insured, an acceptance by the Client that the same were uninsurable.

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18. ERRORS AND/OR OMISSIONS IN THE SERVICES

- 18.1 If during the performance of the Services and/or where a SDS Provider has completed the Services, the Client becomes aware of any error or omission in the performance of the Services or of any other breach of this Agreement, the Client shall notify the SDS Provider, who shall, at its own expense and in liaison with the Client and/or any other party or parties nominated by the Client, rectify any error or omission or breach, or where this is agreed by the Client to be impracticable or undesirable, take such other agreed steps to address the error or omission.
- 18.2 Any costs to the Client of remedying any such errors or omissions or breaches shall be paid by the SDS Provider to the Client.
- 18.3 These arrangements shall in no respect diminish the Client's ability to recover damages from the SDS Provider for losses incurred by the Client consequent upon the error or omission or breach in question.

19. TERMINATION FOR SDS PROVIDER DEFAULT

- 19.1 The Client may terminate this Agreement upon giving written notice to the SDS Provider, and this Agreement shall terminate on the date falling 30 days after the service of such notice if:
- 19.1.1 the SDS Provider breaches any material provision or requirement of the Agreement; or
 - 19.1.2 the circumstances envisaged by Clause 33.7 apply;
 - 19.1.3 following a written warning and the removal of any member of the Key Personnel, any replacement member of the Key Personnel is, in the opinion of the Client, incompetent to perform any of his duties;
 - 19.1.4 the SDS Provider conducts itself in a manner which the Client considers to be incompatible with the performance of the Services, and/or in such manner so as to wilfully detract from the image and reputation of the Client, **tie**, CEC, Transport Edinburgh Limited, the Scottish Executive or any project related to the performance of the Services, or
 - 19.1.5 any partner or director of the SDS Provider directly involved with this Agreement is expelled from or sanctioned by his relevant professional Institute or Institution, thus compromising the performance of the Services; or
 - 19.1.6 an Insolvency Event occurs; or
 - 19.1.7 the SDS Provider fails to resolve a conflict of interest in accordance with Clause 31 (*Conflict of Interest*) to the reasonable satisfaction of the Client; or
 - 19.1.8 there is a change in legal status of the SDS Provider or a Change in Control of the SDS Provider which is materially prejudicial to the performance of the Services.
- 19.2 The SDS Provider shall immediately notify the Client of
- 19.2.1 any resolution or decision by the SDS Provider or the board of directors of the SDS Provider or a decision by any director of the SDS Provider to seek legal or financial advice pertaining to the solvency of the SDS Provider; and/or

19.2.2 any presentation of any petition for the purpose of winding up the SDS Provider or any petition for an administration order.

20. TERMINATION, ABANDONMENT OR SUSPENSION OF THE SERVICES BY THE CLIENT

- 20.1 The Client may terminate this Agreement at any time and for whatever reason upon giving written notice to the SDS Provider, and this Agreement shall terminate on the date falling 60 days after the date of service of such written notice.
- 20.2 At any time the Client may decide to postpone or abandon any part of the Services and, if the Client decides to postpone or abandon any part of the Services, the Client may by notice in writing to the SDS Provider seek to vary the Services either by excluding the Services (or any part thereof) to be performed by the SDS Provider, or by suspending performance of the same, and in such notice the Client shall specify the Services affected.
- 20.3 Unless otherwise notified in writing by the Client, if the Client shall not have required the SDS Provider to resume the performance of Services in respect of the whole or any part of the Services suspended under Clause 20.2 within a period of 12 months from the date of the notice, the Agreement shall forthwith automatically terminate in whole if the whole of the Services has been terminated or in part, if part of the Services has been terminated.
- 20.4 The SDS Provider shall, upon receipt of any notice in accordance with this Clause 20 (*Termination, Abandonment or Suspension of the Services by the Client*) terminating, suspending or abandoning the whole or any part of the Services, proceed in an orderly manner but with all reasonable speed and economy to take such steps as are necessary to bring to an end or suspend (as appropriate) the Services and its other obligations under this Agreement. The Client and the SDS Provider shall meet within 7 days of the said receipt of such notice to assess the costs arising.

21. TERMINATION OR SUSPENSION FOR CLIENT DEFAULT

- 21.1 If a Client Default has occurred and the SDS Provider wishes to terminate this Agreement, the SDS Provider must serve a termination notice on the Client within 30 days of becoming aware of the Client Default. Failure to do so shall be a waiver of the right to terminate.
- 21.2 The SDS Provider shall specify in the termination notice the type of the Client Default which has occurred entitling the SDS Provider to terminate.
- 21.3 Provided the SDS Provider has complied with Clauses 21.1 and 21.2, this Agreement shall terminate on the day falling 60 days after the date on which the Client receives the termination notice, unless the Client rectifies the Client Default within 60 days of receipt of the termination notice.
- 21.4 The SDS Provider 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 21 (*Termination for Client Default*) or Clause 23 (*Termination by Reason of Force Majeure*).
- 21.5 If the Client shall fail to pay the SDS Provider in full any amount properly due and payable under this Agreement by the final date for payment in accordance with the requirements of Clause 12 (*Arrangements for Invoicing and Payment*) and no effective notice to withhold payment has been given by the Client to the SDS Provider, the SDS Provider may, after giving the Client 60 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 Services until payment in full is made by the Client.

22. TERMINATION FOR CORRUPT GIFTS AND PAYMENTS

- 22.1 The SDS Provider or anyone employed by it or acting on its behalf (including any SDS Provider Party) shall not commit any Prohibited Act.
- 22.2 If the SDS Provider, or anyone employed by it or acting on its behalf (including any SDS Provider Party), commits any Prohibited Act, then the Client shall be entitled to act in accordance with Clauses 22.3 to 22.7.
- 22.3 If a Prohibited Act is committed by the SDS Provider or by an employee of the SDS Provider not acting independently of the SDS Provider, then the Client may terminate this Agreement by giving notice to the SDS Provider.
- 22.4 If a Prohibited Act is committed by an employee of the SDS Provider acting independently of the SDS Provider, then the Client may give notice to the SDS Provider of termination and this Agreement will terminate, unless within 30 days of receipt of such notice the SDS Provider terminates the employee's employment and (if necessary) procures the performance of the relevant part of the Services by another person.
- 22.5 If a Prohibited Act is committed by anyone acting on behalf of the SDS Provider (excluding employees of the SDS Provider but including any SDS Provider Party, and their employees) and not acting independently of the SDS Provider, then the Client may give notice to the SDS Provider of termination and this Agreement will terminate.
- 22.6 If a Prohibited Act is committed by anyone acting on behalf of the SDS Provider (excluding employees of the SDS Provider but including any SDS Provider Party, and their employees) and acting independently of the SDS Provider, then the Client may give notice to the SDS Provider of termination and this Agreement will terminate, unless within 30 days of receipt of such notice the SDS Provider terminates that party's employment and procures the performance of the relevant part of the Services by another person.
- 22.7 Any notice of termination under this Clause 22 (*Termination for Corrupt Gifts and Payments*) shall specify:
- 22.7.1 the nature of the Prohibited Act;
- 22.7.2 the identity of the person whom the Client believes has committed the Prohibited Act; and
- 22.7.3 the date on which this Agreement will terminate, in accordance with the applicable provision of this Clause 22 (*Termination for Corrupt Gifts and Payments*).

23. TERMINATION BY REASON OF FORCE MAJEURE

- 23.1 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:

- 23.1.1 the Affected Party could, by the exercise of reasonable foresight and diligence, have prevented or reduced the effect of the Force Majeure Event; and
- 23.1.2 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.
- 23.2 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.
- 23.3 The Parties shall enter into bona fide discussions with a view to alleviating the effects of such Force Majeure Event, 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.
- 23.4 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 Services and the SDS Provider 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.
- 23.5 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.

24. PERSISTENT BREACH

- 24.1 If a breach by the SDS Provider of any of its obligations under this Agreement has occurred more than once then the Client may serve a notice ("Persistent Breach Notice") on the SDS Provider:
 - 24.1.1 specifying that it is a Persistent Breach Notice;
 - 24.1.2 giving reasonable details of the breach; and
 - 24.1.3 stating that such breach is a breach which, if it recurs frequently or continues, may result in a termination of this Agreement.
- 24.2 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 the Client may serve another notice ("Final Persistent Breach Notice") on the SDS Provider:
 - 24.2.1 specifying that it is a Final Persistent Breach Notice;

- 24.2.2 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
- 24.2.3 stating that if such failure is not remedied within 7 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.

25. PAYMENT FOLLOWING TERMINATION OR SUSPENSION

- 25.1 No compensation shall be payable by the Client to the SDS Provider for termination of this Agreement whether under contract, delict (including negligence), breach of (or compliance with) statutory duty, restitution or otherwise but without prejudice to payments due under Clause 25.3.
- 25.2 Within 30 days of termination of this Agreement and following receipt of a valid VAT invoice, the Client shall pay to the SDS Provider:
 - 25.2.1 any undisputed sums due from the Client to the SDS Provider pursuant to Clauses 11 (*Methods of Payment*) and 12 (*Arrangements for Invoicing and Payment*); and
 - 25.2.2 any entitlement to demobilisation costs pursuant to Clause 25.3; and
 - 25.2.3 any sums due to the SDS Provider in respect of any work in progress which have not been certified in accordance with Clause 12 (*Arrangements for Invoicing and Payment*) provided that the calculation of such sums have been certified as follows:
 - 25.2.3.1 the SDS Provider shall have provided the Client with a valuation of all work in progress in relation to the Services in accordance with the provisions of Clause 15.4 and subject to Clause 11 (*Methods of Payment*) and, for the avoidance of doubt, subject to any agreed milestone or lump sum payments set out in Schedule 3 (*Pricing Schedule*) or as agreed otherwise in accordance with this Agreement;
 - 25.2.3.2 **tie** shall, subject to any clarifications as are in **tie's** opinion (acting properly and reasonably necessary) certify by notice in writing to the SDS Provider that part of the work in progress which is approved by **tie** and give reasons why any part of the work in progress has not been certified and the value of the sums involved no later than 10 Business Days after the date on which such valuation was received. **tie's** valuation of such work in progress shall be final and binding.
- 25.3 The Client shall make payment to the SDS Provider of any demobilisation costs which have been demonstrably and reasonably incurred by the SDS Provider in respect of:
 - 25.3.1 termination for Client Default pursuant to Clause 21 (*Termination or Suspension for Client Default*); or
 - 25.3.2 termination or abandonment pursuant to Clause 20 (*Termination, Abandonment or Suspension of the Services by the Client*); or

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25.3.3 suspension pursuant to Clause 20 (*Termination, Abandonment or Suspension of the Services by the Client*).

- 25.4 The SDS Provider shall use all reasonable endeavours to minimise and mitigate any such demobilisation costs and the Client shall not be liable to pay the SDS Provider for such demobilisation costs to the extent that the SDS Provider has failed to minimise or mitigate such demobilisation costs or to the extent that such demobilisation costs have arisen out of the SDS Provider's breach of this Agreement or any negligent or wilful act or omission by the SDS Provider.
- 25.5 Within 30 days of termination of this Agreement, the SDS Provider shall pay to the Client any sums due from the SDS Provider to the Client pursuant to this Agreement.
- 25.6 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 SDS Provider shall not be entitled to any compensation on expiry of the Agreement.
- 25.7 Within 30 days of expiry of this Agreement, the Client shall pay to the SDS Provider any undisputed sums due from the Client to the SDS Provider in accordance with Clauses 11 (*Methods of Payment*) and 12 (*Arrangements for Invoicing and Payment*).
- 25.8 Within 30 days of expiry of this Agreement, the SDS Provider shall pay to the Client any sums due from the SDS Provider to the Client pursuant to this Agreement.
- 25.9 Either Party may refer any Dispute about disputed sums to the Dispute Resolution Procedure. If it is determined pursuant to the Dispute Resolution Procedure that the whole or part of any disputed amount is due to either the Client or the SDS Provider, the Client or the SDS Provider (as appropriate) shall raise an invoice within 30 days in respect of such determined amount and payment shall be made by the relevant Party within 60 days of the receipt of such invoice.
- 25.10 In the event of the Agreement being terminated under Clause 19 (*Termination for SDS Provider Default*) or Clause 22 (*Termination for Corrupt Gifts and Payments*) or Clause 24 (*Persistent Breach*), the Client shall be entitled to recover from the SDS Provider all losses, liabilities damages, penalties, fines, forfeitures, and the costs and expenses incident thereto (including without limitation legal costs of defence) sustained by the Client by such termination, and, without prejudice to the generality of this provision, the Client may forthwith employ and pay persons to carry out, manage and complete the Services and recover the costs of so doing from the SDS Provider.
- 25.11 In any case in which the Client has required the SDS Provider to suspend the carrying out of the Services, the Client may at any time within the period of 12 months from the date of the Client's notice served in accordance with Clause 20.2 (or such longer period as may be notified in writing by the Client) require the SDS Provider in writing to resume the performance of such Services. In such event, if the SDS Provider needs to perform any additional services in connection with the resumption of the Services, the Client shall pay the SDS Provider fair and reasonable costs in respect of the performance of such additional services which shall be treated as a Client Change and agreed in accordance with Clause 15 (*Changes*).

26. EFFECTS OF TERMINATION OR EXPIRY

- 26.1 Subject to Clause 25.2, the SDS Provider shall not have any other right or remedy against the Client on termination of this Agreement.
- 26.2 Subject to any exercise by the Client of its rights to perform, or to procure a third party to perform, the obligations of the SDS Provider, 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.

- 26.3 Any termination or expiry of this Agreement shall not prejudice or affect the accrued rights or claims of either Party.
- 26.4 On expiry of this Agreement or any earlier termination of this Agreement for whatever reason, all Deliverables shall be handed to the Client, provided that the SDS Provider may retain one copy of any Deliverable where such copy is required for the purposes of Law or any recognised regulatory requirement or for record purposes (where the Client acting reasonably agrees). The provisions of Clause 33 (*Confidential Information*) will continue to apply to these Deliverables beyond expiry of this Agreement or any earlier termination for whatever reason.
- 26.5 In order to aid the progress of the performance of the Services, the Client may make available to the SDS Provider various information, materials and documents. On expiry of this Agreement or any earlier termination of this Agreement for whatever reason, all such information, materials and documents shall be returned to the Client provided that the SDS Provider may retain one copy of any information, materials and documents where such copy is required for the purposes of Law or any recognised regulatory requirement. The provisions of Clause 33 (*Confidential Information*) will continue to apply to such information, materials and documents beyond expiry of this Agreement or any earlier termination for whatever reason.
- 26.6 Completion or termination of the Services shall not affect the SDS Provider's obligations under Clauses 3 (*Duty of Care, Standards and the Services to be provided*), 11 (*Methods of Payment*), 12 (*Arrangements for Invoicing and Payment*), 13 (*Set-Off*), 14 (*Audit*), 17 (*Required Insurances*), 18 (*Errors and/or Omissions in the Services*), 25 (*Payment Following Termination or Suspension*), 26 (*Effects of Termination or Expiry*), 27 (*Indemnity by SDS Provider*), 28 (*Dispute Resolution Procedure*), 32 (*Copyright and Intellectual Property*) and 33 (*Confidential Information*). Those obligations shall continue in full force and effect.

27. INDEMNITY BY SDS PROVIDER, LIABILITY AND SOLE REMEDY

- 27.1 The SDS Provider shall indemnify the Client 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 or in connection with:
- 27.1.1 any of the SDS Provider's, or its employees' or any SDS Provider Party's negligent or wilful acts or wilful omissions in the performance of the Services ~~whether or not such negligent or wilful act or wilful omission are~~ subsequently found to be proven; or
- 27.1.2 breach of any term or provision of this Agreement ; or
- 27.1.3 breach of any Law; or
- 27.1.4 any non-performance or delay in performance of the SDS Provider's obligations under this Agreement.
- 27.2 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).

- 27.3 Nothing in this Agreement shall exclude or limit the liability of either Party for:
- 27.3.1 death or personal injury caused by that Party's negligence or the negligence of anyone for whom that Party is vicariously liable;
 - 27.3.2 fraud or fraudulent misrepresentation; or
 - 27.3.3 any breach of warranty given as to valid and marketable title, freedom from unduly onerous burdens and conditions or entitlement to possession by action of prescription; or
 - 27.3.4 of the SDS Provider, 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 27.3 shall confer on either Party rights or remedies that they would not otherwise have.

- 27.4 Subject to Clause 27.3, 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 27.4 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 Indirect Loss suffered.

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

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28. DISPUTE RESOLUTION PROCEDURE

- 28.1 The Parties agree that this Clause 28 (*Dispute Resolution Procedure*) shall have effect for the resolution of any Dispute.
- 28.2 Any Dispute shall, in the first instance, be referred to the Internal Resolution Procedure in accordance with Clause 28.10.
- 28.3 Neither Party shall commence any court proceedings until the procedures in Clauses 28.10 to 28.57.3 have been completed, under exception that Clause 28 (*Dispute Resolution Procedure*) shall not apply so as to prevent either Party seeking an interim order, or interim relief, in the Scottish courts.
- 28.4 In the event that any court proceedings whatsoever are initiated by either Party against the other, the Parties agree that the Court of Session, Scotland, shall have exclusive jurisdiction.
- 28.5 Neither Party shall be entitled to suspend the performance of its undisputed obligations under this Agreement merely by reason of the reference of any Dispute to the Dispute Resolution Procedure contained in this Clause 28 (*Dispute Resolution Procedure*).

- 28.6 Subject to the Client's discretionary rights set out in Clause 28.55 to Clause 28.57.3 to require that a Dispute and a Related Dispute (as defined in Clause 28.55) be dealt with together at an appropriate stage of the Dispute Resolution Procedure, the provisions of this Clause 28 (*Dispute Resolution Procedure*) are mandatory and binding upon the Parties.
- 28.7 Unless a Party refers a Dispute to the Dispute Resolution Procedure contained in this Clause 28 (*Dispute Resolution Procedure*) within three months of the date on which the event, matter or situation giving rise to the Dispute first occurred, such Party shall be deemed to have irrevocably waived any right to refer such Dispute to the Dispute Resolution Procedure, under exception that if such Party was not aware, and could not with reasonable diligence have been aware, that such event, matter or situation had occurred, this Clause 28.7 shall have effect as if for the reference herein to the date on which such event, matter or situation occurred, there was substituted a reference to the date when such Party first became, or could with reasonable diligence have become, aware that such event, matter or situation had occurred. This Clause 28.7 is without prejudice to the right of either Party to raise in defence to any Dispute any defence (including, without prejudice to the foregoing generality, any defence of retention, compensation or set-off) which would otherwise be available to it.
- 28.8 Except in relation to the matters provided for in Clauses 28.15 to Clause 28.54 and subject to the provisions of Clause 28.9, in the event that either Party pursues any Dispute under the Dispute Resolution Procedure, and in the event that such Party fails to observe any time limit or timescale provided for in this Clause 28 (*Dispute Resolution Procedure*) in relation to the pursuit or progression of such Dispute, such Party shall, immediately upon such failure occurring, be deemed to have irrevocably waived any right to pursue or progress such Dispute any further. In that event, such Party shall be deemed to have elected not to have referred such Dispute or to have withdrawn such Dispute from the Dispute Resolution Procedure and shall be deemed to have irrevocably waived any right to refer any Dispute arising from the same or substantially the same Dispute or similar circumstances to the Dispute Resolution Procedure and shall be liable for payment of the whole fees incurred by any mediator or adjudicator who has acted in respect of such Dispute. This Clause 28.8 is without prejudice to the rights of either Party to raise in defence to any Dispute any defence (including, without prejudice to the foregoing generality, any defence of retention, compensation or set-off) which would otherwise be available to it.
- 28.9 Notwithstanding the provisions of Clause 28.8, in the event that a Party who pursues any Dispute under the Dispute Resolution Procedure fails to observe any time limit or timescale provided for in this Clause 28 (*Dispute Resolution Procedure*) in relation to the pursuit or progression of the Dispute, the other Party may elect to waive such failure, in which event the time limit or timescale to which such failure relates shall be extended at the discretion of such other Party and the Dispute shall progress in accordance with the Dispute Resolution Procedure, subject that all other time limits and timescales provided for in this Clause 28 (*Dispute Resolution Procedure*) which are affected by such extension shall be deemed to have been extended to give effect to such extension of the time limit or timescale to which such failure relates.

Internal Resolution Procedure

- 28.10 The following procedure is the Internal Resolution Procedure referred to in Clause 28.2:

28.10.1 In the event of any Dispute arising, the SDS Provider's Representative and ~~the Client's Representative~~ shall seek to resolve the Dispute at a meeting to be convened within three Business Days of written notification by either Party to the other that it wishes to initiate the Internal Resolution

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Procedure in respect of that Dispute ("Notification"). Such Notification shall be given in accordance with the provisions of Clause 36 (*Notices*) of this Agreement.

28.10.2 Further meetings may follow the meeting referred to in Clause 28.10.1, but in any event, if the Dispute is not resolved within seven Business Days of Notification, each Party shall, before the expiry of the period of ten Business Days from Notification, serve, in accordance with the provisions of Clause 36 (*Notices*) of this Agreement, a written position paper ("Position Paper") upon the other Party. Each Party's Position Paper shall state in reasonable detail that Party's position and required objectives in relation to the Dispute, any required redress, and, where possible, any comments on the other Party's position.

28.10.3 Upon such service of a Position Paper by the Party initiating or pursuing the Dispute, the Chief Executive (or equivalent) of the SDS Provider and the Chief Executive (or equivalent) of the Client (or their respective deputies in the event of their unavailability) shall seek to resolve the Dispute by meeting in good faith to discuss and negotiate upon the Dispute without recourse to legal or other proceedings.

28.10.4 In the event that resolution of the Dispute is achieved by the Chief Executive (or equivalent) of the SDS Provider and the Chief Executive (or equivalent) of the Client, the resolution shall be reduced to writing and, once it is signed by the duly authorised representatives of both Parties, shall be binding on the Parties.

28.10.5 Unless concluded by a written legally binding agreement, all discussions and negotiations connected with the Dispute shall be conducted in confidence and without prejudice to the rights of the Parties in any future legal or other proceedings. Nor may such matters be produced or relied upon in evidence in any such proceedings.

28.11 In the event that any Dispute is not resolved by the Internal Resolution Procedure within a period of thirty Business Days from Notification (or longer if so agreed by the Parties) then the following provisions of this Clause 28.11 shall apply;

28.11.1 The Chief Executive (or equivalent) of the SDS Provider and the Chief Executive (or equivalent) of the Client or their respective deputies in the event of their unavailability) shall, within a further period of five Business Days, seek to agree that the Dispute shall be resolved by any one of the following procedures:

28.11.1.1 mediation in accordance with Clauses 28.12 to 28.14; or

28.11.1.2 adjudication in accordance with Clause 28.15 to 28.54 in which event the Referring Party must give its Notice of Adjudication to the other Party within five Business Days of the date of expiry of the period of thirty five Business Days from Notification (or longer if so agreed by the Parties); or

28.11.1.3 litigation before the Court of Session, Scotland, in which event the Summons or Petition in any such litigation shall be signetted and served within ten Business Days of the date of expiry of the period of thirty-five Business Days from Notification (or longer if so agreed by the Parties).

28.11.2 In the event that the Chief Executive (or equivalent) of the SDS Provider and the Chief Executive (or equivalent) of the Client (or their respective deputies in the event of their unavailability) are unable to agree that the Dispute be resolved by the procedures described in Clauses 28.11.1.1 to 28.11.1.3, the Party initiating or pursuing the Dispute shall refer the Dispute to mediation (and thereafter adjudication if necessary) in accordance with Clauses 28.12 to 28.14.

Mediation

28.12 The Parties shall attempt in good faith to resolve the Dispute by a procedure of mediation in accordance with the Centre for Effective Dispute Resolution mediation rules or Model Mediation Procedure in force at the commencement of the mediation, (or in the event that the Centre for Effective Dispute Resolution has ceased to exist as at the time of the commencement of the mediation, mediation rules or a model mediation procedure offered by any other body offering commercial mediation services which shall be selected by the Client), which procedure shall be commenced within five Business Days of the date of expiry of the period of thirty-five Business Days from Notification (or longer if so agreed by the Parties). In the event that any provision of such mediation rules or model mediation procedure conflicts with any provision of this Clause 28 (*Dispute Resolution Procedure*), the provisions of this Clause 28 (*Dispute Resolution Procedure*) shall take precedence. In the event that any timescales contained in such mediation rules or model mediation procedure conflicts with the timescales referred to in this Clause 28 (*Dispute Resolution Procedure*), the timescales contained in such mediation rules or model mediation procedure shall be amended accordingly such that the timescales referred to in this Clause 28 (*Dispute Resolution Procedure*) shall be adhered to.

28.13 In the event that resolution of the Dispute is achieved in consequence of such mediation procedure, such resolution shall be reduced to writing and, once it is signed by the duly authorised representatives of both Parties, shall be binding on the Parties. Unless concluded by a written legally binding agreement, all discussions and negotiations connected with the mediation procedure referred to in Clause 28.12 shall be conducted in confidence and without prejudice to the rights of the Parties in any future legal or other proceedings. Nor may such matters be produced or relied upon in evidence in any such proceedings.

28.14 If any Dispute to which this Clause 28 (*Dispute Resolution Procedure*) relates is not resolved by the mediation procedure referred to in Clauses 28.12 and 28.13 within a period of 55 Business Days from Notification (or longer if so agreed by the Parties), the mediation procedure shall be terminated and, unless the Party initiating or pursuing the Dispute withdraws the Dispute, the Dispute shall within a further 5 Business Days, be referred to adjudication in accordance with Clauses 28.15 to 28.54.

Adjudication

28.15 In the event that either Party refers a Dispute to adjudication in terms of Clause 28.11.1 or 28.14, or exercises a statutory right available to it (if any) under the Housing Grants Construction and Regeneration Act 1996 to raise adjudication proceedings, such adjudication shall be conducted in accordance with Clauses 28.15 to 28.54 wherein any reference to "days" is a reference to calendar days.

Notice of intention to seek adjudication

28.16 Either Party may give written notice (the "Notice of Adjudication") of its intention to refer the Dispute to adjudication and the Party giving such notice shall be the "Referring Party".

- 28.17 The Notice of Adjudication shall be given to the other Party and the Party receiving the Notice of Adjudication shall be the "Responding Party".
- 28.18 The notice of adjudication shall set out briefly:
- 28.18.1 the nature and a brief description of the Dispute and of the parties involved;
 - 28.18.2 details of where and when the Dispute has arisen;
 - 28.18.3 the nature of the redress which is sought; and
 - 28.18.4 the names and addresses of the Parties (including the addresses which the Parties have specified for the giving of notices).
- 28.19 The adjudicator selected to consider the Dispute shall be selected from one of the panels ("Panels") appointed by the Parties in accordance with the following:
- 28.19.1 There shall be four Panels, one in respect of legal matters, ("Legal Panel") one in respect of construction matters and construction/operation interface matters ("Construction Panel"), one in respect of operational and maintenance matters ("Operations Panel") and one in respect of financial matters ("Financial Panel").
 - 28.19.2 Each Panel shall be comprised of four members, who are listed in Schedule 10 (*Panels for the Dispute Resolution Procedure*) to this Agreement.
 - 28.19.3 If any member of a Panel resigns or dies or becomes incapax or ill to the extent of being unable to reasonably discharge his duties as a member of the Panel, a replacement shall be appointed by the Parties as soon as practicable. Any such replacement shall be wholly independent of the Client, any Client Party, the SDS Provider, any SDS Provider Party, **tie**, any **tie** Party, City of Edinburgh Council or any Relevant Authority, any Approvals Body, the Tram Supplier or any equipment supplier or any party associated with the Edinburgh Tram Network, and any successor to or subsidiary or parent of any of the aforementioned parties. If the Parties are unable to agree on the identity of such replacement(s), the President or Vice President for the time being of The Chartered Institute of Arbitrators (Scottish Branch) or the Institution of Civil Engineers shall appoint such replacement(s) within thirty days of any application for such appointment by either Party.
- 28.20 The Referring Party shall at the same time as giving the Notice of Adjudication to the Responding Party, send to each of the members of the relevant Panel a copy of the Adjudication Notice and a request that each member of the relevant Panel advises both Parties within three days as to whether or not he is able and willing to act. The Parties shall attempt to agree within two further days as to which one of the members of the relevant Panel who responded indicating that they are able and willing to act shall be requested to act as adjudicator. In the event that such agreement is reached, the Referring Party shall, within a further period of one day, request the member of the relevant Panel upon whom agreement has been reached to act as adjudicator. In the event that such agreement is not reached, the Responding Party shall, within a further period of two days, select one of the members of the relevant Panel who responded indicating that they are able and willing to act and the Referring Party shall request that member to act as adjudicator;
- 28.21 If no member of the relevant Panel indicates that he is able and willing to act within three days of receiving a request to act as adjudicator, the Referring Party shall request the Chairman or the Vice-Chairman for the time being of The Chartered

Institute of Arbitrators (Scottish Branch) or the Institution of Civil Engineers to select a person to act as adjudicator.

- 28.22 Any person appointed, requested or selected to act as adjudicator in accordance with Clause 28.20, 28.21 and 28.24 shall be a natural person acting in his personal capacity. A person appointed, requested or selected to act as an adjudicator shall be wholly independent of the Client, any Client Party, the SDS Provider, any SDS Provider Party, **tie**, any **tie** Party, City of Edinburgh Council or any Relevant Authority, any Approvals Body, the Tram Supplier or any equipment supplier or any party associated with the Edinburgh Tram Network, and any successor to or subsidiary or parent of any of the aforementioned parties.
- 28.23 The request referred to in Clause 28.20 shall be accompanied by a copy of the Notice of Adjudication.
- 28.24 The Chartered Institute of Arbitrators (Scottish Branch) or the Institution of Civil Engineers must communicate the selection of an adjudicator to the Referring Party within three days of receiving a request to do so.
- 28.25 Where The Chartered Institute of Arbitrators (Scottish Branch) or the Institution of Civil Engineers fails to comply with Clause 28.24, the Referring Party may:
- 28.25.1 agree with the other Party to the Dispute to request a specified person to act as adjudicator; or
- 28.25.2 request any other adjudicator nominating body to select a person to act as adjudicator. An "adjudicator nominating body" shall mean a body (not being a natural person and not being a Party to the Dispute) which holds itself out publicly as a body which will select an adjudicator when requested to do by a Referring Party.
- 28.26 The person requested to act as adjudicator in accordance with the provisions of Clause 28.20 or 28.21 shall indicate whether or not he is willing to act within two days of receiving the request.
- 28.27 Where an adjudicator has been selected in accordance with Clause 28.20, 28.21 or 28.24, the Referring Party shall, not later than seven days from the date of the Notice of Adjudication, refer the Dispute in writing (the "Referral Notice") to the adjudicator.
- 28.28 A Referral Notice shall be accompanied by copies of, or relevant extracts from the Agreement and such other documents as the Referring Party intends to rely upon.
- 28.29 The Referring Party shall, at the same time as he sends to the adjudicator the documents referred to in Clauses 28.27 and 28.28, send copies of those documents to the Responding Party.
- 28.30 The adjudicator may, with the consent of the Parties to those disputes, adjudicate at the same time on more than one Dispute under the Agreement.
- 28.31 The Parties may agree to extend the period within which the adjudicator may reach a decision in relation to all or any of these Disputes.
- 28.32 An adjudicator may resign at any time on giving notice in writing to the Parties.
- 28.33 An adjudicator must resign where the Dispute is the same or substantially the same as one which has previously been referred to adjudication, and a decision has been taken in that adjudication.

- 28.34 Where an adjudicator ceases to act under Clauses 28.32 or 28.33, or dies or becomes incapax or ill to the extent of being unable to reasonably discharge his duties;
- 28.34.1 the Referring Party may serve a fresh notice in accordance with Clauses 28.16 to 28.19 and shall in accordance with Clauses 28.20 to 28.29 request an adjudicator to act; and
- 28.34.2 if requested by the new adjudicator, the Parties shall supply him with copies of all documents which they had made available to the previous adjudicator.
- 28.35 The Parties to a Dispute may at any time agree to revoke the appointment of the adjudicator and in such circumstances the fees and expenses of that adjudicator shall, subject to Clause 28.36, be determined and payable in accordance with Clauses 28.52 to 28.53.
- 28.36 Where the revocation of the appointment of the adjudicator is due to the default or misconduct of the adjudicator, the Parties shall not be liable to pay the adjudicator's fees and expenses.

Powers of the Adjudicator

- 28.37 The adjudicator shall:
- 28.37.1 act impartially in carrying out his duties and shall do so in accordance with any relevant terms of the Agreement and shall reach his decision in accordance with Scots law; and
- 28.37.2 avoid incurring unnecessary expense.
- 28.38 The adjudicator may take the initiative in ascertaining the facts and the law necessary to determine the Dispute, and shall decide on the procedure to be followed in the adjudication. In particular, he may:
- 28.38.1 request either Party to supply it ~~him~~ with such documents as he may reasonably require including, if he so directs, any written statement from either Party supporting or supplementing the Referral Notice and any other documents given under Clauses 28.27 to 28.28;
- 28.38.2 conduct the adjudication in the English language and decide whether a translation of any document is to be provided and, if so, by whom, by when, and at whose cost;
- 28.38.3 meet and question either Party and their representatives;
- 28.38.4 subject to obtaining any necessary consent from a third party or the Parties, make such site visits and inspections as he considers appropriate, whether accompanied by the Parties or not;
- 28.38.5 subject to obtaining any necessary consent from a third party or the Parties, procure the carrying out of any tests or experiments, and make directions as to the conditions for and responsibility for the cost of the same;
- 28.38.6 obtain and consider such representations and submissions as he requires, and, provided he has notified the Parties of his intention, appoint experts, assessors or legal advisers;

- 28.38.7 give directions as to the timetable for the adjudication, any deadlines, or limits as to the length of written documents or oral representations to be complied with; and
- 28.38.8 issue other directions relating to the conduct of the adjudication.
- 28.39 The Parties shall comply with any request or direction of the adjudicator in relation to the adjudication.
- 28.40 If, without showing sufficient cause, a Party fails to comply with any request, direction or timetable of the adjudicator made in accordance with his powers, fails to produce any document or written statement requested by the adjudicator, or in any other way fails to comply with a requirement under these provisions relating to the adjudication, the adjudicator may:
- 28.40.1 continue the adjudication in the absence of that Party or of the document or written statement requested;
- 28.40.2 draw such inferences from that failure to comply as may, in the adjudicator's opinion, be justified in the circumstances;
- 28.40.3 make a decision on the basis of the information before him, attaching such weight as he thinks fit to any evidence submitted to him outside any period he may have requested or directed;
- 28.40.4 disqualify any part or parts of that Party's submissions affected by the failure to comply; and
- 28.40.5 grant the other Party proper opportunity to consider and respond to any evidence or representation made late.
- 28.41 Subject to any agreement between the Parties to the contrary, either Party may be assisted by, or represented by, such advisers or representatives (whether legally qualified or not) as he considers appropriate.
- 28.42 The adjudicator shall consider any relevant information submitted to it him by either Party and shall make available to them any information to be taken into account in reaching his decision.
- 28.43 The adjudicator and the Parties shall not disclose to any other person any information or document provided in connection with the adjudication which the Party supplying it has indicated is to be treated as confidential, except to the extent that disclosure is required by law or is necessary for the purposes of, or in connection with, the adjudication, or the information is already in the public domain.

Adjudicator's Decision

- 28.44 Unless otherwise agreed in accordance with Clause 28.56.1 or 28.57.1, the adjudicator shall reach his decision not later than:
- 28.44.1 twenty eight days after the date of the Referral Notice mentioned in Clause 28.25;
- 28.44.2 forty two days after the date of the Referral Notice if the Referring Party so consents; or
- 28.44.3 such period exceeding twenty eight days after the Referral Notice as the Parties may, after the giving of that notice, agree.

- 28.45 Where the adjudicator fails, for any reason, to reach his decision in accordance with Clause 28.44:
- 28.45.1 either of the Parties to the Dispute may serve a fresh notice in accordance with Clause 28.16 to 28.19 and shall request an adjudicator to act in accordance with Clauses 28.20 to 28.29; and
- 28.45.2 if requested by the new adjudicator the Parties shall supply him with copies of all documents which they had made available to the previous adjudicator.
- 28.46 As soon as possible after he has reached a decision, the adjudicator shall deliver a copy of that decision to each of the Parties.
- 28.47 The adjudicator shall decide the matters in Dispute and may make a decision on different aspects of the Dispute at different times.
- 28.48 The adjudicator may take into account any other matters which the Parties agree should be within the scope of the adjudication or which are matters under the Agreement which he considers are necessarily connected with the Dispute and, in particular, he may:
- 28.48.1 open up, review and revise any decision taken or any notice certifying payment given by any person referred to in the Agreement, unless the Agreement states that the decision or notice certifying payment is final and conclusive;
- 28.48.2 decide that any of the Parties to the Dispute is liable to make a payment under the Agreement (whether in sterling or some other currency) and, subject to the terms of the Agreement, when that payment is due and the final date for payment.
- 28.49 The adjudicator shall provide written reasons for his decision.

Effect of the Decision

- 28.50 In his decision, the adjudicator may, if he thinks fit, order either or both of the Parties to comply peremptorily with his decision or any part of it. In the absence of any directions by the adjudicator relating to the time for performance of his decision, the Parties shall be required to comply with any decision of the adjudicator immediately on delivery of the decision to the Parties in accordance with Clause 28.46.
- 28.51 The decision of the adjudicator shall be binding on the Parties, and they shall comply with it, until the Dispute is finally determined by legal proceedings or by agreement between the Parties.
- 28.52 The adjudicator shall be entitled to the payment of such reasonable amount as he may determine by way of fees and expenses incurred by ~~it~~ him and the Parties shall be jointly and severally liable to pay that amount to the adjudicator.
- 28.53 Without prejudice to the right of the adjudicator to effect recovery from either Party in accordance with Clause 28.52, the Parties shall each be liable to pay one-half share of the adjudicator's fees and expenses.
- 28.54 The adjudicator shall not be liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in

bad faith, and any employee or agent of the adjudicator shall be similarly protected from liability.

Related Disputes

- 28.55 Notwithstanding the terms of Clauses 28.2, 28.3, 28.6, 28.7, 28.8 and 28.9, in the event that a dispute or potential dispute under, or in connection with any contract associated with the Edinburgh Tram Network (referred to in this Clause 28 (*Dispute Resolution Procedure*) as "Related Contracts"), has arisen or arises out of substantially the same issues of fact and/or law (as the case may be) as a Dispute under this Agreement (a "Related Dispute"), then providing that the Related Contract contains dispute resolution provisions in terms substantially the same as set out in this Clause 28 (*Dispute Resolution Procedure*) (save for necessary changes), the Client may require and direct that the Dispute and the Related Dispute be dealt with together at an appropriate stage of the Dispute Resolution Procedure.
- 28.56 In the event that a Related Dispute has already been referred to the decision of an adjudicator in accordance with the provisions of the Related Contract, and the Client is of the opinion that a Dispute is to be (but has not yet been) referred to adjudication under this Clause 28 (*Dispute Resolution Procedure*), the Client may refer the Dispute, or may by notice in writing to the SDS Provider require that the Dispute be referred (as the case may be) to the adjudicator appointed under the Related Contract to decide upon the Related Dispute, and:
- 28.56.1 the adjudicator shall, if practicable, hear the Dispute at the same time as the Related Dispute and shall request such extension of time for producing his decision or award as he may require in order to reach a decision in respect of each of the Dispute and the Related Dispute at the same time. The Parties shall agree to such request for an extension of time, except in the event that the Dispute or the Related Dispute relates to "construction operations" within the meaning ascribed to that term by the Housing Grants, Construction and Regeneration Act 1996 (if applicable) (unless otherwise agreed by the Parties, all parties to the Related Dispute and the Adjudicator);
- 28.56.2 except in the event that the Dispute or the Related Dispute relates to "construction operations" within the meaning ascribed to that term by the Housing Grants, Construction and Regeneration Act 1996 (if applicable) (unless otherwise agreed by the Parties, all parties to the Related Dispute and the Adjudicator), the adjudicator shall have power (if so requested by the Client) to make his decisions or awards in the Dispute and the Related Dispute in such a manner as if the rules applicable in the Court of Session, Scotland as to the joining of one or more defenders or third parties or conjoining actions were applicable to the Parties to the Dispute and the Related Dispute, and to the adjudicator; and
- 28.56.3 the Client shall procure that, as soon as practicable, the other party or parties to the Related Dispute shall give the SDS Provider copies of the Related Contract, the referral notice in the Related Dispute and any other documentation provided to the adjudicator by any party to the Related Dispute.
- 28.57 In the event that a Dispute has already been referred to the decision of an adjudicator, and the Client is of the opinion that a Related Dispute is to be (but has not yet been) referred to adjudication, the Client may refer the Related Dispute to the adjudicator appointed under this Clause 28 (*Dispute Resolution Procedure*) to decide upon the Dispute, and:

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28.57.1 the Adjudicator shall, if practicable, hear the Related Dispute at the same time as the Dispute and shall request such extension of time for producing his decision or award as he may require in order to reach a decision in respect of each of the Dispute and the Related Dispute at the same time. The Parties shall agree to such request for an extension of time, except in the event that the Dispute or the Related Dispute relates to "construction operations" within the meaning ascribed to that term by the Housing Grants, Construction and Regeneration Act 1996 (if applicable) (unless otherwise agreed by the Parties, all parties to the Related Dispute and the Adjudicator);

28.57.2 except in the event that the Dispute or the Related Dispute relates to "construction operations" within the meaning ascribed to that term by the Housing Grants, Construction and Regeneration Act 1996 (if applicable) (unless otherwise agreed by the Parties, all parties to the Related Dispute and the Adjudicator), the adjudicator shall have power (if so requested by ~~the Client~~ **tie**) to make his decisions or awards in the Dispute and the Related Dispute in such a manner as if the rules applicable in the Court of Session, Scotland as to the joining of one or more defenders or third parties or conjoining actions were applicable to the Parties to the Dispute and the Related Dispute, and to the adjudicator;

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28.57.3 as soon as practicable, the Client shall give to the SDS Provider copies of the Related Contract, the referral notice in the Related Dispute and any other documentation provided to the adjudicator by any party to the Related Dispute.

29. NOVATION, COLLATERAL WARRANTY IN FAVOUR OF TIE, FUNDER'S DIRECT AGREEMENT AND AGREEMENT BETWEEN THE JOINT REVENUE COMMITTEE AND THE SDS PROVIDER

Novation

- 29.1 **tie** intends to enter into an infrastructure supply contract with the Infraco. It is a material condition of this Agreement that the SDS Provider shall, if and at the time requested by **tie**, enter into and execute a Novation Agreement with **tie** and the Infraco in the form set out in Schedule 8 (*Novation Agreement*).
- 29.2 Notwithstanding the provisions of Clause 15 (*Changes*), **tie** may in its absolute discretion require the reduction of the scope of the Services prior to the execution of the Novation Agreement by the SDS Provider. If required, the SDS Provider shall within 5 Business Days of any request from **tie**, carry out a valuation of all work in progress in relation to the Services in accordance with the provisions of Clause 15.4, and subject to Clause 11 (Methods of Payment) and, for the avoidance of doubt, subject to any agreed milestone or lump sum payments set out in Schedule 3 (Pricing Schedule) or as agreed otherwise in accordance with this Agreement. **tie** shall, subject to any clarifications as are in **tie's** opinion (acting properly and reasonably) necessary, certify by notice in writing to the SDS Provider that part of the work in progress which is approved by **tie** and give reasons why any part of the work in progress has not been certified and the value of the sums involved no later than 10 Business Days after the date on which such valuation was received. **tie's** valuation of such work in progress shall be final and binding.
- 29.3 If the scope of the Services is reduced by **tie**, then within 30 Business Days of the date of execution of the Novation Agreement by the SDS Provider, the SDS Provider shall submit a valid VAT invoice to **tie** for the work in progress certified by **tie** in respect of the services which have been removed from the Services to be performed by the SDS Provider.

- 29.4 Payment will become due to the SDS Provider on the date of receipt of the valid VAT invoice by **tie** and the final date for payment by **tie** of such valid VAT invoice shall be 30 days from the date of receipt of such valid VAT invoice.
- 29.5 Within 10 days of any request from **tie**, the SDS Provider shall provide an Estimate of any changes proposed by the bidders for the Infraco Contract to the scope of the Services or the Deliverables, which have been notified by **tie** to the SDS Provider.

Collateral Warranty in favour of tie

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- 29.6 On the date of execution of the Novation Agreement referred to in Clause 29.1, the SDS Provider shall execute a collateral warranty agreement in favour of **tie** in the form contained in Schedule 7 (*Collateral Warranty Agreement*) and provide the same as executed to **tie** on that date.

Funder's Direct Agreement

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- 29.7 On the date of execution of the Novation Agreement, the SDS Provider shall, if required by **tie**, execute a Funder's Direct Agreement and provide the same as executed to the Infraco on that date.

Agreement between the Joint Revenue Committee and the SDS Provider

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- 29.8 It is a material condition of this Agreement that the SDS Provider shall enter into and execute an agreement with the Joint Revenue Committee substantially in the form set out in Schedule 17 (*Agreement between the SDS Provider and the Joint Revenue Committee*), within 10 Business days of the appointment of the Joint Revenue Committee by **tie**. Failure to enter into such agreement shall constitute a breach of this Agreement but shall not relieve the SDS Provider of any of its obligations in relation to the SDS-JRC Modelling Suite or otherwise under this Agreement. The SDS Provider shall provide **tie** with a duly certified executed copy of the agreement with Joint Revenue Committee entered into pursuant to this Clause 29.7 within 5 Business Days of its execution.

- 29.9 The SDS Provider shall be responsible for the development, testing, validation, commissioning and deployment of a transport modelling suite (the SDS-JRC Modelling Suite) as stipulated in Section 3.5 of Schedule 1 (*Scope of Services*), such Deliverable to be approved by **tie** by 31 March 2006.

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30. ASSIGNATION, CHANGES IN LEGAL STATUS AND CHANGES IN CONTROL

- 30.1 Without prejudice to Clause 9 (*Sub-Letting and the Appointment of SDS Provider Parties*), the SDS Provider shall not assign, novate or otherwise transfer the whole or any part of the Agreement without the prior written agreement of the Client.

- 30.2 In addition to and without prejudice to the provisions of Clause 29.1 and the Novation Agreement to be entered into in accordance with Clause 29.1, the Client shall be entitled to assign, novate or otherwise transfer the whole or any part of this Agreement:

30.2.1 to the Scottish Ministers or any local authority or other body with no worse financial standing than that of **tie** who, as a result of any Change in Law, takes over all or substantially all the functions of **tie**; or

30.2.2 to any other person whose obligations under this Agreement are unconditionally and irrevocably guaranteed (in a form reasonably acceptable to the SDS Provider) by **tie** or a person falling within Clause 30.2.1; or

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- 30.2.3 to Transport Edinburgh Limited; or
- 30.2.4 with the prior written consent of the SDS Provider (such consent not to be unreasonably withheld or delayed).
- 30.3 If the legal status of the SDS Provider shall change in any way, the Client shall be informed by the SDS Provider in writing, immediately.
- 30.4 If there is a Change of Control in the SDS Provider, the Client shall be informed immediately by the SDS Provider in writing.

31. CONFLICT OF INTEREST

- 31.1 The SDS Provider shall:
 - 31.1.1 be responsible for ensuring that no conflict of interest arises in respect of its duties under the Agreement;
 - 31.1.2 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
 - 31.1.3 consult and advise the Client if the SDS Provider considers that a conflict of interest arises or if he considers that a conflict of interest may exist or may arise or may be foreseeable and shall furnish the Client with such information as shall enable the Client to determine whether or not a conflict of interest has arisen.

32. COPYRIGHT AND INTELLECTUAL PROPERTY

- 32.1 All SDS Provider IPR shall continue to be owned by the SDS Provider.
- 32.2 The SDS Provider hereby:
 - 32.2.1 assigns by way of future assignation to the Client with full title guarantee the Project IPR which is created by it and shall procure that Project IPR created by any SDS Provider 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;
 - 32.2.2 grants to the Client a non-exclusive perpetual irrevocable royalty free licence to use such SDS Provider IPR as may be necessary for the Client to use in relation to any projects associated with the Services;
 - 32.2.3 grants to the Client the right to grant non-exclusive non-assignable sub-licences to third parties for such lengths of time as the Client may reasonably require and otherwise on the same terms as the licence granted to the Client pursuant to Clause ~~33.2.2~~32.2.2 above, to use the SDS Provider IPR referred to in that Clause (other than in relation to Third Party Software which is subject to the provision of Clause 32.9) in so far as is necessary or desirable for such third party to use such SDS Provider IPR in relation to any projects associated with the Services;
- 32.3 For the avoidance of doubt, the persons to whom the Client may grant sub-licences pursuant to Clause 32.2.3 above shall include:
 - 32.3.1 any Client Party;

- 32.3.2 the Operator and any party other than the Operator providing support to **tie** in relation to the Edinburgh Tram Network;
- 32.3.3 **tie** and any **tie** Party;
- 32.3.4 bidders for the Infraco Contract and the Tram Supply Contract;
- 32.3.5 the Tram Supplier;
- 32.3.6 any party providing maintenance in relation to the Edinburgh Tram Network;
- 32.3.7 the Joint Revenue Committee;
- 32.3.8 any party appointed by **tie** to carry out utilities diversions; and
- 32.3.9 any assignee or transferee under this Agreement.
- 32.4 The Client hereby grants to the SDS Provider a non-exclusive revocable royalty free licence for the duration of this Agreement to use such Project IPR as is owned by it as may be necessary for the SDS Provider to use solely and exclusively for the purpose of performing the Services.
- 32.5 The copyright of this Agreement and any data or software supplied to the SDS Provider by the Client, shall remain solely with the Client.
- 32.6 The SDS Provider shall at any time and from time to time hereafter at the request of the Client execute all such documents and do all such further acts as may be required in order to vest the rights referred to in Clause 32.2.1 in the Client.
- 32.7 The SDS Provider waives any and all moral rights held or to be held by the SDS Provider in the Deliverables and the Project IPR and shall procure that all of the SDS Provider 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.
- 32.8 The SDS Provider agrees that all rights in the Project IPR shall remain the property of the Client and the SDS Provider shall retain no rights in the Project IPR beyond the licence granted in Clause 32.4 above. The SDS Provider shall be entitled to use such Project IPR only on the terms set out herein and solely for the purpose of the performance of the Services. In particular, otherwise as permitted in this Agreement herein, the SDS Provider shall not disclose, assign, sub-licence, lease, rent or otherwise dispose of the Project IPR.
- 32.9 To the extent that any of the Deliverables are generated by or maintained on a computer or similar system, the SDS Provider shall use all reasonable endeavours to procure for the benefit of the Client, 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 SDS Provider Software is licensed to the Client, to enable the Client or its nominee to access and otherwise use (subject to the payment by the Client of the relevant fee, if any) such Deliverables in connection with this Agreement. As an alternative, the SDS Provider 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.
- 32.10 The SDS Provider 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 SDS Provider shall submit to the Client's Representative for approval its proposals for the back-up and storage in safe custody of the Deliverables and the Client shall be entitled to object if the same is not in accordance with Good Industry

Practice. The SDS Provider shall comply, and shall cause all the SDS Provider Parties to comply, with all such proposals to which the Client Representative has given his or her approval. The SDS Provider may vary its procedures for such back-up and storage subject to submitting its proposals for change to the Client Representative, who shall be entitled to object on the basis set out above.

- 32.11 Where a claim or proceeding is made or brought against the Client or its permitted licensees which arises out of the infringement of any Intellectual Property Rights in any Deliverables or other materials provided by the SDS Provider or any SDS Provider Party to the Client then the SDS Provider shall indemnify and keep the Client indemnified on demand at all times from and against all Indemnified Liabilities arising in connection with such claim or proceedings.
- 32.12 For the purposes of this Clause 32 (*Copyright and Intellectual Property*), "use" shall include the acts of copying, modifying, adapting and translating the material in question and/or incorporating them with other materials and the term "the right to use" shall be construed accordingly.
- 32.13 The provisions of this Clause 32 (*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 SDS Provider shall provide the Client with:
 - 32.13.1 a copy of the object code for the Third Party Software and the SDS Provider Software on media that is reasonably acceptable to the Client;
 - 32.13.2 a copy of the source code for the Specially Written Software on media that is reasonably acceptable to the Client; and
 - 32.13.3 a copy of all documentation, manuals and other technical information relating to the Third Party Software, the Specially Written Software and the SDS Provider Software that is reasonably required by the Client to operate, manage and support the Third Party Software, the Specially Written Software and the SDS Provider Software.
- 32.14 The SDS Provider shall not reproduce or publish any document or matter relating to the Services or this Agreement, either alone or in association with any other body or person, without the prior written consent of the Client.

33. CONFIDENTIAL INFORMATION

- 33.1 Each Party:
 - 33.1.1 shall treat all Confidential Information belonging to the other Party as confidential and safeguard it accordingly; and
 - 33.1.2 shall not disclose any Confidential Information belonging to the other Party to any other person without the prior written consent of the other Party, except to such persons and to such extent as may be necessary for the performance of the Agreement or except where disclosure is otherwise expressly permitted by the provisions of this Agreement.
- 33.2 The SDS Provider shall take all necessary precautions to ensure that all Confidential Information obtained from the Client under or in connection with the Agreement:
 - 33.2.1 is given only to such of the staff and professional advisors or SDS Provider Parties engaged to advise it in connection with the Agreement as is strictly

necessary for the performance by the SDS Provider of the Services and its other obligations under this Agreement and only to the extent necessary for the performance by the SDS Provider of the Services and its other obligations under this Agreement;

- 33.2.2 is treated as confidential and not disclosed (without prior approval) or used by any staff or such professional advisors or SDS Provider Parties otherwise than for the purposes of the Agreement.
- 33.3 Where it is considered necessary in the opinion of the Client, the SDS Provider shall ensure that staff or such professional advisors or SDS Provider Parties sign a confidentiality undertaking before commencing work in connection with the Agreement.
- 33.4 The SDS Provider shall not use any Confidential Information it receives from the Client otherwise than for the purposes of the Agreement.
- 33.5 The provisions of Clauses 33.1 to 33.4 shall not apply to:
- 33.5.1 any information which is or becomes public knowledge (otherwise than by breach of this Clause 33);
- 33.5.2 any information which was in the possession of the receiving Party, without restriction as to its disclosure, before receiving it from the disclosing Party;
- 33.5.3 any information which is received from a third party who lawfully acquired it and who is under no obligation restricting its disclosure;
- 33.5.4 any information which is independently developed without access to the Confidential Information;
- 33.5.5 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 33.7 to 33.11(inclusive);
- 33.5.6 any disclosure by **tie** of this Agreement including the SDS Provider's fees and commercial terms, any information relating to the design of any aspect of the Edinburgh Tram Network and such other information as may be reasonably required for the purpose of conducting a due diligence exercise with any bidders for the Infraco Contract and the Tram Supply Contract and their advisers;
- 33.5.7 any disclosure by **tie** or the Client of this Agreement and any related information to the TSS Provider;
- 33.5.8 any information which is required to be disclosed to that Party's insurers and/or legal advisers subject to Clauses 33.2 and 33.3;
- 33.5.9 any registration of information in respect of the Consents and any property registration required;
- 33.5.10 any disclosure of information by the Client or **tie** to Transport Edinburgh Limited, CEC, Partnerships UK Limited, any department, office or agency of the Scottish Executive or the UK government;
- 33.5.11 any disclosure for the purpose of:

- 33.5.11.1 the examination and certification of **tie's**, the Client's or the SDS Provider's accounts; or
- 33.5.11.2 any examination (pursuant to applicable Law) of the economy, efficiency and effectiveness with which **tie** has used their resources or funding made available to them including any examination pursuant to the Local Government (Scotland) Act 1973 as amended by the Local Government in Scotland Act 2003 of whether the Client has secured Best Value in the performance of its functions

33.5.12 any disclosure of Confidential Information obtained from the SDS Provider:

- 33.5.12.1 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**; or
- 33.5.12.2 to any person engaged in providing any services to the Client for any purpose relating to or ancillary to the Agreement;

provided that in disclosing information under this Clause 33 (*Confidential Information*) the Client 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.

- 33.6 Nothing in this Clause shall prevent either Party from using any techniques, ideas or know-how gained during the performance of the 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.
- 33.7 In the event that the SDS Provider fails to comply with this Clause 33 (*Confidential Information*), the Client reserves the right to terminate the Agreement by notice in writing in accordance with Clause 19.1.
- 33.8 The SDS Provider acknowledges that **tie** is subject to the requirements of FOISA and the Environmental Information Regulations and shall assist and cooperate with **tie** (at the SDS Provider's expense) to enable **tie** to comply with these 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.
- 33.9 The SDS Provider shall and shall procure that the SDS Provider Parties shall:
 - 33.9.1 transfer the Request for Information to **tie** as soon as practicable after receipt and in any event within two Business Days of receiving a Request for Information;
 - 33.9.2 provide **tie** with a copy of all Information in its possession or power in the form that **tie** requires within five Business Days (or such other period as **tie** may specify) of **tie** requesting that Information; and

- 33.9.3 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.
- 33.10 **tie** shall be responsible for determining at its absolute discretion whether the Confidential Information and/or any other Information:
- 33.10.1 is exempt from disclosure in accordance with the provisions of the Code, FOISA or the Environmental Information Regulations;
- 33.10.2 is to be disclosed in response to a Request for Information, and
- 33.11 in no event shall the SDS Provider respond directly to a Request for Information unless expressly authorised to do so by **tie**.
- 33.12 The SDS Provider acknowledges that **tie** may be obliged, pursuant to the Code, FOISA, or the Environmental Information Regulations to disclose Information:
- 33.12.1 without consulting with the SDS Provider, or
- 33.12.2 following consultation with the SDS Provider and having taken its views into account.
- 33.13 The SDS Provider shall ensure that all information and Deliverables produced in the course of the Agreement or relating to the Agreement is retained for disclosure and shall permit the Client and **tie** to inspect such records as requested from time to time.
- 33.14 The SDS Provider 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 33.9.
- 33.15 Any public relations material, press releases, public presentations or conference engagements in relation to this Agreement planned by the SDS Provider requires the Client's and **tie**'s prior written approval.

34. WAIVER

- 34.1 Save where expressly stated, no failure or delay by the Client 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.
- 34.2 The SDS Provider agrees that no waiver shall occur or be deemed to have occurred unless or until a clear and unequivocal express waiver of a clearly identified default is contained in a written notice by the Client to the SDS Provider expressly for the purpose of effecting such waiver.
- 34.3 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.

35. ENTIRE AGREEMENT

- 35.1 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.

- 35.2 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.
- 35.3 Any representations or warranties other than those contained or referred to in this Agreement are superseded and extinguished by this Agreement.
- 35.4 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.

36. NOTICES

- 36.1 Any notice or notification required or authorised to be given under this Agreement by one Party to the other shall be:

36.1.1 in writing;

36.1.2 sent by one of the following methods:

- (i) pre-paid registered or recorded delivery post or facsimile transmission addressed to the Party to which it is given at:
 - (a) in the case of notices given to the Client: **tie**, Verity House, 19 Haymarket Yards, Edinburgh EH12 5BH, fax number 0131 622 8301, attention: Projects Director, or such other address or fax number in the United Kingdom as the Client may notify the SDS Provider from time to time for that purpose; or
 - (b) in the case of notices given to the SDS Provider, [**◆ specify details of address and fax number**] or such other address or fax number in the United Kingdom as the SDS Provider may notify the Client from time to time for that purpose; or
- (ii) facsimile transmission addressed to the Client's Representative or the SDS Provider'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
- (iii) personal delivery into the hands of:
 - (a) in the case of notices given to the Client, the Client's Representative; or
 - (b) in the case of notices given to the SDS Provider, the SDS Provider's Representative.
- (iv) e-mail to:
 - (a) in the case of notices given to the Client, the Client's Representative; or
 - (b) in the case of notices given to the SDS Provider, the SDS Provider's Representative.

36.1.3 be deemed duly served:

- (i) if sent by pre-paid registered or recorded delivery post, 2 clear Business Days after posting; or
- (ii) 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 in which case it shall be deemed duly served on the next Business Day thereafter; or
- (iii) if sent via e-mail, the date of written acknowledgement by the Party to whom the notice was served.

37. CONSENT AND APPROVAL

- 37.1 The giving of any consent or approval by or on behalf of the Client shall not in any way relieve the SDS Provider of any of its obligations under the 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.
- 37.2 Failure by the Client to disapprove or object to any matter or thing shall not prejudice its power subsequently to take action under the Agreement in connection therewith.

38. DISCRIMINATION

- 38.1 The SDS Provider shall not (and the SDS Provider shall insert a clause to this effect in each contract with any SDS Provider 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.

39. FURTHER ASSURANCE

- 39.1 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.

40. APPLICABLE LAW

- 40.1 This Agreement, any document completed or to be completed in accordance with its provisions and any matter arising from it or any such document shall be governed by and construed in accordance with Scots law.
- 40.2 Subject to Clause 28 (*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.

41. VARIATIONS TO BE IN WRITING

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.

42. NO PARTNERSHIP OR AGENCY

- 42.1 Nothing in this Agreement shall be construed as creating a partnership between the Client and the SDS Provider.
- 42.2 The SDS Provider shall not (and shall procure that the SDS Provider Parties shall not) act or purport to act as agent for the Client in relation to any matter unless specifically authorised in writing under this Agreement by the Client. The SDS Provider shall not be entitled to bind the Client in any way or to create any liability or cause of action against the Client and shall not hold itself out (and shall procure that no SDS Provider Party shall hold itself out) as having any such authority or power

43. INVALID TERMS

If any term of this Agreement shall be held to any extent to be invalid, unlawful or unenforceable:

- 43.1 that term shall to that extent be deemed not to form part of this Agreement; and
- 43.2 the validity and enforceability of the remainder of this Agreement shall not be affected.

44. THIRD PARTY RIGHTS

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.

IN WITNESS WHEREOF these presents on this and the preceding [♦] pages together with Schedules One to Seventeen (inclusive) which are annexed and signed as relative hereto are executed as follows:

EXECUTED for and on behalf of **TIE LIMITED** at

on _____ 2005 by:

Authorised Signatory
 Full Name
 Witness Signature
 Full Name
 Address

EXECUTED for and on behalf of **[SDS PROVIDER]** at

on _____ 2005 by:

Director/Authorised Signatory

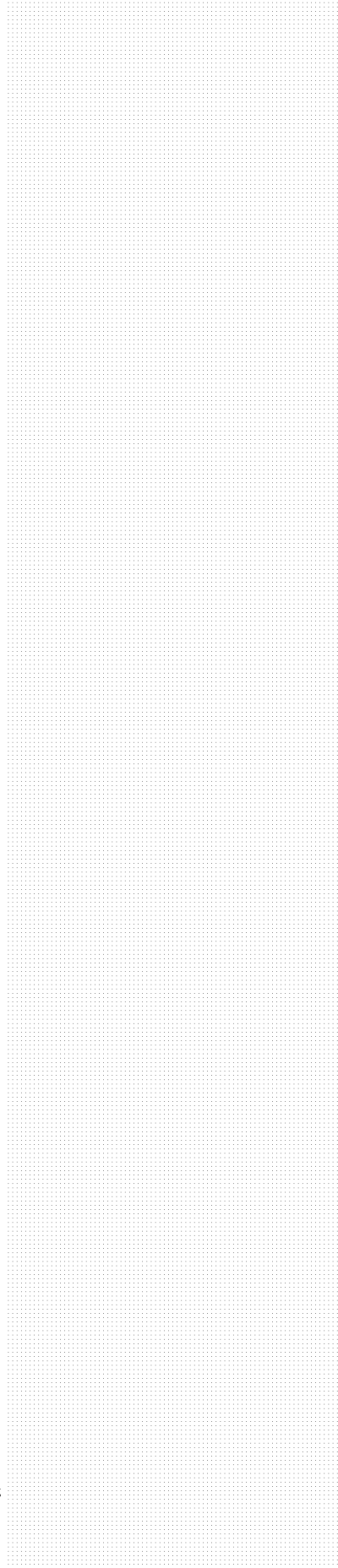
Full Name

Witness Signature

Full Name

Address

.....



This is Schedule One referred to in the foregoing Agreement between the Client and the SDS Provider

SCHEDULE ONE

SCOPE OF SERVICES

[Insert]

.....
Director/Authorised Signatory

TIE LIMITED

.....
Director/Authorised Signatory

[SDS PROVIDER]

This is Schedule Two referred to in the foregoing Agreement between the Client and the SDS Provider

SCHEDULE TWO

KEY PERSONNEL

[To be completed by the SDS Provider]

.....
Director/Authorised Signatory

TIE LIMITED

.....
Director/Authorised Signatory

[SDS PROVIDER]

This is Schedule Three referred to in the foregoing Agreement between the Client and the SDS Provider

SCHEDULE THREE

PRICING SCHEDULES

[TO BE INSERTED]

.....
Director/Authorised Signatory

TIE LIMITED

.....
Director/Authorised Signatory

[SDS PROVIDER]

This is Schedule Four referred to in the foregoing Agreement between the Client and the SDS Provider

SCHEDULE FOUR

PROGRAMME

[To be completed by the SDS Provider]

.....
Director/Authorised Signatory

TIE LIMITED

.....
Director/Authorised Signatory

[SDS PROVIDER]

This is Schedule Five referred to in the foregoing Agreement between the Client and the SDS Provider

SCHEDULE FIVE

COMMERCIALLY SENSITIVE INFORMATION

[To be completed by the SDS Provider]

.....

Director/Authorised Signatory	Director/Authorised Signatory
TIE LIMITED	[SDS PROVIDER]

This is Schedule Six referred to in the foregoing Agreement between the Client and the SDS Provider

SCHEDULE SIX

REQUIRED INSURANCES

Part 1

Required insurances

1. PROFESSIONAL INDEMNITY INSURANCE

- Insured Party:** The SDS Provider
- Coverage:** The legal liability of the SDS Provider as a result of any negligent act, error, or omission in the performance of its professional activities and duties in connection with the Services.
- Limit of Indemnity:** Minimum £10,000,000 on an each and every claim basis and [£◆] on an aggregate basis in respect of pollution and contamination claims and date recognition claims. There is no requirement to maintain cover in respect of asbestos or terrorism related claims and liability is excluded in respect of these.]
- Period of Insurance:** From the Effective Date for 12 months¹ and thereafter each further 12 month period until the earlier of 12 years from the completion by the SDS Provider of the Services and its obligations under this Agreement or 12 years from the Termination Date.
- Extensions:** The insurance must include the following minimum extensions:
[◆]
- Maximum Permitted Deductible:** [◆] each and every claim.

2. THIRD PARTY LIABILITY INSURANCE

- Insured Party:** The SDS Provider
- Coverage:** The legal liability of the SDS Provider for death, injury, illness, disease contracted by third party persons or loss of or damage to property arising out of or in connection with the Services.
- Limit of Indemnity:** Unlimited as to the number of occurrences in each 12 month period in respect of death or injury to persons. For all other occurrences, a minimum of £5,000,000 any one occurrence (unlimited as to number of occurrences in the Period of Insurance stated below) in respect of third liability and £5,000,000 any one occurrence and in the aggregate in any one 12 month period of insurance in respect of products liability and in annual aggregate in respect of pollution and

¹ Will be amended to reflect the successful Tenderer's policy term.

contamination claims.

Period of Insurance: From the Effective Date for 12 months² and thereafter each further 12 month period until the earlier of Termination Date or the completion by the SDS Provider of the Services and its obligations under this Agreement.

Minimum Extensions The insurance must include the following minimum extensions:

[◆]

Maximum Permitted Deductible: [£◆] each and every loss in respect of property damage claims, nil excess for bodily injury claims.

3. EMPLOYERS LIABILITY INSURANCE

Insured Party: The SDS Provider

Coverage: The legal liability of the SDS Provider for death, injury, illness, disease contracted by employees of the SDS Provider caused by or arising out of or in connection with the Services.

Limit of Liability Minimum limit of indemnity of £10,000,000 any one occurrence or series of occurrences arising from one original cause or event.

Period of Insurance: From the Effective Date for twelve 12 months³ and thereafter each further twelve month period until the earlier of the completion by the SDS Provider of the Services and its obligations under this Agreement or the Termination Date.

Extensions The insurance must include the following minimum extensions:

[◆]

Maximum Permitted Deductible: [◆]

² Will be amended to reflect the successful Tenderer's policy term.

³ Will be amended to reflect the successful Tenderer's policy term.

Part 2

Form of Brokers Letter of Undertaking

To: [THE CLIENT]

Dear Sirs

We confirm in our capacity as insurance brokers that the Required Insurances specified in Clause 17 (*Required Insurances*) and Schedule 6 (*Required Insurances*) of the Agreement dated ◆ between ◆ (the "SDS Provider") and the Client as defined therein are, as at the date hereof, in effect in respect of the risks set out in the attached cover notes.

We have arranged the Required Insurances on the basis of the information and instructions given by the SDS Provider. We have not made any particular or special enquiries regarding the Required Insurances beyond those that we would normally make in the ordinary course of arranging the insurances on behalf of our insurance broking clients.

The confirmations set out in this letter are given by reference to our state of knowledge at the date hereof.

Pursuant to instructions received from the SDS Provider, we hereby undertake in respect of the interests of the SDS Provider and the Client in the Required Insurances referred to in the attached cover notes:

1. to use reasonable endeavours to have endorsed on each and every policy evidencing the Required Insurances when the same is issued, endorsements substantially in the form set out in Schedule 6 (*Required Insurances*) of the Agreement;
2. to advise the Client :
 - 2.1 promptly after receiving notice of any insurer's cancellation or suspension of any of the Required Insurances or receiving notice of the intended cancellation or suspension of any of the Required Insurances;
 - 2.2 promptly upon our receipt from the SDS Provider of any notice of any changes proposed to be made to the Required Insurances which, if effected, would result in a material reduction in limits or coverage (including in respect of extensions of cover) or in an increase in deductibles, exclusions or exceptions;
 - 2.3 of any default in the payment of any premium for any of the Required Insurances;
 - 2.4 at least 20 days prior to the expiry of any of the Required Insurances if we have not received written renewal instructions from the SDS Provider or if we receive written instructions to renew, to advise the Client of the details thereof; and
 - 2.5 on receipt of notice of any act or omission of the SDS Provider or any SDS Provider Party which will invalidate or render unenforceable in whole or in part, any of the Required Insurances;
3. no later than seven days (in respect of certificates) and as soon as reasonably practicable in respect of policies and other documents, to supply you and/or your insurance advisors (or your or their authorised representative) copies of all placing slips, certificates, cover notes, renewal receipts and confirmations of renewal and payment of premiums and all policy documents (or confirmation of the terms of such policy documents where such policy documents cannot be made available) in respect of the Required Insurances, or upon request, to make available to you the originals of any or all such documents held by us;

4. to disclose to the insurers any fact, change of circumstance or occurrence is material to the risks insured against under the Required Insurances;
5. to treat as confidential all information in relation to the Required Insurances supplied to us by the SDS Provider or any SDS Provider Party or the Client and not to disclose, without the written consent of the Client, such information to any third party other than the insurers under the Required Insurances, unless required to do so by law or any regulatory authority; and
6. to notify the Client ~~at least 30 days~~ as soon as reasonably practicable prior to our ceasing to act as brokers to the SDS Provider, unless impracticable because of circumstances beyond our control, in which case we shall notify the Client as soon as reasonably practicable upon becoming aware that we shall cease, or have ceased, so to act.

Where insurers wish any of the Required Insurances to be cancelled for reasons of non-payment of premium, we will request those insurers to give you a reasonable opportunity of paying such amounts outstanding before issuing notice of cancellation on behalf of such insurers.

The above undertakings are given subject to our continuing appointment for the time being as insurance brokers to the SDS Provider in relation to the Required Insurances concerned and the monitoring and handling of claims in relation to the SDS Provider, and our obligations set out in this letter shall automatically cease upon termination of our appointment.

For the avoidance of doubt all undertakings and other confirmations given in this letter relate solely to the Required Insurances. They do not apply to any other insurances and nothing in this letter should be taken as providing any undertakings or confirmations in relation to any other such insurance that ought to have been placed or may at some future date be placed by other brokers.

This letter is given by us on the instructions of the SDS Provider and with the SDS Provider's full knowledge and consent as to its terms as evidenced by the SDS Provider's signature below.

This letter shall be governed by and shall be construed in accordance with Scots Law and any dispute as to its terms shall be submitted to the exclusive jurisdiction of the courts of Scotland.

Yours faithfully

.....
 For and on behalf of (Insurance Broker)

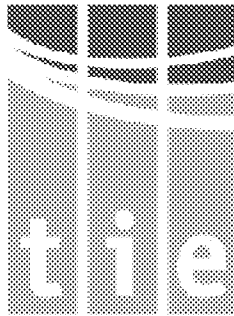
.....
 For and on behalf of (The SDS Provider)

Director/Authorised Signatory TIE LIMITED	Director/Authorised Signatory [SDS PROVIDER]
---------------------------------------------------------	------------------------------------------------------------

**This is Schedule Seven referred to in the foregoing Agreement
between the Client and the SDS Provider**

SCHEDULE SEVEN

COLLATERAL WARRANTY IN FAVOUR OF TIE



(1) [SDS PROVIDER]

- and -

(2) TIE LIMITED

- and -

(3) [INFRACO]

**COLLATERAL WARRANTY IN FAVOUR
OF TIE FROM THE SDS PROVIDER**

relating to

**THE PROVISION OF SYSTEM DESIGN
SERVICES FOR THE EDINBURGH TRAM
NETWORK**

AGREEMENT

BETWEEN

- (1) [SDS PROVIDER] (Company Number ◆) whose registered office is at ◆ ("SDS Provider");
- (2) TIE LIMITED (Company Number SC230949) whose registered office is at City Chambers, High Street, Edinburgh, Midlothian, EH1 1YJ ("tie") which term shall include its successors and permitted assignees); and
- (3) [INFRACO] (Company Number ◆) whose registered office is at ◆ ("Infraco").

BACKGROUND

- A By an agreement in writing dated [◆] 2005 (the "SDS Agreement"), tie appointed the SDS Provider to provide system design services in connection with the Edinburgh Tram Network.
- B tie and Infraco have entered into a contract under which Infraco has been appointed to complete the design and carry out the construction, installation, commissioning and maintenance planning in respect of the Edinburgh Tram Network.
- C tie and Infraco have agreed, with the consent of the SDS Provider, that the Infraco shall take over the rights and liabilities of the "Client" under the SDS Agreement by novating the SDS Agreement from tie to Infraco upon and subject to the terms of the Novation Agreement (as hereinafter defined).
- E It is a term of the SDS Agreement that the SDS Provider shall enter into this Agreement with tie following the execution of the Novation Agreement.

IT IS AGREED as follows:

1. DEFINITIONS AND INTERPRETATION

- 1.1 In this Agreement the following words and expressions have the following meanings, unless the context requires otherwise:

"Agreement" means this document (as amended from time to time pursuant to Clause 14);

"Deliverables" means the Functional Requirements Specifications, the Technical Specifications and the items listed in Appendix 3 to Schedule 1 (*Scope of the Services*) of the SDS Agreement, and all other documents, information, reports, records, diagrams, bills of quantities, manuals, schedules, databases, reinforcement details, photographs, formulae, consultation materials, 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 the SDS Provider (and/or any SDS Provider Party or any other third party) in the performance of the Services and the SDS Provider's other obligations under the SDS Agreement;

"Infraco Contract" means the contract to be entered into or entered into by tie with the Infraco in relation to the completion of the design, and carrying out the construction, commissioning and maintenance planning in respect of the Edinburgh Tram Network;

"Novation Agreement" means the novation agreement entered into among **tie**, the SDS Provider and the Infracore;

"Party" means each and any of the parties to this Agreement and Parties shall be construed accordingly;

"SDS Agreement" means the agreement dated [◆] originally entered into by the SDS Provider and **tie**, which has been novated to the Infracore and the SDS Provider.

- 1.2 Unless the context requires otherwise:
 - 1.2.1 words importing:
 - 1.2.1.1 the singular include the plural and vice versa; and
 - 1.2.1.2 one gender include all other genders.
 - 1.2.2 a reference to:
 - 1.2.2.1 persons includes firms, companies, corporations, partnerships, trusts, authorities and other incorporated and/or unincorporated bodies; and
 - 1.2.2.2 a recital, clause or schedule is a reference to a recital, clause or schedule of or to this Agreement;
- 1.3 The list of contents and clause headings in this Agreement are included for convenience only and do not affect its interpretation; and
- 1.4 Where a party comprises two or more persons:
 - 1.4.1 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
 - 1.4.2 references to that party shall include references to each and any of those persons.
- 1.5 Unless otherwise defined hereunder, where the SDS Agreement defines a meaning to any capitalised word or expression used in this Agreement, the same meaning shall be given to it in this Agreement;
- 1.6 In the case of any unintended conflict between the definition or interpretation of words or expressions in this Agreement and the SDS Agreement, the SDS Agreement shall prevail save where by express words or where it is apparent from the context that the contrary is intended in this Agreement.

2. STANDARD OF CARE

The SDS Provider warrants and undertakes to **tie** that:

- 2.1 it has carried out and shall carry out its Services and other duties and obligations under the SDS Agreement subject to and in accordance with the terms thereof; and
- 2.2 in addition to and without derogation from clause 2.1;
 - 2.2.1 the SDS Provider warrants to **tie** that, in the performance of the Services and its other obligations under the SDS Agreement it shall exercise a reasonable level of professional skill, care and diligence to be expected of a properly

qualified and competent system design services provider experienced in performing services similar to the Services in connection with projects of a similar size, scope and complexity; and

- 2.2.2 it owes a duty of care to **tie** in carrying out its duties and obligations under the SDS Agreement.

3. COPYRIGHT LICENCE

- 3.1 The SDS Provider hereby grants to **tie** an irrevocable, perpetual, royalty-free and non-exclusive licence to use such Project IPR and SDS Provider IPR as may be necessary for **tie** to use in relation to any projects associated with the Services. This licence shall carry the right to grant sub-licences, and be freely transferable to third parties. ~~The SDS Provider shall be liable for the Project IPR and the SDS Provider IPR only to the extent that it is used for the purposes for which it was intended.~~
- 3.2 In so far as ownership of the copyright and any other Intellectual Property Rights in any Deliverable prepared or provided by the SDS Provider in connection with the Edinburgh Tram Network is vested in any person other than the SDS Provider including, without limitation, any SDS Provider Party, the SDS Provider shall procure for **tie** the benefit of such a licence as is referred to in clause 3.1 for the purposes referred to therein.
- 3.3 The SDS Provider shall, if so requested at any time, execute such documents and perform such acts (including the grant to **tie** of a licence to use any SDS Provider Software and/or any Third Party Software and/or any Specially Written Software) as may be required fully and effectively to assure to **tie** or any third party the rights referred to in this clause 3.
- 3.4 The SDS Provider shall provide to **tie** a copy of any of the Deliverables as soon as reasonably practicable after receipt by the SDS Provider of a written request from **tie** to do so.
- 3.5 The SDS Provider undertakes to **tie** that the use by **tie** of any of the Deliverables for any purpose provided for in this clause 3 shall not infringe the rights of any third party in relation to the Deliverables.

4. REQUIRED INSURANCES

- 4.1 The SDS Provider undertakes that:
- 4.1.1 it has maintained and shall maintain during the performance of its obligations under the SDS Agreement each of the Required Insurances in accordance with the requirements of Clause 17 (*Required Insurances*) and Schedule 6 (*Required Insurances*) of the SDS Agreement;
- 4.1.2 cover under the professional indemnity insurance is extended to include the SDS Provider's liabilities under this Agreement;
- 4.1.3 this Agreement has been disclosed to the SDS Provider's current professional indemnity insurers ~~or brokers (as the case may be)~~ and shall be disclosed to any future professional indemnity insurers ~~or brokers~~ providing the insurance required by this Agreement; and
- 4.1.4 the SDS Provider shall abide by the terms and conditions of insurance and not do or omit to do anything that might prejudice the cover or its right to make a claim.

- 4.2 As and when required by **tie**, the SDS Provider shall produce for inspection documentary evidence that such insurance is being properly maintained.
- 4.3 The SDS Provider shall not make any material alteration to the terms of the Required Insurances without **tie's** prior approval which approval shall not be unreasonably withheld. If the insurer makes or attempts to make any material alteration or purports to withdraw cover, or if the SDS Provider is unable to obtain professional indemnity insurance, the SDS Provider shall promptly give notice of this to **tie**.

5. TIE STEP-IN

- 5.1 The SDS Provider shall not exercise nor seek to exercise any right of determination of the SDS Agreement or to rescind the SDS Agreement by reason of a Client Default or to otherwise discontinue the performance of any of the SDS Provider's obligations in relation to the SDS Agreement by reason of breach on the part of the Infraco (or otherwise) without giving to **tie** not less than 21 days' written notice of its intention to do so and specifying in such notice the grounds for the proposed determination. The SDS Provider shall for the period of any such notice diligently and properly continue to perform the SDS Provider's obligations under the SDS Agreement.
- 5.2 Any period stipulated in the SDS Agreement for the exercise by the SDS Provider of a right of determination shall nevertheless be extended as may be necessary to take account of the period of notice required under clause 5.1.
- 5.3 Compliance by the SDS Provider with the provisions of clause 5.1 shall not be treated as a waiver of any breach on the part of the Infraco giving rise to the right of determination nor otherwise prevent the SDS Provider from exercising its rights after the expiration of the notice unless the right of determination shall have ceased under the provisions of clause 5.4.
- 5.4 The right of the SDS Provider to determine the SDS Agreement or to rescind the SDS Agreement or to discontinue the performance of any of its obligations in relation to the SDS Agreement shall cease if within the period of 21 days referred to in clause 5.1, **tie** gives written notice to the SDS Provider:
- 5.4.1 requiring the SDS Provider to continue with the performance of all its obligations under the SDS Agreement;
 - 5.4.2 acknowledging that **tie** is assuming all the obligations of the Infraco (as "Client") under the SDS Agreement; and
 - 5.4.3 undertaking to the SDS Provider to discharge all amounts payable to the SDS Provider under the terms of the SDS Agreement.
- 5.5 Upon compliance by **tie** with the requirements of clause 5.4, the SDS Agreement shall continue in full force and effect as if the right of determination on the part of the SDS Provider had not arisen and in all respects as if the SDS Agreement had been made between **tie** and the SDS Provider to the exclusion of the Infraco.
- 5.6 Notwithstanding that as between the Infraco and the SDS Provider, the SDS Provider's right of determination of its engagement under the SDS Agreement may not have arisen the provisions of clause 5.5 shall nevertheless apply if **tie** gives written notice to the SDS Provider and the Infraco to that effect and **tie** complies with the requirements on its part under clause 5.4.
- 5.7 The SDS Provider does not need to be concerned or required to enquire whether, and shall be entitled to assume that, as between the Infraco and **tie**, the circumstances have occurred permitting **tie** to give notice under clause 5.6.

- 5.8 The SDS Provider acting in accordance with the provisions of this clause 5 shall not incur any liability to the Infraco.
- 5.9 Unless and until **tie** has given notice under this clause 5:
- 5.9.1 **tie** has no liability whatsoever to the SDS Provider in respect of amounts payable to the SDS Provider under the SDS Agreement (except in relation to the sums referred to in Clause 8 of this Agreement); and
- 5.9.2 **tie** has no authority to issue any direction or instruction to the SDS Provider in relation to the performance of the SDS Provider's obligations under the SDS Agreement.
- 5.10 Without prejudice to the provisions of clauses 5.1 to 5.9 inclusive, if prior to the service of any notice under clause 5.4 the SDS Provider is determined under the SDS Agreement for any reason whatsoever the SDS Provider shall if required in writing so do to by **tie** no later than 12 weeks after the date of such determination forthwith enter into a new agreement with **tie** on the same terms as the SDS Agreement, but with such revisions as **tie** and the SDS Provider may reasonably require to reflect altered circumstances and the fact that it is **tie** and not the Infraco employing the SDS Provider.

6. ASSIGNATION

- 6.1 The SDS Provider shall not assign, novate or otherwise transfer the whole or any part of the Agreement without the prior written agreement of **tie**.
- 6.2 **tie** shall be entitled to assign, novate or otherwise transfer the whole or any part of this Agreement:
- 6.2.1 to the Scottish Ministers or any local authority or other body with no worse financial standing than that of **tie** who, as a result of any Change in Law, takes over all or substantially all the functions of **tie**; or
- 6.2.2 to any other person whose obligations under this Agreement are unconditionally and irrevocably guaranteed (in a form reasonably acceptable to the SDS Provider) by **tie** or a person falling within clause 6.2.1; or
- 6.2.3 to Transport Edinburgh Limited; or
- 6.2.4 with the prior written consent of the SDS Provider (such consent not to be unreasonably withheld or delayed).
- 6.3 The SDS Provider undertakes to **tie** not to contend in any court proceedings under this Agreement that any person to whom **tie** assigns or has assigned its rights under this Agreement or any of them in accordance with the foregoing provisions of this clause is to be precluded from recovering any loss resulting from any breach of this Agreement (whenever happening) by reason that such person is an assignee and not the original contracting party under this Agreement or by reason that **tie** is named under this Agreement or any intermediate assignee of **tie** escaped loss resulting from such breach by reason of the disposal of its interest in the same.

7. LIABILITY OF THE SDS PROVIDER

- 7.1 No provision of this Agreement is intended to exclude any obligation or liability which would otherwise be implied whether by law of contract, delict or otherwise.

- 7.2 The responsibility of the SDS Provider under this Agreement is not to be reduced or in any way released or limited by any enquiry or inspection by or on behalf of any person notwithstanding that such enquiry or inspection may give rise to a claim by **tie** against a third party.
- 7.3 The rights and benefits conferred upon **tie** by this Agreement are in addition to any other rights and remedies that **tie** may have against the SDS Provider including (without prejudice to the generality of the foregoing) any remedies in delict.
- 7.4 Subject to the other provisions of this Agreement, the liability of the SDS Provider to **tie** is to be determined in all respects in accordance with the terms of the SDS Agreement and, in the event of any claim by **tie** under this Agreement, the SDS Provider shall be entitled to rely upon any defence, right, limitation or exclusion under the SDS Agreement as though **tie** were named as Client under it, except that:
- 7.4.1 **tie** shall not be affected by any subsequent variation of the SDS Agreement or the waiver, compromise or withdrawal of any claim made by the Infraco; and
- 7.4.2 the SDS Provider shall not be entitled to exercise any right of set-off, retention or withholding against **tie** to which the SDS Provider may be entitled as against the Infraco.
- 7.5 The liability of the SDS Provider under this Agreement shall be no greater in extent than the liability of the SDS Provider under the SDS Agreement.

8. PAYMENT TO THE SDS PROVIDER IN RESPECT OF RETENTIONS AND REDUCTIONS IN THE SCOPE OF SERVICES

- 8.1 **tie** shall make payment of any sums which have been agreed to be due to the SDS Provider in accordance with Clause 12.7.3 and/or Clause 29.4 of the SDS Agreement, in the amounts and the timescales set out within these said Clauses.

9. CONSENT OF INFRACO

- 9.1 The Infraco consents to the terms of this Agreement.

10. NOTICES

- 10.1 Any notice required to be given under this Agreement is to be hand delivered or sent by prepaid registered or recorded delivery post to the party concerned at its address set out in this Agreement or to such other addresses as may be notified by such party for the purposes of this clause.
- 10.2 Any notice given pursuant to this clause, if sent by registered or recorded delivery, is deemed to have been received 48 hours after being posted.

11. RIGHTS OF THIRD PARTIES

- 11.1 A person who is not a party to this Agreement shall have no right to enforce any term of this Agreement.

12. INVALID TERMS

- 12.1 If any term of this Agreement shall be held to any extent to be invalid, unlawful or unenforceable

12.1.1 that term shall to that extent be deemed not to form part of this Agreement;
and

12.1.2 the validity and enforceability of the remainder of this Agreement shall not be
affected.

13. VARIATIONS AND WAIVERS TO BE IN WRITING

13.1 No variation, alteration or waiver of any of the provisions of this Agreement shall be
effective unless it is in writing and signed by or on behalf of the Party against which
the enforcement of such variation, alteration or waiver is sought.

14. WAIVER

14.1 Save where expressly stated, no failure or delay by either Party to exercise any right
or remedy in connection with this Agreement shall operate as a waiver of it or of any
other right or remedy nor shall 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.

14.2 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.

15. JURISDICTION AND LAW

15.1 This Agreement is governed by and is to be construed according to Scots law and the
Scottish courts shall have jurisdiction in relation to all matters arising under it.

15.2 The Parties agree that any dispute in relation to this Agreement shall be conducted in
accordance with clause 28 (*Dispute Resolution Procedure*) of the SDS Agreement
and the provisions of the said clause 28 and schedule 10 (*Panels to the Dispute
Resolution Procedure*) are deemed to be incorporated mutatis mutandis in respect of
this Agreement provided that any reference to "Parties" shall be deemed to refer to tie
and the SDS Provider, any reference to "Client" shall be deemed to refer to tie, the
reference to "Clause 36" shall mean Clause 10 of this Agreement.

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IN WITNESS WHEREOF these presents on this and the preceding ♦ pages are executed as follows:

EXECUTED for and on behalf of [SDS
PROVIDER] at

on 2005 by:
Director/Authorised Signatory
Full Name
Witness Signature
Full Name
Address

.....

EXECUTED for and on behalf of **TIE LIMITED**
at

on 2005 by:

Authorised Signatory

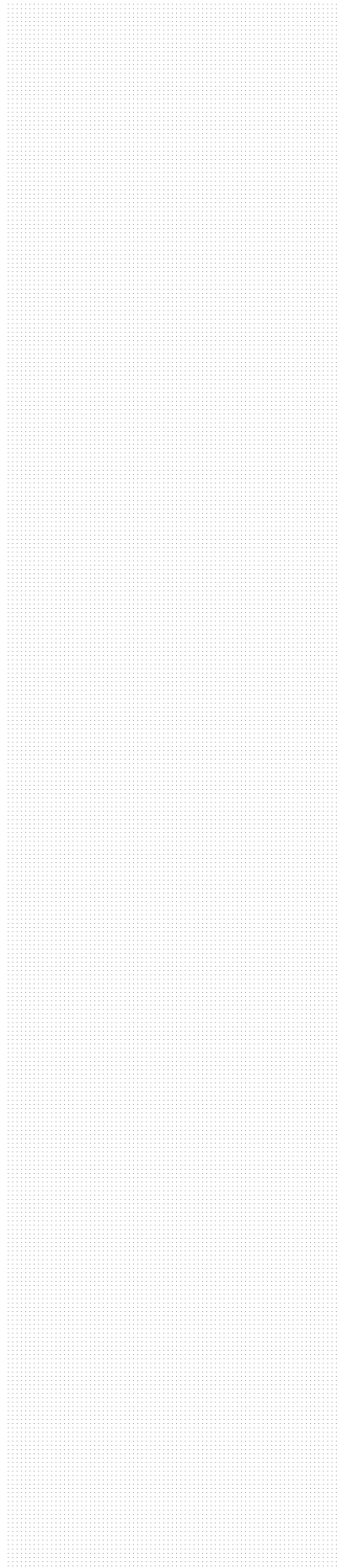
Full Name

Witness Signature

Full Name

Address

.....



EXECUTED for and on behalf of **[INFRACO]** at

on _____ 2005 by:

Director/Authorised Signatory

Full Name

Witness Signature

Full Name

Address

.....

.....

Director/Authorised Signatory

TIE LIMITED

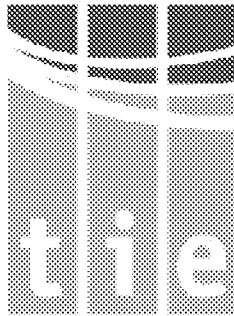
Director/Authorised Signatory

[SDS PROVIDER]

**This is Schedule Eight referred to in the foregoing Agreement
between the Client and the SDS Provider**

SCHEDULE EIGHT

NOVATION AGREEMENT



(1) tie

- and -

(2) INFRACO

- and -

(3) [SDS PROVIDER]

**NOVATION OF SYSTEM DESIGN
SERVICES AGREEMENT**

in respect of

EDINBURGH TRAM NETWORK

AGREEMENT

AMONG

- (1) **TIE LIMITED** (Company number SC230949) whose registered office is at City Chambers, High Street, Edinburgh, Midlothian, EH1 1YJ ("**tie**");
- (2) [**INFRACO**] (company number ◆) whose registered office is at ◆ ("**Infraco**");
- (3) [**SDS PROVIDER**] (company number ◆) whose registered office is at [◆] [OR] [the firm of ◆ [*name of firm*] and the partners and trustees for said firm whose principal place of business is at ◆ [*address*] ("**SDS Provider**").

BACKGROUND

- A By an agreement in writing dated [◆] 2005 ("**SDS Agreement**") **tie** appointed the SDS Provider to provide system design services in connection with the Edinburgh Tram Network.
- B **tie** and Infraco have entered into a contract under which Infraco has been appointed to complete the design and carry out the construction, installation, commissioning and maintenance planning in respect of the Edinburgh Tram Network.
- C **tie** and Infraco have agreed, with the consent of the SDS Provider, that the Infraco shall take over the rights and liabilities of the "Client" under the SDS Agreement by novating the SDS Agreement from **tie** to Infraco upon and subject to the terms of this Agreement.

1. DEFINITIONS AND INTERPRETATION

- 1.1 The definitions given in the recitals to this Agreement apply to this Agreement.
- 1.2 Clause headings in this Agreement are for the convenience of the parties only and do not affect its interpretation.
- 1.3 Unless otherwise defined hereunder, where the SDS Agreement defines a meaning to any capitalised word or expression used in this Agreement, the same meaning shall be given to it in this Agreement;

2. RELEASE BY THE SDS PROVIDER OF TIE

- 2.1 The SDS Provider releases and discharges **tie** from any and all duties, obligations and liabilities owed to the SDS Provider under the SDS Agreement and accepts the liability of the Infraco under the SDS Agreement in lieu of **tie**.

3. RELEASE BY TIE OF THE SDS PROVIDER

- 3.1 **tie** releases and discharges the SDS Provider from the further performance of the SDS Provider's duties and obligations under the SDS Agreement.

4. ACCEPTANCE OF LIABILITY BY THE SDS PROVIDER TO THE INFRACO

- 4.1 The SDS Provider undertakes to continue to perform all the duties and to discharge all the obligations of the SDS Provider under the SDS Agreement and to be bound by its terms and conditions in every way as if the Infraco was and always had been a party to the SDS Agreement in place of **tie**.
- 4.2 The SDS Provider warrants to the Infraco that, in respect of the duties and obligations which it has already performed under the SDS Agreement, it has performed those duties and obligations in accordance with the standards of skill and care set out in the

SDS Agreement. The SDS Provider warrants to the Infraco that it shall be liable for any loss or damage suffered or incurred by the Infraco arising out of any negligent act, default or breach by the SDS Provider in the performance of its obligations under the SDS Agreement prior to the date of this Agreement. The SDS Provider shall be liable for such loss or damage notwithstanding that such loss or damage would not have been suffered or incurred by **tie** (or suffered or incurred to the same extent by **tie**).

4.3 The liability of the SDS Provider to the Infraco pursuant to the SDS Agreement shall not be affected by the Infraco's assumption of liability for design to **tie** pursuant to the Infraco Contract.

4.4 The SDS Provider acknowledges that the Infraco has and shall continue to rely upon all Services carried out by the SDS Provider.

5. VESTING OF REMEDIES AGAINST SDS PROVIDER

All rights of action and remedies against the SDS Provider under and pursuant to the SDS Agreement vested in **tie** shall from the date of this Agreement vest in the Infraco.

6. ACCEPTANCE OF LIABILITY BY THE INFRACO

The Infraco undertakes to perform all the duties and to discharge all the obligations of **tie** under the SDS Agreement and to be bound by its terms and conditions in every way as if the Infraco was and always had been a party to the SDS Agreement in place of **tie** and as if all acts and omissions of **tie** under or pursuant to the SDS Agreement prior to the date of this Agreement were the acts and omissions of the Infraco.

7. VESTING OF REMEDIES AGAINST TIE

All rights of action and remedies under or pursuant to the SDS Agreement vested in the SDS Provider shall from the date of this Agreement lie against the Infraco and not **tie**.

8. ACKNOWLEDGEMENT OF PAYMENT

The SDS Provider acknowledges that all fees and expenses properly due to the SDS Provider under the SDS Agreement up to the date of this Agreement have been paid by **tie** except sums which have been agreed to be due to the SDS Provider in accordance with Clause 12.7.3 and/or Clause 29.4 of the SDS Agreement and which have not been paid by **tie**.

9. AMENDMENT OF SDS AGREEMENT

tie, the SDS Provider and the Infraco agree that the terms of the SDS Agreement shall be and are varied in the manner set out in Appendix 1 to this Agreement.

10. AFFIRMATION OF SDS AGREEMENT

The terms and conditions of this Agreement represent the entire agreement between the parties relating to the novation of the SDS Agreement and, except as specifically amended by Appendix 1 of this Agreement, all the terms and conditions of the SDS Agreement remain in full force and effect.

11. RIGHTS OF THIRD PARTIES

A person who is not party to this Agreement shall have no right to enforce any term of this Agreement. This Clause does not affect any right or remedy of any person which exists or is otherwise available.

12. LAW AND JURISDICTION

This Agreement shall be governed by and construed in accordance with Scots law and the Scottish Courts shall have jurisdiction with regard to all matters arising under it.

IN WITNESS WHEREOF these presents on this and the preceding [♦] pages together with Appendix 1 which is annexed and subscribed as relative hereto are executed as follows:

EXECUTED for and on behalf of **TIE LIMITED** at

on _____ 2005 by: _____
Authorised Signatory
Full Name
Witness Signature
Full Name
Address
.....

EXECUTED for and on behalf of **[INFRACO]** at

on _____ 2005 by: _____
Director/Authorised Signatory
Full Name
Witness Signature
Full Name
Address
.....

EXECUTED for and on behalf of **[SDS PROVIDER]** at

on _____ 2005 by:

Director/Authorised Signatory

Full Name

Witness Signature

Full Name

Address

.....

.....

Director/Authorised Signatory

Director/Authorised Signatory

TIE LIMITED

[SDS PROVIDER]

APPENDIX 1

SCHEDULE OF AMENDMENTS TO THE SDS AGREEMENT

Clause 3 - Duty of Care, Standards and the Services to be Provided

Insert the following new Clauses:

- 3.28 The SDS Provider is aware and has knowledge of all the terms and conditions of the Infraco Contract (in so far as the same has been supplied to the SDS Provider) so that in so far as is consistent with its terms the SDS Provider shall not cause the Infraco to be in breach of the provisions of the Infraco Contract to be observed and performed and complied with by the Infraco in so far as they relate and apply to the Services, and is further aware and has taken and shall continue to take full account of the obligations to be undertaken and the liabilities which may be incurred by the Infraco therein in relation to the Services.
- 3.29 The SDS Provider acknowledges that any breach by it of this Agreement may result in the Infraco committing breaches of and becoming liable for damages under the Infraco Contract and other contracts made by it in connection with the Infraco Contract and may occasion further loss or expense to the Infraco in connection with the Infraco Contract and all such damage, loss and expense is hereby agreed to be within the contemplation of the Parties as being the probable results of any such breach by the SDS Provider. The SDS Provider shall indemnify the Infraco against all such damage, loss and expense.
- 3.30 The SDS Provider shall observe, perform and comply with all the provisions of the Infraco Contract (in so far as the same has been supplied to the SDS Provider) on the Infraco's part to be observed, performed and complied within so far as they relate and apply to the performance of the Services and the SDS Provider shall be liable to the Infraco for:
- 3.30.1 any breach, non-observance or non-performance for which the SDS Provider is responsible of any of the provisions of the Infraco Contract in so far as they relate and apply to the performance of Services; and
- 3.30.2 any act or omission for which the SDS Provider is responsible which involves the Infraco in any liability to **tie** under the provisions of the Infraco Contract in so far as they relate and apply to the performance of Services; and
- 3.30.3 any claim, damage, loss or expense due to or resulting from any negligence or breach of duty for which the SDS Provider is responsible.

Clause 4 - Development, Review, Finalisation and Delivery of the Deliverables

Insert the following new Clause 4.14:

- 4.14 In addition to the other requirements of this Clause 4, the SDS Provider shall support the Client as required in relation to the maintenance and provision of any records, drawings, registers, manuals and/or reports as may be required under the Infraco Contract.

Clause 7.5 - Extensions of Time:

Delete Clause 7.5 and substitute therefor:

- 7.5.1 If the SDS Provider shall be delayed in the execution of the Services:
- 7.5.1.1 by any circumstances or occurrence (other than a breach of this Agreement by the SDS Provider) entitling the Infraco to an extension of time for completion or stage completion of the Infraco Contract; or

7.5.1.2 by the issuing of a Client Change Order in respect of the Services to which Clause 7.5.1.1 does not apply; or

7.5.1.3 by reason of any other breach by the Client of this Agreement; or

7.5.1.4 by reason of any breach by the Infraco of the Infraco Contract.

then in any such event the SDS Provider shall forthwith notify the Client of:-

- (a) the cause of the delay;
- (b) the SDS Provider's estimate of the likely effect of such delay upon the Programme and the Master Project Programme;
- (c) the estimated additional cost that shall be incurred; and
- (d) any acceleration measures which the SDS Provider could take to mitigate the effects of such delay and an estimate of the costs thereof.

7.5.2 The SDS Provider shall, subject to any instruction to accelerate the Services pursuant to Clause 7.5.3, be entitled to such adjustment to the Programme as may in all circumstances be fair and reasonable, provided always that the SDS Provider's entitlement to an extension of time for any event listed in Clause 7.5.1 shall in no circumstances exceed (in respect of such event) the extension of time (if any) to which the Client is entitled for the identical event under the Infraco Contract. An extension of time shall not be granted where the cause of the Services having been delayed, affected or suspended is due to any act, omission, default or breach of the Agreement by the SDS Provider or its employees, agents or servants or any SDS Provider Party.

7.5.3 The Client shall issue a Client Change Order to authorise any agreed acceleration of the Programme and/or increased costs as a result of delays notified under Clause 7.5.1.

7.5.4 If the Services are delayed in circumstances other than those entitling the SDS Provider to an extension of time as set out in Clause 7.5.1 or as a result of a Force Majeure Event, the SDS Provider shall inform the Client at the earliest opportunity and shall give an estimate of the likely effect upon the Programme. The SDS Provider at his own expense shall take such acceleration measures as are necessary to achieve the requirements of the Programme.

7.5.5 The SDS Provider shall not be entitled to and shall be deemed to have irrevocably waived any entitlement to any extension of time unless the SDS Provider has:

7.5.5.1 within ~~7~~ 10 Business Days of becoming aware of the circumstances or occurrences which have caused or are likely to cause delay to the SDS Provider in the performance of the Services notified the Client in writing; and

7.5.5.2 within ~~7~~ 10 Business Days after such notification submitted by further written notice to the Client detailed particulars of any extension of time to which it may consider itself entitled in order that such submission may be investigated at the time; and

7.5.5.3 wherever applicable, complied with the requirements of any Clause under this Agreement requiring timely notice to be given.

7.5.6 Any notice under 7.5.5.1 or 7.5.5.2 above shall give full particulars to the extent then possible of the cause of the delay and of its probable duration and where appropriate reasonable estimate of any direct and indirect costs likely to result therefrom together with any other relevant details.

Clause 15 - Changes

Insert the following new Clause 15.15

- 15.15 Except in relation to a breach of this Agreement or the Infraco Contract by the Client or unless otherwise agreed by the Client in writing, the SDS Provider's entitlement to additional payment or an extension of time for a Permitted Variation shall in no circumstances exceed (in respect of such Permitted Variation) the extension of time (if any) and/or additional payment (if any) to which the Infraco is entitled under the Infraco Contract for the identical Permitted Variation. The SDS Provider's entitlement to such extension of time or additional payment under this Agreement shall in no circumstances exceed that proportion of the Infraco's entitlement to an extension of time or additional payment under the Infraco Contract to which the Infraco becomes entitled in respect of the entitlement claimed by the SDS Provider. An extension of time and/or additional payment shall not be granted where the cause of the Permitted Variation is due to any act, omission, default or breach of the Agreement by the SDS Provider, its employees, agents or servants or any SDS Provider Party.

Clause 19 - Termination for SDS Provider Default

Delete Clause 19.1.3 and substitute therefore "Clause not used".

Clause 20 - Termination, Abandonment or Suspension of the Services by the Client

Delete Clause 20.1 and substitute therefor:

- 20.1 In the event that the Infraco Contract is terminated, this Agreement shall terminate unless the SDS Provider is notified that **tie** (or another nominated party) requires to step into this Agreement.

Clause 22 - Termination for Corrupt Gifts and Payments

Delete Clause 22 (Termination for Corrupt Gifts and Payments in its entirety) substitute therefor:

- 22.1 The SDS Provider or anyone employed by it or acting on its behalf (including any SDS Provider Party) shall not commit any Prohibited Act.
- 22.2 If the SDS Provider or anyone employed by it or acting on its behalf (including any SDS Provider Party) commits any Prohibited Act, then the Client may terminate this Agreement with immediate effect by giving notice to the SDS Provider.

Clause 30 - Assignment, Changes In Legal Status And Changes In Control

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Delete Clause 30.2 and substitute therefor:

- 30.2 The Client shall be entitled to assign, novate or otherwise transfer the whole or any part of this Agreement.
- 30.2.1 to an assignee permitted in accordance with the terms of the Infracore Contract; or
- 30.2.2 with the prior written consent of the SDS Provider (such consent not to be unreasonably withheld or delayed).

.....
Director/Authorised Signatory

.....
Director/Authorised Signatory

TIE LIMITED

[SDS PROVIDER]

**This is Schedule Nine referred to in the foregoing Agreement
between the Client and the SDS Provider**

SCHEDULE NINE

REVIEW PROCEDURE

1. Introduction

- 1.1 Except where otherwise agreed in writing, the provisions of this Schedule 9 (*Review Procedure*) shall apply whenever any Deliverable or course of action is required to be reviewed, approved, agreed, consented to or otherwise processed in accordance with the Agreement.
- 1.2 Each submission by the SDS Provider to the Client's Representative under the Review Procedure shall be accompanied by five copies of the proposed Deliverable (in appropriate agreed format) to be reviewed or a statement of the proposed course of action (the entire contents of a submission being referred to as a "Submitted Item"). In relation to each Submitted Item, the provisions of this Schedule 9 (Review Procedure) shall apply.
- 1.3 Within 20 Business Days of the date of receipt of a submission (or re-submission, as the case may be) of the Submitted Item to the Client's Representative (or such other period as the Parties may agree), the Client's Representative shall return one copy of the relevant Submitted Item to the SDS Provider endorsed (subject to and in accordance with paragraph 3 (*Grounds of Objection*)) "Level A - no objection", "Level B - proceed subject to comments" or "Level C - resubmit".
- 1.4 If the Client's Representative fails to return a copy of any Submitted Item within 20 Business Days (or within such other period as the Parties may agree in writing) of the date of its submission to the Client's Representative, then the SDS Provider shall re-submit the submitted item. If the Client's Representative fails to return a copy of any Submitted Item within seven days of any re-submission, then the Client's Representative shall be deemed to have returned the Submitted Item to the SDS Provider endorsed "Level A - no objection".
- 1.5 If the Client's Representative makes an objection to any Submitted Item in accordance with paragraph 3 (*Grounds of Objection*), the Client's Representative shall state the ground upon which such objection is based and the evidence or other information necessary to substantiate that ground.
- 1.6 For the avoidance of doubt, the Client's Representative shall be entitled to make such comments on any Submitted Item on any grounds as he sees fit but, to the extent that the Client's Representative comments on a Submitted Item other than on the grounds specified in paragraph 3 (*Grounds of Objection*), or fails to comply with the provisions of this paragraph 1, the SDS Provider may, at its discretion request written clarification of the basis for such comments and, if clarification is not received within 10 Business Days of such request by the SDS Provider refer the matter for determination in accordance with the Dispute Resolution Procedure.
- 1.7 Where any information that has been provided is updated, the new issues shall be provided promptly to the Client as soon as reasonably possible.
- 1.8 The Client's Representative shall be entitled to instruct the SDS Provider that a defined class of Deliverable or course of action may be submitted "for information" and not for review in accordance with this Schedule 9 (*Review Procedure*).

- 1.9 The SDS Provider shall ensure that each Submitted Item shall contain sufficient detail and shall be accompanied by sufficient information to enable the Client's Representative to assess the Submitted Item in accordance with Schedule 9 (*Review Procedure*).
- 1.10 Where a revised Submitted Item is submitted, the SDS Provider shall also ensure that such revision clearly identifies what revision to the Deliverable was made.

2. Further Information

- 2.1 The SDS Provider shall submit any further or other information, data and documents that the Client's Representative reasonably requires to act in accordance with this Schedule 9 (*Review Procedure*). If the SDS Provider does not submit any such information, data and documents, the Client's Representative shall be entitled to object to the Submitted Item:
 - 2.1.1 on the basis of the information, data and documents which have been provided; or
 - 2.1.2 on the grounds that insufficient information, data and documents have been provided to enable the Client's Representative to act in accordance with this Schedule 9 (*Review Procedure*).

3. Grounds of Objection

- 3.1 The Client's Representative may object to any Submitted Item on the grounds set out in paragraph 2 (*Further Information*) above but otherwise may make objections in relation to a Submitted Item if, on the balance of probabilities, implementation of that Submitted Item:
 - 3.1.1 would not be in accordance with this Agreement; and/or
 - 3.1.2 would result in an increase to the Client's liabilities or potential or contingent liabilities under this Agreement; and/or
 - 3.1.3 would be inefficient as to expenditure of resource/costs; and/or
 - 3.1.4 would lead to a health and safety risk to any person or property; and/or
 - 3.1.5 would lead to a breach of any Law or the terms of any Consent; and/or
 - 3.1.6 would necessitate the obtaining of a new Law or the obtaining of a variation to an existing Law; and/or
 - 3.1.7 would not be in accordance with any relevant environmental requirements; and/or
 - 3.1.8 would not be in accordance with the Functional Requirements Specifications or the Technical Specifications; and/or
 - 3.1.9 would adversely impact on the flexibility or ease of operation, run time, reliability, operating maintenance costs or revenues of the Edinburgh Tram Network; and/or
 - 3.1.10 would materially adversely affect the SDS Provider's ability to perform its obligations under this Agreement; and/or

- 3.1.11 would materially adversely affect the Client's ability to perform its obligations or enforce its rights under this Agreement; and/or
- 3.1.12 is not in accordance with the SDS Provider's quality plans; and/or
- 3.1.13 would not be in accordance with Good Industry Practice; and/or
- 3.1.14 would prevent efficient procurement, construction, completion and/or commissioning of or under the Infraco Contract; and/or
- 3.1.15 prevent Service Commencement being achieved by the Planned Service Commencement Date.

4. Effect of Review

- 4.1 Any Submitted Item which is returned or deemed pursuant to paragraph 1.4 to have been returned by the Client's Representative endorsed "Level A - no objection" shall be complied with and implemented by the SDS Provider subject to Clauses 7.2 and 7.3 of the Agreement.
- 4.2 If the Client's Representative returns the Submitted Item endorsed other than "Level A - no objection", the SDS Provider shall:
 - 4.2.1 where the Client's Representative has endorsed the Submitted Item "Level B - proceed subject to comments", proceed with the performance of the Services (subject to Clauses 7.2 and 7.3 of the Agreement) but acknowledge and take into account the Client's Representative's comments;
 - 4.2.2 where the Client's Representative has endorsed the Submitted Item "Level C - resubmit", not act upon the Submitted Item, amend the Submitted Item to respond to the Client's Representative's objections and requirements, and re-submit the same to the Client's Representative in accordance with paragraph 4.3 unless the SDS Provider disputes that any such objection or proposed requirement is on grounds permitted by this Agreement, in which case the SDS Provider or the Client's Representative may refer the matter for determination in accordance with the Dispute Resolution Procedure and the SDS Provider shall not act on the Submitted Item until such matter is so determined or otherwise agreed provided that any referral to the Dispute Resolution Procedure is at the risk of the SDS Provider.
- 4.3 Where the Submitted Item has been endorsed *Level C*, the SDS Provider shall within 10 Business Days of receiving the returned Submitted Item, resubmit the Submitted Item as amended to the Client's Representative and the provisions of paragraphs 1.2 to 4 of this Schedule 9 (*Review Procedure*) shall apply (*mutatis mutandis*) to such re-submission.
- 4.4 The return or deemed return of any Submitted Item endorsed "Level A - no objection" or otherwise endorsed in accordance with paragraph 4.2.1 (*Level B* - proceed subject to comments) shall mean that the relevant Submitted Item may be used or implemented (subject to any comments made in accordance with paragraph 4.2.1) for the purposes for which it is intended. However, the return or deemed return of any Submitted Item howsoever endorsed shall not:
 - 4.4.1 relieve the SDS Provider of its obligations under this Agreement; nor
 - 4.4.2 constitute an acknowledgement, admission or acceptance by Client that the SDS Provider has complied with such obligations.

5. Disclaimer

- 5.1 No review, objection, comment or silence by the Client shall operate to (i) exclude or limit the SDS Provider's obligations or liabilities under this Agreement (or the Client's rights under this Agreement) or (ii) fix the Client with any express or implied obligations, duties or liabilities with respect to the Submitted Item.
- 5.2 For the avoidance of doubt, this information is supplementary to information required to be produced by the SDS Provider in order to satisfy the approval requirements of and Consents from other third parties and Approval Bodies. These include those required for:
- 5.2.1 local planning authorities;
 - 5.2.2 local roads authorities;
 - 5.2.3 HMRI;
 - 5.2.4 Network Rail;
 - 5.2.5 statutory undertakers; and
 - 5.2.6 the Scottish Executive.
- 5.3 The SDS Provider shall promptly provide copies of all such submissions to the Client together with the responses to them as a matter of routine.

6. Documentation Format and Management

- 6.1 The SDS Provider shall issue five copies (in appropriate agreed format) of all Submitted Items to the Client and compile and maintain a register of the date and contents of the submission for each Submitted Item.
- 6.2 The SDS Provider shall compile and maintain a register of the date of receipt and content of all Submitted Items that are returned or deemed to be returned by the Client's Representative.
- 6.3 All drawings shall be presented as A3 sized paper copies and drawings shall be prepared at their original size in a manner that allows them to be readily legible when reduced to A3 size. Original drawings shall not be greater than A0 in size.

7. Variations

- 7.1 No review, objection or comment or any failure to make objection or comment under this Schedule 9 (*Review Procedure*) by the Client shall constitute a Client Change
- 7.2 If, having received comments from the Client's Representative, the SDS Provider considers that compliance with those comments would amount to a Client Change, the SDS Provider shall within seven days of any comments being received, before complying with the comments, notify the Client of the same and, if it is agreed by the parties or determined pursuant to the Dispute Resolution Procedure that a Client Change would arise if the comments were complied with, the Client may proceed with the matter in accordance with Clause 15 (*Changes*).
- 7.3 Any failure by the SDS Provider to notify the Client within seven days of comments being received that it considers compliance with such comments of the Client's Representative would amount to a Client Change shall constitute an irrevocable acceptance by the SDS Provider that any compliance with the Client's comments

shall be without cost to the Client and without any entitlement to any extension of time or other relief.

- 7.4 No alteration or modification to the scope, quality, quantity or nature of the Services arising from the development of the detailed Design or from the co-ordination or integration of the Design shall be construed or regarded as a Client Change.

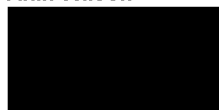
This is Schedule Ten referred to in the foregoing Agreement between the Client and the SDS Provider

SCHEDULE TEN

PANELS FOR THE DISPUTE RESOLUTION PROCEDURE

CONSTRUCTION / OPERATIONAL

Alan Wilson



Peter Chapman



Tony Canham



Guy Cottam



FINANCIAL

Nigel Lowe

Nigel Lowe Consulting Limited
27 Old Gloucester Street
LONDON
WC1N 3XX

John Hunter

Hunter Consulting
Commercial Centre
Stirling Enterprise Park
STIRLING
FK7 7BF

Bryan Porter



[Redacted]

Eric Mouzer

[Redacted]

LEGAL

Gordon Reid, QC

[Redacted]

Robert Howie, QC

[Redacted]

Lord Dervaird (Prof. John Murray QC)

[Redacted]

Gordon Coutts, QC

[Redacted]

Angus Glennie, QC

[Redacted]

■

.....

Director/Authorised Signatory

TIE LIMITED

Director/Authorised Signatory

[SDS PROVIDER]

This is the Schedule Eleven referred to in the foregoing Agreement between the Client and the SDS Provider

SCHEDULE ELEVEN

REQUIREMENTS SPECIFICATION FOR OVERALL SYSTEM AND OPERATIONAL PERFORMANCE REQUIREMENTS

[To be inserted]

.....
Director/Authorised Signatory

TIE LIMITED

.....
Director/Authorised Signatory

[SDS PROVIDER]

This is the Schedule Twelve referred to in the foregoing Agreement between the Client and the SDS Provider

SCHEDULE TWELVE

REQUIREMENTS SPECIFICATIONS FOR CIVIL ENGINEERING WORKS

[To be inserted]

.....
Director/Authorised Signatory

TIE LIMITED

.....
Director/Authorised Signatory

[\$DS PROVIDER]

This is the Schedule Thirteen referred to in the foregoing Agreement between the Client and the SDS Provider

SCHEDULE THIRTEEN

REQUIREMENTS SPECIFICATION FOR SUPERVISION, COMMAND AND CONTROL SUITE OF SYSTEMS

[To be inserted]

.....
Director/Authorised Signatory

TIE LIMITED

.....
Director/Authorised Signatory

[SDS PROVIDER]

This is the Schedule Fourteen referred to in the foregoing Agreement between the Client and the SDS Provider

SCHEDULE FOURTEEN

REQUIREMENTS SPECIFICATION FOR ELECTRIFICATION AND POWER

.....
Director/Authorised Signatory	Director/Authorised Signatory
TIE LIMITED	[SDS PROVIDER]

This is the Schedule Fifteen referred to in the foregoing Agreement between the Client and the SDS Provider

SCHEDULE FIFTEEN
REQUIREMENTS SPECIFICATION FOR TRAM VEHICLE

[To be inserted]

.....
Director/Authorised Signatory	Director/Authorised Signatory
TIE LIMITED	[SDS PROVIDER]

This is the Schedule Sixteen referred to in the foregoing Agreement between the Client and the SDS Provider

SCHEDULE SIXTEEN

SYSTEM-WIDE NON-FUNCTIONAL REQUIREMENTS

[To be inserted]

.....
Director/Authorised Signatory

TIE LIMITED

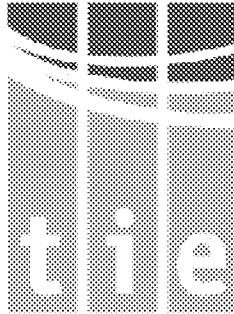
.....
Director/Authorised Signatory

[SDS PROVIDER]

This is the Schedule Seventeen referred to in the foregoing Agreement between the Client and the SDS Provider

SCHEDULE SEVENTEEN

AGREEMENT BETWEEN THE SDS PROVIDER AND THE JOINT REVENUE COMMITTEE



**(1) SDS Provider
- and -**

(2) The Joint Revenue Committee

AGREEMENT

relating to

THE EDINBURGH TRAM NETWORK

AGREEMENT

BETWEEN

- (1) [◆] [a company incorporated under the Companies Act with registration number [◆] and having its registered office at [◆] [a partnership with a place of business at [◆] [a limited liability partnership with a place of business at [◆] [◆ trading as ◆ with a place of business at ◆] (the "SDS Provider") which expression shall include its permitted assignees.

and

- (2) [◆] [a company incorporated under the Companies Act with registration number [◆] and having its registered office at [◆] [a partnership with a place of business at [◆] [a limited liability partnership with a place of business at [◆] [◆ trading as ◆ with a place of business at ◆] (the "JRC") which expression shall include its permitted assignees.

BACKGROUND

- (A) **tie** is a wholly owned subsidiary of the City of Edinburgh Council ("the Council") and **tie** is funded directly by the Council for the delivery of projects included in the Council's Local Transport Strategy.
- (B) **tie** has appointed the Parties (as hereinafter defined) to provide technical consultancy services to support (a) the design, construction and operation of the Edinburgh Tram Network (as hereinafter defined), and (b) requisite public transportation service integration and revenue forecasting.
- (D) Accordingly, the Parties intend in terms of this Agreement to work together to deliver a bespoke transport modelling suite to **tie** for deployment in relation to the Edinburgh Tram Network and its integration into the transport environment in the City of Edinburgh.

IT IS HEREBY AGREED

1. DEFINITIONS AND INTERPRETATION

1.1 In this Agreement, unless the context otherwise requires:

"Agreement" means this document (as amended from time to time pursuant to Clause 14);

"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, trade secrets, properties, assets, trading practices, goods, services, developments, trade secrets, intellectual property rights, know-how, personnel, advisors and suppliers of either Party and all personal data and sensitive personal data within the meaning of the Data Protection Act 1998;

"Edinburgh Tram Network" has the meaning given in the **tie** Appointments;

"FOISA" means the Freedom of Information (Scotland) Act 2002 and any subordinate legislation made under that 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;

"Infraco Contract" means the contract or contracts to be entered into or entered into by **tie** for the provision of the Edinburgh Tram Network infrastructure and operating systems;

"Party" means each and any of the parties to this Agreement and Parties shall be construed accordingly;

"tie" means **tie** limited, the wholly owned subsidiary of Edinburgh City Council responsible for the development and delivery of the Edinburgh Tram Network; and

"tie Appointment " means the agreement under which each party provides services to **tie**, and **tie** Appointments should be construed accordingly.

- 1.2 In this Agreement, except where the context otherwise requires:
- 1.2.1 words importing gender include masculine, feminine and neuter;
 - 1.2.2 the singular includes the plural and vice versa;
 - 1.2.3 a reference to any part, Clause, sub-clause or Schedule is, except where it is expressly stated to the contrary, a reference to such part, Clause or sub-clause of or Schedule to this Agreement;
 - 1.2.4 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);
 - 1.2.5 any reference to this Agreement or to any other document shall include any variation, amendment, or supplement to such document expressly permitted under the terms of this Agreement;
 - 1.2.6 any reference to any 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;
 - 1.2.7 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 to the extent that such assignment and transfer are expressly permitted under the terms of this Agreement;
 - 1.2.8 headings and the contents list are for convenience of reference only and do not affect the interpretation of this Agreement;
 - 1.2.9 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;
 - 1.2.10 an obligation to do something includes an obligation to procure it to be done;
 - 1.2.11 an obligation not to do something includes an obligation not to wilfully allow it to be done;
 - 1.2.12 the word "including" means "including without limitation"; and
 - 1.2.13 a reference to "approval" or "consent" shall mean consent in writing.

2. TERM OF AGREEMENT

- 2.1 This Agreement shall come into effect on the last date of execution hereof and shall continue in effect until the date on which the defects liability period for the Infraco Contract is confirmed by **tie** to have ended.

3. COLLABORATIVE WORKING

- 3.1 The Parties agree as part of their respective mandates pursuant to the relevant **tie** Appointment to collaborate on the development, testing, validation, commissioning and approval of a comprehensive independent hierarchical transport modelling suite ("the SDS-JRC Modelling Suite") as defined and stipulated in the Parties' respective **tie** Appointments.
- 3.2 The Parties shall plan, execute and deliver the completed and fully functional SDS-JRC Modelling Suite to **tie** on the basis of joint and several liability for its timely and efficient production and its fitness for purpose. The Parties agree to indemnify one another in respect of any loss or damage incurred by reason of a failure to comply with an obligation under this Agreement or under their respective **tie** Appointments arising from or in connection with the design, production or commissioning of the SDS-JRC Modelling Suite.

4. MODEL SPECIFICATION

- 4.1 The Parties shall prepare a composite specification together with a detailed staged work programme and resourcing plan to submit to **tie** no later than 30 working days after the formal appointment of the JRC. The development, testing and commissioning process shall be resourced by a team selected by the Parties to combine equal contribution of practical know how, market experience and technical specialism as set out in Appendix 1 to this Agreement. The joint team shall be co located at [◆].

5. INITIAL FORECAST

- 5.1 The Parties shall deploy the SDS-JRC Modelling Suite to generate a model revenue forecast scenario for the first year of public service operations of the Edinburgh Tram Network and shall obtain **tie's** approval of the resultant forecast.

6. MODEL MAINTENANCE

- 6.1 ~~Subject to Clause 6.1, The the Parties have agreed that they shall be jointly and severally responsible at all times to **tie** in relation to:~~

6.1.1 the correction of any single or recurring fault or incapacity; and

6.1.2 the regular calibration, updating and maintenance (including upgrades against obsolescence.

- 6.2 After the date on which **tie** confirms that the Edinburgh Tram Network has completed its defects liability period, the Parties have agreed that JRC shall carry primary responsibility, as between the Parties, with regard to the routine maintenance and guardianship of the SDS-JRC Modelling Suite, in addition to those functions stated above.

7. INTELLECTUAL PROPERTY RIGHTS

- 7.1 The Parties rights with regard to intellectual property rights (including copyright in design rights or exclusive know how) in the SDS-JRC Modelling Suite and the work

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product from the performance of this Agreement shall be vested pursuant to **tie** Appointments.

- 7.2 The Parties shall be entitled to use the SDS-JRC Modelling Suite under a royalty free license from **tie** granted pursuant to **tie** Appointments.

8. INTEGRITY AND CUSTODY OF THE MODEL

- 8.1 Neither Party shall make any adjustment or modification to the SDS-JRC Modelling Suite without the prior consent of both the other Party and **tie**. The parties shall discuss and agree with **tie** as to appropriate custody of a master copy final version of the model as approved by **tie**.

9. CONFIDENTIALITY

- 9.1 Each Party shall treat all Confidential Information belonging to the other Party as confidential and safeguard it accordingly.

- 9.2 Each Party shall not disclose any Confidential Information belonging to the other Party to any other person without the prior written consent of the other Party, except to **tie** and to such persons and to such extent as may be necessary for the performance of the Agreement or except where disclosure is otherwise permitted by the provisions of this Agreement.

- 9.3 The provisions of Clauses 9.1 and 9.2 shall not apply to any Confidential Information received by one Party from the other:

9.3.1 which is or becomes public knowledge (otherwise than by breach of this Clause);

9.3.2 which was in the possession of the receiving Party, without restriction as to its disclosure, before receiving it from the disclosing Party;

9.3.3 which is received from a third party who lawfully acquired it and who is under no obligation restricting its disclosure;

9.3.4 is independently developed without access to the Confidential Information; or

9.3.5 which must be disclosed pursuant to a statutory, legal or parliamentary obligation placed upon the Party making the disclosure, including any requirements for disclosure under FOISA.

10. FOISA

- 10.1 Each Party acknowledges that **tie** is subject to the requirements of FOISA and shall assist and cooperate with the other Party to enable both Parties to comply with any information disclosure requirements to which **tie** directs it is subject under FOISA.

- 10.2 Each Party shall provide the other Party with a copy of any request from **tie** for information under FOISA in relation to this Agreement and the Parties shall act jointly to furnish a response in the format and within the timescales set out in FOISA.

11. ASSIGNATION

- 11.1 Neither Party shall assign or otherwise dispose of any interest in, or rights or obligations under this Agreement in whole or in part to any person, save as may be approved in advance in writing by **tie**.

12. PROJECT RECORDS

- 12.1 The Parties shall in accordance with Good Industry Practice keep and maintain detailed records regarding the activities in relation to the performance of this agreement and shall keep such records for at least twelve years following expiry or termination of this Agreement.
- 12.2 The records referred to in Clause 12.1 shall be kept in good order and in such form as to be capable of technical and financial audit.

13. JURISDICTION AND DISPUTE RESOLUTION

- 13.1 This Agreement, any document completed or to be completed in accordance with its provisions and any matter arising from it or any such document shall be governed by and construed in accordance with Scots law.
- 13.2 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.
- 13.3 Any difference or dispute arising from or in connection with this Agreement shall be referred to the Parties for resolution pursuant to the process stipulated in the **tie** Appointments.

14. VARIATIONS AND WAIVERS TO BE IN WRITING

- 14.1 No variation, alteration or waiver of any of the provisions of this Agreement shall be effective unless it is in writing and signed by or on behalf of the Party against which the enforcement of such variation, alteration or waiver is sought and has been approved in writing by **tie**.

15. WAIVER

- 15.1 Save where expressly stated, no failure or delay by either Party to exercise any right or remedy in connection with this Agreement shall operate as a waiver of it or of any other right or remedy nor shall 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.
- 15.2 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.

16. NO PARTNERSHIP OR DILUTION OF DUTIES

- 16.1 Nothing in this Agreement shall be construed as:
- 16.1.1 creating a partnership between the Parties; or
 - 16.1.1 diluting in any way the duties owed by each Party under separate agreement with **tie**.

17. NOTICES

- 17.1 Any notice or notification required or authorised to be given under this Agreement by one Party to the other shall be:
- 17.1.1 in writing;

17.1.1 sent by one of the following methods:

17.1.1.1 pre-paid registered or recorded delivery post or facsimile transmission addressed to the Party to which it is given at:

(a) in the case of notices given to the SDS Provider attention: [◆], or such other address in the United Kingdom as the SDS Provider may notify the JRC from time to time for that purpose; or

(b) in the case of notices given to the JRC, attention [◆] or such other address in the United Kingdom as the JRC may notify the SDS Provider from time to time for that purpose; or

17.1.1.2 facsimile transmission addressed to the SDS Provider or the JRC 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

17.1.1.3 personal delivery to the respective addresses of the Parties as specified in clause 17.1.2.1

17.1.2 be deemed duly served:

17.1.2.1 if sent by pre-paid registered or recorded delivery post, 2 clear days after posting; or

17.1.2.2 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 in which case it shall be deemed duly served on the next business day thereafter.

18. INVALID TERMS

18.1 If any term of this Agreement shall be held to any extent to be invalid, unlawful or unenforceable

18.1.1 that term shall to that extent be deemed not to form part of this Agreement; and

18.1.2 the validity and enforceability of the remainder of this Agreement shall not be affected.

19. THIRD PARTY RIGHTS

19.1 Save that **tie** shall be entitled to rely upon the undertakings given by the Parties in this Agreement, any person who is not Party to this Agreement shall have no right to enforce any term of this Agreement.

IN WITNESS WHEREOF these presents consisting of this and the [◆] preceding pages [together with Schedules [◆] (inclusive) which are annexed and signed as relative hereto are executed as follows:

EXECUTED for and on behalf of [SDS Provider]

at ◆ on ◆ by

Director/Authorised Signatory:

Full Name:

Witness:

Full Name:

Address:

EXECUTED for and on behalf of **[JRC]**

at ♦ on ♦ by

[Authorised Signatory]:

Full Name:

Witness:

Full Name:

Address:

Appendix 1

[To be completed]

.....

Director/Authorised Signatory	Director/Authorised Signatory
TIE LIMITED	[SDS PROVIDER]