

AGREEMENT

between

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

and

TRANSPORT EDINBURGH LIMITED, a company incorporated under the Companies Acts (registered number SC269639) and having its Registered Office at 55 Annandale Street, Edinburgh EH7 4AZ (“**TEL**”)

Whereas:-

1. The Council set up TEL in June 2004 to assist the Council with implementing its local transport strategy;
2. Powers were conferred upon the Council in relation to the design, construction, commissioning and operation of the Edinburgh Tram Network in terms of the Edinburgh Tram (Line One) Act 2006 and the Edinburgh Tram (Line Two) Act 2006;
3. The Council is the designated planning and roads authority for the City of Edinburgh;
4. The terms of the tram Final Business Case, setting out *inter alia* the anticipated operational and financial parameters of an integrated tram and bus system in Edinburgh, were approved in principle by the Council on 20 December 2007 via powers delegated to various Council officials;
5. The parties now wish to enter into this Agreement to more particularly regulate the relationship between the parties specifically with regard to the delivery of the Tram System and the planning of an integrated tram and bus system in Edinburgh and to define the services TEL will provide to the Council; and

6. The Parties acknowledge that this Agreement will require to be adapted in future to accommodate the evolving role of TEL and in particular in advance of operational commencement of the Tram System.

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

1 Definitions

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

“Agreement”	means this agreement (including the schedules to it), as it may be amended from time to time;
“Company Monitoring Officer”	means the Council officer nominated by the Council to monitor TEL in relation to the Project;
“Final Business Case”	means the business case relating to the Project which was approved by the Council on 20 December 2007, as it may be amended from time to time in agreement with the Council;
“Funding Agreement”	means the Council-accepted grant offer letter from Transport Scotland to the Council relating to the Project, as it may be amended from time to time;
“Infraco Contract”	means the contract between tie and Bilfinger Berger UK Limited and Siemens plc (contracting on a joint and several liability basis) (“the Infraco”), as it may be amended from time to time;

“Legislation”	means all rules, regulations, by-laws, directives, statutes and other binding provisions in force from time to time;
“Lothian Buses plc” or “Lothian Buses”	means the company incorporated under the Companies Acts and having its registered office at 55 Annandale Street, Edinburgh EH7 4AZ (Registered Number SC096849);
“Phase 1A”	means phase 1A as more particularly described in the Final Business Case;
“Phase 1B”	means phase 1B as more particularly described in the Final Business Case;
“Project”	means the delivery of the Tram System and the planning of an integrated tram and bus system in Edinburgh (incorporating Phase 1A and Phase 1B and any approved extension of the Tram System);
“Services”	means all the services to be provided by TEL as specified in this Agreement, including, without limitation, those specified in Schedule 1;
“tie Limited” or “tie”	means the company incorporated under the Companies Acts and having its registered office at City Chambers, High Street, Edinburgh (Registered Number SC230949);
“tie Operating Agreement”	means the operating agreement between tie and the Council dated of even date with this Agreement;
“Tram Acts”	means Edinburgh Tram (Line One) Act 2006 and the Edinburgh Tram

	(Line Two) Act 2006;
“Tram Project Board” or “TPB”	means the committee of the board of TEL established to oversee delivery of the Project; and
“Tram System”	means the tram system comprising Phase 1A and/or Phase 1B, as the context requires, as set out in the Final Business Case and as approved by the Council in terms of scope.

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

2. TEL’s Obligations

- 2.1 TEL hereby agree to provide the Services to the Council throughout the duration of this Agreement in order to assist in, carry out, promote, manage and administer the Project.
- 2.2 TEL shall ensure that all third party advisers and contractors engaged by it shall provide a direct duty of care to the Council in terms acceptable to the Council prior to carrying out any work in relation to the Project, failing which the appointment of any such third party will require the written approval of the Company Monitoring Officer.
- 2.3 TEL shall use best endeavours to ensure that it delivers the Project as set out in the Final Business Case. TEL shall use best endeavours to comply with all timescales and financial projections detailed in the Final Business Case. It is

acknowledged by the Council and TEL that the primary responsibility for delivery of the Tram System rests with the Limited. TEL will use best endeavours to support delivery of the Tram System so far as it can do within its powers and resources.

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

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

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

provided; and (ii) contractors or consultants not providing insurance cover and details of the authorisation obtained from the Council Monitoring Officer in this regard.

- 2.16 TEL shall use best endeavours to ensure best value when providing the Services and in the discharge of all of TEL's responsibilities. TEL shall use best endeavours to ensure best value in the use of funds or resources provided through or by the Council.
- 2.17 TEL shall continue to apply principles of good corporate governance and to adopt and adhere to the Council's Code on Corporate Governance (approved by the Council on 29 June 2006) as it may be amended from time to time.
- 2.18 TEL shall allow the Council, its auditors or the Council's other delegated appointees to examine the books, accounts and other records kept by TEL and shall supply the Council with such financial and other information as it may reasonably request from time to time to keep the Council fully informed about the business of TEL and to protect the Council's interests in relation to the terms of this Agreement. TEL will supply to the Company Monitoring Officer copies of all relevant TEL and other board papers in connection with the governance arrangements set out in Schedule 2.
- 2.19 TEL shall use best endeavours to ensure that it and all third parties it engages and/or contracts with to carry out any works shall at all times comply with all equalities legislation and shall act in a non-discriminatory manner.
- 2.20 The parties acknowledge the terms of the governance arrangements set out in Schedule 2 and TEL shall use best endeavours to comply with the governance diagram. The parties agree that where this Agreement refers to TEL reporting to, or obtaining approval from, the Council or as the case may be the Company Monitoring Officer, all such activity shall be made in accordance with this governance diagram. TEL shall establish the Tram Project Board as a Committee of the TEL Board and shall define the responsibilities of the TPB and shall delegate appropriate authority to the TPB to enable the TPB to carry out its responsibilities. The following matters will be for the TEL to determine and report to the Council as appropriate in terms of the governance arrangements set out in Schedule 2:

All matters affecting the programme, cost and scope of the Project except the following which are matters reserved to the Council:

- (A) (i) any actual or reasonably expected delay to the Project programme of greater than 3 months; or (ii) any actual or reasonably expected increase in cost of over £10m; relative respectively to the programme leading to commencement of revenue service by 31 July 2011 and capital cost of £512m (Phase 1A) or £87m (Phase 1B) as set out in the Final Business Case (or as subsequently approved by the Council prior to commitment by tie to the Infraco Contract); or (iii) notwithstanding the terms of (i) and (ii) above, any projected or actual overspend of the available funding budget (being £545 million) at any time (whether on an annual or overall basis); or (iv) any substantial change to the design, scope or service pattern set out in the Final Business Case; and
- (B) the settlement of any single claim in excess of £500,000, or series of claims in any 12 month period which would exceed in aggregate £1,000,000;

TEL may delegate responsibility for all matters other than those specified at A and B above to the TPB and the TPB may in turn delegate responsibility for all other matters to tie, but only to the extent that such delegation is already within the remit of tie in the context of the tie Operating Agreement. TEL agrees that it shall retain ultimate responsibility for all matters it so delegates.

- 2.21 TEL shall liaise with the Company Monitoring Officer, the Council, and any other bodies which the Council may specify, regularly and shall report to the Council on a four-weekly and annual basis with regard to financial matters and progress generally on the Project in a format acceptable to the Council. TEL will liaise with the Council and tie to ensure that duplication in reporting procedures is minimized.
- 2.22 Immediately that TEL becomes aware of the likelihood of delay to, or overspend in, the Project it will ensure that notification is given to the Company Monitoring Officer at the earliest opportunity, informing them of the reasons for the potential delay or overspend and detailing any measures (together with costs) which may mitigate such potential delay or overspend.
- 2.23 Immediately TEL becomes aware that it requires a decision or information essential to the continuity of the Project from the Council to achieve key dates

- in the Project, TEL shall give notice of such requirement to the Company Monitoring Officer with full supporting information to mitigate any delay to the Project to the fullest extent possible.
- 2.24 The approval of settlement of claims referred to in clause 2.20 sub-clause (B) will be subject to the governance arrangements set out in Schedule 2.
- 2.25 TEL shall procure that it develops and has approved by the TEL board a remuneration policy setting out *inter alia* the benchmarks and procedures for proposed bonus achievement and the project milestone outcomes to which any such bonuses are linked. Such policy to be approved by the TEL board, through its Remuneration Committee, in advance of annual reporting periods as it will apply in the succeeding annual reporting period. TEL's board shall confirm annually to the Council Monitoring Officer that TEL's incentivisation arrangements are aligned to appropriate Project milestones. The remuneration package, including incentivisation arrangements, of the Chairman of TEL will on appointment require approval by the Chief Executive of the Council and thereafter be determined annually by the Remuneration Committee.
- 2.26 TEL will provide a business plan for approval by the Council on an annual basis.
- 2.27 TEL shall use best endeavours to ensure that it and all contractors engaged by it protect the Council's reputation all at times in matters relating to the Project.
- 2.28 TEL shall not novate or otherwise transfer any rights or obligations under any contractual arrangement which the Council has approved and to which TEL is a party without the prior written consent of the Company Monitoring Officer.
- 2.29 TEL shall comply with the terms of all agreements to which it is a party unless authorised in writing by the Company Monitoring Officer to do otherwise.
- 2.30 TEL shall produce a communications protocol in liaison with tie and have this approved quarterly in writing by the Company Monitoring Officer. The communications protocol will *inter alia* reflect the publicity arrangements referred to in Clause 2.5 of this Agreement.
- 2.31 TEL acknowledge that tie and the Project will be subject to an independent peer review panel concerning the management of the Project (including all the contract documentation) and TEL will implement all reasonable recommendations of the panel once approved under the governance arrangements set out in Schedule 2.

2.32 The parties acknowledge that the Infraco Contract contains Council obligations relating to the maintenance of roads and structures (which either form part of, or are integral to the safe and continuous operation of, the Tram System) which require performance by the Council. TEL undertakes to assist the Council in its discharge of these responsibilities which are identified at Section 40 of the Employer's Requirements in the Infraco Contract. The Council undertakes to carry out the required works and services timeously and to the requisite standard in observance of its statutory powers and duties, subject always to any appropriate budgetary constraints.

3. Council's Obligations and Delegation

3.1 In order to facilitate TEL's role in the delivery of the Project, TEL is authorised to operate the delegated authority structure set out in Clause 2.20 in this Agreement, such delegations confirmed for the purposes of the Council's statutory obligations pursuant to the Tram Acts. TEL is further authorised to accept assignation from tie Limited of those contractual agreements previously entered into by tie Limited at a time to be determined by the Council on recommendation from TEL and tie limited, but only to the extent that no material additional obligations, risks or liabilities are created beyond those for which tie Limited is, or would in due course, become responsible for under the contractual agreements to be assigned.

3.2 The Council agrees to guarantee TEL's financial obligations in relation to certain aspects of the Project on terms acceptable to the Council.

3.3 On the basis that TEL has, in the reasonable opinion of the Council, provided adequate evidence that expenditure has been properly and appropriately incurred in relation to the provision of the Services and the Project, the Council will release the funding, or procure that tie releases the funding, which it has secured for such expenditure and shall pass funding to TEL or to tie as appropriate to allow TEL to discharge its obligations in terms of this Agreement.

3.4 The Council will nominate a Council officer to act as a liaison point for day-to-day communication between TEL and the Council.

- 3.5 The Council will appoint a Company Monitoring Officer. The first Company Monitoring Officer will be the Director of City Development or the Director of Finance. The Council will procure, with the approval of the TEL Board, that the Council Monitoring Officer will be a Director of TEL and a member of the Tram Project Board.
- 3.6 The Company Monitoring Officer will be responsible for determining what approval is required from within the Council to allow them to give any consent or recommendation required in terms of this Agreement. The parties acknowledge that the Company Monitoring Officer may require to obtain approval of their proposed actions from the full Council or from a relevant committee or sub-committee as appropriate.
- 3.7 The Council will ensure that, in the Council's opinion, adequate personnel are made available to the Project to fulfill the Council's role in relation to the Project and that all such personnel shall use reasonable skill and care in executing their responsibilities.
- 3.8 The Council acknowledges that TEL may work on other projects in addition to the Project, but TEL will use best endeavours to manage such projects in order that they do not conflict with the terms of this Agreement. Any work to be executed by TEL on projects other than the Project must be approved by the Company Monitoring Officer in advance of commitment by TEL.
- 3.9 The Council agrees to waive its rights to claim against any director, officer or employee of TEL, save in respect of any criminal, fraudulent or willfully negligent action of any such person. This waiver shall not apply to any contractor or consultant engaged by TEL operating in any such role as director or officer.
- 3.10 The parties acknowledge that one of the main purposes of establishing TEL and its sister company tie is to facilitate the integration of the operation of trams and buses in the City of Edinburgh and to assist the Council, tie, Lothian Buses plc and TEL to function as a single coordinated entity in the delivery, management, operation and ownership of an integrated transport system. The Parties acknowledge that pursuit of these objectives is subject at all times to the Council's statutory responsibilities.

4. Term

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

5. Responsibility

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

6. Termination

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

7. Dispute Procedure

- 7.1 Any dispute or difference between the parties as to the meaning or intent of this Agreement or the implementation thereof or as to any other matter in any way arising out of or in connection with this Agreement shall be referred to the decision of an Arbiter to be mutually agreed between the parties or, failing agreement, to be appointed by the President for the time being of the Law Society of Scotland. The decision of such Arbiter shall be final and binding on both parties. The application of Section 3 of the Administration of Justice (Scotland) Act 1972 is hereby expressly excluded.

8. Transfer and Sub-contracting

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

9. Notices

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

10. Freedom of Information

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- 10.1 The parties acknowledge that they will fully comply with, and will assist each other in complying with, the terms of the Freedom of Information (Scotland) Act 2002 ("FOISA"). Insofar as compliant with FOISA, the parties agree to keep confidential all appropriate matters relating to the business and operations of TEL.

11. Nature of Relationship

- 11.1 Nothing in this Agreement shall create a relationship of agency (save where the Council expressly authorises TEL to act as its agent) or partnership between the parties with regard to its subject matter.
- 11.2 Save as otherwise provided, nothing in the Agreement shall prejudice or affect the Council's rights, powers, duties and obligations in the exercise of its functions as a local authority or in terms of any Legislation or relieve TEL from obtaining any approvals or consents required from the Council in any capacity in terms of any Legislation.

12. Entire Agreement and Variations

- 12.1 This Agreement and the attached schedules constitute the entire agreement between the parties in relation to their subject matter. Each party confirms that it has not relied upon any representation, undertaking or warranty not recorded in this document in entering into this Agreement. No variation of this Agreement shall be effective unless confirmed in writing and signed by authorised signatories of both parties to this Agreement. The terms of this agreement supersede the terms of any prior agreement between the parties.
- 12.2 If any ambiguity or conflict arises between the terms of this Agreement and those of TEL's articles of association then, to the fullest extent permitted by law, the terms of this Agreement shall prevail.

13. Severability

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

14. Waiver

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

15. Governing Law and Jurisdiction

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

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

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

Witness.....

Full Name..... Proper Officer

Address.....

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Subscribed for and on behalf of Transport Edinburgh Limited at _____ on _____ day
of _____ 2008

Director.....

Director/Secretary.....

SCHEDULE 1

Scope of Services

1.	Development of a fully integrated bus and tram service plan in advance of tram commissioning.
2.	Provide or procure the provision of accurate and current information to the Council for appropriate decision making and approvals
3.	Address with the Council the funding and related implications of Phase 1B
4.	Develop and agree a communication strategy with tie and the Council and provide effective communications, consistent with this strategy
5.	Plan and manage the interface with tie in order to deliver a smooth handover for operations
6.	Carry out other duties as instructed by the Council in relation to the Project
7.	Act on efficiently and effectively all formal instructions issued by the Council in relation to the Project

Schedule 2
Governance Diagram

GOVERNANCE STRUCTURE

