

## PROJECT CARLISLE

## A MEMORANDUM OF UNDERSTANDING BETWEEN

**tie Limited and Infraco Parties (“the Parties”)**

**for the purpose of negotiating a Change to the Infraco Contract. (“the Negotiations”)**

## SECOND DRAFT FOR DISCUSSION

<b>General Obligations</b>	
Other than the General Obligations hereunder this Memorandum of Understanding places no legal obligation on the Parties or obligation to agree to or enter into any procedure to determine any dispute or difference which may arise from the Negotiations. Each party will bear all of their own costs of these Negotiations.	
1	These Negotiations will be on a strictly without prejudice basis and the Parties will agree that neither party will be able to rely on any issue, declaration, documentation or representation, implied or explicit, in any legal action, arbitration, adjudication, mediation or other form of negotiation.
2	These Negotiations will be kept strictly confidential and the Parties irrevocably agree that they will ensure that its employees, advisors, consultants and agents do not use any of the declarations, documentation or representations, implied or explicit, for any purpose other than these Negotiations.
3	These Negotiations will not prevent or restrict the Parties from relying on and pursuing their rights in Law and Contract until such time as the Parties may eventually agree to vary such rights under binding agreement.
4	The rights and obligations that tie has under Public Law, to CEC and Transport Scotland, and under the Trams Acts will at all times be paramount in these Negotiations.
5	These Negotiations will not relieve any Infraco Party of their joint and several responsibilities to certify that the Design and Construction of the Infraco Works are in accordance with the terms of the Infraco Contract and “fit for purpose”, and to obtain unqualified certification by the Independent Competent Person at the time of testing and commissioning and full Service Commencement.
6	It is agreed that the intention of the Parties is that until one gives the other a written notice that they consider the Negotiations to have irrevocably broken down they will work together in mutual cooperation until such time as tie may be able to issue a tie Change Order on agreed terms (referred to as the “Change of Scope Order”)
<b>Genesis of Understanding</b>	
This Memorandum sets out the origin of the issues to be addressed and the formation of the method of resolving them. Although they may in part be reflected firstly in Heads of Terms and thereafter in a tie Change Order they are not intended to be irrevocable statements of intent.	

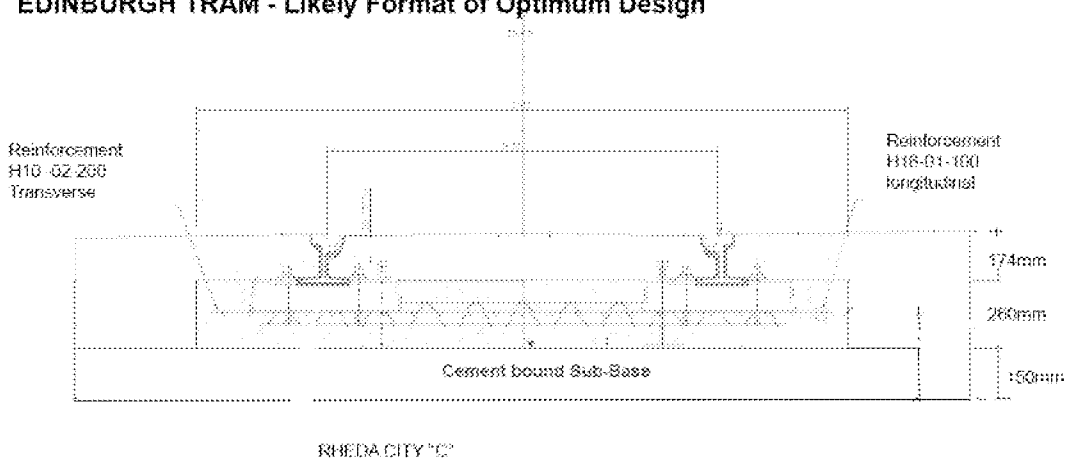
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6	It is agreed that <b>tie</b> and Infraco are both desirous of a Change which <u>inter alia</u> reduces the scope and content of the Infraco Works and settles differences between the parties as to the meaning of certain contractual provisions in the Infraco Contract. It is agreed that whilst the Infraco Contract makes provision for dealing with <b>tie</b> Changes (Clause 80) and Infraco Changes (Clause 81) there is no expressed mechanism to merge a <b>tie</b> Change with an Infraco Change.
7	The Parties intend to reach a wrap-up agreement for the Changes to Off-street Works and to resolve the issues relating to the On-street Civil Engineering Works which were the subject to the proposed OSSA and circumstances which <b>tie</b> acknowledge give Infraco entitlement to Compensation.
8	It is agreed that design for the Infraco Works from Haymarket to the Airport, including those arising from Specified Exclusions, has been developed to the point where Infraco can determine a Guaranteed Maximum Price for those works.
9	It is agreed that it is desirable that "Issued for Construction Drawings" should have completed the Integrated Design Check and take account of only those circumstances and physical conditions known at the time of issue of the permit for construction to commence. Such conditions being comparable with the optimum Track Base Case defined below and which would permit Infraco to issue an Assurance Statement as part of satisfying their obligations under Clause 8..
10	It is agreed that for the On-street Works approval by Approval Bodies and by <b>tie</b> should be constantly kept under Design Review in response to any change caused by unforeseen circumstances and physical conditions. Such review should not create a transfer of risk to <b>tie</b> /ETL/CEC from Infraco Parties without the expressed agreement of <b>tie</b> .
	It is agreed that the terms and conditions of the Infraco Contract are <u>inter alia</u> preventing the Parties from arriving at a mutually agreed method of working and that <b>tie</b> are therefore unwilling to issue further Permits to Commence Works for On-street Works.
11	In response to experience in Princes Street <b>tie</b> desires to study and evaluate a "best practice" value engineered solution to constructing the track and its foundations for the missing link between the Off-street Works and the already constructed section in Princes Street. To permit this it is agreed that the appropriate method of valuing Infraco's entitlement would be on the basis of reimbursement of cost, with an allowance for overheads and profit. To obtain best value, it is agreed that <b>tie</b> will be able to assume direct control of certain Civil Engineering Works by stepping into Infraco's benefits and burdens with their proposed Key-subcontractors.
12	It is also agreed that unless the study demonstrates that Infraco could carry out the Civil Engineering Works in a manner consistent with the Contract Price they would be entitled to an addition to that Contract Price. This agreement to truncate the scope of the Infraco Contract is intended to permit <b>tie</b> to obtain new prices for completing On-street Civil Engineering Works under terms and conditions which are consistent with current best practice and the owners' obligation to obtain whole life best value. It will therefore be based on current prices, taking account of delays caused by late utility diversions and the increased competitive tension being caused by the recession.
14	It will be of the essence to such a <b>tie</b> Change Order that <b>tie</b> issue a conditional Permit to Commence Works for On-street Works included in the Revised Scope.

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15	It is of the essence that for all Works (including those which are assumed by <b>tie</b> ) Infraco and Infraco Parties prepare and sign-off the necessary "Case for Safety" which will permit the Independent Competent Person, <b>tie</b> and Edinburgh Trams fulfil their responsibilities under inter alia the <i>Railway and Other Guided Transport Systems (Safety) Regulations 2006</i> .
16	It is an essential requirement of these Negotiations that Infraco Parties make full and open disclosure of any Deliverables required by <b>tie</b> to Complete the Variation Report.
<b>Definitions</b>	
Any term referred to in this Minute of Agreement which is not defined hereunder will have the same meaning as is ascribed to it in the Infraco Contract.	
a	<b>"Civil Engineering Works"</b> means those works included in the Construction Works Price and all works to construct the Trackslab referred to in Pricing Assumption 28.
b	<b>"Compromise Change"</b> means any change which is subject to an INTC as at 30 April 2010.
c	<b>"Cost Plan"</b> means an analysis of the Contract Price including gross margin of individual elements of work(positive and/or negative), allowance for overheads and profit.
d	<b>"Design Review"</b> will have the meaning given to it in the Infraco Contract plus a joint study of best practice including discussion with Independent Competent Persons.
e	<b>"Enabling Works"</b> means those Works listed in the attached Schedule.
f	<b>"Guaranteed Maximum Price"</b> means a fixed, lump sum price which is only subject to variation by a <b>tie</b> Change valued in accordance with Revised Clause 80.
g	<b>"Issued for Construction Drawings"</b> means those Deliverables necessary for the Infraco to commence construction of the relevant part of the Infraco Works and as shown on the Design Delivery Programme which have been fully approved by all Approval Bodies and in accordance with the Review Procedure.
g	<b>"Negotiations"</b> means any discussions, written submissions and declarations made by one party to the other in pursuance of this Memorandum of Understanding.
h	<b>"Revised Contract Price"</b> means a Guaranteed Maximum Price which includes for: <ul style="list-style-type: none"> <li>▪ Infraco having full responsibility for carrying out and completing the revised Infraco Works including their design and certifying that design in accordance with the Employer's Requirements, including but not exclusively liability caps, PCG's, Collateral Warranties and Bonds.</li> <li>▪ <b>tie</b> having instructed on all items of work which are Specified Exclusions.</li> <li>▪ Deletion or revision of terms and conditions which are no longer relevant</li> <li>▪ Agreed Sectional Completion Dates – with Liquidated Damages.</li> <li>▪ No Incentivisation.</li> <li>▪ Commercial Adjustment recognising transfer of risk.</li> <li>▪ Subject to a <b>tie</b> Change Order on agreed terms.</li> </ul>

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i	<b>“Revised Scope of Works”</b> means the designing, carrying out, commissioning and maintaining the Infraco Works between the Airport and the Terminal Point, and the Enabling Works.
j	<b>“Section A”</b> will have the meaning in the Infraco Contract
k	<b>“Section B”</b> will have the meaning in the Infraco Contract
l	<b>“Section C1”</b> will have the meaning in the Infraco Contract for Section C but for Airport to Haymarket (east end of Haymarket Viaduct)
m	<b>“Section C2”</b> will have the meaning in the Infraco Contract for Section C but for Airport to Princes Street.
n	<b>“Section C3”</b> will have the meaning in the Infraco Contract for Section C but for Princes Street to the Terminal Point.
o	<b>“Section D1”</b> will have the meaning in the Infraco Contract for Section C but for Airport to Haymarket (east end of Haymarket Viaduct)
p	<b>“Section D2”</b> will have the meaning in the Infraco Contract for Section C but for Airport to the Terminal Point.
q	<b>“Section D3”</b> will have the meaning in the Infraco Contract for Section C but for Princes Street to a terminus in Picardy Place (location to be determined)
r	<b>“tie Completion Date”</b> means any programmed completion date agreed by the Parties for works executed under tie’s Step-in Rights.
s	<p><b>“Track Base Case”</b> means the design for Trackslab and its foundation shown by:</p> <p style="text-align: center;"><b>EDINBURGH TRAM - Likely Format of Optimum Design</b></p>  <p style="text-align: center;">RHEDA CITY "C"</p>
t	<b>“Terminal Point”</b> means a convenient location agreed by the Parties between Princes Street and Picardy Place to terminate the Infraco Works.
u	<b>“Variation Report”</b> means a report prepared by tie and advisors to tie for the purposes of supporting and explaining the Change of Scope Order. Such Report will include, but may not be

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	<p>limited to:</p> <ol style="list-style-type: none"> <li>1. A specification and contract sum analysis for the deduction amount to the Contract Price for the off and on street works.</li> <li>2. A specification and contract sum analysis for the Guaranteed Maximum Price for the revised design/specification of the Off and On street works.</li> <li>3. Demonstration that Issued for Construction Drawings have been prepared on the basis of achieving Best Value and have been value engineered.</li> <li>4. A fully detailed Risk Assessment which identifies any change in allocation of risk.</li> </ol>
<b>Revised Scope</b>	
13	<p>Includes:</p> <ul style="list-style-type: none"> <li>▪ All work from the Terminal Point to the Airport; and</li> <li>▪ Enabling Works on or adjacent to the Forth Port's Estate.</li> <li>▪ Provision of all Trams</li> <li>▪ Testing, Commissioning and Maintenance.</li> <li>▪ Certification leading to full Service Commencement as provided under the Infraco Contract.</li> </ul> <p>Excludes:</p> <ul style="list-style-type: none"> <li>▪ All work from Terminal Point to Newhaven.</li> <li>▪ Gogar Interchange.</li> </ul>
14	<p>Subject to a <b>tie</b> Change Order <b>tie</b> will have the following options:</p> <ul style="list-style-type: none"> <li>▪ Purchase unused equipment from Siemens</li> <li>▪ Provisional contract with Siemens to provide E&amp;M from Terminal Point to Newhaven.</li> <li>▪ Provisional contract with Siemens and CAF to Commission and Maintain from the Terminal Point to Newhaven.</li> </ul>
<b>Step-in rights for tie</b>	
15	<p>Infraco will give <b>tie</b> an irrevocable price adjustment to the Contract Price which would be instigated by either <b>tie</b> or Infraco exercising step-in-rights [on terms to be agreed] for the following works:</p> <ul style="list-style-type: none"> <li>▪ Civil Engineering Works from Haymarket Viaduct to the Terminal Point</li> <li>▪ Remedial Work to Princes Street</li> </ul> <p>Note: Step-in will be subject to an agreed deduction in Contract Price and subject to agreement of a <b>tie</b> Completion Date.</p>
<b>Revisions to Infraco Contract</b>	
<u>Schedules</u>	
16	The Parties agree that the Revised Contract Price is in full and final settlement of all claims

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	for extension of time and compensation Infraco may have notified or may have had grounds for and agree that the purpose of the following Schedules is no longer extant:		
16.1	Delete – Schedule Part 4 and 15 including references in the Terms and Conditions.		
16.2	Other than as referred to in item 9 above delete Schedule Part 14.		
16.3	Schedule Part 5 to be revised to reflect the terms conditions and price adjustment.		
<u>Terms and Conditions</u>			
17	The Parties agree that the Revised Contract Price is in full and final settlement of all claims for extension of time and compensation may have notified or may have had grounds for and agree that the purpose of the following Terms and Conditions is no longer extant:		
17.1	Delete Clauses 60.2 to Clause 60.7 inclusive and replace with:  60.2 The Infraco shall update and submit to <del>tie</del> the Programme on the last Friday of each calendar month showing any change to the Programme showing the revised order or manner in which the Infraco proposes to carry out the Infraco Works.  Renumber Clauses 60.8 and 60.9 60.3 and 60.4 respectively.		
17.2	Delete Clause 61.8		
17.3	Delete Clause 80 and replace with the attached revised Clause 80.		
BSC	[Possible revision of Clause 34.1]		
<u>Compensation Events</u>			
17.4	Add Compensation Event (y) delay arising from completion of step-in works being completed later than the agreed <del>tie</del> Completion Date.		
17.5	Delete Compensation Events (t) and (u)		
<u>Previous extensions of time</u>			
18	Previous extensions of time will be rescinded and replaced by dates agreed under item 18 below.		
<u>Completion</u>			
19	The dates for Completion and Liquidated Damages will be revised: [to be agreed]		
19.1	Section A	25 March 2011	
19.2	Section B	25 March 2011	
19.3	Section C1	25 November 2011	
19.4	Section C2	25 November 2011	
19.5	Section C3	30 September 2011	

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19.6	Section D1	25 May 2012	
19.7	Section D2	25 May 2012	
19.8	Section D3	30 March 2012	

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## Appendix 1

### NOTES FOR GUIDANCE – VALUATION RULES FOR THE GUARANTEED MAXIMUM PRICE

<p>Agreement of the Guaranteed Maximum Price will be conducted by the Parties in the spirit inter alia prescribed by Clause 6 of the Infraco Contract. In particular the Parties agree to:</p> <ul style="list-style-type: none"> <li>i. approach all Permitted Variations on a collaborative and Open Book Basis;</li> <li>ii. use reasonable endeavours to avoid unnecessary complaints, disputes and claims against or with the other Party;</li> <li>iii. not interfere with the rights of the other Party in performing its obligations under this Agreement, nor in any other way hinder or prevent the Second Party from performing those obligations or from enjoying the benefits of its rights;</li> <li>iv. take all reasonable steps to manage, minimise and mitigate any foreseeable losses and liabilities of the other Party.</li> </ul>	
1	The Contract Price for the proposed Revised Scope of Infraco Works will be explained by disclosure of a full Cost Plan (with separate sections for On-street and Off-street Works) including overheads and profit.
2	The Cost Plan will be adjusted for an aggregate sum agreed by the Parties in respect of Compromise Changes and the current interim valuation of tie Change Orders to the Off-street Works. The valuation of such Compromise Changes will be arrived at by applying the following valuation rules:
	<ul style="list-style-type: none"> <li>i. by measurement and valuation at the rates and prices for similar work in Appendix F to Schedule Part 4 (<i>Pricing</i>) or Schedule Part 7 (<i>Maintenance Contract Price Analysis</i>) as the case may be in so far as such rates and prices apply;</li> <li>ii. 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;</li> <li>iii. 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.</li> </ul>
3	The Cost Plan for On-street Works will not be adjusted.
4	The Cost Plan will not include for any Loss and Expense.
5	The Parties will agree a sum to be added or deducted to the Cost Plan to reflect the benefit or burden of transfer of risk between the Parties.
6	The Parties will agree a sum to be added or deducted to the Cost Plan to reflect the agreed commercial benefit to the Parties arising from the Revised Scope of Works.

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## Appendix 2

## DRAFT REVISED CLAUSE 80 - TIE CHANGES

80.1	Unless expressly stated in this Agreement or as may otherwise be agreed by the Parties, <b>tie</b> Changes shall be dealt with in accordance with this Clause 80 ( <b>tie</b> Changes). If <b>tie</b> requires a <b>tie</b> Change, it must serve a <b>tie</b> Notice of Change on the Infraco.
80.2	A <b>tie</b> Notice of Change shall set out the proposed <b>tie</b> Change in sufficient detail to enable the Infraco to give <b>tie</b> an Estimate in accordance with Clause 80.4 below.
80.3	Within 18 Business Days after having received a <b>tie</b> Notice of Change (or such longer period as may be agreed by <b>tie</b> (acting reasonably), the Infraco shall deliver to <b>tie</b> the Estimate which include the opinion of the Infraco (acting reasonably) in all cases:
80.3.1	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 <b>tie</b> Change;
80.3.2	any impact on the performance of the Infraco Works and the performance of the Edinburgh Tram Network;
80.3.3	any impact on the Programme and any requirement for an extension of time;
80.3.4	any Consents, Land Consents and/or Traffic Regulation Orders (and/ or any amendment or revision required to existing Consents, Land Consents and/ or Traffic Regulation Orders) which are required in order to implement or as a result of the implementation of the proposed <b>tie</b> Change and any update of the Consents Programme which will be required as a result;
80.3.5	any new agreements with third parties which may be required to implement the <b>tie</b> Change;
80.3.6	any amendment required to the Agreement or the Key Subcontracts as a result of the implementation of the proposed <b>tie</b> Change;
80.3.7	the proposed method of delivery of the proposed <b>tie</b> Change;
80.3.8	proposals to mitigate the impact of the proposed <b>tie</b> Change;
80.3.9	confirmation of the changes to the terms of this Agreement and/or the SDS Contract proposed by <b>tie</b> and any further changes the terms of this Agreement and/or the SDS Contract necessary to give effect to the proposed <b>tie</b> Change; and
80.3.10	any increase or decrease in any sums due to be paid to the Infraco under this Agreement (including the value of any Milestone Payments and the scheduling of such Milestone Payments) in order to implement, and as a direct consequence of implementation of, the <b>tie</b> Change, such increase or, decrease to be valued in accordance with Clause 80.7.
80.4	In the event that the Infraco is unable to give the Estimate in whole or part they should inform <b>tie</b> within 18 Business Days after having received a <b>tie</b> Notice of Change (or such longer period as may be agreed by <b>tie</b> (acting reasonably giving clear reasons why they

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	are unable to do so.
80.5	Where the proposed <b>tie</b> Change, in the opinion of the Infraco acting reasonably, impacts the ability to deliver the Maintenance Services in accordance with Clause 52 (Maintenance) the Estimate delivered pursuant to Clause 80.4 shall include any net increase or decrease in:
80.5.1	in the case of demonstrable impact (taking into account any impact of previously implemented <b>tie</b> or Infraco Changes) on routine maintenance activity:
80.5.2	the consequential change in labour resources and management time required for each affected maintenance element of the Infraco Works; and
80.5.3	the consequential change in materials, plant and equipment required; or
80.5.4	in the case of demonstrable impact (taking into account any impact of previously implemented <b>tie</b> or Infraco Changes) on renewals maintenance activity:
80.5.4.1	the scope of required renewals work or services and frequency of renewals;
80.5.4.2	the resulting change in labour resources and management time required for the renewal work; and
80.5.4.3	the resulting change in materials and plant and equipment (if any) used to effect the renewals.
80.6	As soon as reasonably practicable after <b>tie</b> receives the Estimate, the Parties shall discuss and agree the issues set out in the Estimate. From such discussions <b>tie</b> may modify the <b>tie</b> Notice of Change.
80.7	The valuation of any <b>tie</b> Changes made in compliance with this Clause 80 ( <b>tie</b> Changes) shall be carried out by <b>tie</b> as follows:
80.7.1	by measurement and/or valuation at fair rates and prices; and
80.7.2	if the value of the <b>tie</b> Change cannot properly be ascertained by measurement and/or valuation, the reasonable additional costs of the resources and labour employed thereon including a reasonable allowance for overheads and profit.
80.8	If the Infraco does not intend to use its own resources to implement any proposed <b>tie</b> Change, it shall demonstrate that it is appropriate to subcontract the implementation of such <b>tie</b> Change; and comply with Good Industry Practice with the objective of ensuring that it obtains best value for money when procuring any sub-contractor or Deliverable required in relation to the proposed <b>tie</b> Change.
80.9	If a <b>tie</b> Change requires a change in respect of design work to be carried out by the SDS Provider under the SDS Contract or any other change to the SDS Contract, the cost of such change will be valued in accordance with the terms of the SDS Contract and Infraco shall be allowed such time to perform its obligations under this Clause 80 as may reasonably be required to allow it to obtain information from the SDS Provider under the SDS Contract which Infraco may require in order to prepare an Estimate for such Change and any modifications thereto.

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80.10	The Infraco shall not be obliged to implement any proposed <b>tie</b> Change Order where: <b>tie</b> does not have the legal power or capacity to require the implementation of such proposed <b>tie</b> Change; or implementation of such proposed <b>tie</b> Change would:
80.10.1	be contrary to Law;
80.10.2	not be technically feasible;
80.10.3	increase the risk of a non-compliance with this Agreement by the Infraco to the extent such risk is not capable of being addressed by relief from obligations given to the Infraco or by amendment to the terms of this Agreement;
80.10.4	be outwith the specific competence of the Infraco either in performing the activity required by the <b>tie</b> Change or in supervising an the Infraco Party to carry out the activity required by the <b>tie</b> Change;
80.10.5	5 where the <b>tie</b> Change is instructed after the completion of Section D, require Infraco to carry out work and/or services that are not transport infrastructure and maintenance related to be performed after completion of Section D; or
80.10.6	make the provision of the Maintenance Services by the Infraco financially unfeasible.
80.11	<b>tie</b> may issue a <b>tie</b> Change Order at any time to the Infraco and such the Change Order shall be issued pursuant to Clause 34.1. Infraco shall commence work in respect of a <b>tie</b> Change and the Infraco will be entitled to payment valued in accordance with Clause [ ] on an interim basis for work carried out by them in compliance with the <b>tie</b> Change Order.
80.12	The Infraco shall not be entitled to any extension of time, payment or relief in respect of any <b>tie</b> Notice of Change affecting the construction of the Infraco Works or the delivery of the Maintenance Services if and to the extent that:
80.12.1	with regard to construction, it would be reasonable to expect Infraco to have prevented or materially reduced the requirement for such <b>tie</b> Change, given the information known to Infraco at the time; and
80.12.2	with regard to Infrastructure Maintenance Services, it would have been reasonable to expect the Infraco to have foreseen that a physical deficiency or defect in the Infraco Works would, despite continual planned maintenance, lead to the requirement for a <b>tie</b> Change which could have been prevented or materially reduced by earlier intervention by <b>tie</b> and Infraco has failed to report such deficiency or defect in the Infraco Works in a timely fashion to <b>tie</b> .

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### Appendix 3

<b>Project Carlisle Programme – Key Dates</b>			
The following are key dates only and assume that the Parties will have more detailed programmes for implementation.			
	<b>Action</b>	<b>By Who</b>	<b>By When</b>
1	Agree this Minute of Agreement	Both	7 May 2010
2	Chairmen's confirmation	Both	7 May 2010
3	Mobilise teams	Both	7 May 2010
4	Summarise status of design	<b>tie</b>	11 May 2010
4	Joint team briefings	Both	12 May 2010
5	Agree Design Programme	Both	14 May 2010
6	Agree Terminal Point	Both	25 May 2010
7	Agree Enabling Works	Both	25 May 2010
8	Agree Step-in terms	Both	25 May 2010
9	Infraco to submit adjustment to Contract Price	Infraco	28 May 2010
10	Agree revised Sectional Completion Dates	Both	28 May 2010
11	Confirm compliance with Public Law	Both	21 May 2010
12	Joint best practice study	Both	21 May 2010
13	Preparation of Variation Report by <b>tie</b>	<b>tie</b>	4 June 2010
14	Confirmation of "fit for purpose" design by Infraco Parties.	Infraco	28 May 2010
15	Agree step-in and any revisions to SDS Agreement.	Both	7 June 2010
16	Carry out Risk report for <b>tie</b> Board	<b>tie</b>	7 June 2010
18	Issue all outstanding Design Assurance Statements	Infraco	11 June 2010
19	Infraco to obtain Board Approval subject to Contract	Infraco	11 June 2010
20	<b>tie</b> to obtain Stakeholder and Board approval subject to Contract	<b>tie</b>	16 June 2010
21	Issue all outstanding key Method Statements	Infraco	17 June 2010
22	Finalisation of agreed <b>tie</b> Change Order.	Both	18 June 2010
23	Jointly Agreed Announcement	Both	21 June 2010

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