

DRAFTING PROPOSALS - 23 NOVEMBER

TIE CHANGES and SMALL / ACCOMMODATION WORKS CHANGES

DEFINITIONS

"**tie Change**" means any addition, modification, reduction or omission in respect of the [Infraco Works]¹ or any other term of this Agreement instructed in accordance with Clause 80 (**tie Changes**) or expressly stated to be treated as a **tie Change** under this Agreement, excluding any Small Works Change or any Accommodation Works Change which shall be dealt with in accordance with Clauses 82 (*Small Works Changes*)² and Clause 83 (*Accommodation Works Changes*);

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80. TIE CHANGES³

80.1 Unless expressly stated in this Agreement or as may otherwise be agreed by the Parties, **tie Changes** shall be dealt with in accordance with this Clause 80 (**tie Changes**). If **tie** requires a **tie Change**, it must serve a **tie Notice of Change** on the Infraco.

80.2 A **tie Notice of Change** shall:

80.2.1 set out the proposed **tie Change** in sufficient detail to enable the Infraco to calculate and provide the Estimate in accordance with Clause 80.4 below;

80.2.2 require the Infraco to provide **tie** within 18⁴ Business Days of receipt of the **tie Notice of Change** with an Estimate, [and specify whether any competitive quotes are required] COMPETITIVE QUOTES NOT ACCEPTED FOR IMS; and

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80.2.3 set out how **tie** wishes to pay (where relevant) for the proposed **tie Change**.

¹ Subject to revised definition of Infraco Works to exclude catch all "and/or all other obligations which the Infraco is required to comply with and which are set out in this Agreement" – previously agreed.

² Small Works Change to exclude changes which require input from SDS or Tramco. Suggest that the Small Works Change mechanism may be appropriate for use only during the construction period?

³ Tie to confirm that it accepts Clause 80.13 in BBS mark up of the contract of 22 November

⁴ SDS agreement allows 18 days plus 14 to discuss issues arising. Accordingly where SDS are involved in the change additional time will be required

80.3 If, on receipt of the **tie** Notice of Change, the Infraco considers (acting reasonably) that the Estimate required is too complex to be completed and returned to **tie** within 18 Business Days, then the Infraco shall, within 5 Business Days of receipt of such **tie** Notice of Change, deliver to **tie** a request for a reasonable extended period of time for return of the Estimate, such extended period to be agreed by the Parties, both acting reasonably.

80.4 As soon as reasonably practicable, and in any event within [18] Business Days after having received a **tie** Notice of Change (or such longer period as may have been agreed by the Parties, pursuant to Clause 80.3), the Infraco shall deliver to **tie** the Estimate. The Estimate shall include the opinion of the Infraco (acting reasonably) in all cases on:

80.4.1 whether relief from compliance with any of its obligations under this Agreement is required during or as a result of the implementation of the proposed **tie** Change;

80.4.2 any impact on the performance of the Infraco Works and the performance of the Edinburgh Tram Network;

80.4.3 any impact on the Programme and any requirement for an extension of time;

80.4.4 any Consents, 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 **tie** Change;

80.4.5 any new agreements with third parties which may be required to implement the **tie** Change;

80.4.6 any amendment required to the Agreement or the Key Subcontracts as a result of the implementation of the proposed **tie** Change;

80.4.7 the proposed method of delivery of the proposed **tie** Change;

80.4.8 proposals to mitigate the impact of the proposed **tie** Change; and

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80.4.9 ~~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) or additional amounts required to be paid to Infraco in order to compensate Infraco for additional costs and/ or risk incurred by Infraco as a result of the ~~to~~ implementation, and as a direct consequence of implementation of, the tie Change, such increase, decrease or additional amounts to be calculated in accordance with this Clause 80.~~

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80.4.10 ~~if Infraco accepts tie's proposal for payment, and , if not, Infraco's requirements in relation to payment.~~

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80.5 Where the tie 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 tie or Infraco Changes) on routine maintenance activity:

80.5.1.1 the labour resources and management time required for each affected maintenance element of the Infraco Works; and

80.5.1.2 the materials, plant and equipment required; or

80.5.2 in the case of demonstrable impact (taking into account any impact of previously implemented tie or Infraco Changes) on [renewals]⁵ maintenance activity:

80.5.2.1 the scope of required renewals- work or services and frequency of renewals; and

~~80.5.2.2 the labour resources and management time required for the renewal work;~~

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~~80.5.2.2~~ 80.5.2.3 materials and plant and equipment (if any) used to effect the renewals.

⁵ Clarification of what is intended by renewal required in the interpretation provisions, with reference to EN13306 – should not include new functionality

80.6 The valuation of any **tie** Changes made in compliance with this Clause 80 (*tie Changes*) shall be carried out as follows:

80.6.1 by measurement and valuation at the rates and prices for similar work in Schedule 5 (*Pricing Schedules*) or the Maintenance Pricing Schedules (as the case may be) in so far as such rates and prices apply;

80.6.2 if such rates and prices do not apply, by measurement and valuation at rates and prices deduced therefrom insofar as it is practical to do so;

80.6.3 if such rates and prices do not apply and it is not practicable to deduce rates and prices therefrom, by measurement and/or valuation at fair rates and prices; or

80.6.4 if the value of the **tie** Change cannot properly be ascertained by measurement and/or valuation, the value of the resources and labour employed thereon, as appropriate, in accordance with the basis of rates for provisional work set out in Schedule 5 (*Pricing Schedules*) or the Maintenance Pricing Schedules (as the case may be);

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provided that where any **tie** Change would otherwise fall to be valued under Clauses 80.6.1 and 80.6.2 above, but the instruction therefor was issued at such a time or was of such content as to make it unreasonable for the alteration or addition to be so valued, the value of the **tie** Change shall be ascertained by measurement and/or valuation at fair rates and prices.

80.7 The Infraco shall include in the Estimate evidence demonstrating that:

80.7.1 the Infraco has used all reasonable endeavours to minimise (including by the use of competitive quotes where appropriate NOT ACCEPTABLE FOR MAINTENANCE) any increase in costs and to maximise any reduction of costs;

80.7.2 the Infraco has, where required by **tie** and where appropriate and practicable, sought competitive quotes from persons other than the Infraco Parties in pursuance of its obligation under Clause 80.7.1 above NOT ACCEPTED FOR MAINTENANCE;

80.7.3 the Infraco has investigated how to mitigate the impact of the **tie** Change; and

80.7.4 the proposed **tie** Change will, where relevant, be implemented in the most cost-effective ~~economically advantageous~~ manner (taking into account the reasonable requirement of Infraco in relation to quality) including showing, where reasonably practicable, that when any expenditure is incurred, relevant Changes in Law that are reasonably foreseeable at the time of consideration of the specific **tie** Change and which relate to that **tie** Change have been taken into account by the Infraco.

80.8 If the Infraco does not intend to use its own resources to implement any proposed **tie** Change, it shall:

80.8.1 demonstrate that it is appropriate to subcontract the implementation of such **tie** Change; and

80.8.2 comply with Good Industry Practice with the objective of ensuring that it obtains best value for money when procuring any sub-contractor or Deliverable required in relation to the proposed **tie** Change.

80.9 As soon as reasonably practicable after **tie** receives the Estimate, the Parties shall discuss and agree the issues set out in the Estimate. From such discussions **tie** may modify the **tie** Notice of Change. In each case the Infraco shall, as soon as practicable, and in any event not more than [14]⁶ Business Days after receipt of such modification, notify **tie** of any consequential changes to the Estimate.

80.10 Subject to Clause 80.10.1, if the Parties cannot agree on the contents of the Estimate, then either Party may refer the Estimate for determination in accordance with the Dispute Resolution Procedure.

80.10.1 Where the Parties cannot agree on the content of an Estimate, and it is deemed by **tie** (acting reasonably) that the proposed **tie** Change is urgent and/or has a potential significant impact on the Programme **tie** shall determine a provisional Estimate and the Infraco shall, subject to Clause 80.11, carry out the proposed **tie** Change in accordance with such provisional Estimate. Either Party may refer the provisional Estimate for determination in accordance with the Dispute Resolution Procedure provided that such referral shall not allow the Infraco to

⁶ SDS allows SDS 14 days to respond – a longer period will be required under the Infraco Contract.

refuse to carry out such proposed **tie** Change in accordance with the provisional Estimate.⁷

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

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

80.11.2 NOT USED

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

80.11.3.1 be contrary to Law;

80.11.3.2 not be technically feasible;

80.11.3.3 increase the probability of a non-compliance with this Agreement by the Infraco; or

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

80.11.3.5 where the **tie** Change is instructed after the completion of Section D, require Infraco to carry out work and/or services of a different nature from the Infraco Works to be performed after completion of Section D;

80.11.3.6 reduce the Maintenance Contract Price by more than 20%

80.12 Subject to Clause 80.10.1, as soon as reasonably practicable after the contents of the Estimate have been agreed or determined pursuant to the Dispute Resolution Procedure **tie** shall:

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

80.12.2 withdraw the **tie** Notice of Change, in which case **tie** shall pay to the Infraco Infraco shall be entitled to claim in its next Application for

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⁷ There is no flow though of this provision in the SDS contract. Infraco cannot be obliged to carry out a change prior to an estimate being agreed if it involves SDS and they can not be obliged to begin working in such circumstances

Milestone Payment or applications of payment the reasonable costs incurred by the Infraco in complying with this Clause 80 in relation to that **tie** Notice of Change⁸.

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Subject to Clause 80.10.1, for the avoidance of doubt, the Infraco shall not commence work until instructed through receipt of a **tie** Change Order.

80.13 Subject to Clause 80.10.1, if **tie** does not issue a **tie** Change Order within [30-] ⁹days of the contents of the Estimate having been agreed or determined pursuant to Clause 80.10, then the **tie** Notice of Change shall be deemed to have been withdrawn.

80.14 As soon as reasonably practicable and in any event within [] Business Days of issue of a **tie** Change Order, the Parties shall enter into any document to amend this Agreement as may be required to give effect to the contents of the Estimate to which the **tie** Change Order relates and ~~Infraco shall be entitled to claim **ie** shall make payment to the Infraco of the amounts due to be paid to Infraco as a result of the implementation of the **tie** Change in accordance with Clause 67 (Payment in respect of Applications for Milestone Payments) or Clause 68 (Payment in respect of Maintenance Services) in its next Application for Milestone Payment or application for payment as relevant.~~

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Restrictions on Entitlements to Relief for tie Change

80.1480.15 The Infraco shall not be entitled to any extension of time, payment or relief in respect of any **tie** Notice of Change effecting the construction of the Infraco Works if and to the extent that it would be reasonable to expect Infraco to have prevented or materially reduced the requirement for such **tie** Change, given the information known to Infraco at the time.

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80.1580.16 If, having received instructions from **tie** or **tie's** Representative, the Infraco consider that compliance with those instructions would amount to a **tie** Change, the Infraco shall within 210¹⁰ Business Days of any instructions being received, notify **tie** of the same and, if it is agreed by the parties or determined pursuant to the Dispute Resolution Procedure that a **tie** Change would arise if

⁸ Clause 67 requires some adjustment to make clear that Applications for Milestone Payments include all amounts
⁹ 30 days is also the period in the SDS contract. A few days headroom under the Infraco Contract will be required.
¹⁰ Amended for consistency with Clause 80.16 – this is required to allow sufficient headroom under the SDSI contract

the instructions were complied with, **tie** may proceed with the instruction in accordance with this Clause 80 (*tie Changes*).

~~80.16~~80.17..... Any failure by the Infraco to notify **tie** within 20 Business Days of instructions being received that it considers compliance with such instructions from **tie** or **tie's** Representative would amount to a **tie** Change shall constitute an irrevocable acceptance by the Infraco that any compliance with **tie's** or **tie's** Representative comments shall be without cost to **tie** and without any entitlement to any extension of time or other relief.

~~80.17~~80.18..... Any failure by the Infraco to notify **tie** within 20 Business Days of becoming aware of any other matter or occurrence which could amount to a **tie** Change, shall constitute an irrevocable acceptance by the Infraco that in being instructed to deal with such matter or occurrence as a **tie** Change, the Infraco shall not be entitled to any costs, extension of time or other relief, in respect of such **tie** Change.

Third Party Agreements

~~80.18~~80.19..... Any agreement concluded by **tie** or a **tie** Party with a party whose private or commercial interests are affected by the Edinburgh Tram Network or the execution of the Infraco Works ~~of which the Infraco had no notice prior to the Effective Date which comes into effect after the Effective Date not included in Schedule 13~~¹¹ requiring any addition, modification, reduction or omission to or from the Infraco Works ~~or Infraco to accept any additional responsibility or risk~~ shall be dealt with as a **tie** Change, and the provisions of this Clause 80 shall apply mutatis mutandis, save that **tie** shall serve a notice on the Infraco (the "**TPA Change Notice**") in accordance with Clause 80.2 and references in this Clause 80 (*tie Changes*) to **tie** Notice of Change shall be read as a reference to TPA Change Notice.

~~80.19~~80.20..... Following service by **tie** of a TPA Change Notice, the Parties shall negotiate in good faith and acting reasonably to agree the ~~commercial adjustment to the Contract Price~~, if any, appropriate ~~to compensate Infraco~~ for the Infraco ~~to accepting~~ any additional responsibility or risk arising from the TPA Change Notice to the extent not reflected adequately through application

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¹¹ To be reviewed once Third Party Agreements issue has been resolved.

of Clause 80.5 ~~and taking into account the Infraco's acceptance of similar risk~~
with regard to agreements listed in Schedule 13 (*Third Party Agreements*)¹².

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81. INFRACO CHANGES

81.1 If the Infraco becomes aware of the need or desirability for a variation to the Infraco Works, the Infraco shall notify **tie** of the reasons for such variation and make proposals for the proposed variation in writing. **tie** shall be free to accept or reject any proposed variation as **tie** thinks fit, and the **tie** shall determine whether such proposal is dealt with in accordance with Clause 81.2 or Clause 81.3.

81.2 If **tie** wishes to proceed with a variation proposed by the Infraco, **tie** shall serve a **tie** Notice of Change on the Infraco and Clauses 80.2 to 80.13 ~~80.14~~ shall be adhered to by **tie** and the Infraco, provided that:

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

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

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

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

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

¹² It is not clear what this wording is intended to achieve.

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

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

82. SMALL WORKS CHANGES

82.1 In the event that **tie** or **tie's** Representative, by notice in writing to the Infraco, requests the Infraco to carry out any Small Works ~~(subject always to Clause 80.10)~~, the Infraco shall calculate the cost of them as follows:

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82.1.1 the labour element shall be calculated in accordance with ~~the Schedule of Rates~~ Schedule 5 (Pricing Schedules) or, where such rates are not applicable, in accordance with the rates which are fair and reasonable having regard to the nature of the Small Works requested;

82.1.2 the materials element shall be charged at the cost (excluding VAT) of the materials to the Infraco (net of all discounts) plus the percentage uplift as indicated in ~~the Schedule of Rates~~ Schedule 5 (Pricing Schedules); and

82.1.3 the plant element shall be calculated in accordance with Schedule 5 (Pricing Schedules) ~~the Pricing Schedule~~ or, where such rates are not applicable, in accordance with the rates which are fair and reasonable having regard to the nature of the Small Works requested;; and

82.1.4 the Sub-Contractor element shall be charged at the cost (excluding VAT) plus the percentage uplift as indicated in the Schedule 5 (Pricing Schedules) ~~Pricing Schedule~~

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

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

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

~~82.4 Infraco shall not be obliged to implement a Small Works Change in the circumstances where Clause 80.11 would have applied had the Small Works Change been a **tie** Change.~~

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~~82.482.5 Following completion of any Small Works by the Infraco in accordance with this Clause 82 (*Small Works Changes*), **tie** shall make payment to the Infraco of the costs included in the relevant Small Works Cost Notice in accordance with Clause 67 (*Payment in respect of Applications for Milestone Payments*) or Clause 68 (*Payment in respect of Maintenance Services*) as relevant and Infraco shall be entitled to claim the amounts due to be paid to Infraco as a result of the implementation of the Small Works Change its next Application for Milestone Payment or application for payment as relevant.~~

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83. ACCOMMODATION WORKS CHANGES

83.1 In the event that **tie** or **tie's** Representative, by notice in writing to the Infraco, requests the Infraco to carry out any Accommodation Works¹³ ~~(subject always to Clause 80.10)~~, the Infraco shall calculate the cost of them as follows:

83.1.1 the labour element shall be calculated in accordance with the Schedule of Rates ~~Schedule 5 (Pricing Schedules)~~ or, where such rates are not applicable, in accordance with the rates which are fair and reasonable having regard to the nature of the Accommodation Works requested;

¹³ Timings if this includes a design element to be considered

83.1.2 the materials element shall be charged at the cost (excluding VAT) of the materials to the Infraco plus the percentage uplift as indicated in ~~the Schedule of Rates~~ Schedule 5 (Pricing Schedules); and

83.1.3 the plant shall be calculated in accordance with the Schedule 5 (Pricing Schedules) Pricing Schedule or, where such rates are not applicable, in accordance with the rates which are fair and reasonable having regard to the nature of the Accommodation Works requested.; and

83.1.4 the Sub-Contractor element shall be charged at cost (excluding VAT) plus the percentage uplift as indicated in the Pricing Schedule

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

83.2 The Infraco and **tie** or **tie's** Representative shall agree the timing of any Accommodation Works so as to minimise any inconvenience to **tie** and/or the Infraco and/or disruption to the Programme. The Infraco shall take all reasonable steps to minimise the duration of any Accommodation Works. For the avoidance of doubt, the timing of any agreed Accommodation Works shall not be treated as forming part of the Programme and a separate programme for the completion of such Accommodation Works shall be agreed between **tie** and the Infraco (both Parties acting reasonably). For the avoidance of doubt, if any ~~Relief Event~~ Event or Compensation Event occurs and has an impact on the progress of the Accommodation Works, then any extension of time or relief granted in accordance with Clause 64 (Relief Events) or Clause 65 (Compensation Events) shall be granted in respect of the programme for the completion of the Accommodation Works not the Programme.

83.3 If, at any time within 5 Business Days following receipt by **tie** of an Accommodation Works Cost Notice pursuant to Clause 83.1, **tie** notifies the Infraco in writing that **tie** or **tie's** Representative wishes the Infraco to proceed with the Accommodation Works to which the Accommodation Works Cost Notice relates, the Infraco shall subject to Clause 18 carry out and complete such Accommodation Works in accordance with the said Accommodation

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Works Cost Notice and the relevant request pursuant to Clause 83.1 from **tie** in accordance with the programme agreed pursuant to Clause 83.2 but otherwise as soon as reasonably practicable.

83.4 Infraco shall not be obliged to implement an Accommodation Works Change in the circumstances where Clause 80.11 would have applied had the Accommodation Works Change been a **tie** Change.

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~~83.4~~ 83.5 Following completion of any Accommodation Works by the Infraco in accordance with this Clause ~~83~~ (*Accommodation Works Changes*), **tie** shall make payment to the Infraco of the costs included in the relevant Accommodation Works Cost Notice in accordance with Clause 67 (*Payment in respect of Applications for Milestone Payments*) or Clause 68 (*Payment in respect of Maintenance Services*) as relevant, and Infraco shall be entitled to claim the amounts due to be paid to Infraco as a result of the implementation of the Accommodation Works Change in its next Application for Milestone Payment or application for payment as relevant.

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