

REMEDIAL TERMINATION NOTICE

INFRACO DEFAULT (A): BREACHES EVINCING COURSE OF CONDUCT

1. Infraco Default (a)

- 1.1 The Infraco has breached its obligation under Clause 7.1 of the Infraco Contract to accept full responsibility for and to carry out and complete the Infraco Works fully and faithfully in accordance with the Infraco Contract.
- 1.2 The Infraco has breached its obligation under Clause 7.2 of the Infraco Contract to ensure that, in carrying out and completing the Infraco Works, the Infraco exercises a reasonable level of professional skill, care and diligence to be expected of a properly qualified and competent professional contractor experienced in carrying out works and services of a similar nature to the Infraco Works in connection with projects of a similar scope and complexity to the Edinburgh Tram Project.
- 1.3 Individually and cumulatively, these breaches materially and adversely affect the carrying out and completion of the Infraco Works.
- 1.4 This is an Infraco Default (a) under the Infraco Contract.

2. Nature of the Infraco Default which has occurred

- 2.1 The Infraco has demonstrated, and continues to demonstrate, an ongoing course of conduct which constitutes multiple repeated and unremedied breaches of the Infraco's obligations under the Infraco Contract, to the level that this course of conduct is materially and adversely affecting the carrying out and completion of the Infraco Works.
- 2.2 The course of conduct adopted by the Infraco is in breach of the duty of care owed by the Infraco to tie under the Infraco Contract and is a course of conduct which a properly qualified and competent professional contractor, experienced in carrying out works and services of a similar nature to the Infraco Works in connection with projects of a similar scope and complexity, and acting fairly and reasonably, would not have adopted.
- 2.3 This course of conduct manifests itself in the Infraco's approach to its performance of the Infraco Works and the discharge of the Infraco's obligations under the Infraco Contract and in the Infraco's specific failures to perform and to comply with these obligations.

2.4 Approach to the Infraco Works and the Infraco Contract

- 2.4.1 The Infraco has demonstrated, and continues to demonstrate, a course of conduct which comprises ongoing delinquent and obstructive behaviour and an obdurate refusal to work in mutual co-operation with tie to carry out and complete the Infraco Works and to achieve delivery of the Edinburgh Tram Project in accordance with the terms of the Infraco Contract.
- 2.4.2 The Infraco has demonstrated, and continues to demonstrate an ongoing course of conduct which is adversarial, aggressive and misrepresents facts and where the Infraco's positions have changed throughout the course of the Infraco Contract.

2.4.3 The Infraco operates as a dysfunctional consortium, contrary to its commitment under the Infraco Contract as a joint and severally liable entity, to the detriment of the carrying out and completion of the Infraco Works, the Infraco's relations with **tie**, as client under the Infraco Contract, and the reputation of the Edinburgh Tram Project.

2.4.4 This course of conduct has been evident since the execution of the Infraco Contract on 14 May 2008 and is ongoing.

2.5 Non delivery of the Infraco Works

2.5.1 The Infraco's conduct obstructs the successful delivery of the Infraco Works in accordance with the Infraco Contract.

2.5.2 The Infraco's rate of progress is too slow and cannot meet the standards of "due expedition" and "timely and efficient manner" under the Infraco Contract. After over 30 months of a 38 month Programme, only 24.3% of the Infraco Works have been completed. The Infraco has no contractually compliant Programme. The Infraco persistently refuses to comply with **tie**'s instructions and directions in relation to the inadequate speed of execution of the Infraco Works. Where the Infraco has notified an alleged Compensation Event, the Infraco does not continue with the completion of the Infraco Works as it is required to under the Infraco Contract. The Infraco will not continue with any works which are the subject of a **tie** Change or Notified Departure prior to the issue of a **tie** Change Order or the referral of the relevant Estimate (if there is one) to the Dispute Resolution Procedure.

2.5.3 The Infraco has not yet delivered a contractually compliant Design under the Infraco Contract. The delivery of Issued for Construction ("IFC") Drawings (including IFC Drawings for key structures) is repeatedly late. There is no assured, integrated design solution for on-street trackworks. This is a fundamental failure which goes to the root of compliance with the Infraco Contract (including the Employer's Requirements), and prevents contractually compliant delivery and completion of the Infraco Works.

2.6 Poor design and defective installation

2.6.1 The Infraco's misconduct includes disregard for the quality of the Infraco's delivery of the Infraco Works, in that the Infraco has installed defective works on Princes Street which the Infraco has failed to remedy.

2.6.2 The Design is often of poor quality, does not comply with the Employer's Requirements and is not fit for purpose, but the Infraco takes no measures to manage or sanction or correct the failings that cause this situation. The Design has not been prepared with the requisite level of skill and application of expertise required for a project such as the Edinburgh Tram Project and commensurate with the contractual duty of care. The Infraco has not managed the SDS Provider to provide the SDS Services in accordance with its obligations and commensurate with the contractual duty of care.

2.6.3 The Infraco's conduct demonstrates a disregard for the Deliverables which the Infraco is required to submit and maintain pursuant to the Infraco Contract. The Infraco has submitted and continues to submit to **tie** Deliverables which are unsatisfactory, fail to achieve the contract requirements and are contrary to Good

Industry Practice and the OGC's "Excellence in Construction" initiative and which fall below that which a properly qualified and competent professional contractor experienced in carrying out works and services of a similar nature to the Infraco Works in connection with projects of a similar scope and complexity, acting fairly and reasonably, would have delivered.

2.7 Lack of supervision

- 2.7.1 The ongoing course of conduct of the Infraco demonstrates abrogation of its duties in relation to supervising the carrying out and completion of the Infraco Works.
- 2.7.2 The Infraco failed to provide adequately qualified superintendence of the carrying out of the Infraco Works on Princes Street. The lack of adequate superintendence contributed to the installation of defective works on Princes Street.
- 2.7.3 The Infraco has breached its obligations to manage the SDS Provider and to ensure that the SDS Provider carries out the SDS Services in accordance with the SDS Agreement. The SDS Provider has failed to provide the SDS Services in accordance with the SDS Agreement. The Infraco has not enforced the contractual mechanisms available to it under the SDS Agreement to impose sanctions on poor performance or to ensure the correction of errors. The Infraco has not demonstrated that it has taken any meaningful steps to manage the SDS Provider or the progress of the SDS Services. The delivery of IFC Drawings is repeatedly late, often materially. There are instances where an entirely inadequate design has been proposed and the design has had to undergo redesign.
- 2.7.4 The Infraco's conduct demonstrates a lack of supervision and management over its supply chain, which is necessary to deliver the Infraco Works. After over 28 months, the Infraco does not yet have in place a set of approved Key Sub-Contractors. The Infraco has not procured Collateral Warranties for the benefit of **tie**, CEC and TEL from any of its Key Sub-Contractors in respect of Major Civils Works Contractors.

2.8 Disregard for contractual mechanisms

- 2.8.1 The Infraco's conduct demonstrates a disregard for the application of and adherence to the mechanisms included in the Infraco Contract to manage the Infraco Contract and the Infraco Works.
- 2.8.2 The Infraco has persisted in refusing to comply with the contractual mechanism included in the Infraco Contract to regulate **tie** Changes (including Mandatory **tie** Changes). The Infraco has demonstrated a course of conduct amounting to an abuse of the application of Clause 80, by: automatically notifying matters under the **tie** Change mechanism without demonstrating the appropriateness or why a matter is an alleged **tie** Change; persistently and systematically failing to meet the contractual obligations to deliver contractually compliant and timeous Estimates in relation to **tie** Changes; not complying with its mitigation obligations; and persistently submitting grossly overvalued and inflated Estimates. The Infraco evinces a non-collaborative and exploitative approach to the **tie** Change mechanism and the submission of Estimates. The Infraco refuses to recognise that its behaviour potentially puts **tie** in conflict with its duties of public accountability. The Infraco does not act fairly or reasonably.

- 2.8.3 The Infraco has persisted in refusing to comply with the contractual mechanism included in the Infraco Contract in relation to Compensation Events. The Infraco has demonstrated a course of conduct amounting to an abuse of the application of Clause 65, by submitting claims for Compensation Events without any evidence that an event satisfies the contractual tests for entitlement, often in the form of a standard letter; by refusing to substantiate claims; failing to produce any timely assessment relating to individual facts and circumstances; and consistently being late with submissions. The Infraco has refused on a blanket basis to provide **tie** with meaningful estimates of the effect of the alleged Compensation Event and any acceleration or mitigation measures adopted. This erodes **tie**'s ability to have trust in the Infraco's motive in applying for time and money and undermines **tie**'s position. The Infraco does not inform **tie** of other instances of delay to the Infraco Works which are not caused by alleged Compensation Events.
- 2.8.4 The Infraco has persisted in being obstructive and uncooperative in relation to the application of the audit mechanism in Clause 104 of the Infraco Contract, by conduct including: refusing to respond to questions asked, failing to provide information requested or taking an unreasonably long time to provide information requested; refusing to provide access as requested; and acting contrary to the commitments to work in mutual co-operation with **tie** in the carrying out of the Infraco Works, act fairly and reasonably and approach all actual or potential Permitted Variations on an Open Book Basis.
- 2.8.5 The Infraco has failed to establish at a staffed office and comply with the contractual mechanism to enable the verification of claims made by the Infraco under the Infraco Contract (including in respect of actual or potential Permitted Variations, Compensation Events, and any other claims for additional costs or expenses which the Infraco is claiming) by **tie**, **tie**'s Representative or their duly authorised representatives.
- 2.8.6 The Infraco has persisted in not complying with the contractual mechanism in Clause 28 for the approval of the form of sub-contract for Key Sub-Contractors.
- 2.8.7 The Infraco has failed to comply with the mechanism for design review and the review of Deliverables provided for in the Infraco Contract (the Design Review Procedure and Design Management Plan contained at Schedule Part 9). In respect of the civil engineering works forming part of the Infraco Works, the Design Review Procedure has been used inconsistently.

2.9 Performance of Contract

- 2.9.1 The Infraco's conduct comprises a disregard for the Infraco's obligations under the Infraco Contract and a serial and continuing delinquency regarding performance of the Infraco's obligations under the Infraco Contract.
- 2.9.2 There have been many, and continue to be many, breaches of the terms of the Infraco Contract by the Infraco. The Infraco's breaches of contract have been in respect of almost every aspect of project delivery: some are minor, some are material. The Infraco's breaches include breaches of the clauses of the Infraco Contract included in Appendix A of this Remediable Termination Notice.

2.10 Unwillingness to resolve difficulties or the Infraco's breaches

- 2.10.1 The Infraco's conduct has not demonstrated, and continues not to demonstrate, any willingness or engagement to resolve the difficulties and breaches of contract by the Infraco which arise.
- 2.10.2 **tie** has engaged in much discussion and correspondence with the Infraco in relation to the Infraco's individual and cumulative breaches and behaviour which evince this course of conduct. As at the date of this Remediable Termination Notice, discussion and correspondence has not been able to rectify the Infraco's course of conduct or improve the Infraco's approach to the Infraco Contract and the delivery of the Edinburgh Tram Project.
- 2.10.3 The lack of engagement and failure to act in partnership with **tie** is a tone which was set by the Infraco from the outset of the contractual relationship, for example, by the Infraco's unwillingness to attend and engage in the initial partnering workshops arranged by **tie** following contract signature to facilitate a collaborative partnering environment, and which spans many aspects of project delivery.
- 2.10.4 **tie** has sought to apply the audit process under Clause 104 of the Infraco Contract in order to request information and understand certain matters. Where **tie** has sought to undertake audits, the Infraco has consistently taken issue with the ability of **tie** to undertake the relevant audits and has been obstructive and uncooperative during the audit process and has failed on a number of occasions to provide the information requested. The Infraco's non-compliance with **tie**'s instructions and repeated requests and **tie**'s directions as part of the audit process in relation to the management of the design and design changes is the conduct which partly necessitated the need for the Remediable Termination Notice in respect of the Infraco's failure to provide **tie** with access to an extranet and failure to provide **tie** with information (issued on 9 August 2010) and the Remediable Termination Notice in respect of the Infraco entering into an agreement with the SDS Provider, without **tie**'s prior approval, which contractualises an approach to **tie** Changes (issued on 1 September 2010).
- 2.10.5 The Infraco demonstrates an approach to differences and disputes which is not constructive and which is contrary to the Infraco's obligations to work in mutual co-operation with **tie** and to use reasonable endeavours to avoid unnecessary complaints, disputes and claims and which is contrary to that which a properly qualified and competent professional contractor, acting fairly and reasonably, would take. The Infraco routinely grossly overvalues Estimates, refuses to provide information and explanation, refuses to provide reasons for why a matter is an alleged Notified Departure or alleged Compensation Event under the Infraco Contract and refuses to provide vouching for actual or potential Permitted Variations. On occasion, **tie** has turned to the contractual Dispute Resolution Procedure in order to seek to understand the Infraco's position.

2.11 Underperformance Warning Notices

- 2.11.1 Due to the Infraco's material breaches of contract, and the Infraco's persistent failure to rectify the breaches, the situation has become intolerable and **tie** has been obliged to issue Underperformance Warning Notices in accordance with the terms of the Infraco Contract. As at the date of this Remediable Termination Notice, **tie** has issued an Underperformance Warning Notice in respect of the

Infraco carrying out seriously defective works on Princes Street (issued on 9 August 2010) and an Underperformance Warning Notice in respect of the Infraco's failure to deliver to **tie** a contractually compliant Programme (issued on 8 September 2010).

2.12 Remediable Termination Notices

- 2.12.1 **tie** has been obliged to issue Remediable Termination Notices in accordance with the terms of the Infraco Contract in respect of the breaches by the Infraco listed at paragraphs 2.12.1.1 to 2.12.1.9 below. The Infraco had otherwise failed to rectify the breaches, despite repeated requests from **tie** on each over a period of time, to the extent that the Infraco's breaches were (individually and cumulatively) materially and adversely affecting the carrying out and completion of the Infraco Works. It is a measure of the seriousness as to how **tie** views these breaches and the Infraco's persistent failure to respond to and engage on, in any meaningful way, the concerns and requests of **tie**, as client and counterpart in a partnering contract, that these Remediable Termination Notices have had to be issued.
- 2.12.1.1 Remediable Termination Notice in respect of the installation of seriously defective works on Princes Street (issued on 9 August 2010);
- 2.12.1.2 Remediable Termination Notice in respect of inadequate and incompetent superintendence for the carrying out of works of Princes Street (issued on 9 August 2010);
- 2.12.1.3 Remediable Termination Notice in respect of the Infraco's failure to provide **tie** with access to an extranet and failure to provide **tie** with information (issued on 9 August 2010);
- 2.12.1.4 Remediable Termination Notice in respect of the Infraco's failure to deliver a contractually compliant Programme (issued on 16 August 2010);
- 2.12.1.5 Remediable Termination Notice in respect of the Infraco entering into an agreement with the SDS Provider, without **tie**'s prior approval, which contractualises an approach to **tie** Changes (issued on 1 September 2010);
- 2.12.1.6 Remediable Termination Notice in respect of the Infraco's ongoing failure to deliver a fully integrated, assured design for the on-street trackworks (issued on 8 September 2010);
- 2.12.1.7 Remediable Termination Notice in respect of the Infraco's failure to progress demolition works at Russell Road (issued on 21 September 2010);
- 2.12.1.8 Remediable Termination Notice in respect of the Infraco's persistent breach of the **tie** Change mechanism (issued on 30 September 2010); and
- 2.12.1.9 [Remediable Termination Notice in respect of the Infraco's failure to progress works in respect of Gogarburn Retaining Wall (issued on 30 September 2010).]

- 2.12.2 It is acknowledged that, in response to the Remediable Termination Notices listed at paragraphs 2.12.1.1, 2.12.1.2 and 2.12.1.3, the Infraco's position is that the Remediable Termination Notices are not justified. Notwithstanding, the Infraco submitted rectification plans in order to address the defaults included in 2.12.1.1 and 2.12.1.3 (by letters dated 17 September 2010, references: 25.1.201/KDR/6730 and 25.1.201/KDR/6732). **tie** rejects these. The rectification plan provided by the Infraco in respect of the Remediable Termination Notice at 2.12.1.1 does not contain the necessary approvals from the relevant Approval Bodies (or address how to achieve these); does not address all the defects present in materials and workmanship; is not technically sound; and is put forward without an integrated, assured and complete design relevant for the rectification works. For these reasons, the rectification plan is in itself a breach of contract. The rectification plan provided by the Infraco in respect of the Remediable Termination Notice at 2.12.1.3 is currently under review.
- 2.12.3 As at the date of this Remediable Termination Notice, the Infraco has not yet submitted rectification plans in respect of the Remediable Termination Notices listed at paragraphs 2.12.1.2 and 2.12.1.4 to 2.12.1.9.
- 2.12.4 The rectification plans for the Remediable Termination Notices at 2.12.1.2 (inadequate and incompetent superintendence on Princes Street) and 2.12.1.4 (failure to deliver a contractually compliant Programme) are both overdue.
- 2.12.5 The Infraco's conduct is contrary to that of a properly qualified and competent professional contractor. A properly qualified and competent professional contractor respecting partnering obligations and acting reasonably would have taken steps to resolve the defaults without the need for the client to issue notices of potential termination.

2.13 Disregard for the client's public accountability and best value

- 2.13.1 The Infraco has demonstrated and continues to demonstrate a total disregard for its commitments under the Infraco Contract to assist **tie** to secure best value in respect of the carrying out of the Infraco Works and make arrangements to secure continuous improvement in the way in which the Infraco Works are conducted having regard to the Project Vision and a combination of economy, efficiency and effectiveness. The Infraco has demonstrated and continues to demonstrate disregard for its obligations, specified throughout the Infraco Contract in respect of mitigating and minimising costs in the delivery of the Infraco Works, including in respect of actual or potential Permitted Variations and Compensation Events.
- 2.13.2 The Infraco has approached the **tie** Change mechanism and the Compensation Events mechanism with a course of conduct which demonstrates an exploitation of the Infraco's rights to potential entitlement and which demonstrates an approach to inflating claims made.
- 2.13.3 The Infraco has repeatedly refused to operate on an Open Book Basis in respect of actual or potential Permitted Variations and has demonstrated little attempt to seek to mitigate or minimise costs. The Infraco has demonstrated a course of conduct which seeks to maximise gain for the Infraco, without any fair and reasonable consideration for its contractual commitments to **tie**, as a publicly accountable body.

- 2.13.4 **tie** is aware that the Infraco has entered into an agreement with the SDS Provider, without **tie**'s approval, in breach of contract. The Infraco has refused to disclose this to **tie**. **tie** believes that the agreement contractualises the Infraco's and the SDS Provider's approach to design development and completion, delay in design production and actual and potential Permitted Variations, in a manner which is contrary to that anticipated and permitted under the Infraco Contract and which varies the SDS Provider's entitlement to payment under the Infraco Contract and the Infraco's entitlement under the Notified Departure mechanism in the Infraco Contract. Such approach disguises the true status and circumstances of the design programme and design product and conceals the true picture from **tie**. The existence of this agreement is evidence of a conjoined approach by the Infraco and the SDS Provider to abuse contractual entitlements which may be available to the Infraco and to hide this from **tie**.
- 2.13.5 The Infraco's conduct in respect of the public image and reputation of the Edinburgh Tram Network, **tie** and CEC is contrary to that required by the Infraco Contract and the Infraco's contractual commitment to work in mutual co-operation with **tie** and not wilfully detract from the image of **tie**, CEC and the Edinburgh Tram Project. The Infraco persistently engages with the media, without the approval of **tie**, disclosing Confidential Information. The Infraco has engaged with the media on occasions, without the approval of **tie**, misrepresenting information, which, as a result, discredits **tie** and the Edinburgh Tram Project. This conduct seriously undermines **tie**'s relationship with the Infraco and is contrary to the conduct which should be expected from a properly qualified and competent professional contractor experienced in carrying out works and services of a similar nature to the Infraco Works in connection with projects of a similar scope and complexity and acting fairly and reasonably.

3. Material and Adverse Effect

- 3.1 The Infraco's breaches, individually and cumulatively, as an ongoing course of conduct have a material and adverse effect on the carrying out and completion of the Infraco Works.
- 3.2 The material and adverse effect on the carrying out and completion of the Infraco Works, caused by the Infraco's course of conduct includes:
- 3.2.1 the Infraco Works not being carried out and completed in certain locations;
 - 3.2.2 the Infraco Works being delayed and the absence of a meaningful and contractually compliant Programme;
 - 3.2.3 the existence of defective works and works which are, or are capable of, creating hazards;
 - 3.2.4 works carried having shorter asset life than they ought to have had they been properly carried out in accordance with the Infraco Contract;
 - 3.2.5 works which have been carried out do not satisfy the necessary statutory requirements;
 - 3.2.6 works which have been carried out fall short of the contractual standards;

- 3.2.7 after over 28 months, no completed, assured and integrated design exists for the Edinburgh Tram Network, thereby making completion of the Infraco Works impossible;
- 3.2.8 the production of an inefficient and/or incompetent design which delays works commencement and completion and which impacts upon **tie's** rights to meet the requisite statutory requirements;
- 3.2.9 interference with **tie's** rights as client in respect of the Infraco Works under the Infraco Contract and the systematic substantial inflation of claims for additional costs;
- 3.2.10 denying **tie** the ability to understand and have visibility in relation to the Deliverables necessary for the carrying out and completion of the Infraco Works;
- 3.2.11 failure to mitigate the impact of Permitted Variations; and
- 3.2.12 the creation of considerable uncertainty regarding completion dates and out-turn cost.

4. Rectification Plan

- 4.1 **tie** looks forward to receipt of a comprehensive rectification plan from the Infraco addressing this Infraco Default (a) within 30 Business Days of the date of this Remediable Termination Notice.
- 4.2 In order to address the Infraco Default which has been identified in this Remediable Termination Notice, **tie** would expect any such rectification plan to put forward *inter alia* comprehensive proposals for how the Infraco will remedy the Infraco Default subject of this Remediable Termination Notice, by rectifying its course of conduct, demonstrating commitment to the Infraco Works and the operation of the Infraco Contract, working in mutual co-operation with **tie**, confirming a willingness to resolve difficulties without the need for the issue of Remediable Termination Notices, responding reasonably and proactively to the outstanding Remediable Termination Notices, setting a contractually compliant programme for the carrying out and completion of the Infraco Works, including the delivery of an approved compliant, integrated, assured complete Design, releasing the agreement which the Infraco has entered into with the SDS Provider and demonstrating the commitment to comply with all contractual obligations under the Infraco Contract to carry out and complete the Infraco Works.

5. Definitions

- 5.1 Unless the context otherwise requires, all defined terms used in this Remediable Termination Notice have the same meaning as given in the Infraco Contract.

for and on behalf of tie Limited

..... **Project Director**

..... **Date**

APPENDIX A : INFRACO BREACHES

The Infraco's breaches of the Infraco Contract include:

1. Clause 6.1 - failure to work in mutual co-operation with **tie** to fulfil the agreed roles and responsibilities;
2. Clause 6.1 - failure to apply expertise to carry out and complete the Infraco Works in accordance with the Infraco Contract;
3. Clause 6.2 - failure to procure that each Infraco Party works in accordance with the principles set out in Clause 6.1 of the Infraco Contract and the inducement of the SDS Provider not to comply with its duty of care;
4. Clause 6.3.1 - failure to approach all Permitted Variations on a collaborative and Open Book Basis;
5. Clause 6.3.2 - failure to use reasonable endeavours to avoid unnecessary complaints, disputes and claims;
6. Clause 6.3.4 - failure to not interfere with the rights of **tie** in performing its obligations under the Infraco Contract;
7. Clause 6.3.6 - failure to take all reasonable steps to manage, minimise and mitigate all costs;
8. Clause 7.1 - failure to accept full responsibility for and to carry out and complete the Infraco Works fully and faithfully in accordance with the Infraco Contract;
9. Clause 7.2 - failure to ensure that, in carrying out and completing the Infraco Works, the Infraco exercises a reasonable level of professional skill, care and diligence to be expected of a properly qualified and competent professional contractor experienced in carrying out works and services of a similar nature to the Infraco Works in connection with projects of a similar scope and complexity;
10. Clause 7.3.1 - failure to carry out and complete the Infraco Works in accordance with and so as to comply in all respects with the Infraco Contract;
11. Clause 7.3.2 - failure to carry out and complete the Infraco Works so as to enable the Edinburgh Tram Network to be designed, constructed, installed, tested and commissioned, and thereafter operated and maintained;
12. Clause 7.3.3 - failure to carry out and complete the Infraco Works in accordance with the Infraco's quality management system and plans as developed in accordance with Clause 105 of the Infraco Contract;
13. Clause 7.3.4 - failure to carry out and complete the Infraco Works so as to ensure compliance with the Employer's Requirements;
14. Clause 7.3.10 - failure to carry out and complete the Infraco Works so as to ensure compliance with all applicable Law, Land Consents and Consents;
15. Clause 7.3.12 - failure to carry out and complete the Infraco Works in accordance with all applicable environmental regulations and requirements;

16. Clause 7.3.13 - failure to carry out and complete the Infraco Works in accordance with Good Industry Practice;
17. Clause 7.3.14 - failure to carry out the Infraco Works so as to ensure that the design of the Edinburgh Tram Network is buildable and maintainable;
18. Clause 7.3.15 - failure to carry out and complete the Infraco Works so as to assist **tie** in relation to providing information that best value has been secured in respect of the carrying out of the Infraco Works;
19. Clause 7.3.16 - failure to carry out and complete the Infraco Works so as not to wilfully detract from the image and reputation of **tie**, CEC and the Edinburgh Tram Network;
20. Clause 7.5.1 - failure to use reasonable endeavours to ensure that, in carrying out the Infraco Works, the Infraco maximises productivity by reference to Good Industry Practice;
21. Clause 7.5.2 - failure to use reasonable endeavours to ensure that, in carrying out the Infraco Works, the Infraco minimises disruption to the city of Edinburgh;
22. Clause 7.5.3 - failure to use reasonable endeavours to ensure that, in carrying out the Infraco Works, the Infraco maintains safety;
23. Clause 7.5.4 - failure to use reasonable endeavours to ensure that, in carrying out the Infraco Works, the Infraco safeguards efficiency in the obtaining of Consents;
24. Clause 7.5.5 - failure to use reasonable endeavours to ensure that, in carrying out the Infraco Works, the Infraco minimises costs;
25. Clause 7.6 - failure to keep itself fully informed about all matters relating to, or which might have a bearing on, the carrying out of the Infraco Works;
26. Clause 7.18 - failure to notify **tie** of Abortive Works as soon as reasonably practicable after the Infraco becomes aware that any element of the Infraco Works is likely to be Abortive Works;
27. Clause 8.1.6 - failure to ensure that safety assurances and the Case for Safety will be achieved at the issue of a Certificate of Sectional Completion;
28. Clause 8.3 - failure to carry out all of the system integration activities described in Schedule Part 2 (*Employer's Requirements*);
29. Clause 8.5 - failure to ensure that all elements of design (which form part of the Infraco Works) relative to the Edinburgh Tram Network are compatible with system integration and to make qualified personnel available to ensure system integration throughout the Term;
30. Clause 9.4 - failure to incorporate provisions equivalent to those provided in Clauses 9.1 to 9.2 in every sub-contract in order to protect **tie's** and CEC's interests in all supplies, materials, goods or equipment intended for the Infraco Works;
31. Clause 10.1 - failure to develop and finalise the Deliverables in accordance with the Programme and the Infraco Contract;

32. Clause 10.2 - failure to submit Deliverables associated with any Permitted Variation to **tie**'s Representative for review pursuant to Schedule Part 14 (Review Procedure and Design Management Plan);
33. Clause 10.4 - failure to establish and maintain an extranet which **tie**, any **tie** Parties and any other party reasonably required by **tie** may access remotely by computer (through an appropriate login/security regime) to view all Deliverables including any drawings comprised within the Deliverables and electronically store and/or print copies of such Deliverables;
34. Clause 10.5 - failure to ensure that the Programme sets out the manner and timing and each phase of the development and production of the Deliverables and the order in which each Deliverable is to be submitted for review in accordance with the Review Procedure and the programme for uploading the Deliverables onto the extranet in accordance with Clause 10.3;
35. Clause 10.9 - failure to ensure that the Deliverables fulfil the requirements of the Infraco Contract and meet the needs of Approval Bodies;
36. Clause 10.10 - failure to provide **tie** with all Deliverables in accordance with the terms of the Infraco Contract and, where no timescale for provision of such Deliverables is specified in the Programme, to provide such Deliverables to **tie** as soon as reasonably practicable;
37. Clause 10.16 - failure to establish at the Site and/or elsewhere an office staffed during all normal business hours at which shall be kept a complete, up-to-date and orderly documentary record of the performance of the Infraco Works, all transactions entered into by the Infraco in relation to any potential or actual Permitted Variations and information (including transactional information) in relation to any claims for additional costs or expenses by the Infraco to **tie** arising in accordance with the terms of the Infraco Contract (including Compensation Events) and to permit **tie**, **tie**'s Representative or their duly authorised representatives (to the extent necessary to verify any claim made by the Infraco under the Infraco Contract) to inspect, and take copies of, the documents kept at such office;
38. Clause 11.3 - failure to procure that the SDS Provider shall carry out and complete the SDS Services in accordance with the SDS Agreement;
39. Clause 11.4 - failure to carry out all management activities in order to manage the performance of the SDS Services;
40. Clause 11.5 - breach of obligation not to amend the SDS Agreement without the prior written approval of **tie**;
41. Clause 19.3 - failure to obtain all Design Stage Consents required for the performance and completion of the Infraco Works;
42. Clause 22.3 - failure to give details of the associated estimated costs, and the extent of the anticipated delay in or interference with the carrying out of the Infraco Works, in respect of adverse physical conditions, ground conditions, artificial obstructions and/or land which is contaminated, when giving notice to **tie**;
43. Clause 26.1 - failure to provide all necessary superintendence during the construction and completion of the Infraco Works, given by sufficient persons having adequate knowledge of the operations to be carried out (including the methods and techniques required and the hazards likely to be encountered) for the satisfactory and safe construction of the Infraco Works;

44. Clause 26.4 - failure of the Infraco's Representative to manage and co-ordinate the provision of the Infraco Works by the Infraco (and any Sub-Contractor) and the integration of provision of the Infraco Works with the tasks being performed by **tie**'s internal team and liaise with **tie**'s Representative in relation to matters arising in relation to the Infraco Works;
45. Clause 26.12 - failure to ensure that there are no changes to the Key Personnel without **tie**'s prior consent and that any replacement persons are of at least equivalent status and ability to the person whom they replace;
46. Clause 27.1 - failure to employ in and about the construction and completion of the Infraco Works and in their superintendence only persons who are careful, skilled and experienced in their several trades and callings;
47. Clause 27.2 - failure to remove from the Infraco Works a person employed thereon of whom **tie** has requested the removal due to their incompetence or negligence in the performance of their duties;
48. Clause 28.2 - failure to obtain **tie**'s prior written approval for a sub-contractor for performance of a specific part of the Infraco Works;
49. Clause 28.4 - failure to obtain **tie**'s approval to the form of sub-contract for any work which is sub-contracted to each Sub-Contractor in advance of the sub-contract's execution;
50. Clause 28.7 - failure to procure that every Key Sub-Contractor provides to **tie** a collateral warranty prior to the date of execution of the sub-contract in favour of each of **tie**, CEC, EAL, TEL and Network Rail;
51. Clause 30.3 - failure to comply with all duties and obligations under Law and requirements having the force of law relating to the health, safety and conduct of construction or maintenance operations;
52. Clause 32.2 - failure to seek at all times to minimise any nuisance or inconvenience to or interference with the business or operations of the owners, tenants or occupiers of the Site or other premises upon or in the locality of the Site, to bus operations and to the public generally;
53. Clause 34.1 - failure to construct and complete the Infraco Works in strict accordance with **tie** and **tie**'s Representative's instructions on any matter connected with the Infraco Works;
54. Clause 34.2 - failure to carry out the Infraco Works in the mode, manner and speed of construction in accordance with the Infraco Contract;
55. Clause 41.1 - failure to comply with the Construction Milestone regime in respect of the Preliminaries claimed pursuant to Schedule Part 5 (*Milestone Payments*);
56. Clause 60.1 - failure to progress the Infraco Works with due expedition and in a timely and efficient manner without delay, to achieve timeous completion of the Infraco Works and the Infraco's other obligations under the Infraco Contract in accordance with the Programme;
57. Clause 60.2 - failure to update the Programme in accordance with the requirements of Schedule Part 2 (*Employer's Requirements*);
58. Clause 60.9 - failure to take reasonable steps to mitigate the effects of any delay to the progress of the Infraco Works;

59. Clause 65.2 - failure to give **tie** notice within 20 Business Days after the Infraco becomes aware of a Compensation Event which has caused, or is likely to cause, delay or adversely affect the performance of the Infraco Works or cause the Infraco to incur additional costs, of the Infraco's claim for an extension of time and/or costs and relief and failure to give full details of the nature of the Compensation Event, the date of occurrence and its likely duration;
60. Clause 65.2.2 - failure to include when notifying a Compensation Event full details of the extension of time and relief required and/or any costs claimed, including (i) the Infraco's estimate of the likely effect of delay upon Programme or the adverse effects on the performance of its obligations under the Infraco Contract; (ii) details of the costs or losses which are not Indirect Losses; (iii) mitigation measures adopted and why unsuccessful; and (iv) any acceleration or other measures which the Infraco could take to mitigate the effects of delay or non-performance and, where applicable, estimates of the costs thereof;
61. Clause 65.2.2(a) and (b) - where the Compensation Event has a continuing effect or the Infraco is unable to determine whether the effect of the Compensation Event will actually cause it not to be able to comply with its obligations under the Infraco Contract, such that it is not practicable for the Infraco to submit full details at the time of notification, failure to submit a statement to that effect with reasons and interim written particulars and failure to submit to **tie** update particulars;
62. Clause 65.2.3 - failure to demonstrate to the reasonable satisfaction of **tie** that (i) the Infraco and the Infraco Parties could not reasonably have avoided the occurrence of a Compensation Event or consequences by steps which they might reasonably be expected to have taken; (ii) the Compensation Event is the direct cause of the delay, inability to perform and/or the additional costs; and (iii) the Infraco is using reasonable endeavours to perform its obligations under the Infraco Contract;
63. Clause 65.10 - failure to inform **tie** at the earliest opportunity if the Infraco Works are delayed in circumstances other than those entitling the Infraco to a Compensation Event, and to give **tie** an estimate of the likely effect upon the Programme and to take acceleration measures (at its own expense) as are necessary to achieve the requirements of the Programme;
64. Clause 65.11 - failure to continue to carry out the Infraco Works notwithstanding the occurrence of a Compensation Event;
65. Clause 73.1 - failure to, throughout the Term and to the extent consistent with its obligations under the Infraco Contract, make arrangements to secure continuous improvement in the way in which the Infraco Works are conducted having regard to the Project Vision and a combination of economy, efficiency and effectiveness;
66. Clause 73.2 - failure to undertake such actions as **tie** reasonably requests and prepare and support and assist **tie** in preparing best value performance plans and conducting best value reviews in relation to the Infraco Works;
67. Clause 73.2.3 - failure to comply with requests for information, data or other assistance made by **tie** in pursuance of its best value assessments;
68. Clause 75.2 - failure to comply with the representation, warranty and undertaking that the Infraco's provision of any Deliverables and the use by **tie** of the Deliverables provided to it as part of the Infraco Works has not infringed and shall not infringe any third party's Intellectual Property Rights;
69. Clause 79.1.2 - failure to deal with Infraco Changes in accordance with Clause 81;

70. Clause 80.3 - failure to complete and return Estimates to **tie** within 18 Business Days of receipt of a **tie** Notice of Change;
71. Clause 80.3 - where the Infraco considers (acting reasonably) that the Estimate required is too complex to be completed and returned to **tie** within 18 Business Days of receipt of a **tie** Notice of Change, failure to deliver to **tie**, within 5 Business Days of receipt of a **tie** Notice of Change, a request for a reasonable extended period of time for return of the Estimate and to act reasonably in agreeing such extended period;
72. Clause 80.4 - failure to deliver to **tie** within 18 Business Days (or such longer reasonable period as may be agreed) of receipt of the **tie** Notice of Change, Estimates which include the opinion of the Infraco on the matters listed in Clauses 80.4.1 to 80.4.10;
73. Clause 80.4.8 - failure to deliver Estimates which include the opinion of the Infraco (acting reasonably) on proposals to mitigate the impact of the proposed **tie** Change;
74. Clause 80.7.1 - failure to include in the Estimate evidence demonstrating that the Infraco has used all reasonable endeavours to minimise any increase in costs and to maximise any reduction of costs;
75. Clause 80.7.2 - failure to include in the Estimate evidence demonstrating that the Infraco has investigated how to mitigate the impact of the **tie** Change;
76. Clause 80.7.4 - failure to include in the Estimate evidence demonstrating that the proposed **tie** Change will, where relevant, be implemented in the most cost effective manner;
77. Clause 80.8 - where the Infraco does not intend to use its own resources to implement any proposed **tie** Change, failure to 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;
78. Clause 80.17 - failure to update the Programme, Schedule Part 5 and other Deliverables as soon as reasonably practicable (and in any event within 20 Business Days) of issue of a **tie** Change Order;
79. Clause 81.3 - failure to propose to **tie** any changes which would be Infraco Changes (which could effect a saving of £20,000 or more);
80. Clause 101.1 - failure to treat all Confidential Information belonging to **tie** as confidential and safeguard it accordingly;
81. Clause 101.2 - failure not to disclose any Confidential Information belonging to **tie** to other persons without **tie**'s consent;
82. Clause 101.3 - failure to take all necessary precautions to ensure that all Confidential Information obtained from **tie** in connection with the Infraco Contract is treated as confidential and not disclosed (without prior approval) or used by any such staff, contractors, agents, subcontractors, consultants and professional advisors otherwise than for the purposes of the Infraco Contract;
83. Clause 101.14 - failure to obtain **tie**'s prior written in respect of all press releases;
84. Clause 102.2 - failure to procure a non-exclusive perpetual irrevocable royalty free licence to use Project IPR created by the Infraco Parties in relation to the Infraco Works;

85. Clause 104.2 - failure to make the records referred to in Clause 104.1 of the Infraco Contract available for inspection by or on behalf of **tie's** Representative, **tie**, CEC, **tie's** auditors or CEC's auditors or any other third party at all reasonable times during normal working hours on not less than one Business Day's notice;
86. Clause 104.3 - failure to provide to **tie's** Representative, **tie**, and **tie's** auditors, other information, documents, records and the like in the possession of, or available to, the Infraco as reasonably requested and failure to use all reasonable endeavours to procure that the Infraco Parties provide such information, documents, records and the like;
87. Clause 105.2 - failure of the Infraco to comply with the HSQE System and failure to develop appropriate management plans so as to ensure such compliance with the HSQE System;
88. Clause 105.5 - failure to appoint an HSQE Manager as soon as reasonably practicable following the Effective Date;
89. Clause 118 - failure to act fairly and reasonably when giving any opinion and taking actions, having regard to all the circumstances;
90. Clause 119 - failure to take all reasonable measures to mitigate loss which has occurred;
91. Sections 3.6.1 of Schedule Part 2 (*Employer's Requirements*) - failure to achieve the Deliverables necessary to enable the ETN to be constructed, tested and commissioned and brought into commercial service and consistent with the requirements for the Case for Safety;
92. Section 3.6.1 of Schedule Part 2 (*Employer's Requirements*) - failure to approach the design services in a structured manner using a recognised 'V' life cycle model with regard to the integration of design engineering, systems engineering and safety engineering activities;
93. Section 3.6.2 of Schedule Part 2 (*Employer's Requirements*) - failure to undertake such supplementary analysis that will allow further development of the Case for Safety concurrent with any design undertaken to prove that the ETN is acceptably safe;
94. Section 17.2.6 of Schedule Part 2 (*Employer's Requirements*) - failure to design and execute the Infraco Works using safety management and procedures to demonstrate that the ETN is safe to introduce into service as defined by the Safety Management System under the Railway and Other Guided Transport Systems (Safety) Regulations 2006, to develop the Case for Safety to the satisfaction of the Competent Person and the Project Safety Certification Committee; and to undertake all Infraco Works in accordance with **tie's** written safety verification scheme requirements; and
95. Section 1.1.3 of Schedule Part 3 (*Code of Construction Practice*) - failure to implement and comply with an "environmental management system" in accordance with ISO 14001;
96. Section 3.4 of Schedule Part 3 (*Code of Construction Practice*) - failure to comply with **tie's** system for controlling access to undertake works activities and failure to obtain an approved permit to commence works from **tie** for each Works Site and agreed scope of construction activities;
97. Section 3.4.4 of Schedule Part 3 (*Code of Construction Practice*) - failure to identify on each Permit to Commence Form the necessary licences, third party approvals and notifications that have been obtained/granted to enable the works to be undertaken, together with the specific control measures that require to be implemented under the Infraco's safety management system;

- 98. Section 18.2.1 of Schedule Part 3 (*Code of Construction Practice*) - failure to compile, agree with CEC and publish a schedule of all buildings or structures that are located within the Site, or which are located directly adjacent to Work Sites, which may be at risk of physical damage or damage caused by vibration generated during the Infracore Works;
- 99. Section 22.5 of Schedule Part 3 (*Code of Construction Practice*) - failure to develop, implement and comply with a strategy for the control of invasive and alien species; and
- 100. Paragraph 2.8.1 of Part C of Schedule Part 14 (*Design Review Procedure*) - failure to provide a Design Assurance Statement along with each design package.

..... **Project Director**