

their respective duties and obligations under all Law and requirements having the force of law relating to the health, safety and conduct of construction or maintenance operations.

31. **CARE OF THE INFRACO WORKS**

31.1 Save in respect of the Trams and Tram Related Equipment, the Infraco shall take full responsibility for the care of the Infraco Works from the Commencement Date until, in relation to each Section, the date of issue of a Certificate of Sectional Completion in relation to that Section.

31.2 In relation to each Section, from the date of issue of a Certificate of Sectional Completion in relation to that Section the provisions of Clause 52 (*Maintenance*) shall apply.

31.3 In the event of any loss or damage to the Infraco Works or part thereof while the Infraco is responsible for the care thereof in terms of Clause 31.1, the Infraco shall subject to Clauses 76.17, 76.18, 76.19A, 76.19B, 76.19C, 76.19 and 76.30 at its own cost rectify such loss or damage so that the Infraco Works conform in every respect, subject to Clause 76, with the provisions of this Agreement.

31.4 ~~The Infraco shall take full responsibility for the care of the Trams and Tram Related Equipment from the Commencement Date until, in relation to each Tram and item of Tram Related Equipment, the date of issue of a Certificate of Tram Commissioning in relation to that Tram.~~ **NOT USED.**

31.5 ~~In relation to each Tram and item of Tram Related Equipment from the date of issue of a Certificate of Tram Commissioning in relation to that Trams the Infraco shall comply with the provisions of Clause 52 (Maintenance).~~ **NOT USED.**

31.6 ~~In the event of any loss or damage to the Trams or the Tram Related Equipment while the Infraco is responsible for the care thereof in the terms of Clause 31.4, the Infraco shall, subject to Clause 76.17, 76.18, 76.19A, 76.19B, 76.19C, 76.19 and 76.30 at its own cost rectify such loss or damage so that the Trams or the Tram Related Equipment conform in every respect with the provisions of this Agreement. For avoidance of doubt, **Without prejudice to Clause 77,** the Infraco shall have no responsibility in connection with damage to the Trams or Tram Related Equipment ~~which is caused by vandalism occurring after the date of delivery to the Depot and the relevant Certificate of Tram Commissioning.~~~~

32. **INTERFERENCE WITH TRAFFIC AND ADJOINING PROPERTIES**

32.1 The Infraco shall comply with the requirements of Schedule Part 3 (*Code of Construction Practice and Code of Maintenance Practice*) with regard to the maintenance of access to properties, bus stops and bus services and the closure of roads.

32.2 The Infraco shall at all times seek 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 all bus operations and to the public generally, including measures to reduce the nuisance from noise, dust, smell, fumes and vibration during the carrying out of the Infraco Works. The Infraco shall comply with the requirements of Schedule Part 3 (*Code of Construction Practice and Code of Maintenance Practice*) in this regard.

33. **AVOIDANCE OF DAMAGE TO ROADS AND BRIDGES**

33.1 The Infraco shall use every reasonable means to prevent any of the roads or bridges communicating with or on the route to the Site from being subjected to extraordinary traffic within the meaning of the Roads (Scotland) Act 1984 by any traffic of the Infraco or any Infraco Party. In particular, the Infraco shall select routes and use vehicles and restrict and distribute loads so that any such extraordinary traffic as will inevitably arise from the moving of the Infraco's Equipment and materials or manufactured or fabricated articles from and to the Site shall be limited as far as reasonably possible and so that no unnecessary damage or injury may be occasioned to such roads and bridges.

33.2 The Infraco shall be responsible for and shall pay the cost of strengthening any bridges or altering or improving any road communicating with or on the route to the Site to facilitate ~~the delivery of the Trams by the Tram Supplier and~~ the installation of the Infraco's Equipment or Temporary Works required in the carrying out of the Infraco Works. Subject to Clauses 77.3, 77.7 and 77.8, the Infraco shall indemnify and keep indemnified **tie** against all claims for damage to any road or bridge communicating with or on the route to the Site caused by such movement including such claims as may be made by any competent authority directly against **tie** and/or CEC pursuant to any Law or other statutory instrument and shall negotiate and pay all claims arising solely out of such damage.

33.3 If, notwithstanding Clause 33.1, any damage occurs to any bridge or road communicating with or on the route to the Site arising from the delivery of the ~~Trams by the Tram Supplier,~~ materials or manufactured or fabricated articles being or intended to form part of the Infraco Works and/or the Temporary Works, the Infraco shall notify **tie's** Representative as soon as the Infraco becomes aware of such damage or as soon as the Infraco receives any claim from the authority entitled to make such claim. **tie** shall not be liable for any costs, charges or expenses in respect thereof in relation thereto.

34. **WORK TO BE TO SATISFACTION OF TIE**

34.1 The Infraco shall construct and complete the Infraco Works in strict accordance with this Agreement and shall comply with and adhere strictly to **tie** and **tie's** Representative's instructions on any matter connected therewith (whether mentioned in this Agreement or not) provided that such instructions are given in accordance with the terms of this

Agreement and will not cause Infraco to be in breach of this Agreement. The Infraco shall take instructions only from **tie**, **tie's** Representative, subject to Clause 25.8, from **tie's** Representative's duly appointed delegate or the Operator or Operator's Representative in accordance with 17.10.

34.2 The whole of the materials, Infraco's Equipment and labour to be provided by the Infraco under Clause 7 (*Duty of Care and General Obligations in Relation to the Infraco Works*) and the mode, manner and speed of construction of the Infraco Works are to be in accordance with this Agreement.

34.3 If in pursuance of Clause 34.1 (including for the avoidance of doubt any instructions of ~~tie~~**tie's** Representative, of **tie's** Representative's duly appointed delegate or of the Operator or Operator's Representative in accordance with 17.10 deemed to have been given pursuant or in accordance with Clause 34.1), **tie's** Representative shall issue instructions which involve the Infraco in delay or disrupt its arrangements or methods of construction or so as to cause the Infraco to incur cost then such instructions shall be a Compensation Event under Clause 65 (*Compensation Events*), to the extent they relate to the Off Street Works or Schedule Part X (On Street Works) to the extent they relate to the On Street Works, except to the extent that either such instructions have been required as a consequence of the Infraco's breach of its obligations under this Agreement or such delay and/or extra cost result from the Infraco's default. If such instructions require any variation to any part of the Infraco Works, **tie** shall be deemed to have issued a **tie** Notice of Change requiring such variation, which **tie** Change shall be a Mandatory **tie** Change.

35. **QUALITY OF MATERIALS AND WORKMANSHIP, SAMPLES AND TESTS**

35.1 Save in relation to the Tram Supply Obligations and Tram Maintenance Services all materials and workmanship shall be the respective kinds described in this Agreement or where the Agreement is silent, to the standard proposed by the Infraco and reviewed if applicable in accordance with Schedule Part 14 (*Design Review and Design Management Plan*). Save in relation to the Tram Supply Obligations and Tram Maintenance Services all materials and workmanship shall be subjected to such tests as may be specified in this Agreement at the place of manufacture or fabrication or preparation or on the Site or such other place or places. The Infraco shall undertake such testing and provide such assistance, instruments, machines, stores, labour and materials as are normally required for examining, measuring and testing any work and the quality, weight or quantity of any materials used, and shall supply samples of materials before incorporation or use in the Infraco Works for testing as may be selected and required by this Agreement, ~~provided that in relation to the Tram Supply Obligations and Tram Maintenance Services all such materials and workmanship shall be the respective kinds and described and shall be subjected to such~~

~~tests as may be specified in the Tram Supply Agreement and Tram Maintenance Agreement respectively.~~

- 35.2 All samples shall be supplied by the Infraco at its own cost.
- 35.3 The costs of making any test identified in this Agreement shall be borne by the Infraco. Subject to Clauses 36 and 35.4, in the event that the Infraco is required in accordance with Clause 35.1 to undertake any test which is not identified in this Agreement but is required by **tie**, the requirement to undertake such test shall be a **tie** Change.
- 35.4 In the event that the Infraco is required in accordance with Clause 35.1 to undertake any test which is not identified in this Agreement but is required by **tie** as a result of a breach by the Infraco of its obligations under this Agreement, then the costs of making such test shall be borne by the Infraco.

36. **EXAMINATION OF WORK BEFORE COVERING UP**

- 36.1 Save in relation to the Tram Maintenance Services and the Tram Supply Obligations, no work shall be covered up or put out of view without the consent of **tie's** Representative (acting reasonably), and the Infraco shall afford full opportunity for **tie's** Representative and any other parties authorised by **tie** to examine any work which is about to be covered up or put out of view and to examine foundations before permanent work is placed thereon. Save in respect of unscheduled or reactive maintenance, the Infraco shall give no less than 48 hours notice to **tie's** Representative whenever any such work or foundations are ready or about to be ready for examination and **tie's** Representative shall within 48 hours of such notice, unless he considers it unnecessary and advises the Infraco accordingly, attend for the purpose of examining such work or of examining such foundations.
- 36.2 Save in relation to the Tram Maintenance Services and the Tram Supply Obligations, the Infraco shall uncover any part or parts of the Infraco Works or make openings in or through the same as **tie's** Representative may from time to time direct and shall reinstate and make good such part or parts to the satisfaction of **tie's** Representative (acting reasonably). If any such part or parts have been covered up or put out of view after compliance with the requirements of Clause 36.1 and are found to have been carried out in accordance with the Agreement, the cost of uncovering, making openings in or through, reinstating and making good the same shall be borne by **tie** and Infraco will be entitled to include such costs in its next application for payment but in any other case all such costs shall be borne by the Infraco.

37. **REMOVAL OF UNSATISFACTORY WORK AND MATERIALS**

37.1 Save in relation to the Tram Supply Obligations and Tram Maintenance Services **tie's** Representative shall during the progress of the Infraco Works have power to instruct in writing:

37.1.1 the removal from the Site within such reasonable time or times specified in the instruction, of any materials which are not in accordance with the Agreement ; and/or

37.1.2 substitution of such materials with materials in accordance with the Agreement ; and/or

37.1.3 the removal and proper replacement (notwithstanding any previous test thereof or interim payment therefor) of any work which in respect of:

37.1.3.1 materials or workmanship; or

37.1.3.2 design by the Infraco for which the Infraco is responsible;

is not in accordance with the Agreement . After consultation with the Infraco and with the agreement of **tie**, **tie's** Representative may allow all or any of such materials, workmanship or design to remain and confirm this in writing to the Infraco (which shall not constitute a **tie** Change under Clause 80 (**tie** Changes)) and in which case the use of such materials in accordance with this Agreement shall not be a breach of this Agreement.

37.2 In the case of default on the part of the Infraco in carrying out such instruction, **tie** shall be entitled to carry out or procure the carrying out of such instruction, and all costs and expenses properly incurred by **tie** in relation to such default shall be recoverable from the Infraco by **tie** and may be deducted by **tie** from any monies due or to become due to the Infraco.

37.3 Failure of **tie** or **tie's** Representative to disapprove any work or materials shall not prejudice the power of **tie** or **tie's** Representative subsequently to take action under this Clause 37 (*Removal of Unsatisfactory Work and Materials*).

37.4 If any workmanship or materials are not in accordance with this Agreement, **tie's** Representative may issue such orders or directions under Clauses 35 (*Quality of Materials and Workmanship, Samples and Tests*) or Clause 36 (*Examination of Work Before Covering Up*) to test or open up for inspection as are reasonable in the circumstances to establish the likelihood or extent, as appropriate to the circumstances, of any further similar non-compliance.

37.5 To the extent that such orders or directions issued pursuant to Clause 37.4 are as a result of previous and repeated non-compliance, whatever the result of the test or opening up,

and notwithstanding Clauses 35.3, 36.2 and 48 (*Infraco to Search*), the cost of such test or opening up and the cost of reinstatement shall be borne by the Infraco. The orders or directions shall not constitute **tie** Changes under Clause 80 (*tie Changes*) but shall, unless the test or inspection showed that the workmanship or materials were not in accordance with the Agreement, be a Relief Event under Clause 64 (*Relief Events*).

38. **URGENT REPAIRS AND EMERGENCIES**

38.1 In accordance with the provisions of paragraph 6 of parts A and B of Schedule 3 (*Code of Construction Practice and Code of Maintenance Practice*), if, in the opinion of **tie's** Representative (acting reasonably), any remedial or other work or repair is necessary by reason of any emergency, accident or failure or other event giving rise to an immediate threat to health and safety (including users and/or members of the public) during the carrying out of the Infraco Works, **tie's** Representative shall so inform the Infraco with confirmation in writing.

38.2 Thereafter, if the Infraco is unable or unwilling to carry out such work or repair in accordance with the appropriate time period identified in paragraph 6 of parts A and B of Schedule Part 3 (*Code of Construction Practice and Code of Maintenance Practice*), **tie** may itself carry out or procure the carrying out of the said work or repair.

38.3 If the work or repair so carried out by **tie** is work which the Infraco was liable to carry out at its own expense under the Agreement, all costs and expenses properly incurred by **tie** in relation to such work shall be recovered from the Infraco by **tie** and may be deducted from any monies due or to become due to the Infraco.

38.4 If the Infraco carries out such work or repair, the Infraco shall be paid in accordance with Clause 67 (*Payment in Respect of Applications for ~~Milestone Payments~~ MILESTONE PAYMENTS*) or Clause 68 (*Payment in Respect of Maintenance Services*) the amount of any direct and demonstrable costs as may be reasonable except to the extent that such extra cost results from the Infraco's default.

39. **FOSSILS AND ANTIQUITIES**

39.1 All fossils, EAL Artefacts, antiquities, and other objects having artistic, historic or monetary value and human remains which may be found on or at the Site are or shall become, upon discovery, the absolute property of CEC or, in the case of the EAL Artefacts, EAL.

39.2 Upon discovery of any such item during the course of the Infraco Works, the Infraco shall:

39.2.1 immediately inform **tie's** Representative of such discovery;

39.2.2 take all steps not to disturb the object and, if necessary, cease any Infraco Works in so far as the carrying out of such Infraco Works would endanger the object or prevent or impede its excavation; and

39.2.3 take all necessary steps to preserve the object in the same position and condition in which it was found.

39.3 **tie** shall procure that **tie's** Representative promptly, and in any event within 3 Business Days of notice being given by the Infraco pursuant to Clause 39.2.1, issues an instruction to the Infraco specifying what action **tie's** Representative requires the Infraco to take in relation to such discovery.

39.4 The Infraco shall promptly and diligently comply with any instruction issued by **tie's** Representative referred to in Clause 39.3 and such instruction shall be a **tie** Change and Clause 80 (**tie** Changes) or Schedule Part 45 (On Street Works) shall apply as appropriate.

39.5 If directed by **tie's** Representative, the Infraco shall allow representatives of **tie** to enter the Site for the purposes of removal or disposal of such discovery provided that such entry shall be subject to **tie** complying with all relevant safety procedures, which shall include the Infraco's site rules and any reasonable directions with regard to site safety that may be issued by or on behalf of the Infraco's Representative from time to time.

40. **ERRORS AND/OR OMISSIONS IN THE INFRACO WORKS**

40.1 Subject to the limitation in respect of the duration of Infraco's liability for Patent Defects and latent defects under this Agreement if during the carrying out of the Infraco Works and/or where the Infraco has completed the Infraco Works, **tie** becomes aware of any error or omission in the carrying out of the Infraco Works or of any other breach of this Agreement by Infraco (except where such error, omission or breach has been caused by a ~~Notified-Departure~~ Pricing Assumption Variation, Compensation Event, Relief Event or **tie** Change in relation to the element of the works affected by such ~~Notified-Departure~~ Pricing Assumption Variation, Compensation Event or Relief Event) **tie** shall notify the Infraco, who shall, at its own expense and in liaison with **tie**, rectify any error or omission or breach, or where this is agreed by **tie** to be impracticable or undesirable, take such other agreed steps to address the error or omission.

40.2 Any reasonable and demonstrable direct costs to **tie** associated with the Infraco remedying any such errors or omissions or breaches shall be paid by the Infraco to **tie**.

40.3 These arrangements shall in no respect diminish **tie's** ability to recover damages from the Infraco for losses incurred by **tie** consequent upon the error or omission or breach in question.

40.4 If and to the extent that the Infraco fails to carry out the necessary rectification and/or other agreed steps in accordance with Clause 40.1 to **tie's** reasonable satisfaction and/or within a reasonable period of time, **tie** shall be entitled to carry out such rectification and/or other agreed steps itself, or procure the carrying out by a third party of such rectification and/or other agreed steps at the Infraco's expense and shall recover any costs from the Infraco as a debt.

PART 8 - ~~MILESTONE~~ COMPLETION, TESTING AND COMMISSIONING

41. ~~COMPLETION OF CONSTRUCTION MILESTONES AND CRITICAL MILESTONES~~ PAYMENT PROVISIONS

41.1 ~~The Infraco shall give tie's Representative not less than 14 Business Days notice of the date upon which the Infraco considers that any of the Construction Milestones or Critical Milestones will be achieved and the associated tests to be undertaken in accordance with the Employer's Requirements carried out. tie's Representative shall be entitled to inspect the Infraco Works on the date or dates reasonably specified by the Infraco in accordance with this Clause 41.1, and to attend any of the tests to be carried out. The Infraco shall procure that such of its staff as tie may reasonably request shall accompany tie's Representative on any such inspection. If tie's Representative does not in accordance with this Clause 41.1 attend any tests, or does not carry out an inspection on the date or dates specified by the Infraco in Infraco's notice he shall be entitled, upon giving reasonable notice to the Infraco, to specify a new date or dates for his attendance at such tests or for the carrying out of such an inspection. tie's Representative's failure to attend such tests or to carry out such inspections (or rearranged inspections or tests) and the carrying out of such tests or inspections on the new dates notified by the tie Representative shall be a Compensation Event and Clause 65 shall apply. Subject to Clause 41.2, on each Valuation Date the Parties shall request that the Certifier shall certify in accordance with the Certifier Agreement;~~

41.1.1 the percentage completion of each Milestone in respect of the Off Street Works in respect of work which has been carried out during the Reporting Period ending immediately prior to the Valuation Date and the amounts claimed in respect of such work in the Application for Payment submitted prior to the Valuation Date; and

41.1.2 where the Valuation Date occurs prior to the On Street Works Trigger Date the percentage completion of each Milestone in respect of the On Street Works in respect of which work has been carried out during the Reporting Period ending immediately

prior to the Valuation Date and the amounts claimed in respect of such work in the Application for Payment submitted prior to the Valuation Date; and

41.1.3 where the Valuation Date occurs after the On Street Works Trigger Date in respect of the On Street Works, (i) the resource expended during the Reporting Period ending immediately prior to the Valuation Date in accordance with Part 2 of Appendix A of Schedule Part 45 (On Street Works), and (ii) in respect of Systems and Trackwork the percentage completion of each Milestone in respect of the On Street Works; and (iii) such other amounts Infraco is entitled to include in its Application for Payment in accordance with Part 2 of Appendix A of Schedule Part 45 (On Street Works),

and the Parties acknowledge that the Certifier shall, not later than 7 days after each Valuation Date, issue a certificate (a "Valuation Certificate") to tie and Infraco pursuant to the Certifier Agreement.

- 41.2 ~~Within 7 Business Days of any inspection made pursuant to Clause 41.1, tie's Representative shall notify the Infraco of any outstanding matters (including further evidence of achievement of the Construction Milestone or Critical Milestone and the repetition of any of the tests which are required to be carried out and passed in accordance with the Employer's Requirements) which must be attended to before the relevant Construction Milestone or Critical Milestone will have been achieved in accordance with this Agreement. The Infraco shall attend to all such matters and shall, if necessary, give tie further notices in accordance with Clause 41.1 (but dealing only with matters raised in the notification under this Clause 41.2) so that the procedures in Clause 41.1 and this Clause 41.2 are repeated as often as may be necessary to ensure that all outstanding matters in relation to the Construction Milestone or Critical Milestone are attended to. Conduct of all tests, including repetitions, in accordance with the Employer's Requirements shall be at the cost and under the responsibility of the Infraco.~~ The Parties acknowledge and agree that except in the case of the On Street Works after the On Street Works Trigger Date any Milestone valued at less than £100,000 in the Milestone Schedule shall not be certified by the Certifier until the Milestone is 100% complete.
- 41.3 ~~The Infraco shall notify tie when a Construction Milestone or a Critical Milestone has been achieved in accordance with this Agreement and tie's Representative shall issue the relevant Construction Milestone Completion Certificate or Critical Milestone Completion Certificate (as appropriate) to that effect stating the date upon which the Construction Milestone or~~

~~Critical Milestone was achieved. The issue of a Construction Milestone Completion Certificate or Critical Milestone Completion Certificate shall, in the absence of manifest error, bad faith or fraud, be conclusive evidence for the purpose only of ascertaining that the Construction Milestone or Critical Milestone have been achieved on the date stated in such certificate.~~**Not Used.**

41.4 Preliminaries set out in Schedule Part 5 (Milestones) and Schedule Part 45 (On Street Works) are time based payments which prior to the On Street Works Trigger Date shall be certified by the Certifier once the relevant time period has elapsed without the need for further valuation or substantiation. After the On Street Works Trigger Date the Infraco shall demonstrate as required by Appendix C Part 5 that in relation to the Civil Engineering Works only, the relevant works or expenditure to which such preliminaries relate has been incurred or carried out.

41.5 Any Valuation Certificate may, to the extent it relates to the Off Street Works, be modified or corrected by any subsequent Valuation certificate and shall not be conclusive evidence that any work to which it relates is in accordance with this Agreement.

42. **~~COMPLETION AND CERTIFICATION OF TRAM MILESTONES~~**NOT USED.****

~~42.1 The Tram Milestones are as shown in Schedule 5 to the Tram Supply Agreement and as shown in the Programme.~~

~~42.2 Certification of tram vehicle delivery and tram vehicle commissioning and testing shall be carried out as stipulated pursuant to the Tram Supply Agreement. The issue of a Certificate of Tram Delivery and issue of a Certificate of Tram Commissioning by the Tram Inspector shall be deemed to be certification of the achievement of the relevant Construction Milestone or Critical Milestone under the Infraco Contract. The Tram Mobilisation Milestone shall be deemed to have been achieved on signature of the Tram Supply Agreement. All other Tram Milestones as set out in Schedule 5 to the Tram Supply Agreement and the Tram Maintenance Mobilisation Milestones will be certified as complete jointly by Infraco and the tie Representative when the activities referred to are complete in accordance with the Tram Supply Agreement and the Tram Maintenance Agreement and such certification shall be deemed to be achievement of a relevant Construction Milestone or Critical Milestone under the Infraco Contract.~~

43. **TRAM INSPECTOR,**

43.1 The Parties agree that within 28 days of the date hereof the Parties shall enter into (and tie shall procure that the Tram Inspector enters into) the Tram Inspector Agreement in the form set out in Schedule Part 34 of this Agreement.

43.2 ~~43.1~~ NOT USED.

~~43.2 NOT USED~~

43.3 NOT USED.

43.4 Neither ~~tie~~ nor the Infraco shall, without the other's prior written approval (not to be unreasonably withheld or delayed):

43.4.1 terminate, repudiate or discharge the Tram Inspector Agreement or treat the same as having been terminated, repudiated or otherwise discharged;

43.4.2 waive, settle, compromise or otherwise prejudice any rights or claims which the other may from time to time have against the Tram Inspector; or

43.4.3 vary the terms of the Tram Inspector Agreement or the service performed or to be performed by the Tram Inspector.

43.5 The Parties shall comply with and fulfil their respective duties and obligations arising under the Tram Inspector Agreement.

43.6 The Parties agree to co-operate with each other generally in relation to all matters within the scope of or in connection with the Tram Inspector Agreement. All instructions and representations issued or made by either of the Parties to the Tram Inspector shall be simultaneously copied by that Party to the other and both Parties shall be entitled to attend all inspections undertaken by or meetings involving the Tram Inspector Agreement.

43.7 In the event of the Tram Inspector's appointment being terminated otherwise than following full performance, the Parties shall liaise and co-operate with each other in order to appoint a replacement consultant to act as the Tram Inspector as soon as reasonably practicable. The identity of any such replacement shall be as agreed by the Parties and the terms of his appointment shall, unless otherwise agreed, be as set out in the Tram Inspector Agreement.

43.8 In the event that, pursuant to Clause 43.7, it is necessary to appoint a replacement consultant, the Parties shall as soon as reasonably practicable, in compliance with all Law

relating to procurement which is applicable to either Party, appoint a suitably qualified and experienced consultant to act as the Tram Inspector for the purpose of this Agreement.

43.9 In the event that the Parties fail to agree the identity and/or terms of a replacement Tram Inspector in accordance with Clause 43.7, within 60 days of the previous Tram Inspector's appointment being terminated, then either Party may refer the matter for determination under the Dispute Resolution Procedure.

43.10 **tie** shall be responsible for the cost of the appointment and services of the Tram Inspector.

44. **NOTIFICATION OF SECTIONAL COMPLETION OF SECTIONS A, B, C AND D**

44.1 The Infraco shall give **tie's** Representative and the Certifier not less than 14 Business Days notice of the dates when the relevant Systems Acceptance Tests are to be carried out and the date upon which the Infraco considers that each of Section A, Section B, Section C and Section D will be substantially completed, commissioned and will have satisfactorily passed the relevant Systems Acceptance Tests. **tie's** Representative and the Certifier shall inspect the Infraco Works on the date or dates reasonably specified by the Infraco in accordance with this Clause 44.1 and to attend any of the tests to be carried out. The Infraco shall procure that such of its staff as **tie** may reasonably request shall accompany **tie's** Representative and the Certifier on any such inspection.

44.2 ~~Within~~The Parties acknowledge that within 7 Business Days of any inspection made pursuant to Clause 44.1, ~~tie's Representative shall~~the Certifier shall in accordance with the terms of the Certifier Agreement notify the Infraco of any outstanding matters (including further evidence of achievement of substantial completion or commissioning and the repetition of any of the relevant System Acceptance Tests which are required to be carried out and passed in accordance with the Employer's Requirements) which must be attended to before the Section will have been substantially completed, tested and commissioned in accordance with this Agreement. The Infraco shall attend to all such matters and shall, if necessary, give **tie** and the Certifier further notices in accordance with Clause 44.1 (but dealing only with matters raised in the notification under this Clause 44.2) so that the procedures in Clause 44.1 and this Clause 44.2 are repeated as often as may be necessary to ensure that all outstanding matters in relation to the Section are attended to. Conduct of all tests, including repetitions, in accordance with the Employer's Requirements shall be at the cost and under the responsibility of the Infraco.

44.3 When a Section has been substantially completed, tested and commissioned in accordance with this Agreement, ~~tie's Representative~~and the Certifier shall issue a Certificate of Sectional Completion to that effect stating the date upon which, the Section was substantially completed, tested and commissioned provided always that a Certificate of Sectional Completion shall not be issued:

44.3.1 in respect of Section B, unless a Certificate of Sectional Completion has already been issued in respect of Section A, except where **tie**, acting reasonably, decides otherwise; and

44.3.2 in respect of Section C, unless a Certificate of Sectional Completion has already been issued in respect of both Section A and Section B; and

44.3.3 in respect of Section D, unless a Certificate of Sectional Completion has been already issued in respect of Section A, Section B and Section C.

44.4 The issue of a Certificate of Sectional Completion shall, in the absence of manifest error, bad faith or fraud, be conclusive evidence for the purpose only of ascertaining that the Sectional Completion Date has occurred on the date stated in such certificate provided always that no Certificate of Sectional Completion shall be conclusive evidence that any work to which it relates is in accordance with this Agreement.

44.5 **tie** shall be entitled to apply a retention of 10% of any Milestone ~~Payment~~ payable on the issue of any Certificate of Sectional Completion for Sections A, B and C, if **tie** is not satisfied that all Consents (other than **tie** Consents) relating to the installation of the Infraco Works relevant to each Section have been obtained, are in full force and effect and are unconditional to the extent practicable at the particular stage of the Infraco Works, (unless where a Consent is conditional, such condition relates only to the passage of time) until such time as such Consents have been obtained.

44.5A The issue of the Certificate of Section Completion for Section D pursuant to Clause ~~45.3~~44.3 (*Notification of Service Commencement*) shall be conditional upon **tie** being satisfied that all Design Stage Consents and Construction or Maintenance Stage Consents relating to the issue of the Certificate of Section Completion and required to enable **tie** to legally commence full operation of ~~Edinburgh Tram Network~~ Initial Phase 1a for passenger service (the "**Necessary Consents**") have been obtained by the Infraco and are in full force and effect and are unconditional to the extent practicable at the particular stage of the Infraco Works or, if conditional, such conditionality relates only to the passage of time before the Necessary Consents comes into full force and effect.

The absence of any Necessary Consents (save for the reasons above) shall entitle **tie** to apply a retention of 10% of the relevant Milestone ~~Payment~~ until the Infraco has obtained all such outstanding Necessary Consents.

44.6 For the purposes of this Clause 44 (*Notification of Sectional Completion of Sections A, B, C and D*), 'substantial completion' shall mean successful testing and commissioning of the Section in accordance with the relevant System Acceptance Tests and the provision of all relevant documents all in accordance with Schedule Part 2 (*Employer's Requirements*).

~~tie's Representative~~ may at ~~his~~its absolute discretion authorise the Certifier to issue a Certificate of Sectional Completion notwithstanding that minor items of work ("Snagging") and, in relation to the issue of a Certificate of Sectional Completion for Section D, Patent Defects remain to be completed, in which event such incomplete work and/or commissioning and/or adjustment shall be completed by the Infraco in accordance with the provisions of Clause 46 (*Snagging and Patent Defects*). ~~tie~~ shall identify any such Snagging on a Snagging List.

45. **NOTIFICATION OF SERVICE COMMENCEMENT**

45.1 The Infraco shall give ~~tie's Representative~~the Certifier not less than 14 Business Days notice of the date upon which the Infraco considers that Section D will be substantially completed, commissioned and will have satisfactorily passed the relevant Systems Acceptance Tests. ~~tie's Representative~~The Certifier shall inspect the Infraco Works on the date or dates reasonably specified by the Infraco in accordance with this Clause 45.1 and to attend any of the tests to be carried out. The Infraco shall procure that such of its staff as ~~tie~~ may reasonably request shall accompany ~~tie's Representative~~the Certifier on any such inspection.

45.2 Within 7 Business Days of any inspection made pursuant to Clause 45.1, ~~tie's Representative~~the Certifier shall notify the Infraco of any outstanding matters (including further evidence of achievement of substantial completion or commissioning and the repetition of any of the Systems Acceptance Tests which are required to be carried out and passed in accordance with the Employer's Requirements) which must be attended to before Section D will have been substantially completed, tested and commissioned in accordance with this Agreement. The Infraco shall attend to all such matters and shall, if necessary, give ~~tie~~ further notices in accordance with Clause 45.1 (but dealing only with matters raised in the notification under this Clause 45.2) so that the procedures in Clause 45.1 and this Clause 45.2 are repeated as often as may be necessary to ensure that all outstanding matters in relation to Section D are attended to. Conduct of all tests, including repetitions, in accordance with the Employer's Requirements shall be at the cost and under the responsibility of the Infraco.

45.3 When Section D has been substantially completed, tested and commissioned in accordance with this Agreement, ~~tie's Representative~~the Certifier shall issue a Certificate of Service Commencement to that effect stating the date upon which, Section D was substantially completed, tested and commissioned provided always that a Certificate of Service Commencement shall not be issued until ~~tie~~the Certifier has issued to the Infraco a Certificate of Sectional Completion in relation to each of Section A, Section B, Section C and Section D.

45.4 The issue of a Certificate of Service Commencement shall, in the absence of manifest error, bad faith or fraud, be conclusive evidence for the purpose only of ascertaining that the Service Commencement Date has occurred on the date stated in such certificate, provided always that the issue of a Certificate of Service Commencement shall not be conclusive evidence that any work to which it relates is in accordance with this Agreement.

45.5 For the purposes of this Clause 45 (*Notification of Service Commencement*), 'substantial completion' shall mean successful testing and commissioning of Section D in accordance with Test T1, Test T2 and Test T3, the provision of all required Spare Parts, relevant documents and that the maintenance staff have been trained, all in accordance with Schedule Part 2 (*Employer's Requirements*). ~~tie's Representative~~ The Certifier may at his absolute discretion issue a Certificate of Service Commencement notwithstanding that Snagging and Patent Defects remain to be completed, in which event such incomplete work and/or commissioning and/or adjustment shall be completed by the Infraco in accordance with the provisions of Clause 46 (*Snagging and Patent Defects*). **tie** shall identify any such Snagging on a Snagging List.

46. **SNAGGING AND PATENT DEFECTS**

46.1 Any Snagging on a Snagging List shall be completed by the Infraco within 20 Business Days of receipt by the Infraco of such Snagging List. The scheduling of carrying out of Snagging shall be agreed between the Infraco and **tie** (in consultation with the Operator if appropriate) and if the Snagging cannot be completed within the said 20 Business Days, then **tie** (acting reasonably and taking into account long lead times) shall determine a longer period to enable completion.

46.2 All Snagging shall be carried out by the Infraco, at its own expense. In so far as this creates additional workload or support from the Operator, then any reasonable, direct costs associated with such additional workload or support shall be paid by the Infraco.

46.3 Save where prevented from doing so by reason of a Relief Event or a Compensation Event, or as otherwise agreed in writing with **tie**, if the Infraco fails to carry out any such Snagging in accordance with the agreed schedule, **tie** shall, by giving 5 days written notice, be entitled to carry out that Snagging itself or by using other contractors and **tie** shall be entitled to recover all reasonable direct costs and expenses properly incurred by **tie** in relation to such work from the Infraco and **tie** may deduct the same from any monies that are or may become due to the Infraco. For the avoidance of doubt, this shall not provide any relief to the Infraco from any liability of this Agreement.

46.4 When all Snagging has been completed, ~~tie's Representative~~ the Certifier shall issue to the Infraco a Snagging Rectification Certificate stating the date on which the Infraco shall have completed its obligations to carry out such Snagging

- 46.5 Save as provided for under Clauses 46.6 to 46.9, the issue of a Snagging Rectification Certificate shall not be taken as relieving the Infraco from any liability arising out of or in any way connected with the performance of its obligations under the Agreement other than in respect of Snagging.
- 46.6 The Infraco's liability in respect of Patent Defects related to any design, construction, installation and maintenance of the Infraco Works which took place prior to the issue of the Service Commencement Certificate shall cease upon the issue by **tie** of the Patent Defects Rectification Certificate pursuant to Clause 46.9 or when the Infraco shall have made all payments due pursuant to Clause ~~46.8~~46.9 below.
- 46.7 The Infraco's liability in respect of Patent Defects which arise as a result of the carrying out of the Maintenance Services after the Service Commencement Date shall cease in accordance with Clause 96.7.
- 46.8 If any Patent Defects as mentioned in Clause 46.6 are identified by **tie** within the Patent Defect Notification Period such Patent Defects shall be notified by **tie** to the Infraco in a schedule of defects which **tie** shall deliver to the Infraco not later than 14 days prior to the expiry of the Patent Defect Notification Period.
- 46.8A** If any Patent Defects as mentioned in Clause 46.6 are identified in the traffic lights, traffic light controls and traffic light systems by tie within the relevant Traffic Controls Patent Defect Notification Period such Patent Defects shall be notified by tie to the Infraco in a schedule of defects which tie shall deliver to the Infraco not later than 14 days prior to the expiry of the relevant Traffic Controls Patent Defect Notification Period.
- 46.9 The Infraco shall remedy any Patent Defects notified in accordance with this Clause 46.8 or Clause 46.8A within a reasonable time after receipt of such schedule of defects notified by **tie** in accordance with ~~Clause 46.8~~Clauses 46.8 or 46.8A. Should the Infraco fail to remedy such Patent Defects **tie** may, upon giving 20 Business Days notice to the Infraco, carry out or engage other contractors to carry out the necessary remedial works and **tie** shall be entitled to recover all reasonable direct costs and expenses properly incurred from the Infraco and Clause 46.6 shall apply.
- 46.10 Within 10 Business Days of all Patent Defects which **tie** have required to be made good under Clause 46.5 or Clause 46.8A having been made good, **tie** shall issue a Patent Defects Rectification Certificate which certificate shall be conclusive evidence that the Patent Defects to which such certificate applies to have been made good.
- 46.11 In the event of termination for any reason after Service Commencement Date, the provisions of Clause 95 (Transition on Termination or Expiry) and Clause 96 (Surveys Prior to Expiry Date) shall apply in relation to the Infraco's liability for Patent Defects, save in

relation to liability for Patent Defects in the traffic lights, traffic light controls and traffic light systems.

47. **ISSUE OF NETWORK CERTIFICATE AND RELIABILITY CERTIFICATE**

47.1 The Infraco shall give **tie's** Representative not less than 14 Business Days notice of the dates when Systems Acceptance Tests T4 and T5 are to be carried out. **tie's** Representative shall inspect the Infraco Works on the date or dates reasonably specified by the Infraco in accordance with this Clause 47.1 and to attend any of the tests to be carried out. The Infraco shall procure that such of its staff as **tie** may reasonably request shall accompany **tie's** Representative on any such inspection.

47.2 Within 7 Business Days of any inspection made pursuant to Clause 47.1, **tie's** Representative shall notify the Infraco of any outstanding matters (including further evidence of achievement of Systems Acceptance Tests T4 and T5 (as appropriate) and the repetition of Systems Acceptance Tests T4 and T5 (as appropriate) which must be attended to before Systems Acceptance Tests T4 and T5 (as appropriate) can be considered to have been passed in accordance with this Agreement. The Infraco shall attend to all such matters and shall, if necessary, give **tie** further notices in accordance with Clause 47.1 (but dealing only with matters raised in the notification under this Clause 47.2) so that the procedures in Clause 47.1 and this Clause 47.2 are repeated as often as may be necessary to ensure that all outstanding matters in relation to Systems Acceptance Tests T4 and T5 (as appropriate) are attended to. Conduct of all tests, including repetitions, in accordance with the Employer's Requirements shall be at the cost and under the responsibility of the Infraco.

47.3 When Systems Acceptance Test T4 has been passed in accordance with this Agreement, **tie's** Representative shall issue a Network Certificate to that effect stating the date upon which Systems Acceptance Test T4 was passed. The issue of a Network Certificate shall, in the absence of manifest error, bad faith or fraud, be conclusive evidence for the purpose only of ascertaining that Systems Acceptance Test T4 was passed on the date stated in such certificate.

47.4 When it is satisfied that Systems Acceptance Test T5 has been passed in accordance with this Agreement, **tie's** Representative shall issue a Reliability Certificate to that effect stating the date upon which, in its opinion, Systems Acceptance Test T5 was passed. The issue of a Reliability Certificate shall, in the absence of manifest error, bad faith or fraud, be conclusive evidence for the purpose only of ascertaining that Systems Acceptance Test T5 was passed on the date stated in such certificate.

47.5 For the avoidance of doubt, the issue of a Network Certificate and/or Reliability Certificate pursuant to this Clause 47.5 shall be conditional upon **tie** being satisfied that all Construction and Maintenance Stage Consents required for the issue of a Network

Certificate and/or Reliability Certificate have been obtained, are in full force and effect and are unconditional save in circumstances where Clause 19.17 applies.

48. **INFRACO TO SEARCH**

48.1 The Infraco shall, if required by **tie's** Representative in writing during the carrying out of the Infraco Works, carry out such surveys, searches, tests or trials as may be necessary to determine the cause of any defect or fault under the directions of **tie's** Representative. Unless the defect or fault is one for which the Infraco is liable under the Agreement, the cost of the surveys, searches, tests or trials carried out by the Infraco as aforesaid shall be borne by **tie**. If the defect or fault is one for which the Infraco is liable, the cost of the surveys, searches, tests or trials carried out as aforesaid shall be borne by the Infraco and the Infraco shall in such case repair, rectify and make good such defect or fault at its own expense.

49. **NON-REMOVAL OF MATERIALS AND CONTRACTOR'S EQUIPMENT**

49.1 Save where provided for in the Maintenance Plan, no Trams, engineers works vehicles, Spare Parts, Special Tools, Infraco's Equipment, Temporary Works, materials for Temporary Works or other goods or materials owned by the Infraco and brought on to the Site for the purposes of the Agreement and which continue to be required for the execution and completion of the Infraco Works shall be removed without the written consent of **tie's** Representative (which consent shall not unreasonably be withheld) except where the removal of any such items from Site concerns items belonging to a sub-contractor no longer engaged in the performance of the Infraco Works, in which case the Infraco shall be responsible for ensuring that the removal has no adverse effect on the progress of the Infraco Works or on the performance of its obligations under this Agreement.

49.2 Subject to the exception set out in Clause 77.2, and subject to Clauses 52.17 and 76, **tie** shall not at any time be liable for the loss of or damage to any ~~Trams,~~ engineers works vehicles, Spare Parts, Special Tools, Infraco's Equipment, Temporary Works, goods or materials.

49.3 Save where required for Maintenance Services, if the Infraco fails to remove any of the said Infraco's Equipment, Temporary Works, goods or materials in accordance with Schedule Part 3 (*Code of Construction Practice and Code of Maintenance Practice*) from a Section within such reasonable time after the issue of a Certificate of Sectional Commencement in respect of that Section as **tie's** Representative may allow, then **tie** may sell or otherwise dispose of such items. From the proceeds of the sale of any such items, **tie** shall be entitled to retain any costs or expenses incurred in connection with their sale and disposal before paying the balance (if any) to the Infraco.

PART 9 - SAFETY

50. **CDM REGULATIONS 2007**

50.1 In this Clause 50 (*CDM Regulations 2007*):

"Regulations" means the Construction (Design and Management) Regulations 2007 or any statutory re-enactment or amendment thereof for the time being in force;

"CDM Coordinator" and **"Principal Contractor"** mean the persons so described in the Regulations;

"Health and Safety File" means the file prepared by virtue of regulation 20(2) of the Regulations.

50.2 The terms used in this Clause 50 shall have the meaning ascribed to them in the Regulations unless the context otherwise requires.

50.3 Where and to the extent that the Regulations apply to the Infraco Works:

50.3.1 Turner & Townsend Management Solutions Limited is appointed CDM Coordinator and shall discharge the responsibilities and functions of a CDM Coordinator in terms of the Regulations in relation to the Infraco Works; and

50.3.2 the Infraco is appointed Principal Contractor in respect of the Infraco Works and shall discharge the responsibilities and functions of a Principal Contractor in terms of the Regulations in relation to the Infraco Works.

50.4 In relation to the Infraco Works, Infraco warrants and undertakes that:

50.4.1 it is competent to perform the duties imposed on it by the Regulations;

50.4.2 it has performed and fulfilled and will continue to perform and fulfil the duties imposed on it by the Regulations, in its capacity as the Principal Contractor;

50.4.3 it has allocated and will continue to allocate adequate resources to ensure that it performs and fulfils its duties under the Regulations properly; and

50.4.4 it has not started and will not start any construction work until a construction phase plan, in terms of the Regulations, has been prepared.

- 50.5 Any action under the Regulations taken by either the CDM Coordinator or the Principal Contractor and in particular any alteration or amendment to the Health and Safety File shall be deemed to be a **tie's** Representative's instruction pursuant to Clause 34 (*Work to be to Satisfaction of tie*) provided that the Infraco shall in no event be entitled to any additional payment and/or extension of time in respect of any such action to the extent that it results from any action, lack of action or default on the part of the Infraco.
- 50.6 If any such action of either the CDM Coordinator or the Principal Contractor could not in the Infraco's opinion reasonably have been foreseen by an experienced contractor the Infraco shall as early as practicable give written notice thereof to **tie's** Representative.
- 50.7 The Infraco shall continue to carry out its role as Principal Contractor in respect of the Infraco Works, notwithstanding that any other works are being carried out at the same time as the Infraco Works.
- 50.8 The Infraco shall provide any information required by the CDM Coordinator in relation to the CDM Regulations within 3 Business Days (where reasonably practicable), or such other period as may be agreed, of any request, or sooner where reasonably practicable (for the avoidance of doubt, this does not affect **tie's** responsibility in terms of the Regulations, to provide the pre-construction information).
- 50.9 Following the Service Commencement Date the Infraco shall comply with the Health and Safety File.

51. **NOTICE OF ACCIDENTS AND LIAISON WITH THE EMERGENCY SERVICES**

- 51.1 In the event of any notifiable accident or dangerous occurrence connected with the carrying out of the Infraco Works, the Infraco shall be responsible for reporting a notifiable accident or dangerous occurrence to **tie** and to the Health and Safety Executive or to the ORR (as the case may be in accordance with the Memorandum of Understanding between the Health and Safety Executive and ORR dated 1 April 2006) under the Reporting of Injuries and Diseases and Dangerous Occurrences Regulations 1995, unless the notifiable accident or dangerous occurrence is otherwise reported by an employer of workers on Site with a duty under the Reporting of Injuries and Diseases and Dangerous Occurrences Regulations 1995 to report accidents in which its employees are injured.
- 51.2 The Infraco shall liaise regularly with the Emergency Services, during the design, construction, testing and commissioning, operation and maintenance of ~~the Edinburgh~~ **Tram Network Initial Phase 1a**. In particular, such regular liaison will include:

- 51.2.1 notification and clearance for temporary traffic management arrangements;

~~51.2.2 Edinburgh Tram Network design and implementation;~~ and

51.2.2 ~~51.2.3~~ the supply by the Infraco of training to a reasonable number of personnel of the Emergency Services (to be provided by the Infraco free of charge) to effect rescue procedures during construction, operation and maintenance.

PART 10 - MAINTENANCE SERVICES

52. MAINTENANCE

52.1 In relation to each Section, from the date of issue of a Certificate of Sectional Completion in relation to that Section ~~and in relation to Trams, from the Tram Maintenance Commencement Date~~, the Infraco shall carry out all maintenance, repair, renewals and remedial works to ~~the Edinburgh Tram Network~~ **Initial Phase 1a** as is necessary:

52.1.1 to maintain ~~the Edinburgh Tram Network~~ **Initial Phase 1a** in accordance with the Maintenance Programme and the Maintenance Plan;

52.1.2 to ensure that all the requirements of the Maintenance Specification are met at all times;

52.1.3 to comply with those Operator Procedures as may be agreed between the Parties from time to time and that apply to the Maintenance Services;

52.1.4 ensure that **tie** is informed of any adverse impact of design, redesign or modification to the Infraco Works which is likely to have an adverse impact on maintenance effectiveness and subject to Clauses 80 (*tie Change*) and 81 (*Infraco Changes*) to prevent such design, redesign or modification being undertaken if requested to do so by **tie**;

52.1.5 to ensure that no modification, maintenance or repair work to ~~the Edinburgh Tram Network~~ **Initial Phase 1a**, Spare Parts or Special Tools within the scope of the Maintenance Services shall prejudice the Case for Safety;

52.1.6 so as not to prejudice the health or safety of, or unreasonably interfere with the proper performance of the duties of the Infraco, the Operator, employees and third parties or otherwise expose the Infraco and/or **tie** to liability under the Health and Safety at Work etc. Act 1974 or the Transport and Works Act 1992 or any other legislation relating to health and safety;

52.1.7 to maximise the extent to which ~~the Edinburgh Tram Network~~Initial Phase 1a is Available Infrastructure and ~~the Trams are Available Trams and~~ to minimise unplanned interruption to such availability;

52.1.8 to sustain the functionality of the component parts of ~~Edinburgh Tram Network~~Initial Phase 1a as built for a period not less than the relevant stipulated design life, if any, stipulated in the Employer's Requirements;

52.1.9 ~~the Edinburgh Tram Network~~Initial Phase 1a is handed back to ~~the~~ on the Expiry Date or the Termination Date (whichever is earlier) in a condition consistent with the Infraco having complied with the requirements of this Clause 52 (*Maintenance*) provided that the Infraco shall not be in breach of this Clause 52.1.9 by reason of fair wear and tear or by reason of any work being required to which Clause 52.17 applies where there was not sufficient time between the damage occurring and the Expiry Date or Termination Date (as appropriate) to enable the Infraco to carry out such work; and

52.1.10 nothing in this Clause 52.1 shall impose any obligation on the Infraco to carry out any Operator Maintenance.

52.2 The Infraco shall work with the Operator to ensure the daily handover of ~~the Edinburgh Tram Network~~Initial Phase 1a to the Operator for operation which shall include the completion of a handover checklist confirming the extent to which ~~the Edinburgh Tram Network~~Initial Phase 1a is Available Infrastructure ~~and the Trams are Available Trams~~.

52.3 The Infraco shall work with the Operator to ensure the daily handback of all or part of ~~the Edinburgh Tram Network~~Initial Phase 1a from the Operator to the Infraco following operation of ~~the Edinburgh Tram Network~~Initial Phase 1a and take into account any comments received from the Operator on the performance or condition of ~~the Edinburgh Tram Network~~Initial Phase 1a.

52.4 The Infraco shall carry out and complete the Infrastructure Maintenance Services in accordance with this Clause 52 (*Infrastructure Maintenance*) subject to its ability to sub-contract the Infrastructure Maintenance Services pursuant to Clause 28 (*Sub-Letting and the Appointment of Sub-Contractors*).

52.5 The Infraco shall, during the Mobilisation Period, carry out or procure that the Mobilisation Services are carried out on or before the date for the appropriate Mobilisation Milestone .

- 52.6 The Infraco shall carry out (or shall procure the carrying out of) all Maintenance Services in a safe manner and so that ~~the Edinburgh Tram Network~~ Initial Phase 1a is capable of being operated in a safe and efficient manner free from any unreasonable risk to the health and well being of persons using or maintaining it and free from any reasonably avoidable risk of pollution, nuisance, interference or hazard.
- 52.7 During the Term, the Infraco shall be responsible for, without limitation providing, employing and training all staff necessary to perform the Maintenance Services in accordance with this Agreement and the total cost of providing those staff, the Maintenance Services (including the total cost of providing Spare Parts and Special Tools) is included in the Contract Price.
- 52.8 During the Mobilisation Period, the Infraco shall be responsible for, without limitation, providing all staff necessary to perform the Mobilisation Services in accordance with this Agreement, and the total cost of providing the Mobilisation Services is included in the Contract Price.
- 52.9 The Maintenance Services shall comprise only materials and goods which are of satisfactory quality and unless otherwise agreed in writing, the Infraco shall supply only new materials and goods, save where existing materials and goods have been satisfactorily repaired or reused by the Infraco in accordance with Good Industry Practice and, where applicable, as permitted under the Maintenance Plan.

Spare Parts and Special Tools

- 52.10 The Infraco shall be responsible for the provision of all Spare Parts and Special Tools necessary or required for the Maintenance Services. All such Spare Parts shall meet the technical and safety requirements of the Maintenance Specification. Special Tools to be provided pursuant to this Clause 52.10 shall, as a fundamental condition of this Agreement, be provided with a valid certificate of calibration (where appropriate). ~~The Infraco shall notify **tie** as soon as reasonably practicable after becoming aware of any breach of warranty or supply of defective Spare Parts and Special Tools by the Tram Supplier or Tram Maintainer.~~
- 52.11 The Infraco shall also ensure that throughout the term of this Agreement all Special Tools which require calibration or testing in order that they shall be fit for their intended purpose shall have a valid test and/or calibration certificate (where appropriate), and the Infraco shall give to **tie** within 5 Business Days of any request by **tie** a copy of the current test or calibration certificate (where appropriate).
- 52.12 The Infraco shall acquire adequate stocks of such Spare Parts and Special Tools to ensure that there is always a Minimum Spare Parts Pool at the Depot and, in any case, sufficient Spare Parts and Special Tools to enable the Infraco to carry out (or procure the carrying

out of) the Maintenance Services in accordance with this Agreement and manage reorder levels and lead times such that the stock of Spare Parts or Special Tools are maintained at or above the level of the Minimum Spare Parts Pool.

52.13 NOT USED

52.14 Every Reporting Period, the Infraco and **tie** shall review the level of the Minimum Spare Parts Pool in light of the requirements for Spare Parts in delivering the Maintenance Services pursuant to this Agreement and the Infraco shall make recommendations to **tie** in relation to any adjustments to be made to the Minimum Spare Parts Pool either in relation to the extent of the Minimum Spare Parts Pool or the quantity of any of the Spare Parts required to meet the Minimum Spare Parts Pool. **tie** shall review the Infraco's recommendations and where necessary consult further with the Infraco as to the adequacy of the Minimum Spare Parts Pool in the light of ongoing maintenance pursuant to the Maintenance Services and, subject to Clause 52.12 and the Infraco having taken such steps as are possible to rectify the situation, if **tie**, in its absolute discretion, is of the opinion that it would be appropriate to vary the Minimum Spare Parts Pool then such variation shall be a **tie** Change and the terms of Clause 80 (**tie** Changes) shall apply.

Repairs

52.15 Subject to Clause 46, the Infraco shall effect the repair of all defects in, failures of or damage to ~~the Edinburgh Tram Network~~ Initial Phase 1a excluding the Free Issue Fare Collection Equipment irrespective of cause. The Infraco shall effect all such repairs in a manner consistent with its obligations under this Agreement and in a manner which causes the minimum disruption to the operation of ~~the Edinburgh Tram Network~~ Initial Phase 1a and to enable ~~the Edinburgh Tram Network~~ Initial Phase 1a (excluding the Free Issue Fare Collection Equipment) to be Available Infrastructure ~~and the Trams to be Available Trams~~.

52.16 The Infraco shall bear all of the costs of complying with Clause 52.15 to the extent that any damage to ~~the Edinburgh Tram Network~~ Initial Phase 1a excluding the Free Issue Fare Collection Equipment is caused by:

52.16.1 a breach of this Agreement by the Infraco; and/or

52.16.2 NOT USED

52.16.3 any negligent act or negligent omission by the Infraco or any Infraco Party.

52.17 To the extent that any damage to ~~the Edinburgh Tram Network~~ Initial Phase 1a excluding the Free Issue Fare Collection Equipment is not caused by:

- 52.17.1 a breach of this Agreement by the Infraco; and/or
- 52.17.2 NOT USED
- 52.17.3 any negligent act or negligent omission by the Infraco or any Infraco Party,

then **tie** shall bear the necessary, reasonable and demonstrable costs of the Infraco repairing such damage and any repairs in respect of such damage shall be a Mandatory **tie** Change and the terms of Clause 80 (**tie** Changes) shall apply.

52.18 All repairs to and replacements of ~~the Edinburgh Tram Network~~ **Initial Phase 1a** excluding the Free Issue Fare Collection Equipment shall be carried out to a standard that restores the defective, failed or damaged part of ~~the Edinburgh Tram Network~~ **Initial Phase 1a** excluding the Free Issue Fare Collection Equipment to a condition which meets the requirements of the Maintenance Specification (subject to normal wear and tear) and enables the Infraco to comply with its obligations under this Clause 52 (*Maintenance*).

52.19 Where necessary, the Infraco shall be entitled to carry out temporary repairs to ~~the Edinburgh Tram Network~~ **Initial Phase 1a** excluding the Free Issue Fare Collection Equipment subject to obtaining the prior approval of HMRI, the Operator, **tie** and all appropriate regulatory authorities. All temporary repairs shall be fully repaired at the earliest opportunity and in any event as soon as reasonably practicable upon receipt of written notice from HMRI, **tie** or the Operator (as the case may be) stating that it no longer considers such temporary repairs to be safe and/or fit for their purpose.

52.20 In respect of any incident or failure affecting ~~the Edinburgh Tram Network~~ **Initial Phase 1a** excluding the Free Issue Fare Collection Equipment, the Infraco shall provide such assistance, information and advice as the **tie** or Operator shall reasonably require, including such assistance as **tie** or Operator shall reasonably require in:

52.20.1 the Infraco attending the site of the occurrence to assess the cause of the problem, with a required response time of no more than 15 minutes between the hours of 6:01 am and 10:00 pm or 1 hour between the hours of 10:01 pm and 6:00 am from **tie's** or the Operator's request for attendance to a representative of the Infraco departing from the Depot or elsewhere to attend.

52.20.2 rectifying the problem where such rectification falls within the scope of the Maintenance Services;

52.20.3 implementing measures to overcome and/or mitigate the effect on operation of ~~the Edinburgh Tram Network~~Initial Phase 1a excluding the Free Issue Fare Collection Equipment;

52.20.4 implementing temporary repairs where such repairs fall within the scope of the Maintenance Services; and

52.20.5 recovering any part of ~~the Edinburgh Tram Network (including the Trams but~~Initial Phase 1a (excluding the Free Issue Fare Collection Equipment) for repair (where such part of ~~the Edinburgh Tram Network~~Initial Phase 1a is moveable) where such repair falls within the scope of the Maintenance Services.

52.21 As soon as practicable following the completion of the repair, the Infraco shall prepare and provide a report which summarises the causes of such incident or failure and providing recommendations where applicable to avoid the repetition of such occurrence. To the extent that the incident or failure was not attributable to a breach of this Agreement by the Infraco or a negligent act or omission of the Infraco or any Infraco Party, the Infraco shall be entitled to recover the costs of complying with Clause 52.20 in accordance with Clause 52.17

52.22 Where the most efficient manner of dealing with such failure would be for repairs to be effected at the site of the failure, where such repairs fall within the scope of the Maintenance Services, the Infraco shall have available competent resources to carry out such repairs as can safely be carried out at the site.

52.23 If the Infraco reasonably believes or becomes aware that there is or may be:

52.23.1 a defect or in the case of reporting or control systems, an excess of alarms and fault annunciation in a Part which has been fitted in ~~the Edinburgh Tram Network (including a Tram~~Initial Phase 1a or the Trams (excluding the Free Issue Fare Collection Equipment) whether or not as part of the Maintenance Services; or

52.23.2 any other defect in relation to ~~the Edinburgh Tram Network (including a Tram)~~Initial Phase 1a or the Trams;

which may prejudice the safe or reliable operation of ~~the Edinburgh Tram Network~~Initial Phase 1a, the Infraco shall immediately on becoming aware of such defect notify ~~tie~~ and the Operator of such defect and provide a proposal as to the most effective course of action by which such defect can be rectified where such rectification falls within the scope

of the Infrastructure Maintenance Services. The cost of such rectification shall be allocated in accordance with Clauses 52.16 and 52.17.

Additional System Availability

52.24 In circumstances where **tie** requires any Additional Available Infrastructure ~~or Additional Available Trams~~ for its own use, including but not limited to the training of drivers and extended hours of operation for special events, it shall give the Infraco at least one week's notice of its requirements.

The Infraco shall confirm whether it is able to make available to **tie** any Additional Available Infrastructure ~~or Available Trams~~ requested by **tie**. If the Infraco confirms (such confirmation not to be unreasonably withheld) that it is able to make available to **tie** any such Additional Available Infrastructure ~~or Available Trams~~, the Infraco shall be entitled to payment on the basis set out in Appendix B of Schedule Part 7 (*Maintenance Contract Price Analysis*). Such Additional Available Infrastructure ~~or Available Trams~~ shall be disregarded in relation to any calculations under Schedule Part 6 (*Maintenance Payment Regime*) and **tie's** remedy in the event of any deficiency in or failure to provide Additional Available Infrastructure ~~or Available Trams~~ shall be to apply deductions to payments on the basis set out in Appendix B of Schedule Part 7 (*Maintenance Contract Price Analysis*).

Operations and Maintenance Manual

52.25 The Infraco shall maintain and keep up to date the operations and maintenance manual and as built drawings and Spare Parts list (the "**Operations and Maintenance Manual**"). The Infraco shall provide to **tie's** Representative an electronic copy of such manual and each successive update, free of charge, as soon as reasonably practicable after their production. The Infraco shall provide to **tie's** Representative draft integrated manuals of description and maintenance of all ~~Edinburgh Tram Network~~ Initial Phase 1a components not less than 90 days before the part of ~~the Edinburgh Tram Network~~ Initial Phase 1a into which they are incorporated commences public service. The Infraco shall keep such manuals up to date and provide to **tie's** Representative a copy of each successive update as soon as reasonably practicable after their production.

Control Room

52.26 The Infraco shall provide and maintain the facility for the communication of information, CCTV images and data from the Control Room to CEC's traffic and information centre, to facilitate:

52.26.1 information exchange;

- 52.26.2 the provision of public transport data;
- 52.26.3 the provision of real time passenger information;
- 52.26.4 road traffic monitoring;
- 52.26.5 incident detection and emergency diversions management;
- 52.26.6 co-ordination of traffic signals; and
- 52.26.7 co-ordination of variable messages to passenger information displays.

52.27 **tie shall provide Infraco with a copy of the Self Monitoring Plan (as defined in the Tram Maintenance Agreement) as soon as reasonably practicable following CEC's receipt of the same from the Tram Maintainer.**

53. HAZARDOUS MATERIALS

- 53.1 The Infraco undertakes that it is and will remain during the term of this Agreement, or that any relevant Infraco Party is and will remain during the Term, appropriately qualified and experienced in and accredited for the purposes of carrying out work of the scope, type and complexity that is required in carrying out the Maintenance Services involving the handling of any Hazardous Materials incorporated in ~~the Edinburgh Tram Network~~ **Initial Phase 1a** or any Part thereof and shall maintain an up to date register recording the location, volume, type, storage condition, and handling and disposal procedures for such Hazardous Materials.
- 53.2 The Infraco shall not use any Hazardous Materials in performing the Maintenance Services except where expressly permitted to do so by the Maintenance Specification, Law and Good Industry Practice, or otherwise with the express prior written consent of **tie**. If Hazardous Materials are used other than expressly in accordance with the Maintenance Specification, Law and Good Industry Practice, or with the prior written consent of **tie**, the Infraco shall ensure that all such Hazardous Materials used in the provision of the Maintenance Services are expressly identified in writing to **tie** and the Operator by reference to this Clause 53 (*Hazardous Materials*) with reference to the hazards attached to them and the procedures that the Infraco has for managing such hazards.
- 53.3 The Infraco shall ensure that all Maintenance Services performed under this Agreement which involve Hazardous Materials, including the removal, handling and disposal of those materials, are carried out in such a manner as to ensure compliance with all Law (including any advisory literature provided by the Health and Safety Commission or Executive). The Infraco shall inform **tie's** Representative of any Hazardous Materials, which do not form part of the Maintenance Services or which are encountered in the course of the Maintenance Services and shall submit its proposed method of operation and the

precautions to be taken before commencing any work involving such Hazardous Materials. Such submission shall be a **tie** Change and the terms of Clause 80 (**tie Changes**) shall apply. If the Infraco proposes to handle or dispose of such Hazardous Materials, it shall comply with Law (including any advisory literature provided by the Health and Safety Commission or Executive) and any additional precautions specified by **tie's** Representative as to their handling and disposal.

53.4 The Infraco acknowledges that it is aware that various health hazards may be encountered in performing the Maintenance Services (which may not be immediately apparent as deliberate and malicious concealment of such hazards may take place). The Infraco shall take all reasonably practicable precautions for the protection of the Infraco Parties, the **tie** Parties and any other person who may be affected by the Maintenance Services.

53.5 To the extent **tie** or any **tie** Party stores or uses Hazardous Materials at such area of the Depot as is under the responsibility of the Infraco pursuant to the Depot Licence, **tie's** Representative shall give reasonable notice to the Infraco so that the appropriate entry may be made on the register maintained by the Infraco subject always to the Infraco Representative's ability to advise promptly that:

53.5.1 such storage or use is not appropriate on the grounds that it poses an unreasonable additional responsibility on Infraco, due to the intended use, nature or quantity of the Hazardous Materials in question; or

53.5.2 such storage or use does not relate to transport-related services of which the Infraco has experience

in which event **tie** shall remove such Hazardous Materials and/or indemnify the Infraco from all costs arising from the presence of such Hazardous Materials at the Depot.

54. **RECORDS AND COMPUTER SYSTEMS**

54.1 All the Technical Records for any part installed, replaced, overhauled or inspected by the Infraco or an Infraco Party must be:

54.1.1 written up, maintained and kept up to date at all times by the Infraco in electronic or hard copy form in accordance with the requirements of the Maintenance Specification and/or the Employer's Requirements;

54.1.2 retained by the Infraco for the longer of:

54.1.2.1 the Term; or

54.1.2.26 years from the date on which the Maintenance Services to which such Technical Records relate are provided; and

54.1.3 copied to **tie** within 10 Business Days of a request by **tie** for such Technical Records.

54.2 **tie** will be entitled from time to time to inspect and audit such Technical Records following reasonable notice to the Infraco. When carrying out any inspection or audit under this Clause 54.2, **tie** shall use reasonable endeavours to minimise any disruption caused to the provision of the Maintenance Services by the Infraco or any Infraco Party.

54.3 Further, for each part of ~~the Edinburgh Tram Network~~ **Initial Phase 1a** the following details shall be retained by the Infraco for not less than 6 years after completion of the Maintenance Services and such details provided to **tie** in accordance with the provisions of this Clause 54.3:

54.3.1 the change control register maintained pursuant to Clause 79.2; and

54.3.2 all other quality control activity records as agreed with **tie** from time to time.

54.4 The Technical Records will be written up and maintained by the Infraco in respect of all Maintenance Services in accordance with this Agreement and Good Industry Practice. Such Technical Records will, subject to Clause 54.5 be stored in IFS system or as otherwise agreed between the Parties.

54.5 Upon any request by **tie** for any Technical Record, or upon handover of the Technical Records pursuant to Clause 95.1, the Infraco shall provide such Technical Records in any suitable non-proprietary format as may be reasonably specified by **tie**.

54.6 The Infraco shall:

54.6.1 use all reasonable endeavours to ensure that the computer systems, equipment and other systems of the Infraco used by the Infraco in carrying out the Maintenance Services including the Asset Management System, any computer systems, equipment, other systems and parts supplied by the Infraco, are at all times free from disabling or destructive programs or devices including, without limitation, bugs, virus or logic bombs, Trojan horses and analogous macros, programs or sub-routines; and

54.6.2 ensure that appropriate security systems are implemented and maintained to protect the integrity and security of the Asset Management System and such computer systems, equipment and other

systems from security and IT risks including, without limitation, unauthorised access (both by persons external to the Infraco and the Infraco's employees, agents and subcontractors).

54.7 In the event of a breach of Clause 54.6 , the Infraco shall conduct a full and complete review of its computer systems, equipment and other systems (including the security arrangements relating to such systems) to identify the source of such disabling or destructive program or device and, at its own costs and with the prior written approval of the Infraco (such approval not to be unreasonably withheld or delayed) take such action as may be necessary to immediately remedy the breach and additionally to ensure that such breach does not re-occur.

55. **SURVEYS OF ~~THE EDINBURGH TRAM NETWORK~~ INITIAL PHASE 1A AND AUDITS OF MAINTENANCE PROCEDURES**

55.1 **tie** may carry out or procure surveys of ~~the Edinburgh Tram Network~~ Initial Phase 1a in accordance with Clause 96 (*Surveys Prior to Expiry Date*) and **tie** may audit the Maintenance Procedures pursuant to Clause 104 (*Information and Audit Access*).

55.2 Where following any audit of Maintenance Procedures **tie** identifies non-conformances in the implementation of the Maintenance Procedures the Infraco shall take such steps as are agreed between the Parties to remedy such shortcomings.

55.3 When carrying out any audit under Clause 55.1, **tie** shall (or shall procure that any auditor shall) use reasonable endeavours to minimise any disruption to the provision of the Maintenance Services by the Infraco. Each Party shall bear their own cost of such audits, except where Clause 55.2 applies, when Infraco shall bear **tie's** reasonable and demonstrable costs.

56. **SERVICE PERFORMANCE AND QUALITY MONITORING**

56.1 The Infraco shall comply with the provisions of Schedule Part 6 (*Maintenance Payment Regime*).

56.2 In addition to the provisions set out in Schedule Part 6 (*Maintenance Payment Regime*), the Infraco shall send such representatives as **tie** may reasonably require to a performance meeting every Reporting Period (which will be convened on not less than 2 Business Days' notice by **tie**) and such other meetings as **tie** may reasonably require from time to time to discuss the performance of the Maintenance Services in accordance with the Agreement.

56.3 The Infraco shall submit a Service Quality Report to **tie** no later than 3 Business Days following each Reporting Period End Date. For the avoidance of doubt, **tie** shall not be obliged to process an invoice submitted by the Infraco in the absence of the Service Quality Report pertaining to the relevant Reporting Period. The Infraco shall be responsible

for ensuring that the data contained in the Service Quality Report is generated automatically and, to the extent practicable, electronically.

56.4 In addition to the Service Quality Reports to be submitted by the Infraco pursuant to Clause 56.3 above, the Infraco shall prepare and submit to **tie** an Annual Service Report pursuant to Clause 73 (*Best Value*).

56.5 The Infraco shall monitor its compliance with this Agreement in respect of the Maintenance Services, and the Parties shall comply with the following provisions:

56.5.1 no later than 3 months before the Planned Service Commencement Date and on each anniversary thereafter, the Infraco shall provide to **tie's** Representative its proposed Self-Monitoring Plan for the following 12 months;

56.5.2 the Self-Monitoring Plan shall be designed to underpin **tie's** best value obligations and the Infraco shall have full regard to the requirements of Clause 73 (*Best Value*) when preparing its Self-Monitoring Plan;

56.5.3 no later than the date falling 20 Business Days after receipt by **tie's** Representative of such proposed Self-Monitoring Plan, **tie** shall notify the Infraco in writing as to whether or not it considers the Self-Monitoring Plan to be acceptable for the purposes of this Agreement; and

56.5.4 where **tie** considers the relevant Self-Monitoring Plan to be acceptable, then the Self-Monitoring Plan shall be implemented by the Infraco for the relevant 12 months; or

56.5.5 where **tie** does not consider the relevant Self-Monitoring Plan to be acceptable, then the Parties shall use all reasonable endeavours to reach agreement as to the contents of the Self-Monitoring Plan; and

56.5.6 until such time as the Self-Monitoring Plan has been accepted by **tie**, the previous year's Self-Monitoring Plan shall remain in effect;

or, in default of such agreement, either Party may refer the matter for determination under the Dispute Resolution Procedure, and the Infraco shall implement the Self-Monitoring Plan as so agreed or determined.

56.6 The Infraco shall as soon as reasonably practicable provide **tie's** Representative with relevant particulars of failure to deliver the Maintenance Services. The Infraco shall cooperate with **tie** and provide such access as **tie** may reasonably require to enable **tie** at all reasonable times to observe, inspect and satisfy themselves (including by carrying out

sample checks) as to the adequacy of the monitoring procedures implemented by the Infraco and the Infraco's compliance with this Agreement.

56.7 Subject to Clause 56.9, without prejudice to **tie's** other rights under this Agreement, if

56.7.1 at any time the Infraco has committed any material breach of its obligations under this Agreement; or

56.7.2 following the issue of the Reliability Certificate, in any Reporting Period where Infraco's performance is below the standard required to achieve the Minimum Performance Payment,

then **tie** may issue an Underperformance Warning Notice to the Infraco setting out the matter or matters giving rise to such notice and containing a reminder to the Infraco of the implications of such notice.

56.8 Following the service of an Under Performance Warning Notice in pursuant to Clause 56.7.2:

56.8.1 the Infraco shall within 10 Business Days of receipt of such Under Performance Warning Notice deliver to **tie** a plan setting out how the Infraco propose to remedy the issues which lead to the deductions leading to the service of such Under Performance Warning Notice and proposing a suitable timescale to remedy such issues (a "**Rectification Plan**");

56.8.2 the Parties will use reasonable endeavours to agree the contents of the Rectification Plan within 10 Business Days of receipt by **tie**; and

56.8.3 if the parties do not agree the Rectification Plan within 10 Business Days of receipt by **tie** either Party may refer the matter to the Dispute Resolution Procedure (provided that the Infraco may not refer or cause **tie** to refer the matter to the Dispute Resolution Procedure vexatiously to delay the agreement of a Rectification Plan).

56.9 **tie** shall not be entitled to serve:

56.9.1 more than one Under Performance Warning Notice in any Reporting Period;

56.9.2 an Under Performance Warning Notice pursuant to Clause 56.7.2 in any two consecutive Reporting Periods; or

56.9.3 a further Under Performance Warning Notice pursuant to 56.7.2 in respect of the same circumstances which led to the service of any

previous Under Performance Warning Notice where the Infraco is using reasonable endeavours to comply with the terms of the Rectification Plan put in place to address the issues or circumstances which led to the service of a previous Under Performance Warning Notice

56.10 Without prejudice to **tie's** other rights under this Agreement, if the Infraco receives four or more Underperformance Warning Notices in any twelve (12) month period, **tie** may by notice to the Infraco increase the level of either **tie's** monitoring of the Infraco (including the employment by **tie** of additional performance monitoring officers), or (at **tie's** option) of the Infraco's monitoring of the Infraco's performance of its obligations under this Agreement, until such time as the Infraco shall have demonstrated to the reasonable satisfaction of **tie** that it will perform (and is capable of performing) its obligations under this Agreement, in which case the following provisions shall apply:

56.10.1 any such notice to the Infraco shall specify in reasonable detail the additional measures to be taken by **tie** or by the Infraco (as the case may be) in monitoring the performance of the Infraco;

56.10.2 if the Infraco (acting reasonably) objects to any of the specified measures on the grounds that they are excessive, it shall notify **tie** in writing, within 2 Business Days of the receipt of the notice, of the measures objected to (and of any changes necessary in order to prevent prejudice to the Infraco's performance of its obligations under this Agreement);

56.10.3 the measures to be taken by **tie** and the Infraco (as the case may be) shall be agreed between the Parties or, in the absence of agreement within 3 Business Days of **tie's** receipt of the Infraco's objection, be determined, at the referral of either Party, pursuant to the Dispute Resolution Procedure and on a basis which the relevant adjudicator considers reasonable having regard to the nature and seriousness of the breaches of this Agreement or circumstances leading to the issue of such Underperformance Warning Notices which have occurred, the likelihood of such breaches or circumstances recurring, the risks which would arise if such breaches or circumstances recurred, the level of culpability of the Infraco in relation to such breaches and circumstances and the actions being taken by the Infraco to prevent breaches of this Agreement or circumstances entitling **tie** to issue further Underperformance Warning Notices recurring; and

56.10.4 the Infraco shall bear its own costs and reimburse to **tie** on demand at all times from and against all reasonable costs and expenses incurred by or on behalf of **tie** in relation to such increased level of

monitoring (including an appropriate sum in respect of general staff costs and overheads).

56.11 In the event that the Infraco Party responsible for any Underperformance Warning Notices is terminated, such Underperformance Warning Notices shall be automatically cancelled.

57. PERFORMANCE REVIEW

57.1 Following the end of each Performance Review Period, **tie** shall review and assess the performance of the Infraco on the basis set out in this Clause 57.

57.2 **tie** shall review the following:

57.2.1 the Infraco's historic performance under Schedule Part 6 (*Maintenance Payment Regime*);

57.2.2 whether the Infraco has complied with all of its obligations under this Agreement (and whether **tie** reasonably considers any breach(es) to have been both minor and infrequent); and

57.2.3 the Infraco's Maintenance Plan for the next Performance Review Period to jointly assess whether it is sufficiently robust to satisfy the Infraco, acting reasonably, that the Infraco will comply with its contractual obligations as stipulated in Clause 57.2.1 and 57.2.2 for the next Performance Review Period;

57.3 If any of the criteria set out at Clause 57.2 are not satisfied then **tie** may specify particular requirements in respect of those areas where the criteria set out at Clause 57.2 have not been satisfied, to be met by the Infraco by a specified date prior to the next Performance Review Date. If **tie** specifies such interim date then the provisions of this Clause 57 (*Performance Review*) will apply at the interim date, *mutatis mutandis*, as if that date was the original Performance Review Date (and as if the criteria set out at Clause 57.2 were the requirements specified by **tie** pursuant to this Clause 57.3).

58. TUPE AND HANDOVER

58.1 In this Clause 58 (*TUPE and Handover*) and Schedule Part 36 (*TUPE Information*) the following definitions shall apply:

"Infraco Employees" means any employee of the Infraco or Infraco Parties engaged in the performance of the Maintenance Services under this Agreement during the Termination Period;

"New Provider" means **tie** and/or any third party who takes over (or who the Infraco is notified will be taking over) the provision of some or all of the obligations of the Infraco under this Agreement;

"Relevant Employee" means any employee of the Infraco or an Infraco Party employed wholly or mainly in or assigned to the provision of the Maintenance Services under this Agreement as at the date of the Service Provision Change;

"Service Provision Change" means any termination, variation, amendment or other alteration of this Agreement which results in all or part of the Maintenance Services under this Agreement being provided by **tie** or by a third party;

"Termination Period" means either (i) the 12 month period ending on the Expiry Date or (ii) the period of any notice determining this Agreement prior to the Expiry Date;

"TUPE Employees" means any person whose contract of employment may be transferred to a successor contractor, operator or maintainer by virtue of the operation of Law (including the TUPE Regulations) or in respect of whom liabilities arising from the contract of employment or employment relationship may be transferred;

"TUPE Information" means the information in relation to the TUPE Employees specified in Schedule Part 36 (*TUPE Information*);

"the TUPE Regulations" means the Transfer of Undertakings (Protection of Employment) Regulations 2006.

58.2 NOT USED

58.3 The Infraco shall not, without the prior consent of **tie** (which shall not be unreasonably withheld or delayed), vary or purport or promise to vary, the terms or conditions (as amended from time to time) of employment of any Infraco Employee (including any promise to make any additional payment or provide any additional benefit) where such variation or addition takes effect in the Termination Period unless it is in the ordinary course of business.

58.4 NOT USED

58.5 Subject to Clause 58.6, the Infraco shall at the request of **tie** in the Termination Period provide the TUPE Information within 15 Business Days of such request and thereafter until termination or expiry of this Agreement update such information in accordance with the reasonable requests of **tie** subject to the Infraco's common law duties to their employees or under the Data Protection Act 1998. **tie** shall treat the TUPE Information as Confidential Information to which Clause 101 (*Confidential Information*) shall apply provided that **tie** shall only be permitted to use the TUPE Information for the purposes of conducting a tendering exercise for the appointment of a replacement service provider following a

Service Provision Change and shall only be entitled to disclose the TUPE Information to any tenderer pursuant to such exercise and subject to such tenderers accepting a confidentiality obligation in relation to such information equivalent to the obligations set out in Clause 101 (*Confidential Information*), mutatis mutandis.

58.6 The Infraco shall use its reasonable endeavours to ensure that it will be in a position to provide TUPE Information pursuant to Clause 58.5 in respect of the TUPE Employees who are not also Infraco Employees but, subject to the Infraco having used such reasonable endeavours, the Infraco's obligation to provide TUPE Information pursuant to Clause 58.5 in respect of such TUPE Employees shall be limited to the TUPE Information covering such TUPE Employees actually in the possession of or actually obtainable by the Infraco.

Establishment of hand-over procedure

58.7 During the Termination Period, the Infraco and **tie** both acting diligently and in good faith with a view to ensuring that there shall be no material deterioration or break in the provision of Maintenance Services, shall, at the cost of **tie**, establish appropriate handover procedures.

tie's obligations in relation to TUPE

58.8 **tie** shall within 20 Business Days of a request from the Infraco, provide the Infraco with such information as is requested by the Infraco in order to enable the Infraco to comply with its obligations under Regulation 13(2)(d) of the TUPE Regulations.

Continued technical support

58.9 For a period of six months after termination or expiry of this Agreement, the Infraco shall provide **tie** with such access as **tie** may reasonably require employees of Infraco having the appropriate knowledge and experience of the history of the Maintenance Services and associated technical matters for the following purposes:

58.9.1 general technical advice on subjects for which the Infraco was responsible pursuant to this Agreement; and

58.9.2 interpretation of maintenance history data, drawing modifications, regulations and the like.

tie shall reimburse the Infraco in respect of all reasonable and proper costs and expenses incurred by the Infraco in complying with this Clause 58 (*TUPE and Handover*)

Technical Records

58.10 Upon termination or expiry of this Agreement, the Infraco shall procure that **tie** is provided with an electronic copy of the Technical Records.

Deemed TUPE Transfer

58.11 **tie** and the Infraco acknowledge that in the event of a Service Provision Change, the TUPE Regulations may apply to such Service Provision Change. In the event that the TUPE Regulations do not apply to any Service Provision Change, the New Provider shall, with effect from the date of the Service Provision Change, offer employment to each Relevant Employee on like terms to the terms on which they would have become employed by the New Provider had the TUPE Regulations applied or, to the extent that it is not reasonably practicable to do so in respect of any such term, on terms which are not in such respect materially to the detriment of the Relevant Employee.

58.12 The New Provider shall treat the period of continuous service of each Relevant Employee or TUPE Employee with the Infraco or an Infraco Party up to the date of the Service Provision Change as continuous with such TUPE Employee's or Relevant Employee's service with the New Provider.

TUPE Transfer Indemnity

58.13 **tie** shall, or shall procure that any New Provider shall, indemnify the Infraco and any Infraco Party against any losses, costs, claims, demands, actions, fines, penalties, awards, liabilities and expenses (including reasonable legal expenses) incurred by the Infraco or any Infraco Party in connection with or as a result of:

58.13.1 any claim or demand by any TUPE Employee (whether in contract, delict, under statute, pursuant to Law or otherwise) arising directly or indirectly from any act, fault or omission of the New Provider in respect of any TUPE Employee on or after the date of termination of this Agreement or the ending of the provision in whole or in part of the obligations of the Infraco under this Agreement by the Infraco or any Infraco Party;

58.13.2 any failure by the New Provider to comply with its obligations under Regulation 13 of the TUPE Regulations;

58.13.3 any claim (including any individual entitlement of a TUPE Employee under or consequent on such claim) by any trade union or other body or person representing the TUPE Employees arising from or connected with any failure by the New Provider to comply with any legal obligation to such trade union, body or person;

58.13.4 any change or proposed change in the terms and conditions of employment or working conditions of the TUPE Employees on or after their transfer to the New Provider, or to the terms and conditions of employment or working conditions of any person who would have been a TUPE Employee but for their resignation or decision to treat their employment as terminated under Regulation 4(9) of the Regulations on or before the Service Provision Change as a result of any such changes; and

58.13.5 the change of identity of employer occurring by virtue of the TUPE Regulations and/or this Agreement being significant and detrimental to any of the TUPE Employees, or to any person who would have been a TUPE Employee but for their resignation or decision to treat their employment as terminated under Regulation 4(9) of the Regulations as a result of the change in employer.

59. **STEP-IN FOR HEALTH AND SAFETY AND ENVIRONMENTAL REASONS**

59.1 The provisions of Clauses 59.1 to 59.5 (inclusive) shall apply if the Infraco is in breach of its obligations to provide the Infrastructure Maintenance Services under this Agreement, and **tie**, acting reasonably, considers action is required in connection with Infrastructure Maintenance Services because as a result of such breach (i) a serious risk exists to health or safety of persons or to the environment; or (ii) the safety of the general public is compromised.

59.2 If the circumstances set out in Clause 59 (*Step-In for Health and Safety and Environmental Reasons*) apply, **tie**, acting reasonably, may (without prejudice to its other rights under this Agreement) either:

59.2.1 if **tie** considers that there is sufficient time and that it is likely that the Infraco will be willing and able to provide assistance, require the Infraco by written notice to take such steps as **tie** consider necessary or expedient to mitigate or rectify such circumstances and the Infraco shall use its best endeavours to comply with **tie's** requirements as soon as reasonably practicable; and/or

59.2.2 if **tie** considers there is not sufficient time, or that the Infraco is not likely to be willing and/or able to take the necessary steps, take such steps as are necessary to remove or reduce such risk (either themselves or by engaging others to take any such steps).

59.3 If the Infraco:

59.3.1 does not confirm within 5 Business Days of a notice served pursuant to Clause 59.2 (or such shorter period as is specified by **tie** in the notice where **tie** (acting reasonably) considers there to be an emergency), that it is willing to take such steps as are referred to in Clause 59.2; or

59.3.2 fails to take the steps notified to it by **tie** pursuant to Clause 59.2 within such time as **tie**, acting reasonably, shall think fit,

then (without prejudice to Clause 59.2.1) **tie**, acting reasonably, may itself take, or engage others to take, such steps as they consider appropriate.

59.4 Where **tie** considers it to be necessary or expedient to do so, the steps which **tie** may take pursuant to this Clause 59 (*Step-In for Health and Safety and Environmental Reasons*) shall include the partial or total suspension of the right and obligation of the Infraco to perform the Maintenance Services but only for so long as the circumstances referred to in Clause 59 (*Step-In for Health and Safety and Environmental Reasons*) subsist.

59.5 Any reasonable and demonstrable costs, losses, expenses or damages incurred by the Infraco in taking such steps as are required by **tie** pursuant to this Clause 59 (*Step-In for Health and Safety and Environmental Reasons*) shall be borne by the Infraco.

59.6 The Infraco shall reimburse **tie** for any reasonable and demonstrable costs and expenses incurred by **tie** in acting pursuant to this Clause 59 (*Step-In for Health and Safety and Environmental Reasons*) where such action is necessary by reason of the Infraco's failure to act pursuant to Clause 59.3 or its breach of this Agreement and **tie** shall be entitled to deduct any such amounts from any amount payable to the Infraco under the provisions of this Agreement.

PART 11 - PROGRAMME

60. PROGRAMME

60.1 The Infraco shall progress the Infraco Works with due expedition and in a timely and efficient manner without delay, to achieve timeous delivery and completion of the Infraco Works (or any part thereof) and its other obligations under this Agreement in accordance with the Programme. Notwithstanding the generality of the foregoing, the Infraco shall complete the Infraco Works in each Section so as to enable the Certificate of Sectional Completion in respect of each Section or Certificate of Service Commencement (as appropriate) to be issued in accordance with Clauses 44 (*Notification of Sectional Completion of Sections A, B, C and D*) and 45 (*Notification of Service Commencement*) by

the Planned Service Commencement Date or the relevant Planned Sectional Completion Date.

- 60.2 The Infraco shall update the Programme in accordance with the requirements of Schedule Part 2 (*Employer's Requirements*).
- 60.3 The Infraco shall submit to **tie's** Representative for his acceptance any change to the Programme showing the revised order or manner in which the Infraco proposes to carry out the Infraco Works.
- 60.4 **tie's** Representative shall within 5 Business Days after receipt of any revised programme from the Infraco:
- 60.4.1 accept the revised programme in writing; or
 - 60.4.2 reject the revised programme in writing with reasons; or
 - 60.4.3 request the Infraco to supply further information to clarify or substantiate the revised programme or to satisfy **tie's** Representative as to its reasonableness having regard to the Infraco's obligations under the Agreement.

Provided that if none of the above actions is taken within the said period of 10 Business Days, the Infraco shall issue a reminder to **tie** and if **tie** does not take any of the above actions within 5 Business Days of **tie's** receipt of such reminder, then **tie's** Representative shall be deemed to have accepted the revised programme as submitted.

- 60.5 The Infraco shall within 5 Business Days after receiving from **tie's** Representative any request under Clause 60.4.2 or within such further period as **tie's** Representative may allow, provide the further information requested, failing which the revised programme shall be deemed to be rejected.
- 60.6 Upon receipt of such further information, **tie's** Representative shall within a further 5 Business Days accept or reject the revised programme in accordance with Clauses 60.4 or 60.4.1. In the event that the revised programme is accepted, the revised programme shall form and become the Programme.
- 60.7 Should it appear to **tie's** Representative at any time that the actual progress of the Infraco Works does not conform with the Programme, **tie's** Representative shall be entitled to require the Infraco to produce a revised programme showing such modifications to the Programme as may be necessary to ensure completion of the Infraco Works in each section by the relevant Planned Service Commencement Date. In such event the Infraco shall submit its revised programme within 10 Business Days or within such further period

as **tie's** Representative may allow. Thereafter the provisions of Clauses 60.3 and 60.5 shall apply.

60.8 Acceptance by **tie's** Representative of the Infraco's programme in accordance with Clauses 60.3, 60.5 and 60.7 shall not relieve the Infraco of any of its duties or responsibilities under the Agreement.

60.9 The Infraco shall take all reasonable steps to mitigate the effects of any delay to the progress of the Infraco Works.

61. **RATE OF PROGRESS AND ACCELERATION**

Rate of Progress

61.1 If for any reason which does not entitle the Infraco to an extension of time, the rate of progress of the Infraco Works is at any time, in the reasonable opinion of **tie's** Representative, too slow to ensure substantial completion of any section by the Planned Sectional Completion Date for that Section, or any previously agreed revised time for completion agreed under Clause 61.2, **tie's** Representative shall notify the Infraco in writing and the Infraco shall thereupon take such steps as are necessary and to which **tie's** Representative may consent to expedite the progress so as substantially to complete the Section by the Planned Sectional Completion Date, such consent not to be unreasonably delayed or withheld. The Infraco shall not be entitled to any additional payment for taking such steps.

Acceleration

61.2 Where **tie** desires either:

61.2.1 a date for completion earlier than any Planned Sectional Completion Date current at the date of issue of the preliminary instruction under Clause 61.3; or

61.2.2 to have a Section or Sections completed by the relevant Planned Sectional Completion Date where, following delays or stoppage to programme for whatever reason, the Infraco Works would not be so completed in the absence of any acceleration or resequencing arrangements; or

61.2.3 to obviate the necessity for, or to order the cancellation of, or a reduction in the length of, any extension of time being fixed under Clause 64 (*Relief Events*) so that either the Planned Service Commencement Date current at the date of preliminary instruction under Clause 61.3 is not extended or is not extended by the length of

the extension of time that would otherwise have been given under Clause 64 (*Relief Events*);

tie's Representative may issue a preliminary instruction under Clause 61.3.

61.3 If **tie's** Representative issues a preliminary instruction to the Infraco to accelerate the carrying out or alter the sequence and timing of any work to be executed under the provisions of the Agreement, **tie's** Representative shall in such instruction set out the exact nature of the requirements of **tie** in regard to the Planned Service Commencement Date as referred to in Clause 61.2 for which the preliminary instruction has been issued.

61.4 If the Infraco makes a reasonable objection to such an instruction, the preliminary instruction shall either be withdrawn or so varied as to meet such objection and may then be re-issued by **tie's** Representative.

61.5 As soon as reasonably practicable after receipt of the preliminary instruction (or after receipt of a preliminary instruction re-issued under Clause 61.3) the Infraco shall inform **tie's** Representative in writing in respect of the proposed instruction:

61.5.1 of the amount of any additional cost to which the Infraco should be entitled as a result of compliance with the instruction when issued by **tie's** Representative subject to Clause 61.3; or

61.5.2 that it is not reasonably practicable to state such a sum and that the cost to **tie** of compliance by the Infraco will therefore have to be ascertained in accordance with Clause 80 (*tie Changes*); and

61.5.3 of the earlier date for completion which can become the Planned Service Commencement Date for all the purposes of the Agreement; or

61.5.4 of the extent to which an extension of time that would otherwise be fixed under Clause 64 (*Relief Events*) can be cancelled or reduced and the date for completion which as a result will be or become the Planned Service Commencement Date for all the purposes of the Agreement.

61.6 If on receipt of the information given to **tie's** Representative under Clause 61.4 **tie** wishes to pay the amount referred to in Clause 61.5.1 and to accept the new Planned Service Commencement Date stated by the Infraco pursuant to Clause 61.5.3, **tie** shall cause **tie's** Representative to issue an instruction:

61.6.1 confirming the details of the acceleration or alteration of sequence or timing required, and

61.6.2 fixing the new Planned Service Commencement Date and the amount to which Clause 61.5.1 refers shall be included as if it were a variation.

61.7 Following any instruction under Clause 61.6 the Infraco shall revise the Programme in accordance with the terms of Clause 60 (*Programme*).

Incentivisation Bonus

61.8 ~~Within seven (7) days of the date programmed for completion of each Section in Schedule Part 15 and against the submission of a valid VAT invoice, tie shall pay the Infraco an incentivisation bonus with respect to the completion of each Section of the Infraco Works as follows:~~ **NOT USED.**

~~61.8.1 Section A £1,200,000 (one million two hundred thousand)~~

~~61.8.2 Section B £1,200,000 (one million two hundred thousand)~~

~~61.8.3 Section C £1,200,000 (one million two hundred thousand)~~

~~61.8.4 Section D £1,200,000 (one million two hundred thousand)~~

~~except where Infraco has failed to achieve sectional completion by the Planned Sectional Completion Date and such failure is not due to a Compensation Event, Notified Departure, tie Change or Relief Event in which event such amounts will be paid within seven (7) days of issue by tie of the relevant Certificate of Sectional Completion.~~

62. LIQUIDATED AND ASCERTAINED DAMAGES

62.1 Liquidated and ascertained damages shall be recoverable by tie in respect of delay to Planned Sectional Completion Dates as follows:

62.1.1 if the Infraco fails to achieve completion of any of Section A, Section B, Section C or Section D by the Planned Sectional Completion Date for that Section, the Infraco shall pay to tie the sum prescribed in Clause 62.2 for that Section for every week (or pro-rated for each calendar day) which shall elapse between the Planned Sectional Completion Date and the actual Sectional Completion Date for that Section. The liquidated and ascertained damages in respect of Section A, Section B and Section C shall be cumulative during any period in which there is delay to Planned Sectional Completion to two or more Sections.

62.1.2 liquidated and ascertained damages in respect of Section D shall only be payable in respect of a delay to achieving completion of Section D by the Planned Sectional Completion Date for Section D caused by events occurring after the Sectional Completion Date for Section C and during the carrying out of Section D.

62.2 The liquidated and ascertained damages payable by the Infraco (where the delay is attributable either solely to Infraco ~~solely~~ or ~~both~~ to Infraco and ~~or~~ the Tram Supplier, and/or the Tram Maintainer) attached to non completion of each Section are as follows:

- 62.2.1 Section A £20,000 per week (pro rata);
- 62.2.2 Section B £23,000 per week (pro rata);
- 62.2.3 Section C £40,000 per week (pro rata) for first month, increasing by £20,000 per week in each subsequent month till a maximum of £195,000 per week (pro rata) is reached; and
- 62.2.4 Section D £50,000 per week (pro rata) for first month, increasing by £20,000 per week in each subsequent month till a maximum of £246,000 per week (pro rata) is reached,

provided that Infraco shall not be liable for any liquidated and ascertained damages where the failure to complete any of Section A, Section B, Section C or Section D is caused solely by the failure of the Tram Supplier to achieve any Certificate of Tram Commissioning by the Agreed Tram Commissioning Date for that Tram as specified in the Tram Supply Agreement. Where this proviso applies, Infraco shall repay to tie any amounts that Infraco has recovered from tie pursuant to any breach of Clause 12.1.1 that has resulted from such failure by the Tram Supplier to achieve the relevant Certificate of Tram Commissioning. Infraco's reimbursement obligations under this Clause shall not exceed the liability that Infraco would have had to pay liquidated and ascertained damages to tie but for the operation of this proviso.

~~62.2A Subject to Clause 62.9.2, in the event that:-~~

~~62.2A.1 the first Tram to be issued with a Certificate of Tram Commissioning is not issued with such certificate by the Agreed Tram Commissioning Date liquidated and ascertained damages shall be payable by Infraco at the rate of 1% of the Tram Price (as defined in the Tram Supply Agreement) for each period of seven days (with an apportionment on a time basis for each part period) by which the issue of such Certificate of Tram Commissioning is delayed after the Agreed Commissioning Date~~

~~and until such a Certificate of Tram Commissioning is issued in respect of such Tram; and~~

~~62.2A.2 any other Tram to be issued with a Certificate of Tram Commissioning is not issued with such certificate by the Agreed Commissioning Date the Tram Supplier shall, in respect of each such Tram, liquidated and ascertained damages shall be payable by Infraco at the rate of 0.5% of the Tram Price (as defined in the Tram Supply Agreement) for each period of seven days (with an apportionment on a time basis for each part period) by which the issue of such Certificate of Tram Commissioning is delayed after the Agreed Commissioning Date and until such a Certificate of Tram Commissioning is issued in respect of such Tram.~~

62.3 Subject to Clause 62.9, the total aggregated amount of any liquidated and ascertained damages payable by the Infraco to **tie** under this Clause 62 (*Liquidated and Ascertained Damages*) shall be limited to ~~ten percent (10%) of the Construction Works Price and such cap shall exclude any liquidated and ascertained damages which are payable to tie under Clauses 62.2A and 62.6.~~ **£15,000,000.**

62.4 **tie** may:

62.4.1 deduct and retain the amount of any liquidated and ascertained damages becoming due under the provisions of Clause 62.1 from any sums due or which become due and payable to the Infraco; or

62.4.2 require the Infraco to pay such amount to **tie** forthwith.

If upon a subsequent or final review of the circumstances causing delay, **tie's** Representative grants a relevant extension or further extension of time in respect of the Planned Sectional Completion Date (in relation to Section A, Section B, Section C and Section D) or the Planned Service Commencement Date, **tie** shall no longer be entitled to apply liquidated and ascertained damages in respect of the period of such extension. Any sum in respect of such period which may already have been recovered under this Clause 62 (*Liquidated and Ascertained Damages*) shall be reimbursed forthwith to the Infraco. Interest shall be payable by **tie** on any amounts so reimbursed at a rate per annum equivalent to 2% above the base rate of The Royal Bank of Scotland plc current on the date upon which the liquidated and ascertained damages were actually paid by (by deduction or otherwise) the Infraco to **tie**, adjusted to reflect any changes to the rate during which the period over which the liquidated and ascertained damages were retained by **tie**.

62.5 If after liquidated and ascertained damages have become payable under Clause 62.1, **tie's** Representative orders a variation under Clause 80 (*tie Changes*) or any other situation

outside the Infraco's control arises any of which in **tie's** Representative's opinion results in additional and further delay to that part of the Infraco Works:

62.5.1 **tie's** Representative shall so notify the Infraco and **tie** in writing;
and

62.5.2 **tie's** further entitlement to liquidated and ascertained damages in respect of that part of the Infraco Works shall be suspended until **tie's** Representative notifies the Infraco and **tie** in writing that the additional and further delay has come to an end.

Such suspension shall not invalidate any entitlement to liquidated and ascertained damages which accrued before the period of additional and further delay started to run and, subject to any subsequent or final review of the circumstances causing delay, any monies already deducted from or paid by the Infraco as liquidated and ascertained damages under the provisions of this Clause 62 (*Liquidated and Ascertained Damages*) may be retained by **tie**.

Liquidated Damages for Weight

62.6 ~~If a Tram exceeds the Maximum Tram Weight then the Infraco shall pay liquidated damages in respect of each such Tram of an amount calculated in accordance with said part 2 of Schedule Part 5 provided that if the amount that a Tram is overweight is equal to or more than an amount equal to five per cent (5%) of the Maximum Tram Weight, tie shall without prejudice to its other rights or remedies be entitled to reject the Tram.~~ **NOT USED.**

General

62.7 The parties hereby acknowledge and confirm that the liquidated and ascertained damages payable pursuant to this Clause 62 (*Liquidated and Ascertained Damages*) at the rate and in respect of the circumstances set out in this Clause 62 (*Liquidated and Ascertained Damages*) represent a genuine pre-estimate of the loss that is anticipated to be suffered by **tie** consequent to a failure by the Infraco to comply with those obligations under this Agreement to which they relate. Neither party shall contend otherwise in any submission, claim or proceeding arising out of or in connection with this Agreement.

62.8 All sums payable by the Infraco to **tie** pursuant to this Clause 62 (*Liquidated and Ascertained Damages*) shall be paid as liquidated and ascertained damages for delay and not as a penalty. ~~For the avoidance of doubt, the Infraco shall bear its own costs arising from delay caused by the Tram Supplier.~~

62.9 The recovery by **tie** of liquidated and ascertained damages under this Clause 62 (*Liquidated and Ascertained Damages*) shall not in any way relieve the Infraco from its

obligation to complete the Infraco Works, nor from any of its other obligations or liabilities under the Agreement provided that

62.9.1 the liquidated and ascertained damages payable pursuant to this Clause 62.9 shall, subject to any rights to terminate pursuant to Clause 90 (*Termination on Infraco Default*), be **tie's** sole and exclusive remedy and shall be in full and final satisfaction in respect of any claim arising from delay in achieving the Planned Sectional Completion Date for any of Section A, Section B, Section C and Section D;

62.9.2 ~~the Infraco's liability in respect of liquidated damages for delay arising solely as a result of delay in delivering or commissioning of the Trams due to the acts or omissions of the Tram Supplier shall be limited to an aggregate amount of eleven percent (11%) of the Tram Price as defined in the Tram Supply Agreement.~~ **NOT USED.**

62.10 In the event that at any time the amount representing liquidated damages, ~~save in respect of liquidated damages for delay arising solely as a result of delay in delivering or commissioning of the Trams due to the acts or omissions of the Tram Supplier,~~ exceeds the aggregate liability of the Infraco to **tie** for liquidated damages as described at Clause 62.3, whether paid or unpaid, **tie** may deliver to the Infraco a notice in writing requesting an increase in the Maximum Liquidated Damages ("**Liquidated Damages Cap Increment**"), which notification shall include **tie's** calculation of a proposed Liquidated Damages Cap Increment and indicate that failure to respond within 10 Business Days will constitute an Infraco Default entitling **tie** to terminate the Infraco Contract pursuant to Clause 62.11. The Infraco may respond in writing before the expiry of ten (10) Business Days from the date of such notification confirming its agreement to such Liquidated Damages Cap Increment and upon such agreement the Maximum Liquidated Damages shall be increased by the amount of the Liquidated Damages Cap Increment.

62.11 In the event that Infraco does not respond to **tie's** notification under Clause 62.10 within 10 Business Days of the date of the relevant notification or rejects **tie's** request, such lack of response or rejection shall constitute an Infraco Default and **tie** shall be entitled to issue a termination notice pursuant to Clause 90 (*Termination on Infraco Default*).

PART 12 - PROTESTOR ACTION, EXTENSIONS OF TIME AND COMPENSATION EVENTS

63. PROTESTOR ACTION

63.1 The Infraco shall use all reasonable endeavours as are necessary to protect:

63.1.1 ~~the Edinburgh Tram Network~~Initial Phase 1a as installed from protestor action during the period from the Commencement Date until the date of issue of the Certificate of Service Commencement; and

63.1.2 the Depot from protestor action during the period from the day after the date of issue of the Sectional Completion Certificate for Section A and the last day of the Term.

63.2 The Infraco shall be responsible for repairing, reinstating or making good any damage to the Infraco Works which is caused by or results from protestor action in accordance with Clauses 31 (at any time prior to the date of issue of the Certificate of Service Commencement) and pursuant to Clauses 52.16 and 52.17 (at any time following the date of issue of the Certificate of Service Commencement).

63.2.1 If ~~the Edinburgh Tram Network~~Initial Phase 1a or any part thereof is occupied by protestors at any time during the term of this Agreement, then the Infraco shall notify **tie** as soon as reasonably practicable of this occurrence.

63.2.2 **tie** shall procure that protestors are removed and may request the reasonable assistance of Infraco to remove protestors.

63.2.3 Where **tie** is given assistance in accordance with Clause 63.2.2 then, in respect of any protestor action, **tie** will indemnify Infraco in respect of any demonstrable costs, losses, liabilities, expenses and claims suffered by Infraco as a result of or in connection with the provision of such assistance.

64. RELIEF EVENTS

64.1 If and to the extent that a Relief Event is the direct cause of (i) a delay in achievement of the issue of a Certificate of Sectional Completion on or before the Planned Sectional Completion Date for a Section or a Certificate of Service Commencement on or before the Planned Service Commencement Date, or (ii) adversely effects Infraco's ability to perform any of its obligations under this Agreement (including its ability to perform the Maintenance Services), then the Infraco shall be entitled to apply for an extension of time or relief from performance of obligations. The Infraco's sole right to such extension of time or relief from performance of its obligations in connection with a Relief Event shall be as set out in this Clause 64 (*Relief Events*).

64.2 To obtain such extension of time or relief from performance, the Infraco must, as soon as practicable, and in any event within 20 Business Days after it first became aware that the Relief Event had caused or is likely to cause delay:

64.2.1 give to **tie** a notice of its claim for an extension of time or relief from performance and full details of the nature of the Relief Event, the date of occurrence and its likely duration;

64.2.2 include in any notice given under Clause 64.2.1 full details of the extension of time or relief claimed including:

64.2.2.1 the Infraco's estimate of the likely effect of such delay upon the Programme (if any) or the adverse effects on the performance of its obligations under this Agreement;

64.2.2.2 mitigation measures adopted and why unsuccessful; and

64.2.2.3 any acceleration or other measures which the Infraco could take to mitigate the effects of such delay or non-performance and, where applicable, an estimate of the costs thereof;

provided that where a Relief Event has a continuing effect or the Infraco is unable to determine whether the effect of the Relief Event will actually cause it not to be able to comply with its obligations under this Agreement, such that it is not practicable for the Infraco to submit full details in accordance with this Clause 64.2 then the Infraco shall instead submit to **tie**:

(a) a statement to that effect with reasons, together with interim written particulars (including details of the likely consequences of the Relief Event on the Infraco's ability to comply with its obligations under this Agreement and an estimate of the likelihood and likely extent of the delay or non-performance); and

(b) thereafter, further interim written particulars until the actual delay caused or non-performance (if any) is ascertainable, whereupon the Infraco shall as soon as reasonably practicable, submit to **tie** the items referred to in Clause 64.2.2.

64.2.3 demonstrate to the reasonable satisfaction of **tie** that:

64.2.3.1 Infraco and the Infraco Parties could not reasonably have avoided such occurrence or consequences by steps which they might reasonably be expected to have taken;

64.2.3.2 the Relief Event is the direct cause of the delay or non-performance; and

64.2.3.3 the Infraco is using reasonable endeavours to perform its obligations under this Agreement.

64.3 In the event that the Infraco has complied with its obligations under Clause 64.2, then (as applicable in the circumstances):

64.3.1 the Planned Service Commencement Date and/or the Planned Sectional Completion Dates shall be postponed by such time; and/or

64.3.2 Infraco shall be given relief from its obligations under this Agreement,

as shall be reasonable for such a Relief Event, taking into account the likely effect of delay and on Infraco's ability to perform its obligations under this Agreement and where appropriate the Programme shall be revised by the Infraco in accordance with Clauses 60.2 to 60.5 (inclusive).

64.4 In the event that information required by Clause 64.2 is provided after the dates referred to in that Clause, then the Infraco will not be entitled to any relief in respect of or during the period for which the information is delayed.

64.5 The Infraco shall notify **tie** if at any time it receives or becomes aware of any further information relating to the Relief Event, giving details of that information to the extent that such information is new or renders information previously submitted materially inaccurate or misleading.

64.6 If the Parties cannot agree the extent of the extension of time or relief required or **tie** disagrees that a Relief Event has occurred (or as to its consequences) or that the Infraco is entitled to any extension of time or relief from the performance of its obligations, either Party may refer the matter for determination in accordance with the Dispute Resolution Procedure.

64.7 **tie** shall, in assessing any delay, extension of time or relief for the purpose of this Clause 64 (*Relief Events*):

64.7.1 not take into account any event or cause of delay which is caused by any negligence, default, breach of contract or breach of statutory duty of the Infraco or any Infraco Parties; and

64.7.2 take into account an event or cause of delay only if and to the extent that the Infraco establishes to the satisfaction of **tie** that the Infraco has used its reasonable endeavours to adjust the order and sequence in which the Infraco proposes to execute the Infraco Works in such a manner as to minimise the effects of the delay in, or if possible to avoid altogether any delay in, the progress of the Infraco Works.

- 64.8 The Infraco shall not be entitled to and shall be deemed to have irrevocably waived any entitlement to any extension of time in respect of any failure by the Infraco to:
- 64.8.1 identify any long lead time works and/or order any long lead time materials; or
 - 64.8.2 identify any enabling works which are required in order to commence any part of the Infraco Works; or
 - 64.8.3 subject to Clause 19 manage any required interface with CEC in so far as this forms part of the Infraco Works; or
 - 64.8.4 subject to Clause 19 manage the required interface with any Approval Body and/or third party where consent or approval for the Infraco Works is required at any stage of such works; or
 - 64.8.5 identify any instructions which are required from **tie** in order to progress the Infraco Works in accordance with the Programme, provided that following the occurrence of a Relief Event nothing in this Clause 64.8 shall prevent any long lead times, enabling works, required interfaces with CEC, any Approval Body and/or third party, or instructions which are required from **tie** from being taken into account when considering extensions of time in accordance with Clause 64.
- 64.9 If the Infraco Works are delayed in circumstances other than those entitling the Infraco to an extension of time as set out in this Clause 64 (*Relief Events*), the Infraco shall inform **tie** at the earliest opportunity and shall give an estimate of the likely effect upon the Programme. In such circumstances, the Infraco at its own expense shall take such acceleration measures as are necessary to achieve the requirements of the Programme.
- 64.10 Notwithstanding the occurrence of a Relief Event, the Infraco shall continue to carry out the Infraco Works unless otherwise agreed in connection with this Clause 64 (*Relief Events*).

65. **COMPENSATION EVENTS**

- 65.1 If and to the extent that a Compensation Event:
- 65.1.1 is the direct cause of a delay in achievement of the issue of a Certificate of Sectional Completion on or before the Planned Sectional Completion Date for a Section or the Certificate of Service Commencement on or before the Planned Service Commencement Date (as appropriate); and/or

65.1.2 directly and adversely affects Infraco's ability to perform any of its obligations under this Agreement (including its ability to perform the Maintenance Services); and/or

65.1.3 causes the Infraco to incur costs beyond such costs which were reasonably anticipated to be incurred by the Infraco but for the occurrence of the Compensation Event;

then the Infraco shall be entitled to apply for an extension of time and/or relief from the performance of its obligations, and/or claim for additional costs under this Agreement. The Infraco's sole right to an extension of time and/or relief from the performance of its obligations and/or to claim costs in connection with a Compensation Event shall be as set out in this Clause 65 (*Compensation Events*).

65.2 To obtain such extension of time and/or relief from performance and/or claim for such costs, the Infraco must, as soon as practicable, and in any event within 20 Business Days after it first became aware that the Compensation Event had caused or is likely to cause delay, adversely affect the performance of Infraco's obligations, or cause the Infraco to incur additional costs:

65.2.1 give to **tie** a notice of its claim for an extension of time and/or costs and relief from performance of its obligations and full details of the nature of the Compensation Event, the date of occurrence and its likely duration (a "**Compensation Event Notice**");

65.2.2 include in any notice given under Clause 65.2.1 full details of the extension of time and relief required and/or any costs claimed including:

65.2.2.1 the Infraco's estimate of the likely effect of such delay upon the Programme (if any) or the adverse effects on the performance of its obligations under this Agreement;

65.2.2.2 details of the costs or losses which are not Indirect Losses which in relation to Systems and Trackwork shall be calculated in accordance with Appendix A of Schedule Part 4;

65.2.2.3 mitigation measures adopted and why unsuccessful; and

65.2.2.4 any acceleration or other measures which the Infraco could take to mitigate the effects of such delay or non-performance and, where applicable, an estimate of the costs thereof;

provided that where a 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 this Agreement, such

that it is not practicable for the Infraco to submit full details in accordance with this Clause 65.2 then the Infraco shall submit to **tie**:

- (a) a statement to that effect with reasons, together with interim written particulars of the items referred to at Clause 65.2.2 insofar as such items are available (including details of the likely consequences of the Compensation Event on the Infraco's ability to comply with its obligations under this Agreement and an estimate of the likelihood and likely extent of the delay or non-performance and the costs incurred); and
- (b) thereafter, further interim written particulars as set out in Clause 65.2.2(a) until the actual delay caused and costs incurred or non-performance (if any) are ascertainable, whereupon the Infraco shall as soon as reasonably practicable, submit to **tie** the items referred to in Clause 65.2.2; and

65.2.3 demonstrate to the reasonable satisfaction of **tie** that:

65.2.3.1 subject to Clause 65.12, Infraco and the Infraco Parties could not reasonably have avoided such occurrence or consequences by steps which they might reasonably be expected to have taken;

65.2.3.2 the Compensation Event is the direct cause of the delay, inability to perform and/or the additional costs; and

65.2.3.3 the Infraco is using reasonable endeavours to perform its obligations under this Agreement.

65.2A1 **tie** shall complete a review of the notification and submissions made by the Infraco pursuant to Clauses 65.2.1 and 65.2.2 and shall notify the Infraco within 20 Business Days of receipt (or such other period as the Parties acting reasonably may agree in the light of the complexity of the Compensation Event Notice and further information expected pursuant to Clause 62.2.2(b)):

65.2A1.1 its agreement or otherwise on whether a Compensation Event has occurred;

65.2A1.2 its agreement or otherwise regarding the extension of time, additional costs (which in relation to Systems and Trackwork shall be calculated in accordance with Appendix A of Schedule Part 4) and other relief sought by the Infraco and where **tie** does not agree such matters, **tie**'s assessment in relation to the Infraco's entitlement to extension of time, additional costs and relief;