

CONFIDENTIAL

(1) CITY OF EDINBURGH COUNCIL

and

(2) BILFINGER BERGER UK LIMITED

and

SIEMENS PLC

GUARANTEE AGREEMENT

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GUARANTEE AGREEMENT

BETWEEN

- (1) **CITY OF EDINBURGH COUNCIL**, the Local Authority for the said City constituted in terms of the Local Government etc. (Scotland) Act 1994 and having its principal offices at City Chambers, High Street, Edinburgh, EH1 1YJ (the "**Guarantor**"); and
- (2) **BILFINGER BERGER CIVIL UK LIMITED**, a company incorporated in England and Wales under number 02418086 and having its registered office at 3rd Floor Braywick Gate, Braywick Road, Maidenhead, Berkshire SK6 1DA; and **SIEMENS PLC**, a company incorporated in England and Wales under number 00727817 and having its registered office at Faraday House, Sir William Siemens Square, Frimley, Camberley, Surrey, GU16 8QD (each an "**Infraco Member**", together the "**Infraco**" which expression shall include each and either of them and their permitted successors and assigns)

THE PARTIES TO THIS AGREEMENT HEREBY AGREE AS FOLLOWS:

WHEREAS

- (A) The Infraco is an unincorporated joint venture which, on a joint and several liability basis, on 14 May 2008 entered into an agreement (the "**Infraco Contract**") with **tie Limited** ("**tie**"), a company wholly owned by the Guarantor, to construct, test, commission and maintain a tramway in Edinburgh. Infraco is entering into a settlement agreement on or around the date of this guarantee to amend the Infraco Contract. On such amendments coming into force Infraco shall be required to design part of a tramway in Edinburgh and to design, construct, test, commission and maintain another part of a tramway in Edinburgh, together with the provision of certain equipment (the "**Infraco Works**"). "**Infraco Contract**" in this guarantee (other than this Recital) shall mean the Infraco Contract as amended by the settlement agreement on or around the date of this guarantee.
- (B) The Guarantor possesses the statutory powers as authorised undertaker to implement the Infraco Works pursuant to the Edinburgh Tram (Line One) Act 2006 and the Edinburgh Tram (Line Two) Act 2006 and to delegate to **tie** responsibility for entering into the Infraco Contract and has effected that delegation through formal full Council resolution and contract.
- (C) The Guarantor has agreed to guarantee the financial obligations of **tie** owed to the Infraco arising from the Infraco Contract on the terms set out in this Guarantee Agreement.

1. CONSTRUCTION

- 1.1 In this Guarantee Agreement, unless a contrary intention appears:
- 1.1.1 a reference to any person is, where relevant, deemed to be a reference to or to include, as appropriate, that person's successors and permitted assignees or transferees;
 - 1.1.2 references to clauses are references to clauses of this Guarantee Agreement;
 - 1.1.3 a reference to (or any specified provision of) any agreement, deed or other document is to be construed as a reference to that agreement, deed or other document (or that provision) as it may be from time to time, amended, varied, supplemented, restated or novated and/or replaced from time to time;
 - 1.1.4 a reference to a statute or statutory instrument or any provision thereof is to be construed as a reference to that statute or statutory instrument or such provision thereof as the same may be amended or re-enacted from time to time;
 - 1.1.5 headings are inserted for convenience only and are to be ignored in construing this Guarantee Agreement;
 - 1.1.6 words importing the plural shall include the singular and vice versa;
 - 1.1.7 a "consent" includes an authorisation, approval, exemption, licence, order, permission or waiver; and
 - 1.1.8 words and expressions defined in the Infraco Contract shall bear the same meanings when used in this Guarantee Agreement.

1A. CONDITION PRECEDENT

- 1A.1 It is a condition precedent for this Guarantee entering into force that the original parent company guarantee issued by the Guarantor dated 14 May 2008 (Guarantee No.)(the "Original Guarantee") is returned to the Guarantor and the Guarantor is released and discharged from any of its obligations under the Original Guarantee.
- 1A.2 Infraco agrees that by returning the Original Guarantee, it also releases and discharges the Guarantor from any of its obligations under that Original Guarantee

2. GUARANTEE

- 2.1 Subject to the terms of this Guarantee Agreement, the Guarantor undertakes as primary obligor and not merely as cautioner or surety that if tie fails to pay any amount payable to the

Infraco by **tie** when due and payable in accordance with the terms of the Infraco Contract , the Guarantor will promptly within 5 business days of its receipt of a written demand notice (in the form set out in Schedule Part 1 annexed and signed in accordance with Clause 2.4) duly served by the Infraco pay to the Infraco the amount not so paid. This Guarantee Agreement shall be a guarantee of payment only and not of performance.

- 2.2 No written demand notice may be served hereunder in respect of any amount which is the subject of a dispute raised in good faith and on material grounds by **tie** and which is the subject of an ongoing process pursuant to the Dispute Resolution Procedure under Clause 97 of the Infraco Contract unless such demand is accompanied by (i) a copy of an adjudicator's decision or a judgment in favour of the Infraco or an Infraco Member in an amount equal to or exceeding the amount demanded; or (ii) a statement that **tie** has suffered an Insolvency Event (as defined in the Infraco Contract).
- 2.3 Any written demand notice shall not be served earlier than 5 business days following the last date on which the amount claimed as due and payable by **tie** became overdue and must set out the amount payable by **tie** and the date on which **tie** was required by the Infraco to pay (exhibiting the demand for payment made to **tie**) pursuant to the Infraco Contract. It shall also state that the notice constitutes a demand for payment from the Guarantor pursuant to this Clause, provide a single set of bank details for transfer of funds to the Infraco, and, unless the demand is accompanied by (i) a copy as set out in Clause 2.2 or (ii) a statement as set out in Clause 2.2, affirm that the amount demanded has not been disputed by **tie** in good faith and on material grounds, or, where it has so been disputed by **tie**, is not subject to any ongoing process pursuant to the Dispute Resolution Procedure under Clause 97 of the Infraco Contract.
- 2.4 Any written demand notice shall be valid only if it is made in accordance with Clauses 2.2 and 2.3 and is signed by two nominated representatives of the Infraco, including at least one representative of each Infraco Member for the time being, provided that where one of the Infraco Members has ceased to be party to the Infraco Contract with approval from **tie** in accordance with the Infraco Contract, only one representative (being a representative of the remaining Infraco Member) need sign the demand notice serviced under Clause 2.2. The nominated representatives of the Infraco Members as at the date of this Guarantee Agreement are set out in Schedule Part 2 hereto. The nominated representatives may be changed or added to by written notice from the relevant Infraco Member to the Guarantor.
- 2.5 Any full and punctual payment made by the Guarantor in accordance with any valid notice served under Clause 2 shall result in the Infraco having no further rights or remedies in respect of the relevant demand provided always that such payment is not reclaimed by the Guarantor

for any reason whatsoever and such payment by the Guarantor to the Infraco is not subsequently avoided or reduced by virtue of any provisions or enactments relating to bankruptcy, insolvency, liquidation or similar laws of general application for the time being in force, and, if any such payment is so reclaimed, avoided or reduced, the Infraco shall be entitled to recover the value or amount of such payment from the Guarantor as if such payment had not been so reclaimed avoided or reduced. For the avoidance of doubt, subject to the proviso above, any payment by the Guarantor, even if not punctual, shall be accounted for in respect of the Guarantor's obligations under this Guarantee Agreement to the extent of such payment.

2.6 The Guarantor shall have no obligation to arrange or inquire as to any distribution between or sharing of such payment by the Infraco Members.

2.7 Any demand notice served in accordance with this Clause 2 shall, in the absence of manifest error, be conclusive and binding on the Guarantor as to the amount demanded. Any demand notice served in accordance with this Clause 2 which is accompanied a copy as set out in Clause 2.1(i) above shall be paid by the Guarantor in accordance with this Clause 2 without further proof or condition and notwithstanding any objection by **tie**.

2.8 All amounts claimed and payable pursuant to this Guarantee Agreement shall be in pounds sterling unless the Guarantor agrees otherwise.

3. GUARANTOR PROTECTION

3.1 Subject to Clause 3.4 and without prejudice to Clause 2.7 the Guarantor shall in no circumstances and at no time have any greater liability to the Infraco (or the Infraco Members) under this Guarantee Agreement than **tie** owes to the Infraco under the Infraco Contract.

3.2 Subject to Clause 3.4 and without prejudice to Clause 2.7, the Guarantor shall be entitled to exercise identical rights of relief, defence, counter-claim, indemnity, reduction and set-off (on a joint and several basis) as are available to **tie** under the Infraco Contract. The Guarantor shall have no other rights of set-off or counterclaim whatsoever and howsoever arising.

3.3 This Guarantee Agreement is a continuing guarantee and accordingly shall continue in full force and effect until the date of issue of the Reliability Certificate, save in respect of any sums payable by **tie** under the Infraco Contract which are the subject of a valid written demand notice served either:

3.3.1 prior to the date of issue of the Reliability Certificate or

3.3.2 in the case of any liabilities accrued prior to the issue of the Reliability Certificate, (i) no later than 3 months after the date of the Reliability Certificate where the amount is undisputed or **tie** has suffered an Insolvency Event or (ii) where an amount is disputed and in relation to which an ongoing process pursuant to the Dispute Resolution Procedure under Clause 97 of the Infraco Contract was commenced prior to or within 3 months of issue of the Reliability Certificate, within 45 days of the final determination of the dispute by written agreement, award or judgment.

Subject to this Clause 3.3 this Guarantee Agreement is not revocable. This Guarantee Agreement is in addition to and not in substitution for and shall not merge with any other right, remedy, guarantee or security which the Infraco may at any time hold for the making of such payments and may be enforced in accordance with its terms without first having recourse to any such right, remedy, guarantee or security. No proceedings in connection with a written demand notice may be commenced more than 6 months of the date of the demand notice. Nothing in this Guarantee Agreement shall limit the Guarantor's liability for death or personal injury resulting from its negligence.

3.4 If any payment obligation of **tie** under the Infraco Contract is invalid, void, illegal or unenforceable, the Guarantor's liability hereunder shall be determined on the basis that such obligation is not so invalid, void, illegal, or unenforceable.

4. NO DISCHARGE

4.1 The Guarantor shall not in any way be released or discharged or otherwise absolved of liability under this Guarantee Agreement by reason of, and the Guarantor waives any right to receive notice from the Infraco in respect of, any of the following:

4.1.1 any forbearance or waiver of any right of action or non exercise of a right or remedy that the Infraco may have against **tie**, or delay by the Infraco in enforcing any right of action or remedy afforded under the Infraco Contract;

4.1.2 any change in the status, function, control, or ownership of **tie**;

4.1.3 the Infraco Contract or any provision thereof being or becoming illegal, invalid, void, or unenforceable;

4.1.4 any other matter or thing (whether or not known to the Infraco) which would or might operate to exonerate or discharge the Guarantor from its obligations under this Guarantee Agreement;

- 4.1.5 Infraco and **tie** making any variation or amendment to the Infraco Contract; or
- 4.1.6 **tie** becoming insolvent, going into receivership or liquidation or having an administrator appointed or becoming subject to any other procedure for the suspension of payments to or protection of creditors or similar proceedings.
- 4.2 Any payment obligation of **tie** arising from any addendum, variation or amendment to the Infraco Contract shall be likewise guaranteed by the Guarantor in accordance with the terms of this Guarantee Agreement.
- 4.3 The Infraco shall not be obliged to take any action in any court against **tie**, to make any other claim demand against **tie** other than as required under Clause 2, to enforce any other security held by it in respect of the obligations of **tie** or to exercise, levy or enforce any distress, diligence or other process of execution against **tie** before it may serve a written demand notice or enforce this Guarantee Agreement. For all purposes directly or indirectly connected with any voluntary arrangement under Part I of the Insolvency Act 1986 proposed in respect of **tie** in circumstances where the voluntary arrangement seeks to restrict the Infraco's rights hereunder, the Guarantor hereby releases and discharges its whole rights of recourse, contribution, relief or subrogation against **tie** in respect of or in connection with all payments made or to be made by the Guarantor under or pursuant to this Guarantee Agreement to the intent and effect that the Guarantor shall not be a creditor of **tie** in respect of any such payments or liabilities for the purposes of any such voluntary arrangement.
- 4.4 Until all amounts which may be or become payable under the Infraco Contract or this Guarantee Agreement have been irrevocably paid in full, the Guarantor shall not, in relation to any payment due and payable to the Infraco under this Guarantee Agreement:
- 4.4.1 be subrogated to any right or security (if any) of the Infraco; or
- 4.4.2 claim or rank in competition with the Infraco against **tie** or any other person in respect of such payment; or
- 4.4.3 demand or accept repayment of any monies or claim any right of contribution from **tie**,
and any such monies so obtained shall be held by the Guarantor in trust for and shall be promptly paid to the Infraco.
- 4.5 The Guarantor shall not hold any security from **tie** in respect of this Guarantee Agreement and any such security which is held in breach of this provision shall be held by the Guarantor in trust for and shall promptly be transferred to the Infraco.

4.6 The Guarantor warrants and confirms to the Infraco that it has not entered into this Guarantee Agreement in reliance upon, nor has it been induced to enter into this Guarantee Agreement by any representation, warranty or undertaking made by or on behalf of the Infraco (whether express or implied and whether pursuant to statute or otherwise) which is not set out in this Guarantee Agreement.

4.7 This Guarantee Agreement shall not in any way be prejudiced or affected by any other bond, security, undertaking or guarantee now or subsequently held by the Infraco for all or any part of the obligations guaranteed by this Guarantee Agreement, or the release or waiver of such other bond, security, undertaking or guarantee.

5. REPRESENTATIONS AND WARRANTIES

The Guarantor represents and warrants to the Infraco that it has the requisite statutory power to execute and to perform its obligations under this Guarantee Agreement by virtue of the Local Government (Scotland) Act 1973 and the Edinburgh Tram (Line One) Act 2006 and the Edinburgh Tram (Line Two) Act 2006, that it has taken all necessary administrative, corporate or other action to authorise such execution and performance, and that such execution and performance has not contravened and will not contravene any law or regulation to which it is subject or cause it to breach any of its statutory duties or constraints or any other agreement binding on it.

6. ADDRESS FOR SERVICE

Any notice hereunder shall be sent to the address below:

Guarantor:

Address: City Chambers,
Waverley Court
4 East Market Street
Edinburgh
EH8 8BG

Attention: Council Solicitor

The Infraco:

Address: Bilfinger Berger - Siemens Consortium,
9 Lochside Avenue,
Edinburgh Park,
Edinburgh
EH12 9DJ

Attention: Martin Foerder

7. MISCELLANEOUS

7.1 No Implied Waivers

Save as provided under Clause 2:

- (a) No failure or delay by the Infraco in exercising any right, power or privilege under this Guarantee Agreement shall operate as a waiver of that right, power or privilege nor, subject to Clause 3.1, shall any single or partial exercise of any right, power or privilege preclude any other or further exercise thereof or the exercise of any other right, power or privilege.
- (b) The rights and remedies provided in this Guarantee Agreement are cumulative and not exhaustive of any rights or remedies provided at law.

7.2 Demands

Subject to Clause 3.1, the Infraco may make one or more demands hereunder in accordance with the terms hereof.

7.3 Invalidity of any Provision

If any provision of this Guarantee Agreement is or becomes invalid, illegal or unenforceable in any respect under any law, the validity, legality and enforceability of the remaining provisions shall not be affected or impaired in any way.

7.4 No Assignment

The Infraco (and the Infraco Members) shall not assign or otherwise transfer their rights under this Guarantee Agreement save to any party to whom the Infraco, (or the Infraco Members, as the case may be) has lawfully assigned their rights in accordance with Clause 98.1 of the Infraco Contract. The Guarantor shall not be entitled to assign or otherwise transfer this Guarantee Agreement.

7.5 Interest

Any amount not paid under this Guarantee Agreement when due and payable shall carry interest at the rate of 2% (two percent) above the prevailing base rate published by The Royal Bank of Scotland plc. For the avoidance of doubt, interest shall not be payable by the

Guarantor under this Clause 7.5 for any period during which interest is continuing to accrue on any late payment under the Infraco Contract.

7.6 No Third Party Rights

A person not party to this Guarantee Agreement shall have no rights to enforce or rely upon any term of this Guarantee Agreement and no *jus quaesitum tertio* is hereby created in favour of any party.

8. GOVERNING LAW

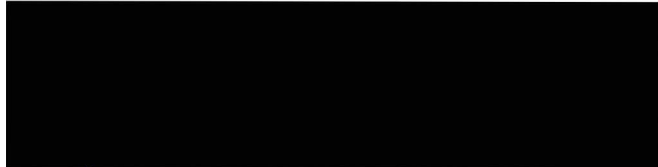
This Guarantee Agreement shall be governed by and construed in all respects in accordance with Scots law and the Parties agree to the exclusive jurisdiction of the Court of Session, waiving any right to raise *forum non-conveniens*.

IN WITNESS WHEREOF these presents on this and the preceding 9 pages together with the Schedule in two parts are executed as follows:

EXECUTED by CITY OF EDINBURGH COUNCIL

at Edinburgh on 15 SEPTEMBER 2011 by:

A Proper Officer



Full Name

ALASTAIR MACLEAN

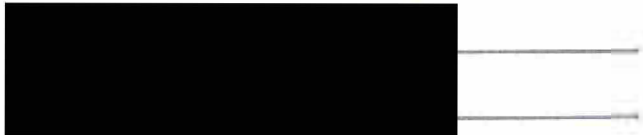
Witness Signature



Full Name

LAURA CATHERINE ALLISON

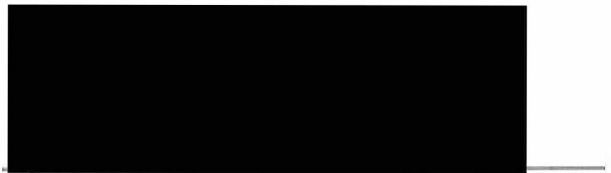
Address



EXECUTED for and on behalf of BILFINGER BERGER UK LIMITED

at Edinburgh on 15 SEPTEMBER 2011 by:

Director



Full Name

MARTIN FOERDER

Director Witness



LAURA CATHERINE ALLISON

Full Name Address



EXECUTED for and on behalf of **SIEMENS PLC**

at Edinburgh on *15 SEPTEMBER* 2011
by:

Authorised Signatory

Full Name

Authorised Signatory

Full Name



This is the Schedule referred to in the foregoing Guarantee Agreement by City of Edinburgh Council in favour of Bilfinger Berger UK Limited and Siemens plc

SCHEDULE PART 1

Demand Letter

City of Edinburgh Council
Waverley Court
4 East Market Street
Edinburgh
EH8 8BG
Attention: Council Solicitor



[Date]

EDINBURGH TRAM NETWORK

Dear Sirs,

We refer to the Guarantee Agreement dated [redacted] 2011 between us and to the contract dated 14 May 2008 between us and **tie** Limited as subsequently amended by the settlement agreement in or around the date of the Guarantee Agreement (the "**Infraco Contract**").

This letter is our formal demand for the payment of £[♦] pursuant to clause 2 of the Guarantee Agreement.

[Insert one of ALTERNATIVES A, B and C and delete others:

ALTERNATIVE A

We affirm that the amount demanded has not been disputed by **tie** limited in good faith and on material grounds, or, if it has so been disputed by **tie** limited, is not subject to any dispute resolution procedure under Clause 97 of the Infraco Contract.

ALTERNATIVE B

This demand is accompanied by a copy of an adjudicator's decision or a judgment in favour of the Infraco in an amount equal to or exceeding the amount demanded.

ALTERNATIVE C

This demand is accompanied by our statement that **tie** limited has suffered an Insolvency Event (as defined in the Infraco Contract).]

The amount payable by **tie** Limited is [♦]. **tie** Limited was required to pay such sum on [♦] (certified copy of demand for payment to **tie** Limited exhibited hereto).

We request that the amount is paid into [*bank account details*] within 5 business days of your receipt of this demand.

Yours faithfully,

[Nominated representative/representatives as per Clause 2.4]

SCHEDULE PART 2

Infraco Representatives

**David Darcy
Martin Foerder
Axel Eickhorn
Alfred Brandenburger
Gordon Wakeford
Julie Owen**

