

BSC Claim for Changes from Base Date Design Information (BDDI) to IFC

Review Meeting – 5 February 2009

Agenda

1.0 Introduction

Dennis Murray

- The issue
- The Contract process

2.0 BSC Position

Dennis Murray

- Notices
- Estimates
- Position papers
- Threat of non performance

3.0 tie Position

Dennis Murray

- Response to notices
- Failure to provide Estimates
- Position papers

4.0 Legal Overview

Keith Kilburn / Jo Glover

- Relevant Contract clauses
- Risk in adjudication
- Referring parties benefits

5.0 Wrap up / Q & A

Steven Bell/ Dennis Murray

1.0 Introduction

The Issue

BSC has submitted around 41 notices to date (many more to come) informing **tie** that the Issue for Construction (IFC) drawings are different to the Base Date Design Information (BDDI) to a greater extent and complexity than normal development and completion of designs. As such BSC consider that this is a mandatory **tie** Change in accordance with the Contract. **tie** considers that BSC require to identify what has changed from BDDI and the reasons for such Changes.

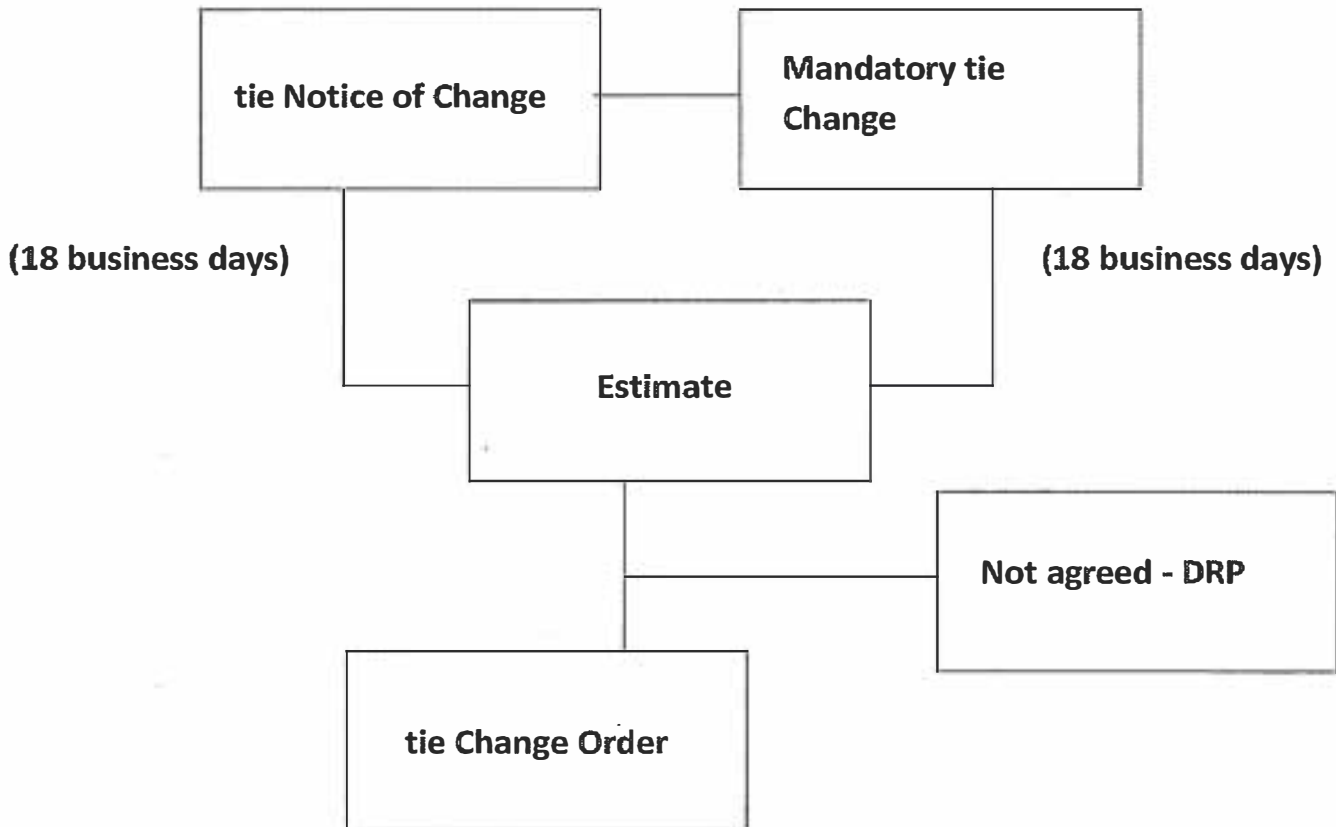
See example letter from BSC 25.1.201/IO/848 ¹

See example letter from **tie** INF CORR 368 ²

The Contract Process

To set the scene the following demonstrates the Change Process Clause 80 of the Infraco Contract deals with Change and the mechanism for Change.

Clause 80 sets out the following basic process;



In this issue, BSC believe that a mandatory **tie** Change exists in accordance with Clause 3.5 of Schedule Part 4 (copy attached) ³ for which **tie** is deemed to have issued a **tie** Notice of Change on

the date notified . Notified Departure is a defined term at 2.8 of Schedule Part 4 and Mandatory **tie** Change is a defined term of the Infraco Contract and definitions ⁴ (copies attached). A Notified Departure is further described at Clause 80.24 of the Infraco Contract (copy attached) ⁵.

Other salient parts of the Infraco Contract will be introduced and described later.

2.0 BSC Position

Notices

BSC has issued notices (circa 41 to date). BSC believe that if the IFC drawings differ from the BDDI drawings then it is a Mandatory **tie** Change for which they expect **tie** ultimately to issue a **tie** Change Order.

Estimates

Following on from a Notified Departure (see Clause 3.5 of Schedule Part 4) ³ a **tie** Notice of Change is deemed to have been issued and the provisions of Clause 80 apply.

Clause 80 requires a basic process to be followed as set out in the Introduction i.e. **tie** Notice of Change then Estimate then **tie** Change Order (or DRP).

No Estimates in respect of the Notices received to date have been submitted.

Estimates require to be submitted within 18 business days or such reasonable extended period agreed in accordance with Clause 80.4 and 80.7 ⁶ (copy attached) and should be priced as Clause 80.6 ⁷ (copy attached).

tie should discuss and agree this Estimate (as soon as reasonably practical). If there is no agreement then the Estimate can be referred to DRP.

Once agreed **tie** issues a **tie** Change Order.

Position Paper

BSC has produced a Position Paper (copy attached) ⁸ which is in response to **tie**'s position.

The main points of BSC's position are:

- Design liabilities not to be confused with cost and programme implications.
- Infraco liabilities for design are on 2.1.1 and 2.1.2.
- Breach in design.
- Restating Clauses 3.5 and 3.4.1.1 and 1.2 and 1.3;
- that a Mandatory **tie** Change flows from the Clauses above;
- only in "very limited" circumstances would bring in the challenge of normal development and completing the design.

Threat of Non-Performance

BSC understands from **tie** responses and discussion (more recently at a higher level) that **tie** intends to challenge the validity of whether all of the Notices issued are in fact Notified Departures and if so

what is to be valued in accordance with Clause 80. On this understanding BSC are refusing to carry out any work that falls into this Notified Departure BDDI – IFC category until **tie** issues a Change order.

3.0 **tie** Position

Response to Notices

tie has responded to Notices (example attached)⁹ to requests identification of the reason for Change.

No Estimates

No Estimates have been received and many of these are months late in being submitted. If **tie** were to satisfied that a **tie** Change should be issued then it can only follow the agreement of an Estimate. The time lost and any costs incurred as a result of the late provision of Estimates is not for **tie** to pick up. BSC is therefore in breach of Clause 80.3 by not providing Estimates and not providing a reasonable request for an extended period.

tie Position

see **tie** Position Paper (copy attached).

tie contests that Infraco are entitled to a “without challenge” Notified Departure and mandatory **tie** Change resulting in a **tie** Change Order.

The Pricing Assumptions Clause 3.4.1 and 3.5 state that it is a Pricing Assumption that the design at BDDI status will not be amended except for normal development and completion of design.

It is **tie**'s position that any amendment beyond the normal development and completion of the design requires to be demonstrated by Infraco to determine the cause of such amendment.

For instance if there is a revision to design principle shape and form and outline specification it could be a result of many factors including;

- An Infraco breach (or SDS provider breach) (see Notified Departures definition)
- An Infraco change (see Notified Departures definition)
- An Change in law (see Notified Departures definition)

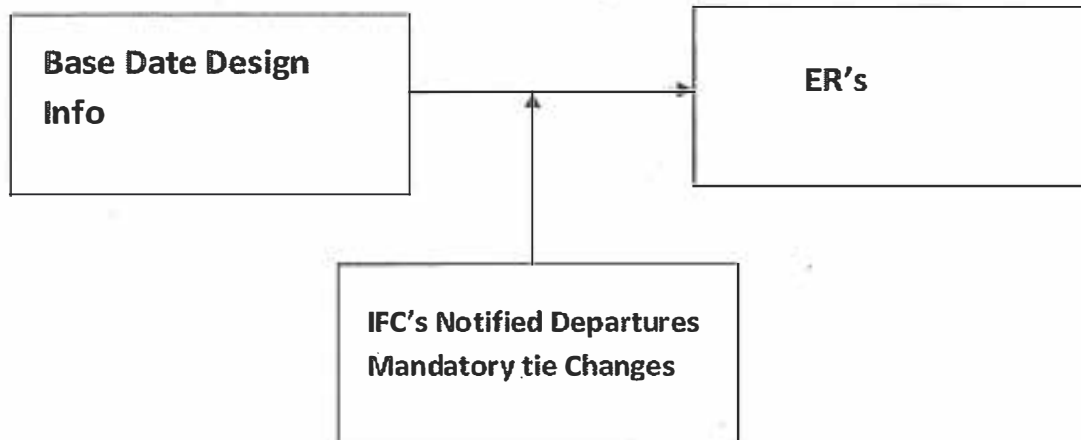
If it is for reasons of **tie** instruction or influence of the design for CEC or other Third Parties then **tie** would be responsible for such revision.

Infraco has a duty to design and construct the tramway in accordance with the ER's. The main body of the Agreement and the ER's have priority over other Schedules and Infraco Proposals. The design is entirely within the scope of the Infraco Contract as is the delivery of the ER's.

Infraco Responsibility



Pricing Assumptions Only



BSC's position relies entirely on the Schedule Part 4 provision and that any changes from BDDI to IFC results in a Notified Departure and tie change. If BSC's position was to be correct then IFC drawings turning to Notified Departures would require a change to the ER's (see Clause 3.5 of the Schedule Part 4). Therefore Infraco would be able to unilaterally revise the design and change the ER's without a tie challenge. This is where we have to look more expansively at the Contract.

IFC drawings¹¹ are defined as Deliverables necessary which have been approved by all the Approval Bodies and in accordance with the Review Procedure.

Clause 10.2 of the Agreement states that Infraco must submit any Deliverables associated with any Permitted Variation to tie for review pursuant to Schedule Part 14 (Review Procedures). (There are other sub clauses relating to this).

Permitted variations¹² are a defined item in the Agreement whose meaning includes Mandatory tie changes and/or Notified Departures (copy attached).

Therefore for Infraco to revise a drawing from BDDI (or any other development) to IFC they are required to put this through a Review Process which is in Schedule Part 14, this process would establish and challenge the matters that tie would wish to challenge prior to any change of the ER's and resultant mandatory tie change.

This would be logical in that tie would control any proposed changes to its own ER's.

Infraco are to build the ER's but do not have a unilateral right to change them by issuing an IFC.

The provision of Clause 10.2 of the Agreement allows for tie to remain in control.

In addition the Estimate should provide all of the necessary information to substantiate these claims (see Clause 80).

4.0 Legal Overview

Relevant Contract Clauses

Risks in Adjudication

Referring future benefits

5.0 Wrap Up/Q&A

BSC position is entirely based upon the wording of Clauses 3.4.1 and 3.5 of the Schedule Part 4.

The Agreement and ER's trump the Infraco Proposals and other Schedules in respect of priority of the documents.

Provision of the Agreement and the Contract as a whole have to be considered.

tie is not delaying matters since Infraco have not yet submitted Estimate for consideration.

Our ref: 25.1.201/IO/848

06 November 2008

tie limited
CityPoint
65 Haymarket Terrace
Edinburgh
EH12 5HD

For the attention of Steven Bell – Tram Project Director

Dear Sirs,

**Edinburgh Tram Network Infraco
Infraco Contract – Infraco Notification of tie Change (INTC) No 201**

Please find enclosed Infraco Notice of tie Change No 201 regarding the IFC Drawings for The Depot Access Bridge. The Infraco Notification noted above is due to the drawings changes being outwith the normal development and completion of design process and therefore promoting a consequential effect on the Infraco Contract Programme. Unfortunately we are unable to provide an accurate programme assessment and estimate due to the complexity of the changes.

In accordance with Clause 80.3 of the Infraco Contract we hereby request a reasonable extension of time to the contract requirement of 18 business days to provide an Estimate.

We would appreciate your comments in due course

Yours faithfully,


C H B Brady
Project Director
Bilfinger Berger Siemens CAF Consortium

Bilfinger Berger–Siemens– CAF
Consortium

BSC Consortium Office
9 Lochside Ave
Edinburgh Park
Edinburgh
EH12 9DJ
United Kingdom

Phone: 



EDINBURGH TRAM NETWORK

INFRACO CONTRACT

Infraco Notification of tie Change

No 201 Date 04 November 2008

1	<p>Tie Change Notified under Clause 80.1</p> <p>Deemed tie Change under Schedule Part 4 paragraph 3.5</p> <p>Mandatory Tie Change under Schedule Part 4 paragraph 3.5</p> <p>Tie of the Representative Instruction considered to be a tie Change under Clause 80.20 <i>(delete as appropriate)</i></p>																				
2	<p>Details of tie Change upon which the Estimate is based (Clause 80.2.1)</p> <p>Schedule Part 4, Pricing Assumption, paragraph 3.4.1.1, assumes that the issued for Construction Drawings do not differ from the base Infraco Proposals, Appendix A of 12/05/2008 other than design development, as the IFC drawings for Depot Access Bridge differ to a greater extent and complexity than design development, the foregoing results in a Notified Departure.</p>																				
3	<p>Amount of tie Change (Excluding VAT) (Clause 80.4.10) To Be Advised due to the complexity of this change and the interaction with other works</p>																				
4	<p>Valued in accordance with :- <i>(delete as appropriate)</i></p> <p>Clause 80.6.1 Rates and Prices for similar work</p> <p>Clause 80.6.2 Deduced Rates and Prices</p> <p>Clause 80.6.3 Fair Rates and Prices</p> <p>Clause 80.6.4 Actual Cost</p>																				
5	<p>Programme Impact and required extension of time (Clause 80.4.3)</p> <p>Subject to verification, this has indicated the following delaying effects are likely upon the planned completion dates for-</p> <table border="1"> <thead> <tr> <th>Section</th> <th>Planned Completion</th> <th>Delayed Completion</th> <th>Delay Days</th> </tr> </thead> <tbody> <tr> <td>A</td> <td>TBA</td> <td>TBA</td> <td>TBA</td> </tr> <tr> <td>B</td> <td>TBA</td> <td>TBA</td> <td>TBA</td> </tr> <tr> <td>C</td> <td>TBA</td> <td>TBA</td> <td>TBA</td> </tr> <tr> <td>D</td> <td>TBA</td> <td>TBA</td> <td>TBA</td> </tr> </tbody> </table>	Section	Planned Completion	Delayed Completion	Delay Days	A	TBA	TBA	TBA	B	TBA	TBA	TBA	C	TBA	TBA	TBA	D	TBA	TBA	TBA
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C	TBA	TBA	TBA																		
D	TBA	TBA	TBA																		
6	<p>Delay Mitigation Proposal (Clause 80.4.8) To Be Advised</p>																				
7	<p>Referred to DRP on [insert date if applicable] (Clause 80.10)</p>																				
8	<p>Competitive quotes required (Clause 80.2.1) YES/NO <i>(delete as appropriate)</i></p>																				
9	<p>Payment method for the proposed tie Change if stated (Clause 80.2.3) To be proposed/confirmed</p>																				
10	<p>Changes required to the terms of this Agreement (Clause 80.2.4) Schedule 15 to be changed</p>																				
11	<p>Changes required to the SDS Contract (Clause 80.2.4) Potentially dependent on agreed mitigation measures</p>																				
12	<p>Extended period of time required for return of the Estimate (Clause 80.3) Yes</p>																				
13	<p>Relief required from compliance with the following Infraco obligations under the Agreement (Clause 80.4.1) Achievement of Planned Sectional Completion Dates in current Schedule 15</p>																				
14	<p>Impact on the performance of the Infraco Works and the performance of the Edinburgh Tram Network (Clause 80.4.2) Delay and additional cost</p>																				
15	<p>Consents and/or Traffic Regulation Orders or any amendment or revision required to existing (Clause 80.4.4) None Identified at this time</p>																				
16	<p>Update Consents Programme (Clause 80.4.4) None - Inform Operator of potential delay in achievement of Commencement of Revenue Service</p>																				
17	<p>New 3rd Party agreements required (Clause 80.4.5) None anticipated</p>																				
18	<p>Amendment required to the Agreement or the Key Subcontracts (Clause 80.4.6) All Major Civil Engineering Package Contractors and BAM Rail Programme and Price will be affected</p>																				
19	<p>Proposed method of delivery (Clause 80.4.7) As approved Infraco Proposals and Method Statement</p>																				
20	<p>Confirmation of Changes to the terms of this Agreement and/or the SDS Contract proposed by tie under Clause 80.2.4 (Clause 80.4.9) To be confirmed</p>																				
21	<p>Any further changes required to the above (Clause 80.4.9) Price and Programme</p>																				
22	<p>Design work required by SDS (Clause 80.11) Programme amendment or acceleration dependent on agreed mitigation measures</p>																				
23	<p>Is a tie instruction to commence works prior to the agreement of the Estimate required? (Clause 80.13.2) Yes - if proposed mitigation implemented</p>																				
24	<p>Has a tie Change Order or instruction to proceed been received allowing work to proceed? (Clause 80.13.1) No</p>																				
25	<p>Has tie issued an instruction to carry out the proposed tie Change prior to the determination or agreement of the Estimate (Clause 80.15) No</p>																				
26	<p>Update the Programme in accordance with Clause 60 (Clause 80.17.1) Unable to update programme at this point due to lack of agreed baseline programme</p>																				
27	<p>Update Milestone Schedule Part 5 in accordance with Clause 67.10 (Clause 80.17.2) To be confirmed</p>																				
28	<p>Update any other previously accepted Deliverable e.g. SDS Deliverables (Clause 80.17.5) SDS potentially affected depending on mitigation measures adopted</p>																				
29	<p>Any other amendments required to this Agreement (Clause 80.18) None anticipated</p>																				
30	<p>Attached Documents</p>																				

The Parties agree the issues set out in this Estimate in accordance with Clause 80.9 and confirm this is now a tie Change Order in accordance with Clause 80.13.1

On behalf of TIE Date.....

On behalf of INFRACO..... Date.....



For the attention of Colin Brady
Project Director
Bilfinger Berger Siemens CAF Consortium
Lochside House
3 Lochside Park
Edinburgh EH12 9DJ

Our Ref: INF CORR 368
Date: 12th November 2008

Dear Sirs,

**Edinburgh Tram Network Infraco
Infraco Contract – Infraco Notification of tie Change (INTC) No 201**

We refer to your letter dated 6th November 2008, reference 25.1.201/IO/848.

Based on the information currently provided by BSC we are unable to agree that the works are a Notified Departure and constitute a Mandatory tie Change.

We request that BSC clearly identifies what works they consider to be a change from the Base Date Design Information which does not form part of normal design development and completion of the design. Included within this information should be reasons behind why the Base Design has been amended.

On receipt of this further information we will review and respond in full with our comments.

Yours faithfully



Steven Bell

Project Director – Edinburgh Tram



tie limited

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e-mail: steven.bell@tie.ltd.uk

web: www.tie.ltd.uk

- JB McLean lean-to Roseburn Street (Plot 92)
 - National Car Rental Roseburn Street (Plot 103)
 - Busy Bee Catering Balgreen Road (Plot 130)
 - ATC Hut Stenhouse Drive (plot 150)
- 37 Asbestos shall not be discovered or identified in buildings to be demolished or altered.
- 38 All CCTV cameras and other road equipment will be connected back to the nearest Open Transport Network (OTN) node in either a sub-station or Tramstop.
- 39 That compliance with the Infraco's obligation pursuant to Clause 18.17B and under Schedule Part 13 Section A (Third Party Agreements) to give "due and proper cognisance to third party requirements" (and similar obligations such as to have "due and proper regard to such third party requirements") under the Third Party Agreements shall not cause any delay or disruption to the carrying out of the Infraco Works, on the basis that the Infraco shall have used reasonable endeavours to mitigate the impact of such compliance and that any such third party requirements could not reasonably have been foreseen by an experienced contractor executing works in the operating environment of a UK city.
- 40 That any conditions attaching to any licence or similar arrangement entered into between **tie** and a third party entered into pursuant to any agreement included in Schedule Part 13 Section A (Third Party Agreements) shall not cause any delay or disruption to the carrying out of the Infraco Works, on the basis that the Infraco shall provide all reasonable assistance to **tie** to ensure compliance at all times with any such conditions and shall use all reasonable endeavours to mitigate the impact of such conditions in the carrying out of the Infraco Works.
- 41 That the Standards (as defined in Clause 16.1):
- (a) In relation to NR Immunisation (as defined in Appendix I to this Part 4 of the Schedule) shall be and shall be in the same terms as those which were in force on 12th October 2007; and
 - (b) In relation to the remainder of the APA Works (as defined in Clause 16.1) shall be and shall be in the same terms as those which were in force at the date of this Agreement.
- 42 That design support during the construction period will be provided by the SDS Provider.
- 43 The Public Realm Design Workbook will not introduce any new requirements into the Prior Approvals process which are in addition to the existing requirements set out in the Tram Design Manual and the City of Edinburgh Council's Standard for Streets.
- 3.5 The Contract Price has been fixed on the basis of inter alia the Base Case Assumptions noted herein. If now or at any time the facts or circumstances differ in any way from the Base Case Assumptions (or any part of them) such Notified Departure will be deemed to be a Mandatory **tie** Change requiring a change to the Employer's Requirements and/or the Infraco Proposals or otherwise requiring the Infraco to take account of the Notified Departure in the

Contract Price and/or Programme in respect of which **tie** will be deemed to have issued a **tie** Notice of Change on the date that such Notified Departure is notified by either Party to the other. For the avoidance of doubt **tie** shall pay to the Infraco, to the extent not taken into account in the Estimate provided pursuant to Clause 80.24.1, any additional loss and expense incurred by the Infraco as a consequence of the delay between the notification of the Notified Departure and the actual date (not the deemed date) that **tie** issues a **tie** Change Order, such payment to be made by **tie** following evaluation, agreement or determination of such additional loss and expense pursuant to Clause 65 (Compensation Events) as if the delay was itself a Compensation Event.

3.6 Earthworks Outline in this Schedule Part 4 means:

3.6.1 the finished earthworks levels and dimensions (prior to topsoiling) for the construction, where specified, of

- (a) carriageway, hard shoulder, hard strip, footway, paved area, central reserve, verge, side slope;
- (b) underside of (i) trackslab, (ii) grasstrack concrete, and (iii) ballast;
- (c) sub-base;
- (d) fill on sub-base material, base and capping;
- (e) contiguous filter material, lightweight aggregate infill;
- (f) surface water channels;
- (g) landscape areas, environmental bunds.

In all cases of filter drains, except narrow filter drains, the Earthworks Outline shall be the top of the filter material.

3.6.2 Where capping or stabilisation to form capping is required by the design in cutting or embankment, the Earthworks Outline shall be as defined in paragraph 3.6.1 i.e. as the top of capping.

3.6.3 Where an embankment is required by the design to be surcharged, the Earthworks Outline shall be defined as in paragraph 3.6.1 and exclude the surcharge.

3.6.4 Where permanent storage or stockpiling of topsoil is required, the Earthworks Outline shall be as defined in paragraph 3.6.1 and exclude stored topsoil.

3.6.5 Where the ground has been subjected to the treatment in respect of ground improvement, mine workings, swallow holes and the like, for the purpose of the definition of Earthworks Outline the existing ground level shall be the level obtained on completion of any such treatment of the areas affected.

Sub-soil Level is defined as the level of the ground after the removal of topsoil.

Surcharge is defined as material placed for the purpose of loading for the periods specified in the design.

4.0 PROVISIONAL SUMS

4.1 Provisional Sums have been allowed for items listed in Appendix B.

	£
Construction Works Price	238,607,664
SDS Price (as defined in the SDS Agreement and the Novation Agreement)	3,308,815
SDS Provisional Sums (as set out in Appendix 4 to SDS Novation Agreement)	
Extended Construction Support	1,000,000
Design Support Team	675,000
Tram Supply Price (as defined in the Tram Supply Agreement)	55,781,634
Infraco Maintenance Mobilisation	1,782,292
Tram Maintenance Mobilisation	2,275,806
Infraco Spare Parts	1,013,090
Total of capital expenditure	£304,444,301

Revenue expenditure comprises amounts payable to the Infraco from the Service Commencement Date.

- 2.6 "Defined Provisional Sum" means a sum included in the Construction Works Price which is provisional but for which Infraco has deemed to have made a provisional allowance for programming and planning (but not Preliminaries).
- 2.7 "Issued for Construction Drawings" shall have the meaning as used in Schedule Part 1 (*Definitions and Interpretations*).
- 2.8 A "Notified Departure" is where now or at any time the facts or circumstances differ in any way from the Base Case Assumptions save to the extent caused by a breach of contract by the Infraco, an Infraco Change or a Change in Law.
- 2.9 "Pricing Assumptions" means the assumptions in respect of the Contract Price as noted in Section 3.4 below.
- 2.10 "Specified Exclusions" means items for which Infraco has made no allowance within the Construction Works Price as noted in Section 3.3 below.
- 2.11 "Traction Power Simulation Modelling" means the technical modelling simulation prepared by the Infraco dated 2 April 2008, reference TSELEN2/484.01r04/STS.
- 2.12 An "Undefined Provisional Sum" means a sum included in the Construction Works Price which is provisional but for which Infraco has not deemed to have made due allowance for programming, planning and pricing Preliminaries.

3.0 CONSTRUCTION WORKS PRICE

amount to a **tie** Change shall constitute an irrevocable acceptance by the Infraco that any compliance with **tie**'s or **tie**'s Representative's instructions shall not constitute a **tie** Change under this Agreement.

Third Party Agreements

80.22 If **tie** wishes Infraco to perform any of the obligations contained in any third party agreement which are not set out in part A of Schedule Part 13 (*Third Party Agreements*) or to be responsible for ensuring that neither **tie** or CEC will be put in breach of their obligations to third parties other than to the extent that it is responsible by virtue of the operation of Clause 18.17A **tie** shall serve a notice on the Infraco (a "**TPA Change Notice**") which notice shall comply with the requirements of Clause 80.2. Subject to Clause 80.25, the provisions of this Clause 80 shall apply *mutatis mutandis* to any TPA Change Notice served by **tie**.

80.23 Following service by **tie** of a TPA Change Notice, the Parties shall negotiate in good faith and acting reasonably to agree the adjustment to the Contract Price, if any, appropriate to compensate Infraco for the Infraco accepting any additional responsibility or risk arising from the TPA Change Notice to the extent not reflected adequately through application of Clause 80.5.

Notified Departures

80.24 Where pursuant to paragraph 3.5 of Schedule Part 4 (*Pricing*) or pursuant to Clause 14 (*tie Obligations*), **tie** is deemed to have issued a **tie** Notice of Change as a result of the occurrence of a Notified Departure, the provisions of this Clause 80 (*tie Changes*) other than Clause 80.19 shall apply.

81. INFRACO CHANGES

81.1 If the Infraco becomes aware of the need or desirability for a variation to the Infraco Works, (which does not fall within any of the other categories listed in Clause 79.1, save for Clause 79.1.2) the Infraco shall notify **tie** of the reasons for such variation and make proposals for the proposed variation in writing. **tie** shall be free to accept or reject any proposed variation as **tie** thinks fit, (other than where the Infraco Change is necessary for Infraco to comply with a Change in Law which is not a Qualifying Change in Law, in which case **tie** shall accept such proposal or such other proposal as **tie** may reasonable require which does not increase the costs to the Infraco of complying with the relevant Change in Law) and **tie** shall determine whether such proposal is dealt with in accordance with Clause 81.2 or Clause 81.3.

80. TIE CHANGES

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

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

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

80.2.2 subject to Clause 80.3, require the Infraco to provide **tie** within 18 Business Days of receipt of the **tie** Notice of Change with an Estimate, and specify whether any competitive quotes are required and;

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

80.2.4 set out any changes which **tie** believe are required to the terms of this Agreement and/or the SDS Contract to give effect to the proposed **tie** Change

80.3 If, on receipt of the **tie** Notice of Change, the Infraco considers (acting reasonably) that the Estimate required is too complex to be completed and returned to **tie** within 18 Business Days, then the Infraco shall, within 5 Business Days (during the period prior to issue of the Reliability Certificate) and within 10 Business Days (at any time after issue of the Reliability Certificate) of receipt of such **tie** Notice of Change, deliver to **tie** a request for a reasonable extended period of time for return of the Estimate, such extended period to be agreed by the Parties, both acting reasonably.

80.4 As soon as reasonably practicable, and in any event within 18 Business Days after having received a **tie** Notice of Change (or such longer period as may have been agreed by the Parties, pursuant to Clause 80.3 or as required by Clause 80.11), the Infraco shall deliver to **tie** the Estimate. The Estimate shall include the opinion of the Infraco (acting reasonably) in all cases on:

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

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

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

80.4.4 any Consents, Land Consents and/or Traffic Regulation Orders (and/ or any amendment or revision required to existing Consents, Land Consents and/ or Traffic Regulation Orders) which are required in order to implement or as a result of the implementation of the proposed **tie** Change and any update of the Consents Programme which will be required as a result;

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

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

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

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

80.4.9 confirmation of the changes to the terms of this Agreement and/or the SDS Contract proposed by **tie** and any further changes the terms of this Agreement and/or the SDS Contract necessary to give effect to the proposed **tie** Change; and

80.4.10 any increase or decrease in any sums due to be paid to the Infraco under this Agreement (including the value of any Milestone Payments and the scheduling of such Milestone Payments) in order to implement, and as a direct consequence of implementation of, the **tie** Change, such increase or, decrease to be calculated in accordance with this Clause 80.

80.5 Where the **tie** Change, in the opinion of the Infraco acting reasonably, impacts the ability to deliver the Maintenance Services in accordance with Clause 52 (Maintenance) the Estimate delivered pursuant to Clause 80.4 shall include any net increase or decrease in:

80.5.1 in the case of demonstrable impact (taking into account any impact of previously implemented **tie** or Infraco Changes) on routine maintenance activity:

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

80.5.1.2 the consequential change in materials, plant and equipment required; or

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

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

80.5.2.2 the resulting change in labour resources and management time required for the renewal work; and

80.5.2.3 the resulting change in materials and plant and equipment (if any) used to effect the renewals.

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

80.6.1 by measurement and valuation at the rates and prices for similar work in Appendix F to Schedule Part 4 (*Pricing*) or Schedule Part 7 (*Maintenance Contract Price Analysis*) as the case may be in so far as such rates and prices apply;

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

80.6.3 if such rates and prices do not apply and it is not practicable to deduce rates and prices therefrom, by measurement and/or valuation at fair rates and prices in accordance with Appendix G Schedule Part 4 (*Pricing*) and Appendix F Schedule Part 7 (*Maintenance Contract Price Analysis*);

80.6.4 if the value of the tie Change cannot properly be ascertained by measurement and/or valuation, the value of the resources and labour employed thereon, as appropriate and in accordance with Appendix G to Schedule Part 4 (*Pricing*) and Appendix F to Schedule Part 7 (*Maintenance Contract Price Analysis*);

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

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

80.7.1 the Infraco has used all reasonable endeavours to minimise (including by the use of competitive quotes where appropriate in the case of construction works and where reasonable in the circumstances that new or additional sub contractors are required to deliver the change in the case of Maintenance Services or where construction works

are undertaken during the maintenance phase) any increase in costs and to maximise any reduction of costs ;

80.7.2 the Infraco has, where required by **tie** and where appropriate and practicable, sought competitive quotes from persons other than the Infraco Parties in pursuance of its obligation under Clause 80.7.1 above;

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

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

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

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

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

80.9 As soon as reasonably practicable after **tie** receives the Estimate, the Parties shall discuss and agree the issues set out in the Estimate. From such discussions **tie** may modify the **tie** Notice of Change. In each case the Infraco shall subject to Clause 80.11, as soon as practicable, and in any event not more than 15 Business Days after receipt of such modification, notify **tie** of any consequential changes to the Estimate.

80.10 Subject to Clause 80.15, if the Parties cannot agree on the contents of the Estimate, then either Party may refer the Estimate for determination in accordance with the Dispute Resolution Procedure.

80.11 If a **tie** Change requires a change in respect of design work to be carried out by the SDS Provider under the SDS Contract or any other change to the SDS Contract, the cost of such change will be valued in accordance with the terms of the SDS Contract and Infraco shall be allowed such time to perform its obligations under this Clause 80 as may reasonably be

BSC Claim for Changes from Base Date Design Information (BDDI) to IFC.

tie basic position

BSC has notified circa 41 occasions to date where they consider that the IFC drawings issued are different from the BDDI drawings such as to be a Notified Departure and therefore a mandatory tie Change.

No Estimates have been provided to date to identify and prove this assertion and these are awaited.

tie's position is that the design production responsibility rests with BSC. BSC are required to carry out and complete the design. If there are design changes from BDDI to IFC then BSC need to demonstrate properly to tie, who made the revisions, what happened to these revisions under the design review process, how these revisions go beyond normal design development and completion of the design and why any design revision has been necessary such as to result in a tie Change. Until this procedure is complete, tie is not committed to a Notified Departure.

BSC Position

1. TIE'S PAPER ENTITLED "DESIGN LIABILITY FOR INFRACO UNDER THE INFRACO CONTRACT"

1.1 There are certain fundamental misunderstandings expressed in tie's paper. In particular:

1.1.1 The question of whether or not the Infraco is liable for the design must not be confused with the cost and programme implications (whether positive or negative) arising from a Notified Departure. These are two quite separate and distinct issues. Design liability arises where the Infraco has not exercised the level of skill, care and diligence to be expected of a professional designer. The issue of the quality/adequacy of the design is irrelevant to the question of whether or not there has been a Notified Departure.

1.1.2 Tie's statement that "If tie issues a Change it shall be valued using the Base Date Design Information and the Pricing Assumptions in Schedule Part 4" is incorrect. The occurrence of a Notified Departure (i.e. the facts and circumstances differ in any way from the facts and circumstances identified in Pricing Assumptions 1 – 43) gives rise to a Mandatory tie Change the valuation of which is in accordance with the provisions of the Infraco Contract.

1.1.3 The "Acceptance of Liability by the Infraco" provisions set out in Clause 6 of the Novation Agreement address the liability of the Infraco for the acts and omissions of tie prior to the date of the novation and are not relevant in the context of liability for design carried out prior to that date.

2. INFRACO'S LIABILITY FOR DESIGN

2.1 The obligations of the Infraco in relation to design are:

2.1.1 to "exercise a reasonable level of professional skill, care and diligence to be expected of a properly qualified and competent professional contractor experienced in carrying out works and services of a similar nature to the Infraco Works in connection with projects of a similar scope and complexity" (Clause 7.2)

- 2.1.2 to carry out and complete the Infraco Works "so as to ensure compliance with the Employer's Requirements" (Clause 7.3.4)

These obligations arise in respect of the Infraco Works as a whole whether or not carried out prior to the date of novation of the SDS Agreement.

2.2 Breach in Design

2.2.1 It should be noted that the risk of negligence by the SDS Provider (or failure by the SDS Provider to achieve IFC issue by the dates set out in the Programme) is a shared risk. In particular Compensation Events (t) and (u) (the SDS Compensation Events) together with the provisions of Clauses 65.11 and 65.12 of the Infraco Contract address how that risk is shared between the Infraco and tie.

2.2.2 More fundamentally, however, the question of the Infraco's liability for failure to comply with its contractual obligations arises on breach. In other words, the question of any liability of the Infraco for defective design arises where the design itself is negligent and causes loss to tie or the design does not comply with the Employer's Requirements. This is of no relevance to the question of design development and the evolution of design and the cost/programme implications of Notified Departures (unless the underlying cause of the Notified Departure was the negligence of the Infraco in design of the Infraco Works).¹

2.3 Risk allocation re design development/evolution

2.3.1 The risk allocation in relation to design development/evolution is clearly identified in Schedule Part 4 (Pricing) of the Infraco Contract. Paragraph 3.5 of Schedule Part 4 provides:

2.3.2 *"The Contract Price has been fixed on the basis of inter alia the Base Case Assumptions² noted herein. If now or at any time the facts or circumstances differ in any way from the Base Case Assumptions (or any part of them) such Notified Departure will be deemed to be a Mandatory tie Change requiring a change to the Employer's Requirements and/or the Infraco Proposals or otherwise requiring the Infraco to take account of the Notified Departure in the Contract Price and/or Programme in respect of which tie will be deemed to have issued a tie Notice of Change on the date that such Notified Departure is notified by either Party to the other. For the avoidance of doubt tie shall pay to the Infraco, to the extent not taken into account in the Estimate provided pursuant to Clause 80.24.1, any additional loss and expense incurred by the Infraco as a consequence of the delay between the notification of the Notified Departure and the actual date (not the deemed date) that tie issues a tie Change Order, such payment to be made by tie following evaluation, agreement or determination of such additional loss and expense pursuant to Clause 65 (Compensation Events) as if the delay was itself a Compensation Event."*

2.3.3 Design Development/evolution is specifically addressed in Pricing Assumption 1. The assumption is that:

¹ Note that the definition of Notified Departure seeks to exclude the Schedule Part 4 mechanism "to the extent caused by a breach of contract by the Infraco, an Infraco Change or a Change in Law".

² The Base Case Assumptions" are the Base Date Design Information, the Base Tram Information, the Pricing Assumptions and the Specified Exclusions.

2.3.4 *The Design prepared by the SDS Provider will not (other than amendments arising from the normal development and completion of designs):*

1.1 *in terms of design principle, shape, form and/or specification be amended from the drawings forming the Base Date Design Information (except in respect of Value Engineering identified in Appendices C or D to this Schedule Part 4);*

1.2 *be amended from the scope shown on the Base Date Design Information and Infraco Proposals as a consequence of any Third Party Agreement (except in connection with changes in respect of Provisional Sums identified in Appendix B); and*

1.3 *be amended from the drawings forming the Base Date Design Information and Infraco Proposals as a consequence of the requirements of any Approval Body.*

For the avoidance of doubt normal development and completion of design means the evolution of design through the stages of preliminary to construction stage and excludes changes of design, principle, shape and form and outline specification.

2.3.5 Whilst we will turn to the detail of this Pricing Assumption it should first be noted that the provisions of Paragraph 3.5 (Mandatory tie Change flowing from circumstances that differ from a Base Case Assumption) apply to all categories of Base Case Assumptions. The definition of Base Case Assumption (as identified above) includes a separate and distinct category of "Base Date Design Information" It follows that it might be reasonably argued that any change to the Base Date Design Information is a Mandatory tie Change whether or not the tests set out in Pricing Assumption 1 have been satisfied.

2.3.6 For current purposes we are asked simply to address the development of design in the context of Pricing Assumption 1. The test for the triggering of a Mandatory tie Change is whether or not the facts and circumstances differ "in any way" from those set out in the Pricing Assumption. It follows that the following events would trigger a Mandatory tie Change:

(a) the design principle being amended from the drawings forming the Base Date Design Information;

(b) the shape being amended from the drawings forming the Base Date Design Information;

(c) the form being amended from the drawings forming the Base Date Design Information;

(d) the specification being amended from the drawings forming the Base Date Design Information³;

(e) the scope being amended from the drawings forming the Base Date Design Information or Infraco Proposals as a consequence of any Third Part Agreement; and

³ 1-4 in the list mentioned above are, of course, subject to an exception in the case of Value Engineering)

(f) the design being amended from the Base Date Design Information as a consequence of the requirements of any Approval Body,

save where any such changes arise from "normal development and completion of design". This term is defined to exclude changes to design principle, shape, form and specification so in practical terms this exception from the Infraco's entitlement to a Mandatory tie Change is likely to be very limited (although this is a matter that would ultimately require to be determined by professional designers).

BSC Claim for Changes from Base Date Design Information (BDDI) to IFC.

tie's Position

As requested, we present our basic position in this paper and some comments on our understanding of BSC position. We have not responded with full comments on a line by line basis to the BSC Position (paper of 28 January 2009), as we do not consider it necessary to do so at this point.

1. BSC has notified circa 41 occasions to date where they consider that the IFC drawings issued are different from the BDDI drawings such as to be a Notified Departure and therefore a mandatory tie Change.
2. No Estimates by InfraCo have been provided to date to identify and prove this assertion and these are awaited by tie.
3. tie understands InfraCo's position to be that Notified Departures have occurred and that this triggers an obligation on tie to issue a tie Change order.
4. tie further understands InfraCo's position to be that only under very limited circumstances can a change in design during evolution from BDDI to IFC not be a Notified Departure.
5. tie's position is that the design production responsibility rests with BSC. Several layers of the InfraCo Contract support this. BSC are required to carry out and complete the design. If there are design changes from BDDI to IFC then BSC need to demonstrate properly to tie within the operation of Clause 80 (tie change): who made the revisions, what happened to these revisions under the design review process, how these revisions go beyond normal design development and completion of the design and why any design revision has been necessary such as to result in a tie Change.

Until this procedure is complete, tie is not committed to a Notified Departure.

6. In order for the Notified Departure mechanism to operate, tie needs to be able to assess the validity of the claim. tie requires an examination of the changes which InfraCo state have been made to BDDI during the evolution of the relevant design. That analysis needs to establish:
 - (a) who made the design change and what the technical need for the change was
 - (b) how the design change process adopted by the InfraCo satisfied Clause 10 and in particular Clause 10.2 of the InfraCo Contract: *"The InfraCo shall submit any Deliverables associated with any Permitted Variations¹ to tie representative for review pursuant to Schedule Part 14 (Review Procedure and Design Management Plan)."*
 - (c) the factual and technical grounds justifying why the changes exceed normal design development from preliminary to construction stage.
 - (d) how InfraCo has complied with its duty to mitigate the effect of Notified Departure (if there has been one).

¹ Permitted Variations include Notified Departures

- (e) there has been no InfraCo breach or SDS Provider breach, InfraCo change or Change in Law, which has caused or contributed to the occurrence of a Notified Departure.
7. It is common ground that when a Notified Dispute occurs, this triggers a mandatory tie Change. But tie rejects the premise that under the InfraCo Contract it is for InfraCo to determine unilaterally that in circumstances envisaged by Pricing Assumption 3.4.1, a design change must automatically be a Notified Departure. The type of design revision, its submission to review and the reasons for it will all affect whether it constitutes a Notified Departure. If the InfraCo does not put tie in possession of these facts, the InfraCo is in breach of its obligations under Clause 80 (tie change).
8. It is also common ground that Clause 80 (tie Change) operates to determine the InfraCo's entitlements in the case of a Notified Departure. The onus is on the InfraCo to track through the requirements of the tie Change mechanism. If the InfraCo fails to provide sufficient information in the form of an Estimate, tie cannot issue a tie Change order and the InfraCo is either intentionally or negligently preventing the proper operation of the tie Change provisions. This would be relevant in the determination of any entitlements due to the InfraCo.

(whether real or personal) of the Party by or on behalf of any creditor or encumbrancer of the Party; or

- (i) anything analogous to any of the events mentioned in paragraphs (a) to (h) above occurs in relation to the Party under the law of any relevant jurisdiction specifically the opening of insolvency proceedings pursuant to the EC Insolvency Regulation 1346/2000, the Insolvency Act 1986 or the Bundesinsolvenzgesetz of 5 October 1994 (as amended) or the equivalent under the laws of Spain;

"Insolvency Termination Notice" has the meaning given to it in Clause 90.1.3;

"Intellectual Property Rights" means any rights in or to any patent, design right, utility model, trade mark, brand name, service mark, trade name, business name, logo, invention (whether registered or unregistered), domain name, semi-conductor right, topography right, software designs and/or other materials, source code, copyright, moral right, know-how or rights in databases and any other rights in respect of any industrial or intellectual property, whether capable of being registered or not, including all rights to apply for any of the foregoing rights or for an extension, revival or renewal of any of the foregoing rights and any similar or analogous rights to any of the above, whether arising or granted under the law of Scotland or of any other jurisdictions;

"Internal Resolution Procedure" means the procedure described in paragraphs 9 and 10 of Schedule Part 9 (*Dispute Resolution Procedure*);

"IPR" means intellectual property rights;

"Issued for Construction Drawings" means those Deliverables necessary for the Infraco to commence construction of the relevant part of the Infraco Works and as shown on the Design Delivery Programme which have been fully approved by all Approval Bodies and in accordance with the Review Procedure;

"Key Personnel" means those staff identified as key personnel of the Infraco and/or any Infraco Parties in Schedule Part 12 (*Key Personnel*);

"Key Sub-Contractor" means any supplier or sub-contractor carrying out works falling within the categories set out in Schedule Part 38 (*Approved Suppliers and Sub-contractors (and Trades)*) as may be amended from time to time;

"Land Consents" means all licences to occupy land, wayleaves and any other licences, permissions, rights of access and related consents in respect of land required for the Infraco

"**Performance Review Period**" means the period between each Performance Review Date (and the period between the Service Commencement Date and the first Performance Review Date);

"**Permanent Land**" means the land shown highlighted in blue on the plans and drawings set out in Schedule Part 31 (*Drawings*);

"**Permits to Work**" means the permits to work issued by tie in accordance with paragraph 3.5 of part A, and paragraph 3.4 of part B, of Schedule Part 3 (*Code of Construction Practice and Code of Maintenance Practice*);

"**Permitted Variation**" means a tie Change, a Small Works Change, an Accommodation Works Change, an Infraco Change, a Mandatory tie Change and/or a Notified Departure which has been authorised to proceed in accordance with the provisions of this Agreement;

"**Persistent Breach Notice**" means a notice served by tie pursuant to Clause 93 (*Persistent Breach*);

"**Phase 1a**" means Edinburgh Airport to Newhaven (inclusive), together with the Depot at Gogar and the spur at Roseburn Junction;

"**Phase 1b**" means Roseburn Junction to Granton Square (inclusive);

"**Phase 1b Works**" means as the context requires, all or any of the works to be designed, constructed and completed and/or services to be provided and/or the plant, machinery and equipment to be supplied and installed by the Infraco in accordance with this Agreement and which are necessary to deliver Phase 1b, and to subsequently maintain Phase 1b all in accordance with the Employer's Requirements and this Agreement.

"**Planned Sectional Completion Date**" means each of the following programmed dates of sectional completion for the relevant Section in accordance with this Agreement of the Edinburgh Tram Network as may be amended from time to time in accordance with this Agreement:

- (a) Section A (Depot) - 25 March 2010;
- (b) Section B (Test Track) - 23 April 2010;
- (c) Section C (Testing and Commissioning) - 17 January 2011;

(B)

"Maintenance Mobilisation Period" means the period ending on the Service Commencement Date;

"Maintenance Payment Due Date" has the meaning given to it in Clause 68.5;

"Maintenance Plan" means the Infrastructure Maintenance Plan and the Tram Maintenance Plan and/or the Tram Maintainer's proposals for implementation of the Infrastructure Maintenance Services or Tram Maintenance Services respectively;

"Maintenance Programme" means the programme for carrying out the Maintenance Services as developed by the Infraco and amended from time to time in accordance with this Agreement;

"Maintenance Services" means the Infrastructure Maintenance Services and the Tram Maintenance Services;

"Maintenance Services Interim Certificate" means any certificate to be issued by tie in accordance with Clause 68.4;

"Maintenance Services Payment" means the Infrastructure Maintenance Services Payment and/or the Tram Maintenance Services Payment;

"Maintenance Specification" means the specification or specifications in respect of Trams, infrastructure and equipment set out in Section 40 of Schedule Part 2 (*Employer's Requirements*) and any modification thereof or addition thereto as may from time to time be approved in writing in accordance with this Agreement;

"Mandatory tie Change" means any addition, modification, reduction or omission in respect of the Infraco Works instructed in accordance with Clause 80 (*tie Changes*) which this Agreement specifically states will be a Mandatory tie Change;

"Maximum Tram Weight" means the maximum weight of a tare Tram of 55.85 tonnes;

"Milestone" means a Construction Milestone, a Critical Milestone, a Mobilisation Milestone, a Tram Milestone and/or a Tram Maintenance Mobilisation Milestone;

"Milestone Completion Certificate" means a Construction Milestone Completion Certificate, a Critical Milestone Completion Certificate, Mobilisation Milestone Completion Certificate and/or Tram Milestone Completion Certificate;

Writing), Clause 110 (*No Partnership or Agency*), Clause 111 (*Notice*), Clause 112 (*Invalid Terms*), Clause 113 (*Third Parties Rights*) and Clause 117 (*Applicable Law*), the obligations of the Parties under this Agreement shall be suspensively conditional upon the occurrence of the Commencement Date.

- 3.2 **tie** may by notice in writing to the Infraco waive any or all of the Conditions Precedent.
- 3.3 On the date that all of the Conditions Precedent (with the exception of any Conditions Precedent that have been expressly waived by **tie** in writing) have, in **tie's** opinion (acting reasonably) been satisfied, **tie** shall issue the CP Certificate.
- 3.4 The Infraco shall use its reasonable endeavours to satisfy or procure the satisfaction of the Conditions Precedent as soon as reasonably possible after the Effective Date.
- 3.5 In the event that the Commencement Date has not occurred by the date falling 3 months after the Effective Date (or such later date as may be agreed in writing between the Parties), **tie** may terminate this Agreement with immediate effect following the service of a notice to that effect on the the Infraco, and in which event, all provisions of this Agreement (other than Part 1 (*Preliminary Matters*), Clause 77 (*Indemnity By Infraco, Liability and Sole Remedy*), Clause 97 (*Dispute Resolution Procedure*), Clause 101 (*Confidential Information*), Clause 102 (*Copyright and Intellectual Property*), Clause 106 (*Entire Agreement*), 108 (*Variations to be in Writing*), 110 (*No Partnership or Agency*), 111 (*Notices*), 112 (*Invalid Terms*), 113 (*Third Parties Rights*) and Clause 117 (*Applicable Law*)), shall cease to have effect and such termination shall be without prejudice to any accrued rights or obligations as at that date.

4. PRIORITY OF CONTRACT DOCUMENTS

4.1 NOT USED

4.2 In the event of any ambiguity or discrepancy between any provisions in the main body of this Agreement and those in any Part of the Schedule, or between the provisions of any Schedules, **tie's** Representative shall state in writing which provision shall take priority, which shall be deemed to be instructions issued pursuant to Clause 34.1. Provided always that, unless expressly stated otherwise by **tie's** Representative the main body of the Agreement shall always take priority and the following order of priority will apply to Schedule Part 2 (*Employer's Requirements*) and Schedule Part 30 (*Infraco's Proposals*):

- 4.2.1 the Employer's Requirements; over
- 4.2.2 the Infraco's Proposals.

- 4.2A Notwithstanding Clause 4.2, if there is any ambiguity or discrepancy between the requirements set out in Schedule Part 44 (*EAL Works*) which the Infraco must comply with whilst carrying out works on the EAL Site and any provision of this Agreement the requirements set out in Schedule Part 44 (*EAL Works*) shall take precedence.

- 4.3 Nothing in this Agreement shall prejudice the Infraco's right to claim additional relief or payment pursuant to Schedule Part 4 (*Pricing*).

- 4.4 The Infraco confirms that it has studied in detail the Employer's Requirements and each document comprised therein and has satisfied itself that no discrepancies or errors exist within the Employer's Requirements or between it and the Infraco's Proposals. The Infraco acknowledges that it accepts all risks arising from any discrepancies, errors or omissions that subsequently appear within or between such documents and that, subject to Clause 4.2, 4.3 and 4.5, it shall not be entitled to make any claim against tie for an extension of time, additional payment, any relief or otherwise in respect of any such errors, discrepancies or omissions. The Infraco will notify tie forthwith upon becoming aware of a discrepancy or error within the Employer's Requirements or between the Employer's Requirements and the Infraco's Proposals. Where there is such discrepancy or error which cannot be resolved by the provisions of the Employer's Requirements, the Infraco shall as soon as reasonably practicable, and in any event within 5 Business Days, provide tie with proposals for resolving such discrepancy or error which comply with this Agreement.

- 4.5 Unless, within 10 Business Days of receipt by tie of the Infraco's proposals for resolving such discrepancy or error, tie notifies the Infraco requiring it to resolve the discrepancy in a different manner (which manner shall be binding but shall be reasonable in time and cost having regard to the Employer's Requirements and which shall be deemed to be instructions in accordance with Clause 34.1), the Infraco shall resolve the discrepancy in the manner proposed by it.

- 4.6 Subject to Clause 4.4, the Infraco shall review all documents, drawings or other subsequent information produced to amplify this Agreement and/or issued by tie, within 10 Business Days or such other period as is agreed by tie acting reasonably of the date of receipt of such documents, drawings or other subsequent information, and shall bring to the attention of tie's Representative any ambiguities or discrepancies, or requirements for further information arising from them. Save as otherwise stipulated in this Agreement and without prejudice to Infraco's express rights or remedies under this Agreement, failure to comply with this obligation shall prevent the Infraco from being entitled to an extension of time, additional payment, any relief or otherwise in respect of problems which would have been notified or