



**EDINBURGH TRAM**  
**Supporting Documents**  
**For**  
**Financial Close**  
**1 May 2008**





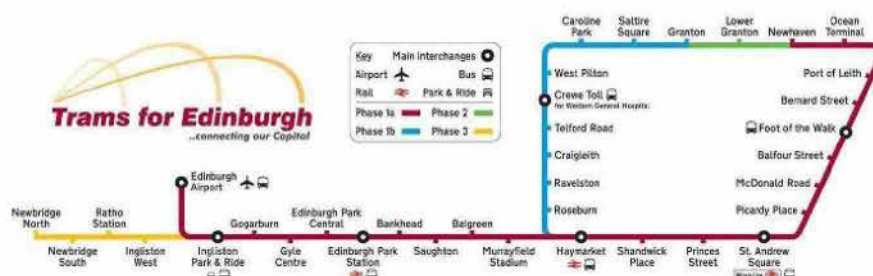
# Edinburgh Tram

## Supporting Documents for Financial Close

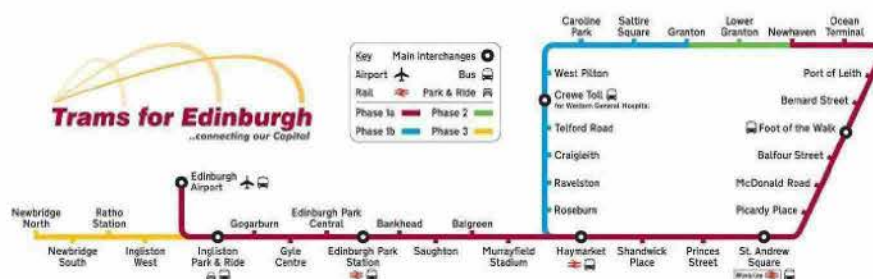
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|--|------|---|
|  |      | <b>Contract</b>                                 |
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| Critical Contractual Decisions to enable Chief Executive to use delegated powers to approve tie to sign the contract with BBS   |                               |  |                             |  |  |   |   |   |   |  |
|---|-------------------------------|--|-----------------------------|--|--|---|---|---|---|--|
| Item  | Issue                         | Description  | Notes                       | Status   | Anticipated Completion Date                              | CEC Deliverables - Link to Supporting Documentation   |   |   |   |  |
|   |                               |  |                             |  |  | Docs 1  | Docs 2  | Docs 3  | Docs 4  |  |
| 1   | Contract                      | 1.1 a) Novation agreement ready to be signed off - CAF   |                             | Draft Letter from DLA dated 12th March provided - Item 1 provides detail on CAF Novation   | 11-Feb   | <a href="#">1.1.1.2 Novation and CEC Guarantee\DLA Letter 120308.pdf</a>                                      | <a href="#">1.1.1.2 Novation and CEC Guarantee\Novation Agreement Part 17.pdf</a>                           | <a href="#">1.1.1.2 Novation and CEC Guarantee\Novation Agreement Part 23.pdf</a>   |   |  |
|   |                               | b) Novation agreement ready to be signed off - SDS   |                             | DLA letter of 12 March 08 provides detail on Novation. Para on Page 7 of GB report on Infraco Contract Suite (ICS) provides further detail.  | 14-Feb   | <a href="#">1.1.1.2 Novation and CEC Guarantee\FW SDS Novation.msg</a>  | <a href="#">1.1.1.2 Novation and CEC Guarantee\DLA Letter 120308.pdf</a>                                    | <a href="#">Final tie Docs - GB\-\$203499_1_UKMATTERS\17_03_08_Report_on_Infraco_Contract_Suite_12_05_08_Clean_and_issued.DOC</a> | <a href="#">1.1.1.2 Novation and CEC Guarantee\Novation Agreement Part 17.pdf</a> |  |
|   |                               | 1.2 CEC Guarantee agreed with BBS and ready to sign off  |                             | Letter from DLA dated 12th March provided - Items 9.1 and 9.2 Cover CEC Guarantee  |  | <a href="#">1.1.1.2 Novation and CEC Guarantee\DLA Letter 120308.pdf</a>                                      | <a href="#">1.1.1.2 Novation and CEC Guarantee\18389119_2_UKMATTERS(CEC Guarantee (final) 08 04 08).DOC</a> |   |   |  |
|   |                               | 1.3 Due Diligence on approvals for Infraco & Tramco (post notification)  |                             | This will be completed immediately before contract award. Letter required from tie confirming due diligence is complete and they are satisfied with outcome. CEC request letter from German and Spanish Lawyers with to confirm satisfaction with due diligence            |  |   |   |   |   |  |
|   |                               | 1.4 a) Operating Agreement - tie   |                             | tie operating agreement agreed. This will be engrossed and held for execution at a later date.   | 04-Feb   | <a href="#">1.4 a tie Operating Agreement\Operating Agreement v30 230408.doc</a>                              |   |   |   |  |
|   |                               | b) Operating Agreement - TEL   |                             | TEL Interim operating agreement agreed. This will be engrossed and held for execution at a later date.   | 11-Feb   | <a href="#">1.4 b TEL Operating Agreement\TEL Operating Agreement v12 230408.doc</a>                          |   |   |   |  |
|   |                               | 1.5 DLA supportive letter with risk matrices   | explanation of risk profile | DLA letter has been provided. Matrices have also been provided.  | 14-Feb   | <a href="#">1.5 DLA Letter and Matrices\18184972_2_UKMATTERS(Infraco Risk Allocation Matrix 23.04.08).DOC</a> | <a href="#">1.1.1.2 Novation and CEC Guarantee\DLA Letter 120308.pdf</a>                                    | <a href="#">1.5 DLA Letter and Matrices\19025969_1_UKMATTERS\LT to CEC - 18_03_2008 (3).pdf</a>                                   | <a href="#">1.5 DLA Letter and Matrices\DLA Final Matrix 140508.pdf</a>           |  |
|   |                               | 1.6 OCIP exclusions  |                             | Report available for review by CEC. Presentation on OCIP given to CEC Officers on 5th February. CEC Insurance officers have reviewed tie Insurance documents with a meeting set up to cover areas of concern. OCIP can be amended to take account of any changes required. |  | <a href="#">1.6 OCIP\CEC OCIP Presentation.ppt</a>  |   |   |   |  |
| 1.7 tie to provide a list of what is not included within the BBS contract ( i.e. the items which BBS have specifically excluded ) with a financial value against each item. | OCIP caps, scope of works etc | Infraco price basis and exclusions is provided in section 8.3 of the Close Report. Email from Susan Clark provides further information | 11-Feb                      | <a href="#">Final tie Docs - GB\Close Report - v11 12.05.08 Clean and Issued.doc</a>   | <a href="#">7.2 Exclusions\FW Infraco Exclusions.msg</a> |   |   |   |   |  |
| 2   | Programme                     | 2.1 Confirm dates for 1a and 1b  |                             | Evidenced in paragraph 2.2 of the close report.  |  | <a href="#">Final tie Docs - GB\Close Report - v11 12.05.08 Clean and Issued.doc</a>                          |   |   |   |  |



| Critical Contractual Decisions to enable Chief Executive to use delegated powers to approve tie to sign the contract with BBS |                        |  |   |   |                             |   |   |  |        |
|---|------------------------|--|---|---|-----------------------------|---|---|--|--------|
| Item  | Issue                  | Description  | Notes   | Status  | Anticipated Completion Date | CEC Deliverables - Link to Supporting Documentation   |   |  |        |
|   |                        |  |   |   |                             | Docs 1  | Docs 2  | Docs 3   | Docs 4 |
|   |                        | 2.2 Agreement of On-street Construction Methodology  | closure periods v cost implications                   | Statement provided by tie to give comfort to CEC that the programme is consistent with the constraints. Consequential impact of guided busway to be taken by CEC. Para 2.2 of Close Report provides detail on management of programme within constraints. |                             | <a href="#">Final tie Docs - GBIClose Report - v11 12.05.08 Clean and Issued.doc</a>                          | <a href="#">2.2 Agreement of On Street Construction Methodology\tie doc - Construction Methodology.pdf</a>    |  |        |
|   |                        | 2.3 Mudfa - risks related to Infraco   |   | MUDFA programme v6 is incorporated into BBS programme. Statement on QRA and what the allowance for slippage is in regard to MUDFA. MUDFA related items account for £8.6m in QRA.  |                             | <a href="#">2.3.5.1.5.2c.5.3.5.4 QRA Transparency and Changes\Financial Analysis Spreadsheet (100408).xls</a> |   |  |        |
| 3   | Employers Requirements | 3.1 Summary to CEC of Employers' Requirements, including detailed scope of the Tram Works with endorsement from DLA. The ER is a key part of the overall contract which sets compliance standards of the tram works. BBS have been given version 2.4 to price. BBS have responded to this with variations, this may be a lowering of standards to keep the price level below the net £498m e.g CCTV specification. tie to produce a list of variations that they are minded to accept from version 2.4, with a justification for the variation with TELs comments, and also to give assurances that what is proposed to accept as a variation is in all cases "fit for purpose" both in term of price and quality. | to assure CEC liabilities are explicit                | DLA Letter confirming alignment of employers requirements has been provided. Commentary provided in GB doc on ICS (page 9) and para 2.3 of Close Report   | 13-Feb                      | <a href="#">3.1 Employers Requirements - DLA Endorsement\ERS 13 03 08.doc</a>                                 | <a href="#">Final tie Docs - GBIClose Report - v11 12.05.08 Clean and Issued.doc</a>                          | <a href="#">Final tie Docs - GBi-\$203499 1 UKMATTERS\17 03 08 Report on Infraco Endorsement\19025969 1 UKMATTERS\LT to CEC - 18 03 2008 (3).pdf</a> |        |
| 4   | Due Diligence          | 4.1 Statement from the Preferred Bidder that they accept the performance run-time model and "law of physics" results and confirmation of acceptance of the emerging quality of design.   | potential for additional design costs                 | Awaiting Confirmation. Response due from BBs on 1st Feb. Confirmation required on whether CAF are providing a warranty covering compliance with the DKE   | 01-Feb                      | <a href="#">4.1 Compliance with Run Time and Law of Physics\4.1 - alignment with DKE.pdf</a>                  |   |  |        |
| 5   | Risk                   | 5.1 Full transparency of QRA   |   | QRA updated for meeting with tie on 4th March. Explanation given on changes in QRA - tie have provided a written statement that they are satisfied that the drop from £50m to £30m is enough cover.   | 14-Feb                      | <a href="#">2.3.5.1.5.2c.5.3.5.4 QRA Transparency and Changes\Financials Spreadsheet.msg</a>                  | <a href="#">2.3.5.1.5.2c.5.3.5.4 QRA Transparency and Changes\Financial Analysis Spreadsheet (100408).xls</a> |  |        |
|   |                        | 5.2 (a) Black flag risks: Provide a list of these items and what is the likelihood of any of these risks occurring? What is tie's strategy to avoid said risks materialising? What is the cost of exiting from a Black Flag item?  | be explicit even if outwith budget avoidance strategy | Costs relating to project cancellation pre and post financial close have been provided by Stewart McGarrity   |                             | <a href="#">5.2a Black Flags\RE Risk Briefing - PRIVATE CONFIDENTIAL.msg</a>                                  |   |  |        |



| Critical Contractual Decisions to enable Chief Executive to use delegated powers to approve tie to sign the contract with BBS |                   |   |   |   |  |   |  |  |  |  |
|---|-------------------|---|---|---|--|---|--|--|--|--|
| Item  | Issue             | Description   | Notes   | Status  | Anticipated Completion Date  | CEC Deliverables - Link to Supporting Documentation   |  |  |  |  |
|   |                   |   |   |   |  | Docs 1  | Docs 2   | Docs 3   | Docs 4   |  |
|   |                   | (b) Details of the risk management strategy for the key risks through delivery.   | highlighted by OGC report   | Draft report available covering this, Susan Clark to provide. Summary of Risk Management Strategy provided in para 8.6 of Close Report.                                   |  | <a href="#">Final tie Docs - GB\Close Report - v11.12.05.08 Clean and Issued.doc</a>                          |  |  |  |  |
|   |                   | (c) Detailed analysis of programme risk. Confirmation of the risk allowance for programme delay. Detail of items on critical path and what is being done to ensure they do not cause (further) delay. | emphasis on liability to CEC.   | Confirmation of programme delay allowance in QRA highlighted in meeting with tie on 4th March and can be identified in QRA.   | 13-Feb   | <a href="#">2.3.5.1.5.2c.5.3.5.4_QRA Transparency and Changes\Financial Analysis Spreadsheet (100408).xls</a> |  |  |  |  |
|   | 5.3               | Tie written statement to CEC on risks as at 25 October 2007 compared to immediately post contract award.  |   | Spreadsheet provided by Stewart McGarrity highlights changes in QRA from October to Financial Close.  | 14-Feb   | <a href="#">2.3.5.1.5.2c.5.3.5.4_QRA Transparency and Changes\Financial Analysis Spreadsheet (100408).xls</a> |  |  |  |  |
|   | 5.4               | Risk Register needs to be updated to include the potential risks and knock-on effects of prior and technical approvals not having being obtained prior to Financial Close. This is linked to 9.2.     |   | Risk allowance of £3.3m in QRA for this issue. Assurance from Stewart McGarrity that this allowance along with the management procedures in place are enough to mitigate. |  | <a href="#">2.3.5.1.5.2c.5.3.5.4_QRA Transparency and Changes\Financial Analysis Spreadsheet (100408).xls</a> |  |  |  |  |
| 6   | Value Engineering | 6.1   | VE summary included in the final deal and highlighting other potential savings with a probability value.  |   | Analysis of V/E provided in Financial Analysis spreadsheet by Stewart McGarrity - further wording in section 8.7 of close report. Schedule 4 Clause 5 provides detail of V/E at Financial Close.   | 13-Feb  | <a href="#">6.1 VE Summary\VE Summary (Extracted from S McGarrity Financial Analysis).xls</a>  | <a href="#">Final tie Docs - GB\Close Report - v11.12.05.08 Clean and Issued.doc</a>   | <a href="#">G:\Projects\Trams\Financial Close\7.4 Design Version of BBS Contract and Price\ETN - Schedule 4 (1504 Clean for CEC).DOC</a> | <a href="#">Susan Clark Close Out CEC List.msg</a> |
| 7   | Pricing & Funding | 7.1   | The Council requires a detailed analysis of prices, costs and risks allowance. tie required to explain how prices for maintenance, etc. impact on operating cost assumptions. | including for both construction and operation e.g. design timescale not accepted  | Section 2.1 of Close Report provides price breakdown. GB report on ICS provides some detail on Maintenance (page 6).   | 13-Feb  | <a href="#">Final tie Docs - GB\Close Report - v11.12.05.08 Clean and Issued.doc</a>   | <a href="#">Final tie Docs - GB\18203499_1_UKMATTERS\17_03_08_Report_on_Infraco_Contract_Suite\12.05.08_Clean_and_issued.DOC</a> |  |  |
|   |                   | 7.2   | Cross refer to item 1.7 above re exclusions from contract by BBS.   |   | Draft Close report section 8.3 provides information covering these items.  | 13-Feb  | <a href="#">Final tie Docs - GB\Close Report - v11.12.05.08 Clean and Issued.doc</a>   |  |  |  |
|   |                   | 7.3   | Statement on % of costs fixed and % outstanding as provisional sums with programme for moving these to fixed costs.   |   | Draft Close report section 8.2 provides information covering these items.  | 13-Feb  | <a href="#">Final tie Docs - GB\Close Report - v11.12.05.08 Clean and Issued.doc</a>   |  |  |  |
|   |                   | 7.4   | What design version was the BBS contract priced against and what changes have subsequently taken place.   |   | Report by tie on the Infraco Contract states in section "Design Expectations of the Infraco" that V31 updated from V22 of the SDS design has been used for Price and Programme - Schedule 4 on pricing received from tie. Appendix 4 (Schedule of Rates and Quantified Schedule of Rates) held by tie and available for CEC to review. | 13-Feb  | <a href="#">G:\Projects\Trams\Financial Close\7.4 Design Version of BBS Contract and Price\ETN - Schedule 4 (1504 Clean for CEC).DOC</a> | <a href="#">Susan Clark Close Out CEC List.msg</a>   |  |  |

| Critical Contractual Decisions to enable Chief Executive to use delegated powers to approve tie to sign the contract with BBS |              |   |       |   |                             |  |  |        |        |
|---|--------------|---|-------|---|-----------------------------|--|--|--------|--------|
| Item  | Issue        | Description   | Notes | Status  | Anticipated Completion Date | CEC Deliverables - Link to Supporting Documentation  |  |        |        |
|   |              |   |       |   |                             | Docs 1   | Docs 2   | Docs 3 | Docs 4 |
|   |              | 7.5 Cost per week of not signing contract on time to be estimated by tie  |       | Costs relating to project delay provided by Stewart McGarrity email dated 10/03/08  | 13-Feb                      | <a href="#">5.2a Black Flags\RE Risk Briefing - PRIVATE CONFIDENTIAL.msg</a>   |  |        |        |
|   |              | 7.6 Does the Infraco contract allow BBS to pre purchase material and equipment prior to design approval? If so how is CEC protected if such materials do not meet CEC approval. |       | Document link provides comfort on advance purchases made by BBS in relation to items they do not have approval for will be entirely at their risk (Paragraph entitled Advance Material Purchases - page 9 of ICS Report) Details of the Bonds to cover advance purchases is also given. Para 2.12 of ICS Report also refers to Advance Purchase Bond. |                             | <a href="#">Final tie Docs - GB\18203499_1 UKMATTERS\17.03.08 Report on Infraco Contract Suite\12.05.08 Clean and issued.DOC</a> | <a href="#">7.6 Infraco Advance Purchase without Approval\TIE - LETTER OF INTENT - 14-3-08 (2).pdf</a> |        |        |
| 8   | Network Rail | 8.1 PPA   |       | Amendment Signed  |                             | <a href="#">8.1 PPA\8.1 - Network Rail Protective Provisions Agreement.pdf</a>   |  |        |        |
|   |              | 8.2 Framework Agreement   |       | With Council Solicitor  |                             |  |  |        |        |
|   |              | 8.3 APA   |       | Signed  |                             |  |  |        |        |
|   |              | 8.4 Neighbourhood Agreement   |       | In framework as final form  |                             |  |  |        |        |
|   |              | 8.5 Lease   |       | In framework as final form  |                             |  |  |        |        |
|   |              | 8.6 Bridge Agreement  |       | In framework - parties to agree acting reasonably   |                             |  |  |        |        |
|   |              | 8.7 Haymarket Depot Car Park  |       | In framework as final form  |                             |  |  |        |        |
|   |              | 8.8 Servitudes incl Balgreen and Haymarket  |       | In framework as final form  |                             |  |  |        |        |
|   |              | 8.10 Lift & Shift   |       |   |                             | <a href="#">8.10 Lift and shift\8.10 - Network Rail - Lift and Shift.pdf</a>   |  |        |        |
|   |              | 8.11 Immunisation   |       | Programme and cost  |                             |  |  |        |        |
|   |              | 8.12 Station & Depot Change   |       | Awaiting confirmation from NR on taxi rank.   |                             |  |  |        |        |



| Critical Contractual Decisions to enable Chief Executive to use delegated powers to approve tie to sign the contract with BBS |                             |   |   |  |                             |  |   |   |   |
|---|-----------------------------|---|---|--|-----------------------------|--|---|---|---|
| Item  | Issue                       | Description   | Notes   | Status   | Anticipated Completion Date | CEC Deliverables - Link to Supporting Documentation  |   |   |   |
|   |                             |   |   |  |                             | Docs 1   | Docs 2  | Docs 3  | Docs 4  |
|   |                             | 8.13 Oil Tanks  |   | Programme and cost   |                             |  |   |   |   |
|   |                             | 8.14 Operating Agreement  |   | Needs to accelerate and become substantially complete  |                             |  |   |   |   |
| 9   | SDS Assurances              | 9.1 Full written explanation of SDS Novation to be provided by tie, including risks of failing to deliver design  | including risks of failing to deliver in terms of quality and in time to meet BBS programme   | SDS Novation Section on Infraco Contract Suite Report  | 01-Feb                      | <a href="#">Final tie Docs - GB18203499_1 UKMATTERS(17 03 08 Report on Infraco Contract Suite) 12.05.08 Clean and Issued.DOC</a> |   |   |   |
|   |                             | 9.2 Full details are required from tie on status and degree of completion of SDS design work  |   | Statement provided in email link from Susan Clark (tie) to say Programme agreed.   | 01-Feb                      | <a href="#">Susan Clark Close Out CEC List.msg</a>   |   |   |   |
|   |                             | 9.3 tie to provide written report on previous claim settlement with SDS identifying details, cause of claim and costs of settlement. Are any further claims expected from SDS ? Are any further claims from SDS competent | showing justification and causes and lessons learned  | Details provided by Stewart McGarrity on 25/04/08. Council report to Tram Sub Committee provides highlights.               | 01-Feb                      | <a href="#">9.3 SDS Previous Claim Settlement(SDS Settlement Proposed April 08.doc)</a>  | <a href="#">9.3 SDS Previous Claim Settlement(SDS claim papers.pdf)</a>                                   | <a href="#">9.3 SDS Previous Claim Settlement(Tram Sub Committee 12 May - SDS Claims.doc)</a> | <a href="#">9.3 SDS Previous Claim Settlement(FW SDS - STRICTLY PRIVATE CONFIDENTIAL.msg)</a> |
| 10  | Funding Letter              | 10.1 Funding terms to be agreed with CEC and TS   | letter from CEC required to say the "best endeavours" reference in the tie operating agreement will not expose TS or Scottish Ministers | Complete - CEC Finance to provide copy of signed Grant Letter to Susan Clark and Colin MacKenzie                           |                             | <a href="#">10.1 Funding Letter(Grant agreement schedule.msg)</a>  | <a href="#">10.1 Funding Letter(Grant award letter FINAL signed 28-01-08.pdf)</a>                         |   |   |
| 11  | Third Party Agreements      | 11.1 Status report on third party agreements  |   | Gyle Licence required (licences for service and underpass) Para 5.19 of Close Report provides status report.               | 13-Feb                      | <a href="#">Final tie Docs - GBIClose Report - v11 12.05.08 Clean and Issued.doc</a>   |   |   |   |
|   |                             | 11.2 Disclosure list and acceptance of these by BBS   | check for exclusions  | List in Section 5 of Close Report - need BBS reference of BBS Acceptance. DLA letter provides overview of TPA's in para 6. |                             | <a href="#">Final tie Docs - GBIClose Report - v11 12.05.08 Clean and Issued.doc</a>   | <a href="#">Close and DLA Reports from Graeme Bissett(19033482_1 UKMATTERS(LT to CEC - 28.04.08).PDF)</a> |   |   |
|   |                             | 11.3 Status of Telewest and SP agreement and when req   |   | Telewest / SP agreement signed   |                             | legal agreements sent to CEC legal by DLA - email request sent to CEC legal on 09/07/08  | <a href="#">Susan Clark Close Out CEC List.msg</a>  |   |   |
|   |                             | 11.4 Forth Ports agreement and risk of not having this in place   |   | Cost issues now resolved agreement in process of drafting and should be signed by a fortnights time                        | 30-Apr                      | obtain from tie-update from a sim  |   |   |   |
|   |                             | 11.5 BAA  |   | Now signed by CEC, BAA and tie.  |                             |  |   |   |   |
|   |                             | 11.6 SRU  |   | Working well towards signature.  |                             | obtain from tie-update from a sim  |   |   |   |
| 12  | Licence between CEC and tie | 12.1 To be concluded before financial close   |   | Signed   | 28-Jan                      | <a href="#">1.4 a tie Operating Agreement(Operating Agreement v30 230408.doc)</a>  |   |   |   |
| 13  | Land Acquisition            | 13.1 Statement of land acquisitions   |   | Section 6 of Close Report  |                             | <a href="#">Final tie Docs - GBIClose Report - v11 12.05.08 Clean and Issued.doc</a>   |   |   |   |

| Critical Contractual Decisions to enable Chief Executive to use delegated powers to approve tie to sign the contract with BBS |       |   |   |  |                             |  |        |        |        |
|---|-------|---|---|--|-----------------------------|--|--------|--------|--------|
| Item  | Issue | Description   | Notes                                     | Status   | Anticipated Completion Date | CEC Deliverables - Link to Supporting Documentation                                  |        |        |        |
|   |       |   |   |  |                             | Docs 1   | Docs 2 | Docs 3 | Docs 4 |
|   |       | 13.2 Confirmation that GVD completed  | any outstanding matters                   | Section 6 of Close Report  |                             | <a href="#">Final tie Docs - GBIClose Report - v11.12.05.08 Clean and Issued.doc</a> |        |        |        |
|   |       | 13.3 Confirmation of match between what land has been acquired by CEC matching BBS requirements | check programme/cost or time implications | Confirmation required that BBS are content that there is a match |                             | <a href="#">Final tie Docs - GBIClose Report - v11.12.05.08 Clean and Issued.doc</a> |        |        |        |

**Other Issues**

Issue re protection re advance purchase of steel to be added to 1.6 in tie list.

7.1 – 7.5 inclusive in tie's list to be moved to Section 3.

Street traders issue to be added to Section 3.

SRU issue in 3.4 in the tie list to be expanded upon and explained further.

**(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 UK LIMITED**, a company incorporated in England and Wales under number 02418086 and having its registered office at 150 Aldersgate Street, London 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)

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**THE PARTIES TO THIS AGREEMENT HEREBY AGREE AS FOLLOWS:**

### WHEREAS

- (A) The Infraco is an unincorporated joint venture which has, on a joint and several liability basis, on or about the date hereof entered into an agreement (the "**Infraco Contract**") with **tie** Limited ("**tie**"), a company wholly owned by the Guarantor, to design, construct, test, commission and maintain the Edinburgh Tram Network (the "**Infraco Works**").
- (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 received grant funding for the Infraco Works from the Scottish Ministers as confirmed by the Grant Funding Letter dated [◆] 2008 from Transport Scotland.
- (D) 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.

## 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 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 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.

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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.

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- 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 1 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.
- 4.3 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:
- 4.3.1 be subrogated to any right or security (if any) of the Infraco; or
  - 4.3.2 claim or rank in competition with the Infraco against **tie** or any other person in respect of such payment; or
  - 4.3.3 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.

4.4 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.

4.4 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.

4.5 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,  
High Street,  
Edinburgh,  
EH1 1YJ

Attention: Council Solicitor

**The Infraco:**

Address: Bilfinger Berger - Siemens Consortium,  
Lochside House,  
3 Lochside Way,  
Edinburgh Park,  
Edinburgh  
EH12 9DT

Attention: Scott McFadden

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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 10 pages together with the annexed Schedules are executed as follows:

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**Deleted:** this Guarantee Agreement has been duly

Executed by **CITY OF EDINBURGH COUNCIL** }  
by a Proper Officer , full name: }  
Signature }  
In the presence of Witness, full name }

Executed by **BILFINGER BERGER UK LIMITED:** }  
} }  
} }  
} }  
Director  
Director

Executed by **SIEMENS PLC:** }  
} }  
} }  
} }  
Director  
Director/Secretary

**This is Schedule 1 referred to in the foregoing Guarantee Agreement by City of Edinburgh Council in favour of Bilfinger Berger UK Limited and Siemens plc**

**SCHEDULE 1**

**Demand Letter**

[Date]

City of Edinburgh Council  
City Chambers  
High Street  
Edinburgh  
EH1 1YJ  
Attention: Council Solicitor

**EDINBURGH TRAM NETWORK**

Dear Sirs,

We refer to the Guarantee Agreement dated [◆] 2008 between us and to the contract dated [ ] 2008 between us and **tie** Limited (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 both of us 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]

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**CITY OF EDINBURGH COUNCIL**

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**BILFINGER BERGER UK LIMITED**

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**SIEMENS PLC:**

This is Schedule 2 referred to in the foregoing Guarantee Agreement by City of Edinburgh Council in favour of Bilfinger Berger UK Limited and Siemens plc

**SCHEDULE 2**

BBS' Representatives

[Insert Names of BBS' Representatives]

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CITY OF EDINBURGH COUNCIL

---

BILFINGER BERGER UK LIMITED

---

SIEMENS PLC:



**STRICTLY CONFIDENTIAL AND LEGALLY PRIVILEGED**  
**NOT FOR DISTRIBUTION**

Gill Lindsay  
Council Solicitor  
City Chambers (Legal Services)  
Anchor Close  
30 Cockburn Street  
EDINBURGH  
EH1 1YJ

**Our reference**

JLG/JLG/310299/15/  
18237137.2

12 March 2008

Dear Ms Lindsay,

**EDINBURGH TRAM NETWORK ("ETN")**  
**DRAFT CONTRACT SUITE AS AT 12 MARCH 2008**

This letter is our report to update you on the matters which we addressed in our letter of 16 December and to report further on the evolution of the contract documentation towards **tie's** planned close date of 24 March 2008. It has been produced under heavy time constraint which will explain the measure of overlap between this letter and Annex A. We are instructed that **tie's** intention is to issue a notification of intent to award the Infraco Contract and the Tramco Contracts on 13 March 2008. This letter therefore provides our view on the status of the contract suite and its readiness for this final stage of the procurement commenced in October 2006. In accordance with our agreement with the Council we have taken instructions from **tie** on all matters on the basis that those instructions are consistent in all respects with the Council's instructions and interests.

**PROGRAMME**

We have commented in this report on those elements of the procurement documentation and central contractual papers which when complete are viewed by **tie** as enabling Council officers to recommend Full Council authorisation for **tie** to enter into the ETN contract suite (as anticipated in the full Council Resolution of 20 December 2007):

**1. CORE INFRACO CONTRACT TERMS SETTLED AND ALIGNED WITH TRAMCO CONTRACT**

Our role in this process has been to support issue of the ITN and draft contracts, assist **tie** in legal evaluation of bids and to engage in final contract negotiation from late September 2007 until now, after **tie's** internal legal and commercial team had taken the draft contracts forward from May 2007 to September 2007, setting positions for preferred bidder phase.

Regulated by the Law Society of Scotland.

A limited liability partnership registered in Scotland (number 300365) which is a law firm and part of DLA Piper, a global organisation.

A list of members is open for inspection at its registered office and principal place of business, Collins House, Rutland Square, Edinburgh, EH1 2AA and at the address at the top of this letter. Partner denotes member of a limited liability partnership.

**UK switchboard**  
+44 (0)8700 111 111



INVESTOR IN PEOPLE

We are able to report that by close of business today Wednesday 12 March the draft ETN contract suite will have been advanced to a point where there are only limited legal issues outstanding on the Infraco and Tramco core terms and conditions which, after a further full working session scheduled tomorrow, should not prevent the documentation being ready for signature by end of March. This forecast will rely also on the cooperation and focus of, and interaction with, the BBS Consortium. Detailed drafting remains necessary to ensure accurate and fully agreed reflection of myriad commercial aspects which have come together in the last 10 days. Annex A to this report, a report by **tie** with input by ourselves on contractual matters, provides more detailed analysis of the draft contracts. We are aware that the Tramco Contract section of the close out report requires further refinement but the report is included as an annex to our letter for the purposes of its protection from public disclosure at this point due to its commercial sensitivity within the procurement.

Infraco/Tramco Contract alignment has been completed to a painstakingly detailed level on all issues which were outstanding when we last reported. CAF has agreed to the terms of the Tram Supply Agreement and Tram Maintenance Agreement and BBS and CAF have agreed to the terms of the two related Novation Agreements, subject to their final review.

In our view the draft agreements in their current state adequately capture the commercial positions which **tie** has achieved. In our opinion, in order for **tie** to issue a notification of intent to award, the following tasks need to be urgently attended to tomorrow, resulting in BBS' agreement on:

- removal of all remaining major issues on Infraco and Tramco Contracts (these are all known items);
- completion of pricing negotiation;
- production of the agreed Master Programme;
- finalisation of Employer's Requirements;
- pricing for Phase 1b;
- close on Network Rail APA;
- agreed treatment of NR immunisation; and
- receipt of final Infraco Proposals.

Clearly this is a full and ambitious day's effort. BBS should be requested to confirm their commitment to close by latest 26 March (24 March being Easter weekend). That commitment would exclude any further visits to any of these core elements of the ETN contract suite.



## **2. UPDATED RISK ALLOCATION MATRICES**

The Infraco Contract Risk Matrix is appended to this letter at Appendix B. It is updated to show change since our 16 December letter.

## **3. PERFORMANCE SECURITY PACKAGE**

3.1 There has been no material change to the structure of the main performance security package. The BBS Consortium will provide:

- (a) bonds/financial guarantees to be issued by ANZ Bank and/or Deutsche Bank (to cover the construction and commissioning of the ETN); and
- (b) German parent company guarantees to underwrite contractual performance and financial liability of the two UK contracting subsidiaries.

The scope, duration and level of cover from these instruments has altered since our report at preferred bidder appointment due to commercial negotiations. The package as a totality remains legally competent to protect **tie** and the Council's interests. It is clearly a judgment for **tie** regarding its financial worth but we view it as not outside market norm.

### **3.2 On Demand Bonds**

Two "On Demand" Bonds offered by the BBS Consortium have been negotiated to a level (on proposed amounts and detailed acceptable terms and conditions), enabling the BBS Consortium to select their proposed sureties for confirmation of pricing. No issues of significance (aside from a possible adjustment to the value of the main performance bond to reflect final contract price) are outstanding. We are awaiting final confirmation on agreed terms accepted by the sureties.

### **3.3 Parent Company Guarantees**

As you know, **tie** has advanced these negotiations in parallel with the negotiation of the terms of the Council's formal Guarantee of **tie's** payment obligations under the ETN suite of contracts. The key terms are now agreed. What remains is the precise liability cap for each Parent Company Guarantee, following final agreement reached on the liability cap, duration and scope for the Infraco Contract, which we expect will be settled by close on Thursday 13 March. Following this, the Parent Company Guarantees will finalise quickly.

## **4. CONFIRMATION OF NOVATION STRATEGY**

Contrary to expectations in December 2007, the process of engagement on SDS Provider novation has proved arduous, with both BBS and SDS taking

positions at opposing ends of the negotiating spectrum. BBS have taken a most risk averse stance, due to their developing first hand views on SDS performance to date, in particular in relation to design Consent achievement, but also in relation to important aspects of scheme design quality.

BBS have insisted on reinforced contractual protection (in our view overplayed) and commercial support in the form of **tie** accepting compensation entitlement for BBS in the event of SDS default on its design production and Consent delivery obligations, which risk to **tie** is discussed further in section 7 below. This is predominately a function of SDS serial underperformance throughout its mandate and also at a time when the need for due and proper performance has been under close bidder scrutiny.

Nevertheless, an agreed form of draft Novation Agreement has been negotiated to close today. The terms of the Novation transfer responsibility for design, as required by the procurement strategy, to BBS (subject to the above). Further work will be necessary to enshrine all technical services and tasks in the final agreement, but **tie** holds a formal letter of commitment to the process signed by SDS Senior UK Management.

## 5. RISK

- 5.1 Our view on the contractual allocation of risk and responsibility between **tie** and the competitively selected private sector providers remains that the Infraco Contract and the Tram Supply and Maintenance Agreements are broadly aligned with the market norm for UK urban light rail projects, taking into account the distinct characteristics of the ETN and the attitudes of BBS and SDS to novation. The project's state of technical and commercial readiness has matured since Christmas. However, the fact that work still continues on the Employer's Requirements Schedule - the core project scope - at this very late stage (resulting in SDS requiring an instruction to align their designs with **tie**'s Employer's Requirements and the Infraco Proposals) means that technical ambiguity (and therefore delay/cost risk) may exist in the interplay between design, scope and method of execution. There is contractual mitigation available whereby (1) the Infraco is under a duty to bring any ambiguity in technical documentation to the attention of **tie**; (2) **tie**'s authority to direct resolution of such issues; (3) the precedence of core terms and conditions over Schedules; and (4) the exercise of SDS now instructed by **tie** to align their designs with the Employers' Requirements and the Infraco Proposals so as to eliminate mismatches.
- 5.2 We are not in a position to comment in relation to the Project Master Programme which remains under development. There is a risk that the SDS exercise in aligning design with Infraco Proposals and Employer's Requirements could have impact on Project Programme both before and after contract award. We are aware that **tie** is endeavouring to mitigate this risk by careful management of the alignment process.



## 6. THIRD PARTY AGREEMENTS

The position achieved regarding Third Party commitments made by the ETN project is as follows:

- 6.1 At ITN issue in October 2006, DLA Piper had included all major third party agreements **tie** had concluded at that time (plus SRU agreement in draft) in the Infraco Contract Schedule 13 (these agreements were prepared by Dundas & Wilson). This exercise put Infraco on notice of the requirements to carry out work and/or observe constraints in these agreements. The inclusion of these agreements in the ITN documentation was carried out by DLA Piper without detailed **tie** instruction or review and that remains the case - that is to say the obligations selected for step down are DLA Piper's judgement, but not informed by any commercial or engineering view from **tie**. This step down is mechanical and neither improves nor detracts from the effect of the original obligation.

In addition to the Schedule 13 agreements (which Schedule has been updated to introduce further agreements concluded since ITN issue date), **tie** had entered into a range of commitments with private individuals and smaller businesses during the parliamentary phase and beyond. Following preferred bidder appointment, BBS took the position that they had never been shown or given access to these papers by **tie** (contained on two CDs "CD Commitments"). Whether this assertion is accurate or not, that is the preferred bid qualification BBS held to, with considerable determination. This situation was negotiated strenuously by **tie**.

- 6.2 Positively, BBS have accepted the contractual outcome that:
- (a) BBS must comply with the obligations set out in Schedule 13;
  - (b) BBS must not put **tie**/CEC in breach of (or in a position where they cannot use entitlement under) the Schedule 13 Agreements (which include, in essence, SRU, Network Rail APA and EAL Agreements);
  - (c) BBS undertakes to take all reasonable steps to ensure not to cause **tie**/CEC to be in breach of the CD Commitments;
  - (d) if BBS Construction Programme or normal activity is impaired by constraints/requirements in the CD Commitments which are unusual or could not reasonably have been foreseen by an experienced contractor, BBS will be entitled to apply for relief and any demonstrable additional cost.

Having reviewed a random sample of the CD Commitments agreements, we are of the view that there are unlikely to be any



agreements which contain an unforeseeable or unduly onerous commitment **tie** is to abide by.

- 6.3 SDS are contractually obliged to ensure that their design deliverables take account of all third party agreements and commitments made by **tie** and known to SDS and they are warranting this to BBS under the Novation Agreement.

#### 6.4 EAL

This matter was finally negotiated to conclusion in February this year. DLA Piper has been involved in the Licence negotiations.

A number of issues have arisen from mismatches between the Licence, agreed to permit construction activity at the airport under MUDFA and the **tie**-Infraco Contract, and the terms of the permanent lease **tie** has negotiated with EAL, which was to reflect the Licence. These are required to be corrected to remove risk and a Minute of Variation is under preparation to propose to EAL regarding access under the Lease to safeguard the right to maintain the tramway post service commencement.

A future risk is uncovered at present. The Lease terms under which EAL is entitled to require the tramway to be shifted (post 1 January 2013) do not include an indemnity to the Council/**tie** in relation to any defects or unforeseen interference in the ETN system which might result from this intrusive construction activity and its ultimate interface with the existing ETN system. **tie** is assessing this and will act to resolve this by means of documenting the precise terms of any shift.

## 7. CONSENTS

- 7.1 The terms of the novation of SDS have been settled on the basis that BBS risk adversity required accommodation, otherwise no transfer of responsibility for design production and consent management could have been achieved on acceptable terms. Two prime concessions have therefore been made by **tie**:

A

- to the extent the CEC consenting process is delayed through no fault of the SDS Provider, that delay will entitle BBS to claim a Compensation Event under the Infraco Contract (time relief and additional cost). Such a claim would also encompass SDS Provider delay costs. Although the SDS Contract provided that SDS would take all consent risk, without exception, BBS were not prepared to absorb this risk (through direct recourse to SDS Provider) having carried out post preferred bidder due diligence on the status and history of SDS design and the consent process within CEC.

- If through its own fault or dilatoriness SDS is late in delivering a design into the CEC Consent process and this in turn delays the issue of construction drawings to BBS, BBS will be entitled to apply liquidated damages up to an agreed level (currently proposed by **tie** at £1,000,000 and with an approximate minimum rate of £20,000 per week).
- BBS would have recovery risk on such liquidated and ascertained damages<sup>1</sup> but beyond the cap, **tie** would be required to recompense BBS.

B

- The current position is that any damages or loss suffered by BBS beyond the £10,000,000 cap under SDS novated contract (in relation to deficiency in SDS design) would be a **tie** risk.

7.2 Following the novation of SDS, **tie** will hold an assignable collateral warranty from SDS regarding SDS services and work product prior to novation. The terms of the Collateral Warranty will be standard for a design and engineering services consultancy and were substantially contained in the annex to the SDS Contract when it was executed in September 2005.

## 8. NETWORK RAIL ("NR") ASSET PROTECTION AGREEMENT

8.1 The Asset Protection Agreement with NR has been fully negotiated and is ready to close. This has been an arduous process, however the outcome is a document which achieves significant commercial improvements for **tie**/CEC on what was originally offered by Network Rail. The arrangement remains heavily tilted in Network Rail's favour, as is inevitable given the starting point of the regulatory template agreements. The main improvements secured have been:

- (a) Significant widening of the circumstances in which **tie** can recover money from Network Rail;
- (b) Reasonableness in Network Rail actions and ability to refer to the Infracore ETN Suite form of Dispute Resolution Procedure; and
- (c) Dilution of indemnities given by **tie** to Network Rail to a mutually acceptable level.

8.2 The unreasonable position taken by Network Rail regarding the indemnities contained in the Protection Provisions Agreement (entered into to remove Network Rail's objection to the tram scheme) delayed closure for a considerable time. This has now been resolved

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<sup>1</sup> Note that the enforceability of such LADs is open to question unless they represent a genuine pre-estimate of BBS loss from the delay. **tie** is working with BBS to achieve this.



to restrict the scope and duration of this indemnity, particularly during construction.

- 8.3 Network Rail require a collateral warranty from BBS. BBS has, until yesterday, refused to disclose the entirety of the draft Infraco Contract to Network Rail, resulting in Network Rail insisting that BBS would not be able to rely upon any part of the Infraco Contract not disclosed. A solution to this impasse is imminent, in our view.

## 9. CEC GUARANTEE

- 9.1 The terms and conditions of the CEC Guarantee and in particular its call mechanics, liability cap and protections are in line with market practice for this type of instrument. It should be noted that the Guarantee may be called upon by the Infraco on multiple occasions if **tie** is in payment default more than once. The instrument has been drafted, negotiated and settled with direct involvement and support of CEC Legal and Finance.
- 9.2 CEC will benefit from the same contractual defences and entitlements to set off as **tie** and will have no liability greater than **tie**'s. No claim can be made for an amount which is in dispute if **tie** has referred the matter under the dispute resolution provisions of the Infraco contract. The Guarantee is released at issue of Reliability Certificate.

## 10. PROCUREMENT RISK

You have asked for our opinion in relation to procurement risk imported on account of adjustment to price, contract terms and commercial risk allocation post preferred bidder. Our view is as follows:

- 10.1 The time which has elapsed since preferred bidder announcement is appreciable, particularly when an outside observer may not have a detailed understanding of the procurement strategy and the considerable difficulty caused by SDS Provider's underperformance. With that passing of time before an award, comes the risk of increased perception that the final deal has been restructured to accommodate the winning party on different and more favourable terms. This may influence both participants in the procurement and interested but disaffected parties.
- 10.2 Both bidders final submissions were qualified as to acceptance of contractual terms and therefore their risk acceptance. It would be difficult, in our view, for a challenge to be upheld on the sole grounds that the settled position on Contractual Risk Allocation is a position that the losing bidder could point to and say: "that is far beyond what I would have required to maintain my price." There have been shifts in risk allocation, but in most key cases, this relates to the process of the novations, which was clearly identified as a post preferred bidder process. Both bidders' positions on novation were heavily qualified.



A very detailed analysis would be needed to rank and analyse the changes introduced post preferred bidder and that is beyond the scope of this letter and not possible in the time permitted for this report's preparation.

- 10.3 We have commented upon a shift in the security package (linked to latent defects). Here, we regard BBS's approach has been partially dictated by the UK representatives overreaching their authority and Germany has intervened. **tie's** acceptance of the revised position does represent a concession post preferred bidder. But the competitor's offering was also qualified.
- 10.4 The area where we have very limited visibility is price. We played a role in bid evaluation only in relation to the two bidders' response to the draft contracts. We note that Tramlines expressly raised this in an informal debrief last autumn. We have been shown today a document prepared by **tie** entitled "Edinburgh Tram Project Assessment of Risk of Successful Procurement Challenge", appended to this letter at Appendix C. Our view as to the likely incidence of challenge or source of such challenge does not differ from **tie's**. In order to fully evaluate the strength of **tie's** ability to resist a challenge we would need to understand the analysis of how the final contract price has been arrived at and to understand how this compares to Tramlines final bid price.
- 10.5 We are not instructed in relation to any matter on the tram supply and maintenance procurements which would alert us to any evident or latent risk of a challenge once CAF are formally awarded the contracts. However, BBS have discussed with **tie** CAF joining the BBS Consortium. If this occurred prior to contract award, it would necessitate a re-evaluation of the bid Consortium. Present indications are that CAF may join post contract award, a matter for BBS to handle, with **tie's** consent.

All our efforts over the next 10 days are focussed in supporting **tie** on an efficient and optimal close out of the contract documentation by authorised representatives to record settled positions from which the award documentation will be prepared and signed.

This report itself has needed to strike a difficult balance between commenting upon what is still under final discussion and what we can reasonably anticipate as a firm, frozen outcome.



We are proud to have been given the chance to work with **tie** on this challenge.

Yours faithfully

A handwritten signature in black ink, appearing to read 'DLA PIPER' followed by a stylized name, likely Graeme Bissett.

**DLA PIPER SCOTLAND LLP**

cc Graeme Bissett, **tie** Limited Strategic Planning Director



**THIS IS SCHEDULE PART 17 REFERRED TO IN THE  
FOREGOING AGREEMENT BETWEEN TIE AND THE  
INFRACO**

**SCHEDULE PART 17**



**(1) TIE LIMITED**

**- and -**

**(2) BILFINGER BERGER (UK) LIMITED**

**- and -**

**(3) SIEMENS plc**

**-and-**

**(4) CONSTRUCCIONES Y AUXILIAR DE FERROCARRILES S.A. (CAF)**

**NOVATION OF A TRAM SUPPLY  
AGREEMENT**

in respect of

**EDINBURGH TRAM NETWORK**



## AGREEMENT

### AMONG

- (1) **tie LIMITED** (company number SC230949) whose registered office is at City Chambers, High Street, Edinburgh, Midlothian, EH1 1YJ ("**tie**");
- (2) **BILFINGER BERGER UK LIMITED**, a company incorporated in England and Wales under number 02418086 and having its registered office at 150 Aldersgate Street, London EC1A 4EJ which expression shall include its successors, permitted assignees and transferees; and
- (3) **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 which expression shall include its successors, permitted assignees and transferees,  
  
(Bilfinger Berger UK Limited and Siemens plc together the "**Infraco**" and each separately an "**Infraco Member**"); and
- (4) **CONSTRUCCIONES Y AUXILIAR DE FERROCARRILES S.A. (CAF)**, a company registered in Spain in the Corporate Register of Guipuzcoa: volume 983, sheet 144, page number SS-329, entry 239 and having its registered office at J.M. Iturrioz 26, 20200 Beasain (Guipuzcoa), Spain ("**Tramco**");

### BACKGROUND

- A By an agreement in writing dated ♦ □2008 ("**Tram Supply Agreement**") tie appointed Tramco to design, manufacture and supply Trams and to supply documentation and associated equipment in connection with the Edinburgh Tram Network. A copy of the Tram Supply Agreement is attached to this Agreement and initialled by the parties for the purpose of identification. This Agreement is supplemental to the Tram Supply Agreement.
- B tie and Infraco have entered into a contract ("**Infraco Contract**") under which Infraco has been appointed to carry out and/or manage the design, construction, installation, commissioning, tram procurement, system integration, infrastructure maintenance, tram maintenance and supply of related equipment and materials, trams and related infrastructure in respect of the Edinburgh Tram Network.

C tie and Infraco have agreed, with the consent of Tramco, that Infraco shall take over the rights and liabilities of the "Client" (as defined in the Tram Supply Agreement) under the Tram Supply Agreement and that Tramco shall owe all of the duties and obligations arising thereunder to Infraco by novating the Tram Supply Agreement from tie to Infraco upon and subject to the terms of this Agreement.

D tie wishes to be released from the Tram Supply Agreement and Tramco has agreed to release tie.

## **1. DEFINITIONS AND INTERPRETATION**

1.1 The definitions given in the recitals to this Agreement apply to this Agreement.

1.2 In this Agreement the following additional words and expressions shall have the meanings set out opposite to them:

"Effective Date" means the last date of execution of this Agreement."

1.3 Clause headings in this Agreement are for the convenience of the parties only and do not affect its interpretation.

1.4 Unless otherwise defined hereunder, where the Tram Supply Agreement defines a meaning to any capitalised word or expression used in this Agreement, the same meaning shall be given to it in this Agreement.

## **2. RELEASE BY TRAMCO OF tie**

2.1 Tramco releases and discharges tie from any and all duties, obligations and liabilities owed to Tramco under the Tram Supply Agreement and accepts the liability of Infraco under the Tram Supply Agreement in lieu of tie.

## **3. RELEASE BY tie OF TRAMCO**

3.1 tie releases and discharges Tramco from the further performance of Tramco's duties and obligations under the Tram Supply Agreement.

## **4. ACCEPTANCE OF LIABILITY BY TRAMCO TO THE INFRACO**

4.1 Tramco undertakes to Infraco to continue to perform all the duties and to discharge all the obligations of Tramco under the Tram Supply Agreement and to be bound by its terms and conditions in every way as if Infraco was and always had been a party to the Tram Supply Agreement in place of tie.

- 4.2 Tramco warrants to Infraco that, in respect of the duties and obligations which it has already performed under the Tram Supply Agreement, it has performed those duties and obligations in accordance with the standards of skill and care set out in the Tram Supply Agreement and otherwise in compliance with all of the terms and conditions thereof. Tramco warrants to Infraco that it shall be liable for any loss or damage suffered or incurred by Infraco arising out of any negligent act, default or breach by Tramco in the performance of its obligations under the Tram Supply Agreement prior to the Effective Date. Tramco shall be liable for such loss or damage notwithstanding that such loss or damage would not have been suffered or incurred by tie (or suffered or incurred to the same extent by tie).
- 4.3 Without prejudice to Clauses 4.2 or 4.4, Tramco shall not contend under this Agreement that its liability to Infraco is affected or diminished by reason of tie having suffered no loss and/or any loss claimed to have been suffered by Infraco being different in character from that suffered by tie.
- 4.4 Tramco confirms it was aware at the time of entering into the Tram Supply Agreement that Infraco could suffer losses, damages, costs, expenses, claims, demands and proceedings as a result of Tramco's breach of the Tram Supply Agreement.
- 4.5 Without prejudice to the generality of this Agreement, Tramco warrants and undertakes to Infraco that its duties and obligations under, the Tram Supply Agreement, whether required to be performed prior to the date hereof, have been and will be performed in accordance with the Tram Supply Agreement.
- 4.6 Tramco acknowledges that any breach of the warranties in this Agreement may cause Infraco to be in breach of the Infraco Contract and/or cause Infraco to suffer loss and/or damage.
- 4.7 The liability of Tramco to Infraco pursuant to the Tram Supply Agreement as novated by this Agreement (both in respect of the period prior to the Effective Date and after the Effective Date) shall not be affected by Infraco's assumption of liability to tie in respect of the Edinburgh Tram Network pursuant to the Infraco Contract.
- 4.8 Tramco acknowledges that Infraco has and shall continue to rely upon all Tram Works provided by Tramco under the Tram Supply Agreement as novated by this Agreement.



4.9 For the avoidance of doubt, in accordance with Clause 41.2 of the Tram Supply Agreement save where expressly provided for in the Tram Supply Agreement, nothing in this Agreement shall expose either Party to the application of Indirect Loss.

**5. VESTING OF REMEDIES AGAINST TRAMCO**

All rights of action and remedies against Tramco under and pursuant to the Tram Supply Agreement vested in tie (including their accrued rights of action and remedies) shall automatically and without the need for any further action on the part of Infraco, vest in Infraco with effect from the Effective Date.

**6. ACCEPTANCE OF LIABILITY BY INFRACO**

With effect from the Effective Date Infraco undertakes to perform all the duties and to discharge all the obligations of tie under the Tram Supply Agreement as novated by this Agreement and to be bound by its terms and conditions in every way as if Infraco was and always had been a party to the Tram Supply Agreement in place of tie and as if all acts and omissions of tie under or pursuant to the Tram Supply Agreement prior to the Effective Date were the acts and omissions of Infraco.

**7. VESTING OF REMEDIES AGAINST tie**

As from the Effective Date, all rights of action and remedies under or pursuant to the Tram Supply Agreement vested in Tramco shall lie against Infraco and not tie whether or not such rights of action or remedies may have arisen prior to, on or after the Effective Date.

**8. ACKNOWLEDGEMENT OF PAYMENT**

Tramco acknowledges that all payments properly due to Tramco under the Tram Supply Agreement up to the Effective Date have been paid by tie (subject to confirmation of pending payments and the assurance that the Tramco will not suffer payment delays due to the novation process).

**9. AMENDMENT OF TRAM SUPPLY AGREEMENT**

tie, Tramco and Infraco agree that the terms of the Tram Supply Agreement shall be and are varied in the manner set out in Appendix 1 to this Agreement.

**10. AFFIRMATION OF TRAM SUPPLY AGREEMENT**

The terms and conditions of this Agreement represent the entire agreement between the parties relating to the novation of the Tram Supply Agreement and, except as specifically amended by Appendix 1 of this Agreement, all the terms and conditions of the Tram Supply Agreement remain in full force and effect. **tie** hereby confirms that it has not exercised any rights and discretions in regard to the Tram Supply Agreement prior to the point of novation.

**11. EQUIVALENT PROJECT RELIEF**

**tie** acknowledges that in relation to any Dispute under the Infraco Contract where the Client's sole involvement in any Client Claim is in performing administrative functions in relation to the Client Claim, and not as an interested or affected party, then Infraco shall be entitled to recover its costs incurred in relation to such dispute pursuant to Clause 7A (*Tramco Equivalent Project Relief*) of the Tram Supply Agreement from **tie**. **tie** agrees to pay to the Infraco such reasonable costs unless the dispute proceeds to adjudication where such costs shall be paid as allocated between **tie** and the Tram Supplier by the adjudicator following the Dispute Resolution Procedure.

The Infraco agrees that it shall minimise as far as reasonably practicable its administrative costs in relation to Equivalent Project Relief.

The Tram Supplier agrees not to vexatiously claim under the Tram Supply Agreement or vexatiously use the Disputes Resolution Procedure.

**12. RIGHTS OF THIRD PARTIES**

A person who is not party to this Agreement shall have no right to enforce any term of this Agreement. This clause does not affect any right or remedy of any person which exists or is otherwise available.

**13. LAW AND JURISDICTION**

This Agreement shall be governed by and construed in accordance with Scots law and the Scottish Courts shall have jurisdiction with regard to all matters arising under it.

IN WITNESS WHEREOF these presents on this and the preceding [◆] pages together with Appendix 1 which is annexed and subscribed as relative hereto and the copy of the Tram Supply Agreement which is attached and subscribed as relative hereto are executed as follows:

**EXECUTED** for and on behalf of **TIE LIMITED**

at

on \_\_\_\_\_ 2008 by:

Authorised Signatory \_\_\_\_\_

Full Name \_\_\_\_\_

Witness Signature \_\_\_\_\_

Full Name \_\_\_\_\_

Address \_\_\_\_\_

**EXECUTED** for and on behalf of **BILFINGER BERGER UK LIMITED**

at

on \_\_\_\_\_ 2008 by:

Director \_\_\_\_\_

Full Name \_\_\_\_\_

Director \_\_\_\_\_

Full Name \_\_\_\_\_

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

at

on \_\_\_\_\_ 2008 by:

Authorised Signatory \_\_\_\_\_

Full Name \_\_\_\_\_

Authorised Signatory \_\_\_\_\_

Full Name \_\_\_\_\_

**EXECUTED** for and on behalf of  
**CONSTRUCCIONES Y AUXILIAR DE  
FERROCARRILES S.A. (CAF)**

at

on \_\_\_\_\_ 2008 by:

Authorised Signatory

\_\_\_\_\_

Full Name

\_\_\_\_\_

Witness Signature

\_\_\_\_\_

Full Name

\_\_\_\_\_

Address

\_\_\_\_\_

\_\_\_\_\_



**APPENDIX 1 TO THE TRAM SUPPLY NOVATION AGREEMENT**

**SCHEDULE OF AMENDMENTS TO THE TRAM SUPPLY AGREEMENT**

**Clause 7.15**

Insert at end of Clause 7.15 the following:

The Tram Supplier acknowledges that it has a copy of the Infraco Contract and is deemed to be aware of the obligations, risks and liabilities assumed by the Infraco thereunder. Without prejudice to the foregoing, the Tram Supplier shall be deemed to be fully aware of the adverse financial and other consequences for the Client which could arise under the Infraco Contract in consequence, in whole or in part, of a breach on the part of the Tram Supplier of its obligations under this Agreement.

**Clause 38.11.2**

Delete Clause 38.11.2 and replace with:

38.11.2 all payments under this Agreement to the Client shall be made in pounds sterling by electronic transfer of funds to:

Name and Address of Bank:

Sort Code:

Account Number:

Account Name:

**Clause 58.2 - No Fault Termination**

Insert the following new Clause 58.2:

58.2 In the event that the Infraco Contract is terminated, this Agreement shall terminate unless the Tram Supplier is notified that tie (or another nominated party) requires to step into this Agreement.

**Clause 60 - Termination for Corrupt Gifts and Fraud**

Delete Clause 60 (Termination for Corrupt Gifts and Fraud), in its entirety substitute therefore:

60.1 The Tram Supplier or anyone employed by it or acting on its behalf (including any Tram Supplier Party) shall not commit any Prohibited Act.

60.2 If the Tram Supplier or anyone employed by it or acting on its behalf (including any Tram Supplier Party) commits any Prohibited Act, then the Client may terminate this Agreement with immediate effect by giving notice to the Tram Supplier.

**Clause 68.1.2.1.1**

Delete Clause 68.1.2.1.1 and replace with:

68.1.2.1.1 in the case of notices given to the Client: Bilfinger Berger-Siemens Consortium, Lochside House, Lochside Way, Edinburgh Park EH12 9DT, fax number 0131 452 2518, attention: Project Director, or such other address or fax number in the United Kingdom as the Client may notify the Tram Supplier from time to time for that purpose; or

.....  
Director/Authorised Signatory  
**tie LIMITED**

.....  
Director/Authorised Signatory  
**BILFINGER BERGER UK LIMITED**

.....  
Director/Authorised Signatory  
**SIEMENS PLC**

.....  
Director/Authorised Signatory  
**CONSTRUCCIONES Y AUXILIAR DE  
FERROCARRILES S.A. (CAF)**





**THIS IS SCHEDULE PART 23 REFERRED TO IN THE  
FOREGOING AGREEMENT BETWEEN TIE AND THE  
INFRACO**





(1) tie

- and -

(2) INFRACO

- and -

(3) PARSONS BRINCKERHOFF LIMITED

**NOVATION OF SYSTEM DESIGN  
SERVICES AGREEMENT**

in respect of

**EDINBURGH TRAM NETWORK**

## AGREEMENT

### AMONG

- (1) **TIE LIMITED** (Company number SC230949) whose registered office is at City Chambers, High Street, Edinburgh, Midlothian, EH1 1YJ ("**tie**");
- (2) **BILFINGER BERGER UK LIMITED**, a company incorporated in England and Wales under number 02418086 and having its registered office at 150 Aldersgate Street, London, EC1A 4EJ, which expression shall include its successors, permitted assignees and transferees and **SIEMENS PLC**, a company incorporated in England and Wales under number 00727817 and having its registered office at Faraday House, Sir William Siemens House, Frimley, Camberley, Surrey, GU16 8QD, which expression shall include its successors, permitted assignees and transferees, acting jointly and severally (together the "**Infraco**");
- (3) **PARSONS BRINCKERHOFF LIMITED** (company number 2554514) whose registered office is at Amber Court, William Armstrong Drive, Newcastle Business Park, Newcastle Upon Tyne, NE4 7YQ ("**SDS Provider**").

### BACKGROUND

- A By an agreement in writing dated 19 September 2005 ("**SDS Agreement**") **tie** appointed the SDS Provider to provide system design services in connection with the Edinburgh Tram Network.
- B **tie** and Infraco have entered into a contract of even date ("**Infraco Contract**") under which Infraco has been appointed to complete the design and carry out the construction, installation, commissioning and maintenance planning in respect of the Edinburgh Tram Network.
- C **tie** and Infraco have agreed, with the consent of the SDS Provider, that the Infraco shall take over the rights and liabilities of the "Client" under the SDS Agreement by novating the SDS Agreement from **tie** to Infraco upon and subject to the terms of this Agreement.

### 1. DEFINITIONS AND INTERPRETATION

- 1.1 The definitions given in the recitals to this Agreement apply to this Agreement.
- 1.2 Clause headings in this Agreement are for the convenience of the parties only and do not affect its interpretation.

1.3 Unless otherwise defined hereunder, where the SDS Agreement defines a meaning to any capitalised word or expression used in this Agreement, the same meaning shall be given to it in this Agreement.

1.4 In this Agreement the following words and expressions shall have the meanings hereby ascribed to them

**"Design Delivery Programme"** has the meaning given in Appendix 1 to this Agreement;

**"Disclosure Statement"** means Appendix, Part 5 (together with all the documents attached to or referred to in it);

**"EAL"** means Edinburgh Airport Limited a subsidiary of BAA plc and the operator of Edinburgh Airport;

**"Employer's Requirements"** has the meaning given in the Infraco Contract;

**"Incentivisation Payment"** means the sum of £1,000,000;

**"Infraco Contract"** has the meaning given in Appendix 1 to this Agreement;

**"Infraco Proposals"** has the meaning given in the Infraco Contract;

**"Issued for Construction Drawings"** has the meaning given in Appendix 1 to this Agreement;

**"SRU"** means the Scottish Rugby Union;

**"Third Party Agreements"** means the Parliamentary Undertakings, Third Party Agreements and other undertakings or commitments entered into at the date of this Agreement by CEC or tie in relation to the Edinburgh Tram Network and listed in Appendix Part 6 (in so far as the same have been supplied to the SDS Provider);

**"tie Change Order"** has the meaning given in the Infraco Contract and shall include a confirmation of a Mandatory tie Change and a Notified Departure (as defined in the Infraco Contract);

**"Tram Legislation"** means the Edinburgh Tram (Line One) Act 2006 and the Edinburgh Tram (Line Two) Act 2006, which received Royal Assent on 8 May 2006 and 27 April 2006 respectively and which confer on CEC all requisite authorities and statutory powers to procure the construction, operation and maintenance of the Edinburgh Tram Network;

**2. RELEASE BY THE SDS PROVIDER OF TIE**

2.1 The SDS Provider releases and discharges tie from any and all duties, obligations and liabilities owed to the SDS Provider under the SDS Agreement and accepts the liability of the Infraco under the SDS Agreement in lieu of tie.

2.2 The Parties acknowledge that the SDS Provider and tie shall enter into a separate agreement in respect of certain design services connected to the implementation of utilities diversionary works for the Edinburgh Tram Network and that scope of work is not novated under this Agreement.

**3. RELEASE BY TIE OF THE SDS PROVIDER**

3.1 tie releases and discharges the SDS Provider from the further performance of the SDS Provider's duties and obligations under the SDS Agreement.

**4. ACCEPTANCE OF LIABILITY BY THE SDS PROVIDER TO THE INFRACO**

4.1 The SDS Provider undertakes to continue to perform all the duties and to discharge all the obligations of the SDS Provider under the SDS Agreement and to be bound by its terms and conditions in every way as if the Infraco was and always had been a party to the SDS Agreement in place of tie.

4.2 The SDS Provider warrants and undertakes to the Infraco that:

4.2.1 in respect of the duties and obligations which it has already performed under the SDS Agreement, it has performed those duties and obligations in accordance with the standards of skill and care set out in the SDS Agreement; and

4.2.2 subject to Clause 12.1:

(a) the SDS Provider is not aware having made due and diligent enquiry, of any breaches by tie of the SDS Agreement and there is no dispute or claim subsisting nor are there any circumstances existing which might give rise to any dispute or claim relative to the SDS Agreement;

(b) the information set out at Appendix Part 4 (*Design and Deliverable Status*) is true, complete and accurate in all respects and is not misleading;



- (c) the Deliverables completed by the SDS Provider to the date of this Agreement and listed in Appendix Part 4:
- (A) are in all respects in compliance with the SDS Agreement and, without prejudice to the foregoing generality:
- (i) the Tram Legislation;
  - (ii) all applicable Law and Consents;
  - (iii) the Parliamentary Undertakings;
  - (iv) the Environmental Statements, and all other applicable environmental regulations and requirements;
  - (v) will permit compliance with the Code of Construction Practice; and
  - (vi) the Third Party Agreements (and in the case of SRU the draft Third Party Agreement);
- (B) is so as to enable the Edinburgh Tram Network on completion of construction, testing and commissioning to be sited (and thereafter be operated and maintained) within the limits of deviation under the Tram Legislation save as expressly indicated in the Disclosure Statement,
- (d) the design as fully developed pursuant to the SDS Agreement following the date of this Agreement shall continue to meet the requirements of Clause 4.2.2(c)(A) and (B) and on the basis of the standard of reasonable skill and care exercised pursuant to clause 3.2 of the SDS Agreement that
- (i) the designs and Deliverables completed prior to the date of this Agreement comply with the Employer's Requirements
  - (ii) the designs and Deliverables as will be completed after the date of this Agreement will comply with the Employer's Requirements,

provided that in circumstances where compliance with the Employer's Requirements is dependant upon further design development to be undertaken by the Client (and which is out with the Services provided by SDS), the SDS Provider's obligation pursuant to this Clauses 4.2.2(d) shall be limited to having produced or producing designs and Deliverables that are capable of allowing Infraco to develop a design which is compliant with the Employer's Requirements.

- (e) save in respect of any Consents which are the responsibility of tie in terms of Clause 19 of the Infraco Contract, the Consents listed at Appendix Part 2 (*Consents Programme*) are all the Design Stage Consents which are required to enable the Edinburgh Tram Network to be procured, constructed, installed, tested and commissioned, and thereafter operated and maintained in accordance with the Infraco Contract;
- (f) it has received no Client Notice of Change or any other instruction from tie to vary any term of the SDS Agreement (whether pursuant to Clause 15 and 29.2 of the SDS Agreement or otherwise) and, subject to Clause 9.1 below, it has agreed no variation, alteration of the SDS Agreement; and
- (g) no Change in Law has come into effect or is anticipated to come into effect which would have a material adverse impact on the Deliverables completed or to be completed pursuant to the SDS Agreement

The SDS Provider warrants and undertakes to the Infraco that it shall be liable for any loss or damage suffered or incurred by the Infraco arising out of any negligent act, default or breach by the SDS Provider in the performance of its obligations under the SDS Agreement prior to the date of this Agreement. The SDS Provider shall be liable for such loss or damage notwithstanding that such loss or damage would not have been suffered or incurred by tie (or suffered or incurred to the same extent by tie) or is different to or arises on a different basis to any loss or damage which would have been suffered or incurred by tie.

- 4.3 The SDS Provider undertakes and warrants to the Infraco that its design is consistent with and delivers the Edinburgh Tram Network runtime set out in the Employers' Requirements , which runtime supersedes that set out in the SDS Agreement.

- 4.4 The liability of the SDS Provider to the Infraco pursuant to the SDS Agreement shall not be affected by the Infraco's assumption of liability for design to tie pursuant to the Infraco Contract.
- 4.5 The SDS Provider acknowledges that the Infraco has and shall continue to rely upon all Services carried out by the SDS Provider.
- 4.6 tie warrants that it has received a report from the SDS Provider (annexed at Part B of Appendix Part 7) setting out the misalignments between the Deliverables completed prior to the date of this Agreement and the Employer's Requirements and that it has issued initial instructions (in the form of the letter annexed at Part A of Appendix Part 7) to the SDS Provider in relation to addressing all such misalignments. Upon completion of the work entailed to resolve the misalignments, the SDS Provider confirms to tie and the Infraco that such Deliverables shall be consistent with the Employer's Requirements.
- 4.7 As soon as reasonably practicable, the Parties shall commence and expeditiously conduct a series of meetings to determine the development of the Infraco Proposals and any consequential amendment to the Deliverables (the "**Development Workshops**"). The matters to be determined at the Development Workshops shall be those set out in the report annexed at Part C of Appendix Part 7 (the "**Misalignment Report**"), together with any items identified as "items to be finalised in the SDS/BBS alignment workshops" in Appendix 4 to be dealt with in the following order of priority and objective unless otherwise agreed:
- 1 Roads and associated drainage and vertical alignment with the objective of minimising the extent of full depth reconstruction for roads thus minimising cost and construction programme duration
  2. Structures value engineering, including track fixings to structures with the objective of enabling BBS to realise the Value Engineering savings for the structures identified in Schedules 4 and 30 of the Infraco Contract (Pricing and Infraco Proposals respectively)
  3. OLE Design with the objective of identifying and agreeing the actions, responsibilities and programme to enable Infraco to implement their proposals for OLE as identified in the Infraco Proposals
  4. Trackform with the objective of completing an integrated design to enable BBS to implement their proposals for trackform

5. Sub-station buildings with the objective of resolving the misalignment between Infraco Proposals and SDS Design with the minimum of changes to accommodate the Infraco Proposals for substations.

The following to be reviewed at the end of the Development Workshop to identify any issues arising from the above items:

1. Earthworks
2. Landscaping
3. OLE Foundations
4. Alignment
5. Site Clearance
6. Tramstops
7. all other items in the Misalignment Report together with any items identified as "items to be finalised in the SDS/BBS alignment workshops" in Appendix 4.

At the Development Workshop, the Parties shall also develop a strategy for co-operation between the SDS Provider and the Infraco to manage design development and the necessary interface between the Infraco's design and the design developed by the SDS Provider.

- 4.8 The product of the Development Workshops shall be a report signed by each of the Parties to detail the conclusions in respect of each matter and the payments to be made to the SDS provider in respect of the work to be carried out by the SDS Provider as a result of the conclusions set out in the report. Any consequential tie Change Orders or instructions shall be appended to such report as and when the same are issued. tie shall pay the SDS Provider for the work required for the Development Workshop on an hourly rate basis in accordance with the hourly rates set out in Appendix Part 8 and the SDS Provider agrees that the Infraco shall not be liable to make such payments to the SDS Provider. For the avoidance of doubt, the Infraco and tie agree that any amendment to the Deliverables completed prior to the date of this Agreement as set out in this report will be a Mandatory tie Change under the Infraco Contract, and a Client Change under the SDS Agreement.



**5. VESTING OF REMEDIES AGAINST SDS PROVIDER**

5.1 All rights of action and remedies against the SDS Provider under and pursuant to the SDS Agreement vested in **tie** (as Client) shall from the date of this Agreement vest in the Infraco.

5.2 Subject to Clause 12.1, **tie** warrants to the Infraco that there is no dispute or claim subsisting (save to the extent that the same are fairly disclosed in the Disclosure Statement), nor are there any circumstances existing which might give rise to any dispute or claim by the SDS Provider against **tie** relative to the SDS Agreement.

5.3 **tie** shall indemnify the Infraco against all loss, injury and damage that the Infraco may incur as a consequence of any dispute or claim by the SDS Provider or circumstance referred to in Clause 5.2 above identified in the Disclosure Statement which relates to the SDS Provider and **tie's** dealings under the SDS Agreement prior to the date of this Agreement.

**6. ACCEPTANCE OF LIABILITY BY THE INFRACO**

6.1 The Infraco undertakes to perform all the duties and to discharge all the obligations of **tie** under the SDS Agreement and to be bound by its terms and conditions in every way as if the Infraco was and always had been a party to the SDS Agreement in place of **tie** and as if all acts and omissions of **tie** under or pursuant to the SDS Agreement prior to the date of this Agreement were the acts and omissions of the Infraco.

6.2 The Infraco undertakes to pay the SDS Provider the amounts set out in Appendix Part 4 in respect of the outstanding work identified in Appendix Part 4 in accordance with the terms of the SDS Agreement.

**7. VESTING OF REMEDIES AGAINST TIE**

7.1 All rights of action and remedies under or pursuant to the SDS Agreement vested in the SDS Provider shall, save in respect of those sums identified in Clauses 8.1 and 8.8 from the date of this Agreement lie against the Infraco and not **tie**.

7.2 Without prejudice to Clause 4.2.2(a), the SDS Provider waives all right to claim against Infraco in respect of any breach of the SDS Agreement by **tie** prior to the date of this Agreement.

**8. ACKNOWLEDGEMENT OF PAYMENT AND INCENTIVE**

8.1 The SDS Provider acknowledges that all fees and expenses properly due to the SDS Provider under the SDS Agreement up to the date of this Agreement have been paid by **tie** other than

any payments which become due under Clause 29.3 of the SDS Agreement or due as a consequence of the further instruction to be issued by **tie** pursuant to Clauses 4.6 or 4.8 to be paid by **tie**.

- 8.2 **tie** and SDS acknowledge that **tie** has paid SDS in respect of its existing claims for prolongation and SDS confirms to **tie** and the Infraco that it has accepted such payments, when made in full and final settlement of any and all claims of whatever nature existing and/or available to it prior to the date of execution of this Agreement.
- 8.3 **tie** warrants to Infraco that all fees and expenses properly due to the SDS Provider under the SDS Agreement up to the date of this Agreement have been paid by **tie**.
- 8.4 The parties agree that Infraco will have no liability in relation to the payments referred to in Clause 8.1 or 8.8.
- 8.5 **tie** has released the retention bond (in accordance with clause 12.7.4 of the SDS Agreement)
- 8.6 Subject to Clause 4.2.1, the SDS Provider warrants to the Infraco that Appendix Part 4 contains an accurate status and identification confirmation of all Deliverables produced by the SDS Provider up to the date of this Agreement.
- 8.7 The parties agree that Appendix Part 4 contains (i) an accurate description of the balance of the Deliverables to be completed; and (ii) the agreed price for completion of the Deliverables.
- 8.8 **tie** shall pay to the SDS Provider the Incentivisation Payment 14 days after the provision of the last required Issued for Construction Drawing save that the Incentivisation Payment shall be reduced by the sum of £8,928.57 in respect of each occasion that the SDS Provider does not achieve the provision of Issued for Construction Drawings by the dates identified in the Design Delivery Programme save where **tie** and the SDS Provider otherwise agree. No further or other reduction can be made to the Incentivisation Payment whether by abatement set off or counterclaim.
- 8.9 For the purposes of Clause 8.8 any extension of time granted to the SDS Provider pursuant to Clause 7.5.2 of the SDS Agreement in respect of any Issued for Construction Drawings shall be ignored save where the cause of the entitlement to an extension of time is a circumstance or occurrence entitling the Infraco to an extension of time and that such circumstance or occurrence is a **tie** Change (as defined in the Infraco Contract).

**9. AMENDMENT OF SDS AGREEMENT**

9.1 **tie**, the SDS Provider and the Infraco agree that the terms of the SDS Agreement shall be and are varied in the manner set out in Appendix Part 1 to this Agreement.

9.2 Subject to Clause 9.1, **tie** warrants to Infraco that it has not issued any Client Notice of Change or any other instruction to the SDS Provider to vary any term of the SDS Agreement (whether pursuant to clause 15 of the SDS Agreement, clause 29.2 of the SDS Agreement or otherwise) and it has agreed no variation, alteration of the SDS Agreement.

**10. AFFIRMATION OF SDS AGREEMENT**

The terms and conditions of this Agreement represent the entire agreement between the parties relating to the novation of the SDS Agreement and, except as specifically amended by Appendix Part 1 of this Agreement, all the terms and conditions of the SDS Agreement remain in full force and effect.

**11. RIGHTS OF THIRD PARTIES**

A person who is not party to this Agreement shall have no right to enforce any term of this Agreement. This Clause does not affect any right or remedy of any person which exists or is otherwise available.

**12. WARRANTIES**

12.1 The warranties set out in Clause 4.2.2(a) to-(g) and Clause 5.2, are subject only to any matter which is fully and fairly disclosed to the Infraco in the Disclosure Statement (with sufficient details to enable the Infraco to identify the nature and scope of the matter disclosed and to make an informed assessment of the matter concerned and its significance to the Infraco and/or the design, construction, installation, testing, commissioning, operation and or maintenance of the Edinburgh Tram Network).

12.2 Save as provided in Clause 12.1 no information of which Infraco has knowledge (actual, constructive or imputed) shall prejudice any claim being made by Infraco under any of the warranties set out in Clauses 4.2, 4.3, 5.2, 8.3, 8.6 and 9.2 (the "Warranties") nor shall it affect the amount recoverable under any such claim and neither the rights and remedies of Infraco nor the SDS Provider's or **tie**'s (as the case may be) liability in respect of the Warranties shall be affected by any investigation made by or on behalf of Infraco.

12.3 Each of the Warranties shall be interpreted as a separate and independent Warranty so that Infraco shall have a separate claim and right of action in respect of every breach of each Warranty.

12.4 Each of tie and the SDS Provider severally undertakes to Infraco both before and after the date of this Agreement to notify the Infraco as soon as reasonably practicable in writing of any event, matter or circumstance which comes to its knowledge which is, or may constitute, a breach of, or which is, or may be, inconsistent with, any of the Warranties given by that Party in this Agreement or the disclosures given by that Party in the Disclosure Statement.

**13. LAW AND JURISDICTION**

This Agreement shall be governed by and construed in accordance with Scots law and the Scottish Courts shall have jurisdiction with regard to all matters arising under it. This Agreement shall be a "Related Contract" for the purpose of clause 28 of the SDS Agreement and Clause 97 (Dispute Resolution Procedure) of the Infraco Contract.

**IN WITNESS WHEREOF** these presents on this and the preceding 10 pages together with the Appendix in 9 Parts which is annexed hereto are executed as follows:

**EXECUTED** for and on behalf of **TIE LIMITED** at Edinburgh on 13 May 2008 by:

Authorised Signatory \_\_\_\_\_  
Full Name \_\_\_\_\_  
Witness Signature \_\_\_\_\_  
Full Name \_\_\_\_\_  
Address \_\_\_\_\_  
\_\_\_\_\_

**EXECUTED** for and on behalf of **SIEMENS PLC** at Edinburgh on 13 May 2008 by:

Authorised Signatory \_\_\_\_\_  
Full Name \_\_\_\_\_  
Authorised Signatory \_\_\_\_\_  
Full Name \_\_\_\_\_



**EXECUTED** for and on behalf of  
**BILFINGER BERGER UK LIMITED** at  
Edinburgh on 14 May 2008 by:

Director

\_\_\_\_\_

Full Name

\_\_\_\_\_

Director

\_\_\_\_\_

Full Name

\_\_\_\_\_

**EXECUTED** for and on behalf of **PARSONS  
BRINCKERHOFF LIMITED** at Edinburgh  
on 14 May 2008 by:

Director

\_\_\_\_\_

Full Name

\_\_\_\_\_

Witness Signature

\_\_\_\_\_

Full Name

\_\_\_\_\_

Address

\_\_\_\_\_

\_\_\_\_\_

This is the Appendix referred to in the foregoing Novation Agreement among tie, Infraco and  
Parsons Brinkerhoff Limited

**APPENDIX PART 1**

**SCHEDULE OF AMENDMENTS TO THE SDS AGREEMENT**

**Clause 1 – Definitions and Interpretation**

1.1 Amend existing definitions:

**Background Information**

Insert ", the Client" after "CEC"

**Change in Law**

Add "(d) any new requirement for any statutory Consent other than a statutory Consent the need for which had been published on 7 August 2007."

**Client Change**

Add 'and any amendment to the Consents Programme and/or the Design Delivery Programme (other than one necessitated by a breach of this Agreement by the SDS Provider) and any change made to the Employer's Requirements or Infraco Proposals made after the date of the Novation Agreement

**Edinburgh Tram Network**

Delete "tie" and replace with "the Client"

**Insolvency Event**

(k) delete references to "tie" and replace with "the Client" in each place

Delete **Master Project Programme** and replace with Programme

**Planned Service Commencement Date** means the date specified for service commencement in the Infraco Contract

## **Programme**

Delete the entire definition and replace with "means the Consents Programme and/or the Design Delivery Programme, as the context may require"

## **Programme Phasing Structure**

Delete "tie" and replace with "the Client"

1.1 Insert the following new definitions:

**Client Designs** means designs and information which are being provided by the Client;

**Compensation Event** has the meaning given in the Infraco Contract;

**Consents Programme** means the document in Appendix Part 2 to the Novation Agreement as amended or updated from time to time in accordance with this Agreement

**Construction Programme** means the programme included in Schedule Part 15 of the Infraco Contract and as may be updated in accordance with the terms of the Infraco Contract such programme to contain the Consents Programme, Design Delivery Programme and the construction activities programme.

**Design Delivery Programme** means the document in Appendix Part 2 to the Novation Agreement as amended or updated from time to time in accordance with this Agreement

**Design Management Plan** means the document which forms part of Part 14 of the Schedule to the Infraco Contract and has that name;

**Design Stage Consents** means the Consents (including Consents in respect of Client Designs) listed in Table A below and any further Consents which may be required for the construction, installation, commissioning, completion and opening of the Edinburgh Tram Network as is consistent with, required by or contained within the Services.

Table A

|                               | <b>Consent</b>   | <b>Approval Body</b>                   |
|-------------------------------|--|--|
| <b>Railways and Aviation</b>  | HMRI   | HMRI                                   |
|                               | Network Rail   | Network Rail                           |
|                               | Airport/Aviation Consents, including EAL Permissions and EAL Works Data, to the extent that the same are Deliverables under the SDS Agreement. | Edinburgh Airport Limited/BAA/CAA/NATS |
| <b>Planning</b>               | Listed Building Consent  | CEC Planning Authority                 |
|                               | Prior Approval   | CEC Planning Authority                 |
|                               | Planning Permission  | CEC Planning Authority                 |
|                               | Conservation Area Consent  | CEC Planning Authority                 |
|                               | Scheduled Monument Consent   | Scottish Executive & Historic Scotland |
|                               | Advertisement Consent  | CEC Planning Authority                 |
| <b>Traffic Management</b>     | Road Technical Approvals relating to structures, lighting, traffic signals, road markings, safety and geometry and drainage.                   | CEC Roads Authority                    |
| <b>Environment Ecological</b> | Badger Licence   | Scottish Natural Heritage              |
|                               | Otter holt/disturbance licence   | Scottish Natural Heritage              |
|                               | Bat Licence  | Scottish Natural Heritage              |

|                            |                                     |                              |
|----------------------------|-------------------------------------|------------------------------|
|                            | Appropriate Assessment              | Competent Authority          |
| <b>Drainage<br/>CAR</b>    | CAR General Binding Rules           | SEPA                         |
|                            | CAR Registration                    | SEPA                         |
|                            | CAR Licence                         | SEPA                         |
|                            | Water/Wastewater Connection         | Scottish Water               |
|                            | Technical Approval                  | CEC Bridges/CEC Roads        |
| <b>Construction</b>        | Building Warrant                    | CEC Building Standards       |
|                            |                                     |                              |
| <b>Radio</b>               | OFCOM licence                       | OFCOM                        |
| <b>Design Consultation</b> | Third Party Design Consultation     | Third parties                |
| <b>Undertakings</b>        | Parliamentary Undertakings          | Parliament and third parties |
| <b>Agreements</b>          | Third Parties approval and consents | Third parties                |

**Infraco Proposals** has the meaning given in the Infraco Contract;

**Infraco Works** has the meaning given in the Infraco Contract

**Issued for Construction Drawings** means those Deliverables necessary for 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;

**Novation Agreement** means the agreement for novation of the SDS Agreement entered into between tie, the Infraco, and the SDS Provider, dated on or about the date of the Infraco Contract



**Quality Management System** means the quality management system entitled Bilfinger Berger - Siemens (BBS) Consortium, Edinburgh Tram Network Infraco, PROJECT MANAGEMENT PLAN INCLUDING QUALITY PLAN utilised by the Infraco and dated 12 February 2008, as amended from time to time in accordance with the Infraco Contract;

**Relief Event** has the meaning given in the Infraco Contract

## **Clause 2 – Term of this Agreement**

Delete Clause 2 and substitute therefore:

This Agreement shall come into effect on the last date of execution of this Agreement. The rights and obligations imposed on the SDS Provider to perform the services set out in Schedule 1 (Scope of Service) shall continue (unless expressly provided otherwise in Schedule 1 to this Agreement) until the date on which the SDS Provider is notified by the Client that the Patent Defects Rectification Period (as defined in the Infraco Contract) has expired. For the avoidance of doubt, the liability of the SDS Provider in respect of any breach of this Agreement or negligence in the performance of the Services shall continue in full force and effect notwithstanding any notification by the Client pursuant to this Clause 2.1.

## **Clause 3 - Duty of Care, Standards and the Services to be Provided**

3.3.4 Insert "Employer's Requirements" after "Technical Specifications".

3.3.14 Insert ", the Client, Bilfinger Berger, Siemens" after "the Scottish Executive"

3.10 Delete references to "tie" and "tie Parties" and replace with references to "the Client" and "Client Parties" respectively.

3.18 Replace "planning supervisor" with "CDM coordinator".

Insert the following new Clauses:

3.28 The SDS Provider is aware and has knowledge of all the terms and conditions of the Infraco Contract and the SDS Provider shall not cause the Infraco to be in breach of the provisions of the Infraco Contract to be observed and performed and complied with by the Infraco in so far as they relate and apply to the Services, and is further aware and has taken and shall continue to take full account of the obligations to be undertaken and the liabilities which may be incurred by the Infraco therein in relation to the Services.

- 3.29 The SDS Provider acknowledges that any breach by it of this Agreement may result in the Infraco committing breaches of and becoming liable for damages under the Infraco Contract and other contracts made by it in connection with the Infraco Contract and may occasion further loss or expense to the Infraco in connection with the Infraco Contract and such other contracts and all such damage, loss and expense is hereby agreed to be within the contemplation of the Parties as being the probable results of any such breach by the SDS Provider. Subject to Clause 27.6 and 27.7, the SDS Provider shall indemnify the Infraco against all such damage, loss and expense.
- 3.30 The SDS Provider shall observe, perform and comply with all the provisions of the Infraco Contract (in so far as the same has been supplied to the SDS Provider) on the Infraco's part to be observed, performed and complied with insofar as they relate and apply to the performance of the Services and the SDS Provider shall be liable to the Infraco for:
- 3.30.1 any breach, non-observance or non-performance for which the SDS Provider is responsible of any of the provisions of the Infraco Contract in so far as they relate and apply to the performance of Services; and
- 3.30.2 any act or omission for which the SDS Provider is responsible which involves the Infraco in any liability to tie and/or the Tram Supplier under the provisions of the Infraco Contract in so far as they relate and apply to the performance of Services; and
- 3.30.3 any claim, damage, loss or expense due to or resulting from any negligence or breach of duty for which the SDS Provider is responsible.
- 3.31 Provided that the Client has received the necessary design and other information from the SDS Provider in accordance with the Design Delivery Programme to allow it to develop the Client Designs, the Client shall, as soon as reasonably practicable, provide to the SDS Provider such Client Designs and, save where the SDS Provider has an obligation pursuant to this Agreement to obtain such information or instructions from another party, such other information and instructions as are necessary to enable the SDS Provider to comply with the Consents Programme and/or the Design Delivery Programme.

**Clause 4 - Development, Review, Finalisation and Delivery of the Deliverables**

- 4.4 Delete reference to tie in third line and replace with "the Client".

Delete Clause 4.5 and insert the following new Clause 4.5

4.5 The SDS Provider shall submit to the Client's Representative five copies of each Deliverable no later than the date shown in the Design Delivery Programme.

4.6 Delete "submittal programme" and replace with "Design Delivery Programme".

4.8 Delete all after 'Approval Bodies' and add: "the SDS Provider shall amend the Deliverable. Such amendment shall be at the SDS Provider's cost except where such amendment is required in order for the Deliverable to meet the requirements of any Approval Bodies, where such requirements are:

4.8.1 inconsistent with or in addition to the Infraco Proposals or the Employer's Requirements;

4.8.2 not reasonable given the nature of the Approval Body; or

4.8.3 not reasonably foreseeable within the context of the Infraco's Proposals or the Employer's Requirements,

in which case such amendment shall be a Client Change. All such amendments shall be made in accordance with Schedule 9 (*Review Procedure*) and shall ensure that the Deliverable shall satisfy the requirements of this Agreement and any Approval Bodies.

4.11/4.12 Insert "Employer's Requirements" in line 3 after "Technical Specifications"

Insert the following new Clause 4.14:

4.14 In addition to the other requirements of this Clause 4, the SDS Provider shall support the Client as reasonably required in relation to the maintenance and provision of any records, drawings, registers, manuals and/or reports as may be required under the Infraco Contract.

#### **Clause 5 – Consents**

Delete Clause 5.1 and substitute therefor:

5.1 The SDS Provider shall (at its own cost and expense):

5.1.1 submit applications which are valid and complete for (and/or for renewal or extension as appropriate of) all Design Stage Consents in accordance with the timetable set out in the Consents Programme and thereafter (subject to Clause 7.5) obtain and maintain in effect all Design Stage Consents;

- 5.1.2 implement each Design Stage Consent within the period of its validity and in accordance with its terms; and
- 5.1.3 observe and comply with the terms of each Consent (not being a Design Stage Consent) obtained from time to time in connection with the construction, installation, commissioning, completion and opening of the Edinburgh Tram Network.

Clause 5.2 - Delete "Consents" and replace with "Design Stage Consents".

Delete 5.4 and substitute therefor:

- 5.4 The SDS Provider shall update the Consents Programme not less than 3 Business Days prior to each Reporting Period End Date, showing progress and identifying any new Consents (whether or not Design Stage Consents) to be obtained. Subject to Clauses 7.5 and 15 no other changes to the Consents Programme shall be permitted without the consent in writing of the Client. The Client shall be entitled to request information in relation to the progress of the application for any such Consent and the Consent itself and the SDS Provider shall provide the same at no cost to the Client.

Insert new Clauses:

- 5.5 Without prejudice to Clause 5.1.1, the SDS Provider shall inform the Client as soon as practicable after becoming aware that a Design Stage Consent (or its extension and/or renewal) will not be obtained by the programmed date set out in the Consents Programme.
- 5.6 Where an application for a Design Stage Consent (or its extension and/or renewal) is denied, the SDS Provider shall notify the Client of the reasons given by the Approval Body for declining to issue or renew the Design Stage Consent and shall provide all appropriate supporting documentation to the Client.
- 5.7 Subject to Clause 5.8 below, failure to obtain a Design Stage Consent from the relevant Approval Body in respect of a design which the SDS Provider is responsible for preparing by the date on which it is shown as required in the Design Delivery or Consents Programme shall not be a breach of this Agreement and shall be a Compensation Event.
- 5.8 Clause 5.7 shall apply following the inability of the SDS Provider to obtain (or maintain) a Design Stage Consent for which it is responsible and in accordance with the Consents Programme contained in the SDS Novation Agreement, provided that:

- 5.8.1 the SDS Provider
- (i) has complied with clauses 5.5 and 5.6;
  - (ii) has used reasonable endeavours to afford the Infracore a period of 3 Business Days from notification under Clauses 5.5 or 5.6 to meet with the relevant Approval Body with a view to resolving the situation and supports them by its attendance at such meeting; The SDS Provider acknowledges that **it** is entitled to attend the meeting
  - (iii) has acted timeously in order to mitigate the impact of the failure to obtain or renew the Consent;
- 5.8.2 the SDS Provider has ensured timely provision of adequate required information to the relevant Approval Body in accordance with the Consents Programme, the Design Delivery Programme, the agreed requirements of the Approval Body and the Design Management Plan.
- 5.8.3 the inability to obtain or renew the Consent is not the result of the SDS Provider reprioritising the Consents Programme and/or the Design Delivery Programme (save where such reprogramming or prioritisation is the direct result of a Client Change, an extension of time pursuant to Clause 7.5, a Relief Event or a Compensation Event) such that the relevant Approval Body has insufficient time or information in which to respond to an altered timescale;
- 5.8.4 there has been a failure of the relevant Approval Body to respond in accordance with the agreed requirements of the Approval Body and timescales set out in the Design Management Plan or Design Delivery Programme or, if none has been stipulated, any reasonable timescale, provided that this failure has not been caused by inadequate or late submissions by the SDS Provider with regard to other Consents;
- 5.8.5 the failure to obtain or renew the Consent is not a consequence of a failure of the SDS Provider to perform its obligations under the SDS Agreement in terms of the quality or content of the relevant Deliverables and as required pursuant to the Design Management Plan, the Design Delivery Programme or the Consents Programme and, where relevant, Clause 10 (*Design Development and Finalisation*); or
- 5.8.6 the failure to obtain or renew a Consent is as a consequence of the quality or content of Client Design.



- 5.9 For the avoidance of doubt, clause 5.7 shall apply where, and to the extent, that a Consent in respect of a submission for Prior Approval is sought and the relevant Approvals Body
- 5.9.1 requires changes to design which could not reasonably have been anticipated from the previous formal or informal consultations or communications with the Approvals Body; or
  - 5.9.2 does not deliver the Consent within the period stated in the Consents Programme or such Consents Programme updated in accordance with these terms.
- 5.10 Clause 5.8.3 shall not apply to a Prior Approval Consent where the Approval Body, acting reasonably, has agreed in writing to a proposal from the SDS Provider to changes in the sequencing, packaging and timescales set out in the Design Management Plan or the Consents Programme, provided that the SDS Provider has provided reasonable advance notice to tie and to the Approvals Body including full details of the proposed changes.

#### **Clause 6 – Quality Assurance**

- 6.1 Delete "a quality management system, and comply with such system" and replace with "and comply with the Quality Management System".
- 6.2 Delete "SDS Provider's quality management system" and replace with "Quality Management System".

#### **Clause 7.1 – Master Project Programme, Programme Phasing Structure and Programme**

- 7.1 Amend to delete reference to "Master Project Programme" and substitute "Programme".

#### **Clause 7.5 - Extensions of Time:**

Delete Clause 7.5 and substitute therefor:

- 7.5.1 If the SDS Provider shall be delayed in the execution of the Services:
  - 7.5.1.1 by any circumstances or occurrence (other than a breach of this Agreement by the SDS Provider) entitling the Infraco to an extension of time for completion or stage completion of the Infraco Contract including, without limitation, any Relief Event or Compensation Event; or
  - 7.5.1.2 by the issuing of a Client Change Order in respect of the Services to which Clause 7.5.1.1 does not apply; or

7.5.1.3 by reason of any other breach by the Client of this Agreement (save to the extent caused or contributed to by breach of this Agreement by the SDS Provider) to the extent not caused or contributed to by breach of the Infraco Contract by tie or any Relief Event or Compensation Event; or

7.5.1.4 by reason of any circumstances to which Clause 5.8.6 applies, irrespective of whether it entitles the Infraco to an extension of time or Compensation Event under the Infraco Contract,

then in any such event the SDS Provider shall forthwith notify the Client of:-

- (a) the cause of the delay;
- (b) the SDS Provider's estimate of the likely effect of such delay upon the Consents Programme and/or the Design Delivery Programme;
- (c) the estimated additional cost that shall be incurred; and
- (d) any acceleration measures which the SDS Provider could take to mitigate the effects of such delay and an estimate of the costs thereof

and, in the case of any event listed in Clauses 7.5.1.1 and/or 7.5.1.2, shall include such information as Infraco would be required to provide pursuant to Clause 65.2 of the Infraco Contract in respect of such event and/or circumstance.

7.5.2 Subject to compliance with Clause 7.5.1, the SDS Provider shall, subject to any instruction to accelerate the Services pursuant to Clause 7.5.3, be entitled to such adjustment to the Consents Programme and/or the Design Delivery Programme as may in all circumstances be fair and reasonable in respect of any event or circumstance under Clause 7.5.1, provided always that the SDS Provider's entitlement to an extension of time for any event listed in Clauses 7.5.1.1 and 7.5.1.2 above shall in no circumstances exceed (in respect of such event) the extension of time (if any) to which the Client is entitled for the identical event under the Infraco Contract. An extension of time shall not be granted where the cause of the Services having been delayed, affected or suspended is due to any act, omission, default or breach of the Agreement by the SDS Provider or its employees, agents or servants or any SDS Provider Party.

7.5.3 The Client shall issue a Client Change Order to authorise any agreed acceleration of the Consents Programme and/or the Design Delivery Programme and/or increased costs as a result of delays notified under Clause 7.5.1.

- 7.5.4 If the Services are delayed in circumstances other than those entitling the SDS Provider to an extension of time as set out in Clause 7.5.1 or as a result of a Force Majeure Event, the SDS Provider shall inform the Client at the earliest opportunity and shall give an estimate of the likely effect upon the Consents Programme and/or the Design Delivery Programme. The SDS Provider at his own expense shall take such acceleration measures as are necessary to achieve the requirements of the Consents Programme and/or the Design Delivery Programme.
- 7.5.5 The SDS Provider shall not be entitled to and shall be deemed to have irrevocably waived any entitlement to any extension of time unless the SDS Provider has:
- 7.5.5.1 within 10 Business Days of becoming aware of the circumstances or occurrences which have caused or are likely to cause delay to the SDS Provider in the performance of the Services notified the Client in writing; and
  - 7.5.5.2 within 10 Business Days after such notification submitted by further written notice to the Client detailed particulars of any extension of time to which it may consider itself entitled in order that such submission may be investigated at the time; and
  - 7.5.5.3 wherever applicable, complied with the requirements of any Clause under this Agreement requiring timely notice to be given.
- 7.5.6 Any notice under 7.5.5.1 or 7.5.5.2 above shall give full particulars to the extent then possible of the cause of the delay and of its probable duration and where appropriate (and that without prejudice to Clause 7.5A) reasonable estimate of any direct and indirect costs likely to result therefrom together with any other relevant details.

**7.5A Additional Costs**

- 7.5A.1 In the event that a Compensation Event causes the SDS Provider to incur costs beyond such costs which were reasonably anticipated to be incurred by the SDS Provider but for the occurrence of the Compensation Event (which for these purposes shall include any breach of this Agreement by the Client to the extent caused or contributed to by breach of the Infraco Contract by tie) then without prejudice to Clause 7.5 the SDS Provider shall be entitled to claim costs under this Agreement.
- 7.5A.2 To claim costs, the SDS Provider must, as soon as practicable, and in any event within 10 Business Days after it first became aware that the Compensation Event had caused or is likely to cause the SDS Provider to incur additional costs:

- (a) give to the Client a notice of its claim for costs and full details of the nature of the Compensation Event, the date of occurrence and its likely duration;
- (b) include in any notice given under Clause 7.5A.2(a) full details of any costs claimed including:
  - (i) details of the costs or losses which are not Indirect Losses;
  - (ii) mitigation measures adopted and why unsuccessful; and
  - (iii) any acceleration or other measures which the Infraco could take to mitigate the effects of any delay or non-performance and, where applicable, an estimate of the costs thereof;

provided that where a Compensation Event has a continuing effect, such that it is not practicable for SDS Provider to submit full details in accordance with this Clause 7.5A.2 then the SDS Provider shall instead submit to the Client:

- (A) a statement to that effect with reasons, together with interim written particulars (including details of the likely consequences of the Compensation Event on the SDS Provider'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 until the actual costs incurred (if any) are ascertainable, whereupon the SDS Provider shall as soon as reasonably practicable, submit to the Client the items referred to in Clause 7.5A.2(b);
- (c) demonstrate to the reasonable satisfaction of the Client that:
- (i) the SDS Provider and the SDS Provider Parties could not reasonably have avoided such occurrence or consequences by steps which they might reasonably be expected to have taken;
  - (ii) the Compensation Event is the direct cause of the additional costs; and
  - (iii) the SDS Provider is using reasonable endeavours to perform its obligations under this Agreement.

- 7.5A.3 In the event that the SDS Provider has complied with its obligations under Clause 7.5A.2, then the SDS Provider shall be paid the amount of any direct and demonstrable additional cost as may be reasonable in the circumstances of the Compensation Event, provided always that the SDS Provider's entitlement to such costs shall in no circumstances exceed (in respect of such event) a fair and reasonable proportion of the costs (if any) to which the Client is entitled for the identical event under the Infracore Contract. An entitlement to additional costs shall not be granted where the cause of the Compensation Event is due to any act, omission, default or breach of the Agreement by the SDS Provider or its employees, agents or servants or any SDS Provider Party.
- 7.5A.4 The SDS Provider shall notify the Client if at any time it receives or becomes aware of any further information relating to the Compensation Event, giving details of that information to the extent that such information is new or renders information previously submitted materially inaccurate or misleading.
- 7.5A.5 If the Parties cannot agree the extent of the extension of time or relief required or the additional costs claimed or the Client disagrees that a Compensation Event has occurred (or as to its consequences) or that the SDS Provider is entitled to any additional costs, either Party may refer the matter for determination in accordance with the Dispute Resolution Procedure.
- 7.5A.6 The Client shall, in assessing any delay or extension of time or costs for the purpose of Clause 7.5 and/or this Clause 7.5A:
- (a) not take into account any event or cause of delay or costs which is caused by any negligence, omission, default, breach of contract or breach of statutory duty of the SDS Provider or any SDS Provider Parties;
  - (b) take into account an event or cause of delay or costs only if and to the extent that the SDS Provider establishes to the satisfaction of the Client that the SDS Provider has used its reasonable endeavours to adjust the order and sequence in which the SDS Provider proposes to carry out the Services 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 Services and mitigate the costs.
- 7.5A.7 The SDS Provider shall not be entitled to and shall be deemed to have irrevocably waived any entitlement to any extension of time and/or additional costs in respect of any failure by the SDS Provider to:



- (a) manage the required interface with CEC in so far as this forms part of the Services;  
or
- (b) manage any required interface with any Approval Body and/or third party where consent or approval is required at any stage of the Services; or
- (c) identify any instructions which are required from the Client and/or tie in order to progress the Services in accordance with the Consents Programme and/or the Design Delivery Programme,

provided that following the occurrence of a Compensation Event nothing in this Clause 7.5A.7 shall prevent any required interfaces with CEC, any Approval Body and/or third party, or instructions which are required from the Client and/or tie from being taken into account when considering extensions of time in accordance with Clause 7.5 and/or additional costs in accordance with Clause 7.5A.

7.5A.8 Notwithstanding the occurrence of a Compensation Event, the SDS Provider shall continue to carry out the Services unless otherwise agreed in connection with Clause 7.5 and/or this Clause 7.5A.

#### **Clause 9 – Sub-letting and the Appointment of SDS Provider Parties**

Delete Clause 9.5.

#### **Clause 11 – Methods of Payment**

In Clause 11.6

In line five, replace "eighty per cent (80%)" with "ninety per cent (90%)"

In line nine, after the word "final.", delete the remaining wording and replace with:

"The SDS Provider may make application for payment in respect of the remaining ten per cent (10%) of the total value of the Detailed Design Phase Milestone payment:

- 11.6.1 in the case of Detailed Design Phase Deliverables which are required to be submitted to CEC for Technical Approval or Prior Approval pursuant to the Design Management Plan, on the date of their submission provided that such submission is made on or before the date of submission required by the Design Delivery Programme; or.

11.6.2 in the case of all other Deliverables (including, without limitation, any Detailed Design Phase Deliverables not submitted on or before the date of submission required by the Design Delivery Programme), following the issue of the Milestone Completion Certificate by the Client in respect of the relevant Detailed Design Phase for the relevant sub-sector or sector (as appropriate)."

#### **Clause 15 - Changes**

Insert the following new Clauses 15.18 and 15.19

- 15.18 Except in relation to a breach of this Agreement by the Client or unless otherwise agreed by the Client in writing, the SDS Provider's entitlement to additional payment or an extension of time for a Permitted Variation shall in no circumstances exceed (in respect of such Permitted Variation) the extension of time (if any) and/or additional payment (if any) to which the Infraco is entitled under the Infraco Contract for the identical Permitted Variation. The SDS Provider's entitlement to such extension of time or additional payment under this Agreement shall in no circumstances exceed that proportion of the Infraco's entitlement to an extension of time or additional payment under the Infraco Contract to which the Infraco becomes entitled in respect of the entitlement claimed by the SDS Provider. An extension of time and/or additional payment shall not be granted where the cause of the Permitted Variation is due to any act, omission, default or breach of the Agreement by the SDS Provider, its employees, agents or servants or any SDS Provider Party.
- 15.19 Clause 15.18 shall not apply in connection with additional payment due to the SDS Provider for Services relating to Deliverables in respect of 'Identified Value Engineering' or 'Further Value Engineering' (both as defined in Schedule Part 4 of the Infraco Contract) .

#### **Clause 19 - Termination for SDS Provider Default**

Delete Clause 19.1.3 and substitute therefore "Clause not used".

#### **Clause 20 - Termination, Abandonment or Suspension of the Services by the Client**

Delete Clause 20.1 and substitute therefor:

- 20.1 In the event that the Infraco Contract is terminated, this Agreement shall terminate. Such termination shall be deemed to have occurred under Clause 20 unless the Infraco Contract is terminated as a result of any circumstances specified in Clause 19 whereupon the provisions of Clause 25.3 shall not apply in such event.

## **Clause 22 - Termination for Corrupt Gifts and Payments**

Delete Clause 22 (Termination for Corrupt Gifts and Payments in its entirety) substitute therefor:

- 22.1 The SDS Provider or anyone employed by it or acting on its behalf (including any SDS Provider Party) shall not commit any Prohibited Act.
- 22.2 If the SDS Provider or anyone employed by it or acting on its behalf (including any SDS Provider Party) commits any Prohibited Act, then the Client may terminate this Agreement with immediate effect by giving notice to the SDS Provider.

## **Clause 27 – Indemnity by SDS Provider, Liability and Sole Remedy**

Insert new Clauses:

- 27.7 If the SDS Provider fails to achieve the provision of Issued for Construction Drawings identified in the Design Delivery Programme by the date set out in the Design Delivery Programme for the release of the Issued for Construction Drawings (or within such longer period as is agreed by the Client), the SDS Provider will pay the Client liquidated damages at the rate of £8,928.57 in respect of each failure.
- 27.8 The SDS Provider will not be liable to pay liquidated damages:
- 27.8.1 to the extent that the failure to achieve the release date for Issued for Construction Drawings is the failure of the CEC to approve the SDS submission of the design Deliverables within the requisite periods set by the Design Management Plan and/or Design Delivery Programme (as appropriate); or
- 27.8.2 if and to the extent that the total aggregate liquidated damages under Clause 27.7 in respect of submissions under this Agreement exceeds £1,000,000.
- 27.9 In the event that it is agreed by the Parties or determined pursuant to Clause 28 (*Dispute Resolution Procedure*) that the Deliverable (including the relevant Issued for Construction Drawings) was not submitted in accordance with the Agreement in terms of packaging, process, or the content or quality was inadequate or insufficient, the limits set out in Clause 27.7 and 27.8 shall not apply and the SDS Provider shall be liable to the full extent under this Agreement.
- 27.10 The liquidated damages set out in Clause 27.7 are a genuine pre-estimate of losses incurred by the Client resulting from failure by the SDS Provider to achieve the relevant release date

and the Parties shall not seek to challenge the application or recovery of such amounts on the basis of this underlying calculation.

- 27.11 Notwithstanding the generality of Clause 27.1, the SDS Provider shall indemnify the Client from all loss, costs, claims, damages, expenses and liabilities incurred by the Client pursuant to Clause 77.5 of the Infraco Contract caused by a breach of this Agreement by the SDS Provider in relation to the exercise of powers under the Tram Legislation (in so far as the same are to be carried out by Infraco pursuant to the Infraco Contract) excluding the construction and maintenance activities associated with the Infraco Works.
- 27.12 Each of the obligations of the SDS Provider under this Agreement shall be interpreted as a separate and independent obligation so that Infraco shall have a separate claim and right of action in respect of every breach of each obligation (including without limitation each failure to comply with Clauses 4.5 and/or 5.1.1).
- 27.13 The SDS Provider shall not be entitled to any common law rights including (but not limited to) rights to damages or any other rights under contract, delict or otherwise (other than specific implement, interim specific implement, interdict, interim interdict or any action for payment) in relation to any breach of this Agreement by the Client to the extent caused or contributed to by breach by ~~tie~~ of the Infraco Contract or any other Compensation Event. The SDS Provider'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 Clause 7.5 and 7.5A, respectively.
- 27.14 The SDS Provider shall not be responsible for the quality or content of Client Design. The SDS Provider shall undertake a general review of Client Design on receipt of the same from the Client, and shall report to the Client with details of any element which is patently inconsistent with the requirements of an Approval Body as applied to design submitted previously.

#### **Clause 28 – Dispute Resolution Procedure**

Delete Clause 28 and replace with:

- 28.1 The Parties agree that this Clause 28 (*Dispute Resolution Procedure*) shall have effect for the resolution of any Dispute.
- 28.2 Any Dispute shall, in the first instance, be referred to the Internal Resolution Procedure in accordance with Clause 28.10.

- 28.3 Neither Party shall commence any court proceedings until the procedures in Clauses 28.10 to 28.57A6 have been completed, under exception that Clause 28 (*Dispute Resolution Procedure*) shall not apply so as to prevent either Party seeking an interim order, or interim relief, in the Scottish courts.
- 28.4 In the event that any court proceedings whatsoever are initiated by either Party against the other, the Parties agree that the Court of Session, Scotland, shall have exclusive jurisdiction.
- 28.5 Neither Party shall be entitled to suspend the performance of its undisputed obligations under this Agreement merely by reason of the reference of any Dispute to the Dispute Resolution Procedure contained in this Clause 28 (*Dispute Resolution Procedure*).
- 28.6 Subject to the Client's tie's discretionary rights set out in Clause 28.55 to Clause 28.57.3 to require that a Dispute and a Related Dispute (as defined in Clause 28.55) be dealt with together at an appropriate stage of the Dispute Resolution Procedure, the provisions of this Clause 28 (*Dispute Resolution Procedure*) are mandatory and binding upon the Parties. For the avoidance of doubt nothing in this Schedule 9 shall be intended to disapply section 80(2) and 79(2) of the Edinburgh Tram (Line One) Act 2006 and the Edinburgh Tram (Line Two) Act 2006 (together the "Tram Acts") respectively.
- 28.7 Not used
- 28.8 Where either Party refers a Dispute to the Dispute Resolution Procedure, such Party shall not have waived nor be deemed to have waived any right to pursue or progress such Dispute in the event that such Party fails to observe any time limit or timescale provided for in this Clause 28.
- 28.9 Not used

#### **Internal Resolution Procedure**

- 28.10 The following procedure is the Internal Resolution Procedure referred to in Clause 28.2:
- 28.10.1 In the event of any Dispute arising, the SDS Provider's Representative and the Client's Representative shall seek to resolve the Dispute at a meeting to be convened within three Business Days of written notification by either Party to the other that it wishes to



initiate the Internal Resolution Procedure in respect of that Dispute ("Notification"). Such Notification shall be given in accordance with the provisions of Clause 36 (*Notices*) of this Agreement.

- 28.10.2 If following the meeting referred to in Clause 28.10.1 the Dispute is not resolved or in the event that a meeting has not been convened within 3 Business Days pursuant to Clause 28.10.1, each Party shall, before the expiry of the period of seven Business Days from Notification, serve, in accordance with the provisions of Clause 36 (*Notices*) of this Agreement, a written position paper ("Position Paper") upon the other Party. Each Party's Position Paper shall state in reasonable detail that Party's position and required objectives in relation to the Dispute; any required redress, and, where possible, any comments on the other Party's position.
- 28.10.3 Upon such service of a Position Paper by the Party initiating or pursuing the Dispute, the Chief Executive (or equivalent) of the SDS Provider and the Chief Executive (or equivalent) of the Client (or their respective deputies in the event of their unavailability) shall seek to resolve the Dispute by meeting in good faith to discuss and negotiate upon the Dispute without recourse to legal or other proceedings.
- 28.10.4 In the event that resolution of the Dispute is achieved by the Chief Executive (or equivalent) of the SDS Provider and the Chief Executive (or equivalent) of the Client, the resolution shall be reduced to writing and, once it is signed by the duly authorised representatives of both Parties, shall be binding on the Parties.
- 28.10.5 Unless concluded by a written legally binding agreement, all discussions and negotiations connected with the Dispute shall be conducted in confidence and without prejudice to the rights of the Parties in any future legal or other proceedings. Nor may such matters be produced or relied upon in evidence in any such proceedings.
- 28.11 In the event that any Dispute is not resolved by the Internal Resolution Procedure within a period of twenty Business Days from Notification (or longer if so agreed by the Parties) then the following provisions of this Clause 28.11 shall apply:
- 28.11.1 the Chief Executive (or equivalent) of the SDS Provider and the Chief Executive (or equivalent) of the Client (or their respective deputies in the event of their unavailability) shall, within a further period of five Business Days, seek to agree that the Dispute shall be resolved by any one of the following procedures:
- 28.11.1.1 mediation in accordance with Clauses 28.12 to 28.14; or

- 28.11.1.2 adjudication in accordance with Clauses 28.15 and 28.54; or
- 28.11.1.3 litigation before the Court of Session, Scotland, in which event the Summons in any such litigation shall be signeted and served within ten Business Days of the date of expiry of the period of 60 Business Days following the conclusion of the internal resolution procedure under Clause 28.10;

28.11.2 in the event that the Chief Executive (or equivalent) of the SDS Provider and the Chief Executive (or equivalent) of the Client (or their respective deputies in the event of their unavailability) are unable to agree that the Dispute be resolved by one of the procedures described in Clauses 28.11.1.1 to 28.11.1.3, the Party initiating or pursuing the Dispute shall refer the Dispute to mediation (and thereafter adjudication if necessary) in accordance with Clauses 28.12 and 28.14.

### **Mediation**

28.12 The Parties shall attempt in good faith to resolve the Dispute by a procedure of mediation in accordance with the Centre for Effective Dispute Resolution mediation rules or Model Mediation Procedure in force at the commencement of the mediation, (or in the event that the Centre for Effective Dispute Resolution has ceased to exist as at the time of the commencement of the mediation, mediation rules or a model mediation procedure offered by any other body offering commercial mediation services which shall be selected by the Client). In the event that any provision of such mediation rules or model mediation procedure conflicts with any provision of this Clause 28 (*Dispute Resolution Procedure*), the provisions of this Clause 28 (*Dispute Resolution Procedure*) shall take precedence. In the event that any timescales contained in such mediation rules or model mediation procedure conflicts with the timescales referred to in this Clause 28 (*Dispute Resolution Procedure*), the timescales contained in such mediation rules or model mediation procedure shall be amended accordingly such that the timescales referred to in this Clause 28 (*Dispute Resolution Procedure*) shall be adhered to.

28.13 In the event that resolution of the Dispute is achieved in consequence of such mediation procedure, such agreed resolution shall be recorded in writing and, once it is signed by the duly authorised representatives of both Parties, shall be binding on the Parties. Unless concluded by a written legally binding agreement, all discussions and negotiations (including written submissions made and documents produced in relation thereto) connected with the mediation procedure referred to in Clause 28.12 shall be

conducted in confidence and without prejudice to the rights of the Parties in any future legal or other proceedings. Nor may such matters be produced or relied upon in evidence in any such proceedings.

- 28.14 If any Dispute to which this Clause 28 (*Dispute Resolution Procedure*) relates is not resolved by the mediation procedure referred to in Clauses 28.12 and 28.13 within a period of 30 Business Days from the referral of the Dispute to mediation (or longer if so agreed by the Parties), the mediation procedure shall be terminated and unless the Party initiating or pursuing the Dispute withdraws the Dispute, the Dispute shall within 60 days of the termination of the mediation procedure be referred to adjudication in accordance with Clauses 28.15 to 28.54.

#### **Adjudication**

- 28.15 In the event that either Party refers a Dispute to adjudication in terms of Clause 28.11.1 or 28.14, or exercises a statutory right available to it (if any) under the Housing Grants, Construction and Regeneration Act 1996 to raise adjudication proceedings in relation to "construction operations" (within the meaning ascribed to that term by the Housing Grants, Construction and Regeneration Act 1996) which are not Authorised Works as defined in the Tram Acts, such adjudication shall be conducted in accordance with Clauses 28.15 to 28.54, wherein any reference to "days" is a reference to calendar days.

#### **Notice of intention to seek adjudication**

- 28.16 Either Party may give written notice (the "**Notice of Adjudication**") of its intention to refer the Dispute to adjudication and the Party giving such notice shall be the "**Referring Party**".
- 28.17 The Notice of Adjudication shall be given to the other Party and the Party receiving the Notice of Adjudication shall be the "**Responding Party**".
- 28.18 The Notice of Adjudication shall set out briefly:
- 28.18.1 the nature and a brief description of the Dispute and of the parties involved;
- 28.18.2 details of where and when the Dispute has arisen;
- 28.18.3 the nature of the redress which is sought; and

- 28.18.4 the names and addresses of the Parties (including the addresses which the Parties have specified for the giving of notices).
- 28.19 The adjudicator selected to consider the Dispute shall be selected from one of the panels ("**Panels**") appointed by the Parties in accordance with the following:
- 28.19.1 there shall be three Panels, one in respect of legal matters, ("**Legal Panel**") one in respect of construction and operational matters ("**Construction/Operational Panel**"), and one in respect of financial matters ("**Financial Panel**");
- 28.19.2 each Panel shall be comprised of at least four members, who are listed in Schedule 10 (*Panels for the Dispute Resolution Procedure*) to this Agreement;
- 28.19.3 if any member of a Panel resigns or dies or becomes incapax or ill to the extent of being unable to reasonably discharge his duties as a member of the Panel, a replacement shall be appointed by the Parties as soon as practicable. Any such replacement shall be wholly independent of the Client, any Client Party, the SDS Provider, any SDS Provider Party, tie, any tie Party, City of Edinburgh Council or any Relevant Authority, any Approvals Body, the Tram Supplier or any equipment supplier or any party associated with the Edinburgh Tram Network, and any successor to or subsidiary or parent of any of the aforementioned parties. If the Parties are unable to agree on the identity of such replacement(s), the President or Vice President for the time being of The Chartered Institute of Arbitrators (Scottish Branch) or the Institution of Civil Engineers or the Law Society of Scotland shall appoint such replacement(s) within thirty days of any application for such appointment by either Party.
- 28.20 The Referring Party shall at the same time as giving the Notice of Adjudication to the Responding Party, send to each of the members of the relevant Panel a copy of the Notice of Adjudication and a request that each member of the relevant Panel advises both Parties within three days of the date of the Notice of Adjudication as to whether or not he is able and willing to act. The Referring Party shall at their sole discretion be entitled to select which of the Panels is the relevant Panel in light of the subject matter of the Dispute. The Parties shall attempt to agree within two further days as to which one of the members of the relevant Panel who responded indicating that they are able and willing to act shall be requested to act as adjudicator. In the event that such agreement is reached, the Referring Party shall, within a further period of one day, request the member of the relevant Panel upon whom agreement has been reached to act as adjudicator. In the event that such agreement is not reached, the Responding

Party shall, within a further period of two days, select one of the members of the relevant Panel who responded indicating that they are able and willing to act and the Referring Party shall request that member to act as adjudicator.

- 28.21 If no member of the relevant Panel indicates that he is able and willing to act within three days of receiving a request to act as adjudicator, the Referring Party shall request the President or the Vice President for the time being of The Chartered Institute of Arbitrators (Scottish Branch) or the Institution of Civil Engineers or the Law Society of Scotland to select a person to act as adjudicator.
- 28.22 Any person appointed, requested or selected to act as adjudicator in accordance with Clause 28.20, 28.21 and 28.24 paragraphs shall be a natural person acting in his personal capacity. A person appointed, requested or selected to act as an adjudicator shall be wholly independent of the Client, any Client Party, the SDS Provider, any SDS Provider Party, tie, any tie Party, City of Edinburgh Council or any Relevant Authority, any Approvals Body, the Tram Supplier or any equipment supplier or any party associated with the Edinburgh Tram Network, and any successor to or subsidiary or parent of any of the aforementioned parties.
- 28.23 The requests referred to in Clause 28.20 shall be accompanied by a copy of the Notice of Adjudication.
- 28.24 The Chartered Institute of Arbitrators (Scottish Branch) or the Institution of Civil Engineers or the Law Society of Scotland must communicate the selection of an adjudicator to the Referring Party within three days of receiving a request to do so.
- 28.25 If the Chartered Institute of Arbitrators (Scottish Branch) or the Institution of Civil Engineers or the Law Society of Scotland fails to comply with Clause 28.24, the Referring Party may:
- 28.25.1 agree with the other Party to the Dispute to request a specified person to act as adjudicator; or
- 28.25.2 request any other adjudicator nominating body to select a person to act as adjudicator. An "adjudicator nominating body" shall mean a body (not being a natural person and not being a Party to the Dispute) which holds itself out publicly as a body which will select an adjudicator when requested to do so by a Referring Party.



- 28.26 The person requested to act as adjudicator in accordance with the provisions of Clause 28.20 or 28.21 shall indicate whether or not he is willing to act within two days of receiving the request.
- 28.27 Where an adjudicator has been selected and appointed in accordance with Clause 28.20, 28.21 or 28.24, paragraph the Referring Party shall not later than seven days from the date of the Notice of Adjudication refer the Dispute in writing (the "**Referral Notice**") to the adjudicator.
- 28.28 The Referral Notice shall be accompanied by copies of, or relevant extracts from the Agreement and such other documents as the Referring Party intends to rely upon.
- 28.29 The Referring Party shall, at the same time as he sends to the adjudicator the documents referred to in Clauses 28.27 and 28.28, send copies of those documents to the Responding Party.
- 28.30 The adjudicator may, with the consent of the parties to those Disputes, adjudicate at the same time on more than one Dispute under the Agreement.
- 28.31 The Parties may agree to extend the period within which the adjudicator may reach a decision in relation to all or any of these Disputes.
- 28.32 An adjudicator may resign at any time on giving notice in writing to the Parties.
- 28.33 An adjudicator must resign where the Dispute is the same or substantially the same as one which has previously been referred to adjudication, and a decision has been taken in that adjudication.
- 28.34 Where an adjudicator ceases to act under Clauses 28.32 or 28.33 or dies or becomes incapax or ill to the extent of being unable to reasonably discharge his duties:
- 28.34.1 the Referring Party may serve a fresh notice in accordance with Clauses 28.16 to 28.19 and shall in accordance with Clauses 28.20 to 28.29 request an adjudicator to act; and
- 28.34.2 if requested by the new adjudicator, the Parties shall supply him with copies of all documents which they had made available to the previous adjudicator.
- 28.35 The Parties to a Dispute may at any time agree to revoke the appointment of the adjudicator and in such circumstances the fees and expenses of that adjudicator shall,

subject to Clause 28.36, be determined and payable in accordance with Clauses 28.52 to 28.53.

- 28.36 Where the revocation of the appointment of the adjudicator is due to the default or misconduct of the adjudicator, the Parties shall not be liable to pay the adjudicator's fees and expenses.

**Powers of the Adjudicator**

- 28.37 The adjudicator shall:
- 28.37.1 act impartially in carrying out his duties and shall do so in accordance with any relevant terms of the Agreement and shall reach his decision in accordance with Scots law; and
  - 28.37.2 avoid incurring unnecessary expense.
- 28.38 The adjudicator may take the initiative in ascertaining the facts and the law necessary to determine the Dispute, and shall decide on the procedure to be followed in the adjudication. In particular, he may:
- 28.38.1 request either Party to supply him with such documents as he may reasonably require including, if he so directs, any written statement from either Party supporting or supplementing the Referral and any other documents given under Clauses 28.27 to 28.28;
  - 28.38.2 conduct the adjudication in the English language and decide whether a translation of any document is to be provided and, if so, by whom, by when, and at whose cost;
  - 28.38.3 meet and question either Party and their representatives;
  - 28.38.4 subject to obtaining any necessary consent from a third party or the Parties, make such site visits and inspections as he considers appropriate, whether accompanied by the Parties or not;
  - 28.38.5 subject to obtaining any necessary consent from a third party or the Parties, procure the carrying out of any tests or experiments, and make directions as to the conditions for and responsibility for the cost of the same;

- 28.38.6 obtain and consider such representations and submissions as he requires, and, provided he has notified the Parties of his intention, appoint experts, assessors or legal advisers;
- 28.38.7 give directions as to the timetable for the adjudication, any deadlines, or limits as to the length of written documents or oral representations to be complied with; and
- 28.38.8 issue other directions relating to the conduct of the adjudication.
- 28.39 The Parties shall comply with any request or direction of the adjudicator in relation to the adjudication.
- 28.40 If, without showing sufficient cause, a Party fails to comply with any request, direction or timetable of the adjudicator made in accordance with his powers, fails to produce any document or written statement requested by the adjudicator, or in any other way fails to comply with a requirement under these provisions relating to the adjudication, the adjudicator may:
- 28.40.1 continue the adjudication in the absence of that Party or of the document or written statement requested;
- 28.40.2 draw such inferences from that failure to comply as may, in the adjudicator's opinion, be justified in the circumstances;
- 28.40.3 make a decision on the basis of the information before him, attaching such weight as he thinks fit to any evidence submitted to him outside any period he may have requested or directed;
- 28.40.4 disqualify any part or parts of that Party's submissions affected by the failure to comply; and
- 28.40.5 grant the other Party proper opportunity to consider and respond to any evidence or representation made late.
- 28.41 Subject to any agreement between the Parties to the contrary, either Party may be assisted by, or represented by, such advisers or representatives (whether legally qualified or not) as he considers appropriate.
- 28.42 The adjudicator shall consider any relevant information submitted to him by either Party and shall make available to them any information to be taken into account in reaching his decision.

28.43 The adjudicator and the Parties shall not disclose to any other person any information or document provided in connection with the adjudication which the Party supplying it has indicated is to be treated as confidential, except to the extent that disclosure is required by law or is necessary for the purposes of, or in connection with, the adjudication, or the information is already in the public domain.

#### **Adjudicator's Decision**

28.44 Unless otherwise agreed in accordance with paragraph Clause 28.56.1 pr 28.57.1 the adjudicator shall reach his decision not later than:

28.44.1 twenty eight days after the date of the Referral Notice mentioned in Clause 28.25;

28.44.2 forty two days after the date of the Referral if the Referring Party so consents; or

28.44.3 such period exceeding twenty eight days after the Referral Notice as the Parties may, after the giving of that notice, agree.

28.45 Where the adjudicator fails, for any reason, to reach his decision in accordance with Clause 28.44;

28.45.1 either of the Parties to the Dispute may serve a fresh notice in accordance with Clause 28.16 to 28.19 and shall request an adjudicator to act in accordance with Clauses 28.20 to 28.29; and

28.45.2 if requested by the new adjudicator the Parties shall supply him with copies of all documents which they had made available to the previous adjudicator.

28.46 As soon as possible after he has reached a decision, the adjudicator shall deliver a copy of that decision to each of the Parties.

28.47 The adjudicator shall decide the matters in Dispute and may make a decision on different aspects of the Dispute at different times.

28.48 The adjudicator may take into account any other matters which the Parties agree should be within the scope of the adjudication or which are matters under the Agreement which he considers are necessarily connected with the Dispute and, in particular, he may:

- 28.48.1 open up, review and revise any decision taken or any notice certifying payment given by any person referred to in the Agreement, unless the Agreement states that the decision or notice certifying payment is final and conclusive;
- 28.48.2 decide that any of the Parties to the Dispute is liable to make a payment under the Agreement (whether in sterling or some other currency) and, subject to the terms of the Agreement, when that payment is due and the final date for payment.
- 28.49 The adjudicator shall provide written reasons for his decision.

#### **Effect of the Decision**

- 28.50 In his decision, the adjudicator may, if he thinks fit, order either or both of the Parties to comply forthwith with his decision or any part of it. In the absence of any directions by the adjudicator relating to the time for performance of his decision, the Parties shall be required to comply with any decision of the adjudicator immediately on delivery of the decision to the Parties in accordance with Clause 28.46.
- 28.51 The decision of the adjudicator shall be binding on the Parties, and they shall comply with it, until the Dispute is finally determined by legal proceedings or by agreement between the Parties.
- 28.52 The adjudicator shall be entitled to the payment of such reasonable amount as he may determine by way of fees and expenses incurred by him and the Parties shall be jointly and severally liable to pay that amount to the adjudicator.
- 28.53 Without prejudice to the right of the adjudicator to effect recovery from either Party in accordance with Clause 28.52, the adjudicator may by direction determine the apportionment between the parties of liability for his fees and expenses.
- 28.54 The adjudicator shall not be liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith, and any employee or agent of the adjudicator shall be similarly protected from liability.

#### **Related Disputes**

- 28.55 In the event that a Dispute arising under, out of or in connection with this Agreement which in the opinion of the Client relates to a dispute or difference arising out of or in connection with any agreement associated with the Edinburgh Tram Network between



the Client and a third party (a "**Related Contract**") all such disputes or differences being referred to as a "**Related Dispute**", then providing that the Related Contract contains dispute resolution provisions in terms substantially the same as set out in this Clause 28 (*Dispute Resolution Procedure*) (save for necessary changes), the Client may required and direct that the Dispute and the Related Dispute be dealt with together at an appropriate stage of the Dispute Resolution Procedure.

**Referral of a Dispute under this Agreement to a Related Adjudicator**

28.56 In the event that a Related Dispute has already been referred to the decision of an adjudicator ("**Related Adjudicator**") in accordance with the provisions of the Related Contract, and the Client or the SDS Provider (as the case may be) is of the opinion, acting reasonably, that a Dispute is to be (but has not yet been) referred to adjudication under this Clause 28 (*Dispute Resolution Procedure*), the Client may refer the Dispute or may by notice in writing to the SDS Provider require that the Dispute be referred (as the case may be) to the Related Adjudicator. The Client and the SDS Provider agree that, without fettering or restricting the adjudicator's power and authority in any way, it is their intention that such adjudicator shall, insofar as is relevant, practicable and appropriate, come to the same conclusion as to the facts and apply the same reasoning and analysis in reaching a decision on the Dispute as the adjudicator's conclusions, reasoning and analysis applied by him as Related Adjudicator in the Related Dispute, and:

28.56.1 the adjudicator shall, if practicable, hear the Dispute at the same time as the Related Dispute and shall request such extension of time for producing his decision or award as he may require in order to reach a decision in respect of each of the Dispute and the Related Dispute at the same time. The Parties shall agree to such request for an extension of time, except in the event that the Dispute or the Related Dispute relates to "construction operations", which are not Authorised Works, within the meaning ascribed to that term by the Housing Grants, Construction and Regeneration Act 1996 (if applicable) (unless otherwise agreed by the Parties, all parties to the Related Dispute and the adjudicator);

28.56.2 except in the event that the Dispute or the Related Dispute relates to "construction operations", which are not Authorised Works, within the meaning ascribed to that term by the Housing Grants, Construction and Regeneration Act 1996 (if applicable) (unless otherwise agreed by the Parties, all parties to the Related Dispute and the adjudicator), the adjudicator shall have power (if so requested by the Client) to make

his decisions or awards in the Dispute and the Related Dispute in such a manner as if the rules applicable in the Court of Session, Scotland as to the joining of one or more defenders or third parties or conjoining actions were applicable to the Parties to the Dispute and the Related Dispute, and to the adjudicator; and

28.56.3 the Client shall procure that, as soon as practicable, the other party or parties to the Related Dispute shall give the SDS Provider copies of the Related Contract, the Referral Notice in the Related Dispute and any other documentation provided to the adjudicator by any party to the Related Dispute.

**The Client's request to consolidate a Related Dispute with a Dispute**

28.56A1 Where a Related Dispute has been referred to adjudication the Client may by written notice request the adjudicator (copied to the SDS Provider and to the other party to the Related Dispute) to consolidate the Related Dispute with the Dispute with a view to allowing all questions arising out of the Dispute and the Related Dispute to be disposed of in the adjudication. Where the Client requests the adjudicator to consolidate the Dispute and Related Dispute then the Client shall (or may procure that the other party to the Related Dispute shall) as soon as practicable, and in any case within fourteen (14) of the referral of the Dispute to the adjudicator, give to the adjudicator conducting the adjudication under this Agreement and also to the other parties to the Dispute and the Related Dispute the following particulars:

28.56A1.1 a copy of the relevant Related Contract;

28.56A.1.2 a preliminary statement from the Client and/or, as the case may be, the other party to the Related Dispute setting out:

28.56A.1.2.1 the basis and the grounds for consolidation of the Related Dispute and the Dispute;

28.56A.1.2.2 the cases of the parties to the Related Dispute;

28.56A.1.2.3 any relief sought by the parties to the Related Dispute; and

28.56A.1.2.4 a list of any documents served in relation to the Related Dispute.

Any such particulars sent by the Client or the other party to the Related Dispute (as the case may be) to the adjudicator shall be sent at the same time to the SDS Provider and the other party to the Related Dispute (as the case may be)

28.56A.2 On receiving the particulars set out in Clause 28.56A.1 provided that such particulars have been received within fourteen (14) days of the referral of the Dispute to the adjudicator, the adjudicator shall if he considers that the Dispute and the Related Dispute are substantially the same or connected one to the other, immediately request that the parties to the Dispute and the other party to the Related Dispute attend a meeting with the adjudicator with a view to determining whether or not the Dispute and the Related Dispute should be consolidated. If the Adjudicator and all the relevant parties agree, they may hold a telephone conference call instead of a meeting, and in such event references in Clauses 28.56A.3 to 28.56A.5 to a meeting or to attending a meeting, shall mean a telephone conference call and taking part in such a telephone conference call.

28.56A3 The Client shall use its reasonable endeavours to procure that an authorised representative or nominee of the other party to the Related Dispute shall attend the meeting with the adjudicator referred to in Clause 28.56A.2. The Client and the SDS Provider each agree to send an authorised representative or nominee to any meeting of this kind under this Agreement or under a Related Contract, which they may be requested to attend.

28.56A4 At the meeting referred to in Clause 28.56A.2, the Party which has not requested the adjudicator to consolidate the Dispute with the Related Dispute shall, as a preliminary matter, either:

28.56A4.1 confirm to the adjudicator that it accept the proposed consolidation of the Related Dispute with the Dispute; or

28.56A4.2 inform the adjudicator that it does not accept the proposed consolidation of the Related Dispute with the Dispute.

#### **Decision to Consolidate**

28.56A5 Where Clause 28.56A4.1 applies, or if the SDS Provider's authorised representative or nominee does not attend the meeting referred to in Clause 28.56A2 above (having received due notice thereof) the adjudicator shall if he considers that the Dispute and the Related Dispute are substantially the same or connected one to the other immediately issue a decision consolidating the Dispute and the Related Dispute and shall have the authority and the power referred to in Clause 28.56A7 below.