

Current Status of Agreement

The Gyle have accepted the proposal to construct the works under licence. Works to relocate utilities outside the LOD at The Gyle commenced on 21 April 2008, with the main INFRACO works scheduled to commence in August 2008. It has now been agreed that the works will be undertaken under two licences. The first is in agreed & final form and allows for utilities works to take place outside the LOD. A letter from CEC was issued to The Gyle on 21 April 2008, confirming that the utilities licence will be signed by CEC within 3 working days. The second licence will cover the main INFRACO works. There is currently a conflict with the programming of the works on the A8 underpass, elements of which are scheduled to take place over the Christmas Shopping period. INFRACO are obliged under the Gyle Side Agreement to develop a works method statement (to be agreed with The Gyle) which seeks to avoid works causing disruption to businesses in The Gyle during the peak retail periods.

Risk to INFRACO Contract Award

BBS, tie and The Gyle will work to develop an appropriate solution to the current programme issue in advance of commencement of the INFRACO works. Although there is no material risk to the award of the INFRACO contract, the programme revision is being addressed as a priority.

5.20 Licence – West Craigs

Purpose of Document

The licence will allow the INFRACO contractor to undertake the works within West Craigs owned land prior to permanent acquisition. In agreeing to undertake this work under licence, CEC will be able to meet the terms of the existing side agreement whereby permanent land take is to be minimised. At this stage in the design process, SDS cannot define with certainty the extent of the operational land. The proposal made to West Craigs is therefore to defer permanent acquisition until this certainty is available.

The acquisition of the 'as built' operational land will eliminate the risk of not meeting the obligations of the side agreement. The existing side agreement already makes provision for a licence to undertake works.

Current Status of Agreement

The licence to undertake the works on West Craigs land was incorrectly executed by West Craigs. The engrossed document has been returned unchanged and tie has been informed that it is now signed by West Craigs and is available for CEC signature. Works to relocate the 800mm water main at Gogar Depot will commence on 28 April 2008.

Risk to INFRACO Contract Award

INFRACO works are expected to commence on the proposed licence site from January 2009. There is no risk to award of the INFRACO contract.

5.21 Network Rail – Neighbour Agreement

Purpose of Agreement

This agreement sets out the benefited and burdened property between CEC and Network Rail land. This agreement ensures that access to the railway network across tram land is maintained at specified points, and defines the various structures supporting the adjacent heavy rail property.

Current Status of the Agreement

The neighbour agreement is in agreed and final form and does not get signed per se, but rather the agreed burdened property plans are registered with The Keeper (Registers of Scotland). This will happen after the framework agreement is finalised.

Risk to INFRACO Contract Award

The Neighbour Agreement is a non-construction related document, and for this reason, it offers insignificant risk to CEC for award of the INFRACO Contract.

5.22 Network Rail – Operating Agreement

Purpose of Agreement

The purpose of the operating agreement is to set out operational interface arrangements and procedures for running tram passenger services adjacent to the railway line. This agreement will be an evolving document which will be updated periodically during the lifetime of the project.

Current Status of Agreement

A draft is current under review by tie and TEL. The intention is to develop this document into draft agreement form during the third quarter of 2008, and complete the agreement prior to commencement of passenger services.

Risk to INFRACO Contract Award

The Operating Agreement is a non-construction related document and the risk to award of INFRACO Contract is considered low.

5.23 Network Rail – Bridge Agreement & Bridge Lease

Purpose of Agreement

The purpose of the Bridge Agreement and Bridge Lease is to allow operation of the ETN and set ongoing maintenance and operational responsibilities for the Carrick Knowe and Edinburgh Park Station Bridges, as these structures interface directly with the heavy rail network. The APA governs the construction of these bridges.

Current Status of Agreement

The framework agreement sets out that NR and CEC will work together, both acting reasonably, to develop a post construction Bridge Agreement. CEC will not be exposed to future network enhancement costs in relation to bridges.

Risk to INFRACO Contract Award

The Bridge Agreement is a non-construction related document, and for this reason, it offers insignificant risk to CEC for award of the INFRACO Contract.

5.24 Telewest utility agreement

Purpose of Agreement

The purpose of the Agreement is to set out how the diversion of utilities owned by Telewest are to be managed during the MUDFA works.

Current Status of Agreement

The contract has now been signed by Telewest and is with CEC for signature.

Risk to INFRACO Contract Award

This is a MUDFA related agreement, and as a result it offers insignificant risk to CEC for award of the INFRACO Contract.

5.25 Scottish Power utility agreement

Purpose of Agreement

The purpose of the Agreement is to set out how the diversion of utilities owned by Scottish Power are to be managed during the MUDFA works.

Current Status of Agreement

The agreement has now been signed by Scottish Power and tie and is with CEC for signature.

Risk to INFRACO Contract Award

This is a MUDFA related agreement, and as a result it offers insignificant risk to CEC for award of the INFRACO Contract.

5.26 DPOFA 2007 Revision

A negotiation was concluded with Transdev to amend the DPOFA signed in 2004. The process is now complete and the principal agreed changes relate to :

- Improved performance bond underpinning both mobilisation and operating obligations
- Alignment with Infraco contract where previous drafting was based on anticipated Infraco terms
- Scope revised to reflect the Phase 1a / 1b configuration from the originally anticipated Lines 1 and 2
- Revisals to KPI performance regime based on up to date commercial view.
- Replacement of original tram revenue incentive mechanism with a reduced cost recharge, reflecting a fully integrated bus and tram system
- Alignment of insurance arrangements under OCIP
- Obtained tram cost synergy savings with introduction of TEL being responsible for transport integration

5.27 Mobilisation agreements (Infraco and Tramco)

The pre-close mobilization agreements with Infraco and Tramco are designed to enable works necessary to maintain programme. The agreements are The Advance Works and Mobilisation Contract ("AWM") and Tram Advance Works Contract ("TAW").

The core of the AWM is that Infraco will perform a schedule of works with payment determined by "Agreed Element Estimates" agreed by the parties in respect of each element of work.

The AWM does not overlap with the Infraco Contract because, when the Infraco Contract is entered into, the AWM automatically terminates. The Infraco Contract therefore deals with payment and other terms relating to advance works underway at that time. The TAW works similarly, in that it ends automatically when the Tram Supply Agreement is entered into.

(6) Land acquisition arrangements

Purpose of process

The process of assembling land required for the construction and operation of the Edinburgh Tram Network has been managed using a combination of Compulsory Purchase (using the General Vesting Declaration Procedure), and entering into long term lease arrangements with Network Rail and Edinburgh Airport Limited.

Current Status of Agreement

By financial close, the position in regard to Land available to INFRACO is as follows:

Nature Of Land	Land Area (sqm)	Available to INFRACO	Land Take Achieved	Target Date	No Plots
Pre GVD	498	Yes	0.1%	Nov-05	3
GVD 1&2	177467	Yes	21.0%	Feb-07	43
GVD 3	167854	Yes	19.9%	Jul-07	22
GVD4	43323	Yes	5.1%	Sep-07	19
GVD5	2381	Yes	0.3%	Dec-07	5
GVD6	83588	Yes	9.9%	Dec-07	17
Licences	24885	Yes	2.9%	Jan-08	14
BAA Licence	18388	Yes	2.2%	Nov-07	17
NR APA	42480	Yes	5.0%	Feb-08	37
Forth Ports (S75)	80293	Yes	9.5%	Mar-08	51
Adopted Roads	202521	Yes	24.0%	Achieved	78
	843679		100.0%	Total	306

Of the total land required, 85.5 % is under the control of CEC through ownership or license, a further 9.5% is committed under Forth Ports existing S75 agreement with the balance of 5% subject to the Network Rail APA agreement which has now been signed.

Land required but outwith Limits of Deviation

In a number of areas, land is required, mostly for temporary access, which is outwith the LoDs laid down in the Acts. These have been reviewed and can be summarised as follows : it is concluded that there is minimal risk of disruption to the programme.

Works Outside LOD Summary

Status of Land	No.	Risk of Access Problem
Within Adopted Road (Covered by Roads & Streetworks Act)	131	Nil
CEC Owned Land (Covered by CEC/tie Licence)	55	Nil
Forth Ports Land (Agreement for tram land transfer as contribution signed)	15	Nil
Covered by signed Licence or Agreement	19	Nil
Licence proposal agreed as yet unsigned *	2	Very Low
More design detail required but Low Risk	12	Low
	234	

The asterisk refers to West Craigs and The Gyle licences which are addressed in Section 5.

The residual 12 locations have been specifically addressed and it has been concluded that there is minimal risk of disruption to the programme.

(7) Governance & corporate arrangements

7.1 Governance & delegations

The Governance model deployed to oversee and control the project has evolved as the project itself has moved through different stages of development. Appendix 2 is a detailed paper which was approved by the Boards on 23rd January 2008 and which has been updated to reflect the final position as at Financial Close. The paper sets out :

- 1) the proposed governance model for the construction period ; and
- 2) the proposed levels of delegated authority

The paper is an update of previous submissions to the Boards and differs only in two material respects – the inclusion of specific levels of delegated authority and alignment with the terms of the tie and TEL Operating Agreements (see below). Neither of these factors should cause concern : the levels of delegated authority are in line with those previously deployed by the TPB and the terms of the operating agreements have been subject to significant scrutiny by senior people over recent months.

7.2 Operating agreements

These agreements are now in final agreed form.

tie

The tie agreement was previously reviewed by the tie Board in December 2007 and the changes since then are in line with the request made by the tie Board. The tie agreement supercedes the existing agreement on matters relating to the tram project and sets out tie and the Council's mutual responsibilities for delivering the tram project.

TEL

The TEL agreement reflects TEL's role but the detailed wording is consistent with the tie agreement. The TEL agreement sets out the specific authority delegated to it by the Council with acknowledgement that TEL will sub-delegate its authority to the TPB.

These internal agreements have been settled, where possible, taking account of DLA Piper's advice to tie and CEC in relation to (i) their acceptability as evidence of agency authority to transact and (ii) their potential adverse impact on the project's strategy towards competition law.

7.3 Taxation

Advice has been taken from PwC on two principle areas :

- 1) The tax effect of the Infraco contract suite structure ; and
- 2) The VAT status of the grant funding

The main objective in tax planning has been to ensure that the arrangements were VAT neutral such that there would be no irrecoverable input VAT and that no unforeseen output VAT would require to be accounted for. We have a formal report from PwC addressed to tie, CEC and TEL confirming this. We have also engaged with HMRC and have a clearance letter from them confirming that the objective is achieved. The contract structure has also been assessed by PwC to ensure that it will be possible in due course to establish a cost base in TEL by either selling or leasing system assets owned by CEC which will create corporation tax shelter in TEL. This could prove very valuable over the operating period of the integrated system.

(8) Risk assessment of in-process and provisional arrangements

This section contributed by Stewart McGarrity, who reviewed those areas of the documents which are provisional in nature and the documents which will be in draft form at Close.

THE MATERIAL IN THIS SECTION IS COMMERCIALY CONFIDENTIAL AND FOISA EXEMPT.

8.1 Overview

tie's approach to identifying and managing risks was fully explained in the Final Business Case. This section reviews the current status of the risks relating to the Infraco and Tramco contracts which have been identified as wholly or partly retained by the public sector beyond Financial Close which are:

- The process for granting of approvals and consents;
- The process for granting of permanent TRO's
- The interface with the implementation of utility diversion works
- Delays to design approvals for reasons outside the control of the Infraco
- Stakeholder instructed design changes

Specific areas covered are:

- Price certainty achieved through the Infraco and Tramco contracts with a view on items included in the contract price which will remain provisional at Financial Close
- Specific exclusions from the Infraco contract price
- Responsibility for consents and approvals

And as an area of particular concern to stakeholders:

- The risks associated with significant 3rd Party Agreements not concluded in full at Financial Close.

8.2 Price certainty achieved

The Tramco price agreed at £55m is a fixed sum in pounds sterling for the supply of trams. The overall capital costs estimate for Tramco also includes fixed sums totalling £3.0m for mobilisation costs associated with the maintenance contract and items of equipment for the depot which will be paid prior to the commencement of operations.

The Infraco price of £233.5mm comprises

- £227.0m of firm costs
- less £12.9m of Value Engineering initiatives taken into the price with the agreement of BBS but with qualifications attached
- plus £19.4m of items which remain provisional at Financial Close.

A thorough risk appraisal has been carried out on the deliverability of the Value Engineering initiatives with reference to the qualifications which attach to them. As a result a prudent allowance of £4m has been made against the possibility that for certain items these qualifications will not be removed (of which £2m has been included in the base cost estimate for Infraco and £2m has been included in the overall risk Allowance for the project).

Provisional items comprise a defined list of 22 Items each with a clear process for and programme for resolution. The estimate for each item has been reviewed by tie's technical consultants and by BBS and the risk of understatement is considered to be low. The most significant items are a £6.3m allowance for civil works, including utilities, at Picardy Place as the design for the approved layout is not yet complete. (the cost of the actual tramway, tram stop and associated works at Picardy Place are included in the firm element of the price) ; £3.1m in respect of works which may be carried out on behalf of 3rd parties (eg Forth Ports) and which are recoverable from those third parties and a £5.0m allowance for Urban Traffic Control works (traffic lights) associated with the implementation of the project.

The overall capital cost estimate for Infraco includes a further £5.0m, comprising £2.6m for maintenance mobilisation (as for Tramco), and £1m for major spare parts based upon a schedule of prices provided by Infraco and a £1.0m provision for known design changes at the Airport tram stop yet to be included in the Infraco price and £1.4m for other items for which the status or procurement method are yet to be finalised.

8.3 Infraco price basis and exclusions

The Infraco price is based upon the Employers Requirements which have been in turn subject to thorough quality assurance and the significant areas where post contract alignment of the SDS design will be required. Crucially the price includes for normal design development (through to the completion of the consents and approvals process – see below) meaning the evolution of design to construction stage and excluding changes if design principle shape form and outline specification as per the Employers Requirements. The responsibility for consents and approvals is further considered below.

Significant exclusions from the Infraco price are items not included in the Employers Requirements in respect of (responsibility for securing incremental sources of funding in brackets):

- Additional works at Picardy Place, London Road and York place (CEC)
- Additional works at Bernard Street (CEC)
- Full footway reconstruction in Leith Walk (CEC)
- Additional works in St Andrew Square outwith the tram alignment (CEC)
- Changes within the Forth Ports area (Forth Ports)
- Any other scope required by third parties not already included in the Employers Requirements by virtue of a commitment in an existing agreement

Full details of all significant such matters have been summarised and reported to CEC. In particular, the cost of tapered OLE poles in the City Centre and Waterfront areas has been provided in the fixed cost.

8.4 Responsibility for consents and approvals

As previously tie/CEC will retain the risk associated with the process of obtaining TROs and TTROs (some for TTROs post-Service Commencement which are Infraco's responsibility). Full provision has been made in the Risk Allowance for the possible costs associated with a legal challenge to the TRO process which it is not anticipated will include a formal public hearing.

As fully detailed in Appendix 1, for all other required consents and approvals (either design or construction related) the principles which apply are:

1. Infraco (including SDS) will bear any costs and programme consequences associated with design quality and constructability for all consented and/or approved design.

2. in respect of consents and approvals outstanding at Financial Close, tie/CEC will bear any incremental construction programme cost consequences of SDS failure to deliver design outputs in a timely and sufficient manner to the consenting or approving authority insofar as the cost is not recoverable by Infraco from SDS under a capped liquidated damages provision or can otherwise be mitigated by the Infraco.
3. tie/CEC will bear the incremental cost and programme consequences associated with a delay in granting consents or approval having received the required information in a timely and sufficient manner and/or the cost and programme consequences of changes to design principle shape form and outline specification (as per the Employers Requirements) required to obtain the consent or approval.

Taking due cognisance of all mitigations described in Appendix 1, the Risk Allowance (see 8.6 below) includes provisions totalling £3.3m for delays associated with outstanding design work at Financial Close in addition to a £6.7m provision for general programme delay.

To clearly delineate responsibility and therefore risk allocation the Infraco contract and associated schedules, including the SDS Novation Agreement, clearly defines in detail and in a manner agreed by Infraco, SDS and tie/CEC:

- The necessary consents and approvals already obtained at Financial Close
- The remaining consents and approvals and whether the information to obtain such rests with Infraco or SDS
- The expectations with regard to quality of information including compliance with relevant law and regulation
- The programmed dates for delivering information and obtaining the necessary consents and approvals consistent with achieving the overall programme for the project

The role of tie in this complex process is to carefully manage the programme of delivery and take mitigating action as necessary to avoid any cost or programme implications from slippage on individual items. tie also retains responsibility for obtaining specific items including obtaining NR possessions which align with the construction programme agreed with Infraco.

The Risk Allowance does not provide for the cost or programme consequences associated with a wholesale failure of this process – see QRA alignment & Risk Allowance below.

8.5 3rd Party Agreements

There are three groups of residual third party related risks :

- EAL – there is a legal matter to resolve around a future redevelopment of the Airport terminus area. This issue and some contract alignment issues are described in the DLA Report and are not anticipated to create any material risk. .
- NR – a number of mostly programme related risks arising from the NR agreements which are in the normal course of business for doing business with NR. The QRA covers for these in the general delay provision
- Forth Ports - risk that the contribution to extra construction costs of their revised design requirements as capped in their agreement proves to be insufficient to cover the costs. However, tie is comfortable that there will be no material overrun and that the underlying design is sufficiently clear to both parties that future dispute risk is minimal. In the final analysis, resort can be had to imposition of the original design to force an acceptable result.

8.6 QRA and Risk Allowance

tie's risk identification and management procedures as detailed in the FBC describe a process whereby risks associated with the project which have not been transferred to the private sector are logged in the project Risk Register. Where possible the cost of these risks is quantified by a QRA in terms of a range of possible outcomes, probability of occurrence and thereby the Risk Allowance which is included in the capital cost estimate for the project. The project Risk Register also details the "treatment plans" being followed to mitigate individual risks and thereby avoid all or part of the cost allowance.

As the Infraco and Tramco procurements have progressed tie has maintained and reviewed contractual Risk Allocation Matrices, which reflect the risks retained by the public sector arising from the contracts, and has exercised prudence in ensuring the Risk Register, QRA and therefore Risk allowance provide adequately for risks retained for the public sector including the major areas or risk assessed above.

The only material change in the Risk Allocation Matrices between Preferred Bidder stage and the position at Financial Close is in respect of the construction programme costs associated with any delay by SDS in delivery of remaining design submissions into the consents and approvals process beyond Financial Close.

The Project Control Budget at Financial Close totals £508m (Final Business Case £498m) including a risk allowance of £32m (Final Business Case £49m). This change primarily reflects the closure of procurement stage risks on Infraco and Tramco including all the risks associated with achieving price certainty and risk transfer to the private sector as has been effectively achieved in the Infraco contract as summarised above.

The risk allowance of £32m includes the following provisions for residual risks retained by the public sector during the construction phase of Infraco and Tramco.

- £8.8m in respect of specifically identified risks held by and to be managed by tie during the construction phase including adverse ground conditions, unidentified utilities and the interface with non-tram works and post close alignment of the Infraco proposals with the SDS design.
- £2m in respect of the risk that conditions attaching to the VE items taken into the Infraco price may not be removed
- £3.3m in respect of post Financial Close consents and approvals risks which provides for the cost or programme consequences of imperfections which may arise in elements of the consents and approval risk transfer as described above.
- £6.6m to provide for the cost of minor Infraco / Tramco programme slippage of up to 3 months (other than as a result of delays to MUDFA which is provided for elsewhere in the risk allowance).

tie has assessed these amounts as providing adequately for the residual risk retained by the public sector arising from the Infraco and Tramco works and the post Financial Close consents and approvals process. However the Risk Allowance does not provide for the costs of:

- Significant changes in scope from that defined in the Employers Requirements – whether such changes were to emerge from the consents and approvals process or otherwise
- Significant delays to the programme as a result of the consenting or approving authorities failing to adhere to the agreed programme (Infraco/SDS having met their own obligations) or any other tie/CEC initiated amendment to the construction programme which forms part of the Infraco contract.

All other things being equal any such changes falling into these categories would give rise to an increase in the cost estimate for Phase 1a of the project above of £508m.

8.7 Value Engineering Opportunities

As explained at 10.2 above, the Infraco price is stated after deducting VE opportunities with an aggregate value of £13.8m subject to satisfying certain conditions including the approvability certain items through the consents and approvals proves. A total of £4m have been provided against the possibility that such conditions will not be satisfied.

Value Engineering is a continuing process during construction and tie continue to seek to present value for money opportunities to save on construction and project management costs.

8.8 Alignment of QRA and Risk Allowance to DLA Letter and Risk Matrices

tie has considered the DLA Report and appended risk allocation matrices and considers that the Risk Allowance of £32m contained in the projected Control Budget at Financial Close and associated QRA adequately reflects the risks identified and the change in such risks retained by the public sector since approval of the FBC in December 2007.

The following references are to specific paragraphs/sections in the DLA letter:

5.1 Employers Requirements (ERs) – Alignment issues

There is a well understood and limited level of uncertainty with regard to the alignment of the ERs, the SDS design and the Infraco proposals (on which their price is based). The alignment work described at Section 2.3 above resulted in limited amendment to cost and risk contingencies.

5.2 Project Master Programme

The Project Master Programme which forms part of the Infraco contract is now agreed in all material respects. The QRA provides an amount of £6.6m (equivalent to 2-3 months complete delay in the programme) for general delay risk which has been assessed by tie management as adequate for the management of the programme but will not provide for any significant stakeholder initiated change beyond the point of Financial Close. The risk allowance accommodates tie's assessment of the anticipated immediate contractual variation which flows from the final integration of SDS design and construction programmes.

6.4 EAL – Option to shift tramway post 1/1/13

The capital cost of any shift in the Tramway at the airport beyond 1/1/13 would be at the expense of BAA and is not therefore a risk which should be provided for in the Phase 1a budget.

7.1 Consents – Delay on post-close consents

This is the one significant change in the risk profile retained by the public sector since December 2007. The exact nature of tie/CEC's continuing risks have been well rehearsed and are detailed in Appendix 1 as are the mitigating actions and processes tie has in place to manage these risks. A risk assessment in relation to the QRA is provided at section 8.4 above.

The total risk allowance provided in the QRA in respect of continuing Consents and Approvals Risk is £3.3m. This equates to the cost of some 3 months of BBS standing time and is considered adequate by tie management in the context of the number and criticality of consents still to be delivered, the liquidated damages available to BBS from SDS in the event the delay is caused by SDS, the responsibility of BBS to mitigate the costs of any delay and the close management of the process beyond Financial Close by tie. The risks summarised in the DLA Report are therefore accommodated in the risk and contingency allowance to an acceptable degree.

(9) Update on critical workstreams and readiness for construction

9.1 Design due diligence

The process and procedures laid out in the design management plan and design assurance process formal design reviews have been undertaken every week since September 2007 to inform and finalise the detailed design submissions. These submissions are then consolidated to form the necessary technical and prior approval packages for CEC to discharge their statutory obligations.

In parallel with the process since August 2007, BBS have had access to the detailed design submission across the range of asset for the Edinburgh Tram Network to enable Infraco's design due diligence to be undertaken. Appendix 1 sets out the status of the design process as at Financial close.

9.2 Run-time due diligence

The Infraco contractor has undertaken modelling based on the updated data provided by SDS and CAF to accept the "laws of physics" runtime as part of the finalised Employer's Requirements.

9.3 TTRO / TRO process

The process for gaining the TRO's for the project is documented in the TRO strategy produced in 2007. A major risk in this respect was removed when the Scottish Government amended the TRO Regulations to remove the need for a mandatory hearing for Tram TRO's. CEC can still elect to hold a hearing if they consider the level of objection to any particular TRO merits such action.

Completion of the TRO's is now driven entirely by design and modelling works being undertaken by SDS and JRC and managed closely by tie. The programme identifies the Orders being made in early 2010 which is in line with the overall construction programme.

9.4 MUDFA including interface with INFRACO programme

The Multi Utilities Diversion Framework Agreement [MUDFA] is currently being progressed to Programme Revision 06 as agreed in November 2007.

This programme has been utilised to integrate with the INFRACO programme and is identified as a constraint in a number of construction items. This has been reflected in the INFRACO Construction Programme with the agreement of BBS and other principal stakeholders as part of the sign up to overall construction methodology. Specific elements of diversions have been transferred to INFRACO where it is required by construction sequencing for the final utilities works.

It is expected that, despite detailed subdivision of works to facilitate BT cabling and commissioning, there will remain some overlapping of work sections as INFRACO commences. It is likely to be restricted to section 1C and 1B and can be managed with INFRACO, BT, AMIS and tie.

Overall progress on the utilities works has been good in terms of adherence to budget (with no contingency drawdown to date) and to programme. In addition, the public communications process has worked well although it is fully acknowledged that there is a long way to go.

9.5 Management team and Handover

The Tram Project Team to manage the construction phase of the project has now been designed and is substantially populated. Interim arrangements are in place for all key posts where a permanent appointment is awaited. Handover arrangements and detailed documentation of the final contract terms are underway and key procurement phase staff are contracted to remain until this handover is successfully completed.

The Infraco Director and team have commenced detailed works from February 2008 and are already managing and monitoring the Mobilisation Agreements with BBS and CAF. In addition, 3rd party facilitation arrangements have been commissioned to accelerate the forming of effective working relationships between BBS and tie.

9.6 Safety

Safety management systems are in place. The governance paper at Appendix 3 sets out the overall approach being taken by tie in collaboration with the contractors and stakeholders. Safety management will be under the specific oversight of a tie Board committee chaired by one of the tie non-executive directors who is an experienced industry professional.

9.7 Commercial Management

tie have appointed their post-contract award Commercial Director, who commenced work on 7 January 2008. He is currently progressing the remaining recruitment to ensure a competent, fully populated commercial team is in place to manage the INFRACO contract (including novated contracts for SDS & TRAMCO) immediately on Financial Close. Updated commercial processes and procedures have also been established.

9.8 Insurance

The project insurance arrangements have been in place for some time under the Owner Controlled Insurance Programme (OCIP) implemented with advice and direction from Heath Lambert. The programme has also been subject to evaluation by the Infraco consortium.

9.9 Risk Management

tie's risk identification and management procedures as detailed in the FBC describe a process whereby risks associated with the project which have not been transferred to the private sector are logged in the project Risk Register. Where possible the cost of these risks is quantified by a QRA in terms of a range of possible outcomes, probability of occurrence and thereby the Risk Allowance which is included in the capital cost estimate for the project.

The project Risk Register also details the "treatment plans" being followed to mitigate individual risks and thereby avoid all or part of the cost allowance. There is an agreed risk management procedure currently in operation to manage and treat risks which is owned by tie's risk manager and subject to detailed scrutiny each period with the individual project managers at the period Project Director's Review.

tie and CEC have also agreed an interface to the project where a filter and review is applied to any risks raised by CEC which may be considered relevant as a project risk and requiring a necessary treatment plan.

tie are focused on managing the delivery risks and associated treatment and mitigation plans to avoid or minimise any cost, quality or programme implications.

(10) Specific confirmations

On the basis of the content of this report, the DLA Report and supporting documentation, it is considered that :

- The Infraco Contract Suite is in terms acceptable for commitment ; and in particular
 - The Tramco Novation Agreement is in terms acceptable for commitment
 - The SDS Novation Agreement is in terms acceptable for commitment
- The CEC Financial Guarantee is in terms acceptable for commitment and is aligned in all material respects with the Infraco Contract Suite
- The tie Operating Agreement is in terms acceptable for commitment
- The TEL Operating Agreement is in terms acceptable for commitment

Background

Negotiations have taken place over a lengthy period of time with the objective of defining a process and set of contractual terms which will enable tie and CEC to manage the risks arising from the overlapping design and construction periods. This problem was not anticipated when the SDS contract was concluded in 2005. The recent discussions have taken place under the umbrella of the SDS Novation Agreement, but it is important to distinguish two groups of issues:

Cost certainty : The primary objective of the novation approach was to ensure that design work could commence long before commitment to the construction contract suite generating maximum construction price certainty and transferring design risk to the construction partner.

Outstanding design risk : SDS have resisted accepting liability to BBS for the timeliness of submission and approval of design packages after Financial Close. Their concern is that the risk is different from (and incremental to) the underlying risk arising from the quality of their work. A delay, they argue, could result in hefty exposure because of the linkage to construction programme delay. SDS did not anticipate this risk when committing to their contract - the expectation was that the majority of design scope and certainly all approvals would be complete prior to Financial Close.

The packages which have been delivered to BBS, with the requisite approvals, by Financial Close (“Approved Packages”) are subject to the Novation terms, which inter alia result in BBS accepting the design quality risk, with resort to SDS in the event of failure under the terms of the existing SDS agreement. The exposure to SDS could be potentially onerous, but was accepted when they entered into the existing contract and is not currently contentious.

This means that the primary objective above of cost certainty and risk transfer has been achieved relative to Approved Packages.

The problem relates to design packages which as at Financial Close are either :

- Submitted for Prior / Technical Approval but not yet approved (“Submitted Packages”) ; or
- Work in progress and not yet submitted (“Outstanding Packages”).

The rest of this paper provides an analysis of the residual risk to tie / CEC arising from these two groups of design packages. The paper does not address so-called “tie Consents” – TROs, TTROs and consents relating to statutory authority to implement the scheme - which have been accepted as out with the responsibility of SDS and BBS, except that BBS (and through them SDS) have an agreed contractual responsibility to assist in the process.

Risk overview

The risks which arise from the overlap of design and construction periods are summarised below :

- A. The Submitted packages are not of requisite standard, preventing CEC from providing consent timeously and creating delay to the construction programme.
- B. The Submitted packages are of requisite standard, but CEC fail to provide consent timeously, creating delay to the construction programme.
- C. SDS fail to provide the Outstanding packages on a timely basis relative to the agreed programme, preventing CEC from providing consent timeously and creating delay to the construction programme.
- D. SDS fail to provide the Outstanding packages to the requisite standard, requiring rework and delay, preventing CEC from providing consent timeously and creating delay to the construction programme.
- E. CEC provide consents and approvals timeously, but SDS then fails to provide IFC ("Issued For Construction") drawings to BBS timeously creating delay to the construction programme.
- F. SDS provide the Outstanding packages on time and to the requisite standard, but CEC fail to provide consent timeously, creating delay to the construction programme.

It is not anticipated that the final Outstanding Packages will be delivered until Autumn 2008. The option of delaying Financial Close to eliminate the risk is therefore unattractive.

SDS has resisted accepting any liability in the event of any of these scenarios. Since the point of investing in a procurement of a design appointment in Autumn 2005 was to secure a completed approvals process with an advanced network design development, there was no allowance for the implications of a coincident design and construction process in the existing SDS agreement. Accordingly, tie / CEC's leverage over SDS on the issue is limited.

BBS have similarly resisted accepting any liability for the consequences of delay arising from the Submitted or Outstanding packages. Their position was reserved (as was Tramlines' position) at preferred bidder, pending due diligence on SDS, as they were aware of the issue at the Preferred Bidder stage, but again we have only limited sanction over them.

There has been no sustained attempt by BBS to sidestep the transfer of design quality risk once the Submitted and Outstanding packages are eventually signed over to them with consent. In fact they have now explicitly accepted the design quality risk as part of the Agreement made on Friday 7 March for Contract Price adjustment. Accordingly, the remaining risk is focussed on construction programme delay as a result of late delivery of design and hence IFC drawings impacting construction.

Resolving this issue has been made more difficult because of concern built up over a long period about the quality and timeliness of SDS's work on the part of tie, CEC and BBS.

There is also a concern that performance against the agreed submission programme could be obfuscated with the intent (or at least result) that design packages fall outwith BBS / SDS responsibility because of claimed failure by CEC. This could happen in four ways:

1. Confusion about submission date if a package is returned by CEC for quality improvement
2. Swamping CEC with a high volume of design packages which cannot be processed within the 8-week period
3. BBS and SDS by some means acting in concert to subvert the process
4. Lack of clarity about the quality of submissions

In summary therefore, tie / CEC are exposed to risks relating to timeliness of submission and / or quality. The risk could be heightened by deliberate or inadvertent actions by BBS / SDS. The next section describes the primary means by which these risks can be contained, through an effective management process controlled by tie / CEC.

Development of the design submission and approval management process

Recent process improvements

The process of managing SDS has not been smooth. The performance of SDS has been consistently disappointing on a number of levels and it is fair to say that weaknesses have also existed in execution by tie and CEC.

More recently, building on the existing Tram and Roads Design Working Groups, a number of important initiatives have been implemented to improve all-round performance. These have together improved both the rate of design production and the quality of those designs.

(1) Co-location of staff

The co-location of tie, CEC and SDS staff in Citypoint shortened lines of communication and promoted a healthy working relationship that has led to quicker resolution of issues. This has been strengthened further by location of SDS approvals team in Citypoint.

(2) Improved contract management arrangements

tie has increased the number and calibre of resource devoted to managing the design contract, strengthening both its capability to deal with engineering issues and to manage the overall relationship including commercial management and issues resolution.

(3) Focus on resolution of outstanding design issues

By instituting the weekly critical issues meeting with attendance from tie, CEC and SDS aimed at clearing critical issues so that they did not hold up design production, tie brought together the relevant individuals, assigned clear responsibility for securing resolution and monitored progress. In recent weeks that has resolved almost all issues that are holding up SDS design and allowed a number of designs that were almost complete to take the critical final step to full completion and submission for approval. This has now evolved to weekly meetings chaired by the tie Executive Chairman to ensure rapid resolution as design progresses to and through the approval process.

(4) Closing out third party agreements

Many of the outstanding design issues involved reaching final agreement with third parties. Although steady progress had been made with many third parties a small number of third party negotiations were not moving to a satisfactory conclusion. tie devoted additional resources to closing out these issues and worked closely with CEC and SDS to ensure final agreements were reached.

Documentation of process and execution

The management process is captured in the Design Management Plan (“DMP”) This, along with the review procedure forms Schedule 14 of the Infraco Contract. In recent months, SDS has had much greater clarity over the reasonable expectations of the approvals bodies. All of SDS’s design packages are clearly defined. A programme has been agreed for the submission of each and the quality of information to be provided with the submissions has been defined. In this context, “quality” relates to an objective assessment of the fitness for purpose of the package, not a subjective assessment of the aesthetic character of the content. A well-defined process of informal consultation prior to submission with relevant CEC people is in effective operation. Once submitted, CEC have an agreed period of 8 weeks to deliver Prior and / or Technical Approval as necessary (“consent”) for each package.

Following novation of SDS to Infraco at Financial Close, tie will continue to use the DMP, working with CEC and InfraCo, to manage the design and consent process and maintain the improved performance in design production and approval. The DMP has been updated to incorporate the role of Infraco in managing SDS following novation but the key principles and initiatives remain in place. This process will be applied to complete the consent process for Submitted and Outstanding Packages as defined above.

Arrangements have been agreed with BBS, SDS and CEC to ensure that all key individuals and constituencies are working very closely together.

CEC’s involvement in the daily meeting ensures that there is timely and effective feedback from the approval body of progress with Submitted Packages. It also allows CEC to raise any issues that need to be resolved before a submission can be made.

Whilst some of the Outstanding Packages lie on the critical path for construction, many do not. This means that there is still some flexibility in the agreed approvals programme. Management of that flexibility lies with tie and CEC and BBS/SDS can only take advantage of the flexibility with tie’s consent.

There will be some changes to the design that SDS submits/has already submitted. Mainly these are necessary refinement of the detail of items where the detailed design will be completed by BBS and these have been allowed for within the programme. Where BBS is proposing an alternative design to that already submitted by SDS, BBS will be responsible for securing approval of that alternative design. In these cases BBS will draw on the experience of SDS to manage that consultation and approval programme.

Contractual underpinning

The contractual terms which capture these arrangements reflect:

- The contractual responsibility for managing SDS design and development work supporting Submitted and Outstanding Packages sits with BBS;
- BBS are contractually obliged to follow the regime under the Review Process and Design Management Plan, as are SDS;
- SDS agree to liquidated damages to be applied by Infraco regarding late or deficient submissions to CEC;
- Contractual clarity as to primary responsibility for categories of Consents

- Excusable delay in failure to obtain CEC Consent entails evidence of full compliance by SDS/BBS with agreed regime: timing, sequence, quality, notification;
- The absolute nature of SDS contractual responsibility to obtain all Consents has been adjusted to reduce tension surrounding interface with CEC;
- The risk of prolongation cost as a result of SDS failings in terms of causing delay (through not obtaining Consent) is to be taken by tie.
- the risk to programme (and generally) of SDS consented design containing a quality deficiency is ultimately taken by SDS and, in the first instance, by BBS. BBS have now explicitly accepted this as part of the Contract Price. tie will hold a collateral warranty from SDS.

Finally and critically, the overall programme for consents is not only embedded in the SDS Novation agreement to which SDS and BBS are parties, but the programme has been interfaced in detail with the construction programme.

In summary, there is confidence among the tie and CEC managers involved that the management process can be executed rigorously after Financial Close.

Focussed risk analysis

In addition to executing effective management control across all design packages, it is useful to identify those packages which carry the greatest risk. This facilitates prioritisation and mitigation action and also creates a clearer view of the residual risk arising from the overlapping design consent and construction programmes.

On 15th February 2008, CEC and tie jointly reviewed the status and risk profile of every Submitted and Outstanding Package relating to Phase 1a, allowing for anticipated progress to Financial Close. The review has been updated through the period to Financial Close, allowing a fresh assessment of risk at both point of Notification of Award and at Financial Close.

The best estimate of progress by end-April will be that 8 Prior Approvals and 7 Technical approvals will have been achieved, making a total of 15 Approved Packages.

The review of the Submitted and Outstanding Packages assessed for each design package seeking Prior and / or Technical Approval :

1. The risk arising from the criticality of the package relative to the construction programme ; and
2. The risk arising from the quality and complexity of the package, which could affect timely consent

A graduated risk measurement was applied to each package for each of the two risk criteria : those packages which were required for the earliest stages of the construction programme having a higher risk rating than those required for later stages ; and more complex or sensitive packages or those with known quality issues were given a higher risk rating than those of a simpler character. The two risk ratings were multiplied together to give a risk rating tabulation across the whole population of Submitted and Outstanding Packages. The tabulation was then stratified into Critical, High, Medium and Low categories based on the risk ratings.

The people who contributed to this process and who have confirmed they are comfortable that the results are properly presented were Susan Clark (tie Programme Director), Andy Conway (CEC Tram Coordinator), Damian Sharp (tie Design Project Manager i/c of the SDS design and approval process), Tom Hickman (tie Programme Manager) and Mark Hamill (tie Risk Manager).

87 individual packages were reviewed, of which 82 were assessed as medium or low risk. The remaining 5 packages in each category were :

<u>Submitted Packages</u>	<u>Critical</u>	<u>High</u>
Prior Approval	0	0
Technical Approval	0	0
<u>Outstanding Packages</u>	<u>Critical</u>	<u>High</u>
Prior Approval	1	2
Technical Approval	1	1

Appendix 1 lists these Critical and High risk packages with a brief summary of their risk profile and the mitigating factors which can be deployed to manage the risk

A report is available which provides a detailed breakdown of the entire population of 87 packages.

For each package, the issue is well understood and mitigation plans have been identified to ensure that the risk is being managed on an ongoing basis. Appendix 1 contains full details of these.

In overall terms, the limited number of Critical / High risk packages is no surprise given the short anticipated time to finalise the consent process relative to the overall construction programme and the extent of work done to date to meet the needs of the approval authority.

Third party approval risk

In addition to approvals by CEC a number of the Submitted and Outstanding Packages also require approval by third parties. The most frequent and significant third party approval body is Network Rail. There has been substantial informal consultation with Network Rail throughout the development of the design and Network Rail has expressed satisfaction with many of the designs in principle. Network Rail has agreed to review Submitted Packages for technical approval in parallel with the CEC consideration of those packages. This means that Network Rail will be in a position to confirm approval very soon after CEC approval is granted. This is a significant concession by Network Rail and reflects their confidence in the design following the consultation to date.

The other significant third party in this context is BAA. Within the EAL Licence, Schedule 3 allows EAL to review tram works data – primarily design & construction related method statements. There is a 30 day review period, and EAL could object to this data, but only on the basis of adverse impact on airport operations or safety. There is also a DRP set out in the licence if an agreed position on design change (both acting reasonably) cannot be resolved.

We are taking EAL through the design and the MUDFA works in a scheduled process of meetings (held 4 weekly, but also in the case of MUDFA, more regularly), there is nothing to suggest that the risk of designs not being accepted is low.

Forth Ports is another player, but the agreement scheduled to be signed with them, and the generally constructive working relationship on these issues, creates a good level of comfort.

No serious issues are anticipated with the other third parties, with whom the approval process is fairly commonplace. Overall, it is considered that the third party arrangements create no material risk to the construction programme.

Higher-level mitigations

In addition to the mitigation arising from control of the well-defined management and approval process and the limited number of Critical / High risk locations, there are a number of higher-level mitigations which are relevant to the overall evaluation.

SDS Liability

In relation to the Submitted and Approved Packages, one contractual feature of importance in assessing the overall risk is the reward / penalty mechanisms to be applied to keep the design process on track after Financial Close. These mechanisms relate to what can reasonably be defined as SDS's performance. SDS will however accept no liability arising from CEC delay (risks B and F above). The effect of these arrangements has been incorporated into the assessment of risk contingency described below.

A general legal protection exists whereby SDS is exposed to claims from BBS following novation for "culpable failure" which could supersede the cap.

Funding support

Any uncapped exposure will carry no financial protection to tie / CEC. However, should this result in increased project cost, assuming legitimately incurred, the terms of the grant funding from Transport Scotland mean that the cost will be substantially covered by grant, to the extent that there remains headroom beneath the aggregate funding of £545m. It must be borne in mind that this factor cushions risk to tie / CEC but not to the project as a whole.

Existing risk contingency

The project cost contains risk contingency amounting to £3.3m linked to the consent risks described in this paper.

Conclusion

The overlap of continuing design and approval processes with the construction programme has created a risk. Experience in the early years of managing the design and approval process was not happy, but recent initiatives have successfully developed a well-defined and effective management process, led and directed by tie / CEC. This management process will continue following Financial Close with minimum risk of interference.

A thorough risk-focussed review of the consents has been performed by competent people from tie and CEC. This has concluded that the residual risk is contained in a small number of design packages. These have been the subject of prioritisation to mitigate their risk profile.

The combination of controlling the management process and focus on the key elements of the residual risk, constitute an effective risk mitigation framework. There are other higher-level mitigations which provide further help, notably the funding arrangements and the existence of a risk contingency in the project budget.

It is the view of the tie and CEC project team that these factors can be relied upon to manage the exposure successfully.

Prior & Technical Approvals

APPENDIX 1

Critical Risks >21	Description	Risk	Issue	Mitigations
Technical Outstanding	A8 underpass	25	Underpass – sewer conflict	Technical solution now agreed and requires sewer to be diverted
Prior Outstanding	Haymarket	25	Prior approval for this batch has been problematic	Revised submission to be made on 30/04 and CEC will aim to approve as soon as possible
High Risks 11 - 20		Risk	Issue	Mitigations
Technical Outstanding	Section 6 Drainage	15	VE solution changes design	SDS are reducing the time taken to make final comments on board and complete IFC drawings
Prior Outstanding	Russell Road Bridge	20		CEC will provide prior approval in time for piling works to commence
Prior Outstanding	Murrayfield Stadium batch	15	Batch has been on hold pending decision on Roseburn Viaduct	Batch now taken off hold. CEC advised that revised Roseburn viaduct solution will be re-submitted.

Paper to : tie Board, Tram Project Board, TEL Board, CEC
 Subject : Project Governance after Financial Close
 Date : UPDATED 7th April 2008

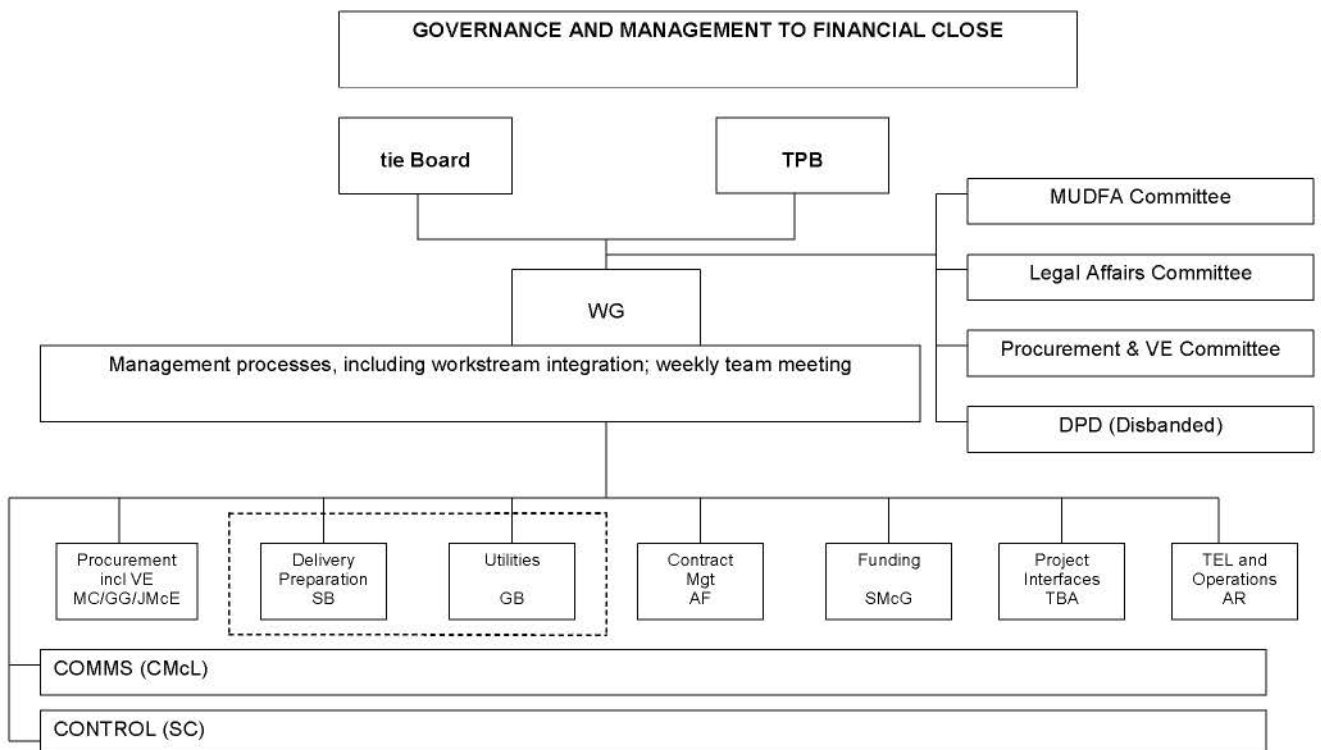
THIS PAPER SUMMARISES THE PROPOSED GOVERNANCE AND MANAGEMENT MODEL AS IT STANDS AT 7th APRIL 2008. THE AREAS WHICH HAVE NOW BEEN UPDATED INCLUDE FINALISATION OF OPERATING AGREEMENTS AND THE DELEGATED AUTHORITY WHICH FLOWS FROM THOSE AGREEMENTS. THIS PAPER IS THE FINAL FORM SUPPORTING FINANCIAL CLOSE

**Edinburgh’s integrated transport system
 Project governance for the construction period**

(1) Governance and management model in period to financial close

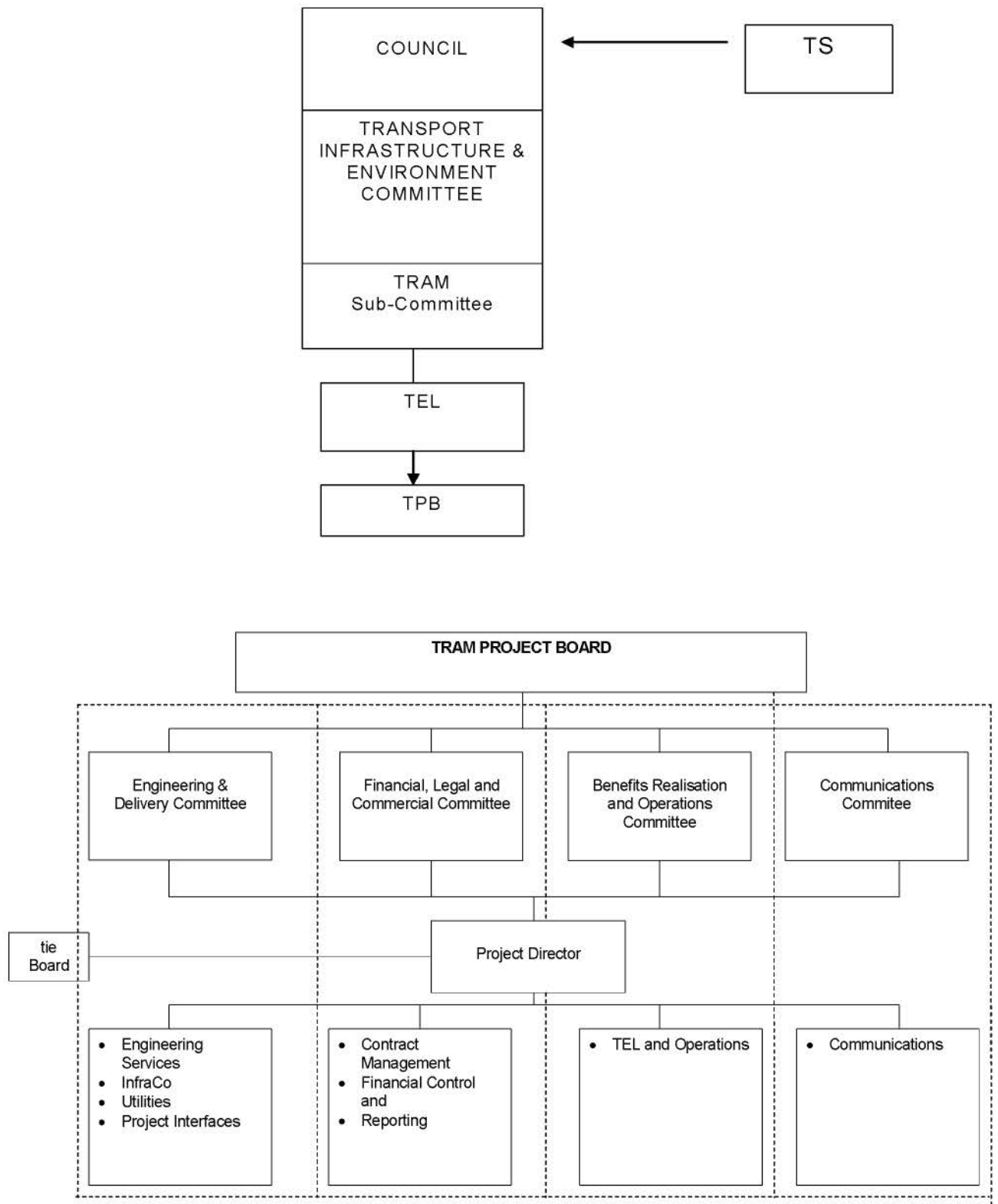
The recipients of this paper approved a governance and project management model for the period to Financial Close prior to the Council’s meeting on 25 October 2007. The purpose of this paper is to present the proposed model for the period from Financial Close to operational commencement, planned for Q2 2011. The proposed model is very similar to the outline presented in October but this paper is drafted to be independent of previous submissions.

The current model is set out in the following diagram, including the project workstream structure under the TPD.



(2) Governance and management model in construction period

The diagram below sets out the proposed governance model for the construction period .



The roles & responsibilities of the entities within the new governance and management model are summarised below.

Transport Scotland (TS)

TS exercise their oversight of the project through 4-weekly reporting in prescribed format and a 4-weekly meeting with the City of Edinburgh Council (CEC).

The principal contractual relationship between TS and CEC is the Grant Award Letter which sets out the terms on which TS will provide the balance of the £500m grant. This contains detailed reporting and certification requirements appropriate to the conduct and scale of the project..

CEC

CEC have established a "Tram sub-Committee" of the existing Transport, Infrastructure and Environment Committee. The sub-Committee is chaired by the Executive Member for Transport with a 6-8 weekly meeting cycle. The purpose of the sub-Committee is to review and oversee decisions with respect to the project. This will include addressing matters directly affecting the Council and providing assurance that matters which cross Council departmental boundaries are managed cohesively (for example, responsibilities for roads & traffic management and budgets).

CEC have prepared Operating Agreements between the Council and respectively tie Limited and Transport Edinburgh Limited (TEL) to codify the arrangements between the entities and the responsibilities of the two subsidiaries. The signing of the Operating Agreements creates the authority for tie and TEL to execute their responsibilities.

The Council Report approved on 20 December 2007 indicated that some issues will require to be referred to Council including the approval of the annual business plans for tie and TEL respectively and significant changes to Council obligations including material changes to scope and cost within the Tram Project, will also be reserved to Council. Full Council will also require to ratify settlement of any claims greater than £500k or £1million in a 12 month period. The precise definition of the delegated interface between the full Council and its committees is a matter for the Council.

The Operating Agreements also specify certain matters which require the approval of a Council Monitoring Officer. The Monitoring Officer will be the same individual with respect to both tie and TEL and will also be a member of the TPB, in order to ensure that the governance structure is clear and singular.

TEL

The TEL Board is focussed on its overall responsibility to deliver an integrated tram and bus network for Edinburgh, on behalf of CEC. The Board is responsible for compliance with its Operating Agreement and it will also address any matters outwith the direct arena of Integrated Bus and Tram systems and any statutory TEL considerations.

The TEL Board comprises an independent non-executive Chairman, independent non-executive directors, Elected Members and Executive management. There is appropriate common membership across the TEL, tie and LB Boards to ensure consistency of approach.

The following matters will be a matter for the TEL Board to determine :

All matters affecting the programme, cost and scope of the Project except the following which are matters reserved to the Council:

- (A) (i) any actual or reasonably expected delay to the Project programme of greater than 3 months; or (ii) any increased cost of over £10m; relative respectively to the programme leading to commencement of revenue service by 31 July 2011 and capital cost of £508m (Phase 1Aa) or £87m (Phase 1Bb) as set out in the Final Business Case or as subsequently approved by the Council prior to commitment by tie to the Infraco Contract ; or (iii) notwithstanding the terms of (i) and (ii) above, any projected or actual overspend of the available funding budget (being £545 million) at any time (whether on an annual or overall basis); or (iv) any substantial change to the design, scope or service pattern set out in the Final Business Case; and
- (B) the settlement of any single claim in excess of £500,000, or series of claims in any 12 month period which would exceed in aggregate £1,000,000;

TEL may delegate responsibility for all matters other than those specified at A and B above to the TPB and the TPB may in turn delegate responsibility for all other matters to tie, but only to the extent that such delegation is already within the remit of tie in the context of the tie Operating Agreement. TEL agrees that it shall retain ultimate responsibility for all matters it so delegates.

The Council's majority shareholding in Lothian Buses (LB) will be transferred to TEL and parallel changes to the composition of the Lothian Buses Board will be effected in due course.

Tram Project Board (TPB) and its sub-Committees

The TPB maintains its role as the pivotal oversight body in the governance structure. The TPB is established as a formal sub-Committee of the TEL Board with full delegated authority to execute the project in line with the proposed remit set out in Appendix 1. In summary, the TPB has full delegated authority to take the actions needed to deliver the project to the agreed standards of cost, programme and quality within the authority delegated to the TEL Board.

The suggested membership of the TPB is 7 people (Office of Government Commerce constituency definitions "highlighted"):

- Chair (David Mackay)
- Senior CEC Representatives - "Senior User Representatives" (Donald McGougan and Andrew Holmes)
- TEL CEO and Project "Senior Responsible Owner" (Neil Renilson)
- "Senior Supplier" representatives (tie Executive Chairman and TEL Operations Director) (Willie Gallagher and Bill Campbell)
- Executive Member for Transport (Phil Wheeler)

The Chair will continue to be the TEL Non-executive Chairman, rather than the Project SRO. Other parties, principally senior project management and advisers, will be called to attend as required, though it is anticipated that a common group of senior project directors will attend

The remit and delegated authority given by TEL to the TPB, and by the TPB to the SRO and Tram Project Director (TPD) are set out in Appendix 1. The TPD will formalise delegated authority downwards to senior members of the delivery team.

tie Limited

tie's role is to deliver the tram network fit for operational purpose, on time and budget. For the foreseeable future, tie will have only one major project, the tram. It will maintain roles with certain smaller projects and will require to comply with normal statutory responsibilities as a limited company, including formal compliance with its Operating Agreement.

The tie Board presently comprises a group of independent non-executive directors and Elected Members under the Executive Chairman. The Elected Members will be the same on each of the TEL and tie Boards to ensure consistency of view across delivery of the system and operations. The independent non-executive members will also provide experienced participation in the TPB's sub-committee deliberations, as explained below.

In overall terms, the composition of the tie Board will be maintained in its present form. The Board will maintain its Audit and Remuneration committees, membership of which are restricted to the NXDs. In addition, a new tie Board sub-Committee will be established to address Health & Safety, chaired by an experienced NXD.

In its role on the tram project, tie provides services to the TPB. The tie Operating Agreement provides tie with the legal authority to enter into all competent contracts to deliver the tram system. The tie Board will delegate authority to its Executive Chairman to execute its contractual responsibilities for the tram project. The Tram Project Director (a tie employee) is given delegated authority by the tie Executive Chairman to manage and deliver the project. The authority given to the TPD in his role as a tie employee is synchronised with the authority delegated to him by the TPB. This ensures that the TPD leads the project delivery under delegated authority from his employer (tie) and from the project client (TEL through the TPB) which is consistently defined.

Further changes to the composition of the TEL, tie and LB Boards will be effected as is deemed necessary over the period ahead. In particular, in the event that tie assumes responsibility for additional major projects in the future, the Board composition may need to be addressed. All such changes will require the formal approval of the Council.

In summary, the roles of the parties are :

CEC

- To be responsible for the creation of a financially viable integrated bus and tram system in line with the approved Business Case ;
- Compliance with the terms of the Grant Award Letter

TEL

- Under authority delegated by its parent CEC, to prepare for the operation of the integrated tram and bus network, including oversight of the delivery of the tram infrastructure executed through its sub-Committee, the TPB ;
- Compliance with the CEC / TEL Operating Agreement ;
- Statutory responsibilities including Board membership, statutory reporting, maintenance of books of account and statutory records ;
- Matters relating to TEL employees including Health & Safety

TPB

- Prepare for the operation of the integrated tram and bus network, including oversight of the delivery of the tram infrastructure, conducted directly or through scrutiny by sub-committees of the TPB of specific activities within the project

tie

- Management of the delivery of the tram infrastructure including management of the contracts written with third parties to achieve delivery of the tram network fit for operational purpose, on time and budget
- Compliance with the CEC / tie Operating Agreement ;
- Statutory responsibilities including Board membership, statutory reporting, maintenance of books of account and statutory records ;
- Matters relating to tie employees including Health & Safety

TS

- To provide grant funding in line with the terms of the Grant Award Letter

(3) Practical operation of the governance model

It is recognised that there is inevitable duplication between the scrutiny by the tie Board of its Executive activities and the oversight role performed by TEL and the TPB. However, this situation is normal, if tie's role of providing a service to its client, in this case TEL, is borne in mind.

It is suggested that the tie and TEL Boards will meet every second period on a period-about basis. The frequency of TEL Board meetings is expected to increase as operational commencement approaches. The TPB and its sub-committees will operate on a 4-weekly cycle, linked to the 4-weekly report to TS. The means by which the Project Director arranges day to day management of the project is not reflected in this paper but will also follow the 4-weekly cycle and will respond to the reporting requirements of the tie and TEL Boards.

The outstanding matters required to finalise the calendar following Financial Close are :

- Dates for proposed CEC Tram sub-committee meeting
- Dates for 4-weekly TS / CEC meetings

The current TPB sub-Committee structure will be dissolved and the new sub-Committee structure will comprise :

Engineering & Delivery Committee (E&D)

- Delivery under contracts - Infraco, Tramco, Utilities / MUDFA, design,
- Health & Safety, Quality & Environment
- Improvement initiatives – VE, Innovation, ICT
- Project interfaces & approvals – Land & Property, Traffic, third parties

Financial, Commercial & Legal Committee (FCL)

- Financial management – reporting, control, audit, risk management, insurance
- Contract management – reporting, compliance, interface with delivery, claims & variations

Benefits Realisation & Operations Committee (BRO)

- Operational & integration planning
- O&M contract planning
- Transdev
- Marketing

Communications Committee

- Comms management – utilities / MUDFA, Construction, Media, stakeholders

It is anticipated that the BRO and Communications committees will not meet for the early period of construction in the absence of any material issues arising which require separate scrutiny. The TPB will deal directly with any relevant matters under these headings for the foreseeable future.

In order to create close cohesiveness between the TPB / sub-Committee governance model and the project management structure, the sub-Committees will be directly interfaced with the Project workstreams and the individual directors responsible. Appendix 2 sets out the interfaces which effectively constitute the remits for these committees.

To further reinforce cohesion, the tie Executive Chairman will Chair each of the sub-Committees. The attendance of senior project and client officers, and the clear responsibilities allocated to individual Project Directors, will ensure that appropriate independence and challenge is achieved. As currently, the sub-Committees will have clear remits and will focus on detailed interrogation of key issues, leading to recommendations to the TPB which retains decision-making authority over all key areas.

(4) Health & Safety

A detailed analysis of the means by which H&S responsibilities are discharged is set out in Appendix 2. In summary, H&S is clearly of paramount importance both currently and in the construction phase of the Project. CDM 2007 will be a key focus and will be given appropriate prioritisation by all parties at all levels. The application of legal H&S responsibilities in the context of the governance and management of a large, complex project requires very careful analysis.

The detailed definition, allocation and communication of responsibilities will be executed as part of the readiness process in advance of construction commencement.

(5) Approvals requested from recipients of this document – tie Board, TPB, TEL Board and CEC in appropriate sessions

The following approvals have been completed :

1. Approval of the proposed governance model for the period from financial close to operational commencement.
2. Approval of the tie and TEL Operating Agreements and all related delegated authorities
3. Confirmation of the proposed members and participants in the governance bodies
4. Confirmation of the proposed meeting cycle
5. Approval of the proposed H&S regime.

GB
07.04.08

Appendix 1 to Governance Paper - Tram Project Board (“TPB”) Remit

TPB has delegated responsibility for the delivery of an integrated Edinburgh Tram and Bus Network on behalf of TEL and CEC, in particular :

1. To oversee the execution of all matters relevant to the delivery of an integrated Edinburgh Tram and Bus Network, with the following delegations :
 - a. Changes above the following thresholds
 - i. Delays to key milestones of > 1 month
 - ii. Increases in capital cost of > £1m
 - iii. Adversely affects annual operational surplus by >£100k
 - iv. is (or is likely to) materially affect economic viability, measured by BCR impact of > 0.1
 - b. Changes to project design which significantly and adversely affect prospective service quality, physical presentation or have material impact on other aspects of activity in the city
 - c. Delegate authority for execution of changes to TEL CEO (the Project SRO) with a cumulative impact as follows:
 - i. Delays to key milestones of up to 1 month
 - ii. Increases in capital cost of up to £1m
 - iii. Adversely affects annual operational surplus by <£100k pa
 - iv. is (or is likely to) materially affect economic viability, measured by BCR impact of <0.1

[Note: these are cumulative impacts since the last position approved by the TPB.]

The TEL CEO will delegate similar authority to the Tram Project Director.

These levels of authority apply to all matters affecting the programme, cost and scope of the Project except the following which are matters reserved to the Council:

- (A) (i) any actual or reasonably expected delay to the Project programme of greater than 3 months; or (ii) any increased cost of over £10m; relative respectively to the programme leading to commencement of revenue service by 31 July 2011 and capital cost of £508m (Phase 1Aa) or £87m (Phase 1Bb) as set out in the Final Business Case or as subsequently approved by the Council prior to commitment by tie to the Infraco contract ; or (iii) notwithstanding the terms of (i) and (ii) above, any projected or actual overspend of the available funding budget (being £545 million) at any time (whether on an annual or overall basis); or (iv) any substantial change to the design, scope or service pattern set out in the Final Business Case; and
- (B) the settlement of any single claim in excess of £500,000, or series of claims in any 12 month period which would exceed in aggregate £1,000,000;

All matters which fall to the determination of the TPB will be reported to the TEL Board on a comprehensive and timely basis.

Matters which do not fall within the TPB and TEL Board’s delegated authority levels described above will require determination by the Tram Sub-Committee of the Council.

2. To appoint the Senior Responsible Owner (SRO) and Tram Project Director (TPD) for the project and to receive reports from the SRO and TPD on project progress
3. To receive reports from sub-committees established to oversee specific areas, as approved by the TPB

4. To ensure project workstreams are executed according to robust programmes under the leadership of Project Director.
5. To approve the submission of funding requests and to recommend approval of funding terms to the TEL Board. TPB will also confirm to CEC compliance with all relevant aspects of the grant award letter.
6. To ensure proper reporting through the TPB Chairman to the TEL Board and to CEC (as appropriate) of decisions made.

Appendix 2 to Governance Paper

Interface between new governance bodies and project management structure in the construction period – people identified are included for discussion only at this stage.

TPB Governance body	Chair	Management responsibility	Director
Engineering & Delivery Committee	Gallagher	Engineering & Delivery - Infraco Tramco Utilities / MUDFA Engineering design Health & Safety planning & management	Bell
		Improvement - VE Quality & Environment ICT Innovation	McEwan
		Project Interfaces & Approvals - Land & Property Traffic management / regulatory Other CEC, third party	Sim
Financial, Commercial & Legal Committee	Gallagher	Financial management - Financial reporting Financial control, internal audit Risk management Insurance	McGarrity/ Thorne
		Contract management - Contractual reporting & compliance Claims & Variations management	Fitchie
Benefits Realisation & Operations Committee	Gallagher	Operational Planning - Integration & service planning O & M planning Transdev Commissioning Marketing	Richards
Communications Committee	Gallagher	Communications management - Utilities / MUDFA Construction Media Stakeholder	McLauchlan

Appendix 3 to Governance Paper Health & Safety background and proposed operational structure

General

H&S obligations are well-understood and entrenched in the project governance and management structure. The increased level of physical activity which may give rise to H&S risks once construction commences reinforces the need to ensure H&S responsibilities are clear and that the highest standards of H&S management are applied. These considerations must be addressed on a daily basis in all actions and at all levels by parties involved in Project.

In overall terms, the key H&S considerations for CEC, TEL, the TPB and tie are:

- the health & safety of their people - the corporate H&S Management Systems address this responsibility
- ensuring that CEC, TEL, the TPB and tie deliver against clearly stated H&S responsibilities in the framework of the project including working alongside third party H&S management systems
- monitoring and reporting regularly that these responsibilities are being properly discharged
- ensuring that all persons employed by CEC, TEL and tie are competent
- ensuring that contracts entered into address H&S issues adequately
- ensuring that H&S ramifications are considered when key investments and business decisions are made

These H&S considerations apply currently, throughout the period to Financial Close and throughout the period of construction and into operation of the tram system. The H&S responsibilities are currently defined clearly to meet the demands of the current project activity including the utility works now underway. These responsibilities will require to be revised to integrate with the revised governance structure described in this paper and to enable effective management of the full-scale construction activity which will follow Financial close. The narrative below provides a description of the responsibilities of the bodies involved in the project and has been drafted with the full involvement of DLA. A precise and legally supported H&S regime will be put forward for approval and then implemented in advance of financial close.

Relationship of revised governance model to H&S responsibilities

The TPB creates an "inclusive" decision making process which is important for the effective operation of the project. The TPB will be a formal sub-Committee of the TEL Board so that members of the TEL Board on the sub-Committee retain the formal responsibility for decisions taken at the TPB, with all other parties to TPB deliberations being participants or observers only. The TPB itself is not a shelter from health and safety liabilities or a clearing house for liabilities. Legally CEC, TEL and tie cannot delegate H&S responsibility to the TPB in the governance structure and thereby declare that they have discharged their health and safety liabilities and have no further duty regarding input into or consideration of health and safety issues.

The ultimate responsibilities for the TPB decisions flow up to the TEL Board and CEC, subject to the intended election under the Construction Design and Management Regulations 2007 ("CDM 2007") of tie as "Client" under those regulations. A Procurator Fiscal may consider that all parties (CEC, TEL and tie), together constitute the entity for the discharge of H&S obligations. As a result H&S implications must be considered by all these parties when making significant decisions affecting design and implementation through the construction phase of the Project. The HSC guidance *Director's Responsibilities for Health & Safety* must be followed by CEC, TEL, the TPB and tie. Appropriate leadership should be demonstrated in this area by the boards and senior management.

Where changes are submitted for TPB approval, or are requested by the TPB, tie/TEL/CEC (and the appointed CDM 2007 parties) will be legally responsible for identifying and managing any impact that these changes will have on safety. The TPB will be responsible for ensuring that they understand and have responsibility for any decisions made in this respect. It is intended that tie will be mainly responsible for implementing the decisions made throughout the construction period.

It is considered that TEL/CEC would remain the "client" in terms" of CDM 2007 as the TPB is not a separate legal entity although it will make decisions on behalf of TEL/CEC. tie is responsible as the elected second client under CDM 2007 and the client/employer (for general health & safety regulations) for the overall project safety management for the development and implementation of the Project. Such an election is, however, not a full delegation of all rights and responsibilities. tie and the TPB must ensure that its activities or its stakeholders or advisors do not undertake actions that encroach upon the role of the designer under CDM 2007, because this would mean that they would require to demonstrate competency in this role and fulfil added responsibilities.

The revised project governance structure described in this paper will distance Transport Scotland from the H&S responsibilities as their responsibilities are related to those of the principal funder of the project, in the absence of any material involvement in design or construction matters.

Health & Safety, Quality & Environment will form an element of one of the new TPB governance sub-Committees. H&S matters within tie will be the responsibility of the Engineering and Delivery Director. In addition to the E&D Director's leadership on this issue, a senior NXD will be the nominated chair of the H&SQE sub-committee of the tie Board to add a further H&S check in the operation of tie and the TPB.

A regular safety report is produced and presented to the tie Board and to the TPB each month. The TPB will ensure that safety is a core agenda item for each meeting and will ensure that the safety report tabled at each meeting is actioned where appropriate. Copies of these reports, or summary documents as appropriate, will be disseminated to TEL and CEC. This will ensure that H&S issues are considered at senior level on a regular and disciplined basis.

Legal backdrop

There may be occasions where a decision which is made by the TPB under its delegated authority from TEL is driven by one of the stakeholder directors to the exclusion of the other members of the board. In the event of an incident, this may result in the contractual relationships or duties between the stakeholders being considered. Notwithstanding that financial indemnities could be put in place to cover losses suffered, if a particular party declares that it will be held accountable for a decision impacting safety, it is important to highlight that it is not possible to ensure that fines imposed as a result of prosecution can be the subject of an enforceable indemnity. It is not possible to contract out of criminal liability nor is it possible to insure against a fine. Although it may be competent to include a clause in a contract, it is possible that such a clause would be construed by the courts as unenforceable and contrary to public policy. In this context, the representative of each stakeholder would need to look to their employer, with regard to personal accountability.

The creation of appropriate safety responsibility structures, safety management systems and culture will form a key defence to any prosecution assuming all procedures have been followed. Clearly there could also be a number of other parties involved in a safety incident, for example contractors, sub-contractors, agency staff, designers, CDM-Coordination and third parties.

The Corporate Manslaughter and Corporate Homicide Act 2007 came into force on 6 April 2008. Corporate homicide will be committed where a death is caused by an unlawful or grossly negligent act of the senior management of an organisation. The management and organisation of activities by senior management must constitute a "substantial element" of the breach, in other words, partial delegation of the duty will not prevent liability attaching to senior management. Breach is punishable by a fine. Although directors do not face personal liability under the Act, the offence will make directors more vulnerable to disciplinary action and further crystallise their accountability for health and safety compliance to their stakeholders. It remains possible for directors and senior management to face personal liability if there is sufficient evidence to bring a prosecution under the existing common law or under the Health & Safety at Work etc Act 1974.

Edinburgh Tram Network

Contract Execution Suite

- the Infraco Contract (and Schedule Parts 1 to 44);
- the Tram Supply Agreement (and Schedules 1 to 23) and the Tram Supply Novation Agreement;
- the Tram Maintenance Agreement (and Schedules 1 to 24) and the Tram Maintenance Novation Agreement;
- the SDS Novation Agreement and its Annexes 1 to 7;
- the CEC Guarantee
- the tie-CEC Operating Agreement.

Source : DLA

Edinburgh Tram – Financial Close and Notification of Contract Award

The City of Edinburgh Council

1 May 2008

1 Purpose of report

- 1.1 To notify the Council of the progress on the suite of contracts for the Edinburgh Tram Network (ETN) and to provide an update on financial close and the capital costs.

2 Summary

- 2.1 A report updating the Council on the progress of the contractual negotiations for the ETN was submitted to Council on 20 December 2007. Delegated authority was given to me to allow **tie Ltd** to enter into contracts to deliver the ETN subject to suitable due diligence and providing any remaining issues were resolved to my satisfaction.
- 2.2 **tie Ltd** are about to conclude the contractual negotiations and have recommended to me that the contracts for the supply and maintenance of the tram vehicles (Tramco) and for the construction and maintenance of the tram infrastructure (Infraco) be awarded to Construcciones y Auxiliar de Ferrocarriles SA (CAF) and Bilfinger Berger Siemens (BBS) respectively. The contracts include the novation of the CAF and the System Design Services (SDS) contracts to the main Infraco contractor.
- 2.3 Negotiations have taken longer than expected due to the complexity and scale of contractual and related issues arising from the contract suite. There has also been a substantial amount of work undertaken to minimise the Council's exposure to financial risk with significant elements of risk being transferred to the private sector. This has resulted in 95% of the combined Tramco and Infraco costs being fixed with the remainder being provisional sums which **tie Ltd** have confirmed as being adequate. The net result of the negotiations is a final estimate for Phase 1a of the ETN of £508m. This figure secures the best deal possible for the Council and Transport Scotland, and is well within the agreed funding envelope of £545m.

- 2.4 Infrastructure construction work is planned to commence in May 2008 and Phase 1a is programmed to be substantially complete by January 2011. A period of testing, driver training and shadow running (to test the entire system meets the performance requirements) overlaps with the Construction phase. Trams will be visible running along the route during this period. Revenue services are planned to commence in July 2011. The Final Business Case (FBC) highlighted commencement of revenue operations in Quarter 1 of 2011. The changed timescales reflect the positive work undertaken in negotiating major contracts which provide greater price certainty, reduced risk exposure and better overall quality and value for the Council and Transport Scotland.

3 Main report

Recent Developments

- 3.1 The required notice of intent to award the contracts to CAF (for the Tramco contract) and BBS (for the Infraco contract) was issued on 18 March 2008, following satisfactory close out by **tie Ltd** of the remaining issues required by the Council. Following the mandatory minimum cooling off period, the contracts will be signed once final due diligence on the documentation is completed by **tie Ltd** and BBS.

Financial Close and Capital Cost

- 3.2 The protracted yet progressive nature of the contractual negotiations highlight the work undertaken by **tie Ltd** and written confirmation has been received from **tie Ltd** stating that the contracts represent the best possible value to the Council.
- 3.3 The FBC aggregate estimate for Phase 1a was £498m as reported to Council on 20 December 2007.
- 3.4 Over the period of negotiations with the preferred bidder there have been changes to the overall cost of the project. The make up of the estimated cost of Phase 1a in the FBC was £498m which included base costs of £449m and a Quantified Risk Allowance (QRA) of £49m. The base cost has now increased to £476m with a revised QRA of £32m giving a final estimated cost of £508m. Firm costs represent 95% of this sum, with the remainder being provisional sums which **tie Ltd** have confirmed as being adequate.
- 3.5 The increase in baseline aggregate costs is largely due to the firming up of provisional prices to fixed sums, currency fluctuations and the crystallisation of the risk transfer to the private sector as described in the FBC. An element of change in price was expected and was included in the risk provision reported to Council on 20 December 2007 based on the assessment of the bids when the preferred bidders were appointed.
- 3.6 The revised costs are based upon the construction programme as advised by **tie Ltd** with works anticipated to commence in May 2008 and Phase 1a being substantially complete by January 2011. Revenue services are planned to commence in July 2011. **tie Ltd** continues, through its appointed contractor, to execute the work under the contract for utility diversion along the tram route on behalf of the Council and reports that this work, which is part of the authorised works under the statutory authority granted to Council under the Edinburgh Tram Acts, is progressing to programme and budget.

- 3.7 The Council approved on 20 December 2007 the draft **tie Ltd** operating agreement and delegated authority to the Council Solicitor to execute the operating agreements with **tie Ltd** and TEL on behalf of the Council. The draft operating agreements have been amended to reflect the fully up to date position including the revised date of service commencement. Provision has also been made for the Tram Project Board (TPB) to oversee all matters affecting the programme, cost and scope of the project, although TPB will have to obtain further authorisation from the Council (or the Tram Sub-committee, as appropriate) with regard to (i) further costs increases in excess of £10m; (ii) any further delays of over three months; (iii) settlement of claims in excess of £500,000; or (iv) any substantial change to the design, scope or services pattern set out in the FBC.
- 3.8 On the 20 December 2007 Council delegated authority to the Council Solicitor to conclude and execute the Guarantee on behalf of the Council for the benefit of BBS.

Quantified Risk Allowance (QRA)

- 3.9 The QRA has reduced from £49m at FBC to £32m. The material change in the QRA relates to procurement risks for Tramco and Infraco closed out at the signing of the contracts offset by allowance to provide for risks and uncertainties to be managed by **tie Ltd** during construction.
- 3.10 A number of the adjustments to risk allocation are positive, reflected in the reduced QRA. As a result of the overlapping period of design and construction a new risk area has emerged which has been the subject of extensive and difficult negotiation. **tie Ltd** advise that the outcome is the best deal that is currently available to themselves and the Council. Both **tie Ltd** and the Council have worked and will continue to work diligently to examine and reduce this risk in practical terms.
- 3.11 A written statement from **tie Ltd** has been provided stating that they are satisfied that £32m is an adequate level of risk allowance.

4 Financial Implications

- 4.1 Following closure of procurement risks the baseline cost of the project has increased from to £449m to £476m with the QRA reducing from £49m to £32m resulting in the final price of the project increasing from £498m to £508m. The estimate remains well within the agreed funding envelope of £545m.

5 Conclusions

- 5.1 It is proposed that the Tramco and Infraco contracts should be awarded to CAF and BBS respectively, securing the best deal possible for the Council and Transport Scotland. The awarding of these two contracts will represent a significant milestone in the implementation of the Tram project. A significant level of risk has been assumed by the private sector considerably reducing the Council's exposure to future uncertainty. Communications about the commitment to these important contracts will be co-ordinated with **tie Ltd** and Transport Scotland.

6 Recommendations

6.1 It is recommended that the Council:

- a note the imminent award of the two contracts with a final price for the Edinburgh Tram Network of £508m which is within the funding envelope of £545m;
- b refresh the delegated powers already given, to authorise me to instruct **tie Ltd** to enter the contracts with Infraco bidder and Tramco bidder, in light of recent changes noted in this report;
- c note that the FBCv2 which was approved by Council on 20 December 2007 is modified to reflect the above position;
- d note the **tie Ltd** and TEL operating agreements have been amended to reflect the fully up to date position; and
- e note that the Guarantee to be executed on behalf of the Council for the benefit of BBS will be provided at financial close.

Tom Aitchison
Chief Executive

Appendices	None
Contact/tel	Andy Conway Alan Coyle
Wards affected	All
Background Papers	Draft tie Ltd operating agreement Draft TEL operating agreement Council Guarantee

(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

Deleted: a

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:

Deleted:
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]

CITY OF EDINBURGH COUNCIL

BILFINGER BERGER UK LIMITED

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]

CITY OF EDINBURGH COUNCIL

BILFINGER BERGER UK LIMITED

SIEMENS PLC:

AGREEMENT

between

THE CITY OF EDINBURGH COUNCIL, the local authority for the City of Edinburgh in terms of the Local Government etc. (Scotland) Act 1994, having its principal office at Council Headquarters, Waverley Court, East Market Street, Edinburgh, EH8 8BG, or its statutory successors (“**the Council**”)

and

TIE LIMITED, a company incorporated under the Companies Acts (registered number SC230949) and having its Registered Office at City Chambers, High Street, Edinburgh, EH1 1YJ (“**tie**”)

Whereas:-

1. The Council set up tie in May 2002 to assist the Council with implementing its local transport strategy;
 2. Powers were conferred upon the Council in relation to the design, construction, commissioning and operation of the Edinburgh Tram Network in terms of the Edinburgh Tram (Line One) Act 2006 and the Edinburgh Tram (Line Two) Act 2006 and the Council wishes to delegate certain of these powers to tie;
 3. The Council is the designated planning and roads authority for the City of Edinburgh;
 4. A general operating agreement between tie and the Council was previously entered into whereby tie agreed to provide services to the Council in developing, procuring and implementing integrated transport projects within Edinburgh, including the delivery of the proposed tram system for Edinburgh;
 5. The terms of the tram Final Business Case and the fact that tie was to enter into various agreements in relation to the Project were approved in principle by the Council on 20 December 2007 via powers delegated to various Council officials;
- and

6. The parties now wish to enter into this agreement to more particularly regulate the relationship between the parties specifically with regard to the procurement and delivery of the trams Project and to define the services tie will provide to the Council.

NOW THEREFORE THE PARTIES HAVE AGREED AND DO HEREBY AGREE AS FOLLOWS:

1 **Definitions**

- 1.1 In this Agreement the following terms and expressions shall have the following meanings:

“Agreement”	means this agreement (including the schedules to it), as it may be amended from time to time;
”Employer’s Requirements”	means the employer’s requirements as more particularly defined in the Infraco Contract;
“Final Business Case”	means the business case relating to the Project which was approved by the Council on 20 December 2007, as it may be amended from time to time in agreement with the Council;
“Funding Agreement”	means the Council-accepted grant offer letter from Transport Scotland to the Council relating to the Project, as it may be amended from time to time;
“Infraco Contract”	means the contract between tie and Bilfinger Berger UK Limited and Siemens plc (contracting on a joint and several liability basis)(“the Infraco”), as it may be amended from

	time to time;
“Legislation”	means all rules, regulations, by-laws, directives, statutes and other binding provisions in force from time to time;
“Lothian Buses plc”	means the company incorporated under the Companies Acts and having its registered office at 55 Annandale Street, Edinburgh EH7 4AZ (Registered Number SC096849);
“MUDFA Contract”	means the agreement between Alfred Macalpine Infrastructure Services and tie dated 4 October 2006;
“Phase 1A”	means phase 1A as more particularly described in the Final Business Case;
“Phase 1B”	means phase 1B as more particularly described in the Final Business Case;
“Project”	means the procurement and delivery of a tram system for Edinburgh (Phase 1A and Phase 1B and any approved extension), as more particularly described in the Final Business Case and as approved by the Council in terms of scope;
“Services”	means all the services to be provided by tie as specified in this Agreement, including, without limitation, those specified in Schedule 1;
“Tram Acts”	means Edinburgh Tram (Line One) Act 2006 and the Edinburgh Tram (Line Two) Act 2006;
“Tram Monitoring Officer”	means the Council officer nominated by the Council to monitor tie in relation to the Project;

“Tram Supply Contract” and “Tram Maintenance Contract”	mean the contracts between tie and Construcciones y Auxiliar de Ferrocarriles S.A., as they may be amended from time to time;
“Tram Project Board” or “TPB”	means the committee of the board of TEL established to oversee the delivery of the Project; and
“Transport Edinburgh Limited” or “TEL”	means the company incorporated under the Companies Acts and having its registered office at 55 Annandale Street, Edinburgh EH7 4AZ (Registered Number SC269639).

- 1.2. Headings are included in this Agreement for ease of reference only and shall not affect the interpretation or construction of it.
- 1.3. In this Agreement, references to clauses are, unless otherwise provided, references to clauses of this Agreement and references to schedules are references to the appropriate schedules to it.
- 1.4. In this Agreement, the masculine includes the feminine and the neuter and the singular includes the plural and vice-versa.
- 1.5. Where this Agreement refers to approval being required from the Council or the Tram Monitoring Officer, the Council shall use best endeavours to procure that such approval is not unreasonably withheld or delayed.

2. tie’s Obligations

- 2.1 tie hereby agree to provide the Services to the Council throughout the duration of this Agreement in order to assist in, carry out, promote, manage and administer the Project.
- 2.2 tie shall ensure that all third party advisers and contractors engaged by it shall provide a direct duty of care to the Council in terms acceptable to the Council prior to carrying out any work in relation to the Project, failing which the appointment of any such third party will require the written approval of the Tram Monitoring Officer.

- 2.3 tie shall use best endeavours to ensure that it delivers a tram system for Edinburgh as specified in the Final Business Case and the Infraco Contract (including the Employer's Requirements). tie shall use best endeavours to comply with all timescales and financial projections detailed in the Final Business Case.
- 2.4 tie shall use best endeavours to ensure that it is at all times suitably resourced to carry out all the Services in relation to the Project.
- 2.5 tie shall use best endeavours to ensure that it does not cause the Council to breach the terms of the Funding Agreement. In particular tie shall use best endeavours to ensure that the Council complies with the conditions relating to publicity in the Funding Agreement. tie will provide all reasonable assistance to the Council in relation to the Council's compliance with the terms of the Funding Agreement.
- 2.6 tie shall use best endeavours to ensure that it complies with and, where it acts on the Council's behalf, shall use best endeavours to ensure that the Council complies with, all Legislation (including all health and safety legislation) relevant to the Project at all times.
- 2.7 tie shall use best endeavours to ensure that all work sites related to the Project are appropriately managed and supervised at all times to ensure compliance with all health and safety Legislation.
- 2.8 tie shall use best endeavours to ensure that it does not infringe the intellectual property rights of any third party at any time.
- 2.9 tie shall use, and shall use best endeavours to procure that all contractors, employees and other third parties which it engages shall use, all reasonable skill, care and diligence in the provision of the Services. All work undertaken by tie shall be progressed with due expedition and without delay to achieve timeous completion of the Project.
- 2.10 tie shall discharge all its obligations in terms of this Agreement in a proper, honest, faithful and diligent manner and shall at all times act in the best interests of the Council (to the fullest extent permitted by law).
- 2.11 Insofar as permitted by law, tie shall at all times promptly comply with all reasonable requests made of it by the Council.
- 2.12 tie shall at all times maintain in place appropriate policies of insurance in relation to all elements of its business and in particular the Project, provided

that each insurance is available in the United Kingdom insurance market at commercially reasonable rates and on commercially reasonable terms to businesses of the same status and discipline as tie. tie shall promptly inform the Tram Monitoring Officer in writing if any insurance ceases to be maintained and/or ceases to be available in the United Kingdom market at commercially reasonable rates and or commercially reasonable terms. In this event, the parties shall meet to discuss the means by which any risks previously covered by insurance should be managed, mitigated or controlled. tie shall provide evidence of all such insurances upon request by the Council. tie shall ensure that the Council is covered as an insured party under the Edinburgh Tram Network Owner Controlled Insurance Programme covering the material damage and third party liability sections and under all other policies of insurance which tie has arranged, where it is possible to do so at reasonable commercial cost.

- 2.13 tie shall ensure that all contractors and consultants engaged or employed by it in any capacity shall have in place a policy of insurance providing tie with appropriate indemnity for all risks relevant to their engagement provided that each insurance is available in the United Kingdom insurance market at commercially reasonable rates and on commercially reasonable terms to businesses of the same status and discipline as the contractor or consultant. tie shall promptly inform the Tram Monitoring Officer in writing if any insurance ceases to be maintained and/or ceases to be available in the United Kingdom market at commercially reasonable rates and or commercially reasonable terms. In this event, the parties shall meet to discuss the means by which any risks previously covered by insurance should be managed, mitigated or controlled.
- 2.14 tie will ensure that the Corporate Public & Products Liability and Professional Indemnity policies are to include an indemnity to principals clause protecting the interest of the Council as principal.
- 2.15 tie shall provide to the Tram Monitoring Officer upon request, and in any event not less than annually, a report providing full details of all its insurances, including *inter alia* details of (i) the contractors or consultants providing insurance cover to tie and the Council and level of cover provided; and (ii)

- contractors or consultants not providing insurance cover and details of the authorisation obtained from the Tram Monitoring Officer in this regard.
- 2.16 tie shall use best endeavours to ensure best value when providing the Services and in the discharge of all of tie's responsibilities. tie shall use best endeavours to ensure best value in the use of funds or resources provided through or by the Council.
- 2.17 tie shall continue to apply principles of good corporate governance and to adopt and adhere to the Council's Code on Corporate Governance (approved by the Council on 29 June 2006) as it may be amended from time to time.
- 2.18 tie shall allow the Council, its auditors or the Council's other delegated appointees to examine the books, accounts and other records kept by tie (and any subsidiary undertakings of tie) and shall supply the Council with such financial and other information as it may reasonably request from time to time to keep the Council fully informed about the business of tie (and any subsidiary undertakings) and to protect the Council's interests in relation to the terms of this Agreement. tie will supply to the Tram Monitoring Officer copies of all relevant tie and other board papers in connection with the governance arrangements set out in Schedule 2.
- 2.19 tie shall use best endeavours to ensure that it and all third parties it engages and/or contracts with to carry out any works shall at all times comply with all equalities legislation and shall act in a non-discriminatory manner.
- 2.20 The parties acknowledge the terms of the governance arrangements set out in Schedule 2 and tie shall use best endeavours to comply with this governance diagram. The parties agree that where this Agreement refers to tie reporting to, or obtaining approval from, the Council or as the case may be the Tram Monitoring Officer, all such activity shall be made in accordance with this governance diagram.
- 2.21 tie shall liaise with the Tram Monitoring Officer, the Council, and any other bodies which the Council may specify, regularly and shall report to the Council on a four-weekly and annual basis with regard to financial matters and progress generally on the Project in a format acceptable to the Council.
- 2.22 Immediately that tie becomes aware of the likelihood of delay to, or overspend in, the Project it shall notify the Tram Monitoring Officer at the earliest opportunity, informing them of the reasons for the potential delay or

- overspend and detailing any measures (together with costs) which may mitigate such potential delay or overspend.
- 2.23 Immediately tie becomes aware that it requires a decision or information essential to the continuity of the Project from the Council to achieve key dates in the Project, tie shall give notice of such requirement to the Tram Monitoring Officer with full supporting information to mitigate any delay to the Project to the fullest extent possible.
- 2.24 tie shall not settle any single claim in excess of £500,000, or series of claims in any 12 month period which would exceed in aggregate £1,000,000, without prior written approval from the Tram Monitoring Officer. In accordance with the terms of Clause 2.20, all such claims approval will be subject to the governance arrangements set out in Schedule 2.
- 2.25 tie shall procure that it develops and has approved by the tie board a remuneration policy setting out *inter alia* the benchmarks and procedures for proposed bonus achievement and the project milestone outcomes to which any such bonuses are linked. Such policy to be approved by the tie board, through its Remuneration Committee, in advance of annual reporting periods as it will apply in the succeeding annual reporting period. tie's board shall confirm annually to the Tram Monitoring Officer that tie's incentivisation arrangements are aligned to appropriate Project milestones. The remuneration package, including incentivisation arrangements, of the Executive Chairman of tie will on appointment require approval by the Chief Executive of the Council and thereafter be determined annually by the tie board through its Remuneration Committee.
- 2.26 tie will provide a business plan for approval by the Council on an annual basis.
- 2.27 tie shall use best endeavours to ensure that it and all contractors engaged by it protect the Council's reputation all at times in matters relating to the Project.
- 2.28 tie shall not novate or otherwise transfer any rights or obligations under any contractual arrangement which the Council has approved and to which tie is a party without the prior written consent of the Tram Monitoring Officer.
- 2.29 tie shall comply with the terms of all agreements to which it is a party unless authorised in writing by the Tram Monitoring Officer to do otherwise.
- 2.30 tie shall produce a communications protocol and have this approved quarterly in writing by the Tram Monitoring Officer. The communications protocol will

inter alia reflect the publicity arrangements referred to in Clause 2.5 of this Agreement.

- 2.31 tie will be subject to an independent peer review panel concerning the management of the Project (including all the contract documentation) and will implement all reasonable recommendations of the panel once approved under the governance arrangements set out in Schedule 2.
- 2.32 tie shall act as the agent of the Council in the capacity of transport authority for the purposes of the New Roads and Street Works Act 1991 and the application of the Road Works (Sharing of Costs) (Scotland) Regulations 2003.

3. **Council's Obligations and Delegation**

- 3.1 The Council hereby delegates to tie, such delegations confirmed for the purposes of sections 68 and 69 of the respective Tram Acts, full legal authority to (i) enter into and manage the Infraco Contract pursuant to the Council resolution dated 20 December 2007; (ii) to enter into and novate to the Infraco the Tram Supply Contract and Tram Maintenance Contract pursuant to the Council resolution dated 20 December 2007; (iii) novate to the Infraco the agreement between tie and Parsons Brinkerhoff Limited dated 19 September 2005; (iv) make such use of the agreement between tie and Transdev Edinburgh Tram Limited dated 14 May 2004 (as amended) as is deemed expedient by tie in relation to the Project; (v) act as agent for the Council under the New Roads and Street Works Act 1991 for the purposes of enabling contributions to be collected from the relevant utility companies and remitted to the Council; (vi) generally, and subject to the express provisions of this Agreement and unless otherwise instructed by the Council, to act on behalf of the Council in relation to undertaking and implementing all matters arising directly from the management and carrying out of the MUDFA Contract and the other contracts and related works and maintenance programmes detailed in (i) to (v) above; and (vii) confirms that the Council will notify the Scottish Ministers as appropriate under the Tram Acts.
- 3.2 The Council agrees to guarantee tie's financial obligations in relation to certain aspects of the Project on terms acceptable to the Council.

- 3.3 On the basis that tie has, in the reasonable opinion of the Council, provided adequate evidence that expenditure has been properly and appropriately incurred in relation to the provision of the Services and the Project, the Council will release the funding which it has secured for such expenditure and shall pass funding to tie to allow tie to discharge its obligations in terms of this Agreement.
- 3.4 The Council will nominate a Council officer to act as a liaison point for day-to-day communication between the Company and the Council.
- 3.5 The Council will appoint a Tram Monitoring Officer. The first Tram Monitoring Officer will be the Director of City Development or their appointed nominee. The Council will use all reasonable endeavours to procure that the Tram Monitoring Officer will be a member of the TPB and a director of TEL.
- 3.6 The Tram Monitoring Officer will be responsible for determining what approval is required from within the Council to allow them to give any consent or recommendation required in terms of this Agreement. The parties acknowledge that the Tram Monitoring Officer may require to obtain approval of their proposed actions from the full Council or from a relevant committee or sub-committee as appropriate.
- 3.7 The Council will ensure that, in the Council's opinion, adequate personnel are made available to the Project to fulfill the Council's role in relation to the Project and that all such personnel shall use reasonable skill and care in executing their responsibilities.
- 3.8 The Council acknowledges that tie continues to work on other projects in addition to the Project, but tie will use best endeavours to manage such projects in order that they do not conflict with the terms of this Agreement. Any work to be executed by tie on projects other than the Project must be approved by the Tram Monitoring Officer in advance of commitment by tie.
- 3.9 The Council agrees to waive its rights to claim against any director, officer or employee of tie, save in respect of any criminal, fraudulent or willfully negligent action of any such person. This waiver shall not apply to any contractor or consultant engaged by tie operating in any such role as director or officer.

- 3.10 The parties acknowledge that one of the main purposes of establishing tie and its sister company Transport Edinburgh Limited is to facilitate the integration of the operation of trams and buses in the City of Edinburgh and to assist the Council, tie, Lothian Buses plc and TEL to function as a single coordinated entity in the delivery, management, operation and ownership of an integrated transport system.

4. Term

- 4.1 This Agreement shall commence on the date of signing and shall continue until termination is agreed between the parties, unless otherwise terminated earlier in accordance with its terms.

5. Responsibility

- 5.1 Subject to the terms of any guarantee(s) given by the Council, tie shall use best endeavours to ensure that it is in a position at all times to apply the financial and other resources necessary to discharge timeously all obligations, liabilities or claims of whatsoever nature arising from the performance of the Services.

6. Termination

- 6.1 Either party may terminate this Agreement immediately by giving notice to that effect to the other if the other party is in material breach of its obligations and has failed to remedy that breach (assuming it is capable of remedy) within 14 days of receiving such notice.

7. Dispute Procedure

- 7.1 Any dispute or difference between the parties as to the meaning or intent of this Agreement or the implementation thereof or as to any other matter in any way arising out of or in connection with this Agreement shall be referred to the decision of an Arbiter to be mutually agreed between the parties or, failing

agreement, to be appointed by the President for the time being of the Law Society of Scotland. The decision of such Arbiter shall be final and binding on both parties. The application of Section 3 of the Administration of Justice (Scotland) Act 1972 is hereby expressly excluded.

8. Transfer and Sub-contracting

8.1 This Agreement is personal to tie and tie shall not assign, novate, sub-contract or otherwise transfer by any means whatsoever any right or interest or obligation which it may have in or under this Agreement without the prior written consent of the Tram Monitoring Officer.

8.2 For the avoidance of doubt, the Council shall be entitled to assign, novate or otherwise dispose of its rights and obligations under this Agreement.

9. Notices

9.1 Any notice given under this Agreement by either party to the other must be in writing and may be delivered personally, by fax or first class post or by email. In the case of posting, such notice will be deemed to have been given three working days after the date of posting; in the case of fax or email, the next working day; and in the case of personal delivery, at the time of delivery. Notices will be delivered or sent to the addresses of the parties on the first page of this Agreement or at any other address or fax number notified in writing by either party to the other for the purpose of receiving notices after the date of this Agreement. All email notices shall be sent to either the Executive Chairman of tie or the Tram Monitoring Officer at the Council or such email notified in writing by either party to the other for the purpose of receiving emails after the date of this Agreement .

10. Freedom of Information

10.1 The parties acknowledge that they will fully comply with, and will assist each other in complying with, the terms of the Freedom of Information (Scotland) Act 2002.

11. **Nature of Relationship**

- 11.1 tie and CEC both agree that, for the purposes of s.47 VATA 1994, tie is acting as agent of the Council in respect of the Infraco Contract, the Tram Supply Contract, the Tram Maintenance Contract, the MUDFA Contract and other related contracts. tie will enter into such contracts in its own name, but will be acting on behalf of the Council. tie will not own or use any of the goods or services bought on behalf of the Council. tie will not alter the nature or value of any of the supplies made between the Council and the relevant contracting parties in relation to such contracts.
- 11.2 Nothing in this Agreement shall create a relationship of agency (save where the Council expressly authorises tie to act as its agent, including the terms of Clause 11.1) or partnership between the parties with regard to its subject matter.
- 11.3 Save as otherwise provided, nothing in the Agreement shall prejudice or affect the Council's rights, powers, duties and obligations in the exercise of its functions as a local authority or in terms of any Legislation or relieve tie from obtaining any approvals or consents required from the Council in any capacity in terms of any Legislation.

12. **Entire Agreement and Variations**

- 12.1 This Agreement and the attached schedules constitute the entire agreement between the parties in relation to their subject matter. Each party confirms that it has not relied upon any representation, undertaking or warranty not recorded in this document in entering into this Agreement. No variation of this Agreement shall be effective unless confirmed in writing and signed by authorised signatories of both parties to this Agreement. The terms of this agreement supersede the terms of any prior agreement between the parties, but only in relation to its subject matter, including for the avoidance of doubt the agreement referred to in preamble 4 to this Agreement.

12.2 If any ambiguity or conflict arises between the terms of this Agreement and those of tie's articles of association then, to the fullest extent permitted by law, the terms of this Agreement shall prevail.

13. **Severability**

13.1 If any term of this Agreement shall be held to be illegal, invalid or unenforceable, in whole or in part, under any enactment or rule of law, such term or part shall to that extent be deemed not to form part of this Agreement but the legality, validity or enforceability of the remainder of this Agreement shall not be affected.

14. **Waiver**

14.1 The failure to exercise or delay in exercising a right or remedy provided by this Agreement or by law does not constitute a waiver of the right or remedy or a waiver of other rights or remedies. A waiver of a breach of any of the terms of this Agreement or of a default under this Agreement does not constitute a waiver of any other breach or default and shall not affect the other terms of this Agreement. A waiver of a breach of any of the terms of this Agreement or of a default under this Agreement will not prevent a party from subsequently requiring compliance with the waived obligation. The rights and remedies provided by this Agreement are cumulative and (subject as otherwise provided for in this Agreement) are not exclusive of any rights or remedies provided by law.

15. **Governing Law and Jurisdiction**

15.1 This Agreement is governed by the Laws of Scotland and, subject to the terms of clause 7, the parties submit to the exclusive jurisdiction of the Scottish Courts.

IN WITNESS WHEREOF this Agreement consisting of this and the preceding fourteen pages and the attached Schedules are executed as follows:

Subscribed for and on behalf of The City of Edinburgh Council at _____ on
day of _____ 2008

Witness.....

Full Name.....

Proper Officer

Address.....

.....

Subscribed for and on behalf of tie Limited at _____ on _____ day of
2008

Director.....

Director/Secretary.....

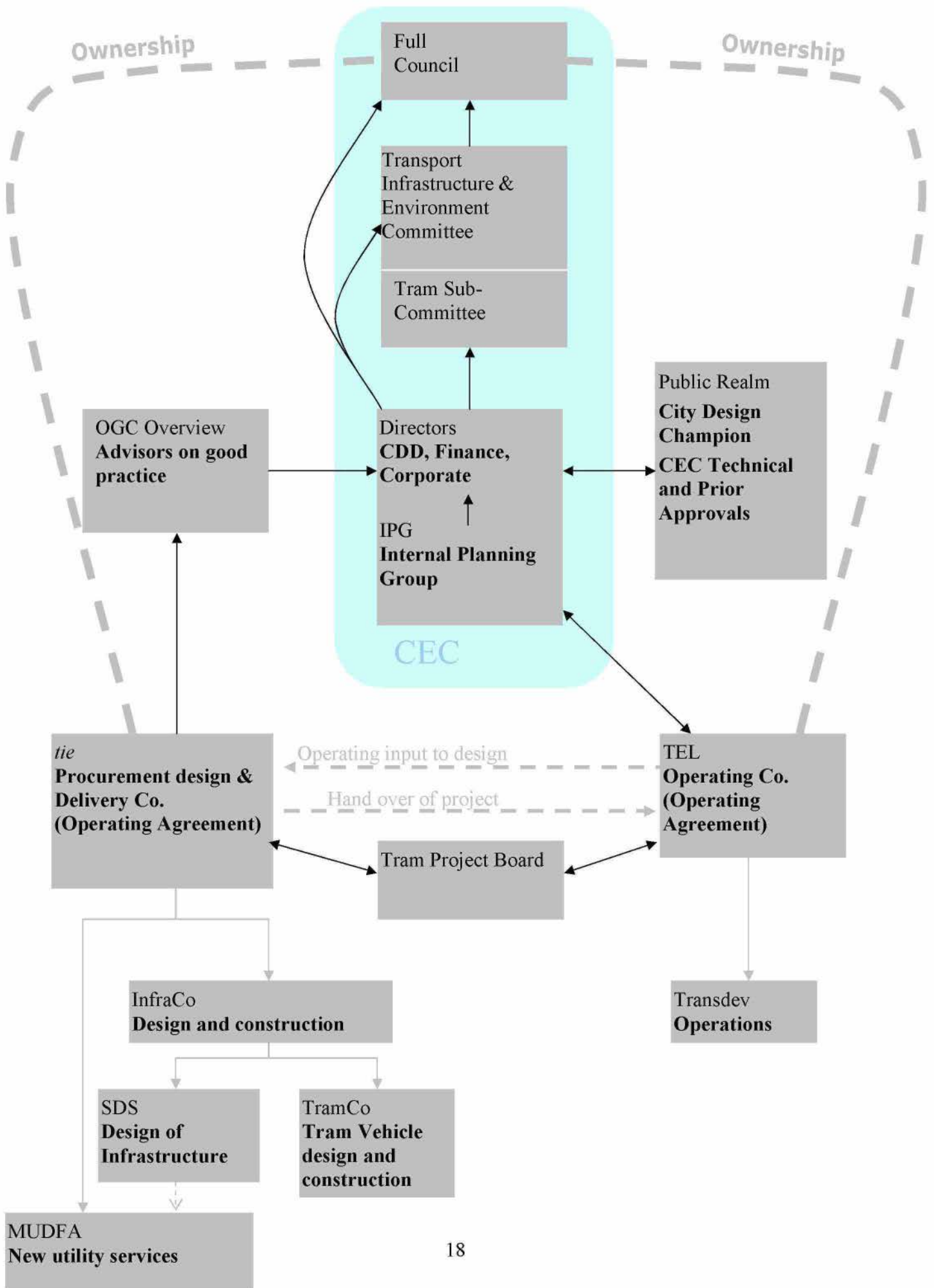
SCHEDULE 1

Scope of Services

1.	Procurement and contract award of all contracts required to deliver the tram project, including the Council's obligations
2.	Provide accurate and current information to Tram Project Board, Transport Edinburgh Limited and the Council for appropriate decision making and approvals
3.	Provide efficient and effective project management services for the Project including cost, financial programme, risk, contract and change management
4.	Provide traffic management expertise to effectively implement and manage both temporary and permanent traffic management alterations, including the Traffic Regulation Order process
5.	Comply with Health and Safety requirements and act as the Construction Design Management Regulations co-ordinator, provide Health, Safety, Quality and Environmental management and expertise to ensure effective approvals through the The Railways and Other Guided Transport Systems (Safety) Regulations process. This should include protecting the Council's interests
6.	Ensure the design is assured, and provide the necessary quality of design for technical and prior approvals in a timeous manner
7.	Develop and agree a communication strategy with the Council and provide effective communications, consistent with this strategy
8.	Provide and demonstrate to the Council that appropriate site management services are in place to ensure quality is delivered
9.	Ensure a continued focus on value engineering and deliver any agreed initiatives
10.	Manage the interface with TEL in order to deliver a smooth handover for operations
11.	Manage project land in accordance with the tie/CEC licence
12.	Ensure and demonstrate to the Council that all contracting parties meet their obligations (including protocols, traffic management, contract conditions, employers requirements, site supervision and testing etc)
13.	Manage all third-party agreements in an effective manner and demonstrate that they are in the Council's interest
14.	Carry out other duties as instructed by the Council in relation to the Project
15.	Act on efficiently and effectively all formal instructions issued by the Council in relation to the tram project

Schedule 2
Governance Diagram

GOVERNANCE STRUCTURE



AGREEMENT

between

THE CITY OF EDINBURGH COUNCIL, the local authority for the City of Edinburgh in terms of the Local Government etc. (Scotland) Act 1994, having its principal office at Council Headquarters, Waverley Court, East Market Street, Edinburgh, EH8 8BG, or its statutory successors (“**the Council**”)

and

TRANSPORT EDINBURGH LIMITED, a company incorporated under the Companies Acts (registered number SC269639) and having its Registered Office at 55 Annandale Street, Edinburgh EH7 4AZ (“**TEL**”)

Whereas:-

1. The Council set up TEL in June 2004 to assist the Council with implementing its local transport strategy;
2. Powers were conferred upon the Council in relation to the design, construction, commissioning and operation of the Edinburgh Tram Network in terms of the Edinburgh Tram (Line One) Act 2006 and the Edinburgh Tram (Line Two) Act 2006;
3. The Council is the designated planning and roads authority for the City of Edinburgh;
4. The terms of the tram Final Business Case, setting out *inter alia* the anticipated operational and financial parameters of an integrated tram and bus system in Edinburgh, were approved in principle by the Council on 20 December 2007 via powers delegated to various Council officials;
5. The parties now wish to enter into this Agreement to more particularly regulate the relationship between the parties specifically with regard to the delivery of the Tram System and the planning of an integrated tram and bus system in Edinburgh and to define the services TEL will provide to the Council; and

6. The Parties acknowledge that this Agreement will require to be adapted in future to accommodate the evolving role of TEL and in particular in advance of operational commencement of the Tram System.

NOW THEREFORE THE PARTIES HAVE AGREED AND DO HEREBY AGREE AS FOLLOWS:

1 Definitions

- 1.1 In this Agreement the following terms and expressions shall have the following meanings:

“Agreement”	means this agreement (including the schedules to it), as it may be amended from time to time;
“Company Monitoring Officer”	means the Council officer nominated by the Council to monitor TEL in relation to the Project;
“Final Business Case”	means the business case relating to the Project which was approved by the Council on 20 December 2007, as it may be amended from time to time in agreement with the Council;
“Funding Agreement”	means the Council-accepted grant offer letter from Transport Scotland to the Council relating to the Project, as it may be amended from time to time;
“Infraco Contract”	means the contract between tie and Bilfinger Berger UK Limited and Siemens plc (contracting on a joint and several liability basis) (“the Infraco”), as it may be amended from time to time;

“Legislation”	means all rules, regulations, by-laws, directives, statutes and other binding provisions in force from time to time;
“Lothian Buses plc” or “Lothian Buses”	means the company incorporated under the Companies Acts and having its registered office at 55 Annandale Street, Edinburgh EH7 4AZ (Registered Number SC096849);
“Phase 1A”	means phase 1A as more particularly described in the Final Business Case;
“Phase 1B”	means phase 1B as more particularly described in the Final Business Case;
“Project”	means the delivery of the Tram System and the planning of an integrated tram and bus system in Edinburgh (incorporating Phase 1A and Phase 1B and any approved extension of the Tram System);
“Services”	means all the services to be provided by TEL as specified in this Agreement, including, without limitation, those specified in Schedule 1;
“tie Limited” or “tie”	means the company incorporated under the Companies Acts and having its registered office at City Chambers, High Street, Edinburgh (Registered Number SC230949);
“tie Operating Agreement”	means the operating agreement between tie and the Council dated ;
“Tram Acts”	means Edinburgh Tram (Line One) Act 2006 and the Edinburgh Tram

	(Line Two) Act 2006;
“Tram Project Board” or “TPB”	means the committee of the board of TEL established to oversee delivery of the Project; and
“Tram System”	means the tram system comprising Phase 1A and/or Phase 1B, as the context requires, as set out in the Final Business Case and as approved by the Council in terms of scope.

- 1.2. Headings are included in this Agreement for ease of reference only and shall not affect the interpretation or construction of it.
- 1.3. In this Agreement, references to clauses are, unless otherwise provided, references to clauses of this Agreement and references to schedules are references to the appropriate schedules to it.
- 1.4. In this Agreement, the masculine includes the feminine and the neuter and the singular includes the plural and vice-versa.
- 1.5. Where this Agreement refers to approval being required from the Council or the Company Monitoring Officer, the Council shall use best endeavours to procure that such approval is not unreasonably withheld or delayed.

2. TEL’s Obligations

- 2.1 TEL hereby agree to provide the Services to the Council throughout the duration of this Agreement in order to assist in, carry out, promote, manage and administer the Project.
- 2.2 TEL shall ensure that all third party advisers and contractors engaged by it shall provide a direct duty of care to the Council in terms acceptable to the Council prior to carrying out any work in relation to the Project, failing which the appointment of any such third party will require the written approval of the Company Monitoring Officer.
- 2.3 TEL shall use best endeavours to ensure that it delivers the Project as set out in the Final Business Case. TEL shall use best endeavours to comply with all timescales and financial projections detailed in the Final Business Case. It is

acknowledged by the Council and TEL that the primary responsibility for delivery of the Tram System rests with tie Limited. TEL will use best endeavours to support delivery of the Tram System so far as it can do within its powers and resources.

- 2.4 TEL shall use best endeavours to ensure that it is at all times suitably resourced to carry out all the Services in relation to the Project.
- 2.5 TEL shall use best endeavours to ensure that it does not cause the Council to breach the terms of the Funding Agreement. In particular TEL shall use best endeavours to ensure that the Council complies with the conditions relating to publicity in the Funding Agreement. TEL will provide all reasonable assistance to the Council in relation to the Council's compliance with the terms of the Funding Agreement.
- 2.6 TEL shall use best endeavours to ensure that it complies with and, where it acts on the Council's behalf, shall use best endeavours to ensure that the Council complies with, all Legislation (including all health and safety legislation) relevant to the Project at all times.
- 2.7 In the event that TEL has formal responsibility for work sites, TEL shall use best endeavours to ensure that all work sites related to the Project are appropriately managed and supervised at all times to ensure compliance with all health and safety Legislation.
- 2.8 TEL shall use best endeavours to ensure that it does not infringe the intellectual property rights of any third party at any time.
- 2.9 TEL shall use, and shall use best endeavours to procure that all contractors, employees and other third parties which it engages shall use, all reasonable skill, care and diligence in the provision of the Services. All work undertaken by TEL shall be progressed with due expedition and without delay to achieve timeous completion of the Project.
- 2.10 TEL shall discharge all its obligations in terms of this Agreement in a proper, honest, faithful and diligent manner and shall at all times act in the best interests of the Council (to the fullest extent permitted by law).
- 2.11 Insofar as permitted by law, TEL shall at all times promptly comply with all reasonable requests made of it by the Council.
- 2.12 TEL shall at all times maintain in place appropriate policies of insurance in relation to all elements of its business and in particular the Project, provided

that each insurance is available in the United Kingdom insurance market at commercially reasonable rates and on commercially reasonable terms to businesses of the same status and discipline as TEL. TEL shall promptly inform the Company Monitoring Officer in writing if any insurance ceases to be maintained and/or ceases to be available in the United Kingdom market at commercially reasonable rates and or commercially reasonable terms. In this event, the parties shall meet to discuss the means by which any risks previously covered by insurance should be managed, mitigated or controlled. TEL shall provide evidence of all such insurances upon request by the Council. In the event that TEL becomes formally responsible for these matters, TEL shall ensure that the Council is covered as an insured party under the Edinburgh Tram Network Owner Controlled Insurance Programme covering the material damage and third party liability sections and under all other policies of insurance which TEL has arranged, where it is possible to do so at reasonable commercial cost.

- 2.13 TEL shall ensure that all contractors and consultants engaged or employed by it in any capacity shall have in place a policy of insurance providing TEL with appropriate indemnity for all risks relevant to their engagement provided that each insurance is available in the United Kingdom insurance market at commercially reasonable rates and on commercially reasonable terms to businesses of the same status and discipline as the contractor or consultant. TEL shall promptly inform the Company Monitoring Officer in writing if any insurance ceases to be maintained and/or ceases to be available in the United Kingdom market at commercially reasonable rates and or commercially reasonable terms. In this event, the parties shall meet to discuss the means by which any risks previously covered by insurance should be managed, mitigated or controlled.
- 2.14 TEL will ensure that the Corporate Public & Products Liability and Professional Indemnity policies are to include an indemnity to principals clause protecting the interest of the Council as principal.
- 2.15 TEL shall provide to the Company Monitoring Officer upon request, and in any event not less than annually, a report providing full details of all its insurances, including *inter alia* details of (i) the contractors or consultants providing insurance cover to TEL and the Council and level of cover

- provided; and (ii) contractors or consultants not providing insurance cover and details of the authorisation obtained from the Council Monitoring Officer in this regard.
- 2.16 TEL shall use best endeavours to ensure best value when providing the Services and in the discharge of all of TEL's responsibilities. TEL shall use best endeavours to ensure best value in the use of funds or resources provided through or by the Council.
- 2.17 TEL shall continue to apply principles of good corporate governance and to adopt and adhere to the Council's Code on Corporate Governance (approved by the Council on 29 June 2006) as it may be amended from time to time.
- 2.18 TEL shall allow the Council, its auditors or the Council's other delegated appointees to examine the books, accounts and other records kept by TEL and shall supply the Council with such financial and other information as it may reasonably request from time to time to keep the Council fully informed about the business of TEL and to protect the Council's interests in relation to the terms of this Agreement. TEL will supply to the Company Monitoring Officer copies of all relevant TEL and other board papers in connection with the governance arrangements set out in Schedule 2.
- 2.19 TEL shall use best endeavours to ensure that it and all third parties it engages and/or contracts with to carry out any works shall at all times comply with all equalities legislation and shall act in a non-discriminatory manner.
- 2.20 The parties acknowledge the terms of the governance arrangements set out in Schedule 2 and TEL shall use best endeavours to comply with the governance diagram. The parties agree that where this Agreement refers to TEL reporting to, or obtaining approval from, the Council or as the case may be the Company Monitoring Officer, all such activity shall be made in accordance with this governance diagram. TEL shall establish the Tram Project Board as a Committee of the TEL Board and shall define the responsibilities of the TPB and shall delegate appropriate authority to the TPB to enable the TPB to carry out its responsibilities. The following matters will be for the TEL to determine and report to the Council as appropriate in terms of the governance arrangements set out in Schedule 2:

All matters affecting the programme, cost and scope of the Project except the following which are matters reserved to the Council:

- (A) (i) any actual or reasonably expected delay to the Project programme of greater than 3 months; or (ii) any increased cost of over £10m; relative respectively to the programme leading to commencement of revenue service by 31 July 2011 and capital cost of £508m (Phase 1A) or £87m (Phase 1B) as set out in the Final Business Case (or as subsequently approved by the Council prior to commitment by tie to the Infraco Contract); or (iii) notwithstanding the terms of (i) and (ii) above, any projected or actual overspend of the available funding budget (being £545 million) at any time (whether on an annual or overall basis); or (iv) any substantial change to the design, scope or service pattern set out in the Final Business Case; and
- (B) the settlement of any single claim in excess of £500,000, or series of claims in any 12 month period which would exceed in aggregate £1,000,000;

TEL may delegate responsibility for all matters other than those specified at A and B above to the TPB and the TPB may in turn delegate responsibility for all other matters to tie, but only to the extent that such delegation is already within the remit of tie in the context of the tie Operating Agreement. TEL agrees that it shall retain ultimate responsibility for all matters it so delegates.

- 2.21 TEL shall liaise with the Company Monitoring Officer, the Council, and any other bodies which the Council may specify, regularly and shall report to the Council on a four-weekly and annual basis with regard to financial matters and progress generally on the Project in a format acceptable to the Council. TEL will liaise with the Council and tie to ensure that duplication in reporting procedures is minimized.
- 2.22 Immediately that TEL becomes aware of the likelihood of delay to, or overspend in, the Project it will ensure that notification is given to the Company Monitoring Officer at the earliest opportunity, informing them of the reasons for the potential delay or overspend and detailing any measures (together with costs) which may mitigate such potential delay or overspend.
- 2.23 Immediately TEL becomes aware that it requires a decision or information essential to the continuity of the Project from the Council to achieve key dates

- in the Project, TEL shall give notice of such requirement to the Company Monitoring Officer with full supporting information to mitigate any delay to the Project to the fullest extent possible.
- 2.24 The approval of settlement of claims referred to in clause 2.20 sub-clause (B) will be subject to the governance arrangements set out in Schedule 2.
- 2.25 TEL shall procure that it develops and has approved by the TEL board a remuneration policy setting out *inter alia* the benchmarks and procedures for proposed bonus achievement and the project milestone outcomes to which any such bonuses are linked. Such policy to be approved by the TEL board, through its Remuneration Committee, in advance of annual reporting periods as it will apply in the succeeding annual reporting period. TEL's board shall confirm annually to the Council Monitoring Officer that TEL's incentivisation arrangements are aligned to appropriate Project milestones. The remuneration package, including incentivisation arrangements, of the Chairman of TEL will on appointment require approval by the Chief Executive of the Council and thereafter be determined annually by the Remuneration Committee.
- 2.26 TEL will provide a business plan for approval by the Council on an annual basis.
- 2.27 TEL shall use best endeavours to ensure that it and all contractors engaged by it protect the Council's reputation all at times in matters relating to the Project.
- 2.28 TEL shall not novate or otherwise transfer any rights or obligations under any contractual arrangement which the Council has approved and to which TEL is a party without the prior written consent of the Company Monitoring Officer.
- 2.29 TEL shall comply with the terms of all agreements to which it is a party unless authorised in writing by the Company Monitoring Officer to do otherwise.
- 2.30 TEL shall produce a communications protocol in liaison with tie and have this approved quarterly in writing by the Company Monitoring Officer. The communications protocol will *inter alia* reflect the publicity arrangements referred to in Clause 2.5 of this Agreement.
- 2.31 TEL acknowledge that tie and the Project will be subject to an independent peer review panel concerning the management of the Project (including all the contract documentation) and TEL will implement all reasonable recommendations of the panel once approved under the governance arrangements set out in Schedule 2.

2.32 The parties acknowledge that the Infraco Contract contains Council obligations relating to the maintenance of roads and structures (which either form part of, or are integral to the safe and continuous operation of, the Tram System) which require performance by the Council. TEL undertakes to assist the Council in its discharge of these responsibilities which are identified at Section 40 of the Employer's Requirements in the Infraco Contract. The Council undertakes to carry out the required works and services timeously and to the requisite standard in observance of its statutory powers and duties, subject always to any appropriate budgetary constraints.

3. **Council's Obligations and Delegation**

3.1 In order to facilitate TEL's role in the delivery of the Project, TEL is authorised to operate the delegated authority structure set out in Clause 2.20 in this Agreement, such delegations confirmed for the purposes of the Council's statutory obligations pursuant to the Tram Acts. TEL is further authorised to accept assignment from tie Limited of those contractual agreements previously entered into by tie Limited at a time to be determined by the Council on recommendation from TEL and tie limited, but only to the extent that no material additional obligations, risks or liabilities are created beyond those for which tie Limited is, or would in due course, become responsible for under the contractual agreements to be assigned.

3.2 The Council agrees to guarantee TEL's financial obligations in relation to certain aspects of the Project on terms acceptable to the Council.

3.3 On the basis that TEL has, in the reasonable opinion of the Council, provided adequate evidence that expenditure has been properly and appropriately incurred in relation to the provision of the Services and the Project, the Council will release the funding, or procure that tie releases the funding, which it has secured for such expenditure and shall pass funding to TEL or to tie as appropriate to allow TEL to discharge its obligations in terms of this Agreement.

3.4 The Council will nominate a Council officer to act as a liaison point for day-to-day communication between TEL and the Council.

- 3.5 The Council will appoint a Company Monitoring Officer. The first Company Monitoring Officer will be the Director of City Development or the Director of Finance. The Council will procure, with the approval of the TEL Board, that the Council Monitoring Officer will be a Director of TEL and a member of the Tram Project Board.
- 3.6 The Company Monitoring Officer will be responsible for determining what approval is required from within the Council to allow them to give any consent or recommendation required in terms of this Agreement. The parties acknowledge that the Company Monitoring Officer may require to obtain approval of their proposed actions from the full Council or from a relevant committee or sub-committee as appropriate.
- 3.7 The Council will ensure that, in the Council's opinion, adequate personnel are made available to the Project to fulfill the Council's role in relation to the Project and that all such personnel shall use reasonable skill and care in executing their responsibilities.
- 3.8 The Council acknowledges that TEL may work on other projects in addition to the Project, but TEL will use best endeavours to manage such projects in order that they do not conflict with the terms of this Agreement. Any work to be executed by TEL on projects other than the Project must be approved by the Company Monitoring Officer in advance of commitment by TEL.
- 3.9 The Council agrees to waive its rights to claim against any director, officer or employee of TEL, save in respect of any criminal, fraudulent or willfully negligent action of any such person. This waiver shall not apply to any contractor or consultant engaged by TEL operating in any such role as director or officer.
- 3.10 The parties acknowledge that one of the main purposes of establishing TEL and its sister company tie is to facilitate the integration of the operation of trams and buses in the City of Edinburgh and to assist the Council, tie, Lothian Buses plc and TEL to function as a single coordinated entity in the delivery, management, operation and ownership of an integrated transport system. The Parties acknowledge that pursuit of these objectives is subject at all times to the Council's statutory responsibilities.

4. Term

- 4.1 This Agreement shall commence on the date of signing and shall continue until termination is agreed between the parties, unless otherwise terminated earlier in accordance with its terms.

5. Responsibility

- 5.1 Subject to the terms of any guarantee(s) given by the Council, TEL shall use best endeavours to ensure that it is in a position at all times to apply the financial and other resources necessary to discharge timeously all obligations, liabilities or claims of whatsoever nature arising from the performance of the Services.

6. Termination

- 6.1 Either party may terminate this Agreement immediately by giving notice to that effect to the other if the other party is in material breach of its obligations and has failed to remedy that breach (assuming it is capable of remedy) within 14 days of receiving such notice.

7. Dispute Procedure

- 7.1 Any dispute or difference between the parties as to the meaning or intent of this Agreement or the implementation thereof or as to any other matter in any way arising out of or in connection with this Agreement shall be referred to the decision of an Arbiter to be mutually agreed between the parties or, failing agreement, to be appointed by the President for the time being of the Law Society of Scotland. The decision of such Arbiter shall be final and binding on both parties. The application of Section 3 of the Administration of Justice (Scotland) Act 1972 is hereby expressly excluded.

8. Transfer and Sub-contracting

- 8.1 This Agreement is personal to TEL and TEL shall not assign, novate, sub-contract or otherwise transfer by any means whatsoever any right or interest or obligation which it may have in or under this Agreement without the prior written consent of the Company Monitoring Officer.
- 8.2 For the avoidance of doubt, the Council shall be entitled to assign, novate or otherwise dispose of its rights and obligations under this Agreement.

9. Notices

- 9.1 Any notice given under this Agreement by either party to the other must be in writing and may be delivered personally, by fax or first class post or by email. In the case of posting, such notice will be deemed to have been given three working days after the date of posting; in the case of fax or email, the next working day; and in the case of personal delivery, at the time of delivery. Notices will be delivered or sent to the addresses of the parties on the first page of this Agreement or at any other address or fax number notified in writing by either party to the other for the purpose of receiving notices after the date of this Agreement. All email notices shall be sent to either the Chairman of TEL or the Company Monitoring Officer at the Council or such email notified in writing by either party to the other for the purpose of receiving emails after the date of this Agreement.

10. Freedom of Information

- 10.1 The parties acknowledge that they will fully comply with, and will assist each other in complying with, the terms of the Freedom of Information (Scotland) Act 2002 (“FOISA”). Insofar as compliant with FOISA, the parties agree to keep confidential all appropriate matters relating to the business and operations of TEL.

11. Nature of Relationship

- 11.1 Nothing in this Agreement shall create a relationship of agency (save where the Council expressly authorises TEL to act as its agent) or partnership between the parties with regard to its subject matter.
- 11.2 Save as otherwise provided, nothing in the Agreement shall prejudice or affect the Council's rights, powers, duties and obligations in the exercise of its functions as a local authority or in terms of any Legislation or relieve TEL from obtaining any approvals or consents required from the Council in any capacity in terms of any Legislation.

12. Entire Agreement and Variations

- 12.1 This Agreement and the attached schedules constitute the entire agreement between the parties in relation to their subject matter. Each party confirms that it has not relied upon any representation, undertaking or warranty not recorded in this document in entering into this Agreement. No variation of this Agreement shall be effective unless confirmed in writing and signed by authorised signatories of both parties to this Agreement. The terms of this agreement supersede the terms of any prior agreement between the parties.
- 12.2 If any ambiguity or conflict arises between the terms of this Agreement and those of TEL's articles of association then, to the fullest extent permitted by law, the terms of this Agreement shall prevail.

13. **Severability**

13.1 If any term of this Agreement shall be held to be illegal, invalid or unenforceable, in whole or in part, under any enactment or rule of law, such term or part shall to that extent be deemed not to form part of this Agreement but the legality, validity or enforceability of the remainder of this Agreement shall not be affected.

14. **Waiver**

14.1 The failure to exercise or delay in exercising a right or remedy provided by this Agreement or by law does not constitute a waiver of the right or remedy or a waiver of other rights or remedies. A waiver of a breach of any of the terms of this Agreement or of a default under this Agreement does not constitute a waiver of any other breach or default and shall not affect the other terms of this Agreement. A waiver of a breach of any of the terms of this Agreement or of a default under this Agreement will not prevent a party from subsequently requiring compliance with the waived obligation. The rights and remedies provided by this Agreement are cumulative and (subject as otherwise provided for in this Agreement) are not exclusive of any rights or remedies provided by law.

15. **Governing Law and Jurisdiction**

15.1 This Agreement is governed by the Laws of Scotland and, subject to the terms of clause 7, the parties submit to the exclusive jurisdiction of the Scottish Courts.

IN WITNESS WHEREOF this Agreement consisting of this and the preceding fifteen pages and the attached Schedules are executed as follows:

Subscribed for and on behalf of The City of Edinburgh Council at _____ on
day of _____ 2008

Witness.....

Full Name.....
Proper Officer

Address.....

.....

Subscribed for and on behalf of Transport Edinburgh Limited at _____ on _____ day
of _____ 2008

Director.....

Director/Secretary.....

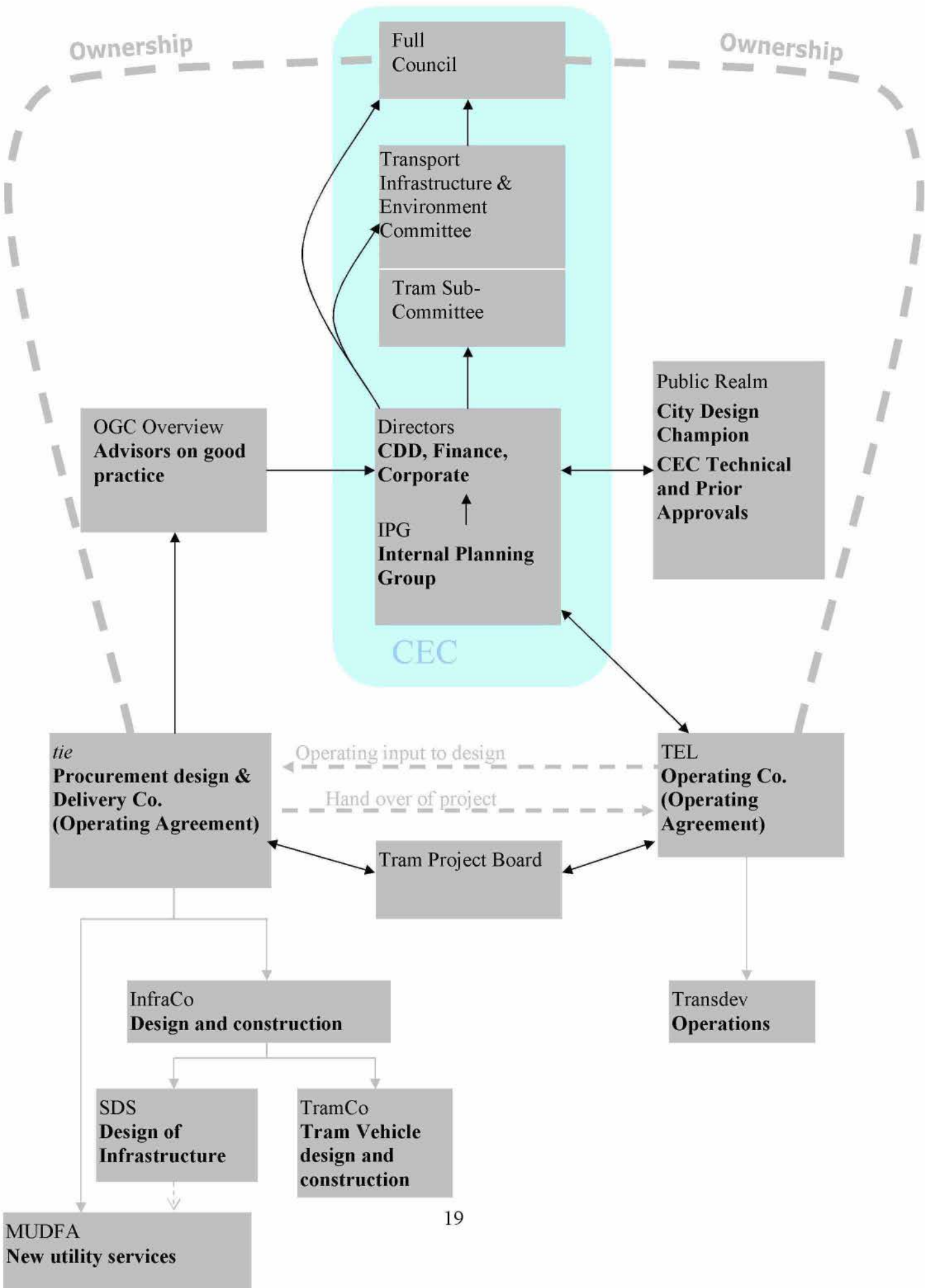
SCHEDULE 1

Scope of Services

1.	Development of a fully integrated bus and tram service plan in advance of tram commissioning.
2.	Provide or procure the provision of accurate and current information to the Council for appropriate decision making and approvals
3.	Address with the Council the funding and related implications of Phase 1B
4.	Develop and agree a communication strategy with tie and the Council and provide effective communications, consistent with this strategy
5.	Plan and manage the interface with tie in order to deliver a smooth handover for operations
6.	Carry out other duties as instructed by the Council in relation to the Project
7.	Act on efficiently and effectively all formal instructions issued by the Council in relation to the Project

Schedule 2
Governance Diagram

GOVERNANCE STRUCTURE



Edinburgh Tram – Financial Close and Notification of Contract Award

The City of Edinburgh Council

1 May 2008

1 Purpose of report

- 1.1 To notify the Council of the progress on the suite of contracts for the Edinburgh Tram Network (ETN) and to provide an update on financial close and the capital costs.

2 Summary

- 2.1 A report updating the Council on the progress of the contractual negotiations for the ETN was submitted to Council on 20 December 2007. Delegated authority was given to me to allow **tie Ltd** to enter into contracts to deliver the ETN subject to suitable due diligence and providing any remaining issues were resolved to my satisfaction.
- 2.2 **tie Ltd** are about to conclude the contractual negotiations and have recommended to me that the contracts for the supply and maintenance of the tram vehicles (Tramco) and for the construction and maintenance of the tram infrastructure (Infraco) be awarded to Construcciones y Auxiliar de Ferrocarriles SA (CAF) and Bilfinger Berger Siemens (BBS) respectively. The contracts include the novation of the CAF and the System Design Services (SDS) contracts to the main Infraco contractor.
- 2.3 Negotiations have taken longer than expected due to the complexity and scale of contractual and related issues arising from the contract suite. There has also been a substantial amount of work undertaken to minimise the Council's exposure to financial risk with significant elements of risk being transferred to the private sector. This has resulted in 95% of the combined Tramco and Infraco costs being fixed with the remainder being provisional sums which **tie Ltd** have confirmed as being adequate. The net result of the negotiations is a final estimate for Phase 1a of the ETN of £508m. This figure secures the best deal possible for the Council and Transport Scotland, and is well within the agreed funding envelope of £545m.
- 2.4 Infrastructure construction work is planned to commence in May 2008 and Phase 1a is programmed to be substantially complete by January 2011. A period of testing, driver training and shadow running (to test the entire system meets the performance requirements) overlaps with the Construction phase. Trams will be visible running along the route during this period. Revenue

services are planned to commence in July 2011. The Final Business Case (FBC) highlighted commencement of revenue operations in Quarter 1 of 2011. The changed timescales reflect the positive work undertaken in negotiating major contracts which provide greater price certainty, reduced risk exposure and better overall quality and value for the Council and Transport Scotland.

Main report

Recent Developments

- 3.1 The required notice of intent to award the contracts to CAF (for the Tramco contract) and BBS (for the Infraco contract) was issued on 18 March 2008, following satisfactory close out by **tie Ltd** of the remaining issues required by the Council. Following the mandatory minimum cooling off period, the contracts will be signed once final due diligence on the documentation is completed by **tie Ltd** and BBS.

Financial Close and Capital Cost

- 3.2 The protracted yet progressive nature of the contractual negotiations highlight the work undertaken by **tie Ltd** and written confirmation has been received from **tie Ltd** stating that the contracts represent the best possible value to the Council.
- 3.3 The FBC aggregate estimate for Phase 1a was £498m as reported to Council on 20 December 2007.
- 3.4 Over the period of negotiations with the preferred bidder there have been changes to the overall cost of the project. The make up of the estimated cost of Phase 1a in the FBC was £498m which included base costs of £449m and a Quantified Risk Allowance (QRA) of £49m. The base cost has now increased to £476m with a revised QRA of £32m giving a final estimated cost of £508m. Firm costs represent 95% of this sum, with the remainder being provisional sums which **tie Ltd** have confirmed as being adequate.
- 3.5 The increase in baseline aggregate costs is largely due to the firming up of provisional prices to fixed sums, currency fluctuations and the crystallisation of the risk transfer to the private sector as described in the FBC. An element of change in price was expected and was included in the risk provision reported to Council on 20 December 2007 based on the assessment of the bids when the preferred bidders were appointed.
- 3.6 The revised costs are based upon the construction programme as advised by **tie Ltd** with works anticipated to commence in May 2008 and Phase 1a being substantially complete by January 2011. Revenue services are planned to commence in July 2011. **tie Ltd** continues, through its appointed contractor, to execute the work under the contract for utility diversion along the tram route on behalf of the Council and reports that this work, which is part of the authorised works under the statutory authority granted to Council under the Edinburgh Tram Acts, is progressing to programme and budget.
- 3.7 The Council approved on 20 December 2007 the draft **tie Ltd** operating agreement and delegated authority to the Council Solicitor to execute the operating agreements with **tie Ltd** and TEL on behalf of the Council. The draft operating agreements have been amended to reflect the fully up to date position including the revised date of service commencement. Provision has also been made for the Tram Project Board (TPB) to oversee all matters affecting the programme, cost and scope of the project, although TPB will have to obtain