

- 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.....

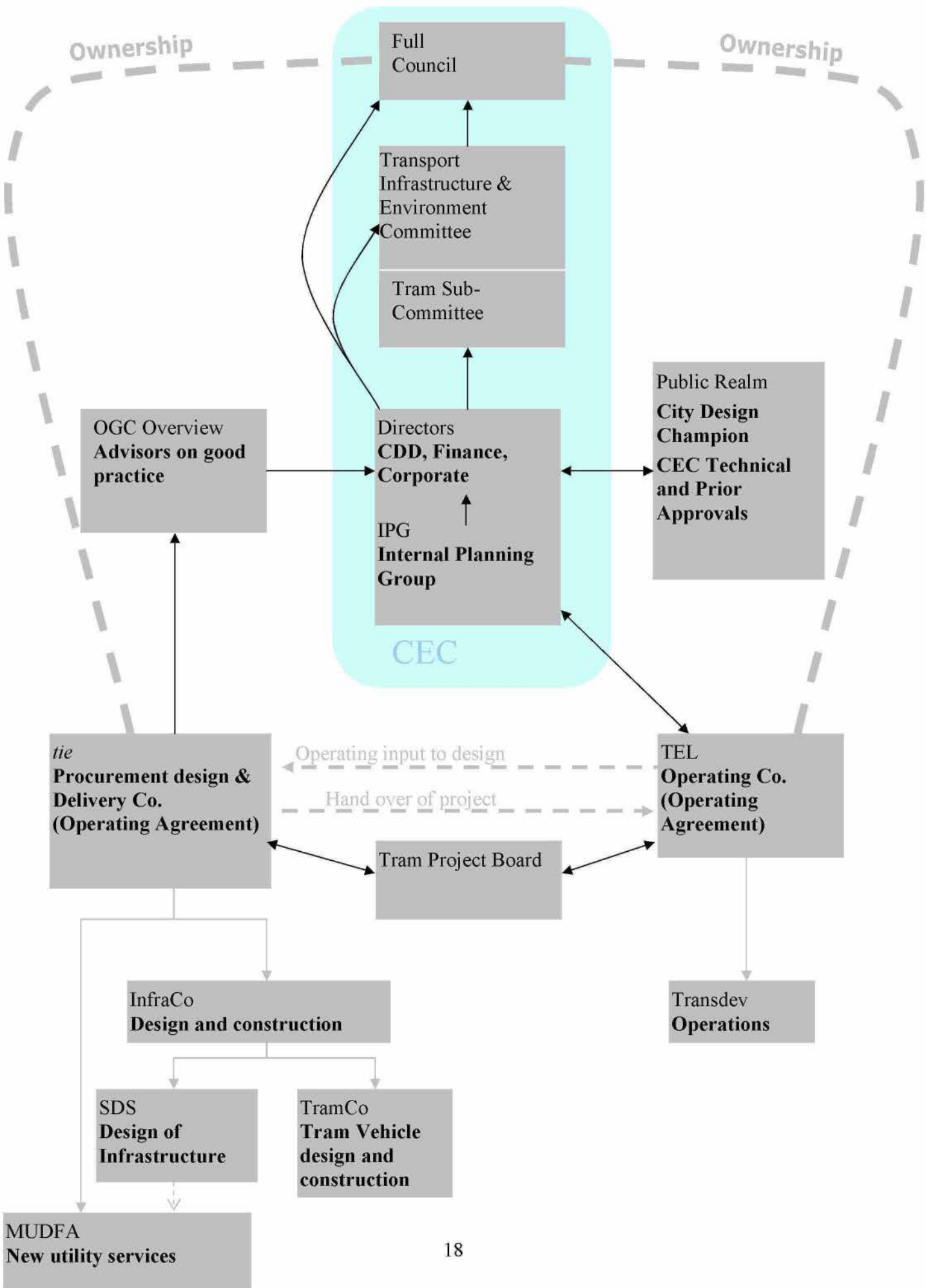
SCHEDULE 1

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 March 2011 and capital cost of £498m (Phase 1A) or £87m (Phase 1B) as set out in the Final Business Case; 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.
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Monitoring Officer with full supporting information to mitigate any delay to the Project to the fullest extent possible.

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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.

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- 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.
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- 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.

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- 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.

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- 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.....

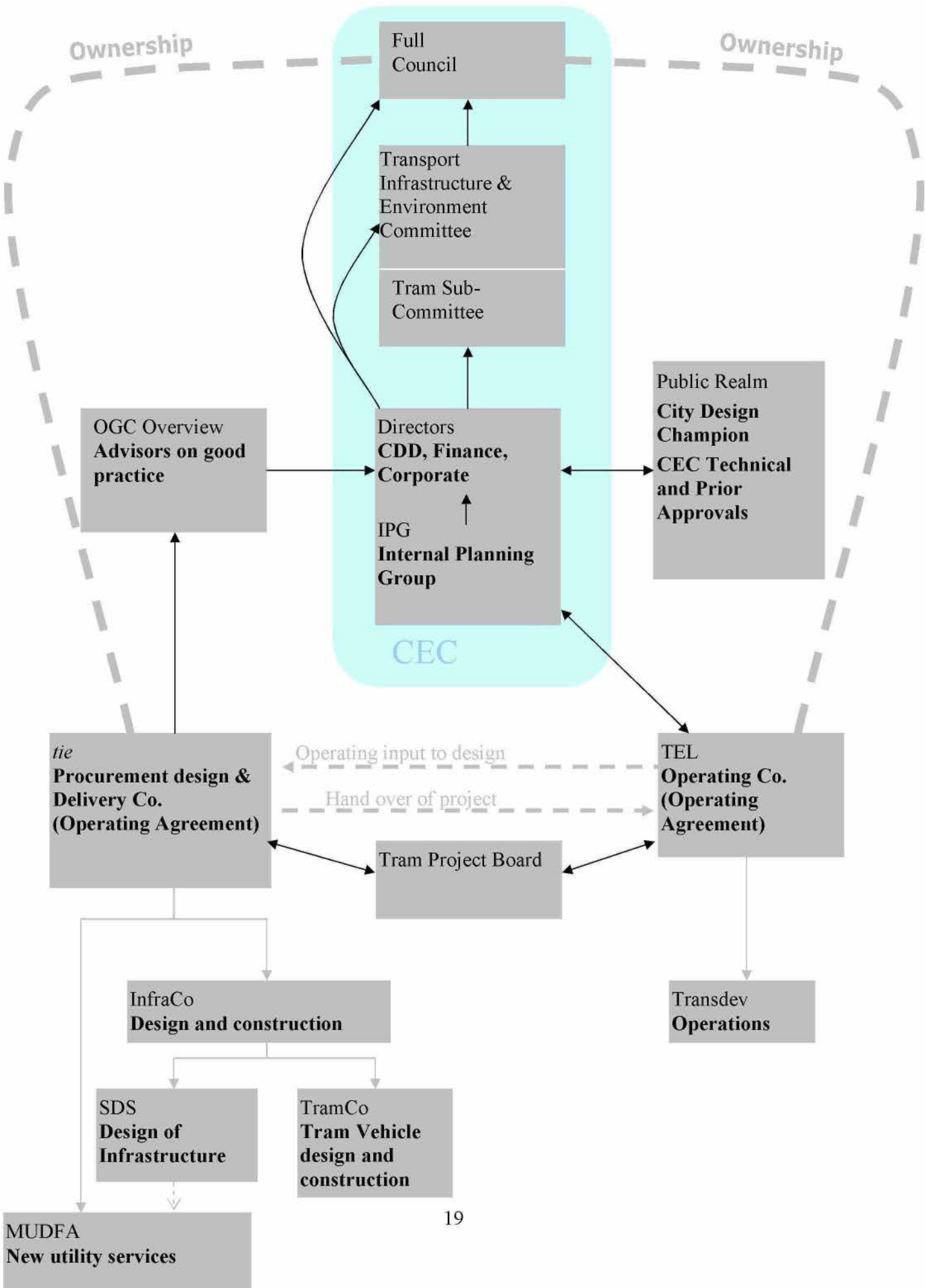
SCHEDULE 1

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



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.

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- 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.....

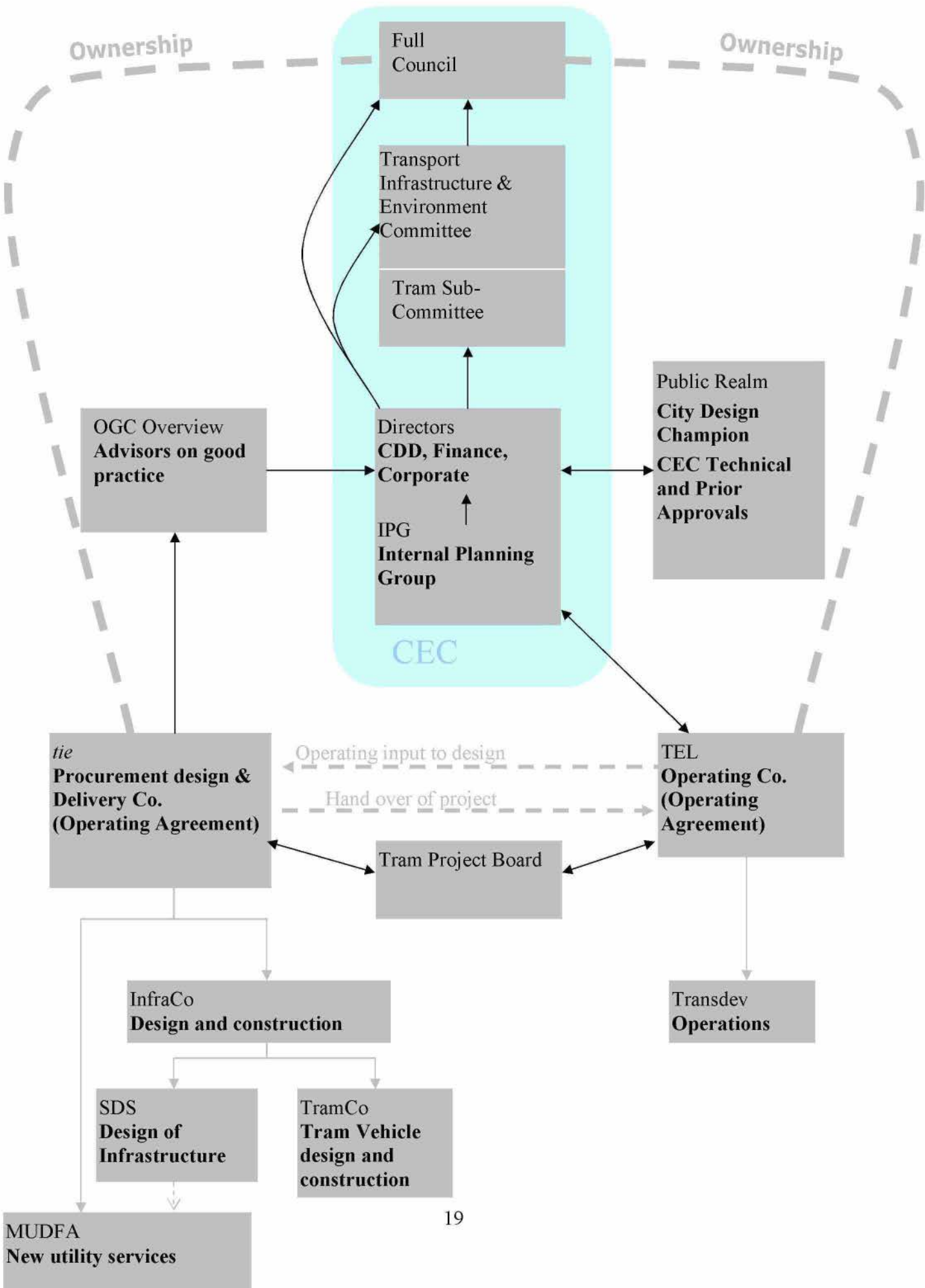
SCHEDULE 1

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 NETWORK

ALLOCATION OF CONTRACTUAL RISKS IN THE DRAFT INFRACO CONTRACT

14 DECEMBER 2007

Risk : General Obligations Clauses	Allocation		
	Public Sector	Private Sector	Shared
[2.2] Failure to serve notice to propose extension no later than 180 days prior to expiry date.	✓		
[3.5] Termination by either party due to failure to satisfy a CP within 3 months of Effective Date which is not waived.	✓	✓	
[4.4/7.4] Discrepancies, errors or omissions in or between the Infraco Proposals and the Employers Requirements.		✓	
[4.5] Failure to bring discrepancies or requirements for further information in relation to documents to the attention of tie's Representative.		✓	
[6.1/6.3] Failure to cooperate in order to facilitate carrying out the Infraco Works.			✓
[6.3.1] Failure to approach all Permitted Variations on a collaborative and Open Book Basis.			✓
[6.3.2] Failure to use reasonable endeavours to avoid unnecessary complaints, disputes and claims against the other Party.			✓
[6.3.3] Failure to comply with Dispute Resolution Procedure in relation to any such complaints, disputes and claims with or against the other Party.			✓
[6.3.4] Interference with the rights of the other Party in performing its obligations under the Infraco Contract, or in any other way hindering or preventing the other Party from performing those obligations or from enjoying the benefits of its rights.			✓
[6.3.5] Failure to take reasonable steps to mitigate any foreseeable losses and liabilities of the other Party which are likely to arise out of any failure by the non complying party to take the steps listed in 6.3.2 to 6.3.4 above.			✓
[6.3.6] Failure to take reasonable steps to manage, minimise and mitigate all costs.			✓
[6.5] Failure of senior representatives to meet quarterly to discuss proposals to minimise cost and optimise quality or to discuss matters which may adversely affect the Infraco Works, the ETN, CEC or the performance of the Infraco Contract.			✓

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Risk : General Obligations Clauses	Allocation		
	Public Sector	Private Sector	Shared
[6.8] Failure to procure the attendance of any of the Infraco Parties as required by tie at the quarterly meetings describe in 6.5 above.		✓	
<p>[5] Failure to adequately inspect the Site and to satisfy and take account of the following:</p> <ul style="list-style-type: none"> - the ground conditions on the Site; - all relevant safety requirements and environmental matters; - the form and nature of the Site; - the nature of the materials to be excavated; - the extent and nature and difficulty of the work and materials necessary for the completion of the Infraco Works; - the quality of any existing structures which will form part of, be adjacent to or be associated with the ETN; - risk of injury or damage to property adjacent to the Site and to occupiers of such property; - possibility of interference from parties other than tie; - the precautions, times and methods of working necessary to comply with the Code of Construction Practice and Code of Maintenance Practice and, in accordance with Good Industry Practice to minimise and nuisance or interference; - use by third parties of land being part of or adjacent to the ETN; - means of communication with and restrictions of access to the Site; - accommodation required by Infraco; - generally to obtain all necessary information as to risks, contingencies and other circumstances influencing or affecting the Infraco Works. 		✓	
[7.1] Failure to perform the Infraco Works fully and faithfully in accordance with the Infraco Contract.		✓	
<p>Failure to carry out the works:</p> <ul style="list-style-type: none"> • [7.2] using a reasonable level of professional skill, care and diligence to be expected of a properly qualified and competent professional contractor experienced in carrying out works and services of a similar nature to the Infraco Works; • [7.3.1] in accordance with the Infraco Contract; • [7.3.2] so as to enable the ETN to be designed, constructed, installed, tested and commissioned, and thereafter operated and maintained; • [7.3.3] in accordance with the Infraco's quality management system and plans; 		<ul style="list-style-type: none"> ✓ ✓ ✓ ✓ 	

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Risk : General Obligations Clauses	Allocation		
	Public Sector	Private Sector	Shared
<ul style="list-style-type: none"> • [7.3.4] in compliance with the Employer's Requirements; • [7.3.5] in compliance with the Infraco's Proposals; • [7.3.6] in accordance with tie and CEC policies; • [7.3.7] in accordance with the Code of Construction Practice; • [7.3.8] in accordance with the Code of Maintenance Practice; • [7.3.9] in compliance with the Tram Legislation; • [7.3.10] in compliance with applicable Laws, Land Consents and Consents; • [7.3.11] using reasonably practicable means to ensure impacts are no worse than residual impacts as identified in the Environmental Statements; • [7.3.12] in compliance with environmental regulations and requirements; • [7.3.13] in accordance with Good Industry Practice; • [7.3.14] to ensure that the design of the ETN is buildable; • [7.3.15] to provide assistance to tie in ensuring best value; • [7.3.16] to not wilfully detract from image of tie, TEL, CEC, the Scottish Ministers, Transport Scotland or the ETN; • [7.3.17] in accordance with OGC's "Excellence in Construction" initiative; • [7.3.18] to ensure sustainability of the ETN in relation to energy consumption and the supply of materials from sustainable resources; • [7.3.19] in a manner not likely to be injurious to persons or property; • [7.3.20] using Key Personnel. 		<ul style="list-style-type: none"> ✓ ✓ ✓ ✓ ✓ ✓ ✓ ✓ ✓ ✓ ✓ ✓ ✓ ✓ ✓ ✓ ✓ ✓ ✓ 	
[7.5.1] Failure to use reasonable endeavours to maximise construction productivity by reference to international best practice.		✓	
[7.5.2] Failure to use reasonable endeavours to minimise disruption to the city of Edinburgh.		✓	
[7.5.3] Failure to use reasonable endeavours to maintain safety and minimise the potential for accidents and safeguard the Infraco Works.		✓	
[7.5.4] Failure to use reasonable endeavours to safeguard the efficiency in the obtaining of Consents.		✓	
[7.5.5] Failure to use reasonable endeavours to minimise costs.		✓	
[7.6] Failure to keep itself fully informed about current professional and technical standards and about all matters relating to, or which might have a bearing on, the Infraco Works.		✓	
[7.8] Failure to fully understand the scope and extent of requirements and sufficiency of information to complete the Infraco Works.		✓	

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Risk : General Obligations Clauses	Allocation		
	Public Sector	Private Sector	Shared
[7.9-7.10] Content, completeness, currency, accuracy or fitness for any purpose of Background Information supplied by tie or any of its stakeholders, subject to fraudulent statements or fraudulent provision of information by tie .		✓	
[7.11] Failure to liaise with any party, as required, to produce information required so that the Infraco Works can be progressed properly, according to Programme and in accordance with the Infraco Contract.		✓	
[7.12] Failure to liaise with regard to material types, methods and programmes, cost effectiveness and temporary works in respect of any Permitted Variation.		✓	
[7.13] Failure to provide all labour, goods, materials, Infraco's Equipment, Temporary Works, transport to and from the Site and everything else of a temporary or permanent nature required in respect of the Infraco Works which is either required in the Infraco Contract or which could have reasonably been foreseen by an experienced contractor.		✓	
[7.14] Failure to ensure the adequacy, stability and safety of all site operations and methods of construction.		✓	
[7.15] Use or specification for use of any materials which are known to be deleterious or contravene any relevant standard or code of practice (including Ove Arup & Partners guidance or Good Industry Practice)		✓	
[7.16] Use of or installation on the Edinburgh Tram Network of materials which are not in accordance with the Employer's Requirements on the date of such use or installation.		✓	
[7.17] Failure to notify tie of any ground, geophysical or other surveys which the Infraco intends to carry out.		✓	
[7.18] Failure to notify tie of any Abortive Work.		✓	
[26.17] Failure of the Infraco, Key Personnel, staff and Infraco Parties to comply with all regulatory requirements and tie's Drug and Alcohol Policy.		✓	

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Risk : System Integration	Allocation		
	Public Sector	Private Sector	Shared
Failure to implement: <ul style="list-style-type: none"> [8.1.1] work to define sub-system performance and demonstrate that the System Availability Target can be met; [8.1.2] management of technical interfaces including system wide issues such as electro-magnetic compatibility and stray current protection, noise, vibration and wheel/rail interface; 		✓	

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Risk : System Integration	Allocation		
	Public Sector	Private Sector	Shared
<ul style="list-style-type: none"> [8.1.3] test management, including the preparation of method statements, test scripts, the setting of pass/fail criteria, and analysis; [8.1.4] alignment of operations and maintenance procedures; [8.1.5] system activation; [8.1.6] safety assurances and the Case for Safety; [8.1.7] a requirements traceability matrix. 		✓	
[8.2] Failure to ensure that Trams and engineers works vehicles are fully integrated with the Infraco Works.		✓	
[8.3] Failure to carry out all of the system integration activities described in the Employer's Requirements and Infraco's Proposals.		✓	
[8.4] Failure to liaise with the Operator and tie in respect of system operation and related design, Systems Acceptance Tests and operational defects.		✓	
[8.5] Failure to ensure that design is compatible with system integration throughout the Term.		✓	
[8.6] Failure to manage configuration control of the ETN.		✓	
[8.7] Failure to procure that the Tram Supplier complies with specific obligations (mock up, testing, safety etc).		✓	

Risk : Infrastructure and Equipment	Allocation		
	Public Sector	Private Sector	Shared
[9.1] Failure to pay the Infraco resulting in the title in all materials, goods and equipment not transferring to CEC.	✓		
[9.1] Failure to transfer title to CEC in all materials, goods, and equipment intended to form part of the ETN.		✓	
[9.1] Failure to deliver or install materials following advance payment including risk of insolvency of suppliers.		✓	
[9.2/9.3/9.4] Failure to clearly identify, separate and label project assets as the property of CEC, whether on site or off site. Failure to include such provisions in sub-contracts.		✓	
[9.5] Failure to procure that CEC pursues claims against suppliers of defective or faulty materials which have vested in CEC and to reimburse Infraco of all costs recovered.	✓		
[9.6/9.7.1] Failure to procure that the Tram Supplier transfers title to CEC in the Trams (free from all Security Interests) or Tram Related Equipment.			✓
[9.8] Compatibility of all infrastructure, equipment and systems and fitness for purpose (as defined complaint with the Employer's Requirements), excluding items free issued to the Infraco by tie.		✓	

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Risk : Infrastructure and Equipment	Allocation		
	Public Sector	Private Sector	Shared
[9.9/9.10] Euro Compliance of equipment, excluding items free issued to the Infraco by tie .		✓	
[9.11] Malfunction, non-operability, late delivery, removal or replacement of free issue fare collection equipment.	✓		
[9.12] Failure to make the Trams and any materials (in which title has passed to tie or CEC) available to the Infraco for performance of its obligations.	✓		

Risk: Security Package - Bonds, Guarantees and Collateral Warranties	Allocation		
	Public Sector	Private Sector	Shared
<u>Failure to provide and responsibility to replace if credit rating drops:</u>			
<u>Parent Company Guarantees</u>			
<u>Bonds (Performance Bond, Retention Bond, defects bond)</u>			
<u>Collateral Warranties</u>		✓	
<u>CEC Guarantee (of payment only)</u>		✓	
		✓	
	✓		

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Risk : Deliverables	Allocation		
	Public Sector	Private Sector	Shared
[10.1] Failure to prepare Deliverables in accordance with the Infraco Contract and Programme.		✓	
[10.2] Failure to submit any Deliverables associated with any Permitted Variations to tie 's Representative for review pursuant to the Review Procedure.		✓	
[10.3] Failure to allow tie 's Representative reasonable opportunity to review any Deliverable at any stage of development.		✓	
[10.4] Failure to provide Deliverables in format required for tie extranet and failure to establish/maintain such an extranet.		✓	
[10.5/10.6] Failure to prepare a Submittal Programme which meets the Programme and submit same to tie and advise of revisions.		✓	
[10.6/10.7] Failure to comply with the Submittal Programme timescales			✓
[10.7] Introduction of alternative Submittal Programme where tie cannot comply with the original programme (not arising from Infraco default).	✓		
[10.8] Failure to give due consideration to tie or tie 's Representative at a meeting called by tie or tie 's Representative to discuss the development of a Deliverable and failure to submit a report detailing		✓	

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Risk : Deliverables	Allocation		
	Public Sector	Private Sector	Shared
such discussions.			
[10.9] Amendment to a Deliverable where such Deliverable does not meet the requirements of the Infraco Contract.		✓	
[10.9] Amendment to a Deliverable where such Deliverable does not meet the requirements of any "Approval Bodies".	✓	✓	
[10.10] Failure to provide Deliverables in accordance with the Infraco Contract.		✓	
[10.11] Provision of further Deliverables as requested by tie .	✓		
[10.12/10.13] Risks from conflicts, ambiguities, discrepancies, errors or omissions in or between Deliverables and proposing and carrying out resolution.		✓	
[10.14] Failure to ensure the Deliverables comply with document control requirements.		✓	
[10.15/10.16] Establishment, staffing and making available for tie's inspection of an office to store record of performance of the Infraco Works, drawings for construction, all specifications, all transactions entered into in relation to Permitted Variations and claims for additional costs or expenses.		✓	
[54.4/54.5] Failure to write up, maintain and store Technical Records in respect of Maintenance Services or in a format reasonably specified by tie .		✓	
[54.6] Maintenance, security, bugs etc in relation to the Infraco's computer systems and equipment		✓	

Risk : Novation and Other Key Interfaces	Allocation		
	Public Sector	Private Sector	Shared
[11.1] Failure of the Infraco to execute the novation agreement.		✓	
[11.1] Failure of tie to create the novation agreement and procure the execution of the same by SDS Provider.	✓		
[11.2.1] Failure of the Infraco to procure and provide to tie a collateral warranty from the SDS Provider.		✓	✓
[11.3] Failure to procure that the SDS Provider carries out and completes the SDS Services.		✓	✓
[11.4] Management of the performance of the SDS Services and resultant liability.		✓	
[11.5] Amendment of the SDS Agreement.	✓	✓	
[11.6] Failure to procure the attendance of the SDS Provider at any meeting in relation to the Infraco Works.		✓	
[11.7] Failure to procure performance of additional services required from the SDS Provider following a request from tie .		✓	
[11.7] Requirement for additional services from SDS.	✓		

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Risk : Novation and Other Key Interfaces	Allocation		
	Public Sector	Private Sector	Shared
[11.8] Termination of the SDS Agreement without the consent of tie .		✓	
[11.9] Failure, if required by tie , on termination or expiry of the Infraco Contract to novate, assign or otherwise transfer the SDS Agreement to tie , the Scottish Ministers, TEL, CEC, Transport Scotland or their successors with no worse financial standing than tie or to any other person whose obligations are unconditionally guaranteed under the SDS Agreement by such a person.		✓	
[11.9] Failure to assist in obtaining a collateral warranty from SDS where novation, assignation or other transfer has taken place.	✓		
[12.1] Failure to enter into a novation agreement with tie and the Tram Supplier.		✓	
[12.1] Failure to procure that the Tram Supplier enters into a collateral warranty in favour of tie and to deliver same to tie .			✓
[12.2] Failure to procure that the Tram Supplier carries out and completes the Tram Supply Obligations in accordance with the Tram Supply Agreement.			✓
[12.3] Management of the performance of the Tram Supply Obligations and resultant liability.		✓	
[12.4] Amendment to the Tram Supply Agreement (including the Tram Supply Obligations).	✓	✓	
[12.5] Failure to procure the attendance of the Tram Supplier at any meeting in relation to the Infraco Works		✓	
[12.6] Failure to use reasonable endeavours to procure supply of additional Trams, spare parts and services following a request from tie .		✓	
[12.6] The requirement for additional Tram Supply services.	✓		
[12.7-12.14] Termination of Tram Supplier or rectification of its defective performance.	✓	✓	
[12.15] Failure, if required by tie , on termination or expiry of the Infraco Contract to novate, assign or otherwise transfer the Tram Supply Agreement to tie , the Operator, the Scottish Ministers, TEL, CEC, Transport Scotland or their successors with no worse financial standing than tie or to any other person whose obligations are unconditionally guaranteed under the Tram Supply Agreement by such a person.		✓	
[12.15] Failure to assist in obtaining a collateral warranty from Tram Supplier where novation, assignation or other transfer has taken place.	✓		
[13.1] Failure to enter into a novation agreement with tie and the Tram Maintainer.		✓	
[13.2] Failure to procure that the Tram Maintainer enters into a collateral warranty in favour of tie .			✓
[13.3] Failure to procure that the Tram Maintainer carries out and completes the Tram Maintenance Services in accordance with the Tram Maintenance Agreement.		✓	

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Risk : Novation and Other Key Interfaces	Allocation		
	Public Sector	Private Sector	Shared
[13.4] Management of the performance of the Tram Maintenance Services and resultant liability.		✓	
[13.5] Amendment of the Tram Maintenance Agreement.	✓	✓	
[13.6] Failure to procure the attendance of the Tram Maintainer at any meeting in relation to the Infraco Works.		✓	
[13.7] Failure to use reasonable endeavours to procure that the Tram Maintainer shall supply any additional spare parts and/or perform any additional services which are required by tie in respect of the ETN.		✓	
[13.8-13.16] Termination of Tram Maintainer or rectification of its defective performance.	✓	✓	
[13.16] Failure, if required by tie , on termination or expiry of the Infraco Contract to novate, assign or otherwise transfer the Tram Supply Agreement to tie , the Operator, the Scottish Ministers, TEL, CEC, Transport Scotland or their successors with no worse financial standing than tie or to any other person whose obligations are unconditionally guaranteed under the Tram Supply Agreement by such a person.		✓	
[13.16] Failure to assist in obtaining a collateral warranty from Tram Maintainer where novation, assignation or other transfer has taken place.	✓		
[14.1] Failure to carry out and complete tie's Obligations (to be defined).	✓		
[15] Establishment of Local Codes of Construction Practice, identification and settlement of issues and resultant delay or disruption.	✓		
[15.1] Provision of assistance and method statements in relation to Local Codes of Construction Practice.		✓	
[16.2] Risks arising through the Asset Protection Agreement.		✓	

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Risk : Operator Interface	Allocation		
	Public Sector	Private Sector	Shared
[17.2] Occurrence and costs to the Infraco of an Operator Event to the extent the Infraco has not materially contributed to such event.	✓		
[17.3/17.4/17.7] Failure to mitigate (at reasonable inconvenience and cost), notify tie of or maintain reports of an Operator Event or matters which may precede an Operator Event.		✓	
[17.5] Arranging meeting and obtaining Operator's cooperation with agreed corrective measures following an Operator Event.	✓		

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Risk : Operator Interface	Allocation		
	Public Sector	Private Sector	Shared
[17.8] Failure to, from the date of the Agreement, take into account comments of the Operator when refining Design and failure to deliver Infraco comments on functional and maintainability issues to tie and the Operator.		✓	
[17.9] Obstruction of the Operator in respect the Operator Maintenance Plan and Maintenance Services .		✓	
[17.9] Obstruction by the Operator of the Infraco in respect of the Maintenance Services.	✓		
[17.10] Failure to observe the Operator's Representative's instructions.		✓	
[17.11-13] Failure to notify and co-operate with tie and the Operator and minimise the adverse consequences of Operator Maintenance, Maintenance Services and any planned or unplanned works or activities, including support in providing alternative transport and notifying passengers.		✓	
[17.12/13] Failure to notify passengers of disruption.	✓		
[17.14-17.17] Failure to comment, <u>respond with set timescales</u> , provide a report on and carry out modifications as a result of a DPOFA Change.		✓	
[17.14 - 17.17] Variation to DPOFA which adversely affects Infraco's <u>performance</u> .	✓		
[17.18.1] Failure to provide a representative for the Project Safety Certification Committee.		✓	
[17.18.2.1/51.2] Failure to liaise with the Independent Competent Person, HMRI and the Emergency Services.		✓	
[17.18.2.2] Failure to develop and implement the Infraco Safety Management System.		✓	
[17.19] Failure to give access to the Infraco Safety Management <u>System</u> .		✓	
[17.20/17.21] Failure to complete safety and service readiness verification each morning, <u>to certify this to tie and the Operator and to rectify where the system is not ready</u> .		✓	
[17.22] Failure to liaise effectively with the Operator in the co-ordination of health and safety issues at the Depot.		✓	
[17.23] Failure to give the Operator and tie a minimum of one month's notice of any planned lifecycle maintenance forming part of the Maintenance Services to be carried out on any part of the ETN <u>and to give subsequent notices</u> .		✓	
[17.24] Failure to provide tie and the Operator with a combined maintenance plan not less than 6 months prior to the Planned Service Commencement Date, subject to supply to the Infraco of the Operator Maintenance Plan 12 months prior to the Planned Service Commencement Date.			✓
[17.25-17.27] Failure to provide technical advice and information to the Operator during normal working hours; failure to provide reasonable works/site access to Operator and tie ; interference with Operator mobilisation.		✓	

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Risk : Operator Interface	Allocation		
	Public Sector	Private Sector	Shared
[17.27/17.28] Interference with Infraco while on Site; failure to comply with safety procedures on site; damage to the Infraco Works caused by the Operator or tie (unless fair wear and tear or due to operations in accordance with the Operations and Maintenance Manual).	✓		
[17.29] Failure to work closely and effectively with the Operator to complete the System Acceptance Tests and related obligations on testing and commissioning.		✓	
[17.31] Failure of the Infraco to work collaboratively with the Operator and failure of the Operator to work collaboratively with the Infraco to: <ul style="list-style-type: none"> [17.31.1] maximise productivity during the Infraco Works and minimise disruption for the public and third parties; [17.31.2] ensure the delivery of complete system integration; [17.3.3] satisfy levels of technical systems availability; [17.31.4] minimise and give the best advance notice of interruption to Transport Services; [17.31.5] not hinder proper performance of the Project Development Services, Project Operations and obligations under the Infraco Contract; [17.31.6] support adherence to timetables and the Programme; [17.31.7] report promptly any proposed change permitted under the DPOFA or the Infraco Contract and related mitigation; [17.31.8] use reasonable endeavours to minimise likelihood of interface disputes. 	✓	✓	
[17.32 and 17.34] Claims against tie by the Operator pursuant to DPOFA due to Infraco <u>breach, save to the extent contributed to by tie or the Operator.</u>		✓	
[17.33] Liaison between the Operator and Infraco.	✓	✓	

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Risk : Land Issues and Consents	Allocation		
	Public Sector	Private Sector	Shared
[18.1/18.18/18.20/18.21/18.22] Failure to provide appropriate licence and the necessary Land Consents to enter and remain upon the Permanent Land <u>or withdrawal, denial, refusal or delay of granting Infraco access that is undisputed by tie.</u>	✓		
[18.2/18.19] Encroachment, design or construction of ETN on any land outside of the Permanent Land and Temporary Sites without the consent of tie .		✓	
[18.3/18.6/18.17] Breach of a Land Consent due to breach of the agreement or wilful act or omission or the use of Temporary Sites outside that specified in the Acts.		✓	

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Risk : Land Issues and Consents	Allocation		
	Public Sector	Private Sector	Shared
[18.4] Failure to give tie not less than 40 days' notice where access is required to any Temporary Site for the purposes of carrying out the Infraco Works.		✓	
[18.5] Failure to provide access to the Temporary Sites following 40 days' notice having been given by the Infraco.	✓		
[18.7/18.8] Failure to minimise period of possession of Temporary Site, or failure to quit occupation of such Temporary Site after 28 days (3 months where a Site Office has been established) following the completion of the Infraco Works to such Temporary Site.		✓	
[18.9] Failure to give notice of the vacation of a Temporary Site.		✓	
[18.10] Failure to remove all temporary works from a Temporary Site and restore the land to the reasonable satisfaction of the land owner.		✓	
[18.10.1] Demolition of a building or any part thereof without the consent of tie .		✓	
[18.10.2] Failure to provide tie with sufficient evidence (including a detailed record of the condition of the land both before and after the occupation of the Temporary Site) to show that restoration obligations have been complied with.		✓	
[18.11] <u>Compliance with the obligations that have been flowed down into the Infraco Contract from the Third Party Agreements when in occupation of the Permanent Land or any Temporary Sites.</u>		✓	
[18.12] Failure to provide notice of temporary possession for maintenance purposes, excluding where any Building Fixing Agreement contains a right for the Infraco to enter onto any land.		✓	
[18.13] Failure to give possession of land for maintenance purposes under section 27(1) of the Tram Acts.	✓		
[18.14.1] Breach of requirement to be <u>in possession of land less than 20m away from Infraco Works.</u>		✓	
[18.14.2] <u>Possession of land which is not reasonably required for or in connection with the Maintenance Services.</u>		✓	
[18.14.3] Breach of requirement to avoid possession of houses or gardens.		✓	
[18.14.3] Breach of requirement to avoid possession of occupied buildings.		✓	
[18.15/18.21] Provision of additional access, land, rights, facilities and/or Land Consents which are required by the Infraco outside the Permanent and Temporary Land.	✓	✓	
[18.16] Failure to use reasonable endeavours to provide assistance to tie in the provision and amendment of Land Consents.		✓	

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Risk : Land Issues and Consents	Allocation		
	Public Sector	Private Sector	Shared
[18.17A - 18.17C] Breach of obligations flowed down to the Infraco Contract from the Third Party Agreements or putting tie or CEC in breach of such agreements.		✓	
[18.17A - 18.17C] Taking steps to ensure tie or CEC is not in breach of obligations which have not been flowed down to the Infraco Contract from the Third Party Agreements disclosed to the Infraco - subject to test of reasonably foreseeability by an experienced contractor executing works of a similar nature in a similar environment.	✓	✓	
[19.1] NOTE: CONSENTS CLAUSE 19 STILL UNDER DISCUSSION Failure to obtain and maintain all TTROs TROs and tie Consents.	✓		
[19.2] Failure to provide required information to enable tie to obtain a TTRO and all other reasonable assistance and support to tie in obtaining the TTROs, TROs and tie Consents.	✓		
[19.3] Failure to obtain and maintain all Design Stage Consents, Construction and Maintenance Stage Consents and TTROs required after Service Commencement.		✓	
[19.4] Failure to provide reasonable assistance and support to Infraco in obtaining and maintaining the consents for which it is responsible.	✓		
[19.5/19.6] Failure of the Infraco to obtain Design Stage Consent in respect of a design for which SDS is responsible provided that the Infraco has: <ul style="list-style-type: none"> the Infraco has informed tie of the reasons given by the Approval Body; the Infraco has managed the SDS Provider; such failure is not as a result of reprogramming the Infraco Works or reprioritising the design or late submissions; the Infraco has mitigated the impact of such failure and afforded tie the opportunity to resolve matters with the Approval Body; such failure is not as a result of SDS failure to perform in terms of quality 	✓		
[19.7] Failure of the Infraco to obtain Design Stage Consent in respect of a design for which SDS is responsible where the Approval Body has required an unanticipated change to design or has not delivered the consent according to the Consents Programme.	✓		
[19.9] Responsibility for obtaining, maintaining or renewing Additional Consents that are Design Stage Consents or Construction and		✓	

- Deleted:** [18.19] Breach of obligations under Schedule 13 (Third Party Agreements).⁶ NOTE: any Third Party Agreements disclosed post Award may be treated as a tie change.
- Deleted:** [18.22-18.24] Failure to obtain access to land required for Accommodation Works.
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Risk : Land Issues and Consents	Allocation		
	Public Sector	Private Sector	Shared
Maintenance Stage Consents.			
[19.9] Responsibility for obtaining, maintaining or renewing Additional Consents that are tie Consents or are not Design Stage Consents or Construction and Maintenance Stage Consents.	✓		
[19.10] Responsibility for obtaining Network Rail Possessions.	✓		
[19.10] Provision to tie of technical and design documentation as necessary to obtain the Network Rail Possessions.		✓	
[19.10] Cost of obtaining Network Rail Possessions save where due to the Infraco's default or delay.	✓		
[19.10] Cancellation or alteration of possession dates, timings or durations.	✓		
[19.11] Failure to update the Consents Programme by each Reporting Period End Date and showing any Additional Consents to be obtained.		✓	
[19.12] Failure to notify Approval Bodies when required on Site and co-ordination of their works with the Infraco Works.		✓	
[19.13] Failure to provide relevant documentation to tie where tie's authorisation or completion of such documentation is required by Law.		✓	
[19.14] Payment of fees to obtain any Consents, unless otherwise stipulated (e.g. Network Rail Possessions).		✓	
[19.15] Failure to use reasonable endeavours to obtain written consent of adjoining or neighbouring landowners with regard to interference with their rights.		✓	
[19.16] Approval of change to Consents Programme where Infraco demonstrates to tie that this is to prevent or mitigate a tie Change, Relief Event, Compensation Event or a Notified Departure.	✓		
[19.17] Refusal or unreasonable delay in granting Construction and Maintenance Stage Consent, where Infraco has used reasonable endeavours, acted in accordance with Good Industry Practice and provided all necessary information.	✓		
[20.1] Failure to submit the Proposals to tie at least 6 months prior to the date on which the Infraco proposes to install, maintain, modify or replace any relevant supporting infrastructure and to obtain tie's consent to the Proposals		✓	
[20.2 and 20.4] Failure to submit the necessary applications and obtain necessary Consents from the relevant Planning Authority or for temporary poles as an alternative (tie to take planning permission risk is under discussion).		✓	
[20.3] Failure to submit revised proposals where tie consent is withheld.		✓	
[20.3] tie to obtain Consents and Building Fixing Agreements	✓		

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Risk : Land Issues and Consents	Allocation		
	Public Sector	Private Sector	Shared
[20.5] Where a building fixing agreement is to be used, securing the consent of the Heritable Proprietor and any other relevant party to allow the Infraco to carry out a survey and securing the agreement of the Heritable Proprietor to allow the setting of such building fixings (both at Infraco cost)	✓		
[20.5] Failure to provide tie with the information it requires and to carry out the relevant survey.		✓	
[20.7] Where necessary due to the Heritable Proprietor withholding its consent to building fixings, the responsibility for and cost of the procedure of application to the Sheriff Court pursuant to the Acts or submittal of alternative plans.	✓		
[20.8] Failure to use all reasonable endeavours to assist tie in the procedure for application to the Sheriff Court pursuant to the Acts.		✓	
[20.9] Rejection of application by Sheriff Court or anticipated rejection, cost of submission by the Infraco of revised proposals.	✓		
[20.10] Cost of removal of a building fixing and installation of OLE pole	✓		
[20.11] Selection of method for supporting OLE, where building cannot support the loadings of a building fixing		✓	
[21.4] Failure to obtain any street works licence, road opening permit and any other consent, licence or permission (other than any Land Consents) that may be required for the Infraco Works.		✓	
[21.5] Failure to give notice to a relevant authority of its proposal to commence any work and failure to provide assistance to tie to recover contributions from the utilities.		✓	
[21.6] Third Party Works being carried out by a utility, roads authority or an authorised third party.	✓		
[22.1] Adverse physical conditions and artificial obstructions, subject to information being provided.		✓	
[22.2/22.5] Discovery of unidentified utility apparatus, unexploded ordnance, contaminated land or adverse physical or ground conditions which was not listed in the Ground Condition and Utility Information or which could not have reasonably been foreseen from the use of such information.	✓		
[23] Failure to provide tie and tie's Representative and any person authorised by tie or tie's Representative with access upon reasonable prior notice to any site, workshop or facility etc during normal working hours.		✓	
[23] Failure to comply with rules and regulations when on such sites.	✓		
[24.1/24.2] Failure to execute the Depot Licence and comply with the terms thereof.		✓	
[24.4] Condition or fitness for purpose of the Depot.		✓	

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Risk : Land Issues and Consents	Allocation		
	Public Sector	Private Sector	Shared
[24.5] Liability for death, injury, damage to property or any other liability resulting from use of the Depot.		✓	
[24.6] Disruption of the Infraco's performance by tie accessing the Depot.	✓		

Risk : Sub-Contracting and Personnel	Allocation		
	Public Sector	Private Sector	Shared
[28.2/28.3] Sub-contracting of part of the Infraco Works without tie's consent except in respect of the SDS Provider, Tram Supplier, Tram Maintainer and any approved sub-contractor and/or trades and failure to provide information to enable tie to make a decision.		✓	
[28.3/28.10] <u>Unacceptable safety record of Key Sub-Contractor or failure of it or Infraco to provide a collateral warranty.</u>		✓	
[28.4] Failure to incorporate required contract terms into subcontracts to be entered into by agreed "Key Sub-Contractors" or where the terms of the subcontract would result in the Infraco not being able to perform its obligations.		✓	
[28.5] Failure to provide such skilled technical assistants and labour as required for execution of the Infraco Works.		✓	
[28.6] Misconduct, incompetence, negligence or non-compliance with safety precautions of any employee of the Infraco and/or a Sub-Contractor.		✓	
[28.7] Failure to use reasonable endeavours to provide Key Sub-Contractor collateral warranties to tie in favour of tie and/or in favour of CEC, BAA, TEL and Network Rail (any other party must be identified prior to Award).		✓	
[28.9] Failure in performance by <u>the Infraco or Sub-Contractors in carrying out the Infraco Works.</u>		✓	

Risk : Performance of the Works	Allocation		
	Public Sector	Private Sector	Shared
[25.1] Failure to observe the reasonable instructions of tie's Representative.		✓	
[25.1 and 25.7] Failure to monitor the Infraco Works and failure to inform Infraco of the identity of tie's Representative.	✓		
[26] Acts or omissions of the Infraco's Representative.		✓	
[26.1] Failure to provide sufficient superintendence to the Infraco Works.		✓	
[26.2/26.5/26.7] Failure to obtain/retain tie's approval of the Infraco's Representative or his deputy.		✓	

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Risk : Performance of the Works	Allocation		
	Public Sector	Private Sector	Shared
[26.3] Supervision, management and coordination of the Infraco Works to ensure completion of the Infraco Works.		✓	
[26.8] Replacement of the Infraco's Representative.		✓	
[26.9/26.10] Failure to provide sufficient staff and involve the Key Personnel in the Infraco Works.		✓	
[26.12] Failure to ensure that there are no changes to the Key Personnel without tie's prior written consent and that any replacement persons shall be of at least equivalent status an ability to the person whom they replace.		✓	
[26.13] Failure to use all reasonable endeavours to ensure the continuity of the personnel assigned to perform the Infraco Works and to carefully select Key Personnel having careful regard to their existing work load and other planned commitments.		✓	
[26.14] Failure to ensure that Key Personnel have the requisite level of skill, experience and authority and receive the necessary amount of training and supervision.		✓	
[26.16] Contracting of or retention of as an adviser or consultant any person currently or previously employed or engaged in the previous 3 months by tie without the prior written approval by tie .		✓	
[26.17] Failure of Key Personnel and other staff to comply with regulatory requirements and tie's drug and alcohol policy.		✓	
[26.18] Allowing the consumption of, or work of under, the influence of alcohol or drugs or the giving, selling or bartering of the same.		✓	
[27.1] Failure to employ careful, skilled and experienced staff or site supervisors with CSCS (or equivalent) certification.		✓	
[27.2] Misconduct, incompetence, negligence or non-compliance with safety precautions of any person employed on the Infraco Works.		✓	

Risk : Construction	Allocation		
	Public Sector	Private Sector	Shared
[29.1 and 29.2] Errors in the position, levels, dimensions or alignment of any setting out of the Infraco Works during progress of Infraco Works <u>until the issue of a Paten Defects Rectification Certificate.</u>		✓	
[29.3] <u>Protection and preservation of items required for setting out.</u>		✓	
[30.1] Failure to have full regard to safety of all persons entitled to be on Site and to keep the Site in an orderly state to avoid danger to such persons.		✓	
[30.2] Failure to provide required lights, guards, fencing etc.		✓	
[30.3] Failure to comply and use reasonable endeavours to ensure others comply with health and safety legislation and requirements.		✓	
[31.1 and 31.2] Failure to take full responsibility for the care of the Infraco Works from the <u>Commencement</u> Date until, in relation to each Section, the date of issue of a Certificate of Sectional Completion in relation to that Section <u>and, in relation to Trams and Tram Related</u>		✓	

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Risk : Construction	Allocation		
	Public Sector	Private Sector	Shared
<u>Equipment, the date of issue of a Certificate of Tram Commissioning including rectification for loss or damage.</u>			
[32.1] Failure to comply with the Code of Construction Practice and Code of Maintenance Practice regarding maintenance of access to properties, bus stops and bus services and the closure of roads.		✓	
[32.2] Failure to minimise nuisance, inconvenience or interference to the business or operations of the owners, tenants of properties on or in the locality of the Site, bus operators and to the public generally and failure to comply with the Code of Construction Practice and Code of Maintenance Practice in this regard.		✓	
[33.1] Failure to use reasonable means to prevent roads or bridges being subjected to extraordinary traffic by the Infraco.		✓	
[33.1] Failure to select routes and use vehicles to as far as possible avoid unnecessary damage to roads and bridges.		✓	
[33.2] Strengthening bridges or altering or improving any highway connecting with the Site to facilitate installation of the Trams, the Infraco's Equipment or Temporary Works.		✓	
[33.2 and 33.3] Claims for damage to highways or bridges caused by the installation of Trams, Infraco's Equipment or Temporary Works.		✓	
[34.1] Failure to construct and complete the Infraco Works in strict accordance with the Agreement and in strict compliance with tie's instructions.		✓	
[34.2] Failure of the materials, Infraco's Equipment, labour, mode and manner of construction being in accordance with the Infraco Contract.		✓	
[34.3] Time and cost (Compensation Event) if tie's instructions result in any delay or disruption or cost to the Infraco unless they result from the Infraco's default.	✓		
[39] Discovery of Fossils and Antiquities (including historical human remains) on Site.	✓		

Risk: Maintenance	Allocation		
	Public Sector	Private Sector	Shared
Failure to carry out all maintenance, repair, renewals and remedial works to the ETN as is necessary to: <ul style="list-style-type: none"> [52.1.1] maintain the ETN in accordance with the Maintenance Programme and the Maintenance Plan; [52.1.2] ensure that the requirements of the Maintenance Specifications are met at all times; [52.1.3] comply with the Operator Procedures; [52.1.4] ensure that tie is informed of any adverse impact of design, redesign or modification to the Infraco Works; 		<ul style="list-style-type: none"> ✓ ✓ ✓ ✓ 	

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Risk: Maintenance	Allocation		
	Public Sector	Private Sector	Shared
<ul style="list-style-type: none"> [52.1.5] ensure that no maintenance or repair work shall prejudice to the Care for Safety; [52.1.6] not prejudice the health or safety of or unreasonably interfere with the duties of the Operator and third parties or expose the liability under health and safety legislation; [52.1.7] maximise the extent to which the ETN is available and to minimise interruption to availability; [52.1.8] sustain the functionality of the component parts of the ETN for not less than the design life; [52.1.9] hand back the ETN in a condition consistent with the Infraco having complied with Clause 52 (Maintenance) provided save for fair wear and tear or the expiry of working life. 		✓	
[52.2/52.3] Failure to work with Operator in respect of daily handover and handback.		✓	
[52.5] Failure to carry out Mobilisation Services on or before the appropriate Mobilisation Milestone Dates.		✓	
[52.6] Failure to carry out the Maintenance Services safely and efficiently and free of any reasonably avoidable risk of pollution, nuisance, interference or hazard.		✓	
[52.7] Failure to employ and train all staff necessary to perform the Maintenance Services in accordance with the Infraco Contract.		✓	
[52.8] Failure to provide and employ all staff necessary to perform the Mobilisation Services in accordance with the Infraco Contract.		✓	
[52.9] Failure to supply only new materials and goods (save where they have been repaired in accordance with Good Industry Practice) of a satisfactory quality.		✓	
[52.10-52.11] The provision of all Spare Parts and Special Tools required for the Maintenance Services (including the provision of valid calibration certificates) and which meet the technical and safety requirements of the Maintenance Specification.		✓	
[52.12/52.14] Failure to manage and maintain adequate stocks for the Minimum Spare Parts Pool at the Depot, manage reorders and lead times and review of the level of Minimum Spare Parts Pool.		✓	
[52.14] Review and variation of the Minimum Spare Parts Pool	✓		
[52.15] Effecting repairs of all defects in, failures or damage to the ETN irrespective of cause, excluding the Free Issue Fare Collection Equipment, causing minimum disruption to the ETN.		✓	
[52.16] Cost of repairs referred to at 52.15 above to the extent that any damage to the ETN is caused by: 1) a breach of the Infraco Contract by Infraco or any Infraco Party or 2) any negligent act or omission by the Infraco or any Infraco Party.		✓	

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Risk: Maintenance	Allocation		
	Public Sector	Private Sector	Shared
[52.17] Cost of repairs referred to at 52.15 above to the extent that any damage to the ETN is not caused by: 1) a breach of the Infraco Contract by Infraco or any Infraco Party or 2) any negligent act or omission by the Infraco or any Infraco Party.	✓		
[52.18] Failure to repair or replace the ETN to a condition which meets the requirements of the Maintenance Specification.		✓	
[52.19] <u>Effecting temporary repairs</u> and obtaining prior approvals.		✓	
[52.20/52.21] Failure to provide assistance, <u>summary reports</u> , information and advice <u>as required by tie</u> and the Operator in the case of incidents or failures affecting the ETN and reporting thereon.		✓	
[52.21] <u>Costs of complying with 52.20 where the incident is not the fault of the Infraco.</u>	✓		
[52.22] Failure to have competent resources available to carry out the repairs at the site of the failure where this is the most efficient manner of dealing with the failure.		✓	
[52.23] Failure to report and propose a solution to defects where rectification falls within the scope of the Infrastructure Maintenance Services in the ETN which may prejudice safety or reliable operation of the ETN.		✓	
[52.24] Failure to provide additional systems availability requested by <u>tie</u> following Infraco's confirmation of its ability to so provide. ¹²		✓	
[52.25] Failure to keep up to date and supply a maintenance manual, electronically and free of charge, to <u>tie's</u> representative.		✓	
[52.26] Failure to provide and maintain the Control Room.		✓	
[53] Use, handling, removal and disposal of Hazardous Materials and keeping an up to date register of same <u>save to the extent tie stores hazardous materials at the Depot in which the Infraco is not experienced in handling.</u>		✓	
[54] Maintenance of Technical Records and Computer Systems.		✓	

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Risk : Quality, Testing and Examination	Allocation		
	Public Sector	Private Sector	Shared
[35.1] Failure of the materials and workmanship to be as described in the Infraco Contract. Testing and examination of the quality, weight or quantity of any materials used before use in the Infraco Works.		✓	
[35.2] Costs of and supply of samples.		✓	
[35.3/41.2/44.2/47.2] Costs of any specified tests.		✓	
[35.3/35.4] Costs of tests not identified in the Infraco Contract but	✓		

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¹² Discussions as to payment of additional availability ongoing.

¹⁵ Subject to negotiation on OCIP cap re damage to property or the Infraco Works.

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Risk : Quality, Testing and Examination	Allocation		
	Public Sector	Private Sector	Shared
requested by tie , <u>save where required because of Infraco's breach.</u>			
[36.1] Failure to give 48 hours notice to allow examination of work prior to covering up.		✓	
[36.2] Cost of uncovering where Infraco Works are found to be in accordance with Agreement.	✓		
[36.2] Cost of uncovering where Infraco Works are found not to be in accordance with Agreement.		✓	
[37.1] Removal and replacement of unsatisfactory workmanship or materials.		✓	
[37.5] Costs of opening up and testing for unsatisfactory work and materials following repeated non-compliance.		✓	
<u>[37.5] Relief Event where opening up shows workmanship to be in accordance with the Infraco Contract.</u>	✓		
[38.3] Urgent repairs carried out by tie which the Infraco was liable to carry out at its own expense under the Agreement and which in the opinion of tie's Representative, acting reasonably, is necessary by reason of emergency or an immediate threat to health and safety.		✓	
[38.4] <u>Cost of urgent repairs carried out by the Infraco (except to the extent such work results from Infraco's default).</u>	✓		
[40] Rectification of errors or omissions in the Infraco Works.		✓	
<u>[40] Rectification of errors or omissions in the Infraco Works where caused by a Notified Departure, Compensation Event or Relief Event.</u>	✓		
[41 and 42] Completion and Certification of Milestones.	✓	✓	
[43] Appointment of Tram Inspector and compliance with obligations in the Tram Inspector Agreement and cooperation regarding related matters.	✓	✓	
[43.10] Costs of appointment and services of the Tram Inspector.	✓		
[44.1/45.1/47.1] Failure to inspect the Infraco works on the dates specified.	✓		
[44.2/45.2/47.2] Costs of tests including necessary repetitions.		✓	
[44.3/45.3/46.4/47.3] Failure to issue certificates on completion of works.	✓		
[44/45/46/47] Failure to complete works in accordance with the Infraco Contract.		✓	
<u>[46] Carrying out and completion of Snagging List works and rectification of Patent Defects.</u>		✓	
[47.2/47.4] Failure to complete T5 and to satisfy tie that T5 is complete and that a Reliability Certificate should be issued.		✓	
[48] Tests, surveys, trials or searches at tie's request where the defect or fault is one for which the Infraco is not liable under the Agreement.	✓		
[48] Tests, surveys, trials or searches at tie's request where the defect or fault is one for which the Infraco is liable under the Agreement.		✓	

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Risk : Quality, Testing and Examination	Allocation		
	Public Sector	Private Sector	Shared
[55.3] Costs associated with surveys and audits which do not show non-compliance by the Infraco.	✓		
[55.3] Failure to use reasonable endeavours to minimise disruption to the provision of the Maintenance Services when carrying out a survey or audit.	✓		
[55.4] Costs associated with surveys and audits which show a non-compliance by the Infraco.		✓	
[55.5/55.6] Failure to carry out rectification in agreed timescales and to the required standard.		✓	
[56.1] Failure to comply with Schedule 6 Maintenance Payment Regime.		✓	
[56.2] Failure to provide required personnel for Maintenance Services performance meetings.		✓	
[56.3-56.5] Failure to submit Service Quality Reports, Annual Service Reports and Self-Monitoring Plans (and failure to comply with such plan) at the required times.		✓	
[56.6] Failure to inform tie where the Maintenance Services have not been delivered and failure to assist tie in inspecting and observing the monitoring procedures.		✓	
[56.8] Costs of and conducting of increased monitoring as a result of Underperformance Warning Notices being issued.		✓	
[105.1.2] Failure to operate a quality management system in accordance with BS EN ISO 9001:2000.		✓	

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Risk : Programme	Allocation		
	Public Sector	Private Sector	Shared
[60.1/60.9/62.1] Failure to progress Infraco Works with due expedition and in a timely and efficient manner in accordance with the Programme and to mitigate any delays.		✓	
[60.4/60.6] Deemed acceptance of a revised programme due to failure by tie's Representative to accept, reject or request further information within 10 Business Days in respect of revised programmes proposed by the Infraco.	✓		
[60.2/60.3/60.5/60.7] Failure to update, submit changes to and provide further information in respect of the revised programme proposed by Infraco.		✓	
[61] Acceleration of progress to achieve Planned Sectional Completion Dates.		✓	
[61] Cost in accelerating progress where tie requires an earlier completion date or where there has been stoppages preventing completion in time for the Planned Sectional Completion Date.	✓		

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Risk : Programme	Allocation		
	Public Sector	Private Sector	Shared
[62] Late completion of any Section resulting in LADs, <u>save where attributable to a tie Change or other situation outwith the Infraco's control.</u>		✓	
[62] Failure to <u>issue a Tram with a Tram Commissioning Certificate by the Agreed Commissioning Date.</u>		✓	
[62.6] Tram exceeding Maximum Tram Weight.		✓	
[62.11] Rejection of or failure to respond to a request to increase the <u>LADs cap.</u>		✓	
[87.1] Time and cost of suspension of the works where necessary <u>save where this is</u> because of Infraco breach and for health and safety reasons.	✓		
[87.1] Suspension by reason of Infraco breach affecting in respect of health and safety of persons and property.		✓	
[87.1] Failure to properly protect and secure the works during a suspension, as required by tie .		✓	
[87.2] Occurrence of abandonment or omission of Infraco Works if permission to resume not granted by tie within 6 months.	✓		

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Risk : Relief Events (time) and Compensation Events (time and/or costs)	Allocation		
	Public Sector	Private Sector	Shared
[Definition of Compensation Event] tie failure to give possession or access including refusal of third party to permit Infraco to exercise occupation rights.	✓		
[Definition of Compensation Event] Occurrence of any delay caused by CEC stopping up streets.	✓		
[Definition of Compensation Event] Execution of Utilities Works or MUDFA works.	✓		
[Definition of Compensation Event] Breach by tie or any tie Party which adversely affects the performance of the Infraco Works.	✓		
[Definition of Compensation Event] Discovery of unexploded ordnance, unidentified utility apparatus or contaminated land.	✓		
[Definition of Compensation Event] Instructions from tie which result in disruption or cost to the Infraco.	✓		
[Definition of Compensation Event] Failure by tie to obtain any Land Consent, Building Fixing Agreement, Consent, land agreement or TRO.	✓		
[Definition of Compensation Event] Protestor Action which lasts for more than 14 days <u>or more than one day in respect of protestor action affecting the Tram Supplier's performance.</u>	✓		
[Definition of Compensation Event] Vandalism impacting ETN.	✓		

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Risk : Relief Events (time) and Compensation Events (time and/or costs)	Allocation		
	Public Sector	Private Sector	Shared
[Definition of Compensation Event] Operator Events.	✓		
[Definition of Compensation Event] Any breach by Network Rail of the Asset Protection Agreement or the Network Rail Agreement.	✓		
[Definition of Compensation Event] Malfunction or non-interoperability of free issue material.	✓		
[Definition of Compensation Event] A breach by the Tram Inspector of the Tram Inspector Agreement.	✓		
[Definition of Compensation Event] Suspension of the Works where not due to Infraco breach.	✓		
[Definition of Compensation Event] Carrying out of rescheduled tests or inspections where tie failed to attend the scheduled test.	✓		
[Definition of Compensation Event] Disruption to the Infraco Works caused by tie exercising its right of access at the Depot.	✓		
[Definition of Compensation Event] <u>Compensation Event under the Tram Supply Agreement resulting from a Relief Event which causes a 3 month delay to the delivery of the Depot.</u>	✓		
[Definition of Compensation Event] <u>Failure of the SDS Provider to achieve Issue for Construction of any Design Package by the due date (less LADs recoverable from the SDS Provider).</u>	✓		
[Definition of Relief Event] Occurrence of any referable delay caused by orders or directions from tie's Representative in respect of the removal of unsatisfactory work or materials	✓		
[49.1/49.3] Failure to remove materials and equipment at the correct time.		✓	
[Definition of Relief Event] Protestor Action against tie that last for less than 14 days or against any unconnected third party.	✓		
[Definition of Relief Event] Acts of terrorism.	✓		
[Definition of Relief Event] UK strike, <u>lockout, go-slow</u> or industrial dispute affecting Infraco <u>or Tramco</u> workforce.	✓		
[Definition of Relief Event] Force Majeure Event.	✓		
[Definition of Relief Event] Fire, explosion, lightning, tempest, flood (other than flood caused by bursting or overflowing of apparatus or pipes), <u>storm, ionising radiation, riot, civil commotion</u> or earthquakes.	✓		
[Definition of Relief Event] Failure by any Utility to carry out works or provide services which they would ordinarily provide.	✓		
[Definition of Relief Event] Any accidental loss of or damage to a material part of the Infraco Works.	✓		
[Definition of Relief Event] Power failure or bursting or overflowing of apparatus or pipes <u>save where caused by the Infraco.</u>	✓		
[64.2/65.2] Failure to notify tie within 20 Business Days of awareness of relief event/compensation event and to notify in the prescribed manner.		✓	
[64.8/65.9] Failure to identify long lead time works or enabling works; to manage interface with CEC, any Approval Body or third party; or to identify instructions required from tie .		✓	

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Risk : Relief Events (time) and Compensation Events (time and/or costs)	Allocation		
	Public Sector	Private Sector	Shared
[64.9/65.10] Any other cause of delay not being a Relief Event or Compensation Event or caused by Infraco breach.		✓	
[80.14] Delay/costs due to a tie Change (save where the Infraco could have prevented the need for the tie change).	✓		

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Risk : Payment and Measurement	Allocation		
	Public Sector	Private Sector	Shared
[41.1] Failure to attend testing relevant to Milestone achievement.	✓		
[41.3] Failure to notify tie in relation to the achievement of a milestone (including a critical milestone).		✓	
[66] Payment of Contract Price.	✓		
[67/68] Submission of applications for payment within required timescales and provision of required information.		✓	
[67/68] Payment of Infraco applications for payment and certification of sums approved.	✓		
[67/68] Failure to adhere to requirement to procure collateral warranties prior to payment.		✓	
[69.1] Interest on Late Payment at Base Rate + 2%.	✓		
[69.2] Set-off of amounts due to tie from the Infraco.		✓	
[69.3] Failure to issue a notice of withholding within the prescribed time period.	✓		
[70.1] Payment of tax on any taxable supplies to tie.		✓	
[70.2] Payment of VAT properly chargeable by the Infraco on the supply to tie of any goods/services under the Infraco Contract.	✓		
[70.3] Provision of support in relation to VAT disputes.	✓	✓	
[70.5] Reimbursement of VAT element of reimbursement or indemnification.	✓	✓	

Risk : Warranties	Allocation		
	Public Sector	Private Sector	Shared
[75] Breach of corporate warranties given to the best of each Infraco Member's knowledge, information and belief.		✓	

Risk : Required Insurances	Allocation		
	Public Sector	Private Sector	Shared
[76.1] Failure to obtain and maintain Required Insurances.		✓	

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Risk : Required Insurances	Allocation		
	Public Sector	Private Sector	Shared
[76.11/76.14] Failure to comply with the terms of the Required Insurances or OCIP Insurances.		✓	
[76.12] No availability of Required Insurances at commercially reasonable rates or maintenance of Required Insurances is at above commercially reasonable rates.			✓
[76.18] Excesses/deductibles under OCIP Insurances or Additional Insurances where not the fault of tie or the Infraco (<u>not agreed during the maintenance phase</u>).			✓
[76.16] Excesses/deductibles under OCIP Insurances or Additional Insurances where the fault of Infraco.		✓	
[76.17/19A] Excesses/deductibles under OCIP Insurances or Additional Insurances where the fault of tie or where tie has altered the level.	✓		
[76.19] Failure to obtain and maintain OCIP Insurances	✓		
[76.20] Failure to obtain and maintain Additional Insurances.		✓	
[76.20] Failure to notify tie of claims under the Required Insurances or Additional Insurances.		✓	
[76.24] Unavailability of Additional Insurances at commercially reasonable rates.	✓		

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Risk : Indemnities, liability and sole remedy	Allocation		
	Public Sector	Private Sector	Shared
[49.2] Loss or damage to Infraco's Equipment, Temporary Works, goods or materials, Trams, engineers works vehicles, Spare Parts, Special Tools, save for death, injury or damage to property caused by tie or CEC.		✓	
[77.1] ¹⁵ The Infraco to indemnify the Indemnified Parties from and against any and all claims, suits, losses, liabilities damages, penalties, fines, forfeitures, and the costs and expenses incident thereto (including without limitation any legal costs of defence) as a result of the Infraco's negligence or breach of the Agreement.		✓	
[77.2] Death, injury or damage to property caused by tie or CEC.	✓		
[77.4-77.7] Loss resulting from claims made by Forth Ports, Stakis or Network Rail. ¹⁶		✓	
[77.8] Death, injury or fraud.	✓	✓	
[77.10] Indirect Losses.	✓	✓	
[77.14] Payment of tonnage, royalties rent for stone, gravel, clay or other necessary materials.		✓	

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¹⁶ Currently under discussion.

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Risk : Indemnities, liability and sole remedy	Allocation		
	Public Sector	Private Sector	Shared
[77.15] Failure to take any measure to ensure tie is not committing an offence where the Infraco has caused tie to commit an offence.		✓	
[77.17] Liability for Latent Defects up to 12 years from issue of the Reliability Certificate.		✓	

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Risk : Changes	Allocation		
	Public Sector	Private Sector	Shared
[79.2] Failure to maintain a change control register and provide a copy (and updates) to tie .		✓	
[80] tie Changes and Mandatory tie Changes.	✓		
[80] Failure to comply with Estimate requirements and time limits		✓	
[80.7] Failure to include attempt to minimise costs, need for, and impact of the tie Change		✓	
[80.8] Failure to demonstrate that it is appropriate to subcontract for the tie Change and obtain best value for money		✓	
[80.8] Failure to agree the Estimate			✓
[80.12] Refusal to implement tie change on grounds as set out.	✓		
[80.13] Withdrawal of tie Notice of Change	✓		
[80.14] Deemed withdrawal of a tie Change due to failure to issue tie Change Order within 28 days of agreement on Estimate.	✓		
[80.19] EoT or Costs if Infraco could have foreseen the need for or materially reduced the scope of the tie charge (not agreed for during the maintenance phase).		✓	
[80.20/80.21] Failure by the Infraco to notify tie within set periods of matters which may constitute a tie Change.		✓	
[80.22] Requirement of Infraco to comply with Third Party Agreements outwith as set out in the Infraco Contract.	✓		
[81] Infraco Changes.		✓	
[81.1] Failure to notify tie of matters which may constitute an Infraco Change.		✓	
[81.2.1] Reduction in Contract Price if Infraco Change results in lower costs.		✓	
[81.2.2] Increase in costs to Infraco if such increased costs result from an Infraco Change.		✓	
[81.3] Proposal of a change which might result in a saving of more than £20,000.		✓	
[81.4/82.6/83.5] Failure to update programme, pricing schedules, maintenance services performance plan and other Deliverables as required.		✓	
[82.3] Failure to take reasonable steps to minimise the duration of any Small Works.		✓	

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Risk : Changes	Allocation		
	Public Sector	Private Sector	Shared
[82.4] Failure to carry out and complete any Small Works in accordance with Small Works Cost Notice.		✓	
[82.5] Payment of Small Works.	✓		
[83.2] Failure to take reasonable steps to minimise the duration of any Accommodation Works.		✓	
[83.3] Failure to carry out and complete any Accommodation Works in accordance with Accommodation Works Cost Notice.		✓	
[83.5] Payment of Accommodation Works.	✓		
[84] Time and cost implications of Qualifying Changes in Law (in excess of the thresholds).	✓		
[84.1/84.2] Agreement and discussion on effects and mitigation measures relating to Qualifying Changes in Law.	✓	✓	
[84.2] Failure to use all reasonable endeavours to minimise increase in costs, to mitigate effects and to implement changes in the most cost effective manner.		✓	
[84.3] Extension of time and costs resulting from any Change in Law.	✓		
[84.3] Failure to implement the change in all circumstances (except to the extent that such change is not necessary to implement the Qualifying Change in Law)		✓	
[84.4.1] Payment in respect of Qualifying Changes in Law which exceed in aggregate £150,000.	✓		
[84.4.2] Where the limit of £150,000 in aggregate has been exceeded, payment in respect of SDS Qualifying Changes in Law which exceed in aggregate £15,000 in respect of each and every event.	✓		
[84.4.3] Where the limit of £150,000 in aggregate has been exceeded, payment in respect of Tram Supply Qualifying Changes in Law which exceed in aggregate £30,000 in respect of each and every event.	✓		
[84.4.4] Payment for 5 years following Service Commencement in respect of Tram Maintenance Qualifying Changes which exceed in aggregate £15,000 in respect of each and every event up to an aggregate of £150,000 and thereafter to be treated as a Mandatory tie Change.	✓		
[84.4.5] Where the limit of £150,000 in aggregate has been exceeded, payment in respect of Infrastructure Maintenance Qualifying Changes in Law which exceed in aggregate £75,000 in respect of each and every event.	✓		
[84.4] Payments in respect of Qualifying Changes in Law within the thresholds.		✓	
[84.5] General Change In Law, subject to Infraco's entitlement to benchmark after 3 years following Service Commencement and thereafter once in any 3 year period.		✓	
[85.1] The cost of any Phase 1b option.	✓		

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Risk : Changes	Allocation		
	Public Sector	Private Sector	Shared
[86.2] Failure to provide the services as requested by tie in relation to any Network Expansion.		✓	
[86.2] The cost of Infraco providing services in relation to any Network Expansions.	✓		

Risk : Termination	Allocation		
	Public Sector	Private Sector	Shared
[87] Suspension of Work (unless necessary by reason of default on the part of Infraco and for health and safety reasons) for more than 6 months.	✓		
[88] Termination on tie Default: agreement terminates 30 days after tie receives Infraco notice specifying default. tie has 30 days to rectify, if capable of rectification.	✓		
[tie Default definition] <ul style="list-style-type: none"> Failure to pay <u>an amount in excess of £250,000 for more than 30 days following the final date for payment;</u> breach of tie's material obligations <u>frustrating or making it impossible for Infraco to perform for continuous period of 45 Business Days;</u> tie Insolvency Event; tie breach of assignment provisions; and Change in Law make Infraco Works impossible or illegal. 	✓		
[88.5] Failure to remove Infraco Equipment following termination.		✓	
[88.8] tie Default termination payments: all works carried out as valued; prelims; supplies/materials committed under contract; demobilisation costs; subcontractor breakage costs; loss of profit <u>in respect of termination after Service Commencement an amount representing one month's payment.</u>	✓		
[88.9] Suspension of works for non-payment by tie <u>or CEC in accordance with the CEC Guarantee.</u>	✓		
[89] Voluntary Termination by tie <u>following</u> three years after the issue of the <u>Certificate of Service Commencement and equivalent payment provisions to termination for tie Default.</u>	✓	✓	
[90] Termination due to Infraco default unless a rectification plan is agreed and adhered to in respect of rectifiable defaults.		✓	
[Infraco default definition] <ul style="list-style-type: none"> Infraco <u>Insolvency Event</u> (rectifiable); Infraco breach of an obligation under the Infraco Contract which materially and adversely affects the Infraco Works 		✓	

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Risk : Termination	Allocation		
	Public Sector	Private Sector	Shared
(rectifiable); <ul style="list-style-type: none"> Infraco does not confirm its acceptance of an increase in LADs cap; Infraco's unremedied failure to take out and maintain the Required Insurances; failure to achieve Sectional Completion Date or the Service Commencement Date on or before the date falling 12 months after the Planned Service Commencement Date or Planned Sectional Completion Date <u>except as a result of a Compensation Event, Relief Event, Force Majeure Event, tie Change, Accommodation Works Change, Change in Law or Suspension</u>; change in legal status or control of the Infraco which is materially prejudicial to carrying out and completing the Infraco Works (rectifiable); 		<ul style="list-style-type: none"> ✓ ✓ ✓ ✓ 	
<ul style="list-style-type: none"> Infraco's failure to commence Works within 90 days of Commencement Date; Infraco's suspension of works without cause for 15 Business Days after receipt of a written notice to proceed; the issue of 4 or more Underperformance Warning Notices in any 12 month period; and 		<ul style="list-style-type: none"> ✓ ✓ 	
[91] Termination for Force Majeure (payments to be made as per tie Default).	✓	✓	
[92] Termination if Infraco or Sub-Contractor commits a Prohibited Act (payments to mirror Infraco Default payments).		✓	
[93] Infraco's persistent breach of its obligations, save for termination of sub-contractors and wipe clean.		✓	

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Risk : Miscellaneous	Allocation		
	Public Sector	Private Sector	Shared
[50.3] Compliance with CDM responsibilities.			✓
[51.1] Failure to report accidents to tie and HSE or ORR as appropriate.		✓	
[51.2] Failure to liaise with the Emergency Services.		✓	
[58] TUPE responsibilities.	✓	✓	
[58.9] Costs of compliance with TUPE provisions.	✓		
[59.5] Reasonable and demonstrable costs arising from a step-in for Health and Safety and Environmental reason or from Infraco taking actions as required under the Step-In provisions.		✓	

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Risk : Miscellaneous	Allocation		
	Public Sector	Private Sector	Shared
[71.2] Employment related and land fill tax fluctuations where tie is informed of such increase within 3 months.	✓		
[71.2] Tax fluctuations where tie is not informed of such increase within 3 months.		✓	
[72] Failure to provide and to procure that sub-contractors provide details of labour as requested by tie .		✓	
[73] Failure to secure continuous improvement in the Infraco Works and to provide reasonable assistance to tie in respect of best value performance and improvement including the preparation of an Annual Service Report.		✓	
[94.4] Failure to return the Deliverables and any information following termination or expiry.		✓	
[95] Failure to provide the Handback Package, to secure continuity in services and assist in the handover following termination.		✓	
[98] Unauthorised Assignment.	✓	✓	
[100.1] Creation of Security Interest over the ETN, the Assets or the Infraco Contract.		✓	
[100.2] Disposal of any right in any Asset if doing so has a material adverse effect on the ETN or the rights of CEC in such Assets.		✓	
[101] Unauthorised disclosure of and inadequate safeguarding of confidential information.	✓	✓	
[101.7] Breach of terms of <u>ministerial guidance in relation to FOISA</u> .	✓		
[101.7] Failure to provide to tie assistance in compliance with FOISA obligations.		✓	
[102.2] Failure to <u>properly</u> assign IPR or grant appropriate licences to tie .		✓	
[102.9] Failure to use reasonable endeavours to procure licences of Third Party Software and commercially available software for tie .		✓	
[102.10] Failure to ensure back up <u>and storage</u> of Deliverables in accordance with Good Industry Practice.		✓	
[102.12] Failure to provide source code, object code and documentation in relation to Third Party Software to tie .		✓	
[102.14] Failure to ensure auditable records and specifications are developed in relation to Infraco Software and that its design and development to industry standard so that a qualified person could verify its performance in relation to equipment and functional requirements.		✓	
[102.15] Failure to provide coding and ancillary programs to generate code in relation to the Infraco Software.		✓	
[102.16] Failure to place and the cost of placing source code of the Infraco Software in escrow.		✓	
[102.17/102.18] Failure to create, maintain, report on, update, hand over and allow access to the Technical Library.		✓	
[103] Breach of data controller obligations and other prescribed obligations in relation to personal data.		✓	

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Risk : Miscellaneous	Allocation		
	Public Sector	Private Sector	Shared
[104.1-104.2] Failure to keep all Deliverables, invoices, timesheets and expense claims in accordance with Good Industry Practice and in good order and to make the same available for inspection.		✓	
[104.3-104.5] Failure to provide further information as requested by tie, to comply with storage, usage or processing requests or to provide required assistance.		✓	
[104.6] Failure to provide information to the Infraco to allow it to perform its obligations under the Infraco Contract.	✓		
[105] Failure to operate, audit, review and comply with the HSQE system.		✓	
[105.3] Defect in the Infraco Works caused by non-compliance of a Deliverable with the HSQE System.		✓	
[107] Failure to do any act or execute any document to give effect to the Infraco Contract.	✓	✓	
[110] Acting as tie's agent where not authorised to do so.		✓	
[115] Unlawful discrimination.		✓	
[118] Failure to act reasonably when exercising discretion.		✓	
[119] Failure to mitigate losses.	✓	✓	
[17] Failure to arrange interface with operator.	✓		
	Public Sector	Private Sector	Shared

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[19.10-19.12]¹ Failure to comply with Special Requirements of any Approval Bodies affected by the Infracore Works, provided **tie** has notified the Infracore of these²

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¹ Special requirements schedule required.

² Costs of compliance with Special Requirements are borne by **tie** as a **tie** change.



EDINBURGH TRAM NETWORK

CONTRACTUAL ALLOCATION OF RISKS IN THE DRAFT INFRACO CONTRACT

AS AT 22 APRIL 2008

Risk : General Obligations Clauses	Allocation		
	Public Sector	Private Sector	Shared
[2.2] Failure to serve notice to propose extension no later than 180 days prior to expiry date.	✓		
[3.5] Termination by either party due to failure to satisfy a CP within 3 months of Effective Date which is not waived.	✓	✓	
[4.4/7.4] Discrepancies, errors or omissions in or between the Infraco Proposals and the Employers Requirements.		✓	
[4.5] Failure to bring discrepancies or requirements for further information in relation to documents to the attention of tie's Representative.		✓	
[6.1/6.3] Failure to cooperate in order to facilitate carrying out the Infraco Works.			✓
[6.3.1] Failure to approach all Permitted Variations on a collaborative and Open Book Basis.			✓
[6.3.2] Failure to use reasonable endeavours to avoid unnecessary complaints, disputes and claims against the other Party.			✓
[6.3.3] Failure to comply with Dispute Resolution Procedure in relation to any such complaints, disputes and claims with or against the other Party.			✓
[6.3.4] Interference with the rights of the other Party in performing its obligations under the Infraco Contract, or in any other way hindering or preventing the other Party from performing those obligations or from enjoying the benefits of its rights.			✓
[6.3.5] Failure to take reasonable steps to mitigate any foreseeable losses and liabilities of the other Party which are likely to arise out of any failure by the non complying party to take the steps listed in 6.3.2 to 6.3.4 above.			✓
[6.3.6] Failure to take reasonable steps to manage, minimise and mitigate all costs.			✓
[6.5] Failure of senior representatives to meet quarterly to discuss proposals to minimise cost and optimise quality or to discuss matters which may adversely affect the Infraco Works, the ETN, CEC or the performance of the Infraco Contract.			✓
[6.8] Failure to procure the attendance of any of the Infraco Parties as required by tie at the quarterly meetings describe in 6.5 above; failure to invite tie to Tram Supply and/or Tram Maintainer meetings.		✓	

Risk : General Obligations Clauses	Allocation		
	Public Sector	Private Sector	Shared
6.9 Failure to notify tie of demand on performance surety of Tram Supplier and/or Tram Maintainer held by Infraco		✓	
<p>[5] Failure to adequately inspect the Site and to satisfy and take account of the following:</p> <ul style="list-style-type: none"> - the ground conditions on the Site (subject to Clause 22); - all relevant safety requirements and environmental matters; - the form and nature of the Site; - the nature of the materials to be excavated; - the extent and nature and difficulty of the work and materials necessary for the completion of the Infraco Works; - the quality of any existing structures which will form part of, be adjacent to or be associated with the ETN; - risk of injury or damage to property adjacent to the Site and to occupiers of such property; - possibility of interference from parties other than tie; - the precautions, times and methods of working necessary to comply with the Code of Construction Practice and Code of Maintenance Practice and, in accordance with Good Industry Practice to minimise and nuisance or interference; - use by third parties of land being part of or adjacent to the ETN; - means of communication with and restrictions of access to the Site; - accommodation required by Infraco; - generally to obtain all necessary information as to risks, contingencies and other circumstances influencing or affecting the Infraco Works. 		✓	
[7.1] Failure to perform the Infraco Works fully and faithfully in accordance with the Infraco Contract.		✓	
<p>Failure to carry out the works:</p> <ul style="list-style-type: none"> • [7.2] using a reasonable level of professional skill, care and diligence to be expected of a properly qualified and competent professional contractor experienced in carrying out works and services of a similar nature to the Infraco Works; • [7.3.1] in accordance with the Infraco Contract; • [7.3.2] so as to enable the ETN to be designed, constructed, installed, tested and commissioned, and thereafter operated and maintained; • [7.3.3] in accordance with the Infraco's quality management system and plans; 		<ul style="list-style-type: none"> ✓ ✓ ✓ ✓ 	<ul style="list-style-type: none"> ✓ (design)
<ul style="list-style-type: none"> • [7.3.4] in compliance with the Employer's Requirements; • [7.3.5] in compliance with the Infraco's Proposals; • [7.3.6] in accordance with tie and CEC policies; • [7.3.7] in accordance with the Code of Construction Practice; 		<ul style="list-style-type: none"> ✓ ✓ ✓ ✓ 	

Risk : General Obligations Clauses	Allocation		
	Public Sector	Private Sector	Shared
<ul style="list-style-type: none"> • [7.3.8] in accordance with the Code of Maintenance Practice; • [7.3.9] in compliance with the Tram Legislation; • [7.3.10] in compliance with applicable Laws, Land Consents and Consents; • [7.3.11] using reasonably practicable means to ensure impacts are no worse than residual impacts as identified in the Environmental Statements; • [7.3.12] in compliance with environmental regulations and requirements; • [7.3.13] in accordance with Good Industry Practice; • [7.3.14] to ensure that the design of the ETN is buildable; • [7.3.15] to provide assistance to tie in ensuring best value; • [7.3.16] to not wilfully detract from image of tie, TEL, CEC, the Scottish Ministers, Transport Scotland or the ETN; • [7.3.17] in accordance with OGC's "Excellence in Construction" initiative; • [7.3.18] to ensure sustainability of the ETN in relation to energy consumption and the supply of materials from sustainable resources; • [7.3.19] in a manner not likely to be injurious to persons or property; • [7.3.20] using Key Personnel. 		<ul style="list-style-type: none"> ✓ ✓ ✓ ✓ ✓ ✓ ✓ ✓ ✓ ✓ ✓ ✓ ✓ ✓ 	
[7.5.1] Failure to use reasonable endeavours to maximise construction productivity by reference to international best practice.		✓	
[7.5.2] Failure to use reasonable endeavours to minimise disruption to the city of Edinburgh.		✓	
[7.5.3] Failure to use reasonable endeavours to maintain safety and minimise the potential for accidents and safeguard the Infraco Works.		✓	
[7.5.4] Failure to use reasonable endeavours to safeguard the efficiency in the obtaining of Consents.		✓	✓ (design)
[7.5.5] Failure to use reasonable endeavours to minimise costs.		✓	
[7.6] Failure to keep itself fully informed about current professional and technical standards and about all matters relating to, or which might have a bearing on, the Infraco Works.		✓	
[7.8] Failure to fully understand the scope and extent of requirements and sufficiency of information to complete the Infraco Works.		✓	
[7.9-7.10] Content, completeness, currency, accuracy or fitness for any purpose of Background Information supplied by tie or any of its stakeholders, subject to fraudulent statements or fraudulent provision of information by tie .		✓	
[7.11] Failure to liaise with any party, as required, to produce information required so that the Infraco Works can be progressed properly, according to Programme and in accordance with the Infraco Contract.		✓	

Risk : General Obligations Clauses	Allocation		
	Public Sector	Private Sector	Shared
[7.12] Failure to liaise with regard to material types, methods and programmes, cost effectiveness and temporary works in respect of any Permitted Variation.		✓	
[7.13] Failure to provide all labour, goods, materials, Infraco's Equipment, Temporary Works, transport to and from the Site and everything else of a temporary or permanent nature required in respect of the Infraco Works which is either required in the Infraco Contract or which could have reasonably been foreseen by an experienced contractor.		✓	
[7.14] Failure to ensure the adequacy, stability and safety of all site operations and methods of construction.		✓	
[7.15] Use or specification for use of any materials which are known to be deleterious or contravene any relevant standard or code of practice (including Ove Arup & Partners guidance or Good Industry Practice)		✓	
[7.16] Use of or installation on the Edinburgh Tram Network of materials which are not in accordance with the Employer's Requirements on the date of such use or installation.		✓	
[7.17] Failure to notify tie of any ground, geophysical or other surveys which the Infraco intends to carry out.		✓	
[7.18] Failure to notify tie of any Abortive Work.		✓	
[26.17] Failure of the Infraco, Key Personnel, staff and Infraco Parties to comply with all regulatory requirements and tie's Drug and Alcohol Policy.		✓	

Risk : System Integration	Allocation		
	Public Sector	Private Sector	Shared
<p>Failure to implement:</p> <ul style="list-style-type: none"> • [8.1.1] work to define sub-system performance and demonstrate that the System Availability Target can be met; • [8.1.2] management of technical interfaces including system wide issues such as electro-magnetic compatibility and stray current protection, noise, vibration and wheel/rail interface; • [8.1.3] test management, including the preparation of method statements, test scripts, the setting of pass/fail criteria, and analysis; • [8.1.4] alignment of operations and maintenance procedures; • [8.1.5] system activation; • [8.1.6] safety assurances and the Case for Safety; • [8.1.7] a requirements traceability matrix. 		✓	
[8.2] Failure to ensure that Trams and engineers works vehicles are fully integrated with the Infraco Works.		✓	

Risk : System Integration	Allocation		
	Public Sector	Private Sector	Shared
[8.3] Failure to carry out all of the system integration activities described in the Employer's Requirements and Infraco's Proposals.		✓	
[8.4] Failure to liaise with the Operator and tie in respect of system operation and related design, Systems Acceptance Tests and operational defects.		✓	
[8.5] Failure to ensure that design is compatible with system integration throughout the Term.		✓	
[8.6] Failure to manage configuration control of the ETN.		✓	
[8.7] Failure to procure that the Tram Supplier complies with specific obligations (mock up, testing, safety etc).		✓	

Risk : Infrastructure and Equipment	Allocation		
	Public Sector	Private Sector	Shared
[9.1] Failure to pay the Infraco resulting in the title in all materials, goods and equipment not transferring to CEC.	✓		
[9.1] Failure to transfer title to CEC in all materials, goods, and equipment intended to form part of the ETN.		✓	
[9.1] Failure to deliver or install materials following advance payment including risk of insolvency of suppliers.		✓	
[9.2/9.3/9.4] Failure to clearly identify, separate and label project assets as the property of CEC, whether on site or off site. Failure to include such provisions in sub-contracts.		✓	
[9.5] Failure to procure that CEC pursues claims against suppliers of defective or faulty materials which have vested in CEC and to reimburse Infraco of all costs recovered.	✓		
[9.6/9.7.1] Failure to procure that the Tram Supplier transfers title to CEC in the Trams (free from all Security Interests) or Tram Related Equipment.			✓
[9.8] Compatibility of all infrastructure, equipment and systems and fitness for purpose (as defined complaint with the Employer's Requirements), excluding items free issued to the Infraco by tie .		✓	
[9.9/9.10] Euro Compliance of equipment, excluding items free issued to the Infraco by tie .		✓	
[9.11] Malfunction, non-operability, late delivery, removal or replacement of free issue fare collection equipment.	✓		
[9.12] Failure to make the Trams and any materials (in which title has passed to tie or CEC) available to the Infraco for performance of its obligations.	✓		

Risk: Performance Security Package - Bonds, Guarantees and Collateral Warranties	Allocation		
	Public Sector	Private Sector	Shared
Failure to provide and responsibility to replace if credit rating drops:			
Parent Company Guarantees		✓	
Bonds (Performance Bond, Retention Bond, defects rectification bond)		✓	
Collateral Warranties (to third parties and to CEC and TEL)CEC Guarantee (of payment only)		✓	
Advance Payment Bond (Trams)	✓		

Risk : Deliverables	Allocation		
	Public Sector	Private Sector	Shared
[10.1] Failure to prepare Deliverables in accordance with the Infraco Contract and Programme.		✓	
[10.2] Failure to submit any Deliverables associated with any Permitted Variations to tie 's Representative for review pursuant to the Review Procedure.		✓	
[10.3] Failure to allow tie 's Representative reasonable opportunity to review any Deliverable at any stage of development.		✓	
[10.4] Failure to provide Deliverables in format required for tie extranet and failure to establish/maintain such an extranet.		✓	
[10.5/10.6] Failure to prepare a Submittal Programme which meets the Programme and submit same to tie and advise of revisions.		✓	
[10.6/10.7] Failure to comply with the Submittal Programme timescales			✓
[10.7] Introduction of alternative Submittal Programme where tie cannot comply with the original programme (not arising from Infraco default).	✓		
[10.8] Failure to give due consideration to tie or tie 's Representative at a meeting called by tie or tie 's Representative to discuss the development of a Deliverable and failure to submit a report detailing such discussions.		✓	
[10.9] Amendment to a Deliverable where such Deliverable does not meet the requirements of the Infraco Contract.		✓	
[10.9] Amendment to a Deliverable where such Deliverable does not meet the requirements of any "Approval Bodies".	✓	✓	
[10.10] Failure to provide Deliverables in accordance with the Infraco Contract.		✓	✓ (design)
[10.11] Provision of further Deliverables as requested by tie .	✓		
[10.12/10.13] Risks from conflicts, ambiguities, discrepancies, errors or omissions in or between Deliverables and proposing and carrying out resolution.		✓	

Risk : Deliverables	Allocation		
	Public Sector	Private Sector	Shared
[10.14] Failure to ensure the Deliverables comply with document control requirements.		✓	
[10.15/10.16] Establishment, staffing and making available for tie's inspection of an office to store record of performance of the Infraco Works, drawings for construction, all specifications, all transactions entered into in relation to Permitted Variations and claims for additional costs or expenses.		✓	
[54.4/54.5] Failure to write up, maintain and store Technical Records in respect of Maintenance Services or in a format reasonably specified by tie .		✓	
[54.6] Maintenance, security, bugs etc in relation to the Infraco's computer systems and equipment		✓	

Risk : Novation and Other Key Interfaces	Allocation		
	Public Sector	Private Sector	Shared
[11.1] Failure of the Infraco to execute the novation agreements.		✓	
[11.1] Failure of tie to create the novation agreement and procure the execution of the same by SDS Provider.	✓		
[11.2.1] Failure of the Infraco to procure and provide to tie a collateral warranty from the SDS Provider.			✓
[11.3] Failure to procure that the SDS Provider carries out and completes the SDS Services.			✓
[11.4] Management of the performance of the SDS Services and resultant liability.		✓	
[11.5] Amendment of the SDS Agreement.	✓	✓	
[11.6] Failure to procure the attendance of the SDS Provider at any meeting in relation to the Infraco Works.		✓	
[11.7] Failure to procure performance of additional services required from the SDS Provider following a request from tie .		✓	
[11.7] Requirement for additional services from SDS.	✓		
[11.8] Termination of the SDS Agreement without the consent of tie .		✓	
[11.9] Failure, if required by tie , on termination or expiry of the Infraco Contract to novate, assign or otherwise transfer the SDS Agreement to tie , the Scottish Ministers, TEL, CEC, Transport Scotland or their successors with no worse financial standing than tie or to any other person whose obligations are unconditionally guaranteed under the SDS Agreement by such a person.		✓	
[11.9] Failure to assist in obtaining a collateral warranty from SDS where novation, assignation or other transfer has taken place.	✓		
[12.A] Failure to enter into a novation agreement with tie and the Tram Supplier.		✓	

Risk : Novation and Other Key Interfaces	Allocation		
	Public Sector	Private Sector	Shared
[12.1] Failure to procure that the Tram Supplier enters into a collateral warranty in favour of tie and to deliver same to tie .			✓
[12.2] Failure to procure that the Tram Supplier carries out and completes the Tram Supply Obligations in accordance with the Tram Supply Agreement.			✓
[12.3] Management of the performance of the Tram Supply Obligations and resultant liability.		✓	
[12.4] Amendment to the Tram Supply Agreement (including the Tram Supply Obligations).	✓	✓	
[12.5] Failure to procure the attendance of the Tram Supplier at any meeting in relation to the Infraco Works		✓	
[12.6] Failure to use reasonable endeavours to procure supply of additional Trams, spare parts and services following a request from tie .		✓	
[12.6] The requirement for additional Tram Supply services.	✓		
[12.7-12.14] Termination of Tram Supplier or rectification of its defective performance.	✓	✓	
[12.15] Failure, if required by tie , on termination or expiry of the Infraco Contract to novate, assign or otherwise transfer the Tram Supply Agreement to tie , the Operator, the Scottish Ministers, TEL, CEC, Transport Scotland or their successors with no worse financial standing than tie or to any other person whose obligations are unconditionally guaranteed under the Tram Supply Agreement by such a person.		✓	
[12.15] Failure to assist in obtaining a collateral warranty from Tram Supplier where novation, assignation or other transfer has taken place.	✓		
[13.1] Failure to enter into a novation agreement with tie and the Tram Maintainer.		✓	
[13.2] Failure to procure that the Tram Maintainer enters into a collateral warranty in favour of tie .			✓
[13.3] Failure to procure that the Tram Maintainer carries out and completes the Tram Maintenance Services in accordance with the Tram Maintenance Agreement.		✓	
[13.4] Management of the performance of the Tram Maintenance Services and resultant liability.		✓	
[13.5] Amendment of the Tram Maintenance Agreement.	✓	✓	
[13.6] Failure to procure the attendance of the Tram Maintainer at any meeting in relation to the Infraco Works.		✓	
[13.7] Failure to use reasonable endeavours to procure that the Tram Maintainer shall supply any additional spare parts and/or perform any additional services which are required by tie in respect of the ETN.		✓	
[13.8-13.16] Termination of Tram Maintainer or rectification of its defective performance.	✓	✓	
[13.16] Failure, if required by tie , on termination or expiry of the		✓	